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SOUND POLITICKS

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EDITOR'S NOTE

Dear Readers,

When you flip through the pages of this journal, I invite you to take a global adventure with us. These articles will transport you from the Supreme Court bench to jail cells, America to Iran, and the time of William Shakespeare to the present.

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After reading about the concerns surrounding the upholding of the Constitution in the face of national security, you will be brought back to Penn under the knowledgable wing of Professor Rogers Smith. With him, you will obtain insight into the past, present, and future of the highest court in America. The Supreme Court's impact on future cases and the potential overturning of past decisions will certainly ripple throughout society.

So take a step back from where you are, and let this journal take you somewhere else.

Happy exploring,

Susan Luo
Editor-in-Chief

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SOUND POLITICKS

The Undergraduate Journal of Political Science at the University of Pennsylvania

"*May the first principles of* ***Sound Politicks*** *be fix'd in the minds of youth.*"

-Benjamin Franklin

Democracy within Empire: the Hidden Potential for the People in Shakespeare's Julius Caesar and Coriolanus

by Adrienne Lee Benson

There is a broad spectrum of opinions in American political science over the decision-making capacities of voters. There are those who argue that ignorance and irrationality dominate the electorate[1], and then the more optimistic view that ignorance is rational and that voters know how to make the right decision with limited information[2]. Others argue that "voters are not fools" and know their own interests[3], while some express the pessimistic perspective that no real preferences can possibly be expressed by voters in a system with more than two choices[4]. In recent decades, political theory has taken a dramatically positive turn with the growing prominence of the theory of deliberative democracy, which not only assumes the capacity for rational decision-making on the part of democratic citizens but also argues that the use of reason is morally demanded in a truly just and fair society[5]. However, much doubt remains about the ability of average citizens—or even elites—to live up to the ideal of reasoned and autonomous decision-making that deliberative democracy implies.

Even so, it is possible to be pessimistic about the rationality of democratic citizens while remaining optimistic about democracy itself and, therefore, to arrive at the Churchillian conclusion that although democracy may be a questionable system, it is certainly the best system available. To demonstrate the ways in which democracy can be a workable and even preferable system despite ignorance or short-sightedness on the part of its participants, I examine two works of the great democracy skeptic William Shakespeare. Both a poet and a political theorist, Shakespeare took a mostly negative view of "the People" in his works, often portraying them as vacuous, manipulable, and unable to judge the truly worthy. In two of his Roman plays, Coriolanus and Julius Caesar, Shakespeare warns against the power of the "rabble," who can bring tragedy to their Empire through their ignorance and gullibility. Coriolanus tells the story of a Roman general forced into exile by tribunes who, empowered by popular support, almost doom Rome to ruin. In Julius Caesar, Shakespeare provides one of the most powerful literary illustrations of voter irrationality when the People trade in their loyalty to Brutus in order to wage war against him after Mark Antony's funeral oration. In examining these works, I do not seek to present them as evidence for the ignorance of a democratic electorate; they are, of course, historical fiction. Rather, I demonstrate that even in the most egregious cases of the People's incapacity to reason, democracy is salvageable—and for several reasons.

In Julius Caesar and Coriolanus, Shakespeare challenges democracy as a form of government whose moral authority is derived from the act of self-governance by the People. Both plays portray the plebeians of Rome as a mob lacking autonomy and principle; in Shakespeare's accounts, the People cannot make decisions independent from elite influence. Moreover, in each play the malleability and ignorance of commoners enables the destruction of great and, in Shakespeare's view, worthy figures of the Roman Empire. Given this portrayal of the People, and Shakespeare's skepticism about their decision-making power, there are several purposes that democracy can serve. First, in an elitist vision, democracy might take the form of an additional playing field for competition among political elites. In a second, more egalitarian perspective, democracy may hold the promise of developing a more autonomous People that heretofore has been deprived of the political education necessary to make decisions—a vision of political learning-by-doing. However, although both these visions offer a meaning of democracy in the absence of an autonomous People, they are each bounded by the fact that they are situated in either an elite or egalitarian perspective. A third conception of democracy takes account of the whole of the state: democracy means stability and effectiveness for society because it enables controversy to be expressed and resolved within state institutions, whose legitimacy is in turn strengthened in the eyes of those subject to their decisions. These three conceptions of democracy—elite-focused, People-focused, and state-focused—provide meaning for democracy despite the skepticism expressed in Julius Caesar and Coriolanus.

THE ELITIST VISION

The elitist vision of democracy accepts the People as an empty vessel for use by elites in competition amongst themselves. In this view, no autonomous decision-making power of the People is necessary to fulfill the purpose of democracy, which merely creates an additional, though significant, playing field for the aristocracy. For example, Joseph Schumpeter offers an account of democracy wherein the People has no "effective volition"; the will of the people cannot rule because that will does not exist in

[1] Angus Campbell, Philip Converse, Warren Miller, and Donald Stokes. The American Voter (Chicago: University of Chicago Press, 1960). See also: Christopher H. Achen and Larry M. Bartels, "Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks," 27 January 2004. Available at: <http://www.international.ucla.edu/media/files/PERG.Achen.pdf>.

[2] Samuel Popkin, The Reasoning Voter. Communication and persuasion in presidential campaigns 2nd edition (Chicago: University Of Chicago Press, 1994). See also: Anthony Downs, An economic theory of democracy (New York: Harper and Row, 1957).

[3] V.O. Key, The Responsible Electorate: Rationality in Presidential Voting, (Cambridge, MA: Harvard University Press, 1966). See also: Jon Krosnick, "Government policy and citizen passion: A study of issue publics in contemporary America," Political Behavior Vol, 12 (1990) 59-92.

[4] See: "Arrow's Impossibility Theorem." Available at: < http://alumnus.caltech.edu/~seppley/Arrow%27s%20Impossibility%20Theorem%20for%20Social%20Choice%20Methods.htm>.

[5] Amy Gutmann and Dennis Thompson, Why Deliberative Democracy? (Princeton, NJ: Princeton University Press, 2006).

any coherent or real way beyond that which is manufactured by elites.[6] According to Schumpeter, all initiative lies with the competing elites—the People passively accept their leadership after a struggle among the contenders.[7] Thus, an elite-focused view allows democracy to retain meaning while simultaneously rejecting autonomous decision-making capacity on the part of the People.

This elitist meaning of democracy does not remove the People from the political picture, however. In fact, they play a critical role in that the conquest of their vote, even in the Schumpeterian account, is the fundamental test of political leadership and success. The support of the people is the measure of the leader—not the honorable qualities she might possess in isolation from the People. In this way, an elitist meaning of democracy relates to Max Weber's account of charismatic legitimacy, wherein a person achieves leadership only if their unique worthiness is recognized by others.[8] When a charismatic leader loses the People's support, he or she immediately loses legitimacy and, therefore, his or her position. This account is much less stable than Schumpeter's conception of democratic leadership, which does not allow the People a similar power of immediate recall. However, both versions of democratic leadership reveal that even in elite-centered accounts of democracy in which the People have no autonomous will they still play a necessary and meaningful role in politics.

Shakespeare provides examples of elite-centered democracy in both Julius Caesar and Coriolanus. In both plays the plebeians demonstrate a lack of "effective volition" and a vulnerability to demagogues; however, in both plays the plebeians also possess considerable power, even if the direction of that power does come from the People themselves. In Julius Caesar, the plebeians turn quickly from anger at Caesar's death to supporting Brutus's claims that Caesar's ambition required his assassination and then back again into a murderous mob in pursuit of Brutus and his fellow conspirators, all within the space of a single scene.[9] Certainly, the demagoguery of Mark Antony's speech reveals that the "will" of the People does not exist independently from elite manipulation. Yet, it also shows the fundamental importance of the People to political competition among elites. Shakespeare offers similar examples of elitist democracy in Coriolanus. At the outset of the play, the plebeians call Martius (later Coriolanus) the "chief enemy of the people,"[10] but they later vote him Consul for displaying his battle wounds.[11] Shortly afterward, the tribunes convince the plebeians to rescind their support for Coriolanus and to banish him.[12] Like the plebeians in Julius Caesar, those in Coriolanus lack autonomous will, yet they remain powerful in that they are the means by which elites engage in political competition. Thus, one way in which democracy can retain meaning despite a lack of autonomous decision-making by the People is an elite-focused account in which aristocrats compete on the passive playing field of the people.

THE EGALITARIAN VISION

In contrast, an egalitarian approach to the people's lack of "effective volition" views democracy as the process by which the people can develop the capacity for autonomous decision-making. This account does not reject the argument that the People lack autonomy, but it views this lack of self-determination as the result of aristocratic political structures rather than an inherent quality of the People. It assumes that the capacity for political decision-making is a learned, rather than inborn, skill. Without opportunities for making political decisions and learning-by-doing, the People will never achieve the ability to effectively control its political power—which even the elitist account admits the People to possess, if only in an uncontrollable manner. This egalitarian perspective accuses the elitist account of reliance on circular reasoning: elites prevent the People from engaging in the decision-making processes necessary for developing political skill, and then justify this exclusion with the claim that the People have not developed political skill. Thus, elites define political worthiness in ways that perpetuate their own control. In the egalitarian view, the meaning of democracy is its potential to deconstruct value systems that preserve elite status, to educate the People, and to transform the People into effective political decision-makers.

On first glance, the disdain for the People in Shakespeare's work would seem to preclude any support for the egalitarian view. However, Coriolanus provides at least two pieces of evidence that political skill and worthiness are learned, rather than natural, qualities. First, Coriolanus' mother, Volumnia, reveals that his heroic military prowess was deliberately developed by the manner in which he was raised. Volumnia boasts that she purposely sent her son into battle in order to shape him into a military hero: "I, considering how honour would become such a person...was pleased to let him seek danger where he was like to find fame. To a cruel war I sent him, from whence he returned, his brows bound with oak."[13] Second, the contrast between the anger of the plebeians and the adoration of Coriolanus by the Volscian soldiers reveals the power of institutions to shape the behavior of people subject to

[6] Joseph Schumpeter. Capitalism, Socialism and Democracy, (New York: Harper & Brothers, 1942) 259 – 265.

[7] Ibid, 270.

[8] Max Weber. Economy and Society, (Berkeley, CA: University of California Press, 1978) 1112 – 1113.

[9] William Shakespeare. Julius Caesar, ed. Arthur Humphreys (Oxford: Oxford University Press, 1984) Act III, Scene 2, pp. 174 – 186.

[10] William Shakespeare, Coriolanus, ed. Philip Brockbank (London: The Arden Shakespeare, 2006) Act I Scene 1, p. 95.

[11] Ibid, Act II, Scene 3. pp. 183 – 187.

[12] Ibid, Act II, Scene 3. pp. 189 – 193.

[13] Coriolanus, Act I, Scene 3. p. 120.

those institutions.[14] In this case, the experience of military discipline predisposes the soldiers to welcome an authoritarian leader. Political behavior is learned, not inherent. These elements of the play support the egalitarian understanding that the People's lack of autonomy is not a natural characteristic, but instead the result of the institutions in which their identities and capacities are constructed. Democracy, in this view, offers the People an opportunity to develop a real political will through a process of learning-by-doing and through the deconstruction of aristocratic standards of political worthiness.

THE THIRD WAY: STABILITY

Both the elitist and egalitarian views demonstrate that democracy can retain meaning even if the People lack autonomous decision-making power. However, these accounts are heavily situated in the perspective of the social class whose interests they advance, and they do little to reconcile the tensions between these groups. To account for the whole of society under conditions of uncertainty regarding the will of the People, a third meaning of democracy focuses on a value threatened in both Julius Caesar and Coriolanus: the stability of the state. Maintaining stability requires that conflicts be addressable through the institutions and procedures of the state in a way that convinces conflicting parties that their claims have been recognized, or at least considered. Without that trust, citizens may seek redress outside the procedures and structure of the state and thereby risk the stability of the state itself. Democracy, if conceived as including regular contests for leadership over time, helps to keep conflicts within the bounds of the state in two ways. First, democracy creates a regularized, procedure-based outlet for the People who might otherwise rebel or turn to destabilizing demagogues for satisfaction. Second, democracy promises elites who are out of power or who have lost power that they will have meaningful future opportunities to seek political power. In this case, democracy can mean stability for a state if it incentivizes both the People and elites to rely upon state institutions and procedures for conflict resolution.

The stability of the state is in danger in both Julius Caesar and Coriolanus, so it may be unclear at first how either of these plays portrays democracy as a meaningful way to promote state stability. However, each play implies ways in which democratic procedures might create incentives for both elites and the People to work within state structures and, in doing so, support the state. First, at the opening of Coriolanus, the plebeians angrily protest the alleged withholding of grain by the patricians. Yet Shakespeare hints that even if their claims to grain are not granted, the plebeians might be satisfied by earning the acknowledgement or respect of Roman elites. Martius recounts to Menenius that although the patricians did not grant the plebeian demand for grain, the plebeians "vented their complainings, which being answer'd and a petition granted them...they threw their caps...shouting their emulation."[15] Though their actual demand is not fulfilled, the plebeians are granted the new democratic right to choose five tribune representatives and are thus not only satisfied, but celebratory.

The choice of elites in Julius Caesar to take an extraordinary and extra-procedural step to address their concerns about losing power also implies that democratic procedures could mean a stabilizing outlet for elite ambitions. Although Brutus and Cassius approach the assassination with very different motives, the fundamental problem that spurs them each to action is the threat of a lifelong dictatorship under Caesar. Cassisus' animosity toward Caesar is personal; he views Caesar as weak and undeserving of power.[16] In contrast, Brutus loves Caesar but fears that his dictatorship will mean tyranny in Rome.[17] Regardless of their personal motivation, the conspirators see assassination as their only means taking power from Caesar. In a democracy with recurring elections—or elite contests for votes—there would be no need for extra-procedural murder to replace a leader. In this way, democracy with regularized procedures for electoral accountability can satisfy not only the expressive needs of the people, but also the personal ambitions of elites, and can thus provide stability by motivating all social classes to work within existing state institutions. Of course, these plays also provide evidence that democratic rule cannot guarantee national stability: a weighty example is Coriolanus' decision to attack Rome under the flag of his former enemy in response to his democratically-enacted banishment.[18] Yet, while democracy may also leave openings for instability, to dismiss its stabilizing qualities on this ground is to deny democracy too much. Moreover, considering the discontent among the People under aristocratic rule in Coriolanus and the elite-driven destruction of the Republic in Julius Caesar, it is not clear that perfect stability could be found in undemocratic regimes either. Therefore, understanding the meaning of democracy in the absence of widespread personal autonomy acknowledges the stabilizing effects of regularized expression by the People and the exchange of power among elites.

ALL'S WELL THAT ENDS WELL

A perspective that encompasses both elite and egalitarian concerns might find democracy's meaning in the state stability that can be achieved through regularized elections and procedures for addressing conflicts between and within social classes. This does not preclude the possibility that the People do have a much greater capacity for reason and informed decision-making. Yet even in a world of rabble and ignorance, democracy retains its value.

[14] Ibid, Act IV, Scene 7. p. 272.

[15] Coriolanus, Act I, Scene 1. p. 110.

[16] Ex., Julius Caesar, Act I, Scene 2, pp. 107 – 111; also, Act I, Scene 3, p. 125.

[17] Ex., Ibid, Act II, Scene 1, p. 131.

[18] Coriolanus, Act IV, Scene 4, p. 249.

An Ideological Army: The Rising Dominance of Iran's Revolutionary Guard Corps

by David Ian Aron

The Islamic Republic of Iran's Constitution includes a perambulatory clause that defines the Islamic Revolutionary Guard Corps (IRGC), also known as the Pasdaran (Persian for Guard), to act not only as a military force but also as a political body tasked with defending the principles of the Islamic Revolution. The Constitution declares that:

> In the formation and equipping of the country's defense forces, due attention must be paid to faith and ideology as the basic criteria. Accordingly, the Army of the Islamic Republic of Iran and the Islamic Revolutionary Guards Corps are to be organized in conformity with this goal, and they will be responsible not only for guarding and preserving the frontiers of the country, but also for fulfilling the ideological mission of jihad in God's way; that is, extending the sovereignty of God's law throughout the world (this is in accordance with the Koranic verse "Prepare against them whatever force you are able to muster, and strings of horses, striking fear into the enemy of God and your enemy, and others besides them" [8:60].[1]

While the Guard was officially created in May 1979 during the Islamic Revolution to solidify Ayatollah Khomeini's grasp of the nation, it is extremely difficult to classify its origins. At the time of the Islamic Revolution, the Guard represented a conglomerate of social and political factions. The dominant of these groups was the lower middle class urban guerillas who had been fighting against the Shah for years.[2] A second grouping consisted of the more opportunistic urban and rural youths who followed local clerics in joining the revolution during its later stages. This mixture mirrors the structure laid out in Katherine Chorley's classic book, Armies and the Art of Revolution, in which she delineates the formation and subsequent stages that revolutionary armies must undergo in order to defend the gains of the revolution.[3] However, while Chorley argues that a revolutionary force necessarily gives up its ideology as it becomes more professionalized, bureaucratic, and complex, this paper will argue that the IRGC has managed to maintain its zealous philosophy as it has grown increasingly institutionalized and powerful.

This paper focuses on the Revolutionary Guards as an institution and their degree of influence over Iranian society. I hope to use this study as a gauge of political thought and power in Iran. In particular, I want to look at the roles that the Guard played during some of the defining events of the nation's history, namely the Islamic Revolution, the Iran-Iraq War and the 2009 elections. By examining the Revolutionary Guard Corps over the last 30 years, I hope to map out Iran's political landscape. I will show how the Guards' development into an institutionalized and ideological military and social force has resulted in increasing gains of power. Just as the ruling government has grown stronger and less susceptible to opposition, as demonstrated by the 2009 presidential election results, so has the Guard established an ever-firmer grasp over the country.

AN OVERVIEW OF THE REVOLUTIONARY GUARD, 1977-2009

Due to the involved nature in which the Revolutionary Guard was founded, it is important to understand the principles and beliefs surrounding the Guard around the time of its inception following the Islamic Revolution. Also known as the Iranian Revolution or the 1979 Revolution, the Islamic Revolution refers to the events that resulted in the overthrow of the Iranian monarchy, which removed the Pahlavi dynasty and Shah Mohammed Reza Pahlavi from power, and the resulting formation of the Islamic Republic of Iran under the revolution's leader, Ayatollah Ruhollah Khomeini.[4] What made the events of 1979 so unique were their unusual characteristics: the revolution lacked typical revolutionary causes, was very popular among Iranian citizens, caused massive change in a short period of time, and resulted in a theocracy based on the Guardianship of the Islamic Jurists, a Shia Islam philosophy that gives Islamic jurists guardianship, or power, over the citizenry.

While the Islamic Revolution provides the historical context for the Guard's founding, it doesn't fully explain the Guard's initial composition. The Mojahedin of the Islamic Revolution (MIR) is arguably the most important of the Guard's predecessors. Unofficially in existence from 1977 onwards, the MIR was the product of a schism from the Mojahedin-e-Khalq Organization (MEK). The MEK was founded in 1965 by members of the Iranian Freedom Movement who opposed the Shah's corrupt rule but who were also frustrated by their perceived notion of the Liberation Movement's ineffectiveness.[5] Initially, the group devoted most of their time to ideological work that combined their Islamic views with Marxist theories. However, as MEK members grew increasingly disenchanted by the growing Marxist revolutionary ideals being formulated, some broke away and founded the MIR because of their preferred support of a revolution that maintained a primarily Islamic tone. In the 1980s, the MIR, being one of the only kolahi, or non-clerical religious groups, within

[1] A. Tschentscher, "Iran- Constitution," http://www.servat.unibe.ch/icl/ir00000.html.

[2] Kenneth Katzman, The Warriors of Islam: Iran's Revolutionary Guard (Boulder, CO: Westview Press, 1993), 31.

[3] Katharine Chorley, Armies and the Art of Revolution (London, England: Faber and Faber Press, 1943), Chapters 11 and 12.

[4] Katzman, 31-32.

[5] Anoushiravan Ehteshami, After Khomeini, the Iranian Second Republic (New York, NY: Routledge, 1995), 9-10.

Iran, was responsible for the purging of the regular armed forces and defeat of leftist forces during the 1981 mini civil war. Kenneth Katzman analyzes statements made by the Iran Weekly Press Digest, an independent news bulletin that provides updates on social, economic, and political developments in Iran, and concludes that at the time of the Guard's founding, the MIR served as its core, with MIR members holding dual membership in the IRGC.[6] Thus, the MIR served as the organized force of experienced guerilla fighters who, according to Katharine Chorley, are necessary for all revolutionary armies to successfully arise, and around which the rest of the IRGC formed.[7] In this capacity, the early Guard was a pretty unstructured but factionalized force designed to weed out and discipline perpetrators of the old regime and assist Khomeini in gaining control of the nation.

Since its founding as a revolutionary militia, the Guard has transformed into a well-trained military that fought in the Iran-Iraq War alongside the regular army, a vestige left over from the time of the Shah, and since then has further developed into a controlling force over state politics, telecommunications, the economy, and virtually every aspect of society. The IRGC is believed to oversee Iran's nuclear program, to be in control of Iran's missile batteries and in charge of a multi-billion dollar business empire that infiltrates every aspect of the economy, from car manufacturing to eye clinics to road building to the black market.[8] During the 2009 Iranian presidential election controversy, the Guard demonstrated extensive power in attempting to silence protests against what many charged as a fraudulent election result in favor of current President Mahmoud Ahmadinejad. Their specific actions caused many political analysts to describe the election as a military coup. Iranian affairs expert Rasool Nafisi has said that "It is not a theocracy anymore, it is a regular military security government with a façade of a Shiite clerical system."[9] While the current state of Iran's government may be questionable, there is no doubt that over the span of only a few decades, the Revolutionary Guard Corps has transformed its structure into a socio-political-economic conglomerate that extends its influence into every aspect of Iran's political life and society.

THE ISLAMIC REVOLUTION AND THE FOUNDING OF THE GUARD

The idea of creating an Islamic army to operate with embedded Islamic ideology in addition to the military actually preceded the Islamic Revolution. Members of the Freedom Movement, a political group that opposed the Shah's regime and operated from Paris while in exile, initiated the dialogue about a revolutionary army that would be similar to Algeria's freedom fighters.[10] After getting the approval of Ayatollah Khomeini, the founders of what would become the IRGC began sending early volunteers to Syria and Lebanon for military training. However it was not until a month after the Islamic Revolution, on May 5, 1979, that Khomeini issued a declaration of this new Iranian militia, the Islamic Revolutionary Guards Corps, which was to be formed from a collection of armed neighborhood komiteh, or committees, who had protested the Shah prior to his downfall.[11] The logic of offering a separate body in addition to the Shah-era military was simple: the IRGC being a creation of the Islamic Republic did not have the tarnished reputation that was associated with the Shah's Imperial Iranian Army. The Chief of the General Staff Major General Nasser Farbod affirmed this notion when on May 10, 1979 he told the media that the IRGC would "strengthen the army while continuing the revolutionary spirit as it combated anti-revolutionary elements."[12]

Initially the IRGC was tasked with restoring order to Iran's main cities and contained approximately 10,000 men. The IRGC's mission differed from that of the regular army, the Artesh, in that it was granted an internal role to strike down against potential counterrevolutionaries and also export the ideas of the revolution to neighboring countries.[13] After formally mandating its role in the Constitution, the Revolutionary Council delineated eight categorical duties of the IRGC. These included assisting police forces in eliminating counterrevolutionary ideals; battling armed counterrevolutionaries; defending the country from internal attacks of foreign forces; working in conjunction with the armed forces; training IRGC members in Islamic ideology; aiding the Republic in implementing the Revolution's ideology; and supporting the Republic's plans for development to capitalize on the IRGC's full resources. [14] In reality, these duties meant that the Guard was responsible for maintaining Khomeini's control of power and invariably led to the assassination of many opposition group members, including the purging of prominent members of the former Imperial Army.[15] By the end of 1881, the IRGC had a base of over 50,000 soldiers and had become Khomeini's primary "domestic assassination machine."[16]

From the onset of the Revolution, Khomeini had a vision

[6] Katzman, 32-33.

[7] Chorley, Chapters 11-12.

[8] Michael Slackman, "Hard Line Force Extends Grip Over a Splintered Iran," New York Times, July 20, 2009. http://www.nytimes.com/2009/07/21/world/middleeast/21guards.html?_r=1 (accessed November 25, 2009).

[9] Michael Slackman, "Hard Line Force Extends Grip Over a Splintered Iran."

[10] Alireza Jafarzadeh, The Iran Threat (New York, NY: Palgrave Macmillan, 2007), 9.

[11] Jafarzadeh, 53.

[12] Mark J. Roberts, "Khomeini's Incorporation of the Iranian Military," McNair Paper 48 (Washington, D.C.: Institute for National Strategic Studies, January 1996), 40.

[13] Frederic Wehrey, Jerrod Green, Brian Nichiporuk, Alireza Nader, Lydia Hansell, Rasool Nafisi, and S.R. Bohandy, RAND National Defense Research Institute, The Rise of the Pasdaran: Assessing the Domestic Roles of Iran's Islamic Revolutionary Guard Corps (Arlington, VA: RAND Corporation, 2009), 20-25.

[14] Frederic Wehrey et. al., 20-25.

[15] Mark J. Roberts, 43

[16] Jafarzadeh, 53.

to create an Iranian army that was rooted in Islamic principles, to the point where soldiers were as proficient in ideology as they were in arms and military strategies. This is exemplified by Article 144 of the Constitution, which clarifies the type of citizens who should be hired into the Guard. It reads: "The Army of the Islamic Republic of Iran must be an Islamic Army, i.e., committed to Islamic ideology and the people, and must recruit into its service individuals who have faith in the objectives of the Islamic Revolution and are devoted to the cause of realizing its goals."[17] As a result, all new Guard members were indoctrinated with radical Islamic propaganda at every level of military training by an organization called the Ideological-Political Directorate of the Armed Forces.[18] Consequently, all emerging soldiers and officers were specifically manufactured to enforce the government's repressive doctrines and spread its fundamental vision of Islamic Republicanism to other nations. Thus as the Guard transformed from a revolutionary militia into a legitimized force Islamic ideology became a key characteristic of Guardsman identity.

While the IRGC's Islamic indoctrination is an important feature of its early history, it is also important to note its competitive role in domestic activity at this time. In fact, during the aftermath of the Islamic Revolution the IRGC was one of several forces used by the leaders to confront external threats to the regime posed by leftist organizations like the MEK and monarchists alike.[19] While the IRGC drew its early membership from the komitehs, their similar operating structures and goals to preserve Revolutionary ideals caused friction. Other local level organizations that the IRGC struggled against to gain dominance included the revolutionary tribunals that maintained de facto Islamic courts throughout Iran and the Islamic Republic Party who supplied some of the most fundamental Islamist political figures in its own attempt to indoctrinate the rest of the country. The Iran-Iraq War served as the turning point in which the IRGC finally proved its supremacy over these groups as a guard of the new regime.

COMPETING FOR INTERNAL DOMINANCE: THE IRGC AND THE IRAN-IRAQ WAR

On September 22, 1980, little over a year after the Republic's founding, Saddam Hussein ordered the invasion of Iran, partly as a result of Ayatollah Khomeini's attempt to provoke the Iraqi Shiite majority into overthrowing Hussein's secular government.[20] This is not surprising since Khomeini's founding goals for the Republic included the extension of its extreme Islamic rule to the rest of the Middle East and world, a belief outlined in Article 11 of the Constitution.[21] While Saddam hoped to make use of Iran's disorganized state, his attack was hardly successful; within two years, Iran had regained almost all lost territory.[22] However, the war continued for almost six more years until a ceasefire was announced on August 20, 1988. Khomeini's resolve to continue fighting past 1982, even after Iran had recaptured both Khorramshah and Abadan and Iraq readied itself to broker a resolution, demonstrates how he prioritized Iran's duty to spread its view of Islam above its citizens' social interests.[23]

While the quality of life for Iranian citizens declined dramatically during the War, the Revolutionary Guard saw a large increase in membership because Khomeini framed the War as a spiritual battle against the enemy, a theme that matched the IRGC's own principles. The post-1982 offensive saw the massive expansion of the IRGC with the creation of the Bassij, a unit that recruited boys under age 18, men, and women.[24] During the next six years, Iranian citizens suffered food shortages, unemployment, massive war debts and deaths of over 1 million soldiers. Furthermore, citizens perceived the Guard to be an ineffective force due to its relative inexperience, emotionality, and ideological priorities.[25] Iran's reluctance to stop fighting stems from its desire to extend its global vision of Islam. If Iran could not succeed in Iraq, the prime candidate to be governed by Islamic rule based on its large Shiite population, then it would fail in its main foreign policy objective. If that were the case, then Khomeini sacrificed a large amount of the public interest to unite the nation behind his Islamic vision.

What is less known about the war is that it was also used as a mechanism for Khomeini and IRGC commanders to further institutionalize and consolidate their power by purging opponents of the Revolution.[26] In many instances, the IRGC attempted to weaken the Artesh by prolonging the war. By keeping the army fully deployed along the western border and minimizing their resources, the Guard prevented the possibility of renewed attempts by the army to overthrow Khomeini, as it had tried to do multiple times in the summer before Iraq invaded.[27] Whether the IRGC's role in the war damaged the public interest, the end of the war resulted in a much larger, more powerful and institutionalized Guard. This detail highlights an important theme that defines the development of the IRGC: the tension between ideology and strategic practicality.[28] In this case, it is clear that the Guard consciously chose to sacrifice strategy and focus on solidifying Islamic ideology among its membership. Just as the Guard emerged from the war much stronger than before, so did the Artesh consequentially decline in power and relevance. Thus, the Iran-Iraq War resulted in a turning point in the Guard's history because it was at this point that the IRGC became a national force that would eventually become involved in all aspects of social and political life.

[17] A. Tschentscher, "Iran- Constitution."
[18] Jafarzadeh, 54.
[19] Frederic Wehrey et. al., 20-25.
[20] Roberts, 51.
[21] A. Tschentscher, "Iran- Constitution."
[22] Afshin Molavi, The Soul of Iran (New York, NY: Norton Press, 2002), 152.
[23] Jafarzadeh, 87.
[24] Katzman, 63.
[25] Frederic Wehrey et. al., 20-25.
[26] Frederic Wehrey et. al., 20-25.
[27] Jafarzadeh, 91.
[28] Frederic Wehrey et. al., 20-25.

THE REVOLUTIONARY GUARD IN THE 2009 ELECTIONS: A FORCE TO BE RECKONED WITH

Since the Iran-Iraq War, the IRGC has seen its political influence rise and fall in a way that can be broken up into three general phases.[29] Between 1989 and 1997, President Rafsanjani oversaw a reconstruction of the country in which the IRGC as a political body was marginalized. During the Khatmi rule (1997-2005), the IRGC allied with conservatives to challenge implemented reforms. When Ahmadinejad was elected President in 2005, the Revolutionary Guard effectively came into power as well. Ahmadinejad is a veteran of the IRGC, having served in the IRGC Intelligence Unit in the 1980's and various senior roles since then. Consequently, much of the Guard's ideology has been reflected in his policy decisions.[30] At the same time, these policies have resulted in Iran arguably undergoing its most controversial changes since the Revolution.

Since 2005, the Revolutionary Guard has dramatically expanded its reach into society. The Iranian Press claims that companies associated with the IRGC have been given over 750 governmental contracts in construction, oil, and gas projects.[31] Furthermore, former Guard members hold many prominent posts in the government and Iran's Parliament, including the Speaker of the Parliament and the mayor of Tehran. The relatively small Guard, numbering around 120,000 members, has its own land, air, and naval forces.[32] As a conglomerate, the Guard offers consumer services in every imaginable sector of the economy. Its ideology reaches every citizen because it influences the education system's curriculum, teaching students about loyalty to the nation, and the media, where it controls TV and radio content.[33] The Guard's most visible impact on Iranian society occurred this past summer, during the fallout from the 2009 Presidential election results.

On June 12, 2009, Iran's 10th Presidential Election was held. Incumbent Ahmadinejad ran against three opponents, including prominent independent reformist Mir-Hossein Mousavi. Only a few hours after the polls closed, Iran's government controlled news agency declared Ahmadinejad the winner by a wide margin, in contrast to Mousavi supporters' expected wide victory.[34] Immediately many countries, including the United Kingdom, expressed doubt over voter fraud during the election, as did most journalists covering the story from Tehran. Beginning the next day and lasting for over a week, widespread protests—nicknamed the "Twitter Revolution" in reference to the use of a new form of internet blogging that was used to circumvent Iranian censorship restrictions—as well as the "Persian Awakening" broke out in response to perceived electoral fraud. While the political situation has since stabilized, the lasting impact and the role of the IRGC in quelling these protests will plague Iranian politics for years to come. Working on behalf of President Ahmadinejad, IRGC members not only influenced the elections but also were responsible for the violent backlash against protestors.

Since many high-ranking IRGC members owe their increased power to Ahmadinejad's first administration, they paid back the favor during the 2009 election cycle. Not only did IRGC Chief Mohammed Ali Jafari give Guard members an obvious directive to guarantee an Ahmadinejad victory by any means, but the Guard has also been accused of rigging the vote itself.[35] The IRGC was also responsible for much of the physical crackdown against protestors that occurred in the the immediate aftermath of the election. They posted a notice on their own website warning protestors to cease or risk physical retribution: "The Guards will firmly confront in a revolutionary manner rioters and all those who violate the law."[36] Prominent opposition politicians and international journalists, like Maziar Bahari were imprisoned for "anti-Revolutionary" activity. In a recount of his 118 days in prison, Bahari details how he was arrested by the Guard's Intelligence Division, a group that is now responsible for Iran's internal security.[37] Ultimately, the crackdown on protestors not only demonstrated the extent to which the President and the Revolutionary Guard operate in conjunction, but also revealed the Guard's immense power and supremacy in relation to other governmental forces.

Even after the Guard suppressed the election protests under orders from Ayatollah Khamenei, it has continued to demonstrate its domination over Iranian society as a socio-political-economic conglomerate. Most recently, it has acquired a majority share in the nation's telecommunications monopoly through a transaction worth approximately $8 billion.[38] The Guard's ability to continue to grow and control a society that so recently almost disintegrated into chaos shows how they are driving national policies. While the Guard's future is almost as unclear as the true election results, they are sure to play a major role in formulating domestic policy for the foreseeable future.

By highlighting three of the defining events in the history of Iran's Revolutionary Guard Corps, this paper demonstrates how the Guard has vastly consolidated its power and become a major political force in present day Iran. Over the last 30 years, the transformation of the IRGC into an institutionalized but ideologically based military and social force has resulted in the formation of a socio-political-economic conglomerate. American

[29] Frederic Wehrey et. al., 17.

[30] Jafarzadeh, 17.

[31] Michael Slackman, "Hard Line Force Extends Grip Over a Splintered Iran."

[32] Neal MacFarquhar, "Layers of Armed Forces Wielding Power of Law," New York Times, June 22, 2009.

[33] Michael Slackman, "Hard Line Force Extends Grip Over a Splintered Iran."

[34] Robert F. Worth, "Both Sides Claim Victory in Presidential Election in Iran," New York Times, June 12, 2009.

[35] Geneive Abdo, "The Rise of the Iranian Dictatorship," Foreign Policy Magazine, October 7, 2009.

[36] Neal MacFarquhar, "Layers of Armed Forces Wielding Power of Law."

[37] Maziar Bahari, "118 Days, 12 Hours, 54 Minutes," Newsweek Magazine, November 30, 2009.

Michael Slackman, "Elite Guard in Iran Tightens Grip With Media Move," New York Times, October 8, 2009.

Exceptionalism: The Defining Institutions of the Carceral State

by Sonya Sackner-Bernstein

The tremendous distinction of the American carceral state as it exists today can no longer be ignored. Today, the United States penal system imprisons its citizens at a rate six times that of comparable countries like Britain, targeting minorities to a highly disproportionate extent.[1] The famous Soledad Brother George Jackson once poignantly concluded that "this prison didn't come to exist where it does just by happenstance," and in this assertion he urged scholars to examine the specific circumstances and structural factors that facilitated the rise of the highly distinctive approach to punishment that characterizes the American legal system.[2] A internationally-oriented comparative study of the American penal system reveals a multifold explanation of the factors that differentiate the American system from its counterparts across the world. Firstly, the institutional capacity of the American federal government in the arena of penal reform has increased to a historic level, largely surpassing that of other industrial nations. In parallel, the historical weakness of the United States as a welfare state provided the context in which law-and-order players have prescribed penal solutions to social problems. Key institutional differences in the American judicial system emboldened the zero-sum view of victims that characterized such law-and-order efforts. Amidst this uniquely permeable environment, rights-based activist groups had the potential to effect change but their message had a backwards effect in the context of these distinct factors. Thus, the historic weakness of social welfare coupled with unique judicial structures and an increasing state capacity formed the context in which activist organizations facilitated an environment conducive to the consolidation of this unprecedented carceral state.

The traditional explanations for the relatively recent trend of mass incarceration fail to convey the combination of structural elements and catalyzing factors that have shaped the American penal system to date. The numbers cannot solely be attributed to law-and-order politics, which prevail on "both sides of the Atlantic."[3] England too saw a conservative shift parallel to that of the United States with the 1979 election of Margaret Thatcher, but without the same results. Nor can the mass imprisonment of minorities be attributed to differing crime rates—America's rates of overall crime and nonviolent crime are actually relatively low. Shifts in public concern over crime also do not differentiate the United States. In California the horror following the kidnapping, rape, and murder of young Polly Klaas led to the passage of the notorious three-strikes legislation. Equally severe crimes that occurred in both Ottawa and Brussels provoked the same fervor in the population but without the extensive changes in penal policy.[4] And while a history of deep racial oppression has certainly played a significant role in the disproportionate incarceration rate of African-Americans, this is not the distinguishing factor of the American carceral state. Minorities in Canada, Britain and Australia are also disproportionately represented in those nation's prisons, and in ratios similar to those in the United States.[5] Sociologist Bruce Western points to sentencing differences as the distinctive feature of the American system, but this is only part of the story. Instead, key institutional differences in the United States allowed the prescription of law-and-order solutions and the backward influence of activist groups to an extent unseen in other countries.

Perhaps the most significant of these defining features of the American carceral state has been the augmentation of state capacity, demonstrated through the enormous expansion of prosecutorial powers. The tremendous increase in prosecutorial discretion was epitomized in Philadelphia's modifications to Rule 352, the notice that preserves the prosecutors' right to seek capital punishment. In 1978, Rule 352 contained ten items, called aggravators, which differentiated capital and non-capital crimes. By 2007, that list had grow to seventeen—the broadest, "grave risk of death," applicable even to non-fatal shootings.[6] At later stages in the process too, the federal government has urged states and localities to shift criminal justice policies in a certain direction. "Truth-in-sentencing" legislation, first passed in 1984, rewards states with federal money for ensuring that offenders spend at least 85% of their sentenced time in prison.[7] Prominent criminologists Zimring and Johnson argue that it is this "larger structural vulnerability of criminal justice to the political process" that sets the United States apart from other countries.[8] Through the use of minimum mandatory sentences and gang status determination, the new federal laws "widened and deepened the capacity of police, prosecutors, and judges to identify, arrest, charge, and convict."[9]

This uniquely steep federal influence in criminal justice proceedings can be examined in the exceptional nature of the United States public prosecutor. One particularly relevant case study is Philadelphia's own former District Attorney Lynne Abraham.

[1] While African-Americans make up 12 percent of the general population, they consist of more than half of the prison population, from Marie Gottschalk, "Introduction," Lecture, Politics of Race Crime and Punishment (9 Sep 2008).

[2] George Jackson, "Soledad Brother," Prison Writing in 20th-Century America ed. H. Bruce Franklin (New York: Penguin Books, 1998) 158.

[3] David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Chicago: University of Chicago Press, 2002) 1.

[4] Franklin E. Zimring and David T. Johnson, "Public Opinion and the Governance of Punishment in Democratic Systems," Annals AAPSS vol 605 (2006) 269.

[5] Adam Liptak, "Inmate Count in US Dwarfs Other Nations," New York Times (23 April 2008).

[6] Tina Rosenberg, "The Deadliest D.A." New York Times 16 Jul 1995, NY ed.: 6.

[7] Bruce Western, Punishment and Inequality in America (New York: Russell Sage Foundation, 2006) 15.

[8] Op. cit., Zimring and Johnson, 277.

[9] Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (California: University of California Press, 2007) 110.

Dubbed "The Deadliest DA," Abraham sought the death penalty more than any other District Attorney in the country, virtually every time the law allowed.[10] Prosecutors like Abraham enjoy leeway at three main stages in a way that prosecutors in other foreign countries do not: the initial decision of whether to press charges, the level at which to charge, and when, or if, to terminate prosecution. These largely unchecked powers, in the form of the decision-making process at each of the three stages, directly contribute to the disproportionate imprisonment of African-Americans—the risk being that the "unfettered discretion given to prosecutors and juries"[11] has provided a "unique opportunity for racial prejudice to operate."[12] Abraham argues that she has been "consistent" in her decisions of whom to prosecute and how they are prosecuted but such thinking is myopic at best.[13] The fact is, "study after study has demonstrated that racial bias taints our entire criminal justice system."[14] Even if racial prejudice were wholly minimized at the trial stage, as Abraham alleges, the system is still feeding minorities into the court at an alarmingly disproportionate rate—Abraham, and others in her position, have only amplified the problem.

In contrast to the ideology and practices that Abraham has triumphed, Western European prosecutors, armed with broad legal educations emphasizing sociology, present markedly different goals. As career civil servants, European prosecutors prove to be less vulnerable to changes in public approval and political pressures. The European tendency to harness prosecutorial powers[15] may explain the significantly lower incarceration rate—the median among all nations is roughly one-sixth of the American rate.[16] The United States system is distinct in the unbridled prosecutorial discretion that has both directly and indirectly contributed to the disproportionate incarceration of African-Americans, as well as the overall trend of mass incarceration.

The institutional framework of the common-law judicial system that has prevailed in the United States further compounded the increasingly punitive nature of the penal environment. The court system, designed to pit victims against the accused, has emboldened what Zimring, Hawkins, and Kamin label the "zero-sum competition"[17] between offenders and victims—the "implicit assumption [being] that anything that is bad for offenders must be beneficial to victims."[18] This line of thinking serves as the basis for tough-on-crime logic, rallying voters under a salient platform issue where the line between "good guys" and "bad guys" is so conveniently clear.[19] Indeed, the highly adversarial nature of the American legal system is one of the factors that has distinguished the system from its foreign counterparts. In the common-law system that characterizes much of continental Europe the goal is an investigation of the facts in order to determine guilt or innocence rather than a war between the defense and prosecution. In the Netherlands, for example, courts spend much of the trial understanding relevant personal circumstances that may have contributed to the crime.[20] The American process emphasizes no such thing. Such institutional differences in the judicial proceedings that distinguish the United States criminal justice system from that of Europe may contribute to the higher incarceration rates in the United States.

In the context of such distinct political, judicial, and electoral institutions and evolving state capacities, rights-based activist organizations actually played a facilitating role in the development of the carceral state in a manner unseen in the rest of the world. Activist groups' unique engagement with the state led to numerous unforeseen consequences as they chose to make "unsavory coalitions and compromises that bolstered the law-and-order agenda and reduced their own capacity to serve as ideological bulwarks against the rising tide of conservatism."[21] Facing seriously constrained political and financial situations, the initially skeptical feminist groups began to employ state power to further their goals in recognition of their increasing need for state intervention. In the early 1980s, the federal government, with the help of Law Enforcement Alliance of America financing, absorbed many of the grassroots rape crisis. The centers, which numbered 600 to 700 in 1976, were reduced to only 200 to 300 five years later.[22] They were transformed not only in size, but in ideology—LEAA involvement had equated rape reform with law enforcement reform,[23] thereby providing "an opening to stress law enforcement solutions at the expense of the deeper social and political critique developed by the radical feminists who initially raised the issue."[24] In the process, the rape centers

[10] Op. cit., Rosenberg, 2.

[11] Stephen B. Bright, "Legalized Lynching: Race, the Death Penalty, and the United States Courts," The International Sourcebook on Capital Punishment ed. William A. Schabas (USA: Northeastern University Press, 1997) 10.

[12] Turner v. Murray 1985, 478 U.S. 28 US Court of Appeals for the Fourth Circuit.

[13] Op. cit., Rosenberg, 6.

[14] Mary Louise Frampton, "Transformative Justice and the Dismantling of Slavery's Legacy in Post-Modern America," After the War on Crime: Race, Democracy, and a New Reconstruction, eds. Mary Louise Frampton, Ian Haney Lopez, and Jonathan Simon (New York: New York University Press, 2008) 211.

[15] The Netherlands are one exception to this rule—here, prosecutors are accorded powers exceeding those of the United States. The key difference lies in the "culture of tolerance" that pervades the political, judicial, and electoral institutions of the Netherlands that is largely nonexistent in the American system from Marie Gottschalk, The Prison and the Gallows (New York: Cambridge University Press, 2007) 100.

[16] Op. cit., Liptak.

[17] Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (New York: Oxford University Press, 2001) 270.

[18] Ibid, 223. See Footnote 23 for a supporting example that demonstrates specifically how increasingly punitive punishments as well as the trend of mass incarceration in general do not necessarily further the cause of women's rights and domestic violence groups as had been expected.

[19] Op. cit., Garland, 4.

[20] Op. cit., Gottschalk, 96.

[21] Op. cit., Gottschalk, 131.

[22] Ibid, 125.

[23] Op. cit., Gilmore

[24] Op. cit., Gottschalk, 126.

"abdicated the[ir] earlier commitment to functioning as independent sites for oppositional ideology that broadly critiqued…society" and instead became the very arms of the state.[25] In the context of the unique institutional framework that characterizes the American system, activists were left with very little choice, "forced to adapt to this institutional terrain and promote different kinds of reform."[26]

American women rights groups, unwittingly or not, were enlisted against the war on crime in a way their European counterparts were not. Even in the nineteenth-century, feminists including Elizabeth Cady Stanton and Susan B. Anthony joined the race to incarcerate in a misguided effort to further their own cause. When bills liberalizing divorce laws failed to pass the Massachusetts legislature numerous times, women's rights activists began to stress punishing abusers, rather than protecting victims. Between 1876 and 1906 bills to restore the whipping post to punish men who abused their wives were introduced across the country.[27] More recently in 1975, Washington State women's lobbyists tacked a rape reform bill onto a popular new death penalty statute.[28,29] The equating of the problem of violence against women with penal solutions enshrined the zero-sum view of victims that propelled the punitive penal environment. In parallel, feminists intent on proving that female criminals, especially prostitutes, could be reformed inadvertently paved the way for harsher sentencing measures. The foundational logic to their approach, that incarceration should serve the function of rehabilitation, led to indeterminate sentencing practices that wholly ignored proportionality to the crime. Their efforts to reduce rape and domestic violence "got funneled through [this] political and institutional process and got transformed in the process."[30] The women's rights movements had equated the solution to their cause with an increasingly punitive penal system.

The different role of activist organizations in England can be attributed to the relatively stable nature of Britain's welfare state, which allowed the British women's movements independence unseen in the United States. Unlike the American rape crisis centers, shelters in Britain could fund themselves primarily by charging rent to their residents, many of whom received at least minimal social security from the government.[31] British feminists could refuse to address domestic violence through law-and-order solutions because they had the option to channel their concerns through a much more supportive social welfare state.[32] Likewise, the European victims' rights movements pushed for improvements in services to victims rather than expanses in their legal rights. In New Zealand, for example, crime victims were included in the expanding social welfare system. The 1967 Woodhouse Report, which led New Zealand to establish a comprehensive state-insurance system, provided benefits for crime victims, thus "anchor[ing] victims of crime in [the] expansive welfare state rather than in [the] criminal justice apparatus."[33] In a stark contrast to the American approach, many industrialized countries in Western Europe and across globe chose to support crime victims by bolstering the welfare state rather than the carceral state.

Thus, in light of activist groups' role in post-1960s America, the unique weakness of the American welfare state set the stage for its similarly unique penal environment. The American rejection of prisons as agencies of social welfare along with the larger rehabilitative ideal[34] can be viewed as an associated consequence of the declining welfare state, one that facilitated the increasingly punitive nature of the justice system. In California, for example, "crumbling welfare institutions… create[d] emergencies that were addressed by the official sector—if at all—…through the expanding system of criminalization."[35] Scholar and activist Ruth Gilmore Wilson points to the one million people in California who "have been locked in…by being locked out"[36] of public housing and social security services. The deliberate undoing of the welfare state evident throughout the United States (most noticeably in the Reagan era) contributed in various ways, notably by limiting the options for activist groups, to the highly uneven playing field that propels minorities into American prisons at an alarming rate.

The exceptionalism of the American carceral state is clear. The prison boom so unique to the United States is both a reflection and "produc[tion] of enduring disadvantages" that pervade American institutions.[37] In Malcom King's "Prisoner," he asserts most powerfully that: "I died when I was born."[38] King's argument is that he "died," or was doomed, because of the disadvantaged world in to which he was born—a world in which incarceration has become so pervasive among African-Americans as to be a defining feature of their collective experience. But while Gottschalk highlights the far-reaching consequences of the carceral state on American society, she encourages her readers to see the potential for change by recognizing "that what is was not always so, and thus not always must be so."[39] The institutional differences that shaped the consolidation of the carceral state are not so entrenched in history as to be irreversible.

[25] Ibid, 132.

[26] Jeff Manza and Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy (New York: Oxford University Press, 2008) 46.

[27] Op. cit., Gottschalk, 119.

[28] Ibid, 131.

[29] See the federal Violence Against Women Act of 1994 for a contemporary example.

[30] Op. cit., Gottschalk, 237.

[31] Ibid, 141.

[32] Social policy legislation failed in USA, sailed through English House of Commons, particularly the liberalization of divorce laws seen in the Matrimonial Causes of Act 1878.

[33] Op. cit., Gottschalk, 181.

[34] See California's 1977 Uniform Determinate Sentencing Act for its clear abdication of any responsibility to rehabilitate.

[35] Op. cit., Wilson, 232.

[36] Ibid, 75.

[37] Op. cit., Western, 530.

[38] Malcolm King, "Prisoner," 224.

[39] Op. cit., Gottschalk, 238.

A Balancing Act: Constitutional Concerns and National Security

by Katie McCarthy

Because the Constitution is dedicated to both civil liberties and national security, the trade-offs between the two must be carefully considered to ensure that the federal government carries out its duties of establishing justice, providing for the common defense, and securing the blessings of liberty. Throughout the history of the United States, dramatic events have called for a recalibration of this balance between civil liberties and national security, with the September 11th attacks yielding the most recent shift. These terrorist attacks shocked the American public, and the ensuing relationship between the government and the suspected terrorists has called into question the correct equilibrium between the respect for due process and the ability of the government to provide security. Ultimately, when considered within the context of relevant precedents, the Supreme Court's most recent decisions concerning Executive detention powers indicate a necessary shift towards more proactive judicial oversight in order to sustain a constitutional balance of powers. In the future, the Court should continue to expand its role in defending the due process rights of detainees, as illustrated in the recent cases of *Hamdi, Hamdan*, and *Boumediene*.

As the supreme law of the land, the structure and duties defined in the Constitution provide the foundation for both Executive detention powers and the Court's ability to oversee such detentions. The ability of the Executive to undertake decisive military action is necessary to ensure national security, and because the President is "Commander in Chief of the Army and Navy," he benefits from a broad range of powers related to this duty. His ability to "make treaties" gives him primacy over the other branches in terms of foreign policy. Therefore, because the Constitution vests the President with the task of "taking care that all Laws be faithfully executed" and of swearing an oath to "preserve, protect, and defend," he enjoys a structural mandate under Article II to protect and defend the country and employ the military.[1] Nevertheless, although the inherent duties of the Executive Branch deal with matters of national security and Executive privilege, there are still dangers in invoking such sweeping grants of authority too broadly, allowing for potential arbitrary abuses of power.

The Judiciary is, thus, entrusted with the task of overseeing the other branches, a power that allows it to effectively curb excessive unilateral action on the part of the President. That the "province and duty of the judicial department is to say what the law is" was established under *Marbury v. Madison*. This precedent indicates that although the Court cannot inquire into "how the Executive performs duties in which he has discretion," the Court can decide on the rights of individuals and on whether Executive actions have unconstitutionally encroached upon those rights. Therefore, while it is necessary for the Executive to issue a decisive response to immediate dangers – such as the 2001 terrorist attacks – in order to ensure national survival and public safety, the Court has the luxury of a more measured reaction to ensure that constitutional and statutory tenants are upheld. This discretion is especially applicable in cases of detention by the Executive because a court must scrutinize the deprivation of liberty in order for it to be considered legal.

Thus, the guarantee of habeas corpus – or judicial inquiry into the lawfulness of detention and a remedy if such detention is found to be unlawful[2] – as protection against abuses of Executive power retains its central importance, having historically been suspended and more recently undermined by actions on the part of the Executive Branch in relation to alleged enemy combatants. Although the writ of habeas corpus has not been officially suspended either by Executive order or by Congress's Authorization to Use Military Force (AUMF), the claim that alien terrorists could be detained and tried before a military commission has essentially negated the effect of formally suspended habeas corpus as a defense for *Hamdi, Hamdan*, or *Boumediene*.[3] These recent decisions by the Court represent a shift towards reinstating the rights of detainees and demonstrating that government actions taken during the course of the "war on terror" are not immune from judicial oversight.

Because the Constitution provides a foundation for two dimensions – both Executive discretion in matters of potential security threats from enemy combatants and the Court's duty to preserve the integrity of constitutional rights – recent decisions by the Court must also be considered in light of pertinent precedents. For example, in *Hamdi v. Rumsfeld* in 2004, the Court decided that Hamdi, an American citizen who had been designated an enemy combatant, was entitled under due process to "a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker." Because the Court could not depart from past precedents, distinctions had to be made between this case, *Ex parte Milligan*, and *Ex parte Quirin*.

In *Ex parte Milligan*, the Court ruled that the jurisdiction of a military commission could "never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." As such, all citizens are entitled to their inalienable rights – including the right of each American citizen not to be "deprived of life, liberty, or property without due process of law" found under the Fifth and Fourteenth Amendment, as well as the right to speedy trial by an impartial jury afforded under the Sixth. From *Milligan*, these fundamental rights can only be suspended when the civilian courts are incapable of functioning, making it "necessary to furnish a substitute for the civil

[1] United States Constitution, Art. II.

[3] Sue Mahan, Terrorism in Perspective, 2nd ed. (Thousand Oaks, CA: Sage Publications, Inc., 2008) 352 – 354.

authority." Inalienable rights cannot be "frittered away on any plea of political necessity," rules Justice Sandra Day O'Connor. However, under the conditions in *Hamdi*, the necessity of "national security" was cited, despite the fact that there was neither an official state of war, nor an inability on the part of civilian courts to function. In Justice O'Connor's majority opinion, she asserts that *Milligan* "does not undermine our holding about the Government's authority to seize enemy combatants." This distinction arises from the decision that Milligan was not a prisoner of war, but was a "resident of Indiana arrested while at home there." Thus, he was unable to be detained under military authority, whereas Hamdi had been classified as an "enemy combatant," and so was subject to a different standard.

O'Connor's ruling also relies on *Ex parte Quirin* as precedent, stating it as evidence that the "capture, detention, and trial of unlawful combatants by 'universal agreement and practice' are important incidents of war." *Quirin* provides two powerful corollaries for the later detention cases in terms of both classification and citizenship. For one, *Quirin* establishes that "unlawful combatants are subject to capture and detention, but in addition [that] they are subject to trial and punishment by military tribunal." The implications of such a categorization carry over into the modern era, with the government's designating detainees such as Hamdi and Hamdan as "enemy combatants." Furthermore, *Quirin* serves as a precedent for the jurisdiction of military tribunals, since the German saboteurs were sentenced to the same. Lastly, *Quirin* establishes that "citizenship in the United States of an enemy belligerent does not relieve him from the consequences" of unlawful belligerency. The modern Court has relied upon this precedent to agree that there is "no bar to this Nation's holding one of its own citizens as an enemy combatant."

However, there are several important distinctions between *Quirin* and both *Milligan*, and the more recent *Hamdi*. Because *Quirin* relied upon the label of "unlawful belligerents" to differentiate the Nazi saboteurs from Milligan's scenario, making them subject to the law of war, the case created the precedent for using military tribunals to try civilians beyond what was strictly necessary. Thus, despite functioning civil courts and a potential encroachment on the rights of citizens under the Fifth and Sixth Amendments, *Quirin* allowed the modern day court to disregard *Milligan's* potentially applicable precedent in favor of a national security maxim that created convenient opportunities for the Executive to manipulate its application. However, unlike *Hamdi*, under the *Quirin* decision a state of war had been declared and "Congress […] had exercised its authority to define and punish offenses against the law of nations by sanctioning […] the jurisdiction of military commissions." In *Hamdi*, a state of war had not been officially declared and Congress had not explicitly advocated detention and the use of military tribunals in the case of enemy combatants. Instead, the Court construed the Authorization to Use Military Force as including detention by its more general allowance of the use of "necessary and appropriate force" by the Executive.[4] Further, while under *Quirin*, the men were "admitted enemy invaders;" the same facts were not conceded in the case of *Hamdi*. Under the absence suspension of the writ, a citizen held where the courts are open is "entitled either to criminal trial or to a judicial decree requiring his release."[5]

Thus, the decision in *Hamdi v. Rumsfeld* was vital in rebutting the government's position that the Court should investigate "only whether legal authorization exists for the broader detention scheme," especially because war had not been declared, and habeas corpus was still valid. However, it must be noted that the Court did not require Hamdi's removal to a civilian court. Additionally, the Court refrained from examining the scope of the term "enemy combatant," the length the government could detain an individual without counsel or a hearing, and whether non-citizen detainees were entitled to the same basic due process rights as Hamdi. Despite the majority assertion that a state of war "is not a blank check for the President when it comes to the rights of the Nation's citizens," they deferred to many of the government's assertions and stretched congressional legislation to authorize the detention of citizens while focusing on the importance of the Court's own power in striking a constitutional balance against an unchecked system of detention.

These same themes carry over into *Hamdan v. Rumsfeld*, which was decided by the Court in 2006. Hamdan was captured in Afghanistan and transported to the military prison in Guantanamo Bay; he was charged with conspiracy and he argued that this was not an offense that violated the laws of war and that he was entitled basic rights under military and international law. This case took place in the context of the Detainee Treatment Act of 2005 passed by Congress, which deprived all courts of the jurisdiction to consider habeas corpus petitions filed by detainees at Guantanamo.[6] The decision's slim majority rejected claims of unilateral Executive authority yet again, and relied on international law as well as domestic precedents to provide basic due process rights to non-citizen detainees. This decision represents an even stronger rebuke of the Bush administration's claims to Executive authority during extreme times, and, unlike *Hamdi*, a departure from *Quirin* since that case embodied "the high-water mark of military power to try enemy combatants for war crimes." The Court in *Hamdan* proved ever more willing to erode the powers of the Executive and defend the due process rights of detainees, in light of the President's inability to satisfy the "most basic precondition" of military tribunals: military necessity.

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[4] Jenny Martinez, "Hamdi v Rumsfeld," The American Journal of International Law 98, no. 4 (2004) 782-788.

[5] Hamdi v. Rumsfeld. Justice Scalia's dissent

[6] Rogers Smith, Lecture: Dec. 2nd, 2009: The Court decided that the DTA did not apply to cases that were currently pending, allowing them to hear *Hamdan*

In this recent decision, the Court seems to have learned from previous mistakes of deference to all Executive claims of military necessity. For instance, in *Hiraybashi v. United States,* the Court found that although Japanese-Americans were being discriminated against based on their ancestry, "the war power of the national government […] extended to every matter and activity so related to war" and that the judiciary was "not to sit in review of the wisdom of their actions." Clearly, the ramifications of this extreme deference to the Executive in matters of national security – in that case following the bombing of Pearl Harbor – have led to a disastrous legacy and a hypocritical stain marked by the American utilization of Japanese internment camps while simultaneously waging a war abroad against Nazi Germany. This same deference could be found in *Korematsu v. United States*, which established the standard for governmental action "under the war power" as being judged entirely in the context of war. Thus, an action that would be stigmatized as lawless in peacetime would be considered acceptable while waging war. This approach led to an imbalance between national security concerns and the constitutional rights of citizens, which were substantially compromised. The precedents of *Korematsu* and *Hiraybashi* again demonstrate the importance of a measured response from the Court, which can refrain from rapid action in the face of a crisis. Instead, the judiciary can rise above transient political pressures to protect the inalienable rights due to any human being.

These inalienable rights – including basic due process rights – are referenced in many international treaties that the United States has ratified. Significantly, in *Hamdan*, the justices reference international law as a standard for the detainment and legal treatment of the detainees, calling on the Common Article 3 of the Geneva Convention especially. This Article required Hamdan to "be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court found that the commission convened by the President did not meet these requirements. Thus, an appropriate forum would include a reliance on standards chosen prior to the crisis and under a system where balance of power was maintained such that no detainee could be "defined, prosecuted, and adjudicated by Executive officials without independent review."[7] Because the President is also required to "take care that the laws be faithfully executed,"[8] he must therefore enact "all treaties made […] under the authority of the United States."[9] Constitutionally, this Article ensures Executive compliance with international laws that have been approved domestically, many of which have become increasingly relevant with relation to terrorism and the detention of suspected enemy combatants.

Finally, in 2008 the Court considered *Boumediene v. Bush,* which found that the constitutional right of habeas corpus review applied to persons held in Guantanamo Bay – even those designated as enemy combatants on that territory.[10] This finding reinforced an earlier ruling in *Rasul v. Bush*, which found that the Court did have jurisdiction within Guantanamo Bay to determine whether non-citizens were being held there unlawfully.[11] The Court considered that "by surrendering formal sovereignty" over any unofficial territory to a third party while still controlling the lease would make it "possible for the political branches to govern without legal constraints." Here again, the Supreme Court shifts the balance away from Executive powers in the name of national security to a more tempered combination of concerns for public safety and for civil rights. By stating that the actions of both the Congress and the President are "subject to such restrictions as are expressed in the Constitution," the Court clearly asserts its role of judicial oversight, even outside the territorial bounds of the United States. This case itself establishes a precedent in that the Court had "never before held that non-citizens" detained in a territory over which another country maintains de jure sovereignty "had rights under the Constitution." Therefore, *Boumediene* did not rely on past precedents because of a "lack of any precise historical parallel." This decision, in effect, limited both the President and the Congress, an indication of the widening powers of the Judiciary in dealing with detention. From this ruling, the Legislature would now have to enact the Suspension Clause of the Constitution in order to suspend the writ, allowing no circuitous approaches to undermining habeas corpus for Guantanamo detainees.[12]

Overall, these three recent cases – *Hamdi, Hamdan,* and *Boumediene* – all represent the Court's reassertion of their duty to maintain the constitutional integrity and moral authority of the Constitution and the United States more broadly. As Justice O'Connor stated in the *Hamdi* opinion, although crises most challenge the country's commitment to the Constitution and due process rights, it is during such times that "Americans must preserve our commitment at home to the principles for which we fight abroad." This is the duty of the Court; with the United States as a global power, purporting to bring democracy abroad, to uphold anything less would be mere hypocrisy.

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[7] Hamdan v. Rumsfeld. Justice Kennedy, concurring in part.

[8] U.S. Const. art. II, § 3, cl. 4.

[9] United States Constitution, Article IV.

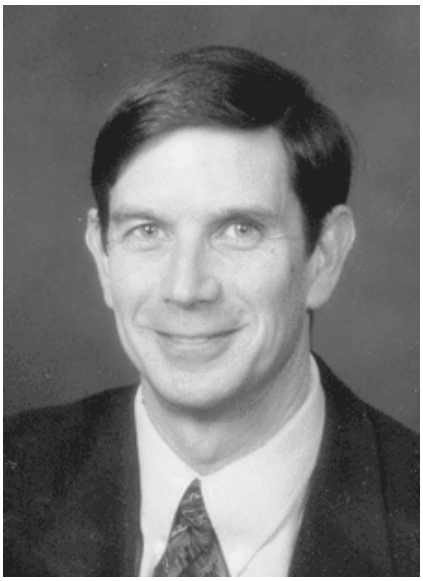
[10] Mahan, 374 – 376.

[11] Mahan, 362 – 366.

[12] United States Constitution. Article I, Sec. 9: That the privilege of habeas corpus cannot be suspended unless "when in cases of rebellion invasion the public safety may require it."

Hot Topic: The Supreme Court

Interview with Professor Rogers Smith
Conducted by Jean Pierre Feghali & Katie McCarthy



To begin, can you tell me about your research?

Currently my main project is a co-authored book with Desmond King of Oxford University, called Still a House Divided? The Structure of American Racial Politics, in which we argue that American racial politics has been structured historically in terms of competing coalitions fighting over a central battleground issue in different eras, slavery, segregation, and today we argue that the central battleground issue is whether policies should be color blind or race conscious in some form designed with specific concern for their racial consequences, something that involves not just affirmative action, but a range of policies where ones might be chosen because of their racial implication, or rejected because of those implications. So we go through a range of contemporary policy issues to show the coalitions at work and how their positions in some ways shape and often distort public faith in public policy.

What have been some of your big suggestion with regards to that issue [of racial discrimination and stuggles in America]?

In the end of this book, with Desmond King, we are arguing that it was probably true in the past that the great battleground issues involving race in America were not really subject to compromise even though American political leader sought to compromise. As Lincoln said in regards to slavery, the nation could not exist half slave or half free, even though the compromise of 1820 and 1850, these were efforts to sustain it half slave and half free. The system of Jim Crow segregation really was inconsistent with democratic system committed to human rights and dignity, even though it represented a kind of compromise between the north and south, But in the end those issues could not be compromised, and that created a legacy in which we think understandably as civil rights issues as highly morally tullard so that you shouldn't compromise. The irony we think is that today efforts to combat racial inequality probably require some mix of more universalistic color blind policies and some race conscious or race targeted polices. We can imagine a set of socialist systems, programs addressed to American in need in general, along with some kind of specialist systems for the racial groups that re most in need. Some kind of packet that might well bring about progress, but for advocated of color blind policies any race conscious measures are immoral and they are not willing to compromise on that, whereas for advocates of race conscious policies, who are a minority – most American favor color blind policies – tend to portray their opponents as simply masking desires to preserve quiet advantages toward color blind policies, and so we shouldn't compromise with those people either. So in an era when we probably should recognize that we can compromise, and some mix of policies would be most productive from everyone's point of view, instead we have very polarized politics in which each side regards the other as a mode of racial injustice.

One thing we hope to do in the book, is in some ways to combat the sense that the question of whether we should combine color blind and race conscious measures in some productive fashion, we want to combat the notion that seeking compromise now is an immoral thing.

Do you think that President Barack Obama's election and his appointments of many minority figures will help with the racial problem?

I think it may in the long run, in the short run it has provoked a lot of anxieties over older white Americans that they are loosing their country, and I think that the rage and the fear visible in the Tea Party movement has a variety of sources, its not just about racial anxieties, but it does include those anxieties. And so the fact that there is an African American president and has appointed a Latina to the Supreme Court, and the attorney general is African American, so forth. I think in the long run this is part of progress that most American will embrace, but in the short run it is contributing to the aclamin in American politics.

With minorities becoming such a large part of the voter block, what future do you foresee for the Republican party?

They are going have to change if they are going to be a viable political party. The option of disfranchising is not a viable political option today. They are going to have to win those votes. In many ways this can represent the Republican Party returning to its original principles, since it was the Republican Party that led the fight to prevent the extinction of slavery, put slavery on the path to extinction, and then for a period in the late 1860s pushed to pass statutes and constitutional amendments mandating racial

equality as a fundamental principle. Racial egalitarianism and national government action to promote inclusion, I would say, is the founding commitment of the Republican Party. Through the ironies of American history, the Republican Party has now become the party of states right and also resistance to active governmental efforts to promote racial equality. They are the party of color blindness. Whereas at the time of their founding the Democrats were the party of states rights and where then the party of open white supremacy, and if not supremacy at least color blindness. They did attack the republicans in the late 1860s for championing what they called Negro supremacy, and what they meant by that was the insistence on equal rights for blacks.

It is a remarkable reverse and you can understand it by tracing shifting coalitions of American politics. The fact that there has been change in the past means there can be change in the future. I do think that the Republican Party is to be viable it is going to have to reclaim in some form that version of its identity, but it also has to do it in ways that distinguishes it from the democrats. It's a big political challenge for them and at this point I don't see how they are going to do it, although I think the concern to remain politically viable will mean that they will find a way.

Can you talk about the implications of Justice Steven's stepping down from the Supreme Court?

Justice Steven's successor is not likely to change the balance on the court dramatically, it is a familiar story now but Justice Steven's who is a moderate republican who was appointed by Gerald Ford has both genuinely become more liberal upon the bench, while meanwhile the court has become more conservative so he has become a leading liberal voice. Obama will replace his with someone who is at least a moderate liberal, but that wont change the voting patterns on the court dramatically, at least not in the short run. It is even possible, Justice Stevens has argued, that since 1971 every new justice – including himself – has been more conservative than the justice that the new appointee was replacing. Justice Stevens got sufficiently liberal, but it is possible that his replacement will be more conservative than he ended up, but he will still be fundamentally liberal, so the voting block will remain the same. Even so the appointee, every individual is different, it is a small group; it may well affect the dynamics of the court in ways that we can't predict if we don't know the nominee.

There is also another interesting feature – how significant remains to be seen – as the US was founded by overwhelmingly protestant communities, its sense of political purpose and appropriate governing institutions and rights and liberties were heavily shaped by the thought of protestants and particularly descending protestants who came to this country. So there is a sense in which American constitutional traditions are linked to a certain kind of protestant heritage even though we are also very shaped by enlightenment political doctrines that did not put religion in politics. While it is possible that Justice Stevens in now the last protestant on the supreme court and it is possible he will be replaced by a Jewish appointee, most of the people on Obama's short list are Jewish. If so there will be no protestant of the Supreme Court it will consist of six Catholics and three Jews, and for a nation that being overwhelmingly protestant in some ways this is an interesting symbolic transformation. I think it can also be understood that the American regime of religious freedom has meant that not only have vibrated religious diversity over time, but also reforms of religion that have prevailed here have recognized the benefits of American constitutional traditions and therefore have incorporated commitments to American constitutional provisions so that if the American constitution was to have certain a close relationship to protestant traditions at the beginning, today it doesn't really matter. The justices share the same blood commitment to American constitutionalism. I don't think it is enormously consequential I think it is more of an indicator of the relative success of America in embracing religious diversity that the court has been transformed in this way. But it still is a big change, until the second half of the 20th century there were only a handful of non-Protestants in the history of the Supreme Court.

What are your thoughts on the current Hastings case? How do you think the Court will decide and what will be the impact of their decision?

It is a significant case because it brings in two positions that the Supreme Court has endorsed. First you might have a constitutional right to do something but that doesn't meant that the government has to provide you material support to do so. You have the right to an abortion, but the government doesn't have to pay for it. You have the right to study theology, but the government doesn't have to pay for it. It can if it wants but it doesn't have to do so according to the constitution. The argument for the state for the Hastings law school is that the Christian Legal society can have any internal leadership policies it wants in regard to gays and lesbians but we don't have to take our public institution facilities sand assist that organization.

The argument the other way, and this is significant about the place of religion in modern American constitutionalism, the Christian legal society is not arguing primarily in terms of religious rights. If they argues primarily in terms of claims of religious free exercise they would probably loose and they know that. Because the court, and even this more conservative court, is not receptive to saying that public policies and laws have to be adapted or abrogated in order to let groups pursue their religion whatever it may be. They worry that that is to anarchical; it makes every man's conscious a law unto itself, as Justice Scalia has said. So they wont go that way, and the litigants know that. They are not even pressing religious free exercise arguments. They are pressing free speech arguments, and the court has been receptive to free speech arguments. Their

logic is if you have a state institution, like the Hastings law school, that is providing facilities and other kinds of assistance to a variety of student organizations that represents an broad diversity of viewpoints, then it is not appropriate to single out a particular group whose viewpoints they don't like on a particular issue and say that they don't get the same opportunities and assistance that other groups do. Then that seems like the use of public institutions to discriminate against certain perspectives that represents an inconsistency with free speech. The court has said to high schools that offer their classrooms after hours to student groups that they have to permit the Christian group to come on the same basis as the gay and lesbian or gay straight alliance student group. That is what the litigants are building on in this case. Most of the free speech arguments have been successful with this court, so the recent precedents suggest that the Christian Legal Society has a good chance to win. But at the same time, the argument that the state doesn't have to pay for the exercise of right sit doesn't approve of is also help. That is why it is a good case. If I had to predict, I think that this still predominantly conservative court might well decide in favor of the Christian Legal society. But there are, even amongst the conservative members of the court, there are those whose voting records suggest its possible they might go the other way.

There has been a lot of talk recently that Roe v. Wade will be overturned by the Court in the coming years. Do you think this is realistic?

I think we heard a lot more of that talk a while back than we do now. I think efforts to push the court to reconsider Roe v. Wade and also Planned Parenthood of Southeast Pennsylvania v. Casey, which is really the governing framework for abortion rights now. It modified Roe v. Wade, and it is now the reining precedent, though it still rests on Roe v. Wade. But we at the University of Pennsylvania should be particularly conscious of the importance of Planned Parenthood of Southeast Pennsylvania v. Casey because it is a case that really originated here and was lead by Catherine … she was at the Annenberg School of Public Policy Center. She is now the head of People to the American Way. She is the lawyer that took the case to the Supreme Court.

What was the effect of the Planned Parenthood of Southeast Pennsylvania v. Casey case?

Instead of the trimester framework of Roe, which primarily said no ban or substantial regulation of abortion in the first trimester, regulations but not bans in the second trimester, and you can ban abortion in the third trimester. Casey replaces that with a two-part framework, prior to viability – the point at which the fetus can survive outside the mother's body without medical assistance – the state can regulate but not ban abortion. But it can now regulate from conception, which did not use to be the case, and after viability you can ban abortion. It permits more state regulation than Roe did. But it does uphold the basic notion that prior to viability, the state can regulate abortion but it cannot place an undue burden that effectively prevents a woman from having an abortion during that time period. The anti-abortion movement is continuing to bring legislation that pushes against that framework, and they would love to see Casey and Roe overturned. The most recent development is the passage in Nebraska of a law that seeks to replace viability as the key at which you can ban abortion with when the fetus has developed enough of a nervous system to feel pain – and that is earlier than viability. That is a strategy of chipping away and Roe and Casey, and some of those efforts have been successful, but I would not predict that the Nebraska law will be upheld. The overturning of Roe entirely is not on the horizon, and I think that certainly replacing Justice Stevens is not going to alter that balance. There is a chance that Obama will appoint a third justice, and if he appoints a third one it is likely he will replace a conservative. If that were to happen, then the Roe and Casey line of decisions would probably be considerably safer.

Are there any big constitutional law issues that haven't been the focus of a lot of news, but that you think are going to become important in the near future?

I can't say there are issues that haven't been in the news that are clearly going to become important, but I do think that the fact that economic crisis led the Obama adminstration to push through a variety of new forms of economic regulation and assistance, including its healthcare plan means that we are going to have more constitutional disputes of national economic regulatory and social assistance powers than we have had since the New Deal. There were lots of constitutional disputes during the New Deal over FDR's legislation, the court struck down a lot of that legislation. A lot of new social legislation in the 1960's, but the Warren Court was eager to uphold it. Now we have the stimulus package, the American Recovery and Reinvestment Act, the new financial regulation bill that looks like it will pass, and we may get other regulations that have to do with energy and the environment – and it's clear that conservative forces are mobilizing to bring lots of challenges to these bills in the name of federalism and state's rights, in the name of the economic and personal liberties of individuals and businesses, and they are doing it in part because there is a conservative majority on the Court. Being so, we do have a scenario much like the early New Deal in which the Court was largely populated by the previous, more conservative Republican generation confronting a flood of Democratic economic and social assistance legislation – and those are circumstances under which certainly conservatives will try to get the Court to challenge the Obama administrations' laws its enacted and may have some success. If so, those issues will dominate the Supreme Court agenda for at least a couple years in a way we haven't really had since the 1935 to 1938 period.