

**International Society
of
Barristers**

Volume 49

Number 4

OUR ELECTED MONARCH
Michael W. McConnell

THE SUPREME COURT AND THE COMING ELECTION
Erwin Chemerinsky

ELECTION OF THE PRESIDENT 2016
Robert F. Bauer and Anita Dunn

THE RHYMING OF HOPE AND HISTORY IN PALESTINE
John McKay

Quarterly



Annual Meetings

2017: March 19–25, Ritz Carlton
Cancun, Mexico

2018: April 15–19, Dorchester Hotel
London, England



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International Society of Barristers Quarterly

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Volume 49
Issue Number 4
2016

The INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY (USPS 0074-970) (ISSN 0020-8752) is published quarterly by the International Society of Barristers, Duke University School of Law, Box 90360, Durham, NC, 27708-0360. Periodicals postage is paid in Durham and additional mailing offices. Subscription rate: \$10 per year. Back issues and volumes through Volume 44 available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY, 14209-1911; subsequent back issues and volumes available from Joe Christensen, Inc., 1540 Adams Street, Lincoln, NE, 68521. POSTMASTER: Please send address changes to Professor Donald H. Beskind, Duke University School of Law, Box 90360, Durham, NC, 27708-0360.

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AND CIRCULATION
(PS Form 3526)**

1. Title of publication: International Society of Barristers Quarterly
2. Publication no. 0074-970
3. Date of filing: 27 September 2016
4. Frequency of issues: quarterly
5. Number of issues published annually: four
6. Annual subscription price: \$10.00
7. Mailing address of known office of publication: 210 Science Drive, Durham, NC 27708-0360
8. Mailing address of headquarters or general business office of the publisher: International Society of Barristers, 210 Science Drive, Durham, NC 27708-0360
9. Names and addresses of publisher, editor, and managing editor: Donald H. Beskind, 210 Science Drive, Durham, NC 27708-0360
10. Owner: International Society of Barristers, a nonprofit corporation, 210 Science Drive, Durham, NC 27708-0360
11. Known bondholders, mortgagees, and other security holders owning or holding one percent or more of total amount of bonds, mortgages, or other securities: none
12. The purpose, function, and nonprofit status of this organization and the exempt status for federal income-tax purposes have not changed during the preceding 12 months.
13. Publication Title: International Society of Barristers Quarterly
14. Issue date for circulation data below: September 2016
15. Extent and nature of circulation:

	<i>Average no. copies each issue during preceding 12 months</i>	<i>Actual no. copies of single issue published nearest to filing date</i>
a. Total number of copies printed (net press run)	944	912
b. Legitimate paid/requested distribution		
1. Outside county paid/requested mail subscriptions	900	875
2. In-county paid/requested mail subscriptions	7	6
3. Sales through dealers and carriers, street vendors, counter sales	0	0
4. Requested copies distributed by other mail classes through the USPS	0	0
c. Total paid or requested circulation	907	881
d. Free or Nominal Rate Distribution		
1. Outside county	27	21
2. In-county	0	0
3. Distributed through USPS by other classes of mail	0	0
4. Outside the mail	0	0
e. Total free or nominal-rate distribution	27	21
f. Total distribution	934	902
g. Copies not distributed	10	10
h. Total	944	912
i. Percent paid and/or requested circulation	97.1	97.7

16. Publication of this statement will be printed in the Vol. 49, No. 4 issue of this publication.
17. I certify that the statements made by me above are correct and complete.

Donald H. Beskind, *Editor*

A Resolution of Appreciation for Nancy Norcott Cheek

On February 22, 2016, Nancy Norcott Cheek, the Barristers' administrative assistant, passed away. For the past five years, Nancy read every word on every page of every issue of this publication and offered her suggestions. She cheerfully ensured that every member received each edition—even if the member had moved firms and not updated his or her membership profile.

At Duke, Nancy was a flame to which many were drawn—chaired professors, media geeks, students who knew she was a font of compassion and good cheer, and anyone there or happening through who had anything at all to do with the Barristers.

In dealing with all of the Society's members and their assistants, Nancy never failed to comment, "Those Barrister Fellows are the *niciest* people." As was Nancy. We will miss her. We already do.

* * *

OUR ELECTED MONARCH*

Michael W. McConnell**

INTRODUCTION

Michael W. McConnell is a native of Louisville, Kentucky, and a graduate of Michigan State University. Michael went from Michigan State to the University of Chicago School of Law, where he was mentored by Professor and Associate-Justice-to-Be Antonin Scalia. After law school, Michael clerked for Chief Judge J. Skelly Wright of the DC Court of Appeals, and subsequently for Associate Justice William Brennan at the United States Supreme Court.

Michael began a distinguished career in government at the Executive Office Building as Associate General Counsel of the Office of Management and Budget in the famous days of early David Stockman. He moved from there essentially across the street to become an Associate Solicitor General under Rex Lee. He has appeared some fifteen times before the United States Supreme Court. (In fact, his first appearance as counsel in any court, small claims and upward, was in the United States Supreme Court.)

*From 1988 to 1990, Michael served as member of the President's Intelligence Oversight Board. One case in particular exhibits his wit in both senses. It's called "The Raisin Case," or *Horne v. US Department of Agriculture*.¹ In that case, he successfully argued on behalf of a*

* Address delivered at the Annual Convention of the International Society of Barristers, San Diego, California, 15 April 2016.

** Richard and Frances Mallery Professor; Director, Stanford Constitutional Law Center; Senior Fellow, Hoover Institution, Palo Alto, California.

1. 135 S. Ct. 2419 (2015).

*California family of raisin growers. The case involved the taking of property and the just compensation therefore. At one point in oral argument, he was interrupted by Justice Sotomayor, asking him how he could distinguish this from a 1929 oyster case, in which the state had similarly reserved a certain percentage of the crop for regulatory purposes. Michael responded, "Well, Leonard involved oyster shells, which are owned by the State. They're wild animals, they're the property of the State, and the oystermen had no property interest in them other than what the State chose to license them to harvest. . . . [R]aisins are not wild animals, even if they're dancing"*²

Following his government service, Michael returned to his alma mater of the law and has remained, foremost, a teacher and a scholar. In addition to his published works on constitutional law, he has produced a body of work on the First Amendment, the Establishment Clause, and the right to free exercise of religion. He has authored a textbook on constitutional law, books about religious liberty, and many law-review articles.

He has served on the boards of directors for the Austin Christian Law Center, a low-income legal-aid clinic, and for the University of Chicago's Laboratory Schools, on the advisory board for the Program in Jewish Law and Interdisciplinary Studies, and he is a Fellow of the American Academy of Arts and Sciences.

Professor McConnell's lifetime commitment to bilaterality is exemplified in two anecdotes: First, this scholar of conservative traditional values and the conservative tradition of American policy and law joined in support of the South Side Chicago's young Barack Obama, recommending him to his position at the University of Chicago School of Law. Michael's particular and compelling commentary was on Obama's role as editor of the Harvard Law Review, particularly Obama's editing his own submission to the law review. That editor made editorial

2. Transcript of Oral Argument at 7–8, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015) (No. 14-275) (alluding to a television commercial featuring dancing raisins).

suggestions that resulted in a contribution of no little substance to Michael McConnell's work. It was a study, he said, made better by skillful effort.

Second, Michael wrote a letter on June 25th, 2010, to the Honorable Patrick Leahy, Chair of the Senate Judiciary Committee, and the Honorable Jeff Sessions, ranking member of the Senate Judiciary Committee, in support of Elena Kagan's nomination to be Associate Justice of United States Supreme Court. "Based on my personal experience as well as her public statements and writings," he wrote, "she deserves not a grudging acquiescence but an enthusiastic confirmation as an Associate Justice of the United States Supreme Court."

I address my comments especially to those who adhere to a generally conservative understanding of the role of the Supreme Court in interpreting the constitutional laws of the United States. Obviously, any nominee of this Administration will reflect the progressive political outlook of the President. One of the prerogatives of the President under our Constitution is nominating justices who share his views. Much in Elena Kagan's record demonstrates this outlook, but this must not be exaggerated. On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy.

** * **

One of the most enduring questions about law and judging is whether it is anything more than politics. In her service in the executive branch and her time as dean, Elena Kagan has skillfully navigated political waters but she has also demonstrated another quality—publicly and privately, in her scholarly work and in her argument on behalf of the United States, Elena Kagan has demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies.

I

GOOD PRINCES, BAD PRINCES

I don't know very many people in this election cycle who've been talking about how great our choices for President are this year. The leading candidates seem to range from scary and buffoonish, to uncompromising and grandstanding, to tired and not very trusted, to unhinged from reality. We may not all agree on which of those descriptions apply to which of the candidates, but I'm going to surprise you. I'm going to say that this is not entirely a bad thing. It's *almost* entirely a bad thing, but not entirely.

The great English political philosopher John Locke—who so influenced our Founders, especially Thomas Jefferson—wrote in his *Second Treatise of Government*, “[T]he reigns of good princes have always been most dangerous to the liberties of their people. . . .”³ Why? Locke wrote, “[The] prerogative”—a technical term that we might define as unilateral presidential power, unchecked by law—“was always largest in the hands of our wisest and best princes” who were trusted to use those powers for the public good.⁴ “But,” he goes on, “their successors, managing the government with different thoughts, would draw upon the actions of these good rulers [as] precedent, and make them the standard of their prerogative.”⁵ That is why good princes were the most dangerous to the peoples’ liberties. People trusted them too much.

Now, you may be thinking to yourself: That’s Britain, that’s John Locke, those were kings. Here in America, we’re fortunate because we have a written Constitution that defines and limits the powers of every part of the government, including the executive. In fact, our system was explicitly designed to protect against the possibility of bad

3. JOHN LOCKE, *SECOND TREATISE*, sec. 166.

4. *Id.* at sec. 165.

5. *Id.* at sec. 166.

princes. Benjamin Franklin on about the fifth day of the Constitutional Convention commented (I love this quote), “The first man put at the helm will be a good one.”⁶ General George Washington is sitting there, not very many seats away from Franklin as he spoke, and everybody knew that Washington was going to be elected the first President. So, the first one will be a good one. “No body knows what sort may come afterwards.”⁷

The executive branch occupied, I would guess, maybe a third of the debates among the drafters at Philadelphia, yet if you pick up your handy pocket copy of the Constitution and you examine Article II, which is about the presidency, you’ll find that it is short, it is oddly organized, and it is largely uninformative. That raises a question: What were Franklin and the other Framers doing all that time? How did they deal with the executive power?

Envisioning a democratic—or they would have said republican, for they regarded the new country as a republic rather than a democracy—envisioning a republican chief executive was one of the most difficult intellectual tasks the Framers had at the Constitutional Convention. The reason is that they had no model to work with, no example in the history of the world of a powerful single executive who was actually chosen in a republican way and operated in a republican way. Now, they knew about legislatures. Many of them had served in legislatures, and they could define legislative powers pretty clearly. They also knew about courts. Many of them were lawyers or judges, and Article III is written with an obvious familiarity with the technicalities of jurisdiction and legal practice. But never in their experience did they know about a strong republican executive, and they had very little idea of how to create it.

6. Madison Debates (June 4, 1787), The Avalon Project, Yale Law School Lillian Goldman Law Library, *available at* http://avalon.law.yale.edu/18th_century/debates_604.asp.

7. *Id.*

Executive Paradigm: English Kings

The example of an executive that was before the Framers' eyes was the king, and that was not a happy example. British constitutional history was a massive struggle for hundreds of years between the monarch and the Parliament over the extent of those prerogative powers Locke was talking about.

The most important struggle was over taxing and spending. The king in medieval British arrangements had certain sources of revenue that would come to him and that he could use to hire an army and do the various things kings do—build fancy palaces and eat fancy dinners. But as the country became more modern and acquired a slightly more modern economy, those sources became smaller and smaller in relation to what the king needed in order to operate a government. And the king always had to go to Parliament to get Parliament to vote for taxes. This, of course, was later to be a principle of the American Revolution—no taxation without representation—but that principle was first fought out in Britain. And some of the kings got frustrated because Parliament either wouldn't give them money or would attach conditions and poke their noses into the king's business, as a condition of providing money. This came to a head under King Charles I in the 1620s and 1630s when he imposed new taxes just as a matter of executive prerogative. He said, Parliament hasn't acted. I've asked for money; they won't give it to me. I have wars to fight. I'm going to impose (what he called) the ship-money tax. And that caused an explosion in Parliament—huge resistance around the country. King Charles I is the one who lost his head in the English Civil War.

The supposed prerogative that the Parliament viewed as illegal—to tax money and spend money without going to Parliament—was unequivocally repudiated both in the Petition of Right in 1628 and then again in the English Bill of Rights in 1689.

A second example of a prerogative viewed as exceeding royal power was borrowing: the king would borrow on his own and very

frequently not pay it off, so the country was saddled with large debts and very high interest rates.

Then there's the matter of making law. Seventeenth-century kings tried to circumvent Parliament's power to make law by issuing what they called "proclamations." A proclamation is like a modern executive order—it is like a law, but issued by the executive instead of the legislature. The most famous was James I's proclamation forbidding certain buildings in areas immediately outside the city of London and forbidding—I have no idea why—making starch from wheat. The real purpose of these two proclamations was to test the king's authority in court. Can the king make new laws without going to Parliament? It took quite a long time for that particular controversy to be worked out, but in the end, kings can't make laws even about starch from wheat without going to Parliament.

Suspending habeas corpus was a major subject. Kings would try to throw rebels and people who were complaining about their governments in jail, but the courts would let them out, issuing a writ of habeas corpus. Sometimes the kings would suspend the writ of habeas corpus in order to keep those people jailed. There was a whole series of statutes, the first ones in 1640 and the most famous one in 1679, but then four more in the 1700s, all forbidding the king from doing this as a matter of prerogative. Parliament could suspend habeas corpus and did so a number of times, so it wasn't that habeas corpus was sacrosanct. But it couldn't be suspended as a prerogative matter by the king, as a matter of unilateral executive authority.

Then there were fights over efforts by Kings Charles II and James II to nullify laws passed by Parliament. Ignoring a law altogether was called the "suspending power": the king would suspend a law for a certain period of time. The "dispensing power," which was used somewhat more frequently, was to say that the law is still in effect, but that certain people had the right to disregard it. James II would actually, literally, give individual people official licenses exempting them from the law, for example, allowing them to

hold office even if there were a law making them ineligible for holding office. James's abuse of the dispensing power was one of the leading reasons for the Glorious Revolution, which booted James out of office and installed William and Mary in his place. The Glorious Revolution was, in effect, a dry run for the American. One American author wrote a book about the Glorious Revolution, entitled *Our First Revolution*.⁸

After the Glorious Revolution, the English Bill of Rights was enacted. It's very similar to Magna Carta in its importance to British constitutionalism. The very first and second provisions of the English Bill of Rights declare illegal the king's attempts to use the dispensing and suspending powers.

The Founders' Debate: The Scope of Presidential Powers

Our Founders were extremely aware of this history. The prospect of a return to unlimited royal power scared them, and they really didn't know how to create an executive that would have powers broad enough and flexible enough to act in emergencies, without also making possible the exercise of powers subversive of republican government. Defining the powers of the executive was really difficult.

To make matters worse, James Madison, the great genius of the Constitutional Convention, was himself unsure about the proper scope of presidential power. Madison had spent four weeks immediately prior to the meeting of the convention working out the details of a proposal for a new Constitution, which we call the Virginia Plan. One reason the convention worked as well as it did was because of the forethought and care that James Madison put into preparing this rough draft of the Constitution. But as it happens, Madison wasn't very interested in the executive power. He wrote a letter to George Washington just a month before the convention, saying, "I have scarcely ventured as yet to form my own opinion either of the manner

8. MICHAEL BARONE, *OUR FIRST REVOLUTION: THE REMARKABLE BRITISH UPHEAVAL THAT INSPIRED AMERICA'S FOUNDING FATHERS* (2007).

in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”⁹ So, as the Constitutional Convention begins, the Founders really don’t know how to deal with this very serious problem.

On the third day of major debate over the Virginia Plan, the Founders turned to the executive question. James Wilson moves that the executive power be vested in a single person, not a committee. Immediately their minds turn to the lessons of British history. Young Charles Pinckney from South Carolina—he was twenty-eight years old (although he lied about his age; he claimed to be twenty-four, because he wanted to be known as the youngest delegate at the convention)—gets up and says he’s for having a “vigorous Executive,” but he was “afraid the executive powers of the existing Congress,” if given to a single man, “might extend to war and peace, &c. [,] which would render the Executive a monarchy of the worst kind, to wit, an elective one.”¹⁰ War and peace were prerogative powers of the king. Pinckney immediately leaps to the conclusion that giving the President all executive powers is tantamount to giving him the royal prerogative powers, including control over war and peace. That is like making him a monarch.

And then comes the most dramatic moment at the entire Constitutional Convention. The proposal for a single unitary executive has been made. George Washington is sitting right there. Everybody knows that he is likely to be the first President. Charles Pinckney has pointed out that just because the President is going to be *elected* means that does not mean everything’s going to be fine, because they understood, as Franklin had said, good men will not always be at the

9. Letter from James Madison to George Washington (April 16, 1787), available at <http://founders.archives.gov/documents/Madison/01-09-02-0208>.

10. James Madison, Debates in the Federal Convention of 1787 (June 1, 1787) (quoting Charles Pinckney), available at <http://teachingamericanhistory.org/convention/debates/0601-2/>.

helm. What can they say about the dangers of the proposed presidency without appearing to criticize Washington?

Madison's notes of the convention report that "a considerable pause" ensued.¹¹ This is the only moment in the three and a half months at the Philadelphia convention when the delegates were not all jumping up, wanting to say something. A pause ensued. Why is there this pause? Because the question of executive power matters a lot. Have we fought the revolution and formed a new republican government, only to turn around and create an elective monarchy? And Washington's presence makes it difficult to talk candidly about the problem.

Ben Franklin stands up and encourages the delegates to overcome their shyness and discuss the problem. Then they get down to details. The next speaker, John Rutledge, who was perhaps the nation's most effective wartime state governor, says he's for vesting the executive power in a single person, but he is not for giving Presidents the powers of war and peace; he is not for giving the President all the prerogative powers of the king. Roger Sherman from Connecticut says we shouldn't give the President any prerogative powers at all. James Wilson of Pennsylvania—the first law professor at a university in America, by the way—says that the prerogatives of the British monarch are not a proper guide to defining the executive powers under the Constitution. He goes on to say that the only powers he considers "strictly executive" were those of executing the laws and appointing officers. That's a pretty small presidency, from a modern point of view. Governor Edmund Randolph of Virginia, who's given to dramatic overstatement, says that the very idea of vesting all the executive power in a single person was the "foetus of monarchy"—and that he saw no reason why we should take the British form of government as our prototype.

11. *Id.*

Madison then makes a proposal. He suggests striking out the reference to “executive powers,” and substituting language that would institute a national executive with the power to carry into effect the national laws, in other words, to execute the laws—that was part of Wilson’s idea—and such other powers not legislative nor judiciary in their nature, as may be delegated by the legislature. This is fascinating because it shows that even Madison can’t define what executive power is. The delegates know what legislative power is and they know what judicial power is, but they cannot define the executive except by process of elimination. Executive power is governmental power that is neither legislative nor judicial. At least at this stage in the Convention, they cannot do better than that.

The Convention moves on to other matters—the Connecticut Compromise and lots of other things—and they don’t take up the issue of executive power again until the middle of August. At that point, the real work is done by a five-man committee called the Committee of Detail. We have very little information about what happened at these committee meetings, but of the five members of the committee, interestingly, the chair was Rutledge and two of the other members were Randolph and Wilson. That is, three of the five men on the committee were those who spoke out on June 1st against having such a powerful executive and against following the model of British prerogative. And they came up with basically the current structure.

The Constitutional Scope of Executive Power

So what is that structure? This is the way they went about it: The first sentence of Article II vests the executive power—all of the executive power—in the President. This is in marked contrast to the first sentence of Article I, which is about the legislative power. It says all legislative powers “*herein enumerated*” will be vested in the Congress. The President gets all executive powers, while Congress gets only those that appear on the list. But then, what the Committee of Detail did was make a mental checklist—you can just see them

when you read the Constitution—of all of the prerogative powers claimed by the British monarch. Some of them, a great many of them, they specifically assigned to Congress, taking them away from the executive; some of them they assign to the President in full—the pardon power, for example; and some of them they assign to the President, but then limit.

Let me give some examples. The Founders have learned the lesson about taxing and spending—the issue on which Charles I lost his head. That was the most important of all the struggles, and on that point our Constitution could not be clearer: Congress is the only body that can impose taxes, and Congress is the only body that can authorize spending. The Founders are so emphatic about this that it's actually in two different places in the Constitution. In Article II, Section 8, it says Congress has the powers of taxing and spending, and then in Section 9, Clause 7, it says no money shall be drawn but in consequence of appropriations made by law. The executive branch, therefore, can't spend a dime unless Congress has appropriated the money. Borrowing similarly was vested only in Congress. Habeas corpus, suspending habeas corpus, is located in Article I, so it, too, is a congressional power, not an executive power.

The powers of war and peace, which were so prominent in the discussions, were very interestingly dealt with. The Committee of Detail came back with a proposal that *Congress* be given the power to make war. There's an interesting debate on the floor, and they change the Constitution to give Congress the power to *declare* war. Now, what's the difference—make war, declare war? The Framers wanted to make sure that as Commander in Chief the President would be able to actually conduct wars having already been initiated. They didn't want war-making by committee. They had tried that during the American Revolution. War-making by committee doesn't work once the war has started, but they wanted to make sure that only Congress can authorize the initiation of hostilities. What if there's an attack? What if Pearl Harbor comes along? So the President has the right to

repel sudden attacks. Also, the Framers were very careful about the word “war” in terms of seventeenth- and eighteenth-century usage. There was something called “complete” war, which is a war expected to be a significant, longstanding conflict. This in contrast to something Grotius and other theorists on the Continent called “imperfect” war, which our Framers called reprisals. These are instances of a low-grade military conflict that are expected to be of short duration and not lead to any more widespread problems.

The war power thus reflected a careful line. Presidents cannot start wars; only Congress can do that. But Presidents may conduct wars once begun—even if they were begun by the other side. All the early Presidents complied with this line until Thomas Jefferson, who claimed to be complying with it but prevaricated about what actually happened. This, alas, became the real precedent for Presidents: you say one thing and do another. Jefferson is not the only President to have done that.

Meanwhile, about peace: The Founders were worried that treaties could be passed that would sell out one region rather than another, and so the treaty power was cabined. The President gets the right to make the treaties but subject to senatorial advice and consent; no treaty can go into effect without two-thirds of the Senate actually voting for it. That’s a pretty strong check.

What was done about the other royal prerogatives? The power of making law goes to Congress. We will not allow presidential proclamations like not making starch from wheat. What about the suspending and dispensing powers? The Founders deal with that by imposing on the President a duty to execute all laws passed by Congress. This is called the Take Care Clause. It says the President shall—*shall*, that’s an affirmative obligation—take care that the laws be faithfully executed. They understand that not every law is going to be executed one hundred percent of the time, but that the laws are supposed to be “faithfully” executed, in accordance with what Congress enacts.

Bottom line here is that the principle of executive power is exactly the opposite of the principle of legislative power. Congress has only those powers that are expressly delegated. The executive has all executive powers except for those that have been expressly limited or assigned to Congress, instead. So that's the reason why Article II can be so short and so uninformative and not mention most of the things that Presidents in fact do: because, instead of specifying what Presidents do, the Constitution specifies what Presidents *cannot* do, and all other executive functions are left to the President.

II PRESIDENTIAL POWER, IN FACT

How has this worked out? At best—okay. There have been all kinds of conflicts with these powers from very early times—though not so much with George Washington, who was extremely scrupulous about his performance at the executive functions. But Abraham Lincoln suspended habeas corpus. Congress wasn't in session. He thought it was an emergency, and so he did it, anyway. Andrew Jackson exercised the dispensing power on several occasions. The Supreme Court unanimously called him on that and said, The President has argued that the Take Care Clause means that he gets to decide what to do about Acts of Congress, and that's untenable under our Constitution. That would be the dispensing power, which is reserved to Congress. Harry Truman seized steel mills during the Korean War in order to keep steel manufacturing going for the war effort. The Supreme Court called him on that. Nixon pushed the envelope in a number of different ways. One that's particularly famous has to do with the spending power—not that he was spending money that hadn't been appropriated but that he *wasn't* spending money that *had* been appropriated. We call that impoundment. There were 160-some-odd cases in the courts around America, all but one of which said, No, the President can't do that.

But what about lawmaking? This is an important power, and yet from even the last hundred years, I would say, we've really advanced (if advanced is the right word—descended) to the point where most major lawmaking is now done not by Congress but by executive branch through various administrative agencies. Think about some recent matters that were debated in Congress: Congress decided not to do a measure, and the executive did it anyway—net neutrality is an example, and wetlands regulation. There's minute regulation of student sex conduct on campus that was in the form of a Dear Colleague letter, not even notice-and-comment rulemaking. There are major carbon climate-change regulations. And there's an increased minimum wage for all employees of contractors.

Now, I want to make something very clear. I don't think that any of the examples I just mentioned are unconstitutional. What they are is a product of sloppily written laws and maybe even more commonly a congressional abdication of its responsibility to pass the laws. So Congress has actually authorized this expanded exercise of executive power. But one other thing has happened, which is that the judiciary has adopted a principle of allowing the executive branch enormous discretion in interpreting what laws mean. This is called the *Chevron* Doctrine, based on the name of the case where it was announced. And the combination of loose, sloppy legislation by Congress and executive exuberance in interpreting the terms of that legislation mean that the executive is able to exercise the great part of the lawmaking power today without violating the Constitution.

By the way, I must point out that fond as I am of the late Justice Scalia, he was the great champion of this *Chevron* Doctrine. So it's actually the conservative wing of the Supreme Court which gave us this idea that the executive branch has so much latitude with respect to interpreting statutes passed by Congress.

And, as Franklin predicted, Presidents push the envelope. They all try. And they all do this. This is not a Republican thing. This is not a Democrat thing. Everything depends upon the degree of resistance.

But the past two presidencies, I think, have greatly accelerated the transformation of executive power into prerogative, into an executive that is not bound by Congress.

Let me just talk about a couple of prerogatives. How about habeas corpus? George W. Bush did not suspend the writ of habeas corpus. Instead, what he did was look around the globe and find one little spot of territory whose sovereign status is highly ambiguous: Guantanamo. Guantanamo is in Cuba but is owned in perpetuity—lock, stock and barrel—by the United States. It looks like the only significant piece of territory in the world where we really do not know who is sovereign. What a great place to put people in prison and then take the legal position that the writ of habeas corpus does not extend there! So that was not a suspension of the Great Writ, but it certainly was a workaround. And eventually the Supreme Court called him on that.

President Bush also took an exceptionally expansive view of the Commander in Chief power, making the Commander in Chief power superior even to statutes passed by Congress. You may recall the so-called Torture Memo. Well, I'm not going to wax indignant about the particular interrogation methods in the memo. That's somebody else's job. That's for your human-rights speaker next time. But in terms of the constitutional point here, Congress had passed statutes that regulated and forbade torture. And what President Bush's lawyers argued in memos was that the Commander in Chief power trumped Congress's passage of statutes, so the Commander in Chief power becomes a prerogative power. The power to make rules for the governance of our armed forces was one of the prerogatives that the Constitutional Convention assigned to Congress. Given the strong views of unilateral executive power held by many members of the Bush Administration—the Vice President prominent among them—I suspect much more would have been done if there hadn't been so much political resistance. Instead, the Administration encountered massive pushback from bar associations and courts and newspapers

and Congress. This helped keep the unitary executive within constitutional bounds.

Let's look at some of the prerogative powers more recently, in the last seven, seven-and-a-half years. How about the power to initiate war? Libya looks an awful lot like a war. It went on for what, seven or eight months? It involved the toppling of a foreign leader. The Administration asserted that this was not a "war" in the constitutional sense because it did not involve ground troops. Except that our very first big war—coincidentally also against Libya, then among the Barbary States—was exclusively a naval war, and Congress had authorized it. Thomas Jefferson thought he needed congressional authorization, and he got it. I don't really understand how an Air Force war can be constitutionally different from a naval war. For the arguments supporting this, read the Office of Legal Counsel's opinion on it.¹² You're all lawyers. Read the opinion and see if you find it more persuasive than I do.

Even more worrisome from a constitutional point of view, the Administration spent weeks getting authorization from the United States Security Council for the Libya War, which proves there was no emergency, but made not the slightest effort to get authorization from Congress. Whatever you may think of the United Nations, that honorable body is not part of our Constitution. Permission from our allies and adversaries abroad must not substitute for the representatives of the American people.

But Libya was not the first unauthorized war. We've been in what? Two-hundred-ninety-some-odd fighting situations since the founding of the republic, depending on how you count—and only five of them involved formal declarations of war. A number of others were pursuant to congressional authorization, which I think is okay.

12. Memorandum Opinion for the Attorney General, Authority to Use Military Force in Libya (April 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

Then there were a lot of low-level conflicts, like chasing Pancho Villa across the border or sending in the gunboats to protect American investors, or when President Ford sent military troops to rescue the crew of the *Mayaguez*, seized by the Khmer Rouge in 1975. These low-level conflicts are in a constitutional grey area; they may or may not have been justified. President Reagan's invasion of Grenada, I think, was very close to the line, but there was at least a fig leaf of authorization by the idea that there was an invitation from a sovereign authority. The Panama incursion looks pretty dicey, but the purpose was to arrest Noriega for drug crimes. Maybe that was a law-enforcement thing. I see no way to justify the Korean War under our Constitution. I see no way to justify the Bosnian conflict under our Constitution. I see no way to justify the Libyan war under our Constitution.

And we are now engaged in yet another war—against ISIS. As a policy matter, I have no problem with this. I'd love to defeat ISIS. But the legal issue is not about the wisdom of any particular war, it's about who has the authority to authorize it. And we are currently fighting ISIS on the theory that Congress authorized this war after 9/11 when it authorized measures against the perpetrators of the 9/11 bombing, which is to say Al Qaeda. So we are fighting ISIS because of an authorization of war against Al Qaeda. ISIS is not Al Qaeda. ISIS is actually competitive with Al Qaeda. They're both pretty nasty groups; I don't want to say they don't have some common objectives, but that's the legal justification for what we are now engaged in. And we should ask ourselves, Why does the President not go to Congress? And I think the answer is just politics—that it would provoke division among the Democratic members of Congress, a kind of intra-party civil war. Not good for the Party. Apparently, the Democratic President thinks it is better just to be off fighting a war that isn't really authorized under the Constitution.

How about peace? Two-thirds of the Senate is required to approve a peace treaty, except of course if the treaty is with the

Islamic Republic of Iran, in which case it's not treated as a treaty. In what was to my mind a highly ignominious moment, Congress even passed a law saying that the treaty could go into effect unless Congress itself voted against the treaty, something that could then be vetoed by the President. The effect was that, instead of a two-thirds vote in favor of the treaty as a prerequisite, which is what my handy pocket copy of the Constitution says is required, the Iranian agreement would go through if merely one-third of either branch of Congress favored it. This effectively erases the constitutional requirement that the President cannot make a treaty without the advice and consent of the Senate.

Borrowing is a very important power not vested in the President. And that has stuck so far. But you may recall that the last time we reached the debt limit, lots of the Administration's supporters—including a few law professors, I'm embarrassed to say—said that the President should be able to go ahead and borrow more money, even though it was above the debt ceiling set by Congress. President Obama's lawyers, especially in the Treasury Department, said, No, we can't do that, we lack the power to do that. I don't know what would happen if there were a recurrence of the debt-ceiling crisis, because in the last couple of years the Administration's lawyers have gotten to be much less restrained than I think they were when there were elections still ahead of them.

How about spending? Congressional power of spending was so important to the Framers that it was reflected in two different provisions of the Constitution. And yet there's a case in the federal District Court in the District of Columbia right now having to do with the bailout for insurance companies under the Obamacare legislation. Congress specifically refused the Administration's request for an appropriation. The Administration spent the money anyway—some seven billion dollars. This is now being challenged under the Appropriations Clause. The key question there, I think, is not so much whether the Administration had legal justification for spending the

money—it seems pretty clear they did not—but whether anybody has standing to bring the case. The district court held that House of Representatives has standing. We could talk about whether that's right or wrong; it's by no means obvious. But if no one does have standing, what Presidents going forward will have the self-restraint to say, I'm going to comply with this provision of the Constitution, even though I can get away with it if I don't? Past Presidents may have had that kind of self-restraint, but I fear future Presidents may not.

The Texas immigration case is all about the dispensing power. It is not about prosecutorial discretion. The District Court for the Southern District of Texas did not order anyone to be deported. There is no challenge to the right of the Administration to decide who is going to be deported and who isn't. The Administration has done something else. What it has said is that four million people who are here in violation of the laws passed by Congress will be given so-called "lawful presence,"¹³ and entitlement to work permits, Social Security, driver's licenses, earned-income tax credits, et cetera. That is the dispensing power. That's the power that King James II asserted, and for which he was deposed. The Texas case will be argued in the

13. The Department of Homeland Security website describes this status thus: "[A]lthough deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time." *Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the DHS, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated Feb. 11, 2015) (emphasis added). The District Court quoted this language in its opinion in *United States v. Texas*, 86 F. Supp. 3d 591, 661 (S.D. Tex. 2015), observing, "This response clearly demonstrates that the DHS knew by DACA (and now by DAPA) that by giving the recipients legal status, it was triggering obligation on the states as well as the federal government." *Id.*

Supreme Court next week.¹⁴ It could be the most important separation of powers case of our era.

III CHECKING PRESIDENTIAL POWER

What can be done? What can *we* do about it? There are some stirrings in Congress. The more-productive stirrings are not about chaining in the President but about revitalizing Congress itself, because a great deal of the problem here is not executive usurpation but congressional collapse and acquiescence. And if Congress can get its act together and start exercising congressional power, that would be a partial, maybe even a major, antidote.

Other than that, I'm not very optimistic at all. None of the four major candidates for President even give lip service to the idea of executive restraint. In fact, all of them—Ted Cruz is a little bit more complicated, but certainly three—are actually outbidding themselves in claims about the use of the executive power. They say, in effect, that Obama did various things by executive order, and we'll do even more—on immigration, on climate change, on building walls. The policies may be different, but the attitude toward executive power is the same. This is in marked contrast to past elections at the end of an eight-year presidency, when almost without exception the out party has been critical of executive unilateralism and their candidate promises to be different. Those promises are never kept, but at least these election promises remind us, and reaffirms in a public way, that as a nation we are committed to a Constitution in which the executive is not just an elected king.

14. After this talk was given, the Court handed down *United States v. Texas*, 136 S. Ct. 2271 (2016), affirming by an equally divided court the decision of the Fifth Circuit, which itself affirmed a preliminary injunction prohibiting the implementation of DAPA (the Deferred Action for Parents of Americans and Lawful Permanent Residents program), issued by the District Court for the Southern District of Texas, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

But cheer up. Here's something we *can* do and we very likely *will* do this. We can elect a bad prince. If we elect a bad prince, what will happen? The media will be all over it. Every time the President violates the law or does something more than is authorized, there are going to be investigative reporters; it's going to be on the news every night. Remember the Bush Administration? An active media. Public opinion. Editorials. Congressional resistance. Rallies. There have been times in recent history in which it was popular to denounce the idea of an "imperial presidency." Footnote: Democrats rail against the imperial presidency when there's a Republican President; Republicans rail against the imperial presidency when there's a Democratic President. You almost never see anyone railing against a President of their own party. But if we elect a bad-enough prince, I guarantee the imperial presidency will again be recognized as a serious problem. Congress will start exercising some of its powers of restraint. It will be *huge*. It will be *beautiful*. And the courts, too. The courts follow the election returns. With a bad prince, they will be more inclined to say "no" to the next President's excesses.

So this is what I urge everyone to do this November: Vote for a very bad candidate for President. I have a feeling everyone in this room is going to do that. But I'm not going to tell you which bad candidate for President to vote for, because we just have so many choices.

THE SUPREME COURT AND THE COMING ELECTION

Erwin Chemerinsky*

Whether one identifies as Democrat or Republican, liberal or conservative, there is no issue more important in the coming election than who will fill the vacancies that are sure to exist on the Supreme Court in the next several years. Especially if the next President serves two terms, he or she is likely to have several appointments to the Supreme Court.

Since 1960, the age of justices leaving the bench has been, on average, 78. Justice Scalia was 79 when he died on February 13th. When the next President is inaugurated, there will be three justices 78 or older: Ruth Bader Ginsburg (who turned 83 on March 16th), Anthony Kennedy (who turned 80 on July 23rd), and Stephen Breyer (who turned 78 on August 15th). Also, of course, there is Justice Scalia's seat, which will quite likely be left for the next President to fill.

Since 1971, when Richard Nixon's third and fourth nominees for the Supreme Court were confirmed, five and sometimes as many as seven justices on the Court were appointed by Republican Presidents. For forty-five years, whenever the Court has been ideologically divided, it has more often than not decided in a conservative direction. But now the Court is evenly divided: four of the current justices were appointed by Democratic Presidents and four by Republican Presidents.

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Literally every issue concerning our constitutional rights will turn on who replaces these justices. Consider five issues that will almost surely depend on who wins the presidency.

Abortion rights

On June 27, in *Whole Women's Health Center v. Hellerstedt*,¹ the Court in a 5-3 decision struck down a Texas law restricting abortions. The majority opinion was written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. The dissents were written by Justice Alito, joined by Chief Justice Roberts, and Justice Thomas.

If Justice Scalia is replaced by someone who favors abortion rights, *Roe v. Wade*² will be more secure than it has been in decades. If Justices Ginsburg, Breyer, and Kennedy are replaced by Hillary Clinton, abortion rights will be protected for decades to come and the Court likely will revisit some of its rulings that allowed restrictions on abortions. But conversely, if even two of these four seats are replaced by Donald Trump, it seems certain that there would be five votes to greatly limit abortion rights and I believe to overrule *Roe v. Wade*. Chief Justice Roberts and Justices Alito and Thomas would have the votes to be the majority, not the dissent, when it comes to laws restricting access to abortions.

Affirmative action

On June 23, in *Fisher v. University of Texas at Austin*,³ the Court in a 4-3 decision upheld the University of Texas' affirmative-action program. Justice Kennedy wrote for the majority, joined by Justices Ginsburg, Breyer, and Sotomayor. Again, there were dissenting opinions by Justice Alito, joined by Chief Justice Roberts, and by

1. 136 S. Ct. 2292 (2016).

2. 410 U.S. 113 (1973).

3. 136 S. Ct. 2198 (2016).

Justice Thomas. Justice Kagan was recused from participating because of her involvement in the case as Solicitor General. But all believe that she would have joined the majority and voted to uphold the affirmative-action program. The surprise, which obviously was determinative, was Justice Kennedy's vote. Prior to this decision, since coming on the Court in February 1988, Justice Kennedy had never voted to uphold any affirmative-action program in any context.

The lineup and the future are thus the same as with abortion. Replacing Justice Scalia with a Democratic appointee ensures a secure majority to allow affirmative-action programs. Replacing some or all among Justices Ginsburg, Breyer, and Kennedy with Democratic appointees will put the issue of the constitutionality of affirmative action to rest. But if even two vacancies are filled by Donald Trump, there are five sure votes to eliminate all affirmative action, as Chief Justice Roberts and Justices Alito and Thomas have made clear that this is their position.

Campaign finance

Recent decisions striking down federal and state campaign-finance laws—such as *Citizens United v. Federal Election Commission*,⁴ *Arizona's Free Enterprise Club's PAC v. Bennett*,⁵ and *McCutcheon v. Federal Election Commission*⁶—were 5–4 rulings. In each case, the majority was comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. In other words, the Court is now split 4–4 when it comes to campaign-finance laws.

As she indicated in her acceptance speech at the Democratic Convention, a Hillary Clinton victory will likely mean the overruling of *Citizens United* and a Court far more willing to allow government regulation of campaign spending. A Donald Trump victory would

4. 558 U.S. 310 (2010).

5. 564 U.S. 721 (2011).

6. 134 S. Ct. 1434 (2014).

ensure a majority on the Court to affirm and extend these limits on campaign finance.

Gun control

Few issues so closely correspond to ideology and political-party affiliation as the meaning of the Second Amendment. Until 2008, the Supreme Court had never invalidated any law as violating the Second Amendment. The Court had always ruled that the Second Amendment was about a right to have guns for the purpose of militia service. But in *District of Columbia v. Heller*,⁷ the Court, 5–4, struck down a 32-year-old District of Columbia ordinance that prohibited private ownership or possession of handguns. Justice Scalia wrote for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Two years later, in *McDonald v. City of Chicago*,⁸ the same five justices were the majority in a 5–4 decision holding that the Second Amendment is a fundamental right that applies to state and local governments.

Again, the current Court is likely split 4–4 on the meaning of the Second Amendment. A Hillary Clinton victory would mean a Court that is unlikely to extend gun rights and very well might overrule *Heller* and *McDonald*. A Donald Trump presidency would create a Court committed to these decisions and one likely to strike down many other laws regulating firearms.

Separation of church and state

Views on the Establishment Clause, too, very much track political-party ideology. Conservatives interpret this provision narrowly as prohibiting the government only from establishing a church or coercing religious participation. Liberals see the Establishment Clause as, in the words of Thomas Jefferson, creating a

7. 554 U.S. 570 (2008).

8. 561 U.S. 742 (2010).

wall separating church and state.

This is reflected in the Court's most recent decision on the Establishment Clause, *Town of Greece v. Galloway*.⁹ The town of Greece is about 100,000 people and is outside of Rochester, New York. For an 11-year period, every month, almost without exception, the Town Board invited a Christian clergy member to deliver a prayer before its meetings, and these usually were explicitly Christian in their content. The Court, in a 5-4 decision, split exactly along ideological lines, rejected an Establishment Clause challenge. Justice Kennedy wrote the Court's opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Kagan wrote the dissent, joined by Justices Ginsburg, Breyer, and Sotomayor.

What then would it mean for the Establishment Clause if Donald Trump replaces Justices Scalia, Kennedy, Ginsburg, and Breyer? Along with Chief Justice Roberts and Justices Thomas and Alito, there would be seven justices who take the accommodationist approach, under which little ever would violate the Establishment Clause. Conversely, if it is Hillary Clinton who replaces these justices, there will likely be six justices to enforce a separation of church and state. This will determine issues such as the constitutionality of prayer in public schools and other government events, of religious symbols on government property, and of the ability of the government to give aid to parochial schools for religious instruction.

Conclusion

The November presidential election is likely to determine the ideological composition of the Court for many years to come. A Donald Trump victory will ensure that the Court will continue to have a majority of justices appointed by Republican Presidents, as it has since 1971. A Hillary Clinton triumph will create a majority on the Court appointed by Democratic Presidents for the first time in 45

9. 134 S. Ct. 1811 (2014).

years. Viewed in this way, the next election will affect all of us in the most intimate and important aspects of our lives. Who fills the vacancies on the Court should be among the most important issues affecting our votes in the November presidential election.

ELECTION OF THE PRESIDENT 2016*

Robert F. Bauer and Anita Dunn‡**

Bob Bauer: Our goal here today is to have a conversation like that Anita and I have, literally every morning over breakfast, about the elections. We'd like to talk through the difference between the election we thought we would have and the election many predicted we would have, the election we seem to be having, and maybe still the election we *will* be having. Those three are all different, and the question is, Why? What accounts for the difference between expectation and what is taking place? So, Anita, let's talk a little bit about what we initially thought we were going to be seeing. Maybe those will be quaint memories by now.

Anita Dunn: Okay. Well, speak for yourself on what you thought you would be seeing.

Bob Bauer: (This does remind me of breakfast.)

Anita Dunn: So, one of the things I think I would like to leave you with—if I leave you with nothing else at the end of this session—is an extraordinarily healthy skepticism of anything you hear from either a politician or a pundit two years before an election about what is actually going to happen. The reason for such skepticism is this group of people who have a way of inserting themselves into a process that the pundits and politicians actually would like to keep just to themselves. That group of people are voters. Voters have a way of

* Address delivered at the Annual Convention of the International Society of Barristers, San Diego, California, 15 April 2016.

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doing things that pundits don't always catch immediately, primarily because there's a very small circle of people who tend to talk to themselves a great deal of the time. If you were listening to an expert at this event even a year ago or you were watching cable news or reading some people who are pretty smart about politics, you probably believed that the dynastic duel of the Bush vs. Clinton dynasties was set to reach its end fight. It was as if this were a trilogy. This is the "Return of the Empire," and this was all going to be decided November 2016 in a big rubber match. So that's what you thought, more or less, and that is what almost everybody in the punditocracy thought, as well. But here is the problem with all of this: It is that the American people actually had some different ideas, and heaven knows the Republican primary voters had some very different ideas.

So if you think about what you were told, you were told that Jeb Bush was the preemptive frontrunner. He had raised a hundred million dollars for this race and so he was going to be the establishment candidate. The so-called conservative candidate was going to be Scott Walker. Anybody remember Scott Walker? Remember he had that brief moment as the "true" conservative front-runner? And then there was going to be that libertarian streak that had emerged in the two previous Republican nominating processes through Ron Paul. And his son, Rand Paul, was very well positioned to pick it up. And remember, he was the one who was going to appeal to millennials because of his stance on privacy. He was to actually cross party lines as the millennial candidate.

That's where we were. And of course on the Democratic side, as you recall, there was no contest. As a matter of fact, I went back and looked at clips to prepare for this discussion and discovered that the nomination for the Democratic contest was called as early as 2013: the nominee for this party was proclaimed to be Hillary Clinton. And the Democratic Party establishment and most pundits actually believed that she would have "no challenge," or if she did have a challenge, it would be so minor that it would be wrapped up by the

time the Iowa caucuses and the New Hampshire primaries were over. A year ago, that was the conventional wisdom.

Why did the conventional wisdom get it so wrong? One reason is a fundamental misunderstanding of polling. Walk out of here knowing this: One, national polls are meaningless for primaries because it's not a national vote. And national polls are meaningless for general elections, too, because it's not a national vote. Ask Al Gore. Okay? So you're looking at national polls from a year ago and Hillary Clinton has got a forty-point lead or a fifty-point lead in the Democratic primary. That's actually kind of meaningless. It's the same thing on the Republican side. Polls are measuring name recognition and news coverage. That's what early national polls do.

Two, early state polls: most of the early state polls showed the alleged frontrunners with leads in these states, but those weren't engaged races. Voters weren't paying attention. They didn't have a choice. Nobody had actually communicated with them yet.

Then finally, I think what you want to think about is that during this period Donald Trump was viewed as someone who would implode. Now, if you've ever been to the movies and you've seen like any of those horror movies, those vampire movies, the zombies don't commit suicide. They actually don't. You think you've killed them, then they come back. You think you've killed them again. So that was a fundamental miscalculation on everyone's part—that somehow Trump's calling John McCain a wimp, not a war hero, that his insulting women and others was an implosion that was going to end his candidacy. After the first round of conventional wisdom, then, you had this idea that the Republican Party was going to fall behind Trump against Ted Cruz.

You had this idea that oh, Bernie might be able to win New Hampshire because you know what New Hampshire is like and Vermont and like—it's just New England—but this will be over by March.

Then, finally, where we are right now is this idea that the party may solidify behind Ted Cruz against Donald Trump. But then people are saying, Well, maybe not, if Donald Trump gets close. And people are now saying that Hillary will almost certainly have to fight this out at least through June and maybe to the convention. It's very, very different—the voters being the common denominator here. I'm going to kick it over to Bob to talk about the other big miscalculation the pundits made.

Bob Bauer: Yes. That isn't to say, by the way, that in the course of our conversations over the election cycle we've been right in our perceptions of these things.

Anita Dunn: No.

Bob Bauer: The problem is obviously that some people are paid to be right and there is no provision for refunds.

Anita Dunn: Or accountability.

Bob Bauer: Or accountability. But the other thing that has happened is that you oftentimes hear various assumptions made about the structure of competition in the primaries and general elections. A good example of that is going to be the role of money. The role of money, how much money is raised and spent and the way in which it's raised and in particular the references to super PACs and *Citizens United*—these are all perfectly legitimate observations about potential impacts on the process. But the primary and general elections are very different, and the role of money in the two processes are quite different. And as we have seen and as Jeb Bush obviously painfully learned—as to some lesser extent did some others like Marco Rubio who had a robust super PAC—money isn't in fact the determinant for a variety of reasons.

Certainly one phenomenon we've seen, and this has been building since I would say probably around 2000 through 2004—the Bradley campaign and then the Howard Dean campaign and then the Obama campaign—is the extraordinary role of technology in enabling small contributions to be raised at virtually no cost with no candidate participation. Whatever one thinks of the mathematical likelihood of Secretary Clinton's winning the nomination, there are a lot of reasons why Senator Sanders has virtually no incentive to leave the field early. One reason is that he's currently raising money without breaking a sweat at a clip of forty-plus million dollars a month and is outspending Secretary Clinton fairly regularly on television. And with that money he's been able to build a significant infrastructure. So the very structure of campaign finance and the role of money in politics has changed. And the emphasis on *Citizens United* and the excitement over super PACs has tended to confuse people about what role money in fact plays.

The other point that we wanted to make here is that a lot of punditry is based on the view that what happens in campaigns every single day is what's going to drive the outcome—that it's all about how smart candidates are or how foolish candidates are, the mistakes they make, the gaffs they commit. Now, it is absolutely true that in primary campaigns, candidate-driven and candidate-executed strategies are actually highly significant. It is less so in a general election, where there are much larger structural factors that fundamentally determine who is likely to win and who is likely to lose. But the coverage you see is based on the view that everything that happens every single day is fraught with strategic significance. A good example is the weight given to debates—and frankly, even the interpretative screen used for telling you what effect debates are going to have on the electorate. And that, too, has been significantly misinterpreted, although I've basically built my preliminary observation here—because there's so much else to talk about—around money.

Up to this point we've been maybe a little more critical perhaps than the pundits would appreciate of some of the punditocratic efforts we've seen. But something has happened here that goes to the weakness of the political parties in the United States today: that is the role that the media plays in ways that were not true a number of years ago. Most strikingly, in the Republican primaries, the media organizations that have organized the debates have had virtual control over the way the debates have been structured. Now, candidates like Trump can agree not to participate, although he came to rue that day, at least at that particular time. But keep in mind that in this campaign, it was not the Republican Party but the individual cable networks that decided who was going to participate in the debates. They would allocate the ones who were the supposed, serious candidates to a main event, then created the so-called undercard debate—which I used to call the kiddy table—where various people at six o'clock in the evening spoke to an audience consisting essentially of the people who were actually in the room with them. Doing so gave those undercard candidates very little opportunity to generate the much-cherished phenomenon known as momentum. It's hard to have momentum if you're debating at six p.m. and nobody is watching. And the media did this on the basis of public-opinion polling. In at least one case they decided to alter their evaluation criteria because they felt they needed to put Carly Fiorina on the main stage one last time. Another striking feature that I'm not sure everybody anticipated in this election cycle is the role of interests other than the candidates and the political parties—including but not only the media—in actually driving fundamental decisions of at least some significance.

Anita Dunn: Yes. And because I've spent my entire professional life dealing with the media, I would say a few things. One is that the Republican candidates who are not named Donald Trump can tell you almost to the dollar the fair-market value of the media time he has

been given during this campaign. Depending on whom you talk to, it's probably close to a billion dollars at this point. It's extraordinary, but as Jeff Zucker, the head of CNN said, he drives ratings. And this is great for the cable networks, which is why on one primary night Donald Trump was given an hour to talk while Bernie Sanders—an equally credible candidate, I would say—was given no time.

Bob touched on the debates. I want you to think about how many times you have read, stated as fact in news articles or on television, the idea that Hillary Clinton is a stronger general-election candidate than Bernie Sanders. Now, I'm not saying she isn't. I might surmise that, based on my experience. I have a lot of opinions about who would be stronger. It may very well be that I believe it would be Hillary Clinton, but there's actually no empirical evidence to suggest that. Think about this for a second. There is no empirical evidence. As a matter of fact, if you look only at the empirical evidence, it tilts strongly the other way. If you look at the head-to-head matchups in general-election polls, Bernie Sanders has consistently, from day one, performed better than Hillary Clinton. Now, as somebody who has done races, I can say it's because he hasn't been attacked. It's because people haven't really learned that much about him, blah, blah, blah. But just based on empirical evidence, he performs better in general-election polls.

Two, fundraising. As Bob mentioned, Sanders has actually done something that no candidate in the history of politics has done—which is build an extraordinary, online, low-donor, fundraising base so that he does not even have to hold fundraising events. He doesn't do fundraisers. He sends emails out to small donors who can give, time and again, and he has outraised Hillary for three months now, by significant margins. So if it's about raising money, you'd probably go to Bernie.

Three, if you look at their favorable–unfavorable ratings, Bernie Sanders is the only candidate left in the race besides John Kasich who has a net favorable–unfavorable with the American public, the

general-election public. And Hillary, of course, has very high unfavorables. The only candidate with higher unfavorables is Donald Trump. Now is this dispositive? No. But it does raise questions about an assertion as fact that she is the strongest general-election candidate.

On the Republican side, the continual assertions that you've seen throughout the race about who is stronger are based, again, not on anything except a feeling. The reality is that no one, including the two people on this stage, has any clue who is going to be a stronger general-election candidate. Why? Because there are things that will influence the general election that we don't know the answers to yet. So anyone who is actually telling you what is going to happen in the general election in April of 2016 is probably in the same category as the people who told you last January, February, or March that it was Jeb Bush. We don't know.

Bob Bauer: On both sides, we have a different dispute developing now, about the conventions. On the Republican side, as Anita said a few minutes ago, the Republicans may very well not nominate a candidate on the first ballot. They may still, by the way. Once again, there's a little bit of this dramatic shift in coverage: They will. They won't. They will. They won't. We don't know yet. There are a number of factors that are going to determine whether there really is more than one ballot at the Republican National Convention.

At the same time, on the Democratic side, as you know, there's been an effort on the part of the Sanders campaign to argue that there really shouldn't be a nomination on the first ballot. In particular, the argument goes, the nomination shouldn't be decided by the so-called pledged delegates who emerge as the choice dictated by voters through the primary and caucus process. This raises the whole question that we hear about in the Democratic Party from cycle to cycle: the role of super delegates—party activists and officials and

DNC members who are not elected delegates and then are free to bind themselves just by choice with a candidate.

Our son, the youngest of our children, twenty years old, called me from college in Wisconsin right before the primary to express absolute outrage, which he apparently shared with the Millennial political party of which he is a member: disbelief that it could be true that somebody could be nominated by the party who doesn't have command of the measures of voter approval, who isn't the absolute clear choice of the voters expressed through primary and caucus-winning percentages. But the truth of the matter is, it's never been true in either party for the entirety of American history that political parties completely relinquish their authority. This is both constitutional and by party rule to temper if not overrule voter choice. The most democratized features of this process are relatively recent, really fundamentally a function of the late '60s and '70s. There have been a series of reforms in each party to bring the voters' will more into the central decisionmaking role in the primary process. But each party in different ways can still step in and make a different judgment in the overall party interest as an institution. It can do that. It's protected against legal or other state action to prevent it from doing what it wants in that way. It can do that as a matter of constitutional associational rights.

This whole notion of convention chaos and—Oh my god, the voters' will is being overridden—this is not the first time these issues have been raised. Hillary Clinton raised very similar issues against Barack Obama in 2008. It will be quite interesting to see. But, by the way, I don't view this as a party lawyer. I mean, other than the fact that we all have this, how would you call it, guilty pleasure at watching the political process erupt into complete circus-like chaos and we say, Oh my god, it's the most horrible thing!

Anita Dunn: Except it's great for ratings.

Bob Bauer: Yeah. But could you please switch to MSNBC? Let's see how they cover it. There's a bit of a division between what we think we should like and what we absolutely relish, but it's also part and parcel of the democratic process as it actually operates within the party system.

So the convention, we can talk about the convention if you like.

Anita Dunn: For years, the television networks have been complaining about having to cover the conventions: Oh, they're so predetermined; they are so boring; oh, they're so terrible; oh the conventions, the conventions! But now the tone has shifted: Oh, boy, the conventions! the conventions! Because people are making a fortune on this race, actually, even if they are bemoaning the state of American democracy, they really love it. I'll just say that, ironically, the Democratic Party created its super-delegate structure because they actually didn't like the will of the voters after 1980 and Jimmy Carter's loss. Elected officials, especially, felt that they'd had to hitch their stars to a sinking ship during that period—a mixed metaphor. But I will just say that we put in this process, we Democrats, to make our process much less democratic and so make sure that our party regulars at the end of the day could block a candidate that they felt was so outside the political mainstream that that candidate could take the party down. This is ironic because, of course, the Republicans in their wildest dreams right now would love to have super delegates to be able to do that, but they do not.

Bob Bauer: If you'd like to go from this sort of sublime theoretical to the everyday kind of ridiculous, another reason we have super delegates is that a lot of the party dignitaries got extremely frustrated that they didn't have credentials to the floor.

Anita Dunn: That's absolutely right.

Bob Bauer: And so they felt, well, entitled.

Anita Dunn: Or they weren't delegates because they had lost on their delegate slates and therefore couldn't get invited to things or get on the floor. So we invented super delegates.

Bob Bauer: It's like a backstage pass.

Anita Dunn: I'm going to briefly go through what you actually should see as the important moments in the general election. As a strategist, if I were writing a memo right now to either of the parties' nominees—the things that they really need to be focusing their strategies on, what you shouldn't be worrying too much about paying attention to is, as Bob said earlier, the day-to-day stuff. Tracking polls, ridiculous. Ignore them. Ninety-nine percent of what you're going to see on cable as breaking news, ridiculous. Ignore it. It's just not important.

What *is* important? There are actually three really important things for general elections. The first is the vice-presidential choice because it's actually the first time that people get the opportunity to view the nominees' presidential-level judgment. Bob and I have just finished working with a group of people from both political parties and the Bipartisan Policy Center on a set of recommendations for campaigns to look at as they think through their vice-presidential process. It's being released next Friday, so you should take a look. But this is a judgment issue. I can tell you as one who was working for Barack Obama in 2008, the choice of Sarah Palin by John McCain was actually really, really damaging to him with independent voters because they had a certain image of John McCain as a patriot—which he is—as being not ideological, as being someone who did things for the right reasons, as an independent, as a maverick. And suddenly he picked someone who is so manifestly unqualified to be President of the United States. I'll say the same in my party—I believe that John

Kerry's choice of John Edwards also raised some significant issues in 2004 about putting someone that close to the presidency who was also manifestly unqualified, but who had at least been a US Senator. This is something that is actually really important to voters.

It is important to voters because it says something about whether this person really can govern, and for a Hillary Clinton—let's just say hypothetically that she wins the nomination—her choice of vice president won't be as important in terms of her presidential judgment and whether she is ready to govern. For a Donald Trump, if he wins the nomination, voters are going to be extremely anxious, given the concerns they have around Trump—around his judgment and his experience—they're going to be anxious to know he's "surrounding himself with good people." This is like a trademarked phrase now from focus groups about him: "Well, but if he surrounds himself with good people, I'll feel better." So that vice-presidential choice for him will be important, as Dick Cheney was for George Bush when he ran—it was like, Okay, so there's going to be an adult in the room and someone who understands. You know? (Well, no. It was like, Okay, there's someone who knows foreign policy. I feel better. Fine, fine. He's going to have good people around him.)

But seriously, the choice of "good people around you," if you're seen as less experienced, is what Joe Biden did for Barack Obama. Okay, he's got somebody who actually knows all this stuff, and he's hoping for change, but with Biden, we've got experience.

Bob Bauer: On foreign policy.

Anita Dunn: And foreign policy. These things actually are really important.

The second thing: The conventions are much maligned but critically important in terms of communicating who the nominee is because it's the first time a larger group of voters tunes in. Right now, even though there's a high degree of interest in these races, there are

still a lot of voters who are not paying a lot of attention. Elections don't get decided in April. They don't get decided in August. They don't get decided in September, either, but the foundation for the decision gets laid: the vice-presidential choice, the conventions, and then, finally, the debates. Debates haven't really decided elections since probably 1960, but debates are extraordinarily important for reaffirming people's decisions, making them feel better. Or for undecided voters, debates can give them extremely important information in the ability to look at two candidates side by side.

I'll just remind you how debates can shape the narrative of a campaign. In 2012, I was involved with helping prepare the President for his general-election debates. And Mitt Romney had the worst September of any candidate I can personally recall. First, he made a series of blunders around foreign policy. By the time he walked on that debate stage at the end of September in 2012, the people of the United States were expecting him to stand up and insult half of them. The forty-seven-percent tape had come out. That's all they had heard. Right? This guy hates forty-seven percent of us. The fact that he delivered what some thought was a pretty good—not great, but pretty good—debate performance and the President delivered what some thought was a pretty bad—not horrible, but pretty bad—debate performance actually reshaped the narrative of the race. So the debates are important. And what Romney was able to do was not only staunch his bleeding but bring a whole bunch of voters who actually were never going to support the President, anyway, but bring them back into his own column and make the race look closer, more competitive—which of course shaped coverage. Those three things are really important. The day-to-day, not so much.

Bob Bauer: And before we conclude here, just one point about the structural pressures or competitive makeup of the general election, one more thing about the debates that Anita said that I just wanted to emphasize: We can have a long conversation about the

significance of the primary debates and how they're interpreted and who won and who lost and whether that's actually ever reported meaningfully. But in the general election, as Anita said, they can put an exclamation mark on the particular mood that is settling within the electorate. One of the better examples is the one debate President Carter agreed to have with Ronald Reagan. The one question remaining within the decisive lock provided by the debate was not whether the people wanted Jimmy Carter to continue to be President. They didn't.

Anita Dunn: Right.

Bob Bauer: The question was whether they were willing to gamble on Ronald Reagan to succeed him and whether for that one debate Ronald Reagan would "hold his own." And he did.

Bob Bauer: By the metrics that are used for debate performance—which are peculiar—that one debate was enough to reassure the body of the electorate that Reagan was acceptable enough to replacing Jimmy Carter, that that was a sound judgment.

The last point: As I mentioned earlier, in a primary campaign, a lot of the day-to-day reporting and a lot of the emphasis on what's taking place that's supposedly significant is off base. It just doesn't actually capture what we and other people see developing in a race. It is also true that, in a primary campaign, the candidates' strategies do matter. A good example is that Donald Trump is being (maybe he catches it up) badly, badly outmaneuvered on something fairly elemental, and that is organizing himself to win delegates under complicated party rules. On the one hand, it's rocket science because the rules are complicated. On the other hand, it's not rocket science because everybody knows you have to do it and has known it for years. So that's a glaring weakness that Cruz is currently exploiting in

Trump. In that and other ways candidates can be the masters of their own fates in the primaries.

In the general election, there are some critical moments in which candidates maximize their strengths and limit their liabilities. But there are other things that matter, and political scientists have demonstrated this. An excellent book on this subject in the 2012 campaign on this subject has come out showing that, fundamentally, depending on the metric you use, if you look at questions like GDP growth in the second quarter or presidential-approval ratings, certain factors control which party is likely to have success in the general election.¹ That success is going to be fairly insensitive to a lot of the day-to-day reporting about how the campaigns operate. And I say this with some regret. I thought the 2012 campaign was absolutely masterful. The two authors of this book, political scientists, explained to me that Anita and I and the rest of the senior staff were pretty much irrelevant. Yet it's a really good book.

Anita Dunn: And it's probably true.

Bob Bauer: It is probably accurate.

So we will conclude by saying we're just other people in the political business. We inflate our own importance.

QUESTIONS & ANSWERS

Q: You've done some research on potential vice-presidential candidates. Who is on the bench for both parties, in your opinion?

Anita Dunn: I have absolutely no insider knowledge of this but, like everybody else, I read the papers. So I would say that one of the things that our Bipartisan Policy Center report looks at is the importance of candidates' getting to know and form personal

1. JOHN SIDES & LYNN VAVRECK, *THE GAMBLE: CHOICE AND CHANCE IN THE 2012 PRESIDENTIAL ELECTION* (2013).

relationships with the person they're going to run with. This personal-chemistry piece is actually very important. It was very important for Mitt Romney with Paul Ryan, for example. I mean, they just clicked. For Bill Clinton and Al Gore, Al Gore was an extraordinarily unconventional choice for Bill Clinton. They were both from the same region of the country. They were generationally the same. You couldn't look at Gore and say, Well, he kind of fills in this blank except for maybe some foreign-policy stuff. But they clicked, and that is a very important thing. So one of the recommendations we make is that the candidate should spend some time with these people, especially if the candidate is an outsider.

Now, Hillary Clinton is not someone who comes from outside this party. She knows folks. But it's interesting—if you look at who she has been campaigning with, Julian Castro, who is the Secretary of the Housing Urban Development, the former Mayor of San Antonio who gave the keynote speech at the 2012 convention. There's a history of those keynote speakers going on, right? Anyway, Julian Castro, is someone she has campaigned with. Tom Perez is Secretary of Labor, who again, is someone that she has been campaigning with. He's been out there as a surrogate. Both of these are Latinos and there's some thought around that. Cory Booker, the senator from New Jersey, she has campaigned with a great deal. Tim Kaine from Virginia, who I think it is publicly known was one of the three finalists for President Obama in 2008, and who is an extraordinarily appealing person. I'm sure that the list is larger than that but I can almost guarantee you that the one person who is on it—and obviously there's a huge amount of sentiment and energy in our party for her—is Elizabeth Warren. I have not seen them campaign together. Elizabeth Warren has not endorsed Hillary Clinton, yet, but I think that there would be a lot of energy behind that idea in some parts of the Democratic Party.

And the Republican Party: you had seventeen people run for President. Of those seventeen, some of those are going to be at the top of anyone's list to be considered.

Bob Bauer: Yeah. You would definitely want to closely consider someone who was able to demonstrate limited voter appeal.

Anita Dunn: On the other hand, who else have they got?

Bob Bauer: Well that's it.

Q: I've always thought of Hillary Clinton as one of the smartest people in the room. She's been running for President for about a decade, so I would think that she would also surround herself with others of the smartest people in the room. And I've been scratching my head about the private server at her house in Chappaqua and the speeches to Goldman Sachs. How did those get through, those decisions between herself and all of that, and, at the end of the day, do you think those are going to have any impact on the general election?

Bob Bauer: This is a very, very good question, and a very complicated question. First of all, whether in fact anything breaks in that space isn't clear. It's often wrongly suggested that the whole significance of the email controversy is whether the Secretary is eventually herself, personally, in legal trouble. Obviously, it's affected her, already. Second, the legal trouble, if there is any legal trouble, it wouldn't have to fall on her personally to have an effect on the race. Beyond that, I think your question was, How does this sort of thing happen? For example, candidates make a judgment—and she's not the only one to have done it that—before they run, in their private-sector activities: they engage in some kind of revenue-generating activity or business activity that arguably is not consistent with the posture they're going to strike as candidates. The only thing I would say is that at the end of the day, all staff know, all consultants know, that we can propose but the candidates dispose.

So I don't know that it's so much a staff failure as ultimately a decision of what a particular candidate believes: A, what that

candidate is *entitled* to do, criticism notwithstanding; or B, what that candidate concludes is *in his or her interest* to do, all criticism notwithstanding. So it is very possible—and this can happen over the course of all the judgments a candidate makes in a political career—that the Secretary just simply didn't anticipate, didn't believe A (that this was going to create the uproar that it did) or B (that she would have as much difficulty putting the issue away as she would). And perhaps, by the way, speaking of the transcripts and the Wall Street speeches, if the Sanders candidacy had not been as vigorous as it has been, the funding issue might have been put away a lot more quickly or it might have been less of a factor in the primary because he has obviously made it a centerpiece of the claims he's making now against her candidacy.

Anita Dunn: Republicans are not going to go attack Hillary for making speeches to Goldman Sachs. Okay? So I think the speeches could be as much a product of the assumption from everybody, including the people around her, that she actually was not going to be vigorously challenged from the left.

I think what Bob said about the email controversy is absolutely accurate. It has hurt her. It has hurt her a great deal so far. But, at the end of the day, when there's a general election, it is going to be two candidates up against each other, and voters are going to weigh all of these factors.

Some people in this room probably remember, in 1992, when her husband was elected President, a majority of people of this country said they didn't think he was an honest person but they fundamentally decided that wasn't as important to them. The personal pieces that they had concerns about were not as important to them as what they thought he would do with the office—that they thought he would fight for them, that they thought he would do a better job standing up for their economic interests for their families than the other two choices.

Bob Bauer: That's true, although I would drop a footnote: It was a three-way race, and President Clinton, though he waged a brilliant campaign, got forty-three percent of the vote. We could have a three-way race this year.

Anita Dunn: Yes. A three-way race would help Hillary Clinton.

Bob Bauer: It would be helpful to Hillary Clinton, but then again, it probably depends on other factors in the race.

Q: [Apropos a three-way race, if Trump doesn't have enough delegates to win the nomination on the first ballot, might it be possible, realistic, to navigate the labyrinth to get on the ballot of each state or to simply short-circuit that by accepting the nomination of a minor party?]

Bob Bauer: Well yeah. I haven't represented a candidate who has attempted to do that and I don't have a clear fix in my mind on what the deadlines would be. But I think you've put your finger on something I would think about first—which is some deadlines for qualifying as an independent candidate. I think these are going to be very difficult for him to meet if he goes all the way through to the end of the convention in July. Whether there's a way around that, including through funding litigation to challenge those deadlines, I don't know. Certainly you're correct that there might be other parties.

Anita Dunn: You have a third-party entity that's already set up out there, as you'll recall. America . . . ?

Bob Bauer: America Elect. Yeah. There's an independent-type or minor party that I think could be on some ballots.

Anita Dunn: Right. But they're not Trump people.

Bob Bauer: They're not Trump people, but whether it's libertarian or a sort of family-values party, if there is such a thing on a ballot, he might be able to attach himself to some minor parties. It depends on which values, of course.

Bob Bauer: So I wouldn't rule it out. I wouldn't rule it out, but it's a very good question. He would certainly have the ability to fund a very elaborate legal strategy to try to get there, but it wouldn't be easy.

Anita Dunn: But I want to go back to one of my fundamental beliefs about Donald Trump—even state it publicly, which means I have to live with it for the rest of my life—which is that he's not Mike Bloomberg. Mike Bloomberg took a serious look at running as an independent candidate. According to public news accounts—and I have reason to believe it's true—if he was going to run, he was prepared to spend a billion dollars, to do all the litigation it would require, because that's how much it would take. But in my opinion Donald Trump has shown no reason—there's no reason to believe—that he actually wants to spend real money. And he hasn't had to, so far. His opponents are quite bitter about this, the amount of money he hasn't had to spend compared to other campaigns. But the amount of money he would personally have to spend to go try to get on these ballots as an independent and then to go and co-opt these political parties is actually not as easy as it sounds. Many of the splinter political parties who already have a place on state ballots are not going to want Donald Trump as their standard barrier. So there are some places where it would work and there are a lot of places where it wouldn't. And you already have Gary Johnson talking again about running on the libertarian line, which is not what Donald Trump is about, to begin with. But it's an interesting question.

Q: And a follow up: What is the standard for a third-party candidate to qualify for federal election money? I don't think it's ever been done.

Bob Bauer: John Anderson did it. John Anderson qualified for public money in 1980 and as a minor-party candidate. Boy, it's been a while, so don't hold me to it, but I believe the standard depends in part upon the percentage of the vote that that party got in the preceding presidential election. And there may be some other criteria. To be honest with you, I don't actually remember what they are. I think Anderson is the last independent candidate who got public funding and, of course, as you know . . .

Anita Dunn: Because Perot didn't take it. He self-funded.

Bob Bauer: Perot didn't take it. And there's not a whole lot of it to go around. You couldn't run a presidential campaign as a minor-party candidate on public funding.

Anita Dunn: The reason that the public-funding system collapsed in the presidential campaigns is that the amounts are so small. The last candidate to take public funding for a general election was John Kerry. And it was what? Seventy-million dollars or something crazy.

We spent a billion dollars in 2008 for Barack Obama—a billion, roughly—so that gives you a sense of why that process fell apart. I'd say of all the things that are going to be important in the general election, money should be about even on both sides, and it will be big.

Q: So the number of supporters that Trump has is not insignificant. To me it appears like the canary in the coal mine. What role do these people have when the zombie finally does stay dead?

Anita Dunn: Well, I think a lot of that is going to depend on whether some of those people vote in the general election. There's

some evidence to suggest that Trump probably uniquely—maybe Bernie a little, but Trump more than anyone—is the person who is getting some disaffected voters to reenter the political process, in the Republican primary, certainly. And some people he’s attracting—I haven’t seen any studies on this yet, but I think somebody will probably go do this work—are probably the people who supported Ross Perot in the ’90s and then probably drifted off again from the political process, because in many ways some of his attraction is similar to what Perot was offering. And some of them—most of them—are going to vote Republican. The reason campaign strategy, the quality of campaigns, is so important in primaries is not just the Byzantine party rules. It’s also because in primaries, there just aren’t a lot of issue differences, so it becomes very much about the personal differences between the candidates and character convictions.

But in a general election, you begin with a different situation. You begin with the partisan divide and the fact that there is really a very small number of voters in this country who are true swing voters at that point. I think a great majority of the Trump supporters are just going to vote for the Republican nominee in the end. They will not vote for the Democratic nominee. They will see voting Democratic as the greater of two evils in the same way that the Sanders people will end up supporting Hillary Clinton. The rest of the Sanders supporters will not vote; but they’re not going to vote for the Republican. They just won’t vote, and the challenge for the Clinton campaign will be to motivate those people to vote.

One of the reasons why public polls are so irrelevant to anything you should be thinking about is this: In the Obama campaign in 2008 and in 2012, we never did a national poll. We never did. It would have been a waste of our money. All of our polling was in seventeen states that were the battleground states, the states that were going to decide the general election. The people we polled in those states were not Democrats and Republicans. They were the soft Democrats, soft Republicans—independent voters who were actually going to decide

the election. So it's a very different kind of polling, and for that reason people go back to their partisan behavior. I don't see a lot of Trump crossovers to Hillary Clinton.

Q: I have a question about Ted Cruz. I wanted to make an observation and then get your reaction to it. He seems to hold irreconcilable views: On the one hand he's promising people that he wants the federal government to get out of the lives of the public or out of our individual lives. On the other hand, his position on abortion is that there are no exceptions for rape, incest, or the life of the mother. I saw him interviewed last night by Chuck Todd, and my question is—and I've never seen this asked, though he advances his daughters as part of the campaign—I would like to see somebody ask him this simple question: Say one of your daughters, by the time she turns twelve years old, is raped and becomes pregnant. Is it your view, Senator Cruz, that the federal government first of all should require her to carry that rapist's baby to term and deliver it? And, second, let's assume that by the time she gets to be eight or nine months pregnant that her life is endangered by the pregnancy. Are you telling me that the federal government is going to insist that she deliver that baby, even though your daughter may die? I don't understand why that question is never asked; I've never seen it posed. I follow this very carefully and would like your comments on that.

Bob Bauer: Well, each party struggles—and this isn't just a Cruz issue—this a struggle for the Republican Party with women. And it is a struggle that obviously challenges the party to explain exactly how they see the role of government. If they're so suspicious of government, why is it that they permit it to intervene in a way that seems to be so inconsistent with the objectives of protecting women's health and protecting women's choices. Particularly in a Republican primary, I think Cruz may be prepared to be very aggressive in the exposition of his view. But almost all the Republican candidates—

including, by the way John Kasich—are going to face very close scrutiny on this particular set of issues.

I should mention, on the kind of question that you're raising, there's always a bit of a double edge to putting the question that way. The most notable example of that having been in the short term potentially very effective and in the long term problematic was the question put to Michael Dukakis in 1988 in his debate with George Bush. He was asked to reconcile his views on the death penalty with his likely reaction to someone raping and murdering Kitty Dukakis. It was asked of him by CNN reporter Bernie Shaw. The electorate responds in mixed ways to such a question. Why the press doesn't ask Cruz the question that way is because there's now a background of uneasiness among reporters about how personal those questions may or should be.

The larger point you raised is a point that the Republicans are going to have grapple with.

Q: In 1979, we saw how Iran had a big impact on the presidential election, and this year there's ISIS and North Korea. Could you comment on how you think the radical groups outside the United States might impact our election?

Anita Dunn: I think one of the vulnerabilities for the Democratic nominee in 2016, whether it is a he or a she, is running for the third Democratic term, which is always difficult. Obviously, Bernie Sanders has defined himself much more as running for a very different kind of term than Hillary Clinton has, but in either case, in the control of the Democratic party. A sense of international weakness is one of the consistent vulnerabilities that's driving the public opinion that the country is headed down "the wrong track"—this in a country where, by the stats, our economy is actually doing pretty well compared to the rest of the world, and where we are actually safer than we've been for a long time. I think the Republicans have done a very good job of

tapping into that emotion, and whoever the Democratic candidate is will have to navigate this, particularly if there is another huge attack directly against United States citizens, whether abroad or here. It is part of the emotion that's fueling Donald Trump.

Unfortunately, if you look at any of the good public-opinion polling right now, Americans feel less safe than they have for a long time, even in the face of empirical evidence that we're actually, as a nation, more safe. Because of that emotion, an attack between now and November—but clearly closer to November—would be highly problematic. You may remember, in 2004, during the general election, there was this continual fear from Democrats around the Bush Administration's upping the threat level, back when we had different colors of levels for how scared you were supposed to be about an imminent terrorist attack, including the so called October-surprise scenario, the sense that some radical group was going to do something or that something would happen to create this sense of real fear in the American public. I think that is one of the things driving the wrong-track polling numbers. I think the American people feel less safe, and it's a real vulnerability for the Democratic candidate, whoever that nominee ends up being.

Q: In 2012, Stuart Rothenberg was interviewed and asked his view of the importance of TV ads. He opined that given the voters who were being competed for, TV ads were utterly irrelevant and the candidates were wasting their money on TV ads. You may or may not agree with that, then, but how do you view the importance of TV ads in this cycle?

Anita Dunn: Well, my firm makes TV ads, and they are extraordinarily important; there's nothing more important! But television as a medium for communicating with voters is less effective than it used to be. For certain kinds of voters, it's still the best way to get through for general-election voters—and, really, the last group of voters to make up their minds. The way people who work on elections

see elections is as concentric circles of communication. There are the people who wake up every morning and read the *New York Times* and the *Wall Street Journal* and their local paper and go online. And if they're Republicans, they are actively looking at the *National Review* and the *Weekly Standard* and some other places—the *Wall Street Journal* editorial page—where there is really robust conversation going on all the time about this. In my political party, we've got all kinds of places, as well.

Then the next circle out are informed voters—not *as* informed—but they also show up and vote in primaries. They're the people whom you can motivate to vote in primaries.

Then there's next kind of circle, which are the independents who really didn't pay that much attention to primaries, but they're still college educated, well informed, checking into this general-election thing.

And, obviously, there's a whole group of people whose partisan behavior is going to tell them what they want to do.

But the last group of voters are the low-information voters, who don't have time or inclination to pay attention to politics. Many of them we call information-fleeing voters, as opposed to information-seeking—like, "I don't want to hear about politics; I don't want to read about politics; I hate the political system, but I might show up and vote." And for those people and also for, may I say, Millennials, you need TV. It is actually the best way to reach them. So TV is still extraordinarily important.

Witness the fact of Bernie Sanders, who has, god knows, some of the most engaged social-network people in the universe right now, who has extraordinary reach with people who use nontraditional media. He is outspending Hillary Clinton in these primaries on television because he has the money. Would they be spending that much money on television if it wasn't useful? No. Television is still as imperfect, but it is the most effective way to reach the greatest number of people with emotional messages. How many of you

actually watch pre-roll ads on your digital or go to “skip this ad?” You watch the ad, right? Unless it’s one of those really annoying ones where you don’t have the option, and then you turn down the volume. Right? Communication right now is additive: every four years you have to spend more and more money to add more and more platforms. But of all the platforms, the most effective is still television.

Bob Bauer: It is also true that within campaigns very frequently there are people who over-promote the importance of the advertising budget to the candidate. I’ll leave it there.

Anita Dunn: Because as we all know, at the end of the day, a good *legal* strategy wins.

Bob Bauer: Well I was once challenged by a communication consultant. I walked in to a strategy meeting and he said, “Oh, boy, we’d better be careful to keep this meeting short. We’ve got somebody coming here who will bill by the hour.” So I said, “I’ll tell you what. I’ll trade my hourly billing procedure for your cut of the buy anytime of the day. Just go ahead. We’ll switch pricing mechanisms.”

But the larger point, the other point I wanted to make was that you’ll also hear an awful lot of anguish. And this almost helps us tie things together. We’ve talked about how we have a primary process where people say, Oh my god, it’s a national nightmare. . . . I can’t stop watching it. Right? Likewise, you’ll hear a lot about the horrible, negative, acidic tone of politics—negative advertising and negative advertising. And the research shows that the most effective advertising and the advertising that voters actually consider the most information-rich is negative advertising. There’s a long book by a political scientist named John Geer² showing that, fundamentally,

2. JOHN G. GEER, IN DEFENSE OF NEGATIVITY: ATTACK ADS IN PRESIDENTIAL CAMPAIGNS (STUDIES IN COMMUNICATION, MEDIA, AND PUBLIC OPINION) (2006).

voters walk away with more information about a race when they see negative advertising than when we see what I call the amber-waves-of-grain variety, where the candidate is looking into the sunlight and imagining . . .

Anita Dunn: Although a good positive ad . . . I don't know how many of you have ever seen the Bernie Sanders' Simon and Garfunkel ad, "They've all come to look for America"—which says something about his campaign. A good positive ad can be memorable, but a good negative ad can win the campaign for you. But it has to be a *good* negative ad. It has to actually be factual. It has to go to some preexisting sense of what the choice is, what the problem is. And it can still drive voters more effectively than just about anything else.

Bob Bauer: Yes, that's absolutely true. And, speaking of the role of the media, I would conclude that one of the most entertaining things the media has recently instituted are fact-checks. The media fact-checks ads. They'll say, Here's a thirty-second ad, and here's what's true, and here is what's not true about it. A study was done at MIT of fact-checking, and the fact-checking causes the viewers to disregard the fact check and absorb the negative ad. I thought that was fabulously unexpected and perversely amusing.

THE RHYMING OF HOPE AND HISTORY IN PALESTINE*

John McKay**

*History says, Don't hope
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.*

Seamus Heany, *The Cure at Troy*

INTRODUCTION

John McKay is a trial lawyer in Seattle. In 1989, George Bush appointed him a White House Fellow, whereby he worked as a Special Assistant to the Director of the FBI. From 1997 to 2001, John was President of Legal Services in Washington, DC, a nonprofit entity created by Congress to provide access to justice to the poor. In 2001, John was nominated and confirmed as US Attorney for the Western District of Washington where he was deeply involved in the War on Terrorism.

In January of 2007, John, along with eight other US attorneys, was asked to resign. Through hearings in the Senate and the House and subsequent investigations, it was learned that the termination had been politically motivated for a failure to either prosecute Democrats or for prosecuting Republicans. In the wake of the investigation, Attorney General Alberto Gonzales and several officials in the Justice Department resigned.

* Address delivered at the Annual Convention of the International Society of Barristers, San Diego, California, 12 April 2016.

** Professor, Seattle University School of Law, Seattle, Washington.

In 2013, John agreed to move to the West Bank of Palestine to be the US State Department's Chief of Team. In that job, he coordinated sixty Palestinian lawyers, law-enforcement officials and others in order to help establish the rule of law in Palestine and enhance public safety. John stayed on the West Bank for two years, living not in Jerusalem but in occupied Palestine.

I RAMALLAH

I consider myself a sort of displaced trial lawyer. From time to time, I've served to train judges overseas, including in the Republic of Georgia and a brief stint at the War Crimes Tribunal for Rwanda. But, really, my heart lies in trying cases and in being a trial lawyer. Yesterday I listened to Dr. Samantha Nutt and I share with her the unsettling feeling of recognizing automatic weapons fire despite never having served in the military. I'm also impressed with this group's knowledge of the completely foreign and unexpected journey I took to Palestine by scheduling me right after the report on Mars. The Middle East is not quite Mars, but there are aspects of it that sometimes cause me to consider how alike they are. I really appreciate this opportunity to try and explain the place I lived and worked in for quite some time—occupied Palestine.

Now, if you're speaking to an Arab, you will call it Palestine. To an Israeli settler, you would say Judea and Samaria. If you're speaking to an official of the United States Department of State, you would say the West Bank, and if you're speaking or working with Google Maps,



you would call it the Palestinian Territories. After receiving an unexpected email inviting me to work in Palestine for the Department of State, I understood that my life would change a great deal as I moved to Ramallah, in the West Bank, under the flag of the Palestinian Liberation Organization.

It soon became clear I would live in the Middle East in an occupied land inside the military occupation. So I did what I think many people in this room would do at first, at least, which was to say, Hell no, I'm not going over there. It's unsafe. I have no interest. I was in the middle of a semester teaching law.

I didn't immediately say no, and about six weeks later I was dropping two duffel bags in a completely bare-walled apartment in Ramallah, lodged between two mosques, hearing the call to prayer and feeling like I was in something of a Hollywood movie set. I hope to tell you a little bit about these experiences as one like you, as a displaced trial lawyer in a place called Palestine and to shed just a little bit of light on what is a very confusing, difficult, violent place—in the news even as we speak. I hope to challenge you as lawyers and judges and people who care about the rule of law to speak out for the human rights of Palestinians, who suffer under this occupation. And I hope to advocate here for a nonviolent solution to a place in tremendous, tremendous need.

So I lived in Ramallah about twenty-five minutes and a couple of Israeli military checkpoints away from the Old City of Jerusalem. Perhaps some of you have traveled there. Ramallah is maybe thirty-five to forty minutes from Jericho, the oldest city in the world and, depending on whether you're an Arab or a Jewish settler, either twenty minutes or an hour and a half to Bethlehem. I served as the Chief of Team to an organization that executed the State Department contract for the rule of law. What does that mean? I had about sixty Palestinian staff. I was the only American on the team. They fortunately were required to speak English and I came away with, as we say, "swhweh-uh, swhweh-uh" in Arabic—a very little amount—

of that language. My staff were embedded with Palestinian police, prosecution, and security services, and we were engaged in an aggressive program with about twenty different project lines, training in human rights. I know some of you are thinking, How could he possibly be training in human rights in Palestine, a place where we know of as a place of violence, a sad place of occupation, a sad place where children are carrying backpacks on their way to school next to Israeli armored vehicles? What possible purpose could the rule of law have in a place like that?

Well, our efforts of course are tied to the idea that one day there will be a state of Palestine. This is the official policy, by the way, of the state of Israel. It is also the official policy of the United Nations, and it is the official policy of the United States. But no one there thinks there will be a state of Palestine. So I of course had to ask myself the question, What in the world was I doing there, working on programs like how to try a criminal case in Palestine when there is no crime lab, no forensic evidence, no ability to use the kinds of tools that would be used in any case here in the United States or in a developed western country. One example of the work that we in the United States program were trying to do was to bring in the capacity to do forensic evidence. Otherwise, as you can imagine, there are really only two ways that you can try a criminal case: one is through witness testimony—and you can imagine the hearsay problems that would build on hearsay problems in trying to get a witness to a crime for which often there are no witnesses. The other is through confessions. Let your imaginations run just a little bit wild as to how confessions might be obtained in a place like this, and you'll understand why even though I couldn't say I was directly helping to build a Palestinian state, as a lawyer I felt very good about helping to train people in human rights and the rule of law as each of us fully understands it.

Palestinian officials liked me a lot because not only would I bring them trainers, but I brought them stuff—from fingerprint platforms to software for building a cybercrime unit, to the kinds of tools needed to bring in forensic evidence. Still, it was difficult to bring trainers into the country. On one misguided occasion, I brought an on-duty FBI agent—a female by the way, a woman—and an on-duty, in-the-line Assistant United States Attorney. This is how they had to be protected: with four big, black Suburbans, because they were currently actively employed by the US. When I took them through the northern city of



Nablus, the State Department security personnel decided that they had to be heavily protected from the potential terrorists in Nablus—where I, by the way, walked freely and regularly and felt completely safe. Even though I had been the United States Attorney,

State Department officials didn't feel the need for machine guns and black Suburbans for me. But this was the complication of trying to do business in this area. On a number of occasions I wanted to bring in some of my friends, including United States District Court judges, and I simply couldn't bring them because of the so-called security need. And I say "so-called," because this simply met with the narrative of the region—that it was unsafe. But, after living there for over two years, I couldn't have felt safer among any group of people than I felt with the Palestinians.

II**ENDING THE ISRAEL–PALESTINE CONFLICT**

You have the background on what I was doing there. But I'm really here to tell you I don't have the answer to the really big question, which is, How do we end the conflict—is there an end to the conflict between Israel and Palestine? But I want to give you just a quick word of warning here: I came to this region supporting Israel, and I left supporting Israel and the state of Israel. But I think you'll find some of the status quo in the West Bank as upsetting as I did. When I began to become deeply aware of the political situation and in particular of the policy of the occupying Israel forces toward the Palestinians, my first reaction was shock and dismay. I like this quote attributed to Gloria Steinem: "The truth shall set you free, but first it's really going to piss you off." That's how I felt when I became aware of the politics and policy of Israel in this place, so I'm just giving you a word of warning.

Video Narration:

What would happen if you built a refuge for a persecuted people in a place where another people already lived? In the next few minutes, you'll learn why this moral quandary is at the root of the struggle between Israelis and Palestinians, and what you can do to help achieve a just peace for everyone in the region.

First, there are a couple of things it's helpful to understand. One, many Jews fled harsh persecution in anti-Semitic Europe, especially the Nazi holocaust. Zionists encouraged massive immigration to historic Palestine, at that time a British colony where Jews had an age old connection and where small Jewish communities had long existed among larger groups of indigenous peoples. But when the UN offered the Jewish immigrants the majority of the land for a new state called Israel, for the indigenous Palestinians who lived

there, it was a massive destruction of life. They rejected the UN's partition plan and several Arab states invaded the new state of Israel. Israeli forces essentially erased over four hundred Palestinian villages and towns. By the end of the fighting, Israel controlled seventy-eight percent of historic Palestine, and when three-quarters of a million Palestinians who fled or were expelled during fighting tried to return to their homes where the new state now stood, they were permanently barred by the Israeli government. Well over a hundred thousand of their relatives and neighbors who hadn't left became second class citizens of the new state, along with the new Jewish majority.

Today, Palestinian refugees and their descendants number in the millions. Most are in the Gaza Strip, the West Bank, and Jordan. Many are spread throughout the world with millions still living in refugee camps, seeking to return to their homeland. To sum up, one group of refugees found a much-needed home, but in the process, a new group of refugees was created.¹

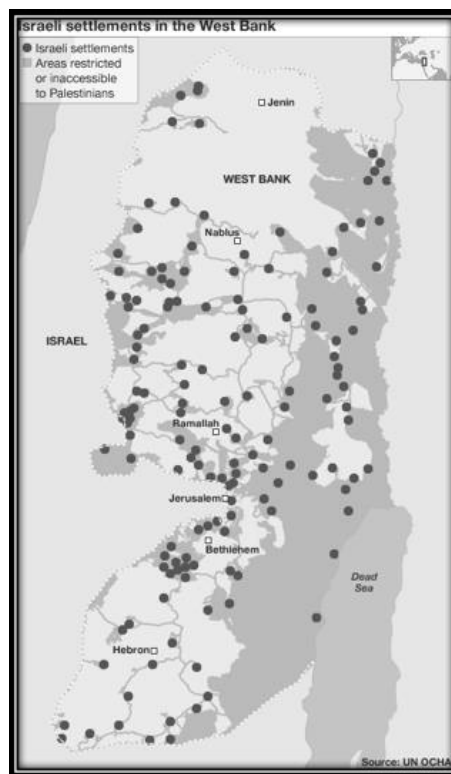
So, this is obviously a very simple, simplistic even, view of the history of this area and the resulting political structure there. But it is incredibly important in trying to understand how each side views its respective roles. It was something that took some time to understand, and of course living there gave that understanding a kind of richness that I know I can't convey here. As a human being, I absolutely—as a lawyer and as a person—condemn the violence that has been visited on both sides of this conflict. Scores of Palestinians have lost their lives, some even in recent days, as have Israeli soldiers and innocent civilians in both Israel and in Palestine. I can't imagine from the Palestinian side how knife attacks against elderly couples in Tel Aviv or elsewhere in Israel, or against children, can ever be justified.

1. Jewish Voice for Peace, *Israeli Palestinian Conflict Explained: An Animated Introduction Israel and Palestine* (Nov. 28, 2012), available at <https://m.youtube.com/watch?v=Y58njT2oXfE&autoplay=1>.

Clearly, the only path is to nonviolent protests, the nonviolent failure to cooperate, noncooperation. The paths of Gandhi and Martin Luther King are the only paths possible in this place. But for the Israeli side, the violence and slavery of nearly fifty years of occupation of the Palestinians, Israeli settlement building, and the killing and imprisonment of Palestinian youth has to end.

While I lived in Ramallah, the nature of the occupation became very clear to me. This is a map of the West Bank. Gaza is excluded here, but if you just take a look at the dots, you'll see the thing that surprised me the most during the time I lived there and traveled throughout this region.

We had offices or staff embedded in almost every city you can see there in the West Bank, and it was my job to frequently move between them. I traveled over contested roads, and many, many times through military checkpoints, often with automatic weapons and semiautomatic weapons pointed at me until I was able to identify myself as an American official. And even then, the soldiers were not so anxious to drop the weapons. The dots are settlements. Now, when I arrived there, I thought that the settlements were a few buildings being constructed around East Jerusalem—very troublesome, a bit of a problem—but I did not realize the extent of the settlement building. And settlements are what they say they are: they are an effort by the Israeli



government, via official Israeli policy, to seize the West Bank. This is obviously their intention. This is what you see here in the building of the settlements. Almost everywhere you travel in the West Bank, when you look up on the hill, you will see an Israeli settlement, illegal in every way under international law. And they're building all the time.

There are now 625,000 or so Israeli Jews living in the West Bank. I have no idea how this can ever be rolled back if there's to be a peace. But to look at the structure of the political situation, the reality on the ground, these are all fortified, mini-cities. Every one of them has an Israeli defense garrison close by. All are walled. All are surrounded by barbed wire and the citizens are armed. On one occasion, I attended a barbeque in an Arab village, above which there was an Israeli settlement. There was a swimming hole,² and I of course invited the settlers to come and eat with us, which they refused to do. But as they turned, in their bathing suits to swim in the swimming hole, they had nine-millimeter pistols in the small of their backs. The Israelis were heavily, heavily armed in every possible way. The Palestinians in this area of the West Bank actually control only about eighteen percent of the land. The rest is all controlled by the Israeli military.

I believe firmly that the Israeli people have the right to live in peace and security, and that includes freedom from suicide bombers, rockets fired from Hamas in Gaza, kidnappings, murders of Israeli youth and the reprisals that follow them. These are all things that obviously the state of Israel has the right to protect themselves against. The problem to me, as a lawyer and as someone who lived there, is clearly the building of settlements. These are actually anti-security, because every time they put one of those dots up, they've got

2. This was located in Palestinian lands abutting the Palestinian village of Dur Ibzeia and located within Area B—lands ostensibly under both Israeli and Palestinian control. The swimming hole was outside of the settlement walls and considered part of the Arab village.

to put in security forces. The way they do this is by seizing the roads that are used by the Palestinians and then banning Palestinians from using the roads. Living there, it begins to look a lot like apartheid. It looks like South African apartheid. It looks like the objective of the Israeli state is to fracture the Palestinians to make sure that they never have a truly unified government, allowing Israel to continue to build settlements and eventually claim all the land. They have established complete military control over the West Bank even over the eighteen percent remaining in Palestinian control because the settlements they've built go right into the cities and abut the cities fully. This is including Ramallah where I lived, including Nablus, which is surrounded by settlements, and Hebron, which is surrounded by settlements. And within Hebron, individual homes are being taken over. So, as a lawyer, you start to see what tools the state of Israel is using to seize this land and to keep the Palestinians in a virtual prison.

III MILITARY RULE

Military proclamations are all-encompassing and all-powerful, so the military commanders have complete control over the regions they govern, which, of course, have hundreds of thousands of Palestinians living in them. The proclamations are grants of power to the regions' military commanders.

A snapshot: From 1993 to 2000 all Palestinians arrested by Israel are arrested under military authority. They are not arrested by the Israeli police. If they are arrested, they are arrested by soldiers, and they are brought to military courts that look a lot like what we have at Guantanamo Bay. I attended many such court hearings. The average age of these arrestees, by the way, is sixteen. It is literally children who are arrested. They are picking up the only weapon they have against the occupation: rocks. It's an extremely rocky area, and the boys and young men throw them. While I was there, the Israeli military passed a new law signed off on by the high command in Tel

Aviv that it was a twenty-year, mandatory-minimum sentence for throwing stones at soldiers, with no minimum age requirement. There is no such thing as a juvenile violation. These kids would receive a twenty-year sentence in Israeli military prison. These are the military courts that have been established in Israel.

The military has full power to arrest, incarcerate, and supervise interrogations, and at any time, military commanders may demolish homes, arrest, interrogate, and imprison people on their own orders.



A troubling issue for me as a lawyer was to learn of the arrests of juveniles. This is the sign you would see entering any Arab village of any kind, any size, in the West Bank. I was often a guest in a Muslim home, and sometimes a Christian home, but in any Arab village, including the one I lived in in Ramallah, you had to go by the signs. The Palestinians are frequently told that they are terrorists and that they are a threat to regular people.

The use of juveniles for intelligence purposes by the Israelis is very, very troubling. One of the current intelligence objectives for the Israelis is to go into small villages—especially on Friday, which is the day of prayer—to essentially kidnap youth. These are usually boys between the ages of eight and eleven, or so. The Israelis hold these kids for an afternoon and attempt to turn them into informants on the village. They do this in one simple way: They tell the kids that if they don't come to this same place every Friday at the same time, they will kill their families. It's brutal. It's horrible. And it is part of a common effort by Israel both electronically and through what we would incorrectly call human intelligence to get eyes on the ground. The Israelis like to have juvenile participants because they're much more manipulative and they can be scared more easily. There's an excellent Australian documentary that does a very good job of showing this.³

I saw this often during the time I was there—arrests of juveniles. This was a boy from Ramallah who was arrested and taken away. His



family didn't hear anything about him for over a week. I don't remember exactly how old he was, but he was no more than ten. He was being handcuffed here and taken away, probably for throwing stones. But the use of the military courts is rampant.

3. John Lyons, Janine Cohen and Sylvie Le Clezio, *Stone Cold Justice*, FOUR CORNERS (February 10, 2014), <http://www.abc.net.au/4corners/stories/2014/02/10/3939266.htm>.

IV
GAZA, SUMMER 2014

What of course happened in the summer of 2014 was the assault on Gaza. While I was there, I could observe the rockets coming from Gaza to Tel Aviv. I could see them from my apartment in Ramallah, the rockets coming across, and I knew what the response was going to be:

Video Narration:

Destruction on an overwhelming scale. From above, we get a new perspective on Shejaiya, one of the areas worst affected by the latest Gaza conflict. Palestinian homes were bombed and battered by Israeli air strikes and tank fire. Israeli troops fought militants here and targeted their tunnels.⁴

The Palestinians all know each other everywhere. There are Palestinians in Gaza and there are Palestinians in the West Bank, but Hamas is in charge of Gaza. It is completely surrounded. It is an open-air prison. Everything is controlled into Gaza. The seaside is absolutely controlled by the Israeli Navy—it's in small attack boats and it's not afraid to fire its automatic weapons towards the beach. My staff, who were all Palestinian, all knew people or had family in Gaza. So when this destruction occurred, I would come to my office and find my colleagues weeping at their desks because people—families—were being wiped out in Gaza. It was very difficult to take. In the beginning, when Hamas fired rockets, of course I was horrified, but some of my Palestinian colleagues—even those I worked with—said, "Thank God someone is doing something in response to this occupation." And I wept at my desk when I asked one of my friends,

4. BBC newscast on the destruction of Gaza, Operation Protective Edge 2014.

“Don’t you know what is going to happen?” And what happened was that over two thousand Palestinians were killed, mostly in their homes.

The United States government maintains a supply depot in Israel for the purpose of showing to any outside attackers of Israel that the United States has skin in the game and that they will protect Israel from outside attackers. Well, the Israeli military ran out of mortars and grenades in Gaza, which they were launching into the most highly occupied zone in the world. The Israelis petitioned the United States government to resupply them from our supply depot. I read about this in a very small article in *The New York Times* and was absolutely floored. The story reported—and I later confirmed this—that the United States government resupplied the Israeli Defense Forces so that they could continue their assault on Gaza. Now, we, the United States Government, were condemning Israel for this attack on Gaza, but at the same time we resupplied them. As the only American official allowed to live in the West Bank at this time—because I had a staff of Palestinians working in the Rule of Law Program—I had a terrible ethical crisis: How could I continue in my role as someone who is there to train Palestinians in human rights when my government was resupplying the military so that it could kill the families of people that I was working with?

I had a very, very difficult weekend in which I worked this through in my head. I didn’t want to resign. I didn’t want to put the jobs of my colleagues in jeopardy; these were actually very good jobs for the Palestinian staff. But I decided I couldn’t be silent. So I made an appointment with the Attorney General for Palestine, with the Chief Judge of the Military Justice Commission, and with the Chief Prosecutor for the West Bank. I went to each of them.

I began with the Attorney General and said, “Mr. Attorney General, I feel that as only the American official allowed to live in the West Bank and the only one whom you deal with, I have to tell you that I’m appalled at my government’s cooperation here in the

resupply and subsequent assault on Gaza. I know you know of it, and if I were you, I would not have any confidence in my leadership of the Rule of Law Program here. Consequently, if you confirm this to me, I will resign and turn this office over to my deputy, who is a Palestinian.” He looked at me, and he shook his head and he got up and he came around the table and he kissed me three times and he put his hands on my shoulders and he said, “Please stay.” He said, “We’re Palestinians. We’re used to being killed.” It was a very difficult moment for me.

This response was essentially repeated by the next two officials, and by the time I went to the fourth, for coffee and to ask his advice on how to proceed, he, another Palestinian, said, “Oh, don’t talk to me.” He said, “I already know. It’s all over the government. You offered to resign. You are a great guy. You stay.”

Well, it wasn’t my intention to try to enhance my standing. I was fully prepared to leave, though I did not want to. I expected them to accept my offer of resignation. Instead, I stayed and learned a lesson: it wasn’t about me. It wasn’t about my view, nor even about the rule of law. It was about the resiliency of people and the willingness of people to work under the most trying circumstances to advance the things that we care about—in particular, the rule of law. How does this get personal? It gets personal when you find that you know someone who is involved in this. And after two years, you can imagine that I got to know families. I got to know what happened to the people I knew. One of those is the mother of Nadeem Huwara.

Nadeem Huwara was seventeen years old. He was well known throughout Ramallah as the best basketball player in the town. He was a Muslim who attended a Christian school. You see this a lot in Palestine, because the population there was pretty heavily Christian for a Middle Eastern country—before the Second Intifada, about twenty-five percent Christian. So Christians and Muslims get along quite well. Women openly do not wear hijabs.



They're not all covered in Ramallah, because there are many Christians and no one harasses them. It's not like living in some of the other Middle Eastern countries.

The Nakbah is the Israeli Independence Day, and it is hugely celebrated in Israel. In Arabic, the Nakbah means “the disaster”—and this is the meaning in Palestine, for it means the time in 1948 when so many Palestinian villages were destroyed and over 700,000 Palestinians became refugees. Nadeem, who had just turned seventeen, decided to go down to protest on Nakbah Day—his first time ever to attend. He went down there to protest, and he was killed. He was assassinated by two Israeli soldiers. He was one of three youths shot over the course of three hours in the very same spot. Nadeem was shot while walking away from the protest, wearing a school backpack. He had no weapons, no rocks—nothing. The soldiers were about a hundred and fifty yards away from him. He was walking towards them. Nadeem was shot through the heart and died instantly. He had told his friends that the next time they saw him, they would kiss him on the forehead instead of on the cheek. Kissing on the cheek



is how they greet each other, but when you kiss someone on the forehead, it's to say goodbye. And that was Nadeem.

When you experience these things personally, the pain is pretty tough to bear, quite frankly. I miss being there and am continuing to try to do this work in whatever small way I can.

V

REASON FOR HOPE?

So, is there a way out? When asked whether I have hope for this situation in Palestine, my answer has to be “No.” I don’t have hope about how this problem can be resolved. The Palestinians insist on a right of return, and to them—some of them—that means they want the olive groves their grandparents had that are now part of the state of Israel. This is not a reasonable starting point for peace negotiations on the part of the Palestinians. The Israelis will not stop building settlements and have no observable way to roll back those heavily armed settlers who now number well over half a million living inside the West Bank—a land to which they have absolutely no claim under law. My head says, No, there’s no hope; but my heart and maybe my

Irish view of the world say, Yes, let's proceed and let's talk about what some of the realities are on the ground.

Here's a key one and many people are not aware of this: The total Jewish population of Israel is around 6.1 million. If you combine the Palestinian populations in Israel, twenty percent of Israeli citizens are Palestinian. Now, they're second-class citizens by all accounts. The Jim Crow laws that apply to the Palestinians inside of Israel would be the basis of another lecture. But if you took that population, the population of Gaza and the population of the West Bank, you're talking about roughly 5.1 million people. So 6.1 million people arguably are occupying 5.1 million people. This is the real threat to the State of Israel: By not making peace with Palestinians, by not allowing them the creation of the state, they are doomed to an occupation mentality. You can imagine what it takes. It's the reason every single Israeli citizen must serve in the military, men and women, because it takes a lot of soldiers to occupy that many people.

But Israel has to end the use of its military laws of occupation. If you look at the situation in Northern Ireland, the only way out is to roll back the occupation, to roll back the laws that governments give themselves when they feel threatened. If you look at the laws that were passed in the United States after 9/11, the government did not make itself weaker when it came to either gathering intelligence, arresting, or prosecuting people, whether they're in special courts like Guantanamo or whether they're in Article III courts in the United States. The US government did not become weaker in its ability to prosecute and to investigate and to incarcerate and to detain. The case in Israel is analogous: the laws are essentially plenary in terms of maintaining this occupation.

Will a Palestinian state be created? Here's what young people in Palestine are saying today: They call it taking the keys to the car and throwing them back to the Israelis. By that, they mean the Palestinian authority should stop doing the dirty work of the Israelis and stop administering what is now an intractable occupation of over forty-

seven years. The young people say, Fine, we'll be Israelis. Make us Israelis. Why? Because perhaps the true weapon the Palestinians have is that their demographic growth, which is occurring at a much, much higher rate than that of Israeli Jews. If those numbers stay the same, then you would see—some say within five years—a majority Palestinian block and you would be really looking at the beginning of an almost direct parallel to South Africa in terms of apartheid state and apartheid activities.

What, if anything, can we do? I'm a personal advocate of boycott divestment and sanctions regarding Israel because I think nothing more direct will change Israeli policy towards the Palestinians. After all, in the middle of the assault on Gaza in 2014, despite Israel's human-rights violations and war crimes, the United States Senate voted, I believe, ninety-two to nothing to support the state of Israel—even while the state of Israel was attacking Gaza and killing literally thousands of people. The European Union is officially boycotting goods manufactured in Israeli settlements. I believe that within the next year or two this will become an overall ban on importing Israeli goods. This is the only way I think Israel will pay attention: through the kinds of sanctions that the world community began to level against South Africa.

As I said, it pains me to say this because I believe in the state of Israel. I believe in a Jewish homeland. But I don't believe in Israeli human-rights violations. I don't believe in their administration of Palestinian territories. And it may not be a legal presumption, but I no longer believe anything the Israeli government says with regard to the West Bank, including security situations. My doubt is for this reason: their stated desire, their policy—articulated in the statements of all of their leaders, especially those of the Prime Minister, Benjamin Netanyahu—their objective is to take what they call Judea and Samaria, to take the West Bank. They are extremely vague on what is to happen to the millions of Palestinians who currently live there. Netanyahu has said that the Israeli hear the footsteps of their

forefathers in this region.⁵ They certainly do. There's no question that this region at one time hosted Arabs, Jews and Christians living together—sometimes not in great peace, but living together. That is a legacy that still exists and certainly should be protected. But that is the Israelis' intention: to create exactly this kind of state.

How does it end? I don't know. I hope that what we will see is a commitment to nonviolent opposition to this occupation, a forty-seven-year occupation. I often asked people, My God, if these were Americans being occupied and living under these conditions, it would be a warzone, at all times, here. Americans would never put up with this. The Palestinians are amazingly patient by comparison, surviving in the hopes that the world will someday support them. Israel really has to look in the mirror and decide whether it can confront its own colonialism and religiosity—religiosity because the only basis for their claims in the West Bank is religion. Those claims are absolutely not based in any kind of law.

I was often asked whether I was safe during the time that I was there. The one time I was not safe was when I was behind the wheel of a car. I tell people who park next to me, I feel sorry for you because I haven't quite banned the vestiges of driving like a Palestinian. Many parts of Palestine are not under the jurisdiction of any police. Technically, they're under the control of the Israeli military, who do nothing. So when you're driving the car, it's like the old demolition derbies that we used to watch on television.

5. "Judea and Samaria, the places where our forefathers Abraham, Isaac and Jacob walked, our forefathers David, Solomon, Isaiah and Jeremiah—this is not a foreign land, this is the Land of our Forefathers." Netanyahu's Foreign Policy Speech at Bar Ilan, June 14, 2009, *available at* <http://www.haaretz.com/news/full-text-of-netanyahu-s-foreign-policy-speech-at-bar-ilan-1.277922>.



People ask, Well what did you do protect yourself? I had a fast Chevy Malibu. I knew my way out of Ramallah, and I knew my way to the Allenby Bridge to go to Jordan if something massively changed within the district. And I had a wad of cash and I had a satellite phone, which I turned on only every four months or so to see if it worked. I would regularly receive a phone call from the security office in the US consulate in Jerusalem, and they'd say "Well, you know, John, you're the only one living up there. If something goes wrong, you really shouldn't count on the Marines getting up there in time to help you." I didn't, at all, of course. I made friends with the Palestinian Chief of Intelligence. We were very good friends. I knew that if something happened, I'd get a phone call from him. And I'd hear from my staff, who were all over the West Bank and every bit as good as any intelligence officer.

So the traffic would be the bad thing. The really good thing, absolutely, was the food in Palestine. I live in Seattle, and you could get invited to someone's home for dinner, and it's not a big deal if you leave after the dinner and you've been there an hour and a half. Try that in Palestine. It is an all-day affair. You are expected to spend the day. The hospitality is absolutely incredible. If you go to a Palestinian wedding, you know, you might be asked about the bride—Oh, the bride, she was beautiful. The groom, the family and the children?—Oh, everyone had so much fun. But they ask, How were the salads? You

had to have at least ten or eleven salads on every plate or it really was just not a very good job at all.

VI *INSHALLAH*

I leave you with my last and favorite word in Arabic: *Inshallah*, literally, God willing. But it's used in Palestine in a way that we, especially lawyers, would find a little unsettling. I mean, if you are dealing with someone on the other side, you might hear something like, Well, we'll get our submittals in by Friday, *Inshallah*. They'd always end with *Inshallah*. I didn't like to hear that. No, no, no. Not *Inshallah*. You have to *promise* me I'm going to get this by Friday. So I kind of did the American thing: Forget about this *Inshallah* business. Don't say that to me.

But when you think about it, almost nothing goes right in the lives of Palestinians. Nothing is predictable. Forty percent of males over the age of twenty-five have been in Israeli prisons, so almost everyone I worked with or came into contact with has been in a prison or a jail. You can be detained at any time. Checkpoints can appear that were never there before. So, really, it's a pretty good word to have, *Inshallah*. I will get this in at this time, *Inshallah*, and that is really how their lives have to work.



VII ASPIRE TO BE FIRED

People, even in my own legal community in Seattle, go, Oh, that's John McKay. He was the US Attorney; he got fired. This is not really how you want your legal career to be characterized. But I am very proud, if not of myself, then of my colleagues—those of us who were fired including Carol Lam, who was the United States Attorney here in San Diego, an absolutely outstanding US Attorney and lawyer, and a former state-court trial judge.

These two things—my getting fired and my two years in the West Bank—are related in this way: we in this room and we hope many of our fellow countrymen believe in the rule of law. If there is hope after disappointment, if there is hope after we see people assume power to themselves that they shouldn't have—whether it's in driving an armored vehicle or agents with badges and guns being directed by someone who forgot their oath to the US Constitution—that hope is the rule of law. The rule of law is the common thread that binds us. You and I are dedicated to the idea that when all else fails, we will support and defend the Constitution of the United States. To be overseas and to try and counsel in one of the most troubled places in the world, maybe, maybe, maybe—*Inshallah*—maybe there's some hope in the idea that human-rights training, that placing some trust in the rule of law, will help to guide these lesser instincts among human beings. If so, then that is a very good thing.

I know this: I know I was very proud to serve over there. As difficult as it was, as crazy as it seemed that I was living in the Middle East, basically alone up in Ramallah, I was proud to be an American—very, very proud to be an American. I was proud to be a trial lawyer and to be trying to promote the rule of law. I know the value of having these systems and capacity in place so the people could look to an independent person when in fact it was the government that was

oppressing them. Whether it works or doesn't work, whether there's anything in the future that might help the Palestinians, I know I can look back on my two years there and say, as a trial lawyer who believes in the rule of law, I at least worked towards that idea. Regardless of anyone's political view of what might happen in the Middle East, whether you're pro-Israel or pro-Palestinian or just don't understand what's happening there, a terribly violent place, we in this room know that the rule of law is a good thing that we can rely on, and building toward it, however we can, it is a really, really good thing.

QUESTIONS & ANSWERS

Q: It seems, sir, that you dealt with the reality on the ground as it is today, but at no time did you go through how we got there. We got there because in '48, after a mandate and a partition, the Arab countries told the Palestinians to leave so that they could invade. That was Iraq. That was Jordan. That was Egypt, and that was Syria. They kept them [Palestinians] there in the camps, festering, because on [the Arab countries'] maps they had no Israel located. They were concerned about the destruction of Israel right in 1948. Then came '56 and Sinai. Then came '67. Then came Hezbollah and Hamas and then came what you see right now. Isn't it a fact, sir, that the Arab governments have done absolutely nothing to take care of their so-called brothers but let them fester in a camp to create a situation so that you could speak the way you're speaking today?

A: You're certainly right about the lack of support from other Arab states. But I want to point out that the Palestinians are referred to by many Israelis and supporters of Israel as Arabs. This is inaccurate. Palestinians are Palestinians. Their roots, their ethnic identity occurs in the state of Palestine, which to them historically includes Israel. The displacement of these people is a terrible event in history. There's no question about it. I think that the only path to peace in the future is to resolve the borders of modern Israel and to

say this is the land of Israel. It must be safe. It must be secure. It cannot be invaded. We should all build towards its safety, but also, as the initial resolution establishing the state of Israel said, there shall be a state of Palestine. That has never been given to the Palestinians. They continue to live, many of them, in these refugee camps. I'd like to see the region do much more. You're certainly right in that regard.

Q: I have read somewhere, I think in a *New Yorker* article about the power of AIPAC [American Israel Public Affairs Committee] during the destruction of the Gaza Strip. I read that the President said we should not supply the Israelis with weapons, but we actually ended up supplying them because of contacts the Israeli government had within the Defense Department. I was interested in your comments on that.

A: Well AIPAC is enormously powerful. It's one of the most powerful lobbies in the United States. They do a very good job of advocating, and they have the ability to spend a lot of money in elections, and they make their presence very well known in support of Israel. I don't know of a direct connection between AIPAC and the resupply of the Israeli Defense Forces in Gaza. I frankly doubt it. I think that the Israelis keyed a treaty right to the American supplies that were kept there, and I'm not sure the United States had any choice under the treaty but to resupply the Israelis. The effect, however, was exactly as I described it: The United States government was completely complicit in the assault on Gaza by literally resupplying Israeli forces so Israel could continue its assault on a defenseless area under the complete control of the Israeli military, *complete* control of the Israeli military.

Q: I would like you to talk a little bit about your departure from the US Attorney's Office and in particular . . .

McKay: I was fired.

Q: I was trying to not say that for the third time today.

McKay: Thank you.

Q: But just talk about how you learned that this was coming. Was this out of the blue or was there some forewarning?

A: There was no warning whatsoever. Six of us, maybe seven—there were nine in total, it turns out—who were fired under provisions of the USA Patriot Act, ironically, which allowed the President to appoint US Attorneys without Senate confirmation. So our replacements were to be officials that they sent out from Washington DC to take our places.

We were all called on Pearl Harbor Day 2006—December 7th—and told that we should resign. We were given no explanation. All of us have compared notes. We’ve spoken together at various law schools. Six of us at least have done this. It’s really clear they wanted us to think that we had done something wrong, but they wouldn’t tell us what it was.

Shortly thereafter, Attorney General Gonzales went to Capitol Hill. Senator Dianne Feinstein said, “What’s with all these resignations of US Attorneys?” He lied about it and said that these were performance-related dismissals. He said this on CSPAN. I buried my head in my hands, and I said, “Aw”—because I went quietly. I resigned. I had already joined the faculty of Seattle University, but we knew we had to confront this because it was a lie. And it turned out that there were very nefarious reasons for those dismissals.

I had just been involved in an investigation into the governor’s election in the state of Washington, the closest election in the history of the government for governors—a hundred and twenty-nine votes out of about seven million cast. The democratic candidate was elected narrowly as governor, and many republicans—I wouldn’t call them highly intelligent—wanted me to investigate the democrats and actually, in the end, arrest the democrats, a suggestion I never entertained. The thought never crossed my mind, but it turns out these nut jobs were writing directly to the Attorney General of the United States who was responding to them. And when it happened, he denied all knowledge. Attorney General Alberto Gonzales testified

before the Senate Judiciary Committee. This is how he answered the question of how nine presidentially appointed people got dismissed.

Splices from video of Alberto Gonzales' testifying before the Senate Judiciary Committee:

*I don't recall.
I don't remember.
I don't recall.
I don't recall.
I have no recollection.
I don't recall. . . .
I don't remember. . . .
I have no recollection.
I don't recall.
I can't recall. . . .
I have no recollection about that.⁶*

This was one hearing. We're laughing now, but those of us who were going through this process, who'd all been fired together, would frequently say to each other, "We have a duty to the Justice Department not to make this worse." But Gonzales was up there embarrassing us. I have to say, as a witness, he was quite coachable. Obviously someone had told him, Mr. Attorney General, whenever questioned about this, in order to avoid personal jeopardy, you had better use the words, "I don't recall." Obstruction of justice was a serious potential problem for him, if indeed I was fired because of the Washington governor's election or if Carol Lam was fired in San Diego because she had just prosecuted Duke Cunningham, a senior republican Congressman who went to federal prison. She had begged the Attorney General's office, "Don't fire me now. It's going to look like you're firing me because I prosecuted a republican." It was the same situation in Arizona with David Iglesias, who was in the process of

6. *Transcribed audio from Angry Cat Productions Video.*

indicting Arizona's democratic treasurer. The republicans wanted him to move faster so they could use it in the upcoming elections, and he refused. He was fired within six weeks of refusing to speed up those indictments.

If there is a lesson in this, it's that when we put power in the hands of people like US Attorneys or federal agents with guns and badges, arresting people has to be an independent function. Even though we get appointed in political processes, we raise our right hand and we swear an oath to support and defend the Constitution. I did not work for President George Bush. I worked for the Constitution. Political people like Alberto Gonzales and others placed into senior positions in the Justice Department, all of whom resigned in disgrace, cannot have the power over these decisions, decisions that send people with guns and badges to people's homes and arrest them. We can't do that for political reasons.

