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FOREWORD: LESSONS LEARNED FROM THE BUSH ADMINISTRATION

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The United States President represents our nation: he is our public face and the collective voice of the American people. As our elected representative, his actions directly reflect on our society's values and culture. Although a President should progress his Administration's policy objectives, he should do so with at least some regard for the public's opinion of those policies, especially the opinion of the elected body who most closely speaks for the American people: the United States Congress. But what happens when a President acts primarily on his own accord, without regard for diplomacy, discourse, or public opinion? What if the President instead acts as a sovereign Executive-in-Chief, unilaterally implementing the Administration's policy decisions despite the nation's traditional systems of checks and balances?

President Bush was such a President. He and his Administration pushed the boundaries of executive power, undermined historical checks on power, and adulterated organizations crucial to the non-

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partisan development and enforcement of our nation's laws and policies.

What lessons can be learned from an overzealous President's term in office? And what can be done to ensure that future Executives remain accountable to the people they represent?

The eight-year tenure of President Bush's Administration provides a tremendous learning opportunity to analyze executive power. In this volume, six uniquely qualified scholars take advantage of this opportunity to critically discuss six issues concerning presidential affairs: the Supreme Court, voting rights, administrative law, executive power, international law, and civil rights. After analyzing the Bush Administration's actions involving these six issues, each scholar provides insight into the important lessons that can be learned from President Bush's time and actions in office.

A President's power to nominate Supreme Court Justices is one of the most important means by which he can directly influence constitutional law and policy. During President Bush's tenure, two Supreme Court Justices retired, giving him an opportunity to appoint two justices. President Bush's two appointees, Justice Samuel Alito and Chief Justice John Roberts, are excellent examples of the long-term impact a President's choice of appointees can have: both are relatively young by Supreme Court Justice standards, are intelligent and influential, and are politically right-leaning. And both will have a long life on the bench during which they can leave their and the Bush Administration's mark on America's law and policy.

Professor David A. Strauss discusses the first lesson learned from the Bush Administration by analyzing the Administration's impact on the Supreme Court. As a former Attorney-Advisor in the Department of Justice, as an Assistant to the Solicitor General, as special counsel to the Senate Judiciary Committee during the nomination of Justice David Souter to the Supreme Court, as an advocate who has argued before the Court eighteen times, and as one of the nation's leading scholars in judicial theory, Professor Strauss has both observed and contributed to constitutional law, interpretation, and theory. He here dissects the meaning of judicial conservatism and teaches that the current Court has no cohesive approach to judicial decision-making. And without such an approach, the Court appears to lack a principled rationale for overturning its coordinate branches' acts and policy decisions.

Many of the policy and legal lessons learned from the Bush Administration only tangentially involve the courts, so political checks must also direct the President's policy and constrict his power. The foundational source of the President's power is his election by the American people, so the first check on the President's power is the democratic act of voting. Voting, of course, relates to more than just the President: congressmen and congresswomen—the people's representatives who carry their constituents' voices to the federal government and who are constitutionally assigned to balance the Executive's power—must also be elected. As a result, the implementation and enforcement of voting laws is paramount to our representative government.

Professor Pamela S. Karlan, one of the pioneers of and one of the world's leading experts in the study of the law of democracy, instructs the second lesson learned from the Bush Administration, the lesson of voting rights. Her article analyzes the creation and enforcement of voting laws during President Bush's two terms in office, focusing particularly on how voter identification laws disenfranchise voters and skew election results, frequently along political lines. From her analysis of the Bush Administration, Professor Karlan draws a number of lessons on voting rights: lessons that would significantly help to protect the democratic process from the manipulation and partisan influences that both colored many of the election results of the past eight years and undermined the first check on presidential policy and power.

A second important control on the Executive's policy-making decisions is the use of scientific agencies. Scientific research underlies many aspects of American law and policy—research that supports such things as environmental law and policy, food and drug law, and even bioethics (e.g., stem cell research)—and scientific agencies are designed to insulate this research from political influence. Yet the Bush Administration interfered with and politicized this check on the Executive as well.

Professor Sydney A. Shapiro, a leading expert on regulatory policy and administrative law, who has authored six books and over fifty articles and served as a consultant to government agencies and as Vice President of the Center for Progressive Regulation, identifies in the third lesson learned from the Bush Administration the proper role of science in regulatory policy and administrative law. He discusses

how the Bush Administration, in contravention of this role, altered or disregarded scientific research and reporting when the results of that research did not support the Administration's agenda. Professor Shapiro concludes his article with a simple proposal for how to protect science from politics: mandatory disclosure of unedited scientific results in order to provide sufficient transparency to ensure governmental accountability and minimize the risk of partisan intrusion on agencies' political autonomy.

The final system of checks and balances is codified in our Constitution, which delegates power and authority between the President and Congress. Ideally, Congress' ambitions compete with and negate the President's. But party loyalty and congressional representatives' personal ambition has largely vitiated Congress' ability to act as an effective check on the Executive. President Bush, without consulting Congress, implemented numerous policies that reflect on our nation's values and culture (e.g., enemy combatant detention and interrogation), laws (e.g., the Terrorist Surveillance Program), and signing statements (e.g., the infamous "Torture Memo"). In doing so, President Bush constantly pushed the boundaries of his authority and Congress was ineffective as a check or balance against his unilateral expansion of presidential power.

Professor Neil Kinkopf, a nationally-renowned scholar in Executive Authority and, during the Clinton Administration, an attorney for the Department of Justice's Office of Legal Counsel—the office charged with advising the President on separation of powers, executive authority, and other constitutional questions—frames the fourth lesson learned from the Bush Administration, the lesson on executive power, in terms of Machiavelli's infamous question of whether it is better to be feared than loved. He asserts that the Administration was non-accommodationalist, and thus chose fear over love by relying on unilateral action and formalistic legal justifications rather than diplomacy, persuasion, and popular support. Historical checks on the President's power can and have failed, Professor Kinkopf notes, and he warns that the most important lesson to be learned from the Bush Administration about executive authority is to not indulge the myth that our system of checks and balances is failsafe: future Presidents may tip the balance of power too far in their own favor as President Bush and his Administration did.

A popular misconception about the Bush Administration is that the Administration routinely disregarded international law, especially if it conflicted with domestic interests. But in the area of foreign affairs related to international law, where President Bush had the most power, he was the most respectful of traditional legal procedure and international norms. Whereas within domestic law the President sometimes acted without regard for legal procedure, as with, arguably, the Terrorist Surveillance Act, within international relations the Administration acted with too much consideration for the law.

Professor Curtis A. Bradley, former Counselor on International Law in the Legal Advisor's Office of the U.S. State Department and current member of the Secretary of State's Advisory Committee on International Law, explains how the Bush Administration excessively focused on formal compliance with the law in matters concerning international relations. This perhaps unexpected conclusion, however, is entirely consistent with the Administration's overarching exercise of executive authority. Professor Bradley explains how the Administration's legal focus caused it to eschew diplomacy and public consent for the majority of President Bush's term in office, and he teaches the fifth lesson to be learned from the Bush Administration: the importance of soft powers, process, and tone, especially in international matters.

President Bush and his Administration clearly had a political agenda to accomplish during his term. One way in which the Administration achieved this agenda was by politicizing traditionally non-partisan organizations. The most egregious example of this was the hiring practices of the Department of Justice's Civil Rights Division. Such hirings adulterated decades of legal expertise in exchange for an ideologically homogenous group of attorneys who primarily enforced the Administration's agenda. This can be seen in the Department of Justice's shift away from traditional areas of legal enforcement such as the protection of minority voting rights, but also in the focus the Administration placed on areas of civil rights and civil-rights related events that occurred during its term, such as Hurricane Katrina.

The final lesson learned from the Bush Administration comes from Professor Goodwin Liu, Co-Director of a civil rights law and policy think tank, the Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, and a Constitutional Law scholar. He

examines the Administration's treatment of civil rights through the lens of the Department of Justice's Civil Rights Division, the No Child Left Behind Act, and the aftermath of Hurricane Katrina. The lessons that emerge from his analysis are that the nation as a whole, not just the Bush Administration, lacks an agenda that effectively addresses core civil issues—education, race, and poverty.

In this issue, six scholars present the lessons learned from the Bush Administration. First, although the Bush Administration appeared to have a definitive agenda, the Supreme Court, even with two new appointees, lacks a cohesive judicial theory to implement that agenda. Second, historical systems of checks and balances are not failsafe, so the President must respect the limitations on his power to ensure an effective, balanced system of government. Third, to help ensure the proper balance of the system, Congress should attempt to implement statutory changes that encourage disclosure, accountability, and representation. Fourth, the President should favor soft powers over hard powers: soft powers yield the President and the nation a much greater value, both monetarily and politically. And finally, the nation needs to develop a coherent agenda to address pressing social issues that are still unsuccessfully addressed by current law and policy. These are the most pressing Lessons Learned from the Bush Administration.