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Foreword

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FOREWORD

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EVERY year, the SMU Law Review compiles an impressive series of articles surveying critical developments in Texas law. This edition is an invaluable resource for busy lawyers, judges, and others interested in the Texas legal environment. Undoubtedly, you will find in the pages of this Survey a discussion of issues relevant to your work in serving clients, in running a business, in the administration of justice, or in academic pursuit. When practicing in Texas, I would have looked forward to reading the articles published in this volume about appellate practice, evidence, civil procedure, commercial transactions, conflict of laws, and other topics to glean information valuable in my practice. Back then, I would have never imagined that Constitutional issues would someday dominate my day-to-day legal work. Today they do. Recently, as you may have read, clashes among our three branches of government have drawn considerable media attention. This forward offers a perspective on these current Constitutional issues from someone who sees the practical struggles of the three branches trying to work independently from each other, while at the same time, trying to work with each other.

We should not find surprising today's discussions concerning the separation of powers and the checks and balances embodied in our Constitution. History teaches that times of war test the relationships of our three branches of government. And we are a nation at war. The reality of the War on Terror affects the nature of the work of White House Counsel, as well as the types of issues addressed by the Congress and our courts.

In the War on Terror, the United States has been called upon to address how to respond to the attacks of terrorists who meld into our free culture and exploit the liberties our country provides only to hurt our people and our Nation. We have been called upon to fight a war effectively against terrorists, and at the same time ensure the civil liberties we all hold so dear. The Nation also has been called upon to address how to bring unlawful enemy combatants to justice and prevent their returning to the battlefield. With protection of the American people paramount, the President and Commander in Chief must act decisively to wage a unique war.

During the Civil War, President Abraham Lincoln also faced a war that was unique—the enemies were fellow Americans. At times during the Civil War, President Lincoln issued orders that increased military control, permitting military arrests and trials of civilians and suspending habeas

corpus. The legality of President Lincoln's authorizations of military commissions and the suspension of habeas corpus against a civilian in a State not part of the Confederacy was tested before the Supreme Court in *Ex Parte Milligan*. The Court held that neither the President *nor* Congress could suspend the writ of habeas corpus as long as civilian courts were in full operation and the area was not a combat zone. The decision left open the possibility of using military commissions in other circumstances. And the Supreme Court later dismissed a challenge to the use of a military commission in the prosecution of a journalist who wrote incendiary editorials urging resistance to reconstruction laws.

President Lincoln's aggressive use of his powers was upheld when he instituted a blockade of the ports of Confederate States with neither prior approval from the Congress nor a declaration of hostilities by the Congress. His authority to institute the blockade was hotly contested and challenged as unconstitutional. In the 1863 *Prize Cases*, the Supreme Court affirmed President Lincoln's bold actions.

In World War II, President Franklin D. Roosevelt authorized a special military commission to try eight German saboteurs. The Supreme Court upheld the use of a military commission in that case, writing: "[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."

In 1952, the United States was engaged in the Korean War, and steel was badly needed for the war effort. President Harry S Truman ordered the Federal seizure of the Nation's steel mills to prevent the possibility of a labor strike that he believed would impair his ability to successfully fight the war. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court found no constitutional or statutory basis to support President Truman's order. There were seven different opinions addressing the issues of presidential power in the *Youngstown* case. Justice Robert H. Jackson authored the opinion most quoted. In his concurring opinion, Justice Jackson analyzed the interrelation of presidential power and the power of the Congress. He observed that the president's power is the greatest when acting with the support of the Congress, less when he is acting without the Congress having spoken, and weakest when the president acts in defiance or contrary to an act of the Congress.

This language may sound very familiar. It was referred to by both Chief Justice John Roberts and Justice Sam Alito when answering questions from Senators during their confirmation hearings. Each nominee sought to assure the Senators that, as a potential member of the Supreme Court, he was equipped to handle in a balanced way issues that would come before him presenting conflicts between the exercise of powers by the Executive Branch and the Congress. Unlike the ideal scales of justice perfectly balanced, balancing the separate powers of the three branches of

government cannot be perfect and should not be. That was part of the genius of our founders.

It is no surprise that presidential action is being challenged in a country where the third branch of government is designed to hear the complaints of those who believe that the President, in the exercise of his powers as President and Commander in Chief, should be doing certain things differently, or should not be doing them at all. Understandably, with the passage of time, there are differences of opinion about the laws governing war. Specifically, in this kind of war that our Nation currently faces, there are differences over the proper balance between the roles of the Congress, the Executive, and the Judiciary. Former Arkansas Senator J. William Fulbright has been quoted: "Our proper objective is neither a dominant presidency nor an aggressive Congress but, within the strict limits of what the Constitution mandates, a shifting of the emphasis according to the needs of the time and the requirements of public policy."

The disputes over the powers of the presidency are playing out in the courts. There are issues about detainees, about the use of military commissions, about the terrorist surveillance program, and as always, about the roles of our three branches of government and their abilities to act as constraints on the others. All of that is as it should be. Our courts are open to administer justice and to interpret the Constitution when it is appropriate for them to act.

It is the wisdom of the founders of this Nation, as embodied in the Constitution, which has served us so well through the most trying of times, even during a bloody civil war. They created a system of government with three equal and independent branches, each with powers that are exclusive, but also powers that overlap. It is the balance of these three branches that has made our government strong and adaptable to challenges throughout our existence, and it is why we will continue to thrive for generations to come as a great Nation, a beacon of liberty, and hope to peoples throughout the world. That we always remember to celebrate the greatness of our system of justice is only right.

Congratulations to all who participated in producing another instructive review of developments in the law and the system of justice as it functions in the Great State of Texas. I am sure it will be a helpful resource for all those interested in staying abreast of current law.

