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PRESIDENTIAL POWER IN AN AGE OF TERROR

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Abstract

Questions about Presidential or executive power and its abuse, particularly in times of national crisis, have been recurring at least since the time of Lincoln. Important examples can be seen at the time of World War I during the Palmer raids; during World War II with the internment of Japanese Americans; as well as an attempt to nationalize the steel mills during the Korean War. Following the 9/11 *al Qaeda* attacks on the U.S., the Bush Administration embarked on military campaigns, in Afghanistan and Iraq in a "Global War on Terror," seeking to deal with both foreign and domestic threats. The Bush administration fearlessly used the Authorization for the Use of Military Force (AUMF) statute to run roughshod over the Constitution, federal law, and anything else that stood in their path to "making the nation safe." While their ultimate objectives may have been noble, the path taken leaves questions as to their ultimate legality, as well as whether they were operationally useful. The most serious concerns here include: (1) the detainment of foreign nationals; (2) torture of prisoners and detainees; and (3) domestic surveillance programs intended to aid counter-terrorism efforts. The Supreme Court has already ruled that some of Bush's actions were unconstitutional, and others are still before the federal courts. This was not the first time the president exceeded constitutional limits in a time of crisis, and there can be no guarantee that it will be the last. The nation has survived intact, and is not sliding into a great constitutional abyss where American core values have been damaged beyond repair. Given the relative transparency of the actions taken, and the speed with which the courts dealt with the problem, future presidents will certainly be aware that abusing the Constitution cannot be done in secret for long, if at all, and that such new transparency and enhanced oversight will constrain Presidential abuses in the future, even if they cannot be eliminated forever.

Introduction – The Historical Context

For most of the nation's history, questions about Presidential or executive power have not been constant, but they have certainly been recurring. At the outset of the republic, the nature of the chief executive was a matter of substantial concern to the founding fathers and a matter of considerable debate at the time of the Constitutional Convention.[1] The early days under the Articles of Confederation had not gone all that well, and the hope of the Constitution's authors was to draft a more viable plan for a democratic government. Following 1789, the first years of the Republic were largely an experiment in democracy, characterized by a series of relatively weak presidents prior to Lincoln, presiding over a very small federal government that faced issues that were not as grave as that ones to follow in Lincoln's time and afterwards.[2]

President Lincoln and the nation faced a number of unprecedented challenges. His was a presidency largely consumed by the political, economic, social and military issues related to the cessation of the Confederate States and the Civil War. These critical challenges forced Lincoln to meet or exceed the limits of presidential power articulated in the Constitution in the hopes of preserving the Union in the bloodiest war the nation has ever faced.[3] The most severe criticisms of Lincoln's abuse of executive power related to the suspension of the writ of *habeas corpus*, an issue that again reared its ugly head during the Bush Administration in relation to the detention of terrorist suspects at the Guantanamo naval base in Cuba, and elsewhere.The experience of the Bush Administration in the years following the *al Qaeda* terrorist attacks on the U.S. on September 11, 2001 was one in which many such questions were raised, and have yet to be fully resolved by either the legal system or scholars. Following the 9/11 attacks, which the U.S. regarded as a national security crisis, the nation embarked on military campaigns, in Afghanistan, Iraq and elsewhere, as well as in what came to be called a "Global War on Terror." Here the nation sought

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[1] The records of the Constitutional Convention and the Federalist Papers further articulated many of the concerns of the founders, there is substantial concern about the role of the new chief executive and powers of the office. Possibly the most instructive is Alexander Hamilton, *Federalist Paper No. 69: The Real Character of the Executive* (March 14, 1788). Available at http://www.constitution.org/fed/federa69/htm.

[2] It is hard to even imagine the very limited scale of the federal government in the early years of the nation. The State Department staff in the U.S., for example, when John Adams was Secretary, consisted of the Secretary (Adams) and a single clerk. By Lincoln's time, the State Department had grown to a staff of 12, and in the early 20th Century during Wilson's administration had a staff of less than 60.

[3] Frank J. Williams, "Doing Less and Doing More: The President and the Proclamation—Legally, Militarily and Politically," in Harold Holzer (ed.), *The Emancipation Proclamation* (2006); Howard Jones, *Abraham Lincoln and a New Birth of Freedom: The Union and Slavery in the Diplomacy of the Civil War* (1999); Glenn M. Linden, *Voices from the Gathering Storm: The Coming of the American Civil War*. (New York: Rowman & Littlefield, 2001); and, Steven W. Woodworth (ed.), *American Civil War: A Handbook of Literature and Research* (1996).

to deal with threats both at home and abroad, including some that were real and others that were largely imagined.[4]

Doubtless many of these concerns are well-placed. President George W. Bush came to the White House with what most historians will agree was at best a limited understanding of the Constitution or, as his critics hold, much of anything else.[5] In the wake of the 9/11 attacks on the World Trade Center and the Pentagon, President Bush, Vice President Richard "Dick" Cheney and other senior officials engaged in a series of measures to deal with the emerging national security crisis. These activities sorely strained the concept of the Chief Executive under the Constitution, a large body of federal statute, and Supreme Court Decisions going back over two centuries. Bush and Cheney were strongly assisted in this enterprise by a supporting cast of aides whose regard for the law was in most cases subverted by what they perceived to be a compelling need to save the nation from impending future terrorist attacks at home and from the growth of terrorism abroad from Islamic fundamentalists.

Shortly after 9/11 President Bush requested, and the Congress enacted into law, the famed Authorization for Use of Military Force (AUMF). This amazingly short statute authorized the President to:

> . . . use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[6]

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[4] Analytically at least, it is unfortunate that this term was used and has stuck. It isn't logically possible to engage on a war against terror, since terror isn't an enemy. It is, rather a set of tactics employed by a range of adversaries, ranging from actual nation states to various non-state actors, which are commonly lumped into an overall category of "terrorist organizations." It is also important to note that the current wave of terrorism is, according to one scholar, the fourth in a series of waves dating back to the late 19th Century. See David C. Rapoport "The Four Waves of Terrorism" in Audrey Cronin and James Ludes (eds.) *Attacking Terrorism Elements of a Grand Strategy* (Washington: Georgetown University Press, 2004).

[5] There is already an excellent and evolving historical literature of the George W. Bush presidency, including some good accounts from several who served in the administration. Where national security is involved, some of the best works thus far include: Bob Woodward, *Bush at War (2002)*; *Plan of Attack (2004)*; *State of Denial: Bush at War Part III (2006);* (New York: Simon & Schuster); James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (New York Simon & Schuster, 2006); and Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Gharib*. (New York: Harper-Collins, 2004). Some of the better "inside accounts" include Francis Fukuyama, *After the Neocons: America at the Crossroads* (London: Profile, 2007); Scott McClellan, *What Happened Inside the Bush White House and Washington's Culture of Deception* (New York: Public Affairs, 2008); and John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

[6] Authorization for Use of Military Force. Enacted September 18, 2001. Public Law 107-40 [S. J. RES 23]. 107th Congress.

In the ensuing years, President Bush and others in his administration fearlessly used this statute to run roughshod over the Constitution, federal law, and anything else that stood in their path to "making the nation safe" and prosecuting its perceived foes wherever they might be. Indeed the ultimate objectives were noble, but the path taken leaves questions unanswered, both in terms of their ultimate legality, as well as whether or not they were operationally useful at all. The most serious of these concerns about the use of Presidential power in responding to these national security crises after 9/11 concern the detainment of foreign nationals, torture of prisoners and detainees, and various domestic surveillance programs intended to aid counter-terrorism efforts.

Use of Presidential Power – Cyclical, Not Serial

The uses, and indeed abuses of Presidential power from Lincoln's time to the present have not been either serial or degrading of the Constitution or American core values as some recent historians would suggest.[7] In all fairness, it is possible to argue that increasing and sometimes excessive use of Presidential power has generally been related to perceived national crises – both domestic and those in the national security areas. A number of post-Lincoln and pre-Bush examples stand out. While not the only examples, the following are worth considering:

President Woodrow Wilson and the Palmer Raids (1919 – 1921): The First World War witnessed a relentless campaign against potentially divided loyalties on the part of immigrants and ethnic groups, including Germans and Irish. President Wilson warned against "hyphenated Americans [who] have poured the poison of disloyalty into the very arteries of our national life. Such creatures of passion, disloyalty and anarchy must be crushed out."[8] The 1917 Russian Revolution added additional fears of labor agitators and partisans of foreign ideologies like anarchism, while a number of anarchist bombings in 1919 demonstrated that the threat was real.[9] Attorney General A. Mitchell Palmer, himself a target of one bomb, attempted to have the Justice Department arrest and deport suspected radicals. Raids and arrests

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[7] See William O. Walker III, *National Security and Core Values in American History* (New York: Cambridge University Press, 2009) for an articulate, if liberal historic interpretation. For a more conservative view see John Lewis Gaddis, *Surprise, Security and the American Experience* (Cambridge: Harvard University Press, 2004), and John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2010).

[8] David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980).

[9] The Palmer Raids occurred in the larger context of the so-called "Red Scare," the term given to American fear of and reaction against political radicals in the years immediately following. See here Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920* (Minneapolis: University of Minnesota Press, 1955).

in 1919 and 1920 saw thousands of warrants issued and more than 500 foreign citizens actually deported.[10] Palmer's efforts were largely frustrated by Labor Department officials responsible for deportations and who objected to Palmer's methods and disrespect for the legal process.

In May 1920, the American Civil Liberties Union (ACLU) published a report, entitled *Report of the Illegal Practices of the United States Department of Justice,* documenting the Justice Department's unlawful activities in arresting suspected radicals, illegal entrapment by agent provocateurs, and unlawful incommunicado detention. Prominent lawyers and law professors including Felix Frankfurter, Roscoe Pound and Ernst Freund signed it.[11] The Congressional Rules Committee gave Palmer a hearing in June 1920, where he attacked Labor Secretary Louis Post and other critics whose "tender solicitude for social revolution and perverted sympathy for the criminal anarchists. . .set at large among the people the very public enemies whom it was the desire and intention of the Congress to be rid of." In June 1920, the federal district court in Massachusetts ordered the discharge of 17 arrested aliens and denounced Department of Justice's actions, which effectively prevented any renewal of the raids.

President Franklin D. Roosevelt and the Internment of Japanese Americans (1942- 1944): From 1939 to 1941, the FBI compiled a Custodial Detention Index (CDI) on citizens, enemy aliens and foreign nationals, in the interest of national security. In June 1940, the Alien Registration Act was passed requiring, among other things, the registration and fingerprinting of all aliens above the age of 14, and all aliens to report any change of address within five days. Subsequently nearly five million foreign nationals registered under the act.

Shortly after the Japanese attack on Pearl Harbor, President Franklin Delano Roosevelt authorized internment under Executive Order 9066, which allowed local military commanders to designate "military areas" as "exclusion zones," from which "any or all persons may be excluded." This power was used to declare that all people of Japanese ancestry, including U.S. citizens and lawful residents, were excluded from the entire Pacific coast, including all of California and most of Oregon and Washington, except for those in internment camps.[12] In 1944, the Supreme Court upheld the constitutionality of the exclusion orders, while noting that the provisions that singled out people of Japanese ancestry were a separate issue

[10] Acting Secretary of Labor Louis Post, canceled more than 2,000 warrants as being illegal. Of the thousands arrested, only 556 people were eventually deported under the Immigration Act of 1918.

[11] Harvard Professor Zechariah Chafee criticized the raids and attempts at deportations and the lack of legal process in writing "That a Quaker should employ prison and exile to counteract evil-thinking is one of the saddest ironies of our time." Zechariah Chafee, *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920), p. 197.

[12] See *Korematsu v. United States*, 323 U.S. 214 (1944). See also, Dennis M. Ogawa and Evarts C. Fox, Jr., *Japanese Americans, from Relocation to Redress*. (Honolulu: University of Hawaii Press, 1991).

outside the scope of the proceedings.[13] The hotly debated *Korematsu* decision rendered by Justice Hugo Black, in which the Court was divided 6 – 3, has not been explicitly overturned, although the trial court judgment against Korematsu was vacated decades later. Indeed, the *Korematsu* ruling was the first instance of the Supreme Court applying the strict scrutiny standard to racial discrimination by the government, as well as being one of the very few cases in which the Court held that the government met that standard.

Supporting this, the Joint Immigration Committee of the California Legislature sent a manifesto to California newspapers which attacked "the ethnic Japanese," whom it alleged were "totally unassimilable." This manifesto further argued that all people of Japanese heritage were loyal subjects of the Emperor of Japan; Japanese language schools, furthermore, according to the manifesto, were bastions of racism which advanced doctrines of Japanese racial superiority.[14] Ultimately some 120,000 Japanese Americans, including many who were U.S. citizens and Japanese residing in the United States were sent to so-called "War Relocation Camps."

Internment of Japanese Americans was applied unequally throughout the United States. Those residing on the West Coast of the United States were all interned, whereas in Hawaii, where more than 150,000 Japanese Americans composed nearly a third of that territory's population, only 1,200 to 1,800 were interned. Of those interned, 62% were United States citizens. Internment was not entirely limited to those with Japanese ancestry, but included a small number of German and Italians as well. Those that were as little as 1/16th Japanese could be placed in internment camps. There is some evidence supporting the argument that the measures were racially motivated, rather than a military necessity. For example, orphaned infants with "one drop of Japanese blood" (as explained in a letter by one official) were included in the program.

A military report depicting racist bias against Japanese Americans was circulated and then hastily redacted in 1943-1944. The report stated flatly that, because of their race, it was impossible to determine the loyalty of Japanese Americans, thus necessitating internment. The original version was so offensive — even in the atmosphere of the wartime 1940s — that all copies were ordered to be destroyed. A copy of the original *Final Report: Japanese Evacuation from the West Coast - 1942* was found in the National Archives, along with notes showing the numerous differences between the original and redacted versions. This earlier, racist and inflammatory version, as well as the FBI and Office of Naval Intelligence reports, led

[13] *Ibid.*

[14] Andrew E. Taslitz, "Stories of Fourth Amendment Disrespect: From Elian to the Internment," 70 *Fordham Law Review*. 2257, 2306-07 (2002).

to the *coram nobis* retrials which overturned the convictions of Fred Korematsu, Gordon Hirabayashi and Minoru Yasui on all charges related to their refusal to submit to exclusion and internment.[15]

The courts found that the government had intentionally withheld these reports and other critical evidence, at trials including the Supreme Court, which would have proved that there was no military necessity for the exclusion and internment of Japanese Americans. Justice Department officials writing during the war were, found to have provided justifications based on "willful historical inaccuracies and intentional falsehoods" as historian Greg Robinson has noted.[16]

President Harry S. Truman and the Nationalization of the U.S. Steel Industry (1952): Early in 1950 Senator Joseph McCarthy denounced President Truman for permitting known communists to remain in the employment of the U.S. Government, sparking a four-year period of anti-communist policies and attitudes known as "McCarthyism." Accusations by McCarthy and others put Truman on the political defensive, and led him to seek ways in which he might prove that he was not "soft on communism."[17] In June 1950 North Korea invaded South Korea, touching off the Korean War at a time when U.S. wartime mobilization agencies were dormant. President Truman attempted to use recently formed National Security Resources Board (NSRB), as the nation's military mobilization agency, and quadrupled the defense budget to $50 billion. The NSRB placed controls on prices, wages and raw materials while inflation soared and shortages in food, consumer goods and housing appeared. Later in the year Congress enacted the Defense Production Act, which permitted the president to requisition any facilities, property, equipment, supplies, and component parts of raw materials needed for the national defense and gave the president the authority to impose wage and price controls. Truman also issued Executive Order 10161, establishing the

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[15] While the Supreme Court upheld the convictions of Korematsu and others, the decision in *Korematsu v. United States* was very controversial. Korematsu's conviction for evading internment was finally overturned by a federal court in California in November 1983, after Korematsu challenged the earlier decision by filing for a writ of *coram nobis.* The U.S. District Court granted the writ, vacating the original judgment and thereby voiding Korematsu's original conviction, because in Korematsu's original case, the Government had knowingly submitted false information to the Supreme Court that had a material affect on the Supreme Court's decision. The Government did not appeal this decision.

[16] See here Greg Robinson, *A Tragedy of Democracy: Japanese Confinement in North America*. (New York: Columbia University Press, 2009); Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans,* (Cambridge: Harvard University Press, 2001); and, Civil Liberties Public Education Fund, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians*. (Bellevue: Civil Liberties Public Education Fund and University of Washington Press, 1997).

[17] See Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power,*. (New York: Columbia University Press, 1977). See also, Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate,* (Amherst: University of Massachusetts Press, 1970); and, Edwin R. Bayley, *Joe McCarthy and the Press,* (Madison: University of Wisconsin Press, 1981).

Economic Stabilization Agency (ESA) to coordinate and supervise these controls, utilizing a model developed in World War II.

When the United Steelworkers of America struck against U.S. Steel and nine other steelmakers in 1952, President Truman nationalized the American steel industry hours before the workers walked out. The steel companies sued to regain control of their facilities, and in a landmark decision, the Supreme Court ruled that the president lacked the authority to seize the steel mills.[18] The Steelworkers struck to win a wage increase. The strike lasted 53 days, and ended on July 24, 1952, on essentially the same terms the union had proposed four months earlier.[19]

Impact of 9/11 Attacks

Three days after the 9/11 attacks President Bush visited the World Trade Center site and addressed a gathering via megaphone while standing on a heap of rubble: "I can hear you. The rest of the world hears you, and the people who knocked these buildings down will hear all of us soon." A week later, on September 20, 2001, President Bush addressed a joint session of the Congress condemning Osama bin Laden and *al Qaeda*, and issued an ultimatum to the Taliban regime in Afghanistan, where bin Laden was operating, "hand over the terrorists, or … share in their fate." Bush announced a "Global War on Terrorism," and after the Taliban regime was not forthcoming with Osama bin Laden, ordered the invasion of Afghanistan to overthrow the Taliban. In his January 2002 State of the Union address, Bush further asserted that an "axis of evil" consisting of North Korea, Iran and Iraq was "arming to threaten the peace of the world" and "pose[d] a grave and growing danger" declaring that the U.S. had a right and intention to engage in preemptive war, also called preventive war, in response to perceived threats, forming the basis for what became known as the Bush Doctrine.

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[18] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Initially attorneys for the steel companies focused on the issue of equitable relief and pointed out to the trial court that they could not make a claim for relief if the courts found the seizure illegal. Additionally, the Federal Tort Claims Act required the government to give its consent to be sued for relief, and this the government had not done. The trial court pressed the steel company attorneys to address the constitutional issue, which the government had strongly emphasized in its briefs. Most of the company attorneys seemed shocked by the court's request, and were unable to address the issue. Counsel for Armco Steel, however, squarely argued the issue. In their counter-argument the Government claimed that the courts had no authority to enjoin the President of the United States and then argued that the court should ignore the constitutional issue if it could decide the case on grounds of equity, relying heavily on *Ex parte Merryman* 17 F. Cas. 144 (1861), *Mississippi v. Johnson* 71 U.S. 475 (1866), *In re Debs* 158 U.S. 564 (1895) and *United States v. Pewee Coal Co.* 341 U.S. 114 (1951) as justification for the government's claims of unfettered executive power.

[19] Marcus, *Op. Cit*., p. 253.

The 9/11 attacks by *al Qaeda* came relatively early in the Bush presidency. He had been in office for only eight months, and came to the White House with no serious experience in the area of national security.[20] Of necessity, relied on a number of key personnel in his administration, the most influential being Vice President Cheney, and to a lesser extent his national security adviser Condoleezza Rice, Deputy Secretary of Defense Paul Wolfowitz and others.[21] While Cheney was clearly the most senior, the most experienced, and the one "in charge" none of the team had ever faced a national security challenge of this type. Apart from criticisms of how the Bush administration handled this attack, a number of important points are worthy of note.

First, in terms of the actual threat and its implementation, this was the first time that the United States homeland had been attacked since the War of 1812.[22] The U.S. was simply not expecting an attack, and did not have in place an effective infrastructure to process the types of intelligence data that were available prior to the attack, and to respond accordingly.[23]

Second, the failure to anticipate and detect the attack was seen by all parts of the political spectrum as a major intelligence failure, and clearly the most significant U.S. intelligence failure since the 1962 Cuban Missile Crisis. In the aftermath of 9/11 the Executive Branch and the Congress moved to investigate thoroughly the nature of the failings and to initiate significant changes in the organization of the U.S. Intelligence Community and the federal government to deal with homeland security threats. The Department of Homeland Security was created at the cabinet level, and the 2004 Intelligence Reform and Terrorism Prevention Act (IRTPA) legislation created a new Director of National Intelligence (DNI) and an organization focused on terrorist analysis and warning. Unlike most other nations, the U.S. had no domestic intelligence service, and reorganization to deal with new domestic threats from terrorists posed a major challenge.[24]

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[20] There is no shortage of history on the Bush presidency. See here Woodward (2002), *Op. Cit.*

[21] Key here were Deputy Secretary of Defense Paul Wolfowitz, Secretary of State Gen. Colin Powell, CIA Director George Tenet, and Attorney General John Ashcroft. Of these, Wolfowitz and Condoleezza Rice had been Bush's principal foreign policy advisors prior to his election as President.

[22] It should be noted that at the time of the Pearl Harbor attack, Hawaii was not a state, and that in any case the Japanese attack was not against the U.S. mainland.

[23] See Gerald Posner, *Why America Slept: The Failure to Prevent 9/11,* (New York: Random House, 2004); and *Report of the National Commission on Terrorist Attacks upon the United States,* (U.S. Congress. August 21, 2004). Available at http://www.9-11commission.gov/report/911Report_Ch9.htm.

[24] As a result of the National Security Act of 1947 and successive legislation, the U.S. simply had no domestic intelligence service similar to Great Britain's MI-5, Israel's *Shin Bet* or the equivalent in any number of nations. Under the 1947 Act and Executive Order 12333 (1981) the CIA was prohibited from operating as a domestic intelligence agency, and the FBI was not empowered to do so. The Intelligence Reform and

Third, enormous uncertainty existed over the threat of future attacks from *al Qaeda* and other terrorist organizations. Apart from the fact that U.S. intelligence and law enforcement agencies had failed to "connect the dots" and see the 9/11 attacks coming, it was clear that the intelligence activities then in place were not in a secure position from which to anticipate what else might be in the works by these new enemies. If Bush and his administration over-reacted or reacted badly, it was not because they misused a well-functioning intelligence system that they inherited from their predecessors, particularly with respect to domestic intelligence and the integration of national foreign intelligence data. In many respects, they were "flying blind" in the early post-9/11 days.

Fourth, the 9/11 attacks took place in a radically changed media environment. This was the new world of 24/7 cable and network news; Internet sites; and a level of attention orders-of-magnitude greater than in any prior crisis. While it was a major shock to the nation, to a great extent the magnitude of attack was multiplied by the media. Bush and Cheney helped to fuel the media fires, beating the 9/11 drums endlessly for the next seven years of their administration. Certainly, suffering 3,000 casualties on 9/11 was a horrible outcome, but it was not the end of the republic.[25] Nor did it justify a long and costly war against Iraq and other outcomes not directly related to the 9/11 attacks at all.

Bush/Cheney Perceptions

In the immediate aftermath of the 9/11 attacks, Bush and others in his administration saw an understandable and compelling need to save the nation. Even when Osama Bin Laden and *al Qaeda* had been identified as the source of the attacks, it was unclear what further strikes were under way, planned, or what infrastructure had been established to support further attacks.[26] Intelligence reports of further attacks were now investigated and taken seriously, even where the substance was bogus or mythical.[27]

Terrorism Prevention Act of 2004 (IRTPA), Public Law 108-458 enacted December 17, 2004 did not entirely solve this problem.

[25] A cynical view might hold that from 1814 to 2001 the United States experienced a total of only 3,000 deaths from foreign invaders, while the nation suffers over 450,000 deaths annually from smoking related illness.

[26] *Report of the National Commission on Terrorist Attacks upon the United States, Op. Cit.* For some time the Justice Department under Attorney General John Ashcroft and the FBI appeared to be operating under a Cold War model which assumed that *Al Qaeda* cells and support infrastructure must exist and be operating within the U.S.

[27] Possibly the most interesting was a report from an agent code-named "DRAGONFLY" which told of a terrorist nuclear weapon in New York City. While taken seriously at the time, the report was obviously not true.

Even if all of the intelligence reports were not entirely correct as to their specifics, it was clear that the nation faced a real and increasing threat from terrorism abroad, largely from Islamic fundamentalists. Earlier attacks on U.S. personnel and assets abroad, such as the *Al Qaeda* attack on the USS Cole, bombing of U.S. embassies in Africa, and military barracks in Saudi Arabia, demonstrated the terrorists' determination to strike.

As is often the case with intelligence problems, the data available in the immediate post-9/11 environment were both limited and often conflicting. Even after the Cold War ended the collection and analysis of data on terrorist organizations and Middle East states were not given either high priority or major resources within the Intelligence Community.[28] Dedicated activities such as CIA's Counter Terrorism Center (CTC), were badly managed, understaffed and under-funded. The Counter Terrorism Coordinator at the White House lacked any resources and was largely engaged in inter-agency squabbles. Bush had inherited a counter-terrorism system from his predecessors that was in many respects dysfunctional, and even if he personally did not realize the extent of this problem at the outset, many at the White House, the NSC and elsewhere in his administration did understand it. Much of what they did subsequently, in the name of national security was aimed at overcoming these now obvious shortfalls as quickly as possible, and obtaining reliable information as well as "actionable intelligence." If this meant pushing the limits on executive power, it was done as part of an effort to gain information the administration regarded as vital to protecting the nation.

Another legacy inherited by the Bush administration was an Intelligence Community and federal law enforcement establishment not organized, authorized or equipped to deal with the new and emerging homeland threats. The post-World War II organization of the Intelligence Community and establishment of the CIA provided for national foreign intelligence but essentially no mechanism for the effective detection of domestic threats.[29] At the same time the personal animosity between CIA's first director, Gen. William

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[28] See Risen, *Op. Cit*. Among other failings the Intelligence Community had few qualified linguists fluent in Arabic and other critical languages to deal effectively with what was collected. In the years following 9/11 the Community has filed to remedy this problem to any significant extent.

[29] See National Security Act of 1947 (Pub. L. No. 235, 80 Cong., 61 Stat. 496, 50 U.S.C. Ch.15); Central Intelligence Agency Act of 1949 (CIA Act) (Pub. L. No. 81-110, 63 Stat. 208); Executive Order 12333: *United States Intelligence Activities*. (December 4, 1981), amended by Executive Order 13355: *Strengthened Management of the Intelligence Community* (August 27, 2004) and Executive Order 13470: *Further Amendments to Executive Order 12333, United States Intelligence Activities* (July 30, 2008) to strengthen the role of the Director of National Intelligence (DNI). While the new CIA was empowered to coordinate national foreign intelligence, the were specifically restricted from acting as a domestic intelligence service, and the existing FBI was not given a broad charter in this regard, with the explicit exception of national foreign counter-intelligence.

"Wild Bill" Donovan and FBI Director J. Edgar Hoover became institutionalized over the years, and the level of needed cooperation between these two agencies that might have aided in dealing with foreign threats to the U.S. homeland was exceedingly limited in the pre-9/11 days.[30]

As the 9/11 Commission found, in considerable detail, the FBI did not effectively operate as a domestic intelligence service prior to 9/11 and "failed to connect the dots" with the information they did have at hand. Apart from the existing statutes and Executive Orders, which many argued would have enabled the FBI to do a better job, the existing organization and culture of the FBI as a law enforcement organization—and not an intelligence service was a major stumbling block both before and after 9/11, with limited ability to detect threats from *al Qaeda* and others.

Authorization for Use of Military Force

In the immediate aftermath of 9/11, the Bush administration recognized a need for not only effective intelligence against apparent domestic threats but also military actions against these threats, including some non-state actors such as terrorist organizations. A week after 9/11, Congress responded to the Bush request and enacted the famed Authorization for the Use of Military force (AUMF) quoted above.[31] While most legislators saw this as an interim measure that would enable the president to use military resources against *al Qaeda*, few saw the extent to which the Bush administration would employ this act as legal cover for the use of military and related intelligence capabilities against terrorist threats.

As a practical matter, many of the intelligence resources employed by the U.S. are in fact located with the Department of Defense, or draw heavily on military personnel.[32] Reacting to the immediate challenge of 9/11 the Bush administration took the easiest and most efficient path of employing military resources to solve both military and intelligence problems related to counter-terrorism. In the end, the AUMF provided a large part of the basis for what has been seen as Bush's abuse of Executive power. It was used repeatedly by the President and aides over the next seven years to run fearlessly roughshod over the Constitution, federal statute, and anything else that stood in the path to "making the nation safe."

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[30] See here *Report of the National Commission on Terrorist Attacks upon the United States, Op. Cit.*

[31] Authorization for Use of Military Force. Enacted September 18, 2001. *Op. Cit.*

[32] Included here are several Defense agencies, such as the National Security Agency (NSA); the Defense Intelligence Agency (DIA); the Office of Naval Intelligence (ONI): and arguably the National Reconnaissance Office (NRO) whose massive budget is largely included within the Defense Department authorizations and appropriations. Within the military services are a host of special operations activities and a substantial number of uniformed military personnel are detailed to the CIA. Drawing any clear line between where defense and military end and intelligence and covert operations begin is indeed difficult, and grew even more difficult during the Bush years.

The Bush administration received broad bi-partisan support in its recognition of the fact that the nation was long overdue for a major intelligence reorganization and authorizing statute. The 2004 IRTPA was one significant attempt to address the problem, by falls far short of meeting the requirements at a complete or even acceptable solution to the entire set of problems identified.[33]

The Bush Doctrine

While not enacted into statute as the AUMF, the so-called "Bush Doctrine" delineated in the 2002 *National Security Strategy of the United States,* provided further support to the various Executive actions taken by Bush and his administration ultimately seen by some as an abuse of power.[34] The new strategy saw the security environment confronting the national as radically different from what it had faced before. As the U.S. homeland had not been attacked since 1814, he was largely correct. The new strategy went on to say:

> ". . .the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are few greater threats than a terrorist attack with WMD.
>
> To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.[35]

The Bush Doctrine was subsequently employed as the basis for preemptive U.S. military action in Afghanistan and Iraq, and represented a major U.S. Policy change from strategic globalism to one of preemption. Combined with the AUMF, it also provided far greater latitude to the Executive and the military

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[33] The 2004 IRTPA took a few critical steps, the most important of which were the creation of a Director of National Intelligence (DNI) to oversee all U.S. intelligence activities, rather than "dual hating" the CIA Director as Director of Central Intelligence (DCI). The creation of the National Counter-Terrorism Center (NCTC) is more questionable, and an outright failure to address the major issue of a domestic intelligence service remains.

[34] *National Security Strategy of the United States* (September 17, 2002.) Available at www.globalsecurity.org/military/library/policy/national/nss-020920.pdf

[35] *Ibid,* p. 1.

in dealing with those found in foreign combat theaters and elsewhere that could potentially be accused of being terrorists or supporting terrorism.

Areas of Abuse of Presidential Power

Abuse of Executive power by the Bush administration can be viewed as flowing from the pressing need to obtain timely and critical intelligence related to terrorist threats, and to the related problem of dealing with individuals captured by the military in what Bush referred to as the "Global War on Terror."[36] Considered here are potential abuses in three key areas:

- *Detainment of foreign nationals:* Included here are the capture of suspected terrorists, others subsequently held at secret prisons outside the U.S. and one established at the U.S. Naval base in Guantanamo, Cuba.[37]
- *Torture of prisoners and detainees:* Widespread concerns have been raised over the interrogation of terrorists and terrorist suspects captured outside the U.S. by CIA operatives, the U.S. military and others, largely conduced in prisons outside the U.S.
- *Domestic surveillance programs:* In particular, large-scale technical collection programs such as the Terrorist Surveillance Program (TSP) initiated by the National Security Agency (NSA) by Presidential order following 9/11.

Detainment of Foreign Nationals

[36] As the new Global War on Terror (GWOT) was not conventional in any sense, a definitional and operational problem came from those captured in various nations overseas. Were they "enemy combatants" in the sense of the Geneva Conventions; criminals and subject to criminal law and Constitutional protections; or some other category? In the end the term "detainees" was utilized to avoid both international Convention and U.S. law entirely. See here Joseph Margulies, *Guantanamo and the Abuse of Presidential Power*, (New York: Simon & Schuster, 2006).

[37] Use of the naval base at Guantanamo Bay itself raised an interesting question as to whether this was under U.S. sovereignty. The Supreme Court ultimately ruled in 2008 that Guantanamo Bay (GITMO) is not formally part of the United States, and under the terms of the 1903 lease between the U.S. and Cuba, the latter nation retained ultimate sovereignty over the territory while, the former exercises jurisdiction and control. Previously the Bush administration argued that GITMO was not the U.S., and the Constitution didn't apply, and the lower courts agreed that the foreign terrorism suspects held there do not have Constitutional rights. *Boumediene v. Bush*, 476 F.3d 981 (2007), *Al Odah v. United States*, 127 S. Ct. 3067 (2007), and *Rasul v. Bush*, 542 U.S. 466 (2004). See also Margulies, *Op. Cit.* Joseph Margulies served as legal counsel to plaintiffs in several of these cases.

No nation has ever expressed greater concern than the U.S. with respect to those suspected or accused of crimes, no matter how offensive or heinous. Responding quickly to the 9/11 attacks, the U.S. and allied powers engaged in both military activities and covert operations in Afghanistan and elsewhere to deny *al Qaeda* use of bases and training camps. The inevitable result of these operations was the capture of a significant number of foreign nationals, some of which were known terrorists and others who were either "suspected" terrorists and many that were simply in the wrong place at the time. These were difficult military and special forces operations in Third World areas, and there was simply no way to avoid such an outcome. Even were some of those captured were not terrorists, it was reasonable to assume they might have knowledge of intelligence value. The critical questions then become ones of what is their "status" under international and domestic law; where should they be detained; how should they be interrogated; and what procedures should be followed for their trial or release?

Those captured and "detained" by the U.S. and allied powers, and who were not clearly foreign military, were initially held overseas in various prisons, such as one established at Bagram Air Force Base in Afghanistan, as well as a number of "secret prisons" set up by the CIA and military special forces in various foreign nations such as Poland, Romania, Tunisia and elsewhere. Such facilities were in part a logistics convenience, but they also served to keep these detainees away from the gambit of U.S. Constitutional law.[38] It did not keep those captured away from international law and the Geneva conventions, which the Bush administration frequently argued did not apply since the detainees were not "enemy combatants"[39]

As in Lincoln's time, the greatest concern of lawyers and legal scholars here has been the writ of *habeas corpus*, as well as the right to trial guaranteed under the Constitution and its amendments, as these individuals were clearly in U.S. custody. Cases filed on behalf of Guantanamo detainees during the Bush administration have already been heard by the Supreme Court which held that Bush had clearly exceeded his authority. In 2006 the Court held that the military commissions set up to try the detainees at Guantanamo lack "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949."[40]

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[38] See Jane Mayer, "Use of Torture in Secret Prisons," *The New Yorker* (August 14, 2007). Several reports indicate that 'secret prisons" were also set up on U.S. Naval ships.

[39] See here Harold H. Bruff, *Bad Advice: Bush's Lawyers and the War on Terror*. (Lawrence: University of Kansas Press, 2009).

[40] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Specifically the Court held that that Common Article 3 of the Geneva Conventions was violated and the detainees were entitled to be treated as "enemy combatants."

Subsequently in 2008, in *Boumediene v. Bush,* the Court held that the detainees held in Guantanamo have the right to challenge their detention in U.S. courts and are entitled to the protections of the U.S. Constitution.[41] Here the Court applied the Insular Cases, by the fact that the United States, by virtue of its complete jurisdiction and control in Guantanamo, maintains "de facto" sovereignty over this territory, while Cuba retained ultimate sovereignty over the territory. Therefore, the aliens detained as enemy combatants on that territory were entitled to the protection of the writ of *habeas corpus* — a Constitutional right provision not contained in the Bill of Rights. While the lower court expressly indicated that no constitutional rights (not merely the right to *habeas corpus*) extend to the Guantanamo detainees, rejecting the petitioners' arguments, the Court in a 5-4 decision by Justice Kennedy overruled prior cases and recognized that fundamental rights afforded by the Constitution extend to Guantanamo.

Torture in the Name of Security

Closely related to the detention of persons captured in counter-terrorist operations outside the U.S. were efforts to obtain actionable intelligence from the detainees. Interrogations have been conducted in a number of prisons, including the various "secret prisons," Abu Gharib in Afghanistan and Guantanamo Bay, Cuba.[42] Interrogations conducted by CIA operatives, military personnel as well as their contractors often employed what the Bush administration referred to as "enhanced interrogation techniques" and administration critics categorized as "torture" that violated the law as well as ethical and moral standards.[43]

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[41] *Boumediene v. Bush*, *Op. Cit.* See also, Margulies, *Op. Cit;* Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration*. (New York: Norton, 2007); Karen J. Greenberg and Joshua L. Dratel (eds.). *The Enemy Combatant Papers: American Justice, the Courts and the War on Terror*. (New York: Cambridge University Press, 2008); and Philip B. Heymann and Juliette N. Kayyem, *Protecting Liberty in an Age of Terror,* (Cambridge: Massachusetts Institute of Technology Press, 2005).

[42] See here Mark Danner (ed.), *Torture and Truth: America, Abu Gharib and the War on Terror*. (New York: New York Review of Books, 2004) and Karen Greenberg and Joshua L. Dratel (eds.). *The Torture Papers: The Road to Abu Gharib,* (New York: Cambridge University Press, 2005).

[43] *Ibid.* The literature on these interrogations and "torture" employed is already extensive. See also John Langbein, "The Legal History of Torture" in Sanford Levinson (ed.), *Torture: A Collection*, (New York: Oxford University Press, 2004); and Anthony Lewis, "Torture: The Road to Abu Gharib and Beyond" in Karen J. Greenberg (ed.), *The Torture Debate in America,* (New York: Cambridge University Press, 2006); Christopher H. Pyle, *Getting Away with Torture: Secret Government, War Crimes and the Rule of Law,* (Washington: Potomac Books, 2009); Joseph Margulies, *Guantanamo and the Abuse of Presidential Power,* (New York: Simon & Schuster, 2006); and James R. Schlesinger, Harold Brown, Tillie K. Fowler and Charles A. Horner, *Final Report of the Independent Panel to Review DoD Detention Operations.* in Mark Danner (ed.) *Torture and Truth: America, Abu Gharib, and the War on Terror*, (New York: New York Review of Books, 2004).

However unconstitutional, distasteful or immoral, these interrogations were not undertaken in a legal vacuum. Early on the CIA requested legal advice on detainee interrogation from the White House, which in turn asked the Justice Department for an analysis and opinion on the subject. CIA's request was routed to the Justice Department's Office of Legal Counsel (OLC) by then White House General Counsel Alberto Gonzalez who desired the "ability to quickly obtain information from captured terrorists and their sponsors." Here the CIA wanted to know whether, after the terrorist attacks of September 11, 2001, it could aggressively interrogate suspected high-ranking *Al-Qaeda* captured outside the U.S.[44] The results of this analysis was a document prepared by the United States Department of Justice's Office of Legal Counsel (OLC) in response to the CIA request to the White House.[45] The now famed "Bybee Memo" was principally authored by OLC lawyer John Yoo, with aid from David Addington, legal counsel and principal advisor to Vice President Cheney.

The memo describes the limitations on the behavior of U.S. government interrogators outside the United States as governed by the United Nations Convention Against Torture.[46] After surveying the history of 18 USC § 2340, the Convention itself, court decisions regarding the Torture Victims Protection Act (28 U.S.C. § 1350), and the Commander-in-Chief powers of the President, the memo concludes that torture is defined as "acts inflicting...severe pain or suffering, whether mental or physical "Physical pain" must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Mental pain "must result in significant psychological harm of significant duration, e.g., lasting for months or even years," as well as be the result of one of the specific causes of mental pain contained in 18 USC § 2340, "namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party." The memo also concluded that even though an act is "cruel, inhuman, or degrading," it does not necessarily inflict the level of pain that

[44] In effect, the CIA was asking for an interpretation of the statutory term of "torture" as defined in 18 U.S.C. § 2340. That section implements, in part, the obligations of the United States under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

[45] On August 1, 2002 the so-called "Bybee Memo," also known as the "Torture Memo" and the "8/1/02 Interrogation Opinion," and officially titled *Memorandum for Alberto R. Gonzales, Counsel to the President,* from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* was officially submitted. This memo and subsequent ones cannot be dismissed as mere "window dressing" and are indeed excellent pieces of legal scholarship, even if the courts did not ultimately agree with the conclusions. Available at http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf.

[46] The Convention's provisions are implemented in the United States by 18 U.S.C. § 2340.

18 USC § 2340 prohibits, and thus does not subject an interrogator to criminal prosecution, and stated that a defense of "necessity or self-defense may justify interrogation methods" that violate 18 USC § 2340.[47]

In a second memo Bybee goes into great detail on ten techniques, a number of which have been referred to as torture, and why they are legal to apply to CIA prisoner Abu Zubaydah, who at the time was held in a covert CIA "black site." This memo's detailed legal analysis has subsequently been repudiated by the new OLC personnel who simultaneously promised to defend and indemnify any government employee who ever relied on that advice to commit violations of domestic and/or international law.

The so-called “torture memos” have been widely criticized. Harold Koh, former Yale Law School Dean, Assistant Secretary for Human Rights, and currently State Department Legal Adviser called it "perhaps the most clearly erroneous legal opinion I have ever read" which "grossly overreaches the president's constitutional power."[48] John Yoo's legal opinions were controversial, even within the Bush Administration. Secretary of State Colin Powell strongly opposed the invalidation of the Geneva Conventions, while Navy general counsel Alberto Mora campaigned internally against what he saw as the "catastrophically poor legal reasoning" and dangerous extremism of Yoo's legal opinions. Philip D. Zelikow, former State Department adviser to Condoleezza Rice, testified to the Senate Judiciary Committee, "It seemed to me that the OLC interpretation of U.S. Constitutional Law in this area was strained and indefensible. I could not imagine any federal court in America agreeing that the entire CIA program could be conducted and it would not violate the American Constitution." Zelikow also alleged that Bush administration officials not only ignored his memos, but attempted to destroy them.

In June 2004, the memo was rescinded by Jack Goldsmith, a Harvard law School professor who had taken over OLC in 2007, calling the memo "deeply flawed" and "sloppily reasoned." Nevertheless, Goldsmith has asserted that he "hadn't determined the underlying techniques were illegal."[49] He continues, "I wasn't in the position to make an independent ruling on the other techniques. I certainly didn't think they were unlawful, but I couldn't get an opinion that they were lawful either." Goldsmith has defended the memo's authors. "I don't impugn the integrity of anyone. I really do believe that everyone, both me and the people I disagreed with, were acting in good faith. And it's quite possible that I made mistakes as well—we

[47] The memo also concluded that even though an act is "cruel, inhuman, or degrading," it does not necessarily inflict the level of pain that 18 USC § 2340 prohibits, and thus does not subject an interrogator to criminal prosecution. Additionally, it stated that a defense of "necessity or self-defense may justify interrogation methods" that violate 18 USC § 2340.

[48] See Harold H. Koh, “Setting the World Right.” *Yale Law Journal* 115 (2006): 2350-2379. Former Nixon White House counsel John Dean concludes that the memo is tantamount to evidence of a war crime.

[49] Jack L. Goldsmith, The Terror Presidency: Law and Judgment inside the Bush Administration, (New York: Norton, 2007).

were all acting under intense pressure" in the post 9/11 climate." Others have noted that ultimately the memo caused no long-term legal damage because it was redrafted and is not legally binding, and even John Dean noted that after the memo leaked, "the White House hung Judge Bybee out to dry."[50]

At the very end of the Bush administration Steven G. Bradbury, Principal Deputy Assistant Attorney General, of the OLC stated, that:

> "we have also previously expressed our disagreement with the specific assertions excerpted from the 8/1/02 Interrogation Opinion." The August 1, 2002, memorandum reasoned that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." I disagree with that view and further that The federal prohibition on torture, 18 U.S.C. §§ 2340-2340A, is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President's Commander in Chief authority. The statement to the contrary from the August 1, 2002, memorandum, quoted above, has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find that statement persuasive. The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution.[51]

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[50] Bybee was, however, appointed to a lifetime job as a federal judge. Robert Scheer asked in his column in the *Los Angeles Times* in 2004, "Was it as a reward for such bold legal thinking that only months later Bybee was appointed to one of the top judicial benches in the country?" and then goes on to proclaim, "The Bybee memo is not some oddball exercise in moral relativism but instead provides the most coherent explanation of how this Bush administration came to believe that to assure freedom and security at home and abroad, it should ape the tactics of brutal dictators." An editorial in *The New York Times* on April 19, 2009 said that Bybee is "unfit for a job that requires legal judgment and a respect for the Constitution" and called for Bybee's impeachment from the federal bench. Friends of Bybee have indicated that the jurist privately regrets the controversial memo's inadequacies and growing notoriety. In response to the criticism, Bybee told the *New York Times* his signing of the controversial opinions was "based on our good-faith analysis of the law." In addressing the reports of his regrets, he explained in the same article that he would have done some things differently, like clarifying and sharpening the analysis of some of his answers to help the public better understand the basis for his conclusions in retrospect. In an April 25, 2009 *Washington Post* article, Senate Judiciary Committee Chairman Patrick J. Leahy stated: "If the Bush administration and Mr. Bybee had told the truth, he never would have been confirmed," adding that "the decent and honorable thing for him to do would be to resign [from the U.S. Court of Appeals for the 9th Circuit]". Four days later, Senator Leahy sent a letter to Judge Jay S. Bybee inviting him to testify before the Judiciary Committee in connection with his role in writing legal memoranda authorizing the use of harsh interrogation techniques while serving as the Assistant Attorney General of the Office of Legal Counsel (OLC). Bybee declined to respond to the letter.

[51] *Memorandum Regarding Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001,* 15 January 2009. See also Steven G. Bradbury, *Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001.* United States Department of Justice. (15 January 2009).

Notwithstanding the ultimate legality of the enhanced interrogation or "torture" employed by CIA and others during the Bush administration are some very real questions as to whether such methods are in fact torture; whether they have actually yielded any operational intelligence; and at what cost to the nation and its international standing. While clearly objectionable by most standards, the methods discussed have been viewed by many as "torture light" as compared to torture satanic employed by other nations.[52]

The question as to whether such techniques actually yield actionable intelligence is still a matter of ongoing debate. Cheney continues to maintain that these practices did in fact yield highly useful intelligence and were of great benefit to the nation. Others familiar with the specific interrogation cases disagree. Indeed, most experts agree that torture seldom yields accurate, actionable intelligence, and those subjected to various levels of "enhanced interrogation" simply provide information that is inaccurate or useless to alleviate their situation.[53] It remains a task for future historians to resolve this question fully when the necessary materials become available for study.

A final question here is whether the U.S. appears to have abandoned its own Constitutional concepts, including a fundamental respect for human dignity by engaging in such practices. Does the U.S. have some special provenance to make its own rules, not tainted by Old World conventions and treaties? Indeed, has the U.S. given up the moral high ground for nothing? Some here argue that in the post-9/11 era the debate is one between a New Reality vs. Old Morality. In the Global War on Terror the nation is waging a real war against concealed fanatics who travel the globe at will, and are capable of mass killing without warning. This is a newly vulnerable, porous world. This vision holds that "due process is for sissies" and that human rights fetishist are fighting the last war. Old rules are now quaint.

A Human Rights counter-vision sees Abu Gharib and Guantanamo as outposts in a global American gulag where the innocent and guilty alike illegally detained and tortured, and where little or no useful intelligence is gained from such treatment. Here the U.S. is seen as squandering moral capital for trash, and torture is viewed as the refuge of the stupid and lazy. Real intelligence services don't use torture. Rather they learn their captives' language and culture and interrogate people with patience,

[52] In reviewing these methods, Defense Secretary Donald Rumsfeld commented on the method of "prolonged standing" as less time than he spent standing each day, and that he was well over 70 years old. It should also be noted that the memos authorized not only the use of these techniques individually, but all of them together, which could produce a far different effect than any single one. There is also the issue that some practices, however humiliating and degrading, should not be categorized as torture.

[53] Israel, for example, where torture of prisoners was allowable under Israeli law for some time, found that these techniques were largely useless and more often than not yielded false or useless information.

respect and often tea and cookies.[54] Under the Bush administration the U.S. turned against civilized opinion since Aristotle; it abandoned the Geneva Conventions the 1994 Anti-torture law and a century of progress toward basic human rights, compromising the ideals of freedom and democracy and became a pariah state where any Muslim was fair game for torture.[55]

Domestic Surveillance Programs

Throughout the Cold War the vast majority of all useful intelligence came from technical intelligence collection programs, largely signals intelligence or "SIGINT" where the intercept of foreign communications provided the basis for attack warning and analysis of potential adversaries. Enabling statutes for the National Security Agency, CIA, and other federal agencies strictly prohibited and constrained the intercept of both "domestic" communications as well as any "U.S. persons" wherever they were located.[56] In the immediate post-9/11 environment it was obvious that both the legal environment of the Cold War era was inadequate for the current threat to the homeland, and also that the technology environment had radically changed, with vast increases in international communications using cell phones, the Internet and other modern advances. The U.S. moved from what may be viewed as a 1930s model of

[54] See Anat Berko, *The Path to Paradise The Inner World of Suicide Bombers and Their Dispatchers,* (New York: Praeger Publishers, 2007).

[55] Also important, but not discussed here are various Special access programs (SAPs) in set up within the Department of Defense and authorized by Presidential finding in late 2001. Under these highly classified programs clandestine team of Special forces and others were able to defy diplomacy and international law. With the existence of the programs hidden in DoD and their details known only to a very few (< 200), the initial targets were "high value" *al Qaeda* targets. These teams were authorized to capture or assassinate, if necessary, and operate anywhere in the world. Secret interrogation centers set up in allied countries, with harsh treatment of prisoners, and were largely unconstrained by legal limits or public disclosure. The rules were "grab whom you must, do what you want." The most authoritative history of these operations is contained in Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Gharib,* (New York: HarperCollins, 2004).

[56] See here Abraham R. Wagner (ed.), *Domestic Intelligence: Needs and Strategies,* (Santa Monica: Center for Advanced Studies on Terrorism and The RAND Corporation, June 2009). NSA's electronic surveillance operations are governed primarily by four legal sources, namely Fourth Amendment to the U.S. Constitution; the Foreign Intelligence Surveillance Act of 1978 (FISA); Executive Order 12333; and United States Signals Intelligence Directive 18 (1976), reissued and superseded in 1993. Additional regulations of U.S. surveillance and investigations of U.S. persons are contained in Department of Defense Regulation 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons,* and Department of Justice, *Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations*. A pre-9/11 analysis of this issue was provided by NSA to the Congress, as *Legal Standards for the Intelligence Community in Conducting Electronic Surveillance* (February 2000), available at: http://www.fas.org/irp/nsa/standards.html.

telecommunications, with landlines linked with identified parties to cellular systems and hybrid devices, not tied to any identified user.

At the same time, legal authorization for domestic collection was tied to Title III of the 1968 federal statute – a law now four decades old and a multitude of technology generations out of date.[57] Similarly the 1978 Foreign Intelligence Surveillance Act (FISA), which bears on national foreign intelligence collection, with domestic implications, was also out of date and largely unworkable in the modern environment.[58] For the next seven years the Bush administration approached this problem by fiat, largely ignoring existing statutes as well as the Congressional oversight committees for intelligence and justice.

Shortly after 9/11 the National Security Agency (NSA) implemented an electronic surveillance program named the Terrorist Surveillance Program (TSP) as part of a broader surveillance program conducted under the overall umbrella of the Global War on Terrorism in an effort to intercept *al Qaeda* communications overseas where at least one party was not a U.S. person.[59] The controversy which arose following disclosure of the highly secret program in the *New York Times* in late 2005 concerns surveillance of persons within the U.S. incident to the collection of foreign intelligence by NSA which was authorized by executive order to monitor phone calls, e-mails, Internet activity, text messaging, and other communication

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[57]Omnibus Crime Control and Safe Streets Act of 1968, PL 90-351, 82 Stat., 18 U.S.C. §§ 2510 *et. Seq.* It is important to note that the role of the traditional "telecoms" expanded greatly to commercial Internet Service Providers (ISPs); cable system operators; and others that maintain massive file systems and offer various forms of communications services. In meeting evolving domestic surveillance requirements the cooperation of these commercial enterprises was essential to key government programs. At the same time, the Government has failed to provide such firms with the protection they need from potential lawsuits. How such firms will be treated in a new technical and legal regime remains a critical question.

[58] Foreign Intelligence Surveillance Act (FISA), PL 95-511, Title I, 92 Stat. 1976 (1978), 50 U.S.C. §§ 1801 *et. seq*.

[59]It was later disclosed that some of the intercepts included communications were "purely domestic" in nature, igniting the NSA warrantless surveillance controversy. The technical details of the program are still classified, and it is unknown how many domestic communications were intercepted. See James Risen and Eric Lichtblau, "Spying Program Snared U.S. Calls." *New York Times* (December 21, 2005), p. 1. Because the technical specifics of the program have not been disclosed, it is unclear if the program is in fact subject to FISA. The next day Bush gave an eight-minute television address during which he addressed the wiretap story directly, stating "I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to *al Qaeda* and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks." Bush implied he had approved the tracing of domestic calls originating or terminating overseas, stating the program would "make it more likely that killers like these 9/11 hijackers will be identified and located in time.'" He forcefully defended his actions as "crucial to our national security" and claimed that the American people expected him to "do everything in my power, under our laws and Constitution, to protect them and their civil liberties" as long as there was a 'continuing threat' from *al Qaeda*."

involving any party believed by the NSA to be outside the U.S., even if the other end of the communication lies within the U.S., without warrants.

While the exact scope of the program has not been revealed, NSA was provided total, unsupervised access to all fiber-optic communications going between some of the nation's major telecommunication companies' major interconnect locations, including phone conversations, email, web browsing, and corporate private network traffic. A large number of critics and legal scholars have held that such "domestic" intercepts require authorization under FISA, while the Bush administration maintained that the authorized intercepts are not domestic but rather foreign intelligence integral to the conduct of war and that the warrant requirements of FISA were implicitly superseded by the subsequent passage of the Authorization for Use of Military Force Against Terrorists (AUMF).[60] It was further claimed that this program operated without the judicial oversight mandated by FISA and legal challenges to the program are still undergoing judicial review.

A few days after the *New York Times* disclosure Attorney General Alberto Gonzales stated that the program authorizes warrantless intercepts where the government "has a reasonable basis to conclude that one party to the communication is a member of *al Qaeda*, affiliated with *al Qaeda*, or a member of an organization affiliated with *al Qaeda*, or working in support of *al Qaeda*" and that one party to the conversation is "outside of the United States."[61] This revelation raised immediate concern among elected officials, civil right activists, and legal scholars about the legality and constitutionality of the program and the potential for abuse. Subsequently the controversy expanded to include the press's role in exposing a highly classified program, the role and responsibility of Congress in its executive oversight function and the scope and extent of Presidential powers under Article II of the Constitution.

President Bush stated that he reviewed and reauthorized the program approximately every 45 days since it was implemented and that the leadership of the Intelligence Committees of both the House and Senate were briefed a number of times since initiation of the program. They were not, however, allowed to

[60] FISA makes it illegal to intentionally engage in electronic surveillance under appearance of an official act or to disclose or use information obtained by electronic surveillance under appearance of an official act knowing that it was not authorized by statute. In addition, the federal Wiretap Act (18 USC §119) prohibits any person from illegally intercepting, disclosing, using or divulging phone calls or electronic communications.

[61] The White House, "Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence" (December 19, 2005).

make notes or confer with others to determine the legal ramifications, or even to mention the existence of the program to the full membership of the Intelligence Committees.[62]

When the classified details of the program were leaked to the press, its legality was immediately called into question, with the crux of the debate being twofold. First, were the parameters of this program subject to FISA; and secondly, if so, did the President have authority, inherent or otherwise, to bypass FISA?

Since FISA explicitly covers "electronic surveillance for foreign intelligence information" performed within the United States, and there is no Court decision supporting the theory that the President's constitutional authority allows him to override statutory law. This was emphasized by 14 constitutional law scholars, including the dean of Yale Law School and the former deans of Stanford Law School and the University of Chicago Law School:

> "The argument that conduct undertaken by the Commander in Chief that has some relevance to 'engaging the enemy' is immune from congressional regulation finds no support in, and is directly contradicted by, both case law and historical precedent. *Every* time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute. No precedent holds that the President, when acting as Commander in Chief, is free to disregard an Act of Congress, much less a *criminal statute* enacted by Congress, that was designed specifically to restrain the President as such. [Emphasis in the original.][63]

The 2005 disclosure of the program brought forth a number of challenges in federal court. In August 2006, U.S. District Judge Anna Diggs Taylor in Michigan initially ruled the TSP program unconstitutional and illegal.[64] On appeal, the decision was overturned on the procedural grounds that the ACLU lacked the standing to bring the suit, and the lawsuit was dismissed without addressing the merits of the claims, although one further challenge is still pending in the courts.[65] In January 2007, Attorney

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[62] The Bush administration refused to identify to the public which members of the Congressional intelligence oversight committees were briefed, but claimed that it provided a complete list of these members to the Senate Select Committee on Intelligence (SSCI).

[63] Letter to Congress regarding FISA and NSA, fourteen constitutional law scholars, February 2, 2006, p. 5.

[64] *American Civil Liberties Union v. NSA*, 06-CV-10204 (2006). On February 19, 2008, the Supreme Court, without comment, turned down an appeal from the American Civil Liberties Union, letting stand the earlier decision dismissing the case.

[65] In August 2007, the United States Court of Appeals for the Ninth Circuit heard arguments in two lawsuits challenging the surveillance program, which were the first to reach the court after dozens of civil suits against the government and telecommunications companies over NSA surveillance were consolidated before the

General Gonzales informed Senate leaders by letter that the program would not be reauthorized by the president, but would be subjected to judicial oversight. "Any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."

If there were in fact ongoing abuses of executive power in this area, they did not entirely end with the termination of the Bush presidency. In January 2009, the new administration of President Barack Obama adopted the same position as his predecessor, claiming that the state secret privilege entitled them to engage in warrantless intercept and monitoring, when it urged the Court to set aside a ruling in *Al-Haramain Islamic Foundation, et al. v. Obama, et al*.[66] In March 2010 the federal district court ruled against the Obama Administration in this matter, consolidated with others, and held that the State Secrets Privilege did not "trump FISA" and permit the Government to engage in warrantless electronic surveillance of suspected terrorists.[67] The Obama administration also sided with the prior Bush administration in its legal defense of July 2008 legislation that immunized the nation's telecommunications companies from lawsuits accusing them of complicity in the eavesdropping program, according to testimony by Attorney General Eric Holder.

The constitutional debate surrounding Bush's authorization of warrantless surveillance is principally about separation of powers, and if no "fair reading" of FISA can be found in satisfaction of the canon of

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United States District Court for the Northern District of California. One of the cases is a class action against AT&T, focusing on allegations that the company provided the NSA with its customers' phone and Internet communications for a vast data-mining operation. Plaintiffs in the second case are the al-Haramain Foundation Islamic charity and two of its lawyers. See *al-Haramain Islamic Foundation v. Bush*, CV-07-00109 (2007). Here the Court ruled that that the charity could not introduce a key piece of evidence in its case (a classified document inadvertently obtained) because it fell under the government's claim of state secrets, although the judges said that "In light of extensive government disclosures, the government is hard-pressed to sustain its claim that the very subject matter of the litigation is a state secret." *Ibid.* Also in September 2008, the Electronic Frontier Foundation (EFF), an Internet-privacy advocacy group, filed a new lawsuit against the NSA, President George W. Bush, Vice President Dick Cheney, Cheney's chief of staff David Addington, former Attorney General and White House Counsel Alberto Gonzales and other government agencies and individuals who ordered or participated in the warrantless surveillance. They sued on behalf of AT&T customers to seek redress for what the EFF alleges to be an illegal, unconstitutional, and ongoing dragnet surveillance of their communications and communications records.

[66] *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp 2d 1215 (D Or 2006). Pursuant to Fed. R. Civ. P. 25(d), President Obama is substituted in his official capacity as a defendant in this case.

[67] *In Re: National Security Agency Telecommunications Records Litigation*, MDL Docket No. 06-1791. The decision and order by federal Chief Judge Vaughn Walker specifically pertains to the *Al-Haramain Islamic Foundation v. Obama* case, Case No. 07-0109. All federal cases with regard to the TSP were consolidated in the Ninth Circuit under the MDL Docket Number M 06-1791, and are also referenced by their individual docket number. As of yet it is not clear whether the Government will appeal this district court decision.

avoidance, these issues will have to be decided by the U.S. Appellate Courts, where the burden of proof is placed upon the Congress to establish its supremacy in the matter: the Executive branch enjoying the presumption of authority until an Appellate Court rules against it.

Article I of the Constitution vests Congress with the sole authority "To make Rules for the Government and Regulation of the land and naval Forces" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Supreme Court has used "the necessary and proper" clause of Article I to affirm broad Congressional authority to legislate as it sees fit in the domestic arena but has limited its application in the arena of foreign affairs.[68]

Article II of the Constitution vests the President with power as "Commander in Chief of the Army and Navy of the United States," and requires that he "shall take Care that the Laws be faithfully executed." The Court has historically used Article II to justify wide deference to the President in the arena of foreign affairs. Here the situation is one of dealing not only with an authority vested in the President by an exertion of legislative power, but also with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress, but which must be exercised in subordination to the applicable provisions of the Constitution. The extent of the President's power as Commander-in-Chief has never been fully defined, and continues to be a matter of both scholarly debate and legal challenge.[69] Whether "proper exercise" of war powers includes authority to regulate the gathering of foreign intelligence, which in other rulings has been recognized as "fundamentally incident to the waging of war," is a historical point of contention between the Executive and Legislative branches.[70]

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[68] See *United States v. Curtis-Wright Export Corp*., 299 U.S. 304 (1936). Justice Sutherland writes in his opinion of the Court: The ["powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs"] are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. See also Dawn E. Johnson, "What's a President to Do – Interpreting the Constitution in the Wake of Bush Administration Abuses," 88 *B.U. L. Rev.* 395 (2008).

[69]Two U.S. Supreme Court cases are considered seminal in this area, including *Youngstown Sheet and Tube Co. v. Sawyer, Supra,* and *United States v. Curtis-Wright Export Corp, Supra.* See also, Johnson*, Op. Cit., and* Yoo*, Crisis and Command, Op. Cit.*

[70] See Congressional Research Service, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information." This excellent review of the history of intelligence collection and

The 1978 passage of the Foreign Intelligence Surveillance Act (FISA) and the inclusion of such exclusivity language reflects Congress's view of its authority to limit the President's use of any inherent constitutional authority with respect to warrantless electronic surveillance to gather foreign intelligence, at least where there is a "U.S. person" involved in at least one end of the conversation.[71] It is, however, important that the passage of FISA not be considered out of context. The mid-1970s saw the disclosure of a highly-classified study of Intelligence Community abuses going back several decades, entitled the "Family Jewels," which led to not only a major Congressional investigation by the Church Committee, but major changes in intelligence organization and oversight.[72] FISA was but one piece of a much larger change in intelligence operations, and was undertaken not only as a protection of individual rights, but in actuality as an effort to protect U.S. communications companies cooperating with the Intelligence Community.[73]

Application of the Fourth Amendment to Constitution to electronic surveillance has had a varied history. Neither the Constitution nor the Bill of Rights makes any mention of intelligence at all, and at the time of the Constitution's adoption in 1787 electronic communications did not even exist.[74] The Fourth Amendment does guard against "unreasonable" searches and seizures by agents of the government, and, for "reasonable" searches or seizures requires a court order (warrant). It is solely a right of the individual

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its regulation by Congress suggests that the two political branches have never quite achieved a meeting of the minds regarding their respective powers. Presidents have long contended that the ability to conduct surveillance for intelligence purposes is a purely executive function, and have tended to make broad assertions of authority while resisting efforts on the part of Congress or the courts to impose restrictions. Congress has asserted itself with respect to domestic surveillance, but has largely left matters involving overseas surveillance to executive self-regulation, subject to congressional oversight and willingness to provide funds.

[71] The Senate Judiciary Committee articulated its view with respect to congressional power to tailor the President's use of an inherent constitutional power, noting that "The basis for this legislation [FISA] is the understanding — concurred in by the Attorney General — that even if the President has an "inherent" constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance."

[72] *Memorandum for: Executive Secretary, CIA Management Committee, Subject: "Family Jewels"* (16 May 1973), available at: http://www.foia.cia.gov/docs/DOC_0001451843/0001451843.pdf.

[73] A leading force in the drafting of FISA was then Vice Admiral B.R. Inman (USN), then Director of the National Security Agency. While one might see NSA as the last place that would want FISA, Inman wanted it to protect the process and give legal "cover" to critical resources at AT&T and elsewhere. See Wagner (2009), *op. cit.*

[74] At the time of adoption of the Constitution and Bill of Rights (1787) these communications technologies were not even on the horizon. Morse invented the telegraph in 1838, but it did not come into widespread use until after the Civil War. Bell's telephone came much later in the 19th Century, and did not see broad use until after World War I. The Internet, which began as DoD's ARPANET, was commissioned in 1989, and its explosive growth has been a most recent phenomenon. See Abraham R. Wagner, "Technology and National Security" (New York: Columbia University, December 2009).

that neither the Executive nor Legislative branch can lawfully abrogate, not even if acting in concert: no statute can make neither an unreasonable search reasonable, nor a reasonable search unreasonable.[75]

The law countenances searches without warrant as "reasonable" in numerous circumstances, among them “the persons, property, and papers of individuals crossing the border of the United States and those of paroled felons; in prisons, public schools and government offices; and of international mail.” Although these are undertaken as a result of statute or Executive order, they should not be seen as deriving their legitimacy from these, rather, the Fourth Amendment explicitly allows reasonable searches, and the government has instituted some of these as public policy.

Whether or not communications intercept was a violation of privacy rights did not even reach the Supreme Court until 1928 when the Court held in *Olmstead v. United States* that warrantless wiretapping and electronic intercept did not violate the Fourth Amendment protections against unreasonable search. The *Olmstead* decision was not reversed until 1967 when the Court held in *Katz v. United States* that the monitoring and recording of private conversations within the U.S. constitutes a "search" for Fourth Amendment purposes, and therefore the government must generally obtain a warrant before undertaking such domestic wiretapping.[76] It is also possible to view the Court’s decision in *Katz* as a refutation of the argument that executive power has steadily increased.[77]

The protection of "private conversations" has been held to apply only to conversations where the participants have both a desire as well as a reasonable expectation that the conversation is private and that no party whatsoever is listening in. In the absence of such a reasonable expectation, the Fourth Amendment does not apply, and surveillance without warrant does not violate it. Privacy is clearly not a

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[75] The term "unreasonable" is deliberately imprecise but connotes the sense that there is a rational basis for the search and that it is not an excessive imposition upon the individual given the motivation for and circumstances of the search, and is in accordance with customary societal norms. It is conceived that a judge will be sufficiently distanced from the authorities seeking a warrant that he can render an impartial decision unaffected by any prejudices or improper motivations they may harbor. An individual who believes that his Fourth Amendment rights have been violated by an unreasonable search or seizure may file a civil suit for monetary compensation and to seek a court-ordered end to a pattern or practice of such unlawful activities by government authorities. Such civil rights violations are sometimes punishable by state or federal law. Evidence obtained in an unlawful search or seizure is generally inadmissible in a criminal trial.

[76] *Olmstead v. United States*, 277 U.S. 438 (1928), and *Katz v. United States*, 389 U.S. 347 (1967).

[77] A number of legal scholars view *Olmstead* as a bad decision, and point to the dissent in that case by Justice Brandeis as a more sensible approach, later adopted in *Katz*. It is also worth noting that *Katz* came at a time of significant social turmoil in the U.S., and federal surveillance of protestors and “agitators” was a matter of great national concern. Following Katz the Congress enacted the 1968 Omnibus Crime Control and Safe Streets Act of 1968, PL 90-351, 82 Stat., 18 U.S.C. §§ 2510 *et. seq.*, and under Title III of this act warrants were now required for electronic surveillance in cases not involving national security, outside of the U.S.

reasonable expectation in communications to persons in the many countries whose governments openly intercept electronic communications, and is of dubious reasonability in countries against which the U.S. is waging war. The law also recognizes a distinction between domestic surveillance taking place within U.S. borders and foreign surveillance of non-U.S. persons either in the U.S. or abroad.[78] The U.S. Supreme Court has never ruled on the constitutionality of warrantless searches targeting foreign powers or their agents within the U.S., although they have been several circuit court rulings upholding the constitutionality of such warrantless searches.[79]

Legal scholars are still divided on the issue of the constitutionality of such warrantless searches. Harold Koh, State Department Legal Adviser and former Yale Law School Dean, and Suzanne Spaulding, former general counsel for the Senate Select Committee on Intelligence, contend that FISA clearly makes the wiretapping illegal and subject to the criminal penalties of FISA, in seeming disagreement with the FISA Court of Review.[80] Professor John Eastman, of Chapman University, concluded in one study that under the Constitution, as well as both historical and Supreme Court precedent, "the President clearly has the authority to conduct surveillance of enemy communications in time of war and of the communications to and from those he reasonably believes are affiliated with our enemies. Moreover, it should go without saying that such activities are a fundamental incident of war."[81] While not in the realm of actual intercept,

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[78] In *United States v. Verdugo-Urquidez* 494 U.S. 259 (1990), the Supreme Court reaffirmed the principle that the Constitution does not extend protection to non-U.S. persons located outside of the United States, so no warrant would be required to engage in even physical searches of non-U.S. citizens abroad.

[79] In *USA v. Osama bin Laden*, the Second Circuit noted that "no court, prior to FISA, that was faced with the choice, imposed a warrant requirement for foreign intelligence searches undertaken within the United States." In his written response to questions from the House Judiciary Committee Assistant Attorney General William Moschella explained that in the Bush administration's view, this unanimity of pre-FISA Circuit Court decisions vindicates their argument that warrantless foreign-intelligence surveillance authority existed prior to FISA and since, as these ruling indicate, that authority derives from the Executive's inherent Article II powers, they may not be encroached by statute. In 2002, the United States Foreign Intelligence Surveillance Court of Review (Court of Review) met for the first time and issued an opinion (*In Re Sealed Case No. 02-001*) which seems to echo that view, noting that all Federal courts of appeal having looked at the issue had concluded that there was constitutional power for the president to conduct warrantless foreign intelligence surveillance. Furthermore, based on these rulings it "took for granted such power exits" and ruled that under this presumption, "FISA could not encroach on the president's constitutional power." Other legal scholars have argued that the part of *In Re Sealed Case* that dealt with FISA (rather than the Fourth Amendment) was nonbinding *obiter dicta* and that the argument does not restrict Congress's power to regulate the executive in general. President Bush's former Assistant Deputy Attorney General for national security issues, David Kris, and five former FISA Court judges, one of whom resigned in protest, have also voiced their doubts as to the legality of a program bypassing FISA.

[80] Wagner (2009), *Op. cit.*

[81] John Eastman, "NSA Eastman Letter," Report to the House Judiciary Committee (January 27, 2006). Orin S. Kerr of The George Washington University Law School points to an analogy between the NSA intercepts

concerns have also been raised about the possible contribution of data-mining efforts to the counter-terrorism problem.[82] It remains an open issue as to exactly what role such programs can play in the domestic intelligence arena, and what concerns they raise for privacy and related legal issues.

In the current threat and technology environment the distinction between traditional national foreign intelligence and domestic intelligence continue to blur, particularly where modern communications and information systems are involved. The legal regime is several generations behind the technology, and in many cases no longer makes sense. As a practical matter the nation has invested in a costly and effective set of resources which need to serve the broad set of national requirements. New legislation and regulations must reflect modern and rapidly changing technology, responding to the reality of current terrorist threats, and at the same time balancing privacy, civil liberties, and the rule of law.

Final Thoughts about Presidential Power

Faced with the reality of the 9/11 attacks, a major intelligence failure, and great uncertainty about future threats on the U.S. homeland the Bush administration took a series of measures beginning in September 2001 in the name of national and "homeland" security. These included military actions in Afghanistan and Iraq, as well as number of measures they believed would both mitigate the threat from terrorists and provide badly needed actionable intelligence. In doing so Bush and his administration used executive power which exceeded constitutional bounds in several cases. In several areas the Supreme

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and searches allowed by the Fourth Amendment under the border search exception which permits searches at the border of the U.S. "or its functional equivalent." (*United States v. Montoya De Hernandez,* 473 U.S. 531, 538 (1985)). The idea here is that as a sovereign nation the U.S. has a right to inspect thing entering or exiting the country as a way of protecting its sovereign interests, and that the Fourth Amendment permits such searches. Courts have applied the border search exception in cases of computers and hard drives authorizing the government to search a computer for contraband or other prohibited items at the airport or wherever you are entering or leaving the country. See, e.g., *United States v. Ickes,* 393 F.3d 501 (4th Cir. 2005). Further, in *United States v. Ramsey* 431 U.S. 606 (1977) the Court that the border search exception applies to all international postal mail, permitting all international postal mail to be searched. It is also important to distinguish between the core NSA surveillance program which targeted actual communications; the data mining program; and. the use of National Security Letters. Each continues to present serious legal problems despite the government's efforts to bring them within the relevant statutes.

[82]Large-scale data mining efforts such as that initiated by the Defense Advanced Research Projects Agency (DARPA) established "Total Information Awareness Program (TIA)" in January 2002, which brought significant criticism from the press and various civil rights groups. The name of the program was changed on the "Terrorism Awareness Program" in May 2003, but DARPA funding of the program was terminated by the 2004 Defense Appropriations Act, Signed in October 2003. Elements of the TIA program were subsequently moved to other federal agencies.

Court has already ruled that actions were beyond those permitted under the Constitution and applicable statute, and some aspects of domestic surveillance operations are still before the federal courts.

Certainly this was not the first time the president went beyond constitutional limits in a time of crisis, and there can be no guarantee that it will be the last. The republic and the constitution have survived intact, and the nation is not sliding into a great constitutional abyss where American core values have been damaged beyond repair as some of most severe critical have held. The new administration of President Obama and a new Congress with a Democratic majority have moved to enact legislation that will enable a future president to achieve critical national security objectives more effectively within constitutional bounds, while actions are also under way to resolve the matters of detainees still held at Guantanamo and elsewhere. Clearly President Obama has approached these matters far differently than candidate Obama, and it remains to be seen when and how these matters will ultimately be resolved.

In the case of the Bush administration it is important to note the relative transparency of the actions taken, and the speed with which the courts and others dealt with the problem. Many of the actions involved highly classified programs; secret prisons; and covert activities known only to a very few within the Government. The speed with which such programs were revealed in the media almost defies imagination. Newspaper and other modern media forced the Bush administration, the Congress and the courts to deal with these transgressions more quickly than anyone might have imagined only a few years earlier. If nothing else, future presidents will know that breaking the law and abusing the Constitution cannot be done in secret for long, if at all. Forced transparency and enhanced oversight will certainly act to constrain abuses in the future, even if they cannot be eliminated forever.

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