Presidential Power, Bush and the War on Terror

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2/8/2008

MA Thesis – Copenhagen Business School – English and American Studies – Supervisor: Niels Bjerre Poulsen

Præsidentmagt, Bush og Krigen mod Terror

Når man snakker om George W. Bush og præsidentmagt i USA, omtales han som en 'imperialistisk præsident'. Udtrykket dækker over en række af præsidenter, fra Franklin D. Roosevelt til Richard Nixon, hvis stab forøgedes kraftigt i forhold til tidligere. De fik en masse undersåtter, om man vil. Men betegnelsen bruges også mere negativt om Nixons præsidentembede, hvor han nærmest regerede som en monark, uden respekt for loven og dirigerede sine undersåtter til at udføre sabotage og politisk spionage mod sine modstandere.

Det siges om præsident Bush at han genopliver den imperialistiske præsident, altså Nixon udgaven. Bush bliver sammenlignet med Nixon idet han gennem sine otte år som præsident har ekspanderet sin magt betydeligt med udsæt i den særlige titel en præsident får når USA er i væbnede konflikter, som øverstbefalende for de amerikanske væbnede styrker. Denne titel trådte i kraft efter 11. september 2001 og titlen aktiverer en række krisebeføjelser som bevirker at præsidenten kan agere med større frihed, idet han skal beskytte nationen.

Bush beskyldes for at have ekspanderet sin magt i overdreven stil i krigen mod terror. Ved hjælp fra specielt en mand ved navn John Yoo, en jurist fra kontoret for juridisk bistand i justitsministeriet, har Bush fået udarbejdet en række juridiske memoranda der på det nærmeste har fjernet alle juridiske bånd fra ham.

Afhandlingen vurderer hvorvidt Bush har forøget sin magt i uhørt grad og hvorvidt der i så fald vil være basis for at føre en rigsretssag mod ham.

Spørgsmålet er blevet forsøgt svaret ved gennemgang af de tilgængelige juridiske memoranda samt anden relevant litteratur.

Bush har forsøgt at oprette en lovløs zone på Guantanamo basen hvor det amerikanske retssystem ikke har jurisdiktion. Derudover har han besluttet jævnførende sine krigsbeføjelser, at al Qaeda- og Talibanfanger ikke er dækkede af Geneve konventionerne. Han har også oprettet et militærtribunalsystem til at dømme disse fanger. Bush regeringens underliggende tanke er at benytte Guantanamo til efterretningscenter, hvor der udvindes brugbare efterretninger til brug i krigen mod terror. Forhørsteknikkerne er derfor blevet opgraderet med metoder der ligger på grænsen til tortur. Disse er dog blevet lovliggjorte af Yoo gennem juridiskes memoranda.

Den amerikanske højesteret har kendt flere af ovenstående tiltag på Guantanamo for ulovlige, og derigennem har Bush fået begrænset sin magt. George W. Bush kunne i teorien blive stillet for en rigsret for f.eks. ikke at have udført sine forfatningsmæssige pligter. Om der i teorien er basis for en rigsretssag mod Bush er ikke så relevant da Bush snart er fortid som amerikansk præsident.

Contents

Introduction

Many scholars have suggested that under President George W. Bush, the United States has seen the return of the 'Imperial Presidency'. Power has indeed flowed to the president, but he is a war-time president. Traditionally, presidents are more powerful in times of national emergency. So is this extraordinary in terms of history?

It is no secret that Bush and his Vice President Dick Cheney wished to strengthen the executive branch. Cheney related in interview in 2002 that he and Bush had talked about wanting to "pass on our offices in better shape than we found them to our successors" (WH News 2002).

Critics charge, however, that Bush has used the War on Terror to expand his power unnaturally and to use these powers to violate human and civil rights in the name of protecting America.

In the 1970's, another war-time president would at the previous pinnacle of presidential power claim that right to do criminal deeds. President Richard Nixon would leave the White House in disgrace facing a looming impeachment trial.

This begs the question:

Research Question: Has the perceived usurpation of presidential power by the Bush administration been extraordinary in the history of the presidency, and has the use of said executive power been unconstitutional?

Structure and Delimitation

This thesis will be divided into three overall parts. The first part will examine the historical evolution of presidential power up until the George W. Bush administration, and will particularly look at the founding era and the era of the modern presidency. The second part will examine the George W. Bush administration, and the expansion of presidential power that have occurred during the war on terror. The third part is the conclusion.

Ideally, all controversial assertions of presidential power under George W. Bush would have been examined as well as the role of congress in this matter. The limited nature of the paper, however, dictates that only one area can be meaningfully examined. The area to be examined is the detention and interrogation policy in the war on terror. To me, this is the most intriguing and most controversial of Bush's policies in the war on terror and thus the most interesting to examine. It has, without a doubt, divided people all across the globe and is perhaps the one policy that has had the most negative impact on the standing of the US in the world today.

Methodology

The aim of this thesis is to try to determine the scope of US presidential power and if any unnatural or unlawful expansion of said power has occurred. The nature of the presidency and the aim of the dissertation render it unpractical to answer the research question using a theory of presidential power. It is not that none exists but rather that not a single one is prevalent.

However, there exists two overall, though not comprehensive, theories. One might be termed the *Presidentialist* or *Hamiltonian* theory. This theory advocates that a president has vast inherent powers to act unilaterally, and is only limited by what the Constitution explicitly states he can and cannot do. The other might be termed as the *Constitutionalist* or *Madisonian* theory. This theory advances the argument that presidential power is much more limited and the president must defer to the other branches of government. The president only has the power explicitly enumerated in the Constitution. Though neither of these theories is central to the dissertation, they will still be present as the Bush administration generally is associated with the Presidentialist/Hamiltonian theory and criticizers of the administration often are subscribers to the Constitutionalist/Madisonian theory.

Both primary and secondary literature will be used to answer the research question. Primary includes the Federalist Papers and the Pacificus-Helvidius debate, will be used to examine the original intent of the founders when they developed and debated the Constitution. Government memoranda (memos) and other executive branch papers will be used to examine the arguments and intend of the executive branch and executive branch agencies. Supreme Court cases will be reviewed to determine the Supreme Court's stand on different issues, as it determines the law of the land. Acts and bills will be reviewed to determine Congress's convictions on issues.

Secondary literature will include several different books and articles. The historical development of the presidency will be based heavily on political scientists Mathew Crenson and Benjamin Ginsberg's *Presidential Power: Unchecked &Unbalanced*. Due to the secrecy that surrounds the executive branch, especially during the George W. Bush presidency, much of what is known about the deliberations within the executive branch has been reconnected by investigative journalists. Journalist Charlie Savage's *Takeover: the Return of the Imperial Presidency and the Subversion of the American Democracy* and journalist Jane Mayer's *The Dark Side: the inside Story of how the War on Terror Turned into a War on American Ideals* are used for several aspects of the paper, but mostly to highlight views in opposition to the Bush administration policy. Law Professor John Yoo's *War by Other Means: an Insider's Account of the War on Terror* is used to present and defend Bush administration actions and their legal rationale. Lawyer Joseph Margulies' *Guantanamo and the Abuse of Presidential Power* is used to present the legal opposition to the Bush administration policies.

Other material than the abovementioned will be used, but what has been listed here, is the main literature that the dissertation will be based on. Through the examination of the compiled material, the author will try to answer the research question.

Presidential Power

In their book, *Presidential Power, Unchecked and Unbalanced*, political scientists Matthew Crenson and Benjamin Ginsberg describe how the presidency has expanded since the founding of the United States. Writing about presidents, they suggest that "sometimes even the presidency itself is not big enough for them, and they have repeatedly attempted to expand its powers and increase its political autonomy" (Crenson and Ginsberg 2007: 178).

This situation has its roots at the time of the ratification debate, between the years 1787 and 1789, when the Constitution was finally ratified. Many scholars have pointed to the fact that Article (Art.) I of the Constitution, which establishes the legislative branch, is much more detailed in describing the prerogatives of Congress, than Art. II, which outlines the prerogatives of the executive. Art. I is 2,248 words long as compared to 1,015 words for Art. II (Greg II 2005:14).

During the ratification process, several people who collectively became known as the *anti-federalists,* wrote a series of articles criticizing the Constitution. One of these, writing under the name *Cato*, wrote in Cato IV about this vagueness in the wording of Art. II. Cato pointed out that the "second article, is vague and inexplicit, and leaves the mind in doubt, as to the election of a president and vice-president, after the expiration of the election for the first term of four years" and was concerned that "this inexplicitness perhaps may lead to an establishment for life" (Cato IV). In Cato V he continued to elaborate on this, stating that "I cannot help remarking, that inexplicitness seems to pervade this whole political fabric: certainty in political compacts… has ever been held by a wise and free people as essential to their security." Cato chided the founders for wanting to "precipitate yourselves into a sea of uncertainty, and adopt a system so vague, and which has discarded so many of your valuable rights" (Cato V).

Art. II outlines the executive branch and the executive prerogatives. Despite the few powers it explicitly grants to the president, like designating him Commander in Chief (CiC), it also includes two general but rather vague enumerations: "The executive Power shall be vested in a President of the United States of America" and "he shall take Care that the Laws be faithfully executed" (USConstitution.net).

But what is the scope of the powers inherent in these sentences? Even the founders seemed to disagree. In the *Pacificus* and *Helvidius* letters[1], posted in the written in 1793, Alexander Hamilton and James Madison debated over the scope of presidential power. In Pacificus I, Hamilton, arguing

[1] Also known as the *Pacificus-Helvidius debate*, it had its outset in the controversy surrounding President George Washington's Neutrality Proclamation of 1793 to stay out of a war between Great Britain and France which was seemingly in violation of a treaty between France and the US. This sparked a debate about whether or not the president had the power to interpret or perhaps even cancel a treaty on his own (Frisch 2007).

for expansive executive power, asserted that “the second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America'”. He pointed out that though the Constitution did outline a number of specific powers granted to the president, “it would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations.” In other words, though some specific powers and restrictions had been placed with the executive branch, it did not restrict the possibly expansive powers of the general, unspecified ‘executive power’. The reason for this, stated Hamilton, was due to the “difficulty of a complete enumeration of all the cases of executive authority,” which “would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used.” As Hamilton pointed out, it would be difficult to specify all the powers a president might at some point need, so it was more convenient to grant him general powers (Pacificus I).

Furthermore, he observed the difference in the wording which granted prerogatives to the legislative and executive branches. The vesting clause in Art. I states that “all legislative powers herein granted shall be vested in a congress of the United States” whereas the vesting clause in Art. II states that “'the executive power shall be vested in a President of the United States.” According to Hamilton, “the enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument.'' What Hamilton stressed was that while Congress had been vested with the specific powers “herein granted” in the Constitution, the President had been vested with all the powers implied in ‘executive power’, which was only limited by the “exceptions and qualifications” outlined by the Constitution. In addition, argued Hamilton, the sentence “take care that the laws be faithfully executed” makes the president “the constitutional Executor of the laws.” Therefore, “he who is to execute the laws must first judge for himself of their meaning.” The president, in other words, in order to execute the laws must be the one to construe their meaning (Pacificus I).

James Madison, though, was not of the same conviction. In Helvidius I, he outlined views that was contrary to those of Alexander Hamilton. Madison believed that Hamilton’s view of executive power would amount to the executive having legislative powers. He pointed out that the “natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws.” To think that a president had any legislative power, for instance to determine the meaning and application of a treaty which in essence is a law, was in theory “an absurdity – in practice a tyranny” (Helvidius I). In Helvidius II, Madison observed that “were it once established that the

powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature may be claimed by the executive: if granted, are to be taken *strictly,* with a residuary right in the executive; or, as will hereafter appear, perhaps claimed as a concurrent right by the executive… no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative" (Helvidius II). Madison pointed out that this excessive view of what was inherent in 'executive power' that Hamilton championed was very disturbing because it would be difficult to understand what powers exactly the president possessed.

It is evident that even after the ratification of the Constitution there were different opinions as to the extent of the powers of the executive. The vagueness of Art. II, though, was most likely there by design. According to political scientist Morton J. Frisch, the Constitution "was left uncompleted in 1789, for it needed additional making or doing." The founders could not decide on the limits of the Constitution, and the likes of Hamilton, Madison and Thomas Jefferson would try to shape the Constitution during the early years of the nation through discussions and debate to find the right balance. Frisch points out that "it can be reasonably inferred from the language of the Constitution that the president receives an undefined, nonenumerated reservoir of power from the clause of Art. II containing the general grant of executive power over and above the powers expressed or specifically enumerated in that article."However, the reasoning behind this is that the essential defects of constitutions are inflexibility. In the case of the US Constitution, the strength was that "whatever defects adhere to what is committed to writing are made up for… by the open-endedness that its leading draftsmen worked into its overall design." Therefore "we have no difficulty in recognizing… that much of the meaning of the Constitution would come through inference or construction" (Frisch 2007).

Another reason for the vagueness of Art. II was, according to professor of public policy Mark J. Rozell, that the nation's first president was presumed to be George Washington. He was deemed perfect to 'fill in the blanks' left in the Constitution and was well aware that the actions he took would create precedents for future presidents. Though he showed restraint in asserting his powers, he did not shy away from expanding presidential power on several fronts, and as such the struggle for power between the legislative and executive branches already had its beginnings in the early years of the Union (Greg II 2005:41-45).

As a result, presidents ever since the founding of the nation has to a varying degree contributed to the development of the executive branch by creating precedents for future presidents to follow. This, along with the numerous precedents-creating Supreme Court decisions and the actions of Congress, has molded the presidency into the establishment we know today.

Towards the Imperial President

By the 20th century, presidents began to look for ways to govern unilaterally, in essence striving to make the president 'imperial'.

Crenson and Ginsberg argue that since Franklin D. Roosevelt, presidents have sought to enhance the presidency by expanding on four fronts. First off, they have tried to expand the reach, size and power of the Executive Office of the President (EOP)[2]. Through the EOP and its staff, presidents have tried to enhance the presidency in three other ways. Firstly, they have sought to enhance presidential influence over Congress. Secondly, they have established and extended White House control over the federal bureaucracy. Third off, the EOP staff has helped expand the "sphere of direct presidential governance through executive orders, the regulatory process, and a variety of other devices invented in the cause of unilateral, presidential policymaking". This has resulted in a substantial gain of political autonomy for the White House. Therefore, the president can create and execute executive policy without consulting Congress or act according to public opinion. This is often done when the president can't win congressional approval or public support for his policy objectives (Crenson and Ginsberg 2007: 178-179).

As mentioned above, the president has acquired a series of tools that enables him to govern without consulting legislators. Below is an outline of some of the most important ones.

Executive orders: Executive orders (EO's) have been an important part of the president's tools since the early years of the US. Several important policies have been enacted by EO's, like the emancipation of slaves, and the creation of agencies like the *Food and Drug Administration* is rooted in an EO. In times of war, presidents have relied on EO's to advance their objectives, something both Abraham Lincoln did during the American Civil War and Roosevelt did during WWII. Though EO's were mostly used in times of war, contemporary presidents have begun using them extensively in peacetime as well (Id.: 194-195).

What's more, EO's have given birth to a whole line of other directives that in essence has the same legal bindings as an EO. Amongst these are for instance executive agreements, national security directives and signing statements. Such tools have enabled the president to govern unilaterally. In the realm of foreign policy, executive agreements have virtually replaced treaties as the main foreign policy instrument, thus circumventing Congress' constitutionally granted authority in these matters (Id.: 195).

Though EO's may seem to give far reaching powers to the president, they must be grounded in authority granted by the Constitution or federal statute which each EO usually specifies. Yet, there

[2] EOP "consists of a group of federal agencies immediately serving the president" (EOP 2007). It was created by President Roosevelt in 1939 in accordance with the advice of the Brownlow Committee, and includes such offices as the Office of the Vice President and the Homeland Security Council.

are examples where EO's have been struck down in court. The prime example is *Youngstown Co. v. Sawyer*, in which the Supreme Court ruled that President Harry Truman's takeover of the nation's steel mills during the Korean War was unconstitutional[3] (Id.: 196).

Still, limits on EO's by law leaves substantial latitude for a president's use of these. The courts, in many if not most instances sides with the president, especially in matters of national security. Federal judges have also held that Congress approve or ratifies presidential action through 'acquiescence', that is keeping quiet, or by approving funding for programs enacted by an EO. Congress could overturn an EO by enacting a statute to negate it, but would require a two thirds majority to overwrite a possible presidential veto. Also, Congress has to fine read any EO to determine which powers may lurk within it, as EO's are not governed by the Administrative Procedure Act of 1946 (APA)[4], and as such the president is not required to give advance notice or hold public hearings about it (Id.: 196-97).

Signing statements: Signing statements is an instrument that is used as the legislative process draws to a close and the president must decide whether or not to concur with Congress. Presidents use it to draw attention to a part of a bill that they consider improper or unconstitutional, though he accepts the bill in general and does not want to veto it.

By the 1980's, Ronald Reagan's administration began to look for ways to refine the use of signing statements. Led by Attorney General Edward Meese and Justice Department lawyer Samuel Alito[5], they toyed with the idea of using signing statements to create legislative intend reflecting the views of the executive branch. According to Meese, a signing statement could be drafted in a way that would direct executive agencies to act according to the president's interpretation of a bill. Signing statements are very controversial, and presidents have at times construed sections of bills to mean the opposite of Congress' original intent. Some argue that it lets the president veto a bill, or parts of it, without giving Congress the possibility of overwriting the veto (Id.: 197-199).

The aggressive use of signing statements was seemingly spurred on by some of the young conservative lawyers in the Reagan administration who saw signing statements as way to enhance presidential influence over the law. In memo dated August 23, 1985, Justice Department lawyers John Harrison and Steven Calabresi recommended an increased and more visible use of signing statements to counter the legislative power of "activist courts, ideologically motivated congressional staffers and lobbying groups", and to make sure that courts considered signing

[3] This case would turn out to be one of the key decisions effecting future presidential power struggles between the branches of government.

[4] APA is a set of guidelines determining the process of rule making. For instance, one aspect of APA is to "provide for public participation in the rule making process" (APA Manual).

[5] Now a Supreme Court Justice

statements as legislative history in the same way as congressional reports are (Alito Papers: 8). Edward Meese liked the idea, and requested West Publishing Company to include signing statements in the *U.S. Code Congressional and Administration News*[6] "as part of the legislative history of the Act of Congress," so that "lawyers and courts engaged in statutory interpretation would have more readily available to them in one location both the procedural history of any given statute and its interpretation by the Chief Executive upon enactment."The request was accepted (Id.: 4, 6-7).

Meanwhile, other memos on this subject were being developed in the Office of Legal Counsel[7]. One, written by Ralph Tarr[8] dated October 28 1985, outlined several benefits by expanding the use of signing statements. First of all, it would give the president an additional bargaining tool, as the threat of issuing a signing statement could be used to negotiate concessions from Congress. In addition, signing statements could be "used to tell agencies how to interpret a statute. The President can direct agencies to ignore unconstitutional provisions or to read provisions in a way that eliminates constitutional or policy problems." Lastly, the memo pointed out that signing statements were "underutilized and could become far more important as a tool of Presidential management of the agencies, a device for preserving issues of importance in the ongoing struggle for power with Congress, and an aid to statutory interpretation for the courts" (Id.: 14,18-19).

Another memo, written by Samuel Alito dated February 5 1986, suggested that frequent use of signing statements could "increase the power of the Executive to shape the law." However, Alito pointed out that "our new type of signing statement will not be warmly welcomed by Congress. The novelty of the procedure and the potential increase of presidential power are two factors that may account for this anticipated reaction." Furthermore, "Congress is likely to resent the fact that the President will get in the last word on questions of interpretation" (Alito Memo 1986:2).

Though the idea of getting courts to accept signing statements as legislative history has not been very successful, the theories outlined in the Tarr memo began taking root. Signing statements became a tool whereby Reagan could instruct subordinates and agencies in the executive branch how to interpret laws, for instance by declaring certain sections of bills to be unconstitutional and need not be interpreted as written. Though this was not implied in the theory first put forward by Steven Calebresi, he later noted that he had come "to think of them as being important vehicles by which presidents can control subordinates in the executive branch. They subsequently came to be important to the Unitary Executive[9]" (Savage 2007:234).

[6] The standard collection of bills' legislative history.

[7] The Office of Legal Counsel will be discussed later.

[8] At that moment serving as acting head of the Office of Legal Counsel.

[9] Calabresi refers to a theory he himself helped to develop which will be discussed later.

After Reagan left office, presidents continued to use signing statements extensively. Walter Dellinger, head of the Office of Legal Counsel under President Bill Clinton, asserted in a memo dated November 3, 1993, that "the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce… such a provision, can be a valid and reasonable exercise of Presidential authority." Some argue that if a president do not want to accept a bill in its entirety because he finds parts of it unconstitutional, he should use the veto power granted to him by the Constitution and send it back to Congress unsigned. Dellinger rejected this view, arguing that "in light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision" (Dellinger 1993).

Still, the constitutionality of signing statements remains questionable. Since the time of the founding, presidents have several times argued for the creation of a *line-item veto*. A line-item veto closely resembles a signing statement, and is given to most governors in the US handing them the power to veto individual lines in appropriation bills that they find excessive (Greg II: 194-197). In an attempt to help the president curb 'pork-barrel spending'[10], Congress enacted the *Line Item Veto Act of 1996*, which gave the president the right to block certain limited categories of spending within five days of signing a law (LIVA 1996). However, in 1998 the Supreme Court struck down this provision as unconstitutional in the case *Clinton v. City of New York*, stating that a law enacted through the use of a line-item veto "is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, 7, of the Constitution" (Clinton v. City of New York).

George W. Bush has seemingly used signing statements far more aggressively than all other presidents combined. Charlie Savage quotes political science professor Christopher Kelly for stating that all presidents before Bush have used signing statements to challenge around 600 provisions of bills combined (Savage 2007:130). Bush, though, have according to the website *Presidential Signing Statements* challenged over 1,100 provisions of bills using signing statements (Presidential Signing Statements). A congressional report from 2007 showed that signing statements issued by Bush challenged the constitutionality of laws 78% of the time, substantially more than his immediate predecessors Bill Clinton (18%), George H. W. Bush (47%) and Ronald Reagan (34%). Furthermore, it noted that though the number of bills challenged was not out of the ordinary, 152 by Bush compared with 381 by Clinton, it was the staggering amount of objections, over 1,100, that was out of the ordinary (CSR 2007:2).

[10] This is the funding for 'pet projects' that legislators often slip into bills before they agree to sign them.

Foreign Relations and Security

"The Congress shall have the Power…

To regulate Commerce with foreign Nations

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."

US Constitution, Article 1, Section 8.

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors."

US Constitution, Article 2, Section 2.

(US Constitution.net)

The abovementioned is how the US Constitution deals with the aspect of war and foreign policy. It is clear that the founders intended the power to raise and support armies and not the least to send these to war where to reside within the powers of Congress. The President was to be the Commander in Chief (CiC) of the armed forces. The war powers are an integral part of the foreign policy powers that the founders intended to be shared by the executive and the legislative branches of the government. But in these matters, the Constitution, according to legal historian Edward Corwin, is "an invitation to struggle" for the power to control American foreign policy (Crenson & Ginsberg 2007: 215).

The exact extend of these powers were already a much debated topic during the ratification of the Constitution, as illustrated in the *Federalist Papers*(FPs). The Federalist Papers were written in defense of the Constitution before it was ratified, as opponents started to question different aspects of it in a series of letters and articles. Therefore it offers a unique insight into what is termed 'original intend' of the founders when they drafted the Constitution.

In Federalist 41, James Madison[11] wrote that though the American people may have concerns towards giving power to a central government, it was necessary that they do so to advance the "public happiness" of the nation. However, he did concede that such power bestowed was in danger of being abused. This was why the Constitution must be designed in a way to "guard as effectively against a perversion of the power". In respects to the power to declare war, Madison states that "the existing Confederation establishes this power in the most ample form" (Federalist Papers: No. 41). Madison wrote that the proposed Constitution did offer protection against power abuse in for instance the area of war making.

In Federalist 64, John Jay wrote about the aspect of treaty making. Jay argued that in respects to the negotiation of treaties, "perfect SECRECY and immediate DISPATCH" were sometimes required. Vital "intelligence" may be obtained if "persons possessing it can be relieved from apprehensions of discovery" and these persons would "rely on the secrecy of the President" but not on the secrecy of the Senate or other larger assemblies. The president must make treaties with the advice and consent of Congress, but in forming them he is allowed to "manage the business of intelligence in such a manner as prudence may suggest" (Id.: No. 64). Jay suggested that though the president is obliged to make treaties with the advice and consent of the Senate, he has a lot of individual power in the creation of these and is given an extensive discretion for secrecy.

In Federalist 69, Alexander Hamilton wrote about executive power. In responds to depictions of the executive that compares him to a tyrant or the despised British king, Hamilton argued that the president had less power than the king of England. In respects to the president's powers as CiC, Hamilton argued that though they may seem similar to those of the king, "they are in substance much inferior to it". The president is merely the supreme commander of the military, but does not have the power to declare war or raise and regulate armies and navies like the king, as such powers reside with Congress (Id.: No. 69). Hamilton thus underlined the separation of powers between being CiC and having the ability to take the nation to war.

In Federalist 70a, Hamilton wrote about the decision to create the executive as a position for one person instead of having for instance an executive counsel of several persons. Hamilton argued that "Energy in the Executive is a leading character in the definition of good government", as it is "essential to the protection of the community against foreign attacks". He suggested that the definition of energy is "unity", "duration", "an adequate provision for its support" and "competent powers". Discussing unity, Hamilton described it as placing executive power with one person, as "decision, activity, secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number". Reflecting further on energy, he stated that "in the conduct of war, in which the energy of the Executive is the bulwark

[11] Under the pseudonym Publius which all the FPs were signed with

of the national security" having more persons (what he calls a plurality in the executive) making executive decisions would decrease effectiveness. "But one of the weightiest objections to a plurality in the Executive" wrote Hamilton, is that it can "conceal faults and destroy responsibility". Having one executive was the best way of confining executive power, as it will be more difficult to abuse that power when there is a "single object for the jealousy and watchfulness of the people" (Id.: No. 70a).

As noted above, first president George Washington was also the first president to expand executive power, especially in the realm of foreign policy. He had several clashes with Congress over foreign policy, for instance the previously touched upon Neutrality Act of 1793.

In the aforementioned Pacificus-Helvidius debate, Alexander Hamilton and James Madison also debated the relation between the branches of government in the area of foreign policy. Hamilton argued that "the Legislative Department is not the *organ* of intercourse between the UStates and foreign Nations. It is charged neither with *making* nor *interpreting* Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers." Furthermore, "it is equally obvious that the act in question is foreign to the Judiciary Department of the Government… It is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases … It has no concern with pronouncing upon the external political relations of Treaties between Government and Government." Hamilton thus concluded that "it must then of necessity belong to the Executive Department to exercise the function in Question—when a proper case for the exercise of it occurs. It appears to be connected with that department in various capacities, as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government—as that Power, which is charged with the Execution of the Laws, of which Treaties form a part." As such, the president could act in accordance with his judgment of the national interest and set in motion actions not approved by Congress, and Hamilton argued this enabled the president's to negotiate a treaty to keep the US neutral in a war. Though he acknowledged that "the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War", the president may at times set in motion events in foreign policy that "may consequentially affect the proper or improper exercise of the Power of the Legislature to declare war" (Pacificus I).

Madison, on the other hand, defended the right of Congress to have a role in foreign policy and that Congress should be the sole determiner in the case of whether or not to go to war. Madison pointed out in Helvidius I that "if we consult for a moment, the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws." With respects to war making powers, Madison stressed that "it is not in any respect, an act merely executive," because it is "one of the

most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war." Madison acknowledged that "the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war," but it was obvious that "if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim."Therefore, the power of declaring war was "expressly vested in the Congress, where every other legislative power is declared to be vested... The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature." The reasoning for placing the power to declare war in the legislative branch, while designating the executive the commander in chief was simple: "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued,* or *concluded.*" This, according to Madison, was due to a "great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws" (Helvidius 1).

In Helvidius II, Madison elaborated further on the prospect of both the legislative and the executive branch having seemingly equal authority in foreign affairs and war making. Madison suggested that "a concurrent authority in two independent departments, to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory." He pointed out that "if the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen… that they will judge differently." A situation might arrive, where "the executive… may determine that the United States are not bound to take part in a war, and... proclaim that determination to all the world. To-morrow, the legislature … may determine that the obligations impose war on the United States, and… enter into a *constitutional declaration,* expressly contradicting the *constitutional proclamation.*" Madison asked in what light it would present the US to the world if it was speaking "thro' two different organs," in "two opposite languages, on the same subject and under the same existing circumstances?" He finally concluded the executive must execute any laws, in this case meaning treaties which essentially becomes the *law of the land*, and "leave it to the legislature to decide whether they ought to be altered or not" (Helvidius II).

Indeed, finding the equilibrium power balance in foreign policy and war between Congress and the president has been a prevailing problem throughout the years. As noted by presidential scholar James P. Pfiffner, the challenge the framers faced in creating the Constitution was the dilemma of designing "a government not to weak to act, as under the Articles of Confederation, but one that was not so strong that it would abuse its power. With respects to the chief executive, the office had to be powerful enough to defend the nation and lead the government in times of emergency" However, there was the chance that a too powerful president might abuse this power, especially to win glory for themselves through war. As James Madison once wrote, "it is in war, finally, that

laurels are to be gathered; and it is the executive brow that they are to encircle. The strongest passions and most dangerous weaknesses of the human beast, ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace" (Wadsworth 2008: 204).

This is echoed by John Jay in Federalist 4. Though Federalist 4 primarily focused on the benefits of having *a* United States of America when in need to defend from foreign attacks, Jay offered a unique window into the fears and skepticisms that were at the time of an "absolute monarch" which presumably refers to the British king. Jay wrote that "it need not be observed that there are PRETENDED as well as just causes of war." He argued that "absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people" (Federalist Papers: No 4).

Pfiffner, however, pointed to the fact that though there was a constitutional balance between Congress and the president with respects to the decision to go to war, "it is to be expected that, in times of war, power will flow to the chief executive. There is a need for unified leadership of the country in times of threat, and the president commands the bureaucratic apparatus to wage war." In addition, he pointed out, "Congress has been willing to delegate sweeping powers to the president during wartime as the nation rallies behind the commander in chief" (Wadsworth 2008: 206).

The role of the Judicial Branch

Since the time of George Washington, presidents as noted have used different means, such as executive orders and agreements, to bypass Congress in foreign relations. George W. Bush is just the latest president to adopt this *Hamiltonian* view of the president's foreign policy powers. Should any doubts be raised as to the constitutionality of presidential actions, the judiciary has been called upon to rule in such cases in accordance with the power vested in the judicial branch by the Constitution.

One Supreme Court (SC) case is often cited as affirming the Hamiltonian view. In 1936, in the case *U.S. v. Curtiss-Wright,* the Curtiss-Wright Export Corporation was charged with selling weapons illegally to Bolivia. A Joint Resolution had been enacted in 1934 by Congress giving President Franklin D. Roosevelt the power to stop American companies from selling weapons to the warring parties in an armed conflict in South America. When indicted, Curtiss-Wright challenged the constitutionality of the Joint Resolution, arguing that Congress had unlawfully transferred legislative powers to the Executive Branch. The Supreme Court ruled against Curtiss-Wright and in the written opinion delivered by Justice George Sutherland, the Supreme Court found that the

president was the "sole organ of the federal government in the field of international relations" (US v. Curtiss-Wright 1936).

The question of war powers has been an area of intense contestation for many years. In wartime, Congress has often granted the president enormous powers but has usually taken back what it has given once the war was over. For instance, President Abraham Lincoln took upon himself to take any action necessary to keep the Union intact during the Civil War, for instance suspending *habeas corpus*, many of them taken as Congress was out of session. These were subsequently enacted by Congress as statute, but after the war, Lincoln stated, these powers "would be greatly diminished by the cessation of actual war" (Crenson & Ginsberg 2007: 219,228).

In general, the SC would support the president in his assertion of extraordinary presidential prerogatives during wartime, but in the aftermath of a war it would aid Congress in deflating these powers. One example of this is the *Youngstown Co. v. Sawyer* case. In 1952, during the Korean War, steel workers in the US threatened to strike, thus jeopardizing the war effort. President Harry Truman signed an EO that directed the Secretary of Commerce to seize and operate most of the nation's steel mills. Truman argued that he could do this in his capacity as president "based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander in Chief of the Armed Forces" (Youngstown v. Sawyer 1952).

During both WWI and WW2, Congress had handed this power to the president, but had repealed it afterwards. Though Congress had not commented on the executive order, as such an act of acquiescence, the steel companies nonetheless challenged Truman's right to take over the steel mills (Crenson & Ginsberg 2007: 230). The Supreme Court sided with the steel companies and ruled that the takeover was unconstitutional. Justice Robert H. Jackson, in concurring with the ruling, expressed in his opinion concern that Truman had "invested himself with war powers." He was afraid that such emergency powers would become inherent within the powers of the president, as such power "has no beginning or it has no end. If it exists, it need submit to no legal restraint." To Justice Jackson nothing would seem "more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture" (Youngstown v. Sawyer 1952).

Perhaps the most important precedent established by this ruling, though, is to be found in the simple test developed by Justice Jackson by which a president can determine the scope of his authority, and as such the possible outcome if the judiciary is asked to rule on a presidential act. Justice Jackson divided the level of presidential authority into three overall classifications:

- 1: A president's authority is at its maximum, "when the President acts pursuant to an express or implied authorization of Congress… for it includes all that he possesses in his own right plus

all that Congress can delegate." An act by "the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."

- 2: If a president acts "in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Therefore, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."

- 3: A president's powers is at the lowest ebb, "when the President takes measures incompatible with the expressed or implied will of Congress… for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." A president's "claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

(Youngstown v. Sawyer 1952).

Contemporary Developments in Foreign and Security Policy

Especially in the latter half of the 20th century, the president's foreign relations and war powers expanded, albeit with a few setbacks. *The National Security Act of 1947* centralized military decision making by bringing the War Department and the Navy Department together what into what would later be known as the Department of Defense. It also created the National Security Council (NSC) and the Central Intelligence Agency (CIA) (NSA 1947). This "increased the White House's capacities for foreign policy and security planning, intelligence gathering and evaluation, and covert intelligence operations". Though only an advisory body, the NSC[12] became more important than the State Department with respects to foreign and security policy input, something also evident in George W. Bush's first term, where National Security Adviser Condoleezza Rice often seemed to have more influence than Secretary of State Colin Powell. Rice, though, seems to have retained her influence in her current capacity as Secretary of State (Crenson & Ginsberg 2007: 253-254).

The establishment of a national security bureaucracy within the EOP has enabled the vast post WWII expansion of presidential unilateralism in the realm of security and foreign policy. As mentioned, since Truman, presidents have tended to circumvent Congress in the matter of security and foreign relations by making use of executive agreements and orders. The establishment of the NSC has helped them conduct and administer US foreign and security policy

[12] The NCS consists of persons like the Vice President, the Secretary of State, the Secretary of Defense, the Director of CIA and the Assistant to the President for National Security Affairs also known as the National Security Adviser.

from the oval office. With respects to national security, the president often issues National Security Directives (NSDs), in essence an EO. Most of these are classified and presidents often refuse to discuss their content with Congress or even their existence. The creation of CIA meant that there was another tool for the president in foreign relations and security policy, as it allowed the president to exert "influence" in other nations trough covert operations (Id.:256).Taken together, these new presidential powers seem to be "imperial" in nature.

Presidents have been circumventing Congress' power to declare war many times, especially from the last half of the 20th century and onwards. President Harry Truman was the first president that believed he could engage in full scale war without asking congress. In 1950, North Korea invaded its southern neighbor. Fearing the spread of communism, President Truman decided to take forceful action. He first secured a UN Security Resolution, but instead of getting permission from Congress, he relied exclusively on the UN Resolution and his CiC powers to send American troops to Korea. Truman wanted to establish the precedent that it was the president and not Congress that decided when to go to war. As Congress acquiesced in this case, the principle that the president only asked Congress as a courtesy if it could go to war, was established (Id.: 261-262).

However, the post WWII expansion of presidential power suffered a setback with the collapse of the Richard M. Nixon administration (1969-1974). In response to the leak of the *Pentagon Papers*[13]in the summer of 1971, Nixon ordered the so called White House '*plumbers unit*' to plug the leaks in the administration. They burglarized the office of former defense analyst Daniel Ellsberg, who leaked the papers, later that year. In the summer of 1972, five men were arrested trying to bug the offices of the Democratic National Committee at the Watergate hotel and office complex. One of the persons worked formerly at CIA, and another one was a GOP[14]security aide. It was also discovered that a Nixon reelection campaign contribution was directed to the account of one of the burglars. Though head of the Nixon reelection campaign John Mitchell denied any connection, it was discovered later that year that during Mitchell's former employment as attorney general (AG) in the Nixon administration, he controlled a secret Republican fund to finance intelligence-gathering operations against the Democrats. The FBI investigation into the Watergate break-in concluded that it was part of a massive campaign of political spying and sabotage on behalf of the Nixon reelection effort. Still Nixon won reelection by a landslide. As 1973 progressed, the Nixon administration became increasingly embroiled in the scandal. Former aides were convicted in connection with the Watergate incident, and top White House brass either resigned, including AG Richard Kleindienst, or was fired, like White House Counsel (WHC) John Dean, over the scandal. In May 1973, the Senate Watergate Committee began hearings and

[13] It was a report named *United States–Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense*, and it revealed many incriminating truths about the run-up to, and the prosecution of, the Vietnam War during the Lyndon B. Johnson administration.

[14] *Grand Old Party,* nickname for the Republican Party.

Archibald Cox was designated as the Justice Department's (DoJ) special prosecutor for Watergate. In an interview with Watergate investigators, Dean admitted that he had talked many times with Nixon about covering up Watergate and evidence surface that tied White House staff to the planning of the Ellsberg burglary. It was revealed in the investigation that Nixon recorded all conversations and phone calls in his offices, but Nixon refused to turn over the tapes to both the Senate Watergate Committee and special prosecutor Cox. On October 20, 1973, in what was later called the *Saturday Night Massacre*, Nixon fired Cox and abolished the office of the special prosecutor, prompting his AG and deputy AG to resign stoking the impeachment debate in Congress. Nixon maintained his innocence, but the White House tapes suspiciously showed evidence of tampering. In early 1974, the Nixon White House released over a thousand pages of edited transcript from the tapers, but Congress wanted the tapes themselves to be overturned and in the summer of 1974, the SC ruled that Nixon must do just that. Closely after the ruling, Nixon was indicted on three articles of impeachment, but instead of facing the trial Nixon became the first president to resign and is subsequently pardoned by his predecessor, his former VP Gerald R. Ford (Watergate Timeline).

Nixon claimed the power to use intelligence methods to harass and spy on his political enemies, be it government leakers, political activist or the Democratic Party. Afterwards, he used a wide variety of means, including bribes, to try to cover up his administration's use of dirty tricks. Nixon never believed he had crossed the line and he laid out his views on the presidency in the infamous interview in 1977 with British journalist David Frost:

FROST: *"So what in a sense, you're saying is that there are certain situations… where the president can decide that it's in the best interests of the nation or something, and do something illegal?"*

NIXON: "*Well, when the president does it that means that it is not illegal."*

FROST: *By definition?*

NIXON: *Exactly… If the president, for example, approves something because of the national security… then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position.*

FROST: *"…But, the point is… the dividing line is the president's judgment?"*

NIXON: *"Yes… just so that one does not get the impression, that a president can run amok in this country and get away with it… a president has to come up before the electorate… a president has to get appropriations from the Congress."*

Frost: *"Is the president in that sense—is there anything in the Constitution or the Bill of Rights that suggests the president is that far of a sovereign, that far above the law?"*

NIXON: *"No, there isn't… but I do know this… in war time, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution…"*

(Frost/Nixon Interview 1977)

The Nixon presidency has by many been called the imperial presidency at its apex, and in the aftermath of the Watergate scandal Congress enacted several pieces of legislation to rein in presidential power that had increased from the presidency of Truman, over the presidencies of Dwight D. Eisenhower, John F. Kennedy and Lyndon B. Johnson, before it had seemingly reached its climax with the Nixon presidency. Perhaps the most important one was:

War Powers Act of 1973 (WPA). The WPA was enacted by Congress in an attempt to bring the power to send American troops to war back under the "collective judgment of both the Congress and the President", and it requires the president to "consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances". The act requires the president to alert the leaders of both houses of Congress within 48 hours of the deployment of troops and must explain how and why he was compelled to deploy American forces. Any forces must be withdrawn within 60 days of deployment if Congress does not authorize the president's use of force, a period that can be extended to 90 days in certain circumstances (WPA 1973). However, some point to the fact that the WPA gave power to the president not provided in the constitution by allowing him to deploy force in 60-90 days without Congressional approval.

Other acts were the Case-Zablocki Act of 1972, which requires the president to inform Congress of any executive agreements that the US has entered into (CZA 1972), and the Intelligence Oversight Act of 1980 (IOA), which provides for "congressional oversight of intelligence operations"(Crenson & Ginsberg 2007:264).

Presidents, though, have worked to rid themselves of the restriction passed by Congress in the post Watergate years. President Reagan, for instance, construed IOA simply as authorizing the president to conduct covert operations (Id.:271)

Furthermore, he was the first president to start chipping away at the WPA, as the Reagan White House was determined to remove this restriction on presidential war powers. In several instances he deployed American troops and then dared Congress to force him to comply with the WPA, and Congress always yielded in the end, thus hollowing out the WPA by abandoning the very reason it was created; to rein in presidential war powers. Only the Iran Contra Affair seemed to put a dent in the Reagan White House's attempt at removing this restriction, but that did not prevent the succeeding president George H. W. Bush from picking up the mantle. In the first Gulf War, President George H. W. Bush relied on a UN resolution like Truman had done to order American troops to push Iraq back out of Kuwait, something endorsed by then Defense Secretary Dick

Cheney. Though he did end up getting a congressional authorization, he never believed Congress had a final say in "an executive decision" (Id.:272-274).

President Bill Clinton also disregarded WPA several times, for instance in his use of force in the former Yugoslavia, and by the end of the Clinton administration it was no longer clear what war powers, if any, remained in the hands of Congress (Id.:274).

President Harry Truman was the man who laid the "foundation for presidential supremacy" in the realm of foreign and security policy, which clearly has relegated the role of Congress in these matters as opposed to the "original intend" of the Constitution. Yet, this happened during the Cold War that in essence erased the distinction between war and peace which would traditionally have balanced the power between the branches (handing power to the president in times of war and taking it back in times of peace). Even when Congress reasserted their power in the aftermath of Watergate, it didn't take long for presidents to claw back that power. Furthermore, the president's national security powers have begun to impinge on domestic matters as well. George W. Bush has continued in the same tracks as his predecessors. With the WoT looking as if it could last as long as the Cold War, there is a real possibility that the already substantial powers currently enjoyed by the president in foreign and security policy areas may lead to supremacy for the president in domestic matters as well (Id.:277-278).

Making "the Decider" THE Commander in Chief

There is an important difference to be noted between what is termed a *presidentialist* and what might be termed a *constitutionalist/congressionalist*. When distinguishing between the two, one can look at the views of former presidents Theodor Roosevelt and William Howard Taft.

Roosevelt, serving as president from 1901 to 1909, wrote in his memoirs about his view of the presidency. Roosevelt, sharing the view of Alexander Hamilton, argued that as to a president's powers "it was not only his right but his duty that to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or the laws". Roosevelt believed that a president could take any action unless it was explicitly prohibited by either the Constitution or the laws. He chided other presidents, including Taft, for letting "another branch of the Government" determine "what is seems the especial duty of the President himself to determine" (Gregg 2005: 63-65).

Serving immediately after Roosevelt, Taft held a more *strict-constructionist*, or Madisonian, view of executive powers. In his response to Roosevelt's memoirs, he wrote that the "President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or

justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof". Taft believed that the executive could not perform an action unless it was explicitly allowed by the Constitution or the laws. He was concerned were the view Roosevelt championed might lead. Taft wrote about Roosevelt's view that "ascribing an undefined residuum of power to the President is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right" (Gregg 2005: 67-69).

Bearing VP Dick Cheney's view on presidential power in mind, it is obvious which of the two theories the George W. Bush White House leans towards, and there is much evidence that shows how during the last hundred years, the presidentialist view have been updated and expanded.

Unitary Executive Theory

Traditionally, Republicans have always been opposed to too much power being centralized federally, either economically as in their opposition to big government, or politically as they have a record of opposition against usurpation of power by presidents, though admittedly Nixon was a Republican. Republicans, though, argued that the Watergate scandal was due to personal failings on the part of Nixon and a new generation of conservative activists began toying with the idea that a strong executive with unchecked authority could be a way to forward conservative policies in the face of an otherwise liberal leaning Congress (Savage 2007:44).

Instrumental amongst these activists was a club formed in 1982 called the *Federalist Society* (FS). The FS was created as an opposite to the liberal consensus that dominates American law schools, and its mission is to promote typical conservative ideals within the law. Throughout the years it has grown to include 10,000 students and 30,000 legal professionals and others, forming an impressive conservative network (Fed-Soc: About Us).

Some of the earliest members of the FS were recruited into the DoJ under President Reagan's AG Edward Meese III, and they essentially became "a giant think tank where these passionate young conservative legal activists developed new legal theories to advance the Reagan agenda" (Savage 2007: 45).

One of the most important works of the DoJ think tanks was a report with the title *Separations of Powers: Legislative-Executive Relations*. This report suggested that Reagan should try to regain the powers that the presidentialists believed Congress had unconstitutionally encroached upon. It called for more vetoes, greater use of signing statements and attacks on the constitutionality of the WPA. Furthermore, the report suggested that courts and scholars had for the last 200 years misunderstood the Founders ideas about the *separation of powers* system. Accordingly, the report argued that the real idea behind the separation of powers was to create three cleanly divided, exclusively controlled branches of government. Thus it was wrong when Congress believed it could create independent officials within the executive, as such a check on the president (Id.:47-48).

This highly controversial theory has become known as the *Unitary Executive Theory* (UET). The name hails from Federalist 70a where, as mentioned previously, Alexander Hamilton wrote about a "unitary executive", as opposed to "plurality in the executive". Hamilton argued that good government stems from the "energy" that comes from having a single, or unitary, executive (Federalist Papers: No. 70a). Proponents of the UET construes this as meaning that the executive has most "energy" when run as an exclusive entity.

One man that was very much involved in the development of this theory was co-founder of the FS and Reagan Justice Department lawyer Steven G. Calabresi. He has gone on to write several articles on the subject. In one such article[15], Calabresi and his co-writer Kevin H. Rhodes, in a very complex theoretic analysis of the phrasing of Art. II and III in the Constitution, concluded that the "text and structure of Article II compel the conclusion that the President retains supervisory control over all officers exercising executive power" (Harvard Law Review 1992:1215). This supports the UET in the claims that Congress cannot place independent officials in the executive branch.

In another article[16], Calabresi and co-writer Saikrishna B. Prakash, elaborates further on the UET. In the article, they write the following: "does Article II's vesting of the President with all of the "executive Power" give him control over all federal governmental powers that are neither legislative nor judicial? The answer is unambiguously *yes*" (Yale Law Journal 1994:568-569). Calabresi and Prakash back this up by concluding that "since the President's grant of "the executive power" is exclusive, Congress may not create other entities independent of the President and let them exercise his "executive Power" (Yale Law Journal 1994:664).

In 1988, the Reagan administration challenged the constitutionality of a provision of the Ethics in Government Act under the UET, a momentous test of this theory. The Ethics in Government Act of 1978 (EGA) was established in response to the Watergate scandal, and was created to oversee whether high level officials were corrupt or otherwise acted illegally. Amongst other things, EGA established the Special Prosecutor Act or the Independent Counsel Act (ICA), as it would later be known. The ICA allowed for the creation in times of need of an independent counsel, a prosecutor, to investigate wrongdoings by high level officials. The independent counsel was appointed by a special panel of the US Court of Appeals for the D.C. Circuit, and could not be dismissed by the president (ICA 1978). Precisely because the president could not dismiss the independent counsel, though the counsel worked within the executive branch, the White House lawyers believed that it was in violation of the UET.

[15] *Constitution: Unitary Executive, Plural Judiciary*

[16] *The President's Power to Execute the Laws*

The SC thought otherwise. In the case *Morrison v. Olson*, it was established that the "Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch." In dissenting, though, Justice Antonin Scalia made a strong case in defense of the UET. He argued that the IPA "substantially affect the balance of powers" and that "all purely executive power must be under the control of the President", because the Constitution says that "the executive Power shall be vested in a President of the United States" (Morrison v. Olson 1988).

The Iran-Contra Affair

The UET was not the only idea developed by the right wing presidentialists in the 1980's. One other idea was the result of two 'hawks' getting acquainted during the Iran-Contra scandal: Dick Cheney and David Addington (Savage 2007: 54).

In the early years of the 1980's, the US had become embroiled in a conflict in Nicaragua, supporting the Contras in their fight against the Soviet backed Sandinistas. When Congress discovered that the US, through CIA, had helped the Contras with military assistance, they passed the Boland Amendment. This was in fact a series of amendments to appropriation bills in the early to mid 1980's to "prohibit covert assistance for military operations in Nicaragua" (Boland 1984). To circumvent this amendment and to gain the release of US hostages from Hezbollah in Lebanon, US officials devised a scheme to sell military equipment to Iran and then direct some of the proceeds to the Contras in Nicaragua. However, the scheme was uncovered by a Lebanese weekly and Congress enacted the Iran-Contra committee to look into the allegations. Though President Reagan at first denied the accusations, they proved to be right and Reagan in a nationally televised speech uttered the famous word: "A few months ago I told the American people I did not trade arms for hostages. My heart and my best intentions still tell me that's true, but the facts and the evidence tell me it is not" (Reagan 1987).

There were 26 members of the committee, and 18 signed the majority report, which established that the Iran-Contra operation's setup "was an evasion of the Constitution's most basic check on Executive action – the power of the Congress to grant or deny funding for Government programs" (Iran-Contra 1987: 4-5). The report also found that the "common ingredients of the Iran and Contra policies were secrecy, deception and disdain for the law" and pointed out that this "cabal of zealots" who ran the operation "viewed the law not as setting boundaries for their actions, but raising impediments to their goals. When the goals and the law collided, the law gave way" (Iran-Contra 1987: 11, 18, 22).

But the eight dissenting members, headed by future VP Dick Cheney, thought otherwise and wrote a minority report influenced by views developed by Addington. Cheney and his co-writers asserted that "judgment about the Iran-Contra Affair ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy. There were many statements during the public hearings, for example, about the rule of law. But the fundamental law of the land is the Constitution. Unconstitutional statutes violate the rule of law just as much as do willful violations

of constitutional statutes. It is essential, therefore, to frame any discussion of what happened with the proper analysis of the constitutional allocation of legislative and executive power in foreign affairs." The minority report suggested that the executive stayed within the laws in this case, as the constitution designates him "as the sole organ of foreign policy" and argued that Congress had unconstitutionally encroached upon the executive's powers, for instance by enacting the Boland Amendment. Furthermore, the minority report indicated that the "guerilla warfare" between Congress and the president over powers was the only real concern in the Iran-Contra Affair, as the minority report found nothing outright illegal had been done. Congress was encouraged to "restore the Presidency to the position it held just a few administrations ago," and the report also suggested the creation of the line-item veto (Iran-Contra 1987: 449). In addition, the minority report recommended that secrecy around national security information should be tightened, so that leaks of information could be deterred. This could be done by combining the House and Senate intelligence committees into a *Joint Intelligence Committee*, thus resulting in fewer people in the "intelligence loop". In addition, the report suggested that intelligence committee members should take an oath affirming they would not disclose information and would be subject to strict penalties if they did. Also, strengthening of existing sanctions where encouraged (Iran-Contra 1987: 438, 584-585).

This report was written in 1987, but in 2005 as reporters where questioning the president's authority to order NSA to wiretap without warrants, VP Dick Cheney instructed reporters to look up the minority report in the Iran-Contra Affair as backing for the current administration's authority (WH News 2005). Interestingly, most of the theories and recommendations expressed in the report seem in one way or another to have become policy in the George W. Bush administration.

The War on Terror – the Expansion of Presidential Power

The WoT set in motion by the tragic events of 9/11, would provide the Bush White House with the perfect opportunity to reclaim the power that they believed had been wrongfully embezzled from the presidency. Virtually all of the legal work to expand the powers of the president originated not from WHC Gonzales or AG John Ashcroft, but from the DoJ's Office of Legal Counsel (OLC).

OLC

The role of the OLC is "to assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for

providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. All Executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval" (USDOJ:OLC).

According to the US Code[17](U.S.C.), the president can seek advice in legal matters from the AG. As stated above, the OLC was created to assist the AG, pursuant to his authority, in advising not only the president but also executive departments like the Department of Defense (DoD) (US Code: Chapter 31).

Some call the OLC the "President's law firm" (Yoo 2006: 19). "If OLC interprets the law in a certain way…the government must too "(Mayer 2008:65). No doubt, it is a powerful office.

The OLC draft memos with legal advice, and it is seldom that these are disclosed to the public as the AG, and through him obviously the president, can decide whether or not to release them. These advisory opinions become the binding interpretation of the law and the entire executive branch must follow these. In effect, the OLC is an internal SC within the executive branch. However, only the head[18] of the OLC, requires Senate confirmation; the other attorneys are political appointees. The duty of the OLC is to tell the president and executive branch official what they cannot do, but in reality they can also absolve executive branch officials and the president of wrongdoings because if the OLC deems something to be lawful, officials can take actions based on this interpretation without the fear of prosecution (Savage 2007: 77).

During the beginning of the Bush presidency, however, there was no head of the OLC, so the course of the legal approach in the days after 9/11 was left in the hands Deputy Assistant Attorney General of the OLC John Yoo. It was not until December 2001 that the new head of the OLC Jay Bybee was confirmed. Yoo, however, remained the person who wrote virtually all legal memos concerning national security and the WoT until his departure in 2003. National security matters are often shrouded in secrecy, and as such very few people were privy to the contents of these memos (Id.: 79-80).

Yoo is a presidentialist, according to himself, because he and his family were saved from the shackles of communism by Truman, who took the US to war against North Korea without congressional approval. He is very much influenced by Alexander Hamilton, whom he holds in high regard (Yoo 2006: xii). In 1996 he wrote a controversial article[19] arguing that "Congress was given a role in war-making decisions not by the Declare War Clause, but by its powers over funding and

[17] US laws

[18] The Assistant Attorney General in charge of the Office of Legal Counsel

[19] *The Continuation of Politics by Other Means: The Original Understanding of War Powers*

impeachment" (California Law Review 1996: 170). In other words, the president can do whatever he wants in his capacity as CiC. The only way for Congress to check him is by cutting off funding or by impeaching him. Critics of this theory might suggest that cutting of funding is a weak check as congress will abstain from this not to "give the impression they are leaving American troops at the front defenseless". However, Yoo states that "a congressional decision not to exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution" (California Law Review 1996: 299).

Detaining Prisoners in the War on Terror

"Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated…

Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success."

President George W. Bush September 20, 2001 (WH News 2001)

"We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful."

Vice President Dick Cheney on Meet the Press September 16, 2001 (VP News 2001)

It didn't take long for the Bush administration to decide on a course of action after the September 11, 2001 terrorist attacks. Obviously, there was a sense in the US that the casualties of the terrorist attack and the attack itself needed to be avenged. But there was also this sense of urgency in the White House, where phrases like *second wave*, the *ticking time bomb scenario* and the infamous *mushroom cloud on the horizon* were repeated over and over, and something had to be done to prevent that from happening. As it quickly became evident that al Qaeda and Osama bin Laden was behind the attacks, and that the Taliban ruled Afghanistan was their base of operation, a military attack on the country in some form seemed inevitable. But as noted above, it was also clear from the very start that the intelligence agencies[20] would come to have a paramount role in the prosecution of the looming War on Terror.

As early as September 16 2001, Vice President (VP) Dick Cheney discussed the avenues of response that the White House would be taking. The sentiment in the administration seemed to be that this was a new kind of threat, *a new paradigm* as they called it, and that maybe the

[20] CIA, FBI, NSA, etc.

current laws where inadequate to fight this war. On *Meet the Press*, the now deceased former host Tim Russert and Dick Cheney had the following exchange:

RUSSERT: *"There have been restrictions placed on the United States intelligence gathering, reluctance to use unsavory characters, those who violated human rights, to assist in intelligence gathering. Will we lift some of those restrictions?"*

CHENEY*: "Oh, I think so. I think the--one of the by-products, if you will, of this tragic set of circumstances is that we'll see a very thorough sort of reassessment of how we operate and the kinds of people we deal with. There's--if you're going to deal only with sort of officially approved, certified good guys, you're not going to find out what the bad guys are doing. You need to be able to penetrate these organizations. You need to have on the payroll some very unsavory characters if, in fact, you're going to be able to learn all that needs to be learned in order to forestall these kinds of activities. It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission" (VP News 2001).*

It is evident that plans were brewing to take actions that would be very controversial and would challenge US laws. Reports indicate that Bush and Chaney believed that the terrorists "had struck at the United States because they saw the country as soft." Apparently, there was "too much international law, too many civil liberties, too many constrains on the President's war powers, too many rights for defendants, and too many rules against lethal covert actions" to effectively protect the country against terrorist attacks (Mayer 2008:7) In the following months the Bush administration would unveil several initiatives, including the intention to try terrorist suspects in military tribunals, designating the naval base at Guantanamo Bay as a detention facility and declaring that these prisoners would not be protected by the Geneva Conventions (Margulies 2007: 7-8). In order for this to be legal, the OLC had some heavy legal lifting to do.

There were some people, though, who objected to this view. Lawyers for instance came out in defense of the detainees, mainly on the principle that the government should abide by the laws of the land in the prosecution of the WoT. One such person was lawyer Joseph Margulies. Should the government be given a blanket check authorizing their actions, he feared SC Justice Louis Brandies' remarks from his dissenting opinion in *Olmstead v. U.S.*[21]would come true. Brandeis asserted that "if the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to

[21] This case asserted that the government could wiretap without a court order. It was later overturned in *Katz v. United States*.

secure the conviction of a private criminal-would bring terrible retribution" (Olmstead v. U.S 1928).

While the White House began to churn out a legal strategy to 'untie the hands' of the intelligence agencies and make other initiatives legal, often in secret, a group of lawyers together with other more or less likely allies would begin to string together a series of challenges to the expansion of presidential power that would occur following the 9/11 attacks. This would turn into a protracted legal battle that is still raging as the George W. Bush presidency draws to a close.

The War on Terror

The President is authorized 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 (H.J. Res. 64).

On September 14, 2001, President Bush received authorization from Congress for the use of military force against al Qaeda. Support in Congress was overwhelming; the Senate voted 98-0 and the House voted 420-1. However, in the days and hours leading up to the signing of the joint resolution (H.J. Res. 64*)*, intense negotiation of the wording between the White House and Congress took place. Former Senate majority leader Tom Daschle elaborated on this in a Washington Post article in 2005. The White House tried on the evening of September 12 to include the wording that the president could use military force to "deter and pre-empt any future acts of terrorism or aggression against the United States" to the resolution and on September 14, minutes before the resolution went up for the final vote, the White House again tried to change the wording pushing for "in the United States and" to be inserted after "appropriate force"[22]. Congress, however, believed this would constitute a virtually unlimited authority, and "a strong bipartisan majority could not agree to the administration's request for an unprecedented grant of authority" (Daschle 2005).

The wording of H.J. Res. 64, as seen above, leaves the president with a fairly wide authority to prosecute the war on terror and to designate the enemy. Yet there were still limits and the Bush administration wanted to remove those. The inclusion of "in the United States and" would have given the Bush administration the ability to wage the WoT within the US, with all that would entail, like potentially giving the president the authority to designate American citizens as *enemy combatants* (Mayer 2008: 45). However, the White House was not so easily deterred and immediately after September 14 the OLC began crafting legal memos to obtain the powers that

[22] Thus making the line *….all necessary and appropriate force in the United States and against those nations…*

the White House in their opinion required to win the WoT. John Yoo would look to some of his old theories to help to achieve this.

Bush's War Powers

In a memo[23]dated September 25, 2001, Yoo aggressively asserted the president's powers in the war on terror. In the subheading Yoo stated that "the President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11," which substantially expanded the authority granted by Congress. According to the memo, the president already had the power to "deter and preempt" future attacks that it had sought placed in the joint resolution, and that this was rooted in the Constitution, the WPA and the H.J. Res. 64. (OLC Memo Sep. 25 2001).

Though he had acknowledged that the WPA was part of what gave the president the aforementioned war powers, Yoo, further down in the memo, construed the restrictions placed in the WPA, which presidents had always believed encroached on their powers, as being unconstitutional.

As he had written about before his stint at the OLC, Yoo believed that many scholars misinterpreted the relationship between Congress and the Executive with respects to war. Yoo stated that the original intend by the framers was to place war making with the president. Accordingly, an earlier draft of the Constitution placed war making with Congress, but the framers rejected this version, instead placing the power to declare war with Congress. Consequently, the power to make war must then be placed with the Executive. Yoo suggested that the power to declare war holds no real authority, as the power of declaring war only was "necessary to "perfect" a conflict under international law." Had the framers intended the powers the other way around, several contemporary state constitutions already placed the power of war making under the control of the legislative branch of the state, and as such the framers "knew how to write such provisions." This was seemingly supported by Alexander Hamilton's federalist 70, which as seen above argued for unity in the Executive (Id.). Yoo also cited Hamilton in Federalist 74, were he asserted that "of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority" (Federalist Papers: No. 74).

In addition, Yoo cited the constitutional structure as securing "all federal executive power in the President to ensure a unity in purpose and energy in action" because "any ambiguities in the

[23] *The President's Constitutional Authority to Conduct Military Operations against Terrorists and the Nations supporting them*

allocation of a power that is executive in nature - such as the power to conduct military hostilities - must be resolved in favor of the executive branch". The reason for this is that Art. II of the Constitution provides that "the executive Power shall be vested in the President of the United States," whereas Art. I only gives Congress the powers "herein granted." This difference in language, according to Yoo, suggested that "Congress's legislative powers are limited to the list enumerated in Article I, section 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution." Moreover, Yoo argued that because it has long been established that "the president is not only the Commander-in-Chief but the guiding organ in the conduct of our foreign affairs", granting war powers to another branch "could prevent the President from exercising his core constitutional responsibilities in foreign affairs" (OLC Memo Sep. 25 2001).

That the president became CiC and could introduce US forces into hostilities following the 9/11 attacks seem very clear, as the WPA states that these powers "are exercised pursuant to… a national emergency created by attack upon the United States, its territories or possessions, or its armed forces" (WPA 1973). Though Yoo invoked the WPA as making the president the CiC, at the same time, as noted earlier, he argued that the WPA had no limiting principle on the president's ability to make war, but "must be construed simply as a recognition of, and support for, the President's pre-existing constitutional authority." In the memo, Yoo concluded that "in light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President's constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks… Force can be used… to prevent and deter future assaults… The Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas… Neither statute[24], however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make" (Id.).

However, additional power was seemingly slipped into the memo in footnote 32. In that footnote, Yoo declared that "we of course understand that terrorist organizations and their state sponsors operate by secrecy and concealment, and that it is correspondingly difficult to establish, by the standards of criminal law or even lower legal standards, that particular individuals or groups have been or may be implicated in attacks on the United States. Moreover, even when evidence sufficient to establish involvement is available to the President, it may be impossible for him to

[24] WPA or H.J. Res. 64.

disclose that evidence without compromising classified methods and sources, and so damaging the security of the United States… But we do not think that the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the President from taking such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable" (OLC Memo Sep. 25 2001).

The sum of this memo was really to give the Bush administration the *carte blanche* it had sought from Congress but been denied on September 14, 2001. Not only did the memo suggest that the White House need no authority from Congress to initiate the war on terror, it also asserted that Bush as CiC was basically free to do whatever he wanted, wherever he wanted, including using force on groups and nations with no discernible link to the terrorist attacks, even inside the US. Furthermore, the president need not present any evidence in any trials to justify any actions taken in his role as CiC, and even if he has the evidence he need not disclose it because it could damage national security. On October 9, 2001, Bush was already acting pursuant to this "new" authority. In a letter to congress informing them of the newly begun war in Afghanistan, Bush remarked "I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations as Commander in Chief and Chief Executive" (Bush Letter 10/9).

Classifying Enemies of the US in the War on Terror

Classifying the enemies in the WoT would prove a task in itself. In his book *War by Other Means*, John Yoo outlined how the OLC, who were given the task, would solve this problem. It was quickly established that the US was now in a state of war, which as a result would put the US at a war footing and designate the president the CiC. The reasoning was that the 9/11 attacks had been coordinated to strike at critical buildings in the financial and national capitals in the US: New York and Washington. Yoo pointed out that the terrorists "in some ways had conventional military objectives – to decapitate America's political, military, and economic headquarters." Furthermore, they succeeded in wreaking more devastation and killing more people than the last time the US was caught unawares, by the Pearl Harbor attack in WWII. As Yoo asked, would the US not had gone on a war footing if KGB agents had done the same thing during the Cold War? Why should there be any difference between a terrorist organization like al-Qaeda (AQ) and a nation state in this respect? (Yoo 2006: 3-4). It was later affirmed in the *Hamdi v. Rumsfeld* SC Case that the US was in fact in a state of war.

Being in a state of war with AQ had its benefits. According to Yoo, this would mean the US could employ its war powers to "kill enemy operatives and their leaders, detain them without trial until the end of the conflict, interrogate them without lawyers or Miranda protections, and try them without civilian juries". These were necessary, argued Yoo, to fight an enemy at the world stage

that ”while not a nation, can inflict violence at a level once only in the hands of nations” (Yoo 2006:2).

Were the Bush administration seemed to have no difficulty in comparing AQ to a nation state when determining if the terrorist attacks constituted an act of war, the same was not the case when classifying AQ fighters. In effect, the OLC turned its argument on the head. AQ was *not* a nation state but a “stateless terrorist organization that can attack with the power of a nation” (Yoo 2006: 22).

The Laws of War – The Hague and Geneva Conventions

Two conventions have come to outline the conduct that countries are expected follow in times of war – *The Hague* and the *Geneva Conventions*. The Hague Conventions deals more generally with the conduct of a war, outlining in *The Hague Law* how combatants are to behave in warfare and prohibits the use of certain remedies and actions in war, while also outlining the commencement and cessation of war[25]. The Geneva Conventions (GCs) are divided into four conventions and deals with the humanitarian aspect of war, such as the treatment of the wounded on land (GC I) and sea (GC II), treatment of prisoners of war (POWs) (GC III) and of civilians (GC IV). In this connection, it is GC III that is of most interest.194 countries, including the US, Afghanistan and Iraq, have ratified the GCs (GC Ratifications).

GC III[26] Part I, establishes that the GCs should be respected “in all circumstances” by the high contracting parties, and shall “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Though “one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof” (Avalon GC: GC III, Art 1-2).

Article 3, also known as Common Article 3 because it is present in all four GCs, establishes that “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by… detention… shall in all circumstances be treated humanely” The following acts are explicitly prohibited regardless of any circumstances: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture… Outrages upon personal dignity, in particular, humiliating and degrading treatment; the passing of sentences and the carrying out of executions without

[25] For additional info, see http://avalon.law.yale.edu/subject_menus/lawwar.asp

[26] Also known as the *POW Convention*.

previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (Avalon GC: GCIII, Art 3).

Furthermore, GC III Part I establish that POWs are members of the armed forces of the conflict, including militia or volunteers, even if these are resistance movements, working inside own territory, outside own territory or in occupied territory, as well as forces "who process allegiance to a government or an authority not recognized by the Detaining Power." For this to apply, such groups would have to be "commanded by a person responsible for his subordinates," have "a fixed distinctive sign recognizable at a distance," carry "arms openly," and conduct "their operations in accordance with the laws and customs of war." GCs would also extend to any person "who accompany the armed forces without actually being members thereof." Also covered are "inhabitants of a non-occupied territory, who… spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war" (Avalon GC: GCIII, Art 4).

GC III also states that the convention should apply to POWs "from the time they fall into the power of the enemy and until their final release and repatriation," and should any doubt arise as to whether persons "having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal[27]" (Avalon GC: GCIII, Art 5-7).

Part II, establishes that the nation holding POWs, the detaining power, is responsible for any treatment they are given by the individuals holding them and can only transfer POW's to other nations if these uphold the GCs. Furthermore, "prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation… Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults" (Avalon GC: GCIII, Art 12-15).

Part III, states that "no physical or mental torture, nor any other form of coercion, may be inflicted on" POWs "to secure from them information of any kind whatever." POW's "who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." In addition, POWs "shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area." A POW must also be able to inform relatives of his/her "capture, address and state of health" as well as communicate via letters with the outside world. Furthermore, a POW must be able to contact an organization like Red Cross if they do not believe they are treated right (Avalon GC: GCIII, Art 17- 78).

[27] Article 5 tribunal

GC III, Part III, states that a POW can only be prosecuted after the same laws which cover the detaining power and shall be “tried only by a military court.” If sentenced, POW’s must not endure ”corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty.” No “moral or physical coercion may be exerted” on a POW “in order to induce him to admit himself guilty of the act of which he is accused” as well as no POW “may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.” In addition, “judicial investigations relating” to a POW “shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible.” A POW “shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months. Any period spent by” a POW “in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.” The Detaining Power must notify an organization like the Red Cross of a pending trial and must provide ”specification of the charge or charges on which” the POW “is to be arraigned, giving the legal provisions applicable,” and the place, time and date of the trial, also to the POW’s representative. Evidence must be forwarded as well. A POW is “entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses” and must be made aware of this before a trial. If no choice of counsel is made, one shall be made available by either by the likes of the Red Cross or the detaining power. Any counsel must be able to prepare a defense and be able to “freely visit the accused and interview him in private,” and be presented with any evidence. If sentenced, a POW has the right to appeal the sentence (Avalon GC: GCIII, Art 82-106).

Any POW must be “released and repatriated without delay after the cessation of active hostilities.” Should any death or serious injury to a POW have been caused or suspected to have been caused by a guard, “the Detaining Power shall take all measures for the prosecution of the person or persons responsible” (Avalon GC: GCIII, Art 109-121).

Part VI, Execution of the Convention, establishes that the likes of the Red Cross “shall have permission to go to all places where prisoners of war may be… They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses.” Furthermore, they “shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted.” In addition, nations shall “provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,” and shall “be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons… before its own courts.” Grave breaches is defined as: “willful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health… or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this

Convention." No nation can "absolve itself… of any liability incurred by itself… in respect of" the aforementioned grave breaches (Avalon GC: GCIII, Art 126-131).

Opposing Views

These are the protections that usually apply in armed conflicts. The Bush administration, though, did not believe that the GCs should apply in the WoT. According to Yoo, applying these conventions to AQ would be difficult, as AQ is not "a nation state which obeys the rules of war." The GCs were written in the aftermath of WWII and at the time no one could envision the situation the world would be facing over fifty years later; a terrorist group with the military capabilities of a nation and the prospect of gaining access to weapons of mass destruction (WMD's). The OLC was charged with determining whether AQ and groups like it was to be treated as "illegal or unprivileged nation-states," or should their members be considered as "enemy combatants not entitled to the protections of" the GCs? (Yoo 2006: 22).

The question arose the first time in November 2001 as the first AQ and Taliban (TLB) fighters were being captured in Afghanistan. How was the US to treat them and keep them? Yoo noted that the GCs only applied to conflicts between the "high contracting parties" who has signed them, but AQ is not a nation-state and has never signed the GCs. Though the GCs allow a non-signee to obtain the protections if it accepts GCs terms, AQ never has done this. As AQ has acted contrary to the terms spelled out in the GCs and has violated virtually all written and unwritten rules of war, targeting civilians, hiding amidst these, killing prisoners etc., Yoo suggested that the US was under no obligation to consider AQ to be covered by the GCs (Id.: 23).

The *War Crimes Act of 1996* (WCA) amended Title 18 U.S.C. (18 U.S.C.) to make any "grave breach" of the GCs, as defined above, an offense that is to be appropriately punishable (WCA 1996). In a memo[28] issued January 22, 2002 written by the newly appointed head of the OLC Jay S. Bybee, but practically identical to a draft memo with the same title written by Yoo earlier that January, OLC stated its case for determining whether treaties like the GCs applied to AQ and TLB and should be observed pursuant to 18 U.S.C.. The memo observed that treaties like the GCs did not "protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war." It also observed that the "President has sufficient grounds to find that these treaties do not protect members of the Taliban militia" (Greenberg & Dratel 2005: 81).

The memo laid out several findings that would be beneficial to the Bush administrations future detention strategy. It observed that "grave breaches" merely referred to the ones specifically mentioned[29] and did not mean that all breaches of the GCs was criminal. The memo also

[28] *Application of Treaties and Laws to al Qaeda and Taliban Detainees*

[29] See above for definition.

suggested that Art. 2 and Art. 3 of GC III governed the conduct of contracting countries either in a conflict between nation-states (Art. 2) or in a civil war (Art. 3) and the GCs were limited to these types of conflicts. AQ cannot be categorized as belonging in any of these categories as it operates "from multiple bases from several different states." This argument seemed further strengthened because the US has not ratified the *Protocol Additional* to the GCs written in 1977 (Greenberg & Dratel 2005: 85-89). Protocol Additional was created to solve the problem that GC Art. 3 seemed not broad enough to cover all non-international armed conflicts (PA to GCs). President Reagan refused to ratify Protocol Additional I because it would give "recognition and protection to terrorist groups" Reagan 1987). The memo also suggested it was impossible for the drafters of the GC'S in 1949 to envision the unprecedented nature of AQ. Because the drafters had not envisioned terrorist organizations like AQ coupled with the fact that the US had not ratified the attempt to rectify this gap in 1977, it was not a breach of US law not to apply the GCs to AQ. Therefore, "neither the detention nor trial of al Qaeda fighters is subject to" GC III or the WCA. Further supporting this case was three facts, according to the memo. First, the oft mentioned distinction that AQ was not a "high contracting party" as it was not a nation-state. Second, AQ was not considered to be an irregular force like a volunteer corps or a resistance movement. These would be required to wear uniforms or insignia, carry arms openly and obey the rules of war. However, AQ complied with none of these requirements. Third, as suggested earlier in the memo, the conflict with AQ is neither a "traditional war between states" nor a "non-international civil war". Therefore, AQ members were not entitled to POW status under the GCs (Id.: 89-90).

With respects to the TLB, the memo stated, there was the possibility that the president could simply suspend the GC obligations that the US otherwise has towards Afghanistan, a fellow high contracting country. Article II of the US Constitution, as noted, vests the executive power with the president, makes him commander in chief and has the power, with the advice and consent of the Senate, to make treaties. This has been supported by both Alexander Hamilton and Chief Justice John Marshall, as mentioned above. Therefore, "any unenumerated executive power, especially one relating to foreign affairs," belongs to the president. Even though the Constitution does not explicitly mention the power to suspend or terminate treaties, "long executive branch practice" and court recognition establishes this power to belong "solely to the President." Therefore, "the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or if it has undergone other changes in sovereignty." Also "non-performance of a particular treaty obligation" may "justify a decision to suspend or terminate the treaty."One possible argument was that the president could suspend the GC obligations towards Afghanistan because it constituted a "failed state," and reinstate treaty obligations once Afghanistan ceased to be a "failed state". As Afghanistan under TLB lacked "a functioning central government and other essential attributes of statehood," the president could determine that is was in no "position to perform its treaty obligations." In fact, the US already considered Afghanistan as such in November 2001 (Id.: 91-95, 101).

Furthermore, the memo outlined the possibility that though the GCs do not apply to AQ and the TLB, the US may want to apply the GCs to the conflict as a matter of policy. The benefit of this was that while US forces would be protected by the GCs, the US would have flexibility in deciding "to deviate from certain provisions it did not believe were appropriate to the current conflict." According to the memo, the US had done so several times, including in the Korean and Vietnam Wars (Id.: 105).

Should the president determine that the GCs did apply to Afghanistan, suggested the memo, there were still ways that the TLB could be excluded from the protections. The conflict would be classified as being a conflict between two high contracting parties. As such any person eligible for POW status would have to fall into one of the specific categories outlined in the GCs. Should any doubts arise as to the classification of the prisoners, these should enjoy GC protection until a tribunal determines their status. The memo forwarded an arguments that suggested the president, instead of letting this be decided on a "case-by-case" determination, could "determine categorically that all Taliban prisoners are presumed to fall outside" GC III protection. The president could do this "under Article II of the Constitution," which gives the president the "power to interpret treaties on behalf of the Nation." Accordingly, the president could determine that due to the facts that had become known about the TLB during the war in Afghanistan, the TLB, in his interpretation of GC III, would "not fall within the legal definition of" POW's as defined in the GC's. This would prevent the need for the aforementioned tribunals. However, this would require the executive branch to conclude that the "Afghanistan conflict demonstrated that the conduct of the Taliban militia had always violated these requirements" that would otherwise have ensured them POW status. If the TLB was not protected by the GC's, then there was no danger of a violation of the WCA pertaining to their detention (Id.: 110-111).

Moreover, should the GCs, because of their universal approval, have risen to the status of customary international law, the executive branch is not bound by such laws as these are not federal laws, stressed the memo (Id.: 111-112).

In the conclusion, Bybee wrote that neither the WCA nor the GCs "would apply to the detention conditions of al Qaeda prisoners." Furthermore, the president had the constitutional power to "suspend our treaty obligations toward Afghanistan" and may "exercise that discretion on the basis that Afghanistan was a failed state." Otherwise, the president could interpret GC III "to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty." Should the president choose either to "suspend our treaty obligations" or construe GC III not to apply to the Taliban, he need not "make any specific finding" but need only approve policies "consistent with the understanding" that al-Qaeda and Taliban are not POW's under GC III (Id.: 117).

However, it is quite obvious that the executive branch was not united in this assessment. State Department Counsel (DoSC) William Howard Taft IV in a memo dated January 11, 2002,

repudiated many findings of the Yoo draft memo, which seems to have been the rough draft of the Bybee memo. Taft reacted to statements like "customary rules of international law… do not bind the President or the U.S. Armed Forces in their conduct of the war in Afghanistan," and "the President has authority to limit or qualify the application of such rules. He could exempt certain operations from their coverage" (Id.: 75-78).

The Taft memo suggested that Yoo's assertions and legal analysis were "seriously flawed," and asserted that "only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years." If the US decided to declare that the GCs did not apply to the conflict in Afghanistan, this could have several adverse effects. Amongst his concerns where that if the GCs where deemed not to apply, this could "presumably be the basis for actions that otherwise would violate the Convention, including conduct that would constitute a grave breach," which would raise the risk of "future criminal prosecution for U.S. civilian and military leadership and their advisers." He also raised the point that the US "would have no basis to complain of violations of the Geneva Conventions committed against U.S. or coalition forces." The central issue addressed by the memo, though, was the case laid out by Yoo and Bybee that would allow the US to suspend it GC obligations towards Afghanistan. It pointed out that the "failed state" theory was not a legal concept, and as such the US could not determine that Afghanistan was not party to the GCs, however much it did not recognize the TLB as a legit government. Other nations, the memo noted for instance, still recognized Afghanistan's borders, and both the US and the UN, while not considering the TLB as a legit government, still considered the TLB as the de facto government. The memo also disputed the theory that TLB soldiers did not constitute an army, did not adhere to rules that there was a chain of command within the army and that they did wear uniforms. It acknowledged that some TLB troops might have committed acts contrary to the laws of war, "but there is no evidence to suggest that the Taliban provided central command level direction and guidance for forces to violate the laws of war." As a consequence of the aforementioned, the memo argued that the TLB was covered by the GCs, though it did not mean that individual members could not be determined not to be covered by the GCs. This, however, should be determined be a tribunal, as stated in the GCs, on an individual basis. Finally, the memo concluded that historically the US has followed international law, and accepted "the fact that the internationally wrongful act may have been lawful under the internal law of a State has no bearing on the lawfulness of the act under international law." Therefore, the state must "cease its wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act." As a result, with respect to international law and federal law, "it is clear that customary international law creates international legal obligations for the United States for the breach of which the United States would be responsible as a matter of international law" (Taft 2002: 1-7, 19-21, 35, 36).

As Yoo later noted, OLCs conclusion that the GCs did not apply to AQ were not as such disputed. But according to the Taft memo, customary international law was binding to the US, and the question must be asked whether over fifty years of adherence by many if not most nations of the world would not in effect make the GCs customary international law? Not according to the OLC. Yoo once again argued that because the original GCs only covered two types of armed conflict, a regular war between nations and a civil war, "no clear customary international law on megaterrorism like 9/11 existed"(Yoo 2006: 34, 36).

According to Yoo, Bush made the decision to exempt AQ and TLB from GC III coverage on January 18, 2002 (Id.: 39). The following day, Defense Secretary Donald Rumsfeld sent a memo to the Joint Chiefs of Staff, directing them to instruct "Combatant Commanders" that AQ and TLB were not entitled to POW status under GC III, but they were to be treated "humanely and, to the extend appropriate and consistent with military necessity, in a manner consistent with the principles" of the GCs (Rumsfeld 2002).

However, the internal discussion in the executive branch was far from over. On January 25, 2002, WHC Gonzales issued a memo to Bush to clarify his options regarding the decision of whether or not to apply the GCs to the WoT. The memo was issued in response to a request by Secretary of State (SoS) Colin Powell to apply GC III to both AQ and the TLB, though he acknowledged AQ and TLB fighters could be denied POW protections but only on a individual basis by a military board as required by the GCs (Greenberg and Dratel 2005: 118).

Gonzales echoed the view of Yoo and Bybee that Bush was in his right to deny GC protection for AQ and the TLB, underlining that the OLC had established that "as a matter of international law and domestic law" the GCs did not apply to the conflict with AQ and Bush had the authority to exclude the TLB as well. Gonzales sited the "failed state" theory and the argument that the TLB was not a government, but "a militant, terrorist-like group."He outlined the positives and negatives of determining not to apply the GCs to the conflict. The positive ramifications included flexibility, which would aid the US "ability to quickly obtain information for captured terrorists and their sponsors in order to avoid further atrocities against American civilians" as the "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Not extending the GCs would also "eliminate any argument" of the need for status determining tribunals, and would "substantially reduce the threat of domestic criminal prosecution" under the WCA because even if GC III did not apply to the TLB, Common Art. 3 would still apply to the TLB and action taken against the Taliban was thus still punishable under the WCA. Furthermore, Gonzales suggested that not applying the GCs would "guard effectively against misconstruction or misapplication" of the WCA, because some of the language in GC III is vague and does not define for instance what constitutes "outrages upon personal dignity" making it difficult to predict what would constitute a violation of this. Preserving flexibility was also important, as it was "difficult to predict the needs and circumstances that could arise" in the war on terror. Finally, it "would create a reasonable basis in law… which would provide a solid defense to any future prosecution" if "prosecutors and

independent counsels" should "decide to pursue unwarranted charges" based on the WCA. The negative ramifications of not applying the GCs included arguments like the US forces would consequently not be covered by the GCs as well, would encourage other countries to "look for technical "loopholes" in future conflicts to conclude that they are not bound" by GC III, and that it could "undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and would introduce an element of uncertainty in the status of adversaries" (Id.: 119-120).

Gonzales still believed it best to exempt AQ and the Taliban from the GCs, calling arguments of the contrary "unpersuasive." He argued that it would not be the first time the GCs had not been applied to an armed conflict including the US, and because the war on terror was "a new type of warfare – one not contemplated in 1949 when" GC III was framed, it required a "new approach in our actions toward captured terrorists," because the GC III could due to their status as terrorists and irregular force not cover AQ and the TLB. In addition, the application of GCs had not encouraged many previous adversaries to apply GC treatment to captured US troops and would likely not encourage the current adversaries to do so. He also suggested that the US forces was still constrained by its "commitment to treat the detainees humanely and, to the extent appropriate and consistent with the military necessity," apply the principles of the GCs, and would also adopt "minimum standards of treatment universally recognized by the nations of the world. The US military would also uphold military discipline because the president instructed the troops to treat detainees humanely (Id.: 120-121).

The following day, Powell issued a memo advocating changes to the Gonzales memo. Underlining that he believed that AQ was not covered by the GCs and that the TLB may or may not be covered depending on what is determined, perhaps by a tribunal, he argued that both deciding that the GCs applied to the conflict or not would leave the US with the same flexibility in how to "treat detainees, including with respects to interrogation and length of the detention," to "provide conditions of detention and trial" and would allow the US "not to give the privileges and benefits of POW status to al Qaeda and Taliban." To not apply the GCs would "on its face provide maximum flexibility, removing any question of case-by-case determination for individuals," but would "reverse over a century of U.S. policy … and undermine the protections of the law of war for our troops." Furthermore, it could make the US "vulnerable to domestic and international legal challenges" and undermine "the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions," and could deprive the White House of a "winning argument to oppose habeas corpus actions in U.S. courts." By applying the GCs to the conflict, however, this would "provide a more defensible legal framework" to preserve US flexibility "under both domestic and international law," and would provide the strongest legal foundation for whatever the US intended to do in the war on terror. It would preserve "U.S. credibility and moral authority by taking the high road," and put the US "in a better position to demand and receive international support." It would encourage GCs protection of US forces and

reduce "the incentive for international criminal investigations directed against U.S. officials and troops." Powell further outlined some details he believed to be "factual errors" making the Gonzales memo "inaccurate or incomplete." Should the US argue that Afghanistan was a failed state, it would be contrary to the official US government position. Furthermore, Powell questioned the legal conclusions from the Yoo/Bybee memos, and asserted that the US had before the war on terror always fully recognized the GC's in armed conflicts. Powel also repudiated the claim by OLC and Gonzales that the GC's could not be applied to the war on terror, stating that "while no-one anticipated the precise situation that we face," the GC III "was intended to cover all types of armed conflict and did not by its terms limit its application." Finally, it pointed out that if the US intended to "conform our treatment of the detainees to universally recognized standards," it meant complying with GC III (Id.: 122-125).

It seems obvious that the State Department favored applying GCs to the WoT, at least to the conflict in Afghanistan, though it did not as such shy away from the theory that AQ and TLB members would not receive POW protections. Years later, Yoo continued to bash the State Department's assessments. For instance, he insinuated that Powell was only arguing for the GCs to be applied because he was "precisely the person – the secretary of state – who must be concerned with world opinion." Yoo speculated on whether or not any future adversary, for instance China, would really care about the assertion that the GCs would not cover AQ and the TLB. He noted that any of the most likely adversaries did not exactly have a record of observing the GCs let alone human rights (Yoo 2006: 41-42).

On February 1, 2002, AG John Ashcroft weighed in on the discussion in a letter to Bush. Ashcroft advised Bush to determine that the GCs did not cover the TLB as it did not cover AQ on the grounds that Afghanistan was a failed state. His argument was simple: declaring that the GCs did not apply because Afghanistan was a failed state and not party to the treaty, "various legal risks of liability, litigation, and criminal prosecution are minimized." Ashcroft argued that if the president *determined* "that a treaty does not apply, his determination is fully discretionary and will not be reviewed by the federal courts." It would "provide the highest assurance that no court would subsequently entertain charges that American military officer, intelligence officials, or law enforcement officials violated" the GCs "relating to field conduct, detention conduct or interrogation of detainees." Should the president choose to accept that the GCs applied to Afghanistan but *interpret* that the TLB was "unlawful combatants not subjects to the treaty's protections," this could lead to court cases reviewing the president's interpretation of the GCs that might "involve substantial criminal liability for involved U.S. officials," as well as "judicially-imposed conditions of detainment – including mandated release of a detainee" (Greenberg and Dratel 2005: 126-127).

On January 7, 2002, Bush made his final decision on the matter. He stated that the WoT ushered in "a new paradigm, one in which groups with broad, international reach commit horrific acts against civilians, sometimes with the direct support of States. Our Nation recognizes that this new

paradigm… requires new thinking in the laws of war, but thinking that should nevertheless be consistent with the principles of Geneva." Relying on his authority as CIC and chief executive of the US, and backed by Bybee's OLC memo and Ashcroft's letter, Bush determined that AQ was not covered by the GCs and recognized that he had the authority to suspend the GC obligations between Afghanistan and the US but declined to do so "at this time" though he reserved the right to "exercise this authority in this and future conflicts." However, he determined that Common Article 3 of the GCs did not apply to AQ or the TLB because he believed it only applied to civil wars, and he determined that "Taliban detainees are unlawful combatants and, therefore," do not qualify as POW's under the GCs as well as AQ did not qualify as POWs. The US would, though, continue to threat detainees humanly and, "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva (Id.: 134-135).

The theory that the president could determine that detainees need not have their status reviewed before an Article 5 tribunal was further strengthened that same day in a memo[30] signed by Bybee. Though Bybee acknowledged that the US military had always used Article 5 hearings, this need only be obeyed if there is any doubt as to the status of the detainee. Citing the president's constitutional power to interpret treaties, Bybee once more suggested that the president could interpret GC III in a way that would exclude the detainees from being covered by GC III and thus not be entitled to a hearing by an Article 5 tribunal. By declaring there is no doubt about the status of detainees, the memo concluded "there is no need to establish tribunals to determine POW status under Article 5" (Id.: 142-143).

Joseph Margulies, though, offers another take on this situating. He acknowledges the GCs allow detainees to be held until the end of the war to prevent prisoners from returning to the battlefield, and acknowledges that "the laws of war allow countries to hold combatants apart from the civilian judicial system." Therefore, a POW has "no right to insist he be charged with an offence or brought before a judge. He is a military prisoner, not a criminal defendant." POWs, however, are protected by the GCs and enjoy all the protections mentioned above. Yet, what if a person for some reason does not qualify as a POW? Does he not have any rights under the GCs? According to Margulies, this is not the case (Margulies 2007: 54).

The GC IV, the Civilian Convention, covers all people "who, at a given moment and in any manner whatsoever, find themselves, in case of conflict and occupation" in enemy hands. If a person for some reason does not fit into one of the other GCs, he falls into this convention. Even if that person is an *unlawful combatant*, if he is "suspected of or engaged in activities hostile to the security of the State," he "shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention." Furthermore, such a person is "entitled, in all circumstances," to be "humanely treated, and shall

[30] *Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949*

be protected especially against all acts of violence or threats thereof and against insults." The nation who holds such a *protected person* in custody "is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred." Also, "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties," and the high contracting parties are prohibited from causing "physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments…but also to any other measures of brutality whether applied by civilian or military agents" (Avalon GC: GC IV, Art 4-5, 27-32).

The authoritative commentaries on the GCs, prepared by the International Committee of the Red Cross (ICRC), determines that "every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention…There is no intermediate status; nobody in enemy hands can be outside the law." This supports the above mentioned argument that unlawful combatants do belong somewhere in the GCs (ICRC Commentaries).

The US Army Field Manual 27-10, concerning the law of land warfare, also supports this. Paragraph 60 establishes that "the enemy population is divided in war into two general classes: Persons entitled to treatment as" POW's and "the civilian population."Paragraph 73 determines that "if a person is determined by a competent tribunal, acting in conformity with" GC III, Art. 5 "not to fall within any of the categories listed in" GC III, Art 4, "he is not entitled to be treated as a" POW. "He is however" a *protected person* under the GCs. A protected person is defined as in GC VI (FM 27-10: 25, 29, 73).

In addition, argues Margulies, Common Article 3 of the GCs covers all people during an armed conflict. The US has long recognized this as a fact, and has accepted that Common Article 3 is customary international law, which means it "articulates universally accepted norms of civilized behavior and therefore binds the military in all circumstances." Should US forces capture a person whose status is not clear, the person may be an innocent civilian, their status must be determined by a competent tribunal, an Article 5 tribunal, as described in Article 5 of GC III. Any person asserting a right to POW status must be given such a hearing. As noted above, this is common practice in the US army as proscribed by Field Manual 27-10 (Margulies 2007: 55-56).

The point raised by Margulies is that war by no means is a blank check that provides unlimited powers. Powers are granted, yes, but they come with limitations as well. As we saw earlier, the Bush administration, based on the legal findings by amongst others John Yoo, believed that the president as commander in chief could claim all the powers of war but was not subject to the limits. The president did not have to adhere to customary international law, like the GCs, but could cherry pick the powers that were granted during war by international law, like the right to detain prisoners for the seemingly indefinite duration of hostilities without legal process. This has led to another problem. In his statement on February 7, 2002, Bush determined that all AQ and TLB

captives were exempt from the GCs. This meant they were also deprived of their right to a hearing by an Article 5 tribunal. As Margulies points out, this presumes that all the captives are indeed AQ and TLB combatants. But what if the captives were not associated with these groups? This was exactly why Article 5 hearings where created. Argued Margulies, "the suggestion that the president, by unilateral fiat, can dispense with Article 5 hearings simply by declaring that there is no doubt about the status of any prisoner, is ludicrous" (Id.:56-57).

Should the detainees at some point be allowed to have their status reviewed by an Article 5 tribunal and the tribunal determines they are not afforded POW protections they should then receive protections as outlined in GC VI. At a minimum, they should be given the protections outlined in Common Article 3 of the GCs.

Detained terrorists – what to do with them?

As the war in Afghanistan and the overall war on terror began producing prisoners, the Bush White House was faced with an important issue; what to do with the detainees? Many people where caught on the battle field, scores of others were sold by bounty hunters to the US later on. In a recent documentary[31] Pakistani politician Javed Ibrahim Paracha relates how American soldiers would try to obtain suspected terrorists: "Where is Arab? Where is Arab? Where is Arab? You get thousand dollar for one Arab. Thirty thousand, forty thousand, sixty thousand. And helicopter loud speaker announcing these things" (TD Script: 4) Thousands of leaflets were dropped with the text: "Get wealth and power beyond your dreams. Help the Anti-Taliban forces rid Afghanistan of murderers and terrorists" (Afghan Leaflet). News reports would later describe how people were sold as terrorists to the US forces for prices ranging from 3,000-25,000 $. Detainees claimed they had been sold for "a briefcase full of money". As one detainee puts it: "It's obvious. They knew Americans were looking for Arabs, so they captured Arabs and sold them — just like someone catches a fish and sells it" (AP 2005).

As pointed out above, the Bush administration believed that 9/11 created a "new paradigm", an unforeseen new type of conflict that would require new rules and regulations. The US and its allies is not fighting a single country per, but a transnational terrorist organization with the military capability of a nation. The US is fighting an ideology, so the battlefields could be anywhere in the world, even in America, and the enemies come from a host of different countries, including it seems America itself. Though the US during the Cold War also was in a conflict of a seemingly unending time span, the US government did know it would win if it defeated the Soviet Union. In the WoT it is not enough to defeat nations sympathetic to terrorists. It might not even be enough to defeat AQ, so there is a chance the war might continue indefinitely.

[31] *Torturing Democracy*. Can be watched here: http://torturingdemocracy.org/

Margulies points out that this created a situation in which President Bush expanded his presidential power substantially. Due to the borderless extend of AQ, Bush claimed a right to take the war anywhere. As almost any person and many different actions could constitute a threat to the US, Bush claimed a right to designate *who* was a terrorist. Prisoners were believed to have no rights and could be subjected to any treatment found adequate and because there is no end in sight for this war, his commander in chief authority means that these powers last into the unforeseeable future. As Margulies writes, the Bush Administration "claims all the authority that could conceivably flow to the executive branch during a time of armed conflict, but accepts none of the restrictions. The result is unchecked, almost imperial power: the power to define the enemy, to act against this enemy anywhere in the world, to imprison him indefinitely without legal process and under any conditions, and to prevent review of any of these discretionary actions by the courts (Margulies 2007:13-14)." The memo's examined until now has affirmed that the Bush administration believed that the president had these powers. There were others that had to be established as well.

Military Tribunals

In October 2001, preparations began for the drafting of a military order, an EO, to create a legal framework within which to try AQ and other captives in the WoT. It would create a system of military commissions (MCs) that would in the eyes of the Bush administration be the best way to prosecute terrorists. The idea was that trying terrorists before a civilian court would pose a security risk. John Yoo described that MCs were "meant to balance two competing goals: providing a fair trial for enemies who commit war crimes, and protecting the nation's military and intelligence interests" (Yoo 2006: 204). However, it would also afford the executive branch with several advantages, not the least by concentrating the process in the executive branch alone, thus in effect handing the powers of all three branches of government the president himself (Savage 2007: 134).

The process of developing this system became embroiled in controversy from early on. Though the project was initially assigned to an *interagency group*[32], the group became bogged down in debate over how exactly to prosecute terrorists. Some would argue that the criminal justice system would be adequate whereas others would suggest trying them before military courts-marshal. Apparently the so-called War Counsel had other ideas and thought the interagency group was taking too much time in coming up with a solution (Mayer 2008: 80-82).

Deputy WHC Timothy Flanigan drew up an early draft in October that year, but it was not until OLC lawyer Patrick Philbin delivered a still classified 35 page memo[33] that the framework finally took shape. Though still unseen, it has been cited in several different de-classified memos and claimed

[32] Consisting of lawyers from all the relevant departments like the DoD, DoS, DoJ and the NSC.

[33] *Legality of the Use of Military Commissions*

that bush had the authority to unilaterally set up military commissions. It argued that 9/11 had been an act of war instead of a crime, thus handing commander in chief powers to the president, including the right to establish these military commissions (Savage 2007: 136).

As a precedent the memo cited a WWII SC case, *Ex Parte Quirin* (Quirin).In 1942, President Roosevelt created a military commission to try eight Nazi saboteurs caught within the US. The Nazis challenged Roosevelt's power to try them in a MC rather than in a regular court. The court unanimously backed the president, finding that "the military commission was lawfully constituted," and "that petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus. The motions for leave to file petitions for writs of habeas corpus are denied" (Ex Parte Quirin 1942).

Apparently, the SC justices were not proud of their work on that cast, and current SC Justice Antonin Scalia has referred to it as "not this Court's finest hour (Mayer 2008: 87). Subsequently, other measures have been developed both in the US and internationally that regulates any prosecution of a POW. The Universal Code of Military Justice (UCMJ) was passed by Congress in 1950, and covers POWs "in the custody of the armed forces." It is subject to international treaties that the US is party to, and in the UCMJ it is, amongst other things, stated that "no person… may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence in not material to the issue and may tend to degrade him," and "no statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." Furthermore, it directs that "no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made," and that "the accused shall be advised of the charges against him and of his right to be represented at that investigation" (UCMJ 1950). Of course, there are also the GCs as mentioned above.

The Philbin memo ignored this altogether. It asserted that the president as commander in chief "had inherent and exclusive powers to set up military commissions as he saw fit… no act of Congress or treaty could limit his options." Only in the final days before the military order was to be signed by Bush did the military lawyers, Judge Advocate Generals (JAGs), get an invitation to review the order. Major General Tom Romig, the top JAG for the US Army, later remarked that the military order would be "perceived as unfair, because it was unnecessarily archaic" (Savage 2007: 137-138).

On November 13, 2001, the military order[34] was signed by Bush. It granted the president sweeping powers. "By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America,

[34] *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*

including the Authorization for Use of Military Force Joint Resolution," Bush determined that the 9/11 attacks was an act of war and to protect the US from further attacks, and "for the effective conduct of military operations," terrorists needed to be detained, and when tried, "to be tried for violations of the laws of war and other applicable laws by military tribunals." Because of the "danger to the safety of the United States and the nature of international terrorism, "Bush found it "not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the" US district courts. Because of the existing situation, Bush determined there was an "extraordinary emergency… for national defense purposes… and the issuance of this order is necessary to meet the emergency." Those people subject to the order was any non-US citizen whom Bush determined "from time to time" is or was at the relevant time "a member of the organization known as al Qaeda; has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or in preparation thereof," against the US and its interests, "has knowingly harbored one or more" of such individuals, "or if it is the interest of the United States that such individual be subject to this order." It handed Secretary of Defense Rumsfeld the power to "take all measures to ensure that any subject… is detained…and… that such individual is tried" only as proscribed in the order. It also enabled Rumsfeld to claim any person not already being held by the DoD to be handed over to the DoD. Rumsfeld was also given the power to detain prisoners "at an appropriate location… outside or within" the US, required the prisoner to be treated humanely, but "in accordance with such other conditions as the Secretary of Defense may prescribe."Prisoners were to be tried by military commissions and may be punished "with the penalties provided under applicable law, including life imprisonment or death," and Rumsfeld was charged with issuing "such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out" this order. "Orders and regulations issued …shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys." Rumsfeld were given the authority to designate time and place for the trials, and must ensure "a full and fair trial, with the military commission sitting as the triers of both fact and law." Any admission that the commission deemed admissible could be used in the trial as long as it was "consistent with the protection of information classified or classifiable under Executive Order… protected by statute or rule from unauthorized disclosure, or otherwise protected by law."Rumsfeld must provide for "the handling of, admission into evidence of, and access to materials and information, and the conduct, closure of, and access to proceedings; conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order." Any case was to be decided by two thirds majority and Rumsfeld must submit "the record of the trial, including any conviction or sentence, for review and final decision by" Bush. Rumsfeld was authorized to issue "such orders and regulations as may be necessary to carry out any of the provisions of this order." However, the order prohibited "disclosure of state secrets to any person not otherwise authorized to have access to them," and did not "limit the

lawful authority of the Secretary of Defense… to detain or try any person who is not an individual subject to this order." Only MCs could pass judgment on these prisoners and they were outside the jurisdiction of "any court of the United States… any court of any foreign nation, or any international tribunal." The order also barred prisoners from filing a lawsuit against the US or any individuals associated with the order (Greenberg & Dratel 2005: 25-28).

In December 2001, the DoD as instructed by Rumsfeld, began issuing internal memos suggesting that "in the commission system, defendants would have only limited rights to confront their accuser, see all the evidence against them, or be present during their trials. There would be no right to remain silent and hearsay evidence would be admissible, as would evidence obtained through physical coercion. Guilt did not need to be proved beyond a reasonable doubt" (Mayer 2008: 87). The administration clearly believed it was a lawful and a proper thing to do. VP Cheney remarked the day after the order was signed that "It's the right thing to do" (VP 11/14).

Yoo has later defended MCs, arguing that regular criminal courts force the government to reveal its method of intelligence gathering and could expose any informants, thus enabling the like of AQ to "plug any leaks." The executive branch could also be instructed to provide witnesses, for instance enemy combatants, and this would disrupt the government's ability to wage war. As further evidence of why terrorists should be tried by MCs as opposed to in the criminal justice system, Yoo pointed to the debacle of the Zacarias Moussaoui trial[35]. He also suggested that MCs actually limits any compromise between national security and civil liberties, as many otherwise charge it does, by containing any loosening of court standards within this system. In addition, it is more secure, as an MC in Guantanamo is more secure from a terrorist attack than if held in a criminal court in the US. Furthermore, Yoo points out that UCMJ provides for the lawfulness of MCs, as for instance Art. 21 states that "conferring jurisdiction… does not deprive military commissions… of concurrent jurisdiction" (UCMJ). This, and future actions like the *Detainee Treatment Act*, suggests that Congress accepts the president's authority to enact MCs (Yoo 2006: 212-213, 217-219, 226).

After the signing of the military order, the JAGs where finally allowed to have some say, albeit limited, in the implementation of the order. JAGs, really the experts in the field of military law and prosecution, had some influence on areas like the outline of how MCs were created and the proceedings of military commission, making it less draconian than how some of the White House lawyers wanted it (TD Script: 5), but the president observed that the outline advocated by the JAGs "while deemed reliable, does not constitute a definitive statement of the procedures applicable to military commissions" (Fact Sheet Military Commissions: 3). In the eyes of the JAGs,

[35] The trial lasted from 2001-2006. Info on the trial can be found here: http://en.wikipedia.org/wiki/Zacarias_Moussaoui

though, the system was still flawed. Major Dan Mori, a JAG appointed to defend one of the Guantanamo detainees, called the military commissions "a political stunt." He argued that the administration "clearly didn't know anything about military law or the laws of war." The problem, he pointed out, was "that the rules were constructed by people with a vested interest in conviction" (Mayer 2008: 89).

Many law professors also condemned the MCs. Dean of Yale Law School Harold H. Koh wrote an article [36] in 2002 in which he pointed out how the criminal law system had evolved to a state where it was perfectly capable of prosecuting terrorists like AQ members, as it had indeed done previously. Instead, to the surprise of many, the White House created the MCs to try terrorists in the war on terror. According to Koh, this posed two problems: first, it undermined the US's perceived commitment to law and faith in the judicial system at a time when it was most needed. Second, failing to deliver justice in a way not found credible by other countries would undermine the US's ability "to lead an international campaign against terrorism under a rule-of-law banner" (American Journal of International Law 2002: 337-338). Many felt the same way. A letter sent to Senator Patrick Leahy in December 2001 signed by Koh and 700 other law professionals, expressed the same concerns and called the MCs "constitutionally questionable" (Letter to Leahy 2001: 2). The Koh article elaborated on these concerns. For instance, he charged that the Bush administration chose to suspend its international treaty obligations through the military order, though it had not taken any formal steps to enable it to do so in the current emergency. Koh was obviously oblivious to the still secret memo's arguing that Bush had an inherent authority to just that. Koh also pointed out that the military order "undermines the constitutional principle of separation of powers." Under the order, the president directs subordinates to create the commissions, who is to be tried before them and who determines "fact, law and guilt." Furthermore, Koh believes arguing that Quirin set a precedent for the president's authority to create military tribunals is farfetched. Quirin did not give the president the power to unilaterally create the MCs, and determine all terrorist cases could be moved to the commissions. Also, Congress has not formally declared war and authorized the use of commissions, as had happened in WWII. By creating the MCs, Koh points out that the US undermines its traditional role of displaying moral leadership in the world. How can the US criticize Russia and China, or any other country for that matter, for their way of prosecuting people, when in a time of need the US resorts to the same dubious methods? Instead, the US should show the world that credible justice can prosecute the war criminals in the war on terror, either through the use of the US criminal court system, or through the military courts-martial system (American Journal of International Law 2002: 339-344).

[36] *The Case Against Military Commissions*

Acquiring Actionable Intelligence

As remarked earlier, the war on terror presented a new situation to the US and the world, or as the Bush administration called it, a new paradigm. Though the US was on a mission to find and punish those responsible for 9/11, the White House was also highly focused at protecting America and to prevent future attacks from happening. Bush made this clear shortly after 9/11 when he told AG Ashcroft: "Don't ever let this happen again" (Mayer 2008: 33). This new paradigm also ushered in a new way of thinking in the area of investigation and intelligence. It required, not that crimes were solved, but that crimes were prevented. In order to ensure this, the intelligence work and interrogations had to be aimed not at recovering evidence for a crime already committed but at gathering evidence to prevent a future crime from happening. Allot of suspected terrorists would be detained, and some of these may have information, or "actionable intelligence", of interest to the US or the war effort. AQ is in many ways a clandestine military organization and as such secrecy is very important. This was underlined by an AQ training manual found by the police in England. The manual is a very thorough guide describing how an AQ group sets op a clandestine operation in a country, with emphasis on secrecy and it being vital that each member only has a limited knowledge of any part of the operation. As a result, it is seldom that a single source will have knowledge of all information relating to a possible terrorist attack or even organizational information (Al Qaeda Manual).

According to Margulies, the Bush administration based its intelligence gathering on what is labeled the *mosaic theory*. This theory is designed exactly for circumstances like the war on terror, where seemingly innocent information can be gathered from different sources which combined, like a mosaic, will reveal its true picture, perhaps an eminent terrorist attack. However, the downside to this approach is that it is a very painstaking and time consuming process. Prisoners are interviewed multiple times for long stretches of time so as they might give up that piece of information which combined with other testimony or pieces of information might be processed into usable, or actionable, intelligence (Margulies 2007:21-22).

The reliance on the mosaic theory in the war on terror would require the establishment of two practices: first, because of the time consuming nature of this intelligence gathering method it was necessary to detain suspects practically indefinitely to ensure that every possible piece of a theoretical puzzle was extracted, as prisoners might be required to be re-interrogated if new pieces of the mosaic was discovered. Second, it was deemed vital to keep such a program completely classified, both to keep the terrorists from discovering what intelligence might have been obtained but also to prevent terrorists from becoming informed about American intelligence practices (Id.:24).

However, in order to obtain any intelligence through interrogation a particular framework had to be established for this method to work. In the case *Jose Padilla v. George W. Bush,* Director of the

Defense Intelligence Agency (DIA) Vice Admiral Lowell E. Jacoby issued a declaration that outlined the interrogation strategy used by the Bush Administration.

In his declaration, Jacoby explained that "the security of this Nation and its citizens is dependent upon the United States Government's ability to gather, analyze, and disseminate timely and effective Intelligence." Furthermore, he stated that "one critical feature of the intelligence process is that it must be continuous. Any interruption to the intelligence gathering process, especially from an external source, risks mission failure… Protecting the specific sources and methods used during the intelligence process is of paramount importance to the integrity of the process. DIA employs all available safeguards to ensure that its sources and methods are not intentionally or inadvertently made public… because of the resulting damage to intelligence collection efforts." With respects to the actual interrogations, Jacoby asserted that "DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator." Developing this "relationship of trust and dependency" necessary for an "effective interrogations is a process that can take a significant amount of time", which could amount to months or years. However, "anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship." Finally, Jacoby also pointed out that as "detainees collectively increase their knowledge about United States detention facilities and methods of interrogation, the potential risk to national security increases should those methods be released" (Jacoby 2003: 2-6).

In essence, the Bush administration created a system that relied on prolonged and potentially permanent incarceration, where subjects were completely isolated from everything and everyone but their interrogators in order to develop a "relationship of dependency and trust". Furthermore, the program, including the detainees on whom it was used, was shrouded in absolute secrecy and even if a subject proved to be useless, the possibility of release seemed slim. The Bush administration's insistence that the US was in a state of war, though not officially declared, ensured that they could detain people until the end of hostilities, which because of the nature of the conflict is virtually indefinitely. The insistence that AQ and the TLB was not protected by the GCs gave the more flexibility in the area of interrogation and detention, and the MCs order ensured the standard and admissibility of evidence were more to the Bush administration's liking. The order even dictated that SoD Rumsfeld could dictate where to place detainees.

Interrogating Prisoners

The US military has for many years relied on the *Army Field Manual 34-52, Intelligence Interrogation* (FM 34-52) as the main interrogation guidelines for army personnel. The preface in FM 34-52 establishes that interrogation of prisoners is constrained by the *Uniform Code of Military Justice* (UCMJ) and *the Geneva Conventions* (GC's) (FM 34-52:5-6). Furthermore it asserts that

"experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts and can induce the source to say what he thinks the interrogator wants to hear". In addition, FM 34-52 suggests that "revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors" (Id.:14). It also points out that enemy prisoner abuse does not justify prisoner abuse by US personnel. The manual includes a list of examples of coercive measures deemed physical and mental torture. These include "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time" and "abnormal sleep deprivation" (Id.:14).

By February 2002, President Bush had declared that the GCs did not apply to prisoners taken in the war on terror. As a consequence, interrogators could abstain from FM 34-52 and look for other guidelines. A possible set of guidelines could be found in the until recently declassified KUBARK[37] manual.

This manual was developed for CIA covert operatives to extract information from a resistant source. Though the manual does not in itself allow an interrogator to use coercive measures, it allows for these to be used if approved by the "Headquarters" (KUBARK part one: 11). Thus the manual is not restricted by the GCs. Much of what is written in the KUBARK manual supports the theories established earlier that the Bush administration championed. For the interrogation to be effective the detainee must be completely isolated and have developed this relationship of "trust and dependence" with the interrogator(s). The goal is to "induce regression" which erodes those mental defenses that a detainee has. These defenses are seemingly rooted in the higher functions of the brain which allows a person to act beyond the basic human functions. Regression would lead a subject to become more childlike, and therefore more susceptible to a relationship of "dependence and trust" by suppressing the ability, for instance, to "deal with trying interpersonal relations." Upon apprehending a suspect the person should be placed in a setting that would enhance the subjects "feelings of being cut off from the known and the reassuring", and the manual stresses the need to remove the subject's own clothes immediately to enhance this feeling. The KUBARK manual also asserted that "control of the source's environment permits the interrogator to determine his diet, sleep pattern, and other fundamentals. Manipulating these into irregularities, so that the subject becomes disoriented, is very likely to create feelings of fear and helplessness." The manual, though, suggests that the infliction of pain by the interrogator is not very effective and tends to produce false confessions. The mere threat of pain is more useful. Furthermore, if a prisoner is somehow made to induce pain to him or herself, for instance by forcing the person to stand at attention for a long period of time, it is thought to be an effective

[37] KUBARK is a codename for CIA

way to sap a detainee's resistance (KUBARK part 2:22-43). All these measures are supposed to make a prisoner ripe for confession.

Some years later, the CIA developed a new manual called *Human Resource Exploitation Training Manual* (HRETM) which was supposedly intended for the education of interrogators in Central America by the CIA. The HRETM further expanded on the theories presented in the KUBARK manual. The planning of a detention and interrogation block was carefully explained, for instance with the suggestion that "heat, air and light should be externally controlled[38]." The manual asserted that "throughout his detention, subject must be convinced that his "questioner" controls his ultimate destiny, and that absolute cooperation is essential to survival" (HRETM part 1: 40, 51). Furthermore, HRETM suggests the implementation of the three Ds: *Debilitation*, which is weakening of the subjects physique and can be achieved for instance through exposing the subject to "prolonged constraint; prolonged exertion; extremes of heat, cold or moisture and deprivation of food or sleep"; *Dependency* on the interrogator to fulfill basic needs, and *dread*, which means letting a subject live in intense fear or anxiety. Though the manual also suggests that threats of, for instance, violence is more effective than violence itself, it does argue that any threat must be carried out or else threats lose their value as a tool (HRETM part 2: 43-44, 50-51).

The KUBARK and HRETM manuals assumed, though, that a screening process had taken place that would have excluded innocents from being interrogated. In addition, those manuals where developed for covert CIA operations which are fairly limited in scope. As a result of the Bush administration interrogation strategy, a detention and interrogation framework were installed that would be responsible for extracting information, often by coercion, from a significant part of the thousands of prisoners captured in the global WoT, many of whom might not know anything (Margulies 2007: 42-43).

Miranda Warnings and Rights

Though the Bush administration slowly but surely had begun paving the way for them to be able to extract "actionable intelligence", there were still some regulations that did not fit the Bush administration's intelligence gathering framework. One of these was the so-called *Miranda Warning*.

The typical Miranda Warning is the one made famous in countless movies and TV series throughout the years. It goes as follows: *You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present*

[38] Quite comically, the authorities responsible for the manual had revise several parts of it by crossing out words or sentences and writing replacement words, sentences or additional comments above or besides the corrected parts. The quoted sentence, for instance, had *should* replace with *may* and besides the sentence were written *but not to the point of torture*.

during questioning. If you cannot afford an attorney, one will be appointed to you. Do you understand these rights? (Mirandawarning.org).

The Miranda Warning stems from the Supreme Court Case *Miranda v. Arizona.* The first ten amendments to the Constitution are called *the Bill of Rights*. The Bill Rights establishes certain rights for US citizens and protects the citizens from abuse by for instance the US government. Fifth Amendment of the Constitution establishes that "no person… shall be compelled in any criminal case to be a witness against himself" (USConstitution.net). Miranda v. Arizona established that "the prosecution may not use statements… stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination." Furthermore, it stated that "the atmosphere and environment of… interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination." Therefore, a detained person must be read his so-called Miranda Rights, for instance in the way as mentioned above. "Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel," the Supreme Court case proscribed (Miranda v. Arizona 1966). In other words, testimony is only admissible as evidence if the detainee was informed of his Miranda rights beforehand.

DoDC William 'Jim' Haynes asked whether or not a Miranda warning applied to detainees in the war on terror. OLC head Bybee replied in a memo[39] dated February 26, 2002. Bybee concluded that Miranda rights were not applicable to the military commissions as they only applied to "any criminal case," and because "the Fifth Amendment does not confer rights upon aliens outside the sovereign territory of" the US. US military tribunals abroad need not grant detainees Miranda rights. Should the detainee be prosecuted before a GC III court, for instance a military court-martial conducted in the US, detainees are most likely afforded Miranda rights, though Bybee suggested it was likely "statements arisen out of interrogations intended to develop military operations and intelligence information" would be admissible without a Miranda warning (Greenberg & Dratel 2005: 147-148, 152-153).

Interrogation Centre Guantanamo – Placing the Prisoners

The Bush administration needed a place that would be able to accommodate the interrogation framework they had established, and Guantanamo naval base (GTMO) would be deemed perfect. This was disclosed by SoD Rumsfeld in December 2001, determining after a thorough review that the naval base at GTMO was the "least worst place" to hold the detainees (Seelye 2001).

[39] *Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan.*

Placing the prisoners was more deliberate then was immediately conveyed. John Yoo, in his book relates how the Bush administration determined where to place the prisoners in the war on terror. As Yoo writes, "the one thing we all agreed on was that any detention facility should be located outside the United States." The Bush administration believed that the civilian criminal system would not be adequate to handle military prisoners in the WoT and wanted to find a place where federal courts did not have jurisdiction, as they might substitute "familiar peacetime prison standards for military needs and standards" (Yoo 2006:142). In an OLC opinion from December 28, 2001, Yoo and co-author Patrick Philbin answered the question from the DoDC William J Haynes of "whether a federal district court would probably have jurisdiction to entertain a petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantanamo Bay". Apparently, the administration was concerned that "if a federal district court were to take jurisdiction over a habeas petition, it could review the constitutionality of the detention and the use of a MC, the application of certain treaty provisions, and perhaps even the legal status of AQ and TLB members". Yoo and Philbin concluded that "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at" Guantanamo (Greenberg 2005 & Dratel :29). However, they did stress that they could not guaranty that a federal court would come to the same decision.

While the memo established that in the view of the OLC it was all but certain that GTMO was beyond the reach of the federal courts, it also laid bare the concerns within the administration that the whole setup for prosecuting terrorists in the WoT was of questionable constitutionality. They really did not want this tested before the courts. The reason that Yoo and Philbin felt that GTMO detainees were beyond the reach of the federal courts was based on a series of court decisions about the previous use of GTMO which was settled during the first Bush and the Clinton administration. The court decisions didn't provide any clear answers, but Yoo and Philbin construed them as giving the US "control and jurisdiction" over GTMO, but that this did not amount to "sovereignty", which means that though the US has complete say over GTMO it is not US territory (Id.:34-35).

The question about "control and jurisdiction" and "sovereignty" stems from the lease agreement that that the US government made with the Republic of Cuba in 1903 following the *Spanish American War*. The original purpose was for the US navy to have a coaling station and naval base at GTMO. Art. III of the agreement states precisely that ultimate sovereignty remains with Cuba, but that the US has complete control and jurisdiction over GTMO (American-Cuban Lease Agreement 1903). The exact extent of what this means has been debated often and as noted been a theme in many court cases. The way that Yoo and Philbin construed the distinction is central to the core reason why they believe habeas does not cover aliens detained at GTMO: the Supreme Court case *Johnson v. Eisentrager*.

In 1945, as WWII was in the final months, a group of Germans were caught in China by American forces still engaging in military activity despite the Third Rich having capitulated. The Germans

were tried and convicted in China by an American MC, and was subsequently moved to the American occupied part of Germany were they were imprisoned in the custody of the army. The Germans claimed that their trail, conviction and imprisonment violated the US Constitution and the GC's, and they petitioned for a writ of habeas corpus. In Johnson v. Eisentrager, the Supreme Court ruled that "a nonresident enemy alien has no access to our courts in wartime." In addition it asserted that "in extending certain constitutional protections to resident aliens, this Court has been careful to point out that it was the aliens' presence within its territorial jurisdiction that gave the Judiciary power to act," and that "a nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts". Furthermore, it pointed out that "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security," and that "it being within the jurisdiction of a military commission to try these prisoners." Therefore, "these nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States" (Johnson v. Eigentrager 1950).

According to Yoo and Philbin, this court case established that if an alien who had engaged in military action against the US where caught and sentenced outside US territory this person could not petition for a writ of habeas corpus in a US court. Furthermore, it was established that "enemy aliens" were under the power of the executive and that it was perfectly legal for these to be tried by a MC. Because Yoo and Philbin had construed that GTMO was "outside the territorial jurisdiction of any court of the United States," see as how "control and jurisdiction" do not equal "territorial jurisdiction", which is the same as "sovereignty," GTMO was in fact the perfect place to detain prisoners in the WoT (Greenberg & Dratel 2007:33). Moreover, it gave President Bush the right to hand over prisoners to SoD Rumsfeld for him to try these in MCs.

That the detainees might seek a writ of habeas corpus is something quite natural. Habeas corpus is one of the main pillars in American justice. The Constitution states that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (USconstitution.net). Alexander Hamilton wrote about the importance of habeas corpus in federalist 84, noting that "the creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." He quotes "the judicious Blackstone" as saying that " to bereave a man of life… or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government" (Federalist: No. 84).

Habeas corpus is Latin for *you have the body* and according to Joseph Margulies it is a "check on executive detention by forcing the government to defend a prisoner's incarceration in court… If the government cannot or will not make this showing, the court must order the prisoner released" (Margulies 2007:46). In the SC Case *Bowen v. Johnston,* the court held that "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired" (Bowen v. Johnston 1939) In *Harris v. Nelson,* the SC asserted that "the writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action… The scope and flexibility of the writ -- its capacity to reach all manner of illegal detention -- its ability to cut through barriers of form and procedural mazes -- have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected" (Harris v. Nelson 1969).

Habeas corpus has also been imbedded in the U.S.C., where it is stated that "the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States" (US Code State Custody).

Though the detainees would apparently, according to the abovementioned, be entitled to petition a writ a habeas corpus, thus being able to challenge the lawfulness of their detention, the court precedents points to the fact that this can only happen if the detainees are on sovereign US land. Therefore, it was paramount for the administration to place them outside the jurisdiction of the US courts: something the so-called jurisdiction memo by Yoo and Philbin argued was the case with GTMO.

Others pointed out the weaknesses of this argument. Margulies, for instance, argued that petitioners in the Eisentrager case differed very much from any potential petitioners from GTMO. The Eisentrager petitioners had already been through a case where they had enjoyed the due process of law. They had been charged, had been given access to counsel, and could prepare a defense, etc. As Margulies noted, "it is one thing to hold… that war criminals who had been tried, convicted and sentenced by a lawful MC, and who had an opportunity to challenge the allegations against them, could not secure another review in a civilian court. But it is quite another to extend that holding to people who have never been charged, let alone tried and convicted" (Margulies 2007:48).

Furthermore, Margulies suggested that viewing GTMO as not being US territory could very well be wrong. There are several arguments that could be put forward to suggest that GTMO is in fact US territory. The lease agreement with Cuba is indefinite and both parties must agree to terminate it for it to cease to exist. The Cuban government has for a long time fought to get the US to leave

GTMO, calling the US presence illegal and refusing to collect the rent payment. The US has chosen to stay put declaring it can stay as long as it wants, thus drawing into question whether GTMO constitutes sovereign Cuban territory at all, also because Cuban laws are seemingly ineffectual on that piece of land. Instead, legal disputes are handled regularly by federal courts[40] and all personnel are governed by US law. Maybe most important though, throughout history the US has in several instances considered GTMO as US territory, for instance when former Solicitor General Theodor Olson in his stint at the OLC under Reagan described GTMO as under "exclusive United States jurisdiction" (Id.:50).

Torture

It would not take long for US military and other interrogation personnel to begin using these measures that were being made 'legal' by the Bush administration. Already in January 2002, Amnesty International (AI) became concerned over pictures showing hooded detainees. It warned that this was a violation of numerous international treaties, including the GC's, and the *UN Convention against Torture*, which the US had ratified in 1994 (UNCT). In a letter they sent to SoD Rumsfeld, AI stated that hooding and several measures may not be used in interrogation as they would "violate the prohibition of torture and ill-treatment." These measure included "restraining in very painful conditions; playing of loud music; prolonged sleep deprivation… using cold air to chill the detainee" (AI Letter 2002). When asked at a press conference some days later if the detainees rights were violated by hooding them, Rumsfeld answered "it simply isn't." The administration was working out how to handle them, but they would be handled the right way. They would not be handled as POWs, but as unlawful combatants, and "technically, unlawful combatants do not have any rights under" the GC's (Rumsfeld News 2002).

Already in the early months of 2002, the US forces and intelligence agencies like the CIA began using methods like those described in the KUBARK and HRETM manual, something known and debated at the highest level by the likes of current SoS Rice, AG Ashcroft SoD Rumsfeld (Warrick 2008). Moazzam Begg[41], a British citizen, was seized in January that year in Afghanistan. At sometime in April, Begg was transferred to *Bagram Airbase*, the main detention center in Afghanistan. There, according to Begg, he was interrogated and experienced some of the interrogation practices that had became available the US forces, like sleep deprivation and being shackled in stress positions (Begg Interview 2007).

Yet, the Bush administration was not satisfied with the interrogation tactics, and indeed the number and experience of the interrogation professionals at hand, so they looked for other options. Over the summer of 2002, the administration's attention turned to the *SERE*[42] program

[40] See for instance *Kirchdorfer, Inc. v. United States (1993)*

[41] Begg was released in 2005, without having been charged.

[42] *Survival, Evasion Resistance, Escape*.

(Benjamin 2008). At roughly the same time, reports suggests, the interrogation of a captured high-ranking member of al Qaeda named Abu Zabaydah[43] ground to a standstill. He was one of the detainees that would later be subjected *water boarding* (Mayer 2008: 157).

SERE is a secret military training program for US personnel in danger of being captured by the enemy, like pilots and Special Forces soldiers, and has its roots in the Korean War. During the war, 36 US airmen were caught by the Korean army and would later in an astonishing propaganda event falsely admit to having committed outrages war crimes. When the airmen were finally released to the US, they told tales of physical and mental torture that had broken the airmen and led to the false statements. One pilot, Frank Schwable, related how he had not been subject to much physical torture, but had been subject to mental torture, "a more subtle kind of torment." Instead of battle scars, he had suffered "a slow, quiet, and diabolic destruction of his mind." The CIA studied this interrogation tactic thoroughly and the findings would turn into the aforementioned KURBAK and HRETM manuals. The US army, though, turned what was learned into the SERE program. The SERE program exposed participants to a series measures including "water boarding, sleep deprivation, isolation, bombardment with agonizing sounds… and temperature extremes"(Mayer 2008: 157-161). The program was designed to help "high risk-of-capture" persons cope with a situation where that person might be alone behind enemy lines. This could mean capture and interrogation by a "totalitarian evil nation with a complete disregard for human right," and US personnel must be prepared as best as possible so as not to have another 'Schwable incident' (Nance Interview 2007). SERE instructors were very good at being instructors, and were very good at creating this illusion of an interrogation (Kleinman Interview 2007). The Bush administration observed this too, and around the summer of 2002, they hired former SERE instructors to try to 'reverse-engineer' the SERE program into an interrogation tool for the US, and would turn to SERE instructors to implement and at times carry out this new 'intelligence gathering tool'(Mayer 2008: 158, 163).

However, the reliance on coercive interrogations in the war on terror, which would be expanded if SERE techniques would be used in interrogations as well, meant the White House needed to determine if such methods were illegal or legal. OLC would determine this in an opinion[44] dated August 1, 2002, signed by OLC Head Bybee, but widely believed to be authored by John Yoo. The memo asked the question of conduct of interrogation under Title 18, paragraph 2340 and 2340A (Greenberg & Dratel 2005: 172).

18 U.S.C. §§ 2340 and §§ 2340A prohibits the use of torture as part of the US law. Torture is defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering… another person within his custody or physical

[43] He was one of the 'trophy terrorists' that Bush mentioned by name from time to time.

[44] *RE: Standards of Conduct for Interrogation under18 U.S.C. §§ 2340-2340A*

control." Severe mental pain and suffering is defined as "the prolonged mental harm caused by or resulting from… the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality, the threat of imminent death, or the threat that another person will imminently be subjected to death, severe physical pain or suffering." This is prohibited within the US. §§ 2340A proscribes that people can also be prosecuted if they commit torture outside the US, if that person is a US citizen or is on US territory, or conspires to violate §§ 2340. Sentencing is up to 20 years in prisons, and if the victim dies, prison for life or the death sentence (18 U.S.C.: §§ 2340 & §§ 2340A).

The Constitution also seemingly prohibits coercive measures. The Fifth Amendment dictates that persons detained by the government must be indicted, cannot be compelled to testify against themselves (Miranda rights) and has a right to due process of law. The Eight Amendment bans "cruel and unusual punishment" and the Fourteenth Amendment states that the 'Bill of Rights' extends to people "subject to the jurisdiction" of the US (US Constitution.net).

The memo of August 1, 2002, by now known as the 'torture memo', would conclude several controversial things. For an act to be torture, it must inflict pain "difficult to endure." For physical pain to be torture, it must be the "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." OLC derived this from a statute in the U.S.C. which defined "an emergency medical condition for the purpose of providing health benefits." For mental pain or suffering to be torture, it must result in "psychological harm of significant duration… lasting for months or even years" as seen in post-traumatic stress disorder. Mental harm is only criminal if it is a result of incidents described in §§ 2340, such as "threats of eminent death, threats of infliction of… pain that would amount to physical torture." It was concluded that only "extreme acts" would constitute torture and that persons could only be prosecuted for these acts, and not acts of "cruel, inhuman, or degrading treatment or punishment."Furthermore, the memo suggested that any act only violated §§ 2340 if the act was specifically indented to inflict "severe pain and suffering," if it was the defendant's "precise objective." Knowing that it would constitute "severe pain or suffering equivalent" to torture was not specific intent. In other words, torture could in theory be permitted if the object in itself was not to inflict "severe pain or suffering." The memo also established that "decisions by foreign or international bodies are in no way binding authority on" the US. However, the memo offered, they could be used as a guideline to determine what internationally would be considered torture. It suggested that measures like hooding, subjection to noise and sleep deprivation were not severe and intensive enough to constitute torture. Furthermore, §§ 2349A was concluded to be unconstitutional as it encroached on the president's ability to conduct a war as commander in chief by inferring with his ability to detain and interrogate enemy combatants. His commander in chief powers are further bolstered by the AUMF. The memo also found that were Congress to

"regulate the interrogation of battlefield combatants," it would be unconstitutional as "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." Should the above mentioned in any future criminal case be discarded as valid defenses, a defendant could claim that he was committing acts which may amount to torture, either out of necessity or in self-defense, to defend the nation against potential terrorist attacks (Greenberg & Dratel 2005: 172-214).

Over the next two years, internal discussions over the Bush administration's interrogation policy would seemingly unfold while the spread of coercive interrogation methods would reach Iraq and gain worldwide notoriety in the debacle of Abu Ghraib (Benjamin 2008).

In September 2002, a group of lawyers visited GTMO to amongst other things receive briefings on intelligence successes, challenges, techniques and problems and future plans for facilities. Amongst those participating are DoD GC Haynes, VP Counsel Addington (GTMO Visit).

On October 2, 2002, a meeting took place at GTMO to discuss the use of coercive interrogation techniques and the possible adoption of SERE techniques or as they are also referred to, counter-resistance techniques. At the meeting it is suggested to use methods like sleep deprivation, exploitation of phobias and "the wet towel technique," that is water boarding. Some of the arguments laid out in the August 1 memo is presented, suggesting that the use of these methods is not criminal and it is suggested that the CIA are already using these methods. One statement about whether or not these techniques are torture goes: "It is basically up to perception. If a detainee dies you're doing it wrong." It is also discussed whether or not to videotape interrogation sessions, as these "are scrutinized too much in the courts. The overall theme of the meeting seems to be that they are willing to employ these methods if they get the legal cover from higher up. But a US Army officer is clearly concerned about the discussion that had take place. He forwards the minutes from this meeting, remarking that "this looks like the kinds of stuff Congressional hearings are made of" and "someone needs to be considering how history will look back at this" (CRSM Minutes: 1-4).

On October 25, 2002, a request for the use of counter-resistance techniques was forwarded to the chairman of the JCS (Greenberg and Dratel 2005: 223) from the *USSOUTHCOM*[45]. Attached to this request was a memo by Lieutenant Colonel Jerald Phifer outlining the techniques sought approval for, and a legal review of the techniques by Lieutenant Colonel Diane Beaver, Staff Judge Advocate.

The Phifer memo suggested that the techniques they currently had at their disposal were insufficient to "counter advanced resistance." The memo outlined an interrogation plan in three categories. Category I techniques was the regular time-tested techniques as described in FM 34-

[45] *The United States Southern Command* located in Florida and covers for instance Cuba.

52. Should they fail, the interrogator could with the permission of the officer in charge (OIC) switch to category II techniques. These included the use of stress positions, like standing, for up to four hours, isolation, deprivation of light and auditory stimuli, hooding, 20 hour interrogations, removal of clothing and exploitation of phobias. Category III techniques could be used on a very limited number of detainees, "the most uncooperative detainees," and were derived from "U.S. military interrogation resistance training," that is the SERE program. These had to be approved at the highest levels of the US army and included techniques like threats of imminent death or severe administration of pain to the detainee or the detainee's family, exposure to cold weather and water and water boarding (Id.: 227-228).

The Beaver legal opinion supported the Phifer memo's assertion that FM 34-52 interrogation methods were not sufficient any longer. It echoed the abovementioned August 1 memo and supported the legality of the methods suggested in the Phifer memo, recommending they were approved. Furthermore, it recommended that interrogators were properly trained in these methods and that the methods proposed would undergo specific "legal, medical, behavioral science, and intelligence review prior to their commencement" (Id.:229-235).

In November 2002, military officials and JAGs begin questioning the methods of interrogation that were being considered (Benjamin 2008). The 27th of that month, SoD Rumsfeld received an action memo about the requested interrogation methods requiring his signature. His DoDC William Haynes[46] suggested he approved all but most of the methods in Category III; though he believed all the Category III methods may be legal, he did not believe a blanket approval was warranted yet, possibly due to the concerns being voiced within the DoD. Rumsfeld approved the techniques in early December, but in hand writing on the memo itself he noted: "However, I stand up for 8-10 hours a day. Why is standing limited to 4 hours?" (Greenberg & Dratel: 237). That same month, am FBI legal analysis of the coercive interrogation methods. The analysis suggested that most of the proposed Category II and III techniques could violate 18 U.S.C §§ 2340 and was unconstitutional. However, a new category had been added to the techniques considered. Category VI was the option of rendition, that is sending a detainee from GTMO to a third country and allow those countries to use their interrogation techniques to extract information, presumably using torture. That method was deemed to violate the statute above (FBI Analysis: 1-3). It has been widely reported that FBI agents early on were ordered not to participate in coercive interrogation.

The same day as Rumsfeld signed the action memo, a guideline for employing SERE techniques at GTMO was produce. The memo, of which only an edited excerpt has been made available, described how SERE techniques were used to 'break' army personnel in training, and could be used to break real detainees during interrogation. However, it warned that all interrogators must

[46] Goes by both William and Jim

undergo "training by certified SERE instructors" before being approved to use these methods. It meticulously described how to employ these tactics, both some of the aforementioned, but it also mentioned other techniques like *walling* [47](SERE Instruction: 1-6). During late December 2002 and early January 2003, SERE instructors visited GTMO on the insistence of a "high-level directive." They trained 24 interrogators in the use of SERE techniques (SERE Instructor Trip: 1-2).

In mid January, though, SoD Rumsfeld rescinded his order of approval for the GTMO interrogation techniques (Greenber & Dratel 2005: 239). On December 17, 2002, US Navy General Counsel Alberto Mora received word from the head of the NCIS[48] Dave Brant that his people at GTMO had observed detainee abuse. Believing at first that this had been the work of a few rogues, Mora quickly discovered to his surprise that this had been approved by Rumsfeld himself. He was horrified and concerned, and thought legal reasoning incompetent. He believed the reasoning was not thought through and "could lead to disastrous conduct." Three days later, he relayed his concerns to DoD General Counsel Haynes, telling him he believed the techniques could very well amount to torture and it was contrary to what the US stands for, its history of being on the forefront in the question of human rights. After the meeting, Mora believed he had convinced Haynes that approving these techniques had been wrong, that the mistake would be corrected. It was not. During his Christmas vacation he received a call informing him that the coercive techniques were still in use. He knew then he had to gather a coalition to fight this from the inside. Mora was concerned about several things, besides the moral and legal issues. He believed the lack of adequate interrogators, the possibility of 'force drift'[49] to be troublesome. And he was afraid what signals the hand written Rumsfeld note on the action memo might send. In the beginning of January 2003, Mora had another meeting with Haynes and tried to persuade him to recognize the ramifications that this could have for the US and its relationship with its allies. But to no avail. Mora continued to build his coalition within pentagon, but he believed he needed to act swifter, so he drafted a memo rejecting the views of for instance the Diane Beaver memo and outlined all the damage it could do both internally and externally to the US. He presented the draft to Haynes in mid January, but without reading it Haynes suggested that Rumsfeld was considering rescinding the approval of the techniques. On January 15, he did just that (Mora Interview 2007).

On that same day, Rumsfeld issued a memo directing Haynes to assemble a working group consisting of experts from across the DoD. This working group was to asses legal and policy considerations with respect to interrogation and interrogation techniques, and to make

[47] Consist of placing a detainee forcibly against a wall.

[48] *Navy Criminal Investigative Service.*

[49] The theory that once the use of force is allowed, the possibility exists that an interrogator could, maybe inadvertently, increase his use of force to produce results, until it becomes torture.

"recommendations for employment of particular interrogation techniques by DoD interrogators." The report was to be completed in 15 days (Greenberg & Dratel 2005: 238).

It would take longer than that. On March 6 2003, a draft of the working group report was issued. It basically adopted the same views that had been outlined in the August 1st memo and the Diane Beaver memo. OLC was also asked to draw up a legal opinion for the working group to base their findings on. When Mora got to view this draft, he subsequently told Haynes "it was a bad piece of work," and encouraged him to "put it in a desk drawer" and never let it see the light of day again (Mora Interview 2007). Several other JAGs who were privy to the development of the working group report shared the same views. This is evident in a number of memos submitted during February and March of that year, advocating several changes to the draft report. Several of the memos warned that the OLC opinion had been given too much weight in the draft report. The JAGs suggested that the proposed interrogation techniques might very well make US personnel susceptible to prosecution for violation of anti torture statutes, both nationally and internationally, pointed out how it would take the US away from its history of taking the "moral high-road." Some suggested that US soldiers and interrogators might be confused by first having been indoctrinated to always follow and respect the GC's, and then being told that they didn't apply. One memo recommended that decision-makers "be made fully aware of the very narrow set of circumstances – factually and legally – upon which the policy rests… I recommend we ask decision-makers directly: is this the "right thing" for U.S. military personnel?" Another one indicated that OLC did not represent the armed services and wondered if the view of these were adequately represented. Some questioned the quality of the OLC opinion (JAG memos: 1-11).

The new OLC opinion[50] was written by Yoo and dated March 14, 2003. It was basically identical to the August 1, 2002 memo. It just expanded the ideas to answer new questions. It suggested that the Fifth Amendment did not apply to a president's conduct of war and if so, it did not apply "extraterritorially to aliens who have no connection to" the US. Also the Eight Amendment did not apply to aliens abroad, but it was also constricted to criminal cases only. It suggested that criminal law could not be applied to persons acting pursuant to the president's role as commander in chief. Should criminal law for some reason apply, it was allowed to for instance maim a detainee as long as it did not involve any of the specific actions prohibited 18 U.S.C. § 114 defined as maiming and methods of maiming. Furthermore, it was allowed to maim someone, as long as this was not the specific intend (Yoo Memo 2003: 6-10, 12, 30-31).

On April 4, 2003, the final version of the WG report[51] was completed. It was supposedly the result of a "collaboration effort" of the organizations within the DoD, "after consideration of diverse views." The report found that interrogation techniques could be divided into three categories:

[50] *Re: Military Interrogation of Alien Unlawful Combatants held outside the United States*

[51] *Detainee Interrogations in the Global War on Terror.*

routine techniques, not formerly recognized techniques, more aggressive counter-resistance techniques. These were basically the same categories developed in the Phifer memo. The WG report also suggested that due to the nature of the conflict with al Qaeda and Taliban, it was "appropriate…. to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied" to a POW subject to the GCs. The WG report was base legally on the previous OLC opinions, very much so on the March 14 memo. A new argument, though, had been developed (Greenberg & Dratel 2005: 286-287, 301). The report suggested that interrogations performed at GTMO was not covered by the 18 U.S.C. §2340 as §2340A states that it covers acts outside the US. However, according to 18 U.S.C. § 7, GTMO was included within the "special maritime and territorial jurisdiction" of the US, though interrogation in for instance Afghanistan would still be subject to §2340 and 2349A (18 U.S.C: §7, 2340 and 2340A). Therefore, regular criminal statutes prohibiting acts like maiming and murder (Id.: §114 and 1111) might be applicable to GTMO interrogators, but only if these act were committed with specific intent. According to the report, US personnel would not be prosecutable if these act where taken pursuant to the president's commander in chief authority. That Congress was barred from legislating in these matters was once again underlined, as well as the possibility that persons facing charges of committing torture could claim *necessity* or *self-defense*. In addition, it was noted that constitutional rights for aliens were only extended is these were within the sovereignty of the US, so it was not enough to be within US jurisdiction. The report also answered the question offenses under the UCMJ. Once again, *necessity* and *self-defense* could be evoked. An interrogator might also be protected if he could prove *mistake of fact*, for instance if a person commits torture but is not aware that it is illegal. Furthermore, the report considered interrogation policy. It acknowledged that for a considerable period of time, the US Army had adhered to the principles in FM 34-52. It suggested, though, that the main priority was to effectively gather intelligence, and as such harsher interrogation methods would be needed, pursuant to a "risk benefit analysis." These had to be specifically considered and approved in each case. Whether or not any evidence derived in this way were admissible, were to be determined by the probative value in each case if the case were tried before an MC. The report also reaffirmed the position that the US was not bound by the GCs and customary international law (Greenberg & Dratel 2005: 301-302, 306-313, 316-340)

The WG report also considered interrogation techniques. It evaluated a list of 35 techniques deemed to be permissible, but underlined that the evaluation was based on the individual technique, and as techniques were usually used in combination, the cumulative effect should be considered before any use was approved. Techniques 1-17 were Category I techniques, the same as the ones in FM 34-52. 18-26 were Category II techniques. These included hooding, environmental manipulation (e.g. temperature manipulation), sleep adjustment (not to be confused with sleep deprivation, it merely changes up 'bed time' hours). Category III techniques, the aggressive counter-resistance techniques requiring "risk benefit analysis" and prior approval, included techniques like isolation, prolonged standing, sleep deprivation and exploitation of aversions or phobias. Though it recommended this list of 35 techniques, and that interrogators

should be specifically trained in their usage, the report also recommended that "a procedure be established for requesting approval of additional interrogation techniques… that could be considered equivalent in degree to any of the "exceptional techniques" addressed in this report" (techniques 27-35). In other words, though water boarding was not amongst the recommended techniques, that did in no way mean that it could not be used in the future (Id.:340-242, 347). On April 16, 2003, SoD Rumsfeld approved the findings in the WG report and approved the use of these techniques, as Rumsfeld made clear, though, these techniques were limited to be used at GTMO only (Id.:360).

The WG report claimed to be the result of a collaboration effort taking into consideration diverse views from the different organizations within the DoD, but this is a truth with substantial modifications. As stated above, JAGs like Alberto Mora were very critical of the WG draft report and Mora had recommended that the report was shelved. And apparently this is what Mora believed and his fellow JAGs had happened. After being consulted in the process of developing the report and having been issued with a near complete draft for review, which many JAGs had widely criticized, Mora and his colleagues didn't hear anything more about the report and was never presented with a finished product. They thought the report had been dropped, that Rumsfeld had finally decided to shy away from authorizing coercive interrogations. To their complete surprise, they discovered a year later, during the Congressional hearings into what had happened at Abu Ghraib, that the WG report had been completed and signed by Rumsfeld in spite of their objections to the contents of the report (Mora Interview 2007).

Iraq

Despite Rumsfeld's determination that the WG techniques were for use only at GTMO, there is substantial evidence that these techniques started spreading into the interrogation centers of Iraq. There is one fundamental problem with this; as explained by WH/C Alberto Gonzales in 2004 as the scandal broke, "Iraq presents a very different situation. Both the United States and Iraq are parties to the Geneva Conventions. The United States recognizes that these treaties are binding in the war for the liberation of Iraq. There has never been any suggestion by our government that the conventions do not apply in that conflict" (Gonzales 2004). So the GC's, the WCA and 18 U.S.C. § 2340 and 2340A would without a doubt cover any interrogation in Iraq.

Sometime during 2003, 'Special Mission Unit' forces began developing interrogation methods modeled on the practices in Afghanistan (Benjamin 2008). An e-mail correspondence between still unnamed military personnel during 2003 corroborates this. In the e-mail, one of the writers indicated that military intelligence was looking for input on how to treat and interrogate unlawful combatants. This was in response to an order from a still censured higher instance, letting the interrogators know that "the cloves are coming of gentlemen," and it was made clear that the unlawful combatants needed to be broken as casualties were mounting. In response, another person who had spent time as an interrogator in Afghanistan, though apparently had only used

standard interrogation methods, suggested the use of SERE techniques. A third respondent suggested that since they had taken over the country, all the persons they detained were 'unprivileged bilingrents', which is enemy combatants, thus who are not protected by the GC's. However, that person warned about the 'gloves are coming off' mentality, pointing out that the US had a history of embracing the CG's, and that it must be realized that being in war meant sustaining casualties (Interrogation E-mail:1-3).

On September 14, 2003, General Ricardo Sanchez, commander of US forces in Iraq sent a formal request to the US Central Command, asking for authorization to use a new interrogation policy. This policy, an "Interrogation and Counter-Resistance Policy," was to be modeled on the one "implemented for interrogations conducted at" GTMO. Some of the techniques that were requested approved included sleep management (sleep deprivation), yelling, loud music, light control and stress positions (Sanchez Request 2003: 1-6). In April 2004, the Abu Ghraib scandal broke.

In February 2004, the ICRC drafted a report[52] on detainees in Iraq. The report outlined serious violation of human rights by the Coalition Forces (CFs). These alleged violations were reported to the ICEC between March and November 2003. The violations included "brutality against protected persons upon capture and initial custody, sometimes causing death and serious injury," and "physical and psychological coercion during interrogation to secure information." The report found a "consistent pattern with respects to… brutal behavior during arrest." Ill-treatment was systematic when detainees were related to "suspected security offences or deemed to have an 'intelligence' value." These where in high risk of being "subjected to… harsh methods ranging from insults… to both physical and psychological coercion, which in some cases were tantamount to torture." The report also alleged that "in certain cases, such as the Abu Ghraib intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operation procedure." These methods included hooding, threats of imminent death, exposure while hooded to loud noise and music and stress positions. ICRC also reported that several persons showed signs of having suffered mentally as a result of their treatment at a visit to Abu Ghraib. At Baghdad International Airport, several 'high value detainees' were kept in strict isolation, some reported for several months (Greenberg & Dratel 2005: 384-385, 391-393, 398).

There are pieces of information that suggests that the spread of coercive interrogation to Iraq might have been directed from the top levels of the White House. An E-mail by an unnamed FBI agent from May 2004 mentioned several times an EO signed by President Bush authorizing sleep management, stress positions and environmental manipulation such as loud music. The FBI agent believes that the techniques authorized by the EO are "beyond the bounds of standard FBI practice." FBI are pursuant to the EO required to report any abuses but the FBI agent is compelled

[52] *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons in Iraq.*

to ask for clear guidelines to determine "what is clearly abuse and conduct that, while seemingly harsh, is permissible under applicable" EOs (FBI E-mail 2004). A strong link between GTMO and Iraq and the spread of SERE based techniques can be trace to August/September 2003. In this period, a team of GTMO interrogators visited Iraq, with the mission to discuss "interrogation operations, and detention operations" (Greenberg & Dratel 2005: 451) In an interview, former General Janis Karpinski, who had run Abu Ghraib until the early 2004, claimed to have seen a memo from SoD Rumsfeld authorizing the use of the aforementioned techniques, with an added remark under his signature stating: "make sure this is accomplished" (Reuters 2006).

In early 2008, the Bush administration finally officially admitted that it knew about, and had authorized the use of, water boarding. According to the Bush administration, three persons had been water boarded in 2002 and 2003, though it had apparently not been an approved technique since 2006 (Eggen 2008). However, Bush wants to keep the option of ordering water boarding. In March 2008, he vetoed a bill that had passed both chambers of Congress which would ban the use of water boarding, stating that the bill "would take away one of the most valuable tools in the war on terror" (MSNBC 2008). In October 2008, it became known that CIA had pushed for specific authorization for their use of coercive interrogation methods, including water boarding. Top White House officials, including current SoS Rice and VP Cheney were present at briefings were coercive techniques were explained. Then CIA Director George Tenet was seeking what could be termed a 'golden shield' for his subordinates, establishing a paper trail and having a legal opinion that would cover them if they would ever be indicted for their actions. These legal coverings were provided in 2004 (Warrick 2008 2: 1-3)

Rejecting Torture and 'Bush Almighty'

Not surprisingly the revelation that coercive treatments and seemingly torture were conducted by US personnel caused an outcry. As noted already, NGO's like ICRC were very concerned with the choices that the Bush administration had made in the WoT. When the controversial interrogation methods gradually became known to the public, and scandals like Abu Ghraib was uncovered, the Bush administration was condemned by people on both the right and the left. Congressional probes and investigative were launched. Legal professionals were at the forefront of the denunciation of the Bush White House.

Law Professor Jeremy Waldron drafted a paper[53] rebuking, not only the Bush White House, but especially the lawyers who had developed the legal opinions in support of coercive techniques and torture, lawyers like John Yoo. Waldron found such a defense of torture "shocking" and called it a "dishonor to the profession." He called the quality of the August 1st memo a "disgrace," for instance pointing out that the approach to defining 'severe pain' was "strange" as Bybee/Yoo did

[53] *Torture and Positive Law: Jurisprudence for the White House*

not even take into account the different context of 'severe pain' in a medical situation and a torture situation (Waldron 2005: 5, 30-31).

Professor Harold Koh scolded the Bush administration's actions in a recent Congressional testimony. Koh charged that Bush had "gravely diminished our global standing and damaged our reputation for respecting the rule of law." Koh criticized Bush for asserting a "constitutional theory of unfettered executive power, based on extraordinarily broad interpretations of Article II's "Commander-in- Chief" Clause and the Supreme Court's decision in United States v. Curtiss-Wright," and for having "consistently rejected the universalism of human rights in favor of executive efforts to create law-free zones, such as Guantánamo; executive courts, such as military commissions; extralegal persons, who are labeled enemy combatants; and law-free practices, such as extraordinary rendition, all of which it claims are exempt from judicial review."Koh also pointed out that "we have increasingly heard claims that the executive can infringe upon our civil liberties without clear legislative statements, relying on such broadly worded laws as the Authorization for Use of Military Force Resolution (AUMF) of September 2001 to justify… indefinite detentions, and torture of foreign detainees."Another problem was "the startling argument that executive action should be treated as a kind of law unto itself. Remarkably, the President's lawyers have recently argued, the policy rationale for executive action has somehow created the legal justification for executive unilateralism," meaning that "once the President had authorized an action, in effect, it had become legal under the President's constitutional powers and thus could not contravene any criminal statutes." Koh also noted that the controversial August 1st memo "evoked eerie memories of Richard Nixon's comment: "[W]hen the president does it, that means that it is not illegal." Should this be true, "then the President's word alone is law, and the carefully prescribed system of checks and balances prescribed in the Constitution no longer exist" (Koh 2008).

It is not only legal scholars that take offence with the Bush administration's actions. As mentioned earlier, DoS officials took offences with some of the Bush policies and so did the JAGs, to such a degree that the supposed experts were seemingly sidetracked in policy development. The question of this was on ongoing trend must be considered. The Bush administration seemingly had no problem embracing coercive interrogation techniques. Several experts believe this was ill advised. In an interview, former SERE instructor Malcolm Nance for instance chided the Bush administration for failing to observe that water boarding is torture; that it is not 'simulated' drowning but controlled drowning. In Nance's eyes the US has become a nation of tortures, and "it will hurt us for decades to come." There is a very real chance that captured US personnel will in the future be subjected to the same techniques approved by the Bush White House, and the perpetrators can argue that it is not torture because Bush said it wasn't. As to the administration's assertion that 9/11 ushered in a 'new paradigm' that has to be approached differently, Nance has a though provoking answer: "What we had was a failure in homeland defense on September 11th. That's all... We had a failure in intelligence, because of the imagination of the counterterrorism people" (Nance Interview 2007).

Colonel Steven Kleinman, a military interrogator and SERE instructor, outlined in an interview why it was a poor fit for intelligence gathering to uses SERE techniques. First of all, the techniques SERE were based on was supposed to make someone say what the captor wanted, not provided the captor intelligence, as was the case with the downed airmen in the Korean War. Torture and coercive techniques as a whole was also very useless as it tends to force people to tell the interrogator what he *wants*, to make the pain stop, not necessarily what is true. So the possibility of false confessions is fairly high (Kleinman Interview 2007). It is not as if the old time-tested interrogation techniques did not work in the 'new paradigm' conflict. A former interrogator wrote an article under a pseudonym in the Washington Post. He relayed how he had used the FM 34-52 methods very successfully in Iraq. He was the interrogator who produced the information that allowed US forces to take out Abu Musab al-Zarqawi[54], thus proving the mettle of the FM 34-52 method. According to this former interrogator, the main reason foreign fighters flocked to Iraq to fight, was the abuses of Guantanamo and Abu Ghraib, further underlining just how counter-productive the use of torture might be (Washington Post 2008:1).

The same could perhaps be said of Bush's attempt to create a trial system for terrorists, the military commissions. As of December 2008, this policy seems to be an utter failure. It is true that the military commissions convicted its first person in August of 2008, former Bin Laden drive Salim Hamden was sentenced six years prison, but the history of the commissions seems surrounded by chaos (Worth 2008). At least four prosecutors has resigned in protest from the commissions and as noted above the constitutionally of the system is rather fragile (Meyer 2008: 1).

Presidential scholar James P Pfiffner charged that Bush had suspended the system of checks and balances by taking upon himself all three roles of government:"In the cases where President Bush asserted inherent presidential power to ignore the law, he was claiming that the checks and balances in the Constitution were not binding on him. In the case of military tribunals, the president would act as lawmaker in creating the commissions himself and not in accord with enacted laws. He would act as executive in detaining suspects in prisons. And he would act as judge in conducting the trials, imposing sentences, and serving as the final appeal. In the case of the Geneva Conventions and torture, President Bush would act as lawmaker in suspending the treaty, which according to the Constitution is "the supreme Law of the Land." He would act as executive in carrying out the policy by interrogating prisoners with harsh interrogation practices. And he would act as judge by keeping the proceedings secret and arguing that federal courts did not have jurisdiction to consider appeals of detainees."(Wadsworth2008: 245-246).

However, other disturbing things have happened. In August 2002, CIA begins water boarding Abu Zabaydah, possibly torturing him with other methods as well. Apparently, some of these torture sessions were videotaped. At some point in November 2005, the CIA suddenly destroys these

[54] The now deceased former al Qaeda in Iraq leader.

tapes. In January 2008, AG Michael Mukasey announces a criminal investigation into torture tapes destruction (Torture Tape Timeline).

Other Branches of Government

There have been some attempts by the other branches of government to rebuke the Bush administration policies. First and foremost, four SC cases have rejected some of the claims of the Bush White House.

Rasul v. Bush

14 petitioners, all being held by at GTMO, challenged the legality of their detention, "alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals." The Bush administration had argued that GTMO unique status as being within US jurisdiction but not under US sovereignty, as ruled in Johnson v. Eisentrager would mean that detainees held at GTMO would not be within the jurisdiction of US courts. The SC held that US courts did have jurisdiction to hear *habeas corpus* petitions from detainees at GTMO, and therefore rejected one of the main reasons why GTMO was chosen detention center (Rasul v. Bush 2004).

Hamdi v. Rumsfeld

At the same day the verdict was announced in another case. Yaser Hamdi was captured by Northern Alliance forces in 2001 and turned over to US forces. The US charged he was fighting for the Taliban, though Hamdi's father Esam Hamdi claimed he was a relief worker who was captured by a mistake. The Hamdi case was different from the Rasul case because Hamdi had dual citizenship both as a Saudi Arabian and a US citizen. What's more, Hamdi had been move from GTMO to the US when it was discovered he was a US citizen. The decision delivered by Justice Sandra Day O'Connor in the Hamdi case was very confusing and fractured. It ruled that Hamdi was entitled to due process, but that the president was entitled to order Hamdi detained during hostilities. O'Connor indicated that the court would not consider whether or not the president as CiC had the inherent power to detain people, but accepted that the president had the power to detain people because Congress had provided the president with the AUMF, in essence establishing that the US was in a state of war. Therefore, as an enemy combatant, Hamdi could be detained for the duration of hostilities, for as long as that may be. However, Hamdi also had a right to due process though evidence standards to determine his status must by necessity be lower. O'Connor suggested creating a tribunal system, like an Art. 5 tribunal, to determine the status of detainees. A president's war power was substantial, but the SC "had long since made it clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" as O'Connor famously stated (Hamdi v. Rumsfeld 2004).

In both cases, power claimed by the Bush administration seemed to have been curbed. The SC had established that it was within the jurisdiction of federal courts to intervene in wartime in commander in chief matters, had extended their jurisdiction to GTMO and required hearings to be held to determine the status of enemy combatants. On the other hand, the nature of these hearings had not been provided for which gave the president free reins in designing them (Savage 2007: 194).

A few days later, the Combatant Status Review Tribunals (CSRTs) were established at GTMO. The CSRTs were created to determine the status of detainees, the decision to be made by three commissioned officers, which would be reviewed by a senior officer (Margulies 2007: 159).

The importance of a status review of detainees is underscored in a report[55] drafted by Professor Mark Denbeaux in 2006. Denbeaux wanted to create a clearer picture of whom the detainees were and why they were at GTMO. His report revealed for instance that "55% of the detainees are not determined to have committed any hostile acts against the United States. Only 8% of the detainees were characterized as al Qaeda fighters. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. This 86% of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies" (Denbeaux 2006: 1-2).

Another outcome of the Hamdi and Rasul cases was the *Detainee Treatment Act of 2005* (DTA). In the summer of 2005, Senator John McCain introduced an amendment to the annual defense appropriation bill. The act would put a ban on all "cruel, inhuman, or degrading treatment or punishment" and instructed that all interrogations must be performed pursuant to FM 34-52 (DTA 2005). The White House balked at this and threatened to veto the bill. The DTA passed overwhelmingly in the Senate that October, but getting it passed with a veto proof majority in the House of Representatives was another matter entirely. In November 2005, Senator Lindsey Graham added an amendment that prohibited any court to take up new *habeas corpus* petitions and replaced it with limited review in the District of Columbia Court of Appeals to determine if the CSRT had followed its own procedure. It was debated and passed with a veto proof margin in mid December in both houses and December 30, 2005, Bush signed the appropriation bill into law (Margulies 2007: 44-47). A momentous victory over the White House, it seemed, who fought the act doggedly all the way. But the White House was not beaten. Bush attached a signing statement to the bill proclaiming that the president would construe the act "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief "(Signing Statement 2005).

[55] *A Profile of 517 Detainees through Analysis of Department of Defense Data*

Hamdan v. Rumsfeld

In the summer of 2006, another momentous case would be decided. The plaintiff was the aforementioned Salim Ahmad Hamdan, Osama bin Laden's driver. Hamdan was caught during the invasion of Afghanistan by militia forces and handed over to the US who sent him to GTMO. In 2004 he was charged with conspiracy to commit terrorism and arrangements had been made for him to be tried before a MC. Hamdan filed a petition for a writ of habeas corpus. He charged that the MC supposed to try him was illegal and did not comply with the UCMJ, that he must be afforded the protections of the GCs and that he could not be tried for conspiracy to commit torture. The White House wanted the case dismissed pursuant to the DTA which prohibited the courts to take up *habeas corpus* petitions. The SC denied this; DTA had no such power it ruled. It struck down the MCs because the violated both the GCs and UCMJ and because they were not expressly authorized by a congressional Act. Hamdan must as a minimum be covered GC Common Art, 3 it ruled, and it was also not possible to charge Hamden with conspiracy as MCs did not have that jurisdiction (Hamdan v. Rumsfeld 2006).

It was a blow to the Bush administration, and they acted quickly to control the damage. Two months later Congress passed the *Military Commissions Act of 2006* (MCA). It would recreate the MCs but this time as an Act of Congress. It would incorporate aspects of the DTA, for instance banning courts from hearing *habeas corpus* petitions, and would also deny GC protection to anyone deemed an unlawful combatant. In effect, it rolled back Hamdan v. Rumsfeld (MCA 2006).

Boumediene v. Bush

In the summer of 2008, the SC would for the fourth time rule against the Bush White House. The court held the petitioners, a group of detainees from GTMO, have the right to petition for *habeas corpus***.** The court also held that the Bush administration assertion that GTMO was outside US court jurisdiction was wrong. It ruled that "because the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA §7 operates as an unconstitutional suspension of the writ." The court underlined that:"in considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers" (Boumediene v. Bush 2008).

Conclusion

There's no doubt that the framers, when they wrestled with the question of presidential power, were deeply divided. So they did the only thing possible; created a vaguely formulated executive branch, inserted one perfect first president, helped him mould the presidency to perfection. Even with Washington in place, that proved a difficult task.

To this day it remains the gift and the curse of American democracy, its vagueness, and openness to interpretation. The presidency has indeed changed in many ways, but it has also stayed the same. In the founding era, the scope of presidential power was as vigorously debated as it was at the turn of the 20th century, as it is now. There are two broad factions, on championing broad inherent power, one championing more restrained power. But times have changed. Amidst the founders, there was a profound believe that the power of war making resided with the legislative branch. Even as Alexander Hamilton strayed from this conviction, he argued that the president could not unilaterally make war, but suggested he could set in motion events that could lead to war. However, Hamilton himself set in motion events back then by straying just a little farther away from the checks and balances system so engrained in the constitutional system. Today, as then, there are people who believe in confined presidential power, and people who believe in expansive inherent powers.

The Hamiltonians today have strayed much farther from the system of checks and balances than the founding farther himself did. The low point of the presidency came at the pinnacle of the imperial presidency with the Nixon administration. Nixon believed himself almost removed from that system, only checked by the legislature's power of the purse, treat of impeachment or his reelection. When caught in mischief, he was clearly of the persuasion that he had done nothing wrong, proclaiming that what the president says is legal is not illegal. Unstrained presidential power at full display.

Obviously, there was a massive expansion of presidential power from WWII an onwards. The main reason for this is most likely the almost constant war footing the US found them self on throughout the last sixty years. As was noted in the main text, power flows to the executive in times of war. Such a constant pouring of power into the pond of the presidency will test its limitations, and erode its checks and balances. Sometimes presidential powers cannot be contained and will spill over as happened with Nixon.

To rein in that power again, Congress tried to fix the erosions that had weakened the system of checks and balances through impeachment and subsequent legislation. While the former ridded

them of an imperial president, the latter, creating laws like the WPA, may have done more harm than good.

The contemporary presidents have so many ways to act unilaterally so they have become preeminent in the conduct of foreign policy and war; Congress has become too weak to contain them so the legislative branch's role is constantly diminishing in these matters, whatever they like it or not.

The new man in the new millennium was Bush and within the first year the country suffered the deadliest attack in the history of the country. America were under siege, at least for one day. It was a new millennium and the US was faced with an (almost) new enemy, a new paradigm, the stateless terror organization with the military capability of a nation-state. I can appreciate the fear of the second wave, the "never let this happen again" mentality.

Once more, power is poured into the executive branch, and sadly, as with Nixon, the Bush presidency could not contain it and it spills over, eroding the checks and balances even more. President Bush wanted to rule unilaterally, and Yoo provided him with the CiC carte blanche, which combined with the UET in theory made him almighty. Bush and VP Cheney had a plan to restore the office to its rightful power, pre-Watergate that is. It is exactly the resemblance with the Nixon presidency that is so disturbing. Nixon felt above the law. So did Bush with the help of Yoo. Nixon could order burglaries 'legal'. Bush could order torture legal because of his CiC powers.

As should be evident in the these, the Bush White House engaged in numerous dubious acts. One very worrisome I noticed was the one prevalent feature of the OLC memos to find legal ways to commit seemingly unlawful acts, by developing farfetched legal reasoning. Consider the case of GTMO. The Bush administration needed a place to lock up people indefinitely so as to set up an effective 'mosaic' interrogation program. 'Actionable' intelligence, for the WoT was needed, sooner rather than later. Detainees were needed to be relieved of their rights, so the Bush administration construed that AQ and TLB were not protected by the GCs by designating them as unlawful enemy combatants. The Bush administration wanted to have full jurisdiction over these detainees, so as to prevent the federal courts from interfering with GTMO detainees, so White House lawyers construed GTMO as the legal equivalent of a black hole. Torture'ish SERE techniques were imported to speed up interrogations. All of this made 'legal' by OLC memos. In the words of Richard Armitage: "if you were twisting yourselves into knots because you're fearful that you may be avoiding some war crimes, then you're probably tripping too closely to the edge."

The problem is that numerous wrongs have been committed that will affect so many people, not only Americans, for such a long time into the future. Bush authorized torture, or cruel and unusual punishment, which equals torture in many people's eyes, claiming it to be a vital tool to protect the US. Granted, the US has not been attacked, but no one knows if this is due to these

techniques. However, interrogators have come forward and explained how useless these methods are for intelligence collection and told of intelligence gathering successes using FM34-52 methods.

Has Bush claimed too much presidential power? I believe so, and so does the SC, ruling that his MCs were unconstitutional, that Bush could not decide if detainees could petition for habeas corpus in US courts and that detainees must be afforded GC protection, amongst other things.

Could he have been impeached? There is a very good chance he could. One argument is that he failed to faithfully execute the laws. Legal scholars could most likely come up with more examples.

But Congress has especially during the Bush administration illustrated how weak it has become. Ten years ago Bill Clinton was impeached for perjury, obstruction of justice, and abuse of power relating to his adultery. Yet Congress has not seriously considered impeaching Bush for human rights abuse?

It is too late now; Bush is leaving the White House. On the 20th of January 2009, a man who won overwhelmingly on a platform of 'Change' will pick up the mantel of the presidency. It is a presidency in need of change, in need of someone who will roll back all those extralegal Bush policies that has caused so much harm. Hopefully you will fulfill your pledge Mr. Obama.

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