

The Law

Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?

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The George W. Bush administration will long be remembered for its constitutional and legal arguments on behalf of exclusive and inherent executive power. In its extreme form, this uncompromising effort appears to have failed, and may even have pushed the judicial branch to limit executive authority and return to a more traditional insistence on interbranch cooperation in foreign affairs. Ironically, the Bush-Cheney legal legacy ultimately will depend on the Barack Obama administration's public commitments and legal arguments, but early evidence suggests that President Obama's assertions of executive power will rest less on assertions of constitutional prerogative, and more heavily on statutory delegation as well as long-standing judicial precedent.

It is no secret that long before his election as vice president, Dick Cheney was deeply committed to the proposition that the executive branch had been dangerously diminished in the aftermath of the Watergate scandals. The period after Watergate and the Vietnam War, Cheney told reporters on Air Force Two in 2005, was “the nadir of the modern presidency in terms of authority and legitimacy,” a period in which the chief executive’s ability to lead “in a complicated, dangerous era” was severely diminished (Baker and VandeHei 2005). Cheney returned to the White House as the second-ranking official in the George W. Bush administration in 2001 determined to restore executive branch power and autonomy. To do so, Cheney pushed others in the administration to aggressively press legal arguments and constitutional assertions not only to achieve their immediate policy goals, but also to set lasting precedents, fortifying the nation’s

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predisposition toward deference to—and acceptance of—executive prerogative powers in foreign and domestic affairs alike (Cheney 1990, 2009).

Just nine days after Bush and Cheney were inaugurated in 2001, the White House hosted a series of energy policy discussions with key industry leaders. When asked to reveal the names of those involved in drafting these policy proposals, however, the White House refused, asserting sweeping new claims of executive privilege (Gellman 2008; Hayes 2007; Savage 2008).¹ This, it turns out, was only the first of a long train of arguments asserting executive authority. The Bush legal team fought battle after battle in areas ranging from questions about the interpretation and application of treaties (Goldsmith 2007; Yoo 2005) to wiretapping (Fisher 2007a, 2008a; Savage 2008), and from war powers (Fisher 2004) to military commissions and interrogation techniques. But will these efforts succeed in fundamentally shifting the national understanding of the allocation and separation of powers? Will the Bush-Cheney legal legacy in the separation of powers be a lasting one?

Early indications suggest not only that the Bush lawyers failed to embed and entrench their claims, but that the U.S. Supreme Court, along with the new Barack Obama administration, actually may be returning to the more traditional foundations of executive power, built on statutes and long-standing judicial doctrine. Far from shifting our constitutional understanding of executive power, the Bush-Cheney legal legacy may be a return to the very assumptions and foundations they sought to replace.

Shifting Default Assumptions in the Separation of Powers

Bush administration lawyers recognized that *how* they won their cases was critically important if they wanted to fundamentally reallocate power and authority to the executive branch. By pressing the Supreme Court to revise and redirect the general rules, starting points, and thresholds that set guidelines for the lower courts, the administration could shape and direct the broader standards and judicial doctrine, signaling to Congress the boundaries and limits that could (and, in the administration's view, should) constrain their choices. Borrowing from the world of computers and software design, we might think of these general rules and starting points for the analysis of the allocation of powers as the default assumptions with which judicial decision making begins.²

"Default settings" are those with which a computer program starts. Word-processing programs, for example, are designed to open with an initial template, preset-

1. The National Energy Policy Development Group was established by a January 29, 2001, executive order, and was chaired by Vice President Cheney. The secrecy involved was challenged, and ultimately upheld, by the Supreme Court in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004).

2. The *Oxford English Dictionary* notes that in computing, a default is a preselected setting that is used unless an alternative has been specified. The earliest use of the word in this sense, the *OED* notes, is attributed to G. M. Weinberg, in 1966, who wrote that "the use of default attributes can contribute to the ease of writing and modifying a program." (G. M. Weinberg *PL/1 Programming Primer* iv. 74). Much the same can be said of precedent and judicial default assumptions. A default in computer science, the *American Heritage Dictionary* notes, is a "setting or value for a variable that is assigned automatically by an operating system and remains in effect unless canceled or overridden by the operator," or a "situation or condition that obtains in the absence of active intervention."

ting things such as the margins, size of type, and the font to be used. These can all be overridden or changed in particular cases, but they provide the initial template with which the process begins each time. Judicial doctrine—particularly for the Supreme Court—works in a similar fashion. While it does not determine the outcome in any particular case, and the Court is free to reverse or modify its own decisions, the Court does develop decision rules that provide an initial orientation to analyze particular claims (Silverstein 2009, 63-95, 281-83). The Bush-Cheney legal team clearly committed itself to efforts to shift these initial decision rules, or default assumptions, in its effort to fundamentally rebalance the separation of powers. This commitment appears to have been, in some cases, even more important than the shorter-term objective of winning favorable rulings in particular cases.

Separation of Powers and Foreign Policy

The Supreme Court has never accepted the idea that war, emergency, and foreign policy are free of all judicial constraints. The Court has intervened in foreign policy cases many times, even when the government insisted that these rulings might imperil national security (Fisher 2005; Silverstein 1997). Though Congress has been deferential in some eras, and more aggressive in others, the Court consistently has maintained that (1) the national government (Congress *and* the president, together) has broad but *not* unlimited power in foreign affairs; (2) specific limits or restrictions in the Constitution apply to foreign and domestic policy alike—including provisions assigning powers to the judicial branch itself—and these will be enforced by the Supreme Court even in war and emergencies; and (3) Congress holds a great deal of constitutional authority (should it choose to exercise that authority) in both foreign and domestic affairs.³ These tenets have not changed. What has changed are the thresholds that need to be met (or exceeded) before the Court will intervene and block or reverse government actions.

There are a number of traditional default assumptions that structure the Court's decisions on foreign policy. One of the oldest was announced by Chief Justice John Marshall in the 1804 case of *Little v. Barreme*, in which a naval officer claimed immunity from prosecution for violating a statute because, he said, he was following orders he had received from President John Adams (Fisher 2004, 25-26; Alfange 1996, 274-87).⁴ The question for the Court was, could the orders of the president provide immunity for a naval officer executing those orders in good faith—even if the orders were, in fact, in violation of statutory law? Marshall said no. The president's "instructions cannot change the nature

3. Many insist that the 1936 case of *U.S. v. Curtiss-Wright Export Corporation* undercuts this assertion. This badly misunderstood and often misquoted case does no such thing. (For a full discussion, see Fisher 2007b, 2008b; Silverstein 1997, 37-41.)

4. It is a question that may have particular salience for former members of the Bush administration now that the U.S. District Court for the Northern District of California has ruled that José Padilla—who was designated an enemy combatant and for more than three years was held in U.S. military prisons, where he alleges he was subjected to torture—would be allowed to sue former deputy attorney general John Yoo for his role in authorizing this treatment. If this case sets a precedent, others no doubt will follow, with suits aimed at any number of Bush administration officials who believed they were carrying out the president's directives (*Padilla and Lebrun v. Yoo*, 2009).

of the transaction, or legalize an act which without those instructions would have been a plain trespass." The orders of a superior, even the orders of the commander in chief, provide no legal cover for anyone who breaks the law.⁵

The most familiar default assumption that has long governed any conversation about the constitutional allocation of powers in foreign policy was outlined by Justice Robert Jackson in his concurrence in the 1952 steel seizure case (*Youngstown Sheet & Tube v. Sawyer*). Jackson argued that in deciding what a president could or could not do, cases could be divided into three groups. In one, in which a president "takes measures incompatible with the expressed or implied will of Congress" (where the president acts against the express will of Congress), the president's power is at its most circumscribed, and he or she can do only that which the Constitution explicitly allocates exclusively to the chief executive. At the other end of the spectrum are cases in which the president "acts pursuant to an express or implied authorization of Congress." When the elected branches—the national government—act *together*, Jackson wrote, the president's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." In these circumstances, the national government is free to act unless doing so would violate an explicit prohibition in the Constitution. But what happens between these extremes, when the president and Congress have concurrent powers? At what point does the president's power stop, and congressional power begin?

In the steel seizure case, Jackson made clear that congressional silence could *not* be read as tacit approval—explicit congressional authorization would be needed before the president could act in what he called the "zone of twilight." By the early 1980s, with a very different Court in place, it seemed that this default assumption (congressional silence does *not* equal consent) might be shifting to its opposite—the assumption that a president *could* act unless and until Congress explicitly tried to stop that action (congressional silence, then, would be read as *tacit* consent). This change was reflected in the Court's ruling in *Dames & Moore v. Regan* in 1981, a case that challenged the deal worked out to free American hostages being held in Iran. The courts, Justice William H. Rehnquist wrote in his majority opinion in that case, cannot expect Congress to "anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act" (*Dames & Moore v. Regan*, 678). Seizing on two statutes—one of which actually was designed to *limit* executive power—Rehnquist concluded that because Congress had not formally foreclosed or forbidden these options, these statutes actually indicated that "Congress has *implicitly* approved the practice of claim settlement by Executive agreement" (*Dames & Moore v. Regan*, 680; emphasis added).⁶

Dames & Moore formally shifted the default assumption that had prevailed since the steel seizure case: whereas once a president operating in constitutionally ambiguous

5. The Bush administration took a rather different view. In his confirmation hearings in October 2007, Attorney General Michael Mukasey was asked whether the president could authorize a subordinate to act in violation of an explicit statute. He could if the president was acting "within the authority of the President to defend the country," Mukasey told the Senate Judiciary Committee. In that case, "the President is not putting somebody above the law; the President is putting somebody within the law" (Shannon 2007).

6. The International Economic Emergency Powers Act (1977) was designed to reduce and limit previously authorized executive emergency powers (Silverstein 1997, 178-80; 2009, 224-28).

territory needed explicit congressional support to avoid the most searching judicial scrutiny, now congressional silence might be read as tacit approval. To block the president would now require Congress to act affirmatively: *Dames & Moore* signaled that the Court might be open to further shifts in the executive's direction.

The Bush Administration: Redefining Judicial Defaults in Foreign Policy

America's eighteenth-century constitution makes no clear and unique provisions for events such as those that took place on September 11, 2001. How should the government organize a response to attacks from organized groups, under no formal military command, which wear no uniforms, and never have signed an international protocol or treaty? That the chief executive might respond in ways the Constitution never authorized is not surprising in a moment of crisis. But the Bush administration went well beyond that, turning to a team of lawyers to develop, coordinate, articulate, and defend the exercise of inherent executive power not as a temporary response to emergency, but as a fundamental constitutional right and responsibility (Goldsmith 2007; Yoo 2005, 2007).

George W. Bush was not the first president to assert that Article II of the Constitution bestows broad and inherent powers. But, unlike Bush, the others paired their rhetorical claims for executive power with statutory provisions from Congress that actually allocated and authorized those claims. Abraham Lincoln secured broad statutory support shortly after the Civil War began, as did Franklin D. Roosevelt in World War II. Dwight D. Eisenhower went to Congress for broad powers in dealing with military challenges in Taiwan and the Middle East, and even Lyndon B. Johnson secured legislative support from the Gulf of Tonkin Resolution before escalating U.S. involvement in Vietnam. Richard M. Nixon pressed inherent powers claims to new heights, most fully articulating those claims after he left office (D. Frost 2007; Silverstein 1997). By contrast, the development and defense of inherent executive power was of central concern to the Bush White House (Fisher 2008a; Goldsmith 2007; Pfiffner 2008; Savage 2008; Wittes 2008; Yoo 2005, 2007).

Faced with an unprecedented crisis in 2001, the Bush administration acted as it saw fit, as had other presidents faced with immediate crises, including Thomas Jefferson and Lincoln. But unlike Jefferson and Lincoln, the Bush administration did not come to Congress later for post hoc authorization. To do so would be to acknowledge, as Jefferson and Lincoln did, that final authority and power rested with Congress, and not the executive (Silverstein 1997). Like Jefferson, who worried that the Constitution did not permit him to execute the Louisiana Purchase, and Lincoln, who suspended habeas corpus, called up the militia, and ordered blockades despite the lack of clear constitutional authority to do so, the Bush administration certainly knew that Congress in the shadow of a crisis would willingly authorize just about anything Bush asked. And yet Bush and his administration resisted asking Congress to authorize military commissions for the Guantánamo detainees; insisted that they needed no authorization from

Congress or the judiciary to order warrantless national security wiretaps; claimed that neither Congress nor the judiciary could constitutionally interfere with their nearly unlimited authority to use force where and as the president saw fit; and insisted that the administration was free to interpret treaties or ignore them, particularly those concerning the treatment of prisoners in general, and torture in particular (Yoo and Delahunty 2001, 2002). All of these and more, they said, were constitutionally left to the executive and the executive alone (Yoo 2005).

Lawyers within the Bush administration with deep intellectual and political passions—including Jack Goldsmith, Jay Bybee, John Yoo, Patrick Philbin, and Robert Delahunty, among others—developed aggressive legal theories that they believed would reset the constitutional debate and fortify President Bush’s specific constitutional claims to exercise inherent power, claiming that in foreign affairs, the president alone has final authority, and when the national security is imperiled (a judgment left to the executive), the president is legitimately entitled to override constitutional and statutory constraints to preserve and protect that security (Yoo 2005). Their goal was not simply to support policy choices the administration had made in the midst of an emergency, but rather to assert that these executive actions were a matter of constitutional right, resetting the default allocation and distribution of power at the national level.

The administration deployed a number of weapons in this struggle: public statements by the president and vice president (Pfiffner 2008; Savage 2008); formal legal opinions authored by the Office of Legal Counsel in the Justice Department, the White House Counsel’s office, and the Office of General Counsel in the Defense Department; signing statements attached to legislation, and briefs submitted in litigation before the federal courts. In all of these, the Bush administration consistently asserted independent and unfettered powers that could not constitutionally be interfered with by Congress or even by the federal courts. In signing a defense appropriations bill in 2005 that contained a provision banning torture, President Bush wrote,

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary Executive branch and as Commander in Chief and *consistent with the constitutional limitations on the judicial power*, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. (Bush 2005; emphasis added)

The legal briefs, the public rhetoric, the internal memos, and the signing statements were all aimed, ultimately, at the U.S. Supreme Court, which the Bush administration understood would be the most important battleground for their effort to shift default assumptions and redraw the lines separating the powers of the national government.

Winning the Battles, Losing the War?

The first prominent test came when the Supreme Court considered a challenge to the administration’s authority to seize, hold, and, in some cases, try citizens and non-

citizens alike who were accused of being enemy combatants. It took a few years, but in 2004, the Supreme Court finally accepted a case that would test some of these assertions. The result was not exactly what the Bush-Cheney legal team had hoped. Writing for a plurality in *Hamdi v. Rumsfeld*, Justice Sandra Day O'Connor insisted that the 2001 Authorization for the Use of Military Force (AUMF) statute passed by Congress provided sufficient authority for the government to offer only an extremely truncated procedure for determining whether or not Yaser Esam Hamdi—a U.S. citizen who had been seized in Afghanistan—could be held as an illegal combatant in a military prison. The Bush administration not only wanted to hold Hamdi, but also wanted the Court to rule that they could do so under the president's authority as commander in chief and general administrative authority as the chief executive and head of the executive branch of government. And they wanted the Court to rule that the judicial branch itself was precluded from reviewing these claims through habeas petitions. After making quite clear that the judicial branch would do no such thing, Justice O'Connor and the Court insisted that existing statutes provided sufficient legislative support for the executive action. This allowed the Court to authorize the president's policy choices, without endorsing the Bush administration's broader constitutional claims.

Rasul v. Bush (2004) dealt the administration another setback in a similar constitutional gambit. This time, the administration asserted that U.S. federal courts "lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad . . . incarcerated at the Guantánamo Bay Naval Base, Cuba." Administration lawyers were confident that the only direct precedent that seemed relevant to this case—*Johnson v. Eisentrager* (1950)—supported their assertion that federal courts lacked jurisdiction (Yoo and Philbin 2001). But Justice John Paul Stevens, in his majority opinion in *Rasul*, rejected these claims. In *Eisentrager*, the detainees were nationals of countries formally at war with the United States. Not so in the *Rasul* case, Stevens wrote. The *Rasul* detainees also differed from those in *Eisentrager* because they denied that they were engaged in or plotting acts of aggression against the United States, never had access to any sort of tribunal, had not seen any formal charges against them, and had been held in a place (Guantánamo) over which the United States had exercised exclusive and complete jurisdiction since 1903.⁷

The next year (2005) brought to a close the odd saga of José Padilla, an American citizen seized at O'Hare International Airport in Chicago in 2002 as a suspect in a plot to detonate a "dirty bomb" inside the United States. Designated an enemy combatant by the Bush administration, Padilla was held without formal charges or hearings in U.S. military prisons. Padilla sued, and eventually the case came before a three-judge panel of the Fourth Circuit Court of Appeals in Richmond, Virginia. The circuit court ruled that the administration *could* hold Padilla indefinitely in military detention—the policy outcome the administration sought. The administration, however, was far from pleased, because the ruling did not build on any sort of executive prerogative, but rather an act of Congress. "We conclude," Judge J. Michael Luttig wrote for the circuit court in

7. The detainees in *Eisentrager* were held in a German prison, though by Americans who had temporary control of the prison.

September 2005, that the president possessed this authority “pursuant to the Authorization for Use of Military Force Joint Resolution enacted by Congress” (*Padilla v. Hanft*, 423 F.3d 386, 2005).

Before Padilla’s next appeal could be heard by the U.S. Supreme Court, the administration suddenly filed papers to shift Padilla out of the military system, instead pressing specific charges against him in civil court. This is, oddly, what Padilla had long been demanding, and what Luttig had declined to order the administration to do. Abandoning their effort, however, not only avoided the possibility of a Supreme Court defeat in this particular case, but more importantly, it avoided the risk of yet another Supreme Court ruling that would further limit the president’s authority in foreign policy, pushing the defaults in directions opposite those the administration sought.⁸

In 2006, Salim Ahmed Hamdan’s case provided the Court with the opportunity the administration tried so hard to deny it in the *Padilla* case. A driver for Osama bin Laden, Hamdan was captured in Afghanistan and held at Guantánamo Bay, Cuba. He filed petitions with the district court challenging the administration’s authority to use military commissions to try him, adding that the commissions the Bush administration proposed violated the Geneva Accords, an international treaty to which the United States was a signatory.⁹ In a 5-3 decision, the Supreme Court agreed, ruling that the Geneva Accords were law—enforceable in the federal courts—and that military commissions as the administration had deployed them in this case actually violated the Uniform Code of Military Justice. In short, the president lacked inherent authority to create military commissions. Congress was more than willing to provide the appropriate statutory cover for the administration, and promptly passed the Military Commissions Act of 2006, solving the administration’s immediate problem. But, in the process, the Court had once again made clear that presidential power in this realm rested heavily on statutory authority, dealing yet another blow to the administration’s longer-range efforts to shift the underlying default assumptions in favor of independent Article II authority.

The Military Commissions Act went far beyond simply setting up a statutory framework for military tribunals. Then-Republican Senate Judiciary Committee chairman Arlen Specter ushered a bill through the Senate that provided blanket statutory authority for the new procedures and eliminated the remaining avenues for habeas petitions, stripping the federal courts of the authority to hear these claims and, in effect, reversing the Court’s decision in *Rasul*. This set the stage for a case that might force the Court to confront the underlying constitutional questions that the administration sought to address. The opportunity came in a case in which the administration was no longer asserting power against Congress—but this time in a case in which Congress, *together with* the administration, was asserting power against the judiciary itself.

The Court’s response came in a stinging 5-4 ruling written by Justice Anthony Kennedy in *Boumediene v. Bush*. The right to petition for a writ of habeas corpus is so

8. In March 2009, the new Obama administration’s decision to try Ali Saleh Kahlal al-Marri in a civilian court similarly snatched away an opportunity for the Supreme Court to formally reconsider its default assumptions about executive power regarding detainees (*Al-Marri v. Spagone*, 08-368).

9. Common Article 3 of the Third Geneva Convention precludes the use of evidence to convict a prisoner unless the prisoner has had a chance to see or hear that evidence and to present a defense.

central to the American constitutional system, the majority ruled, that there is only one way to suspend its application—by following the formal and explicit procedure required by Article I, Section 9, clause 2 of the Constitution.¹⁰ While the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 had explicitly stripped the district courts of jurisdiction to hear habeas pleas coming out of Guantánamo, Congress had explicitly *not* “suspended” the privilege of the writ of habeas corpus. The administration had also rested a good deal of its claim to unfettered power on the fact that Guantánamo was neither fish nor fowl: neither a part of the United States, nor under the control of a foreign sovereign, and thus outside the jurisdiction of American federal courts. But the Court insisted that because Guantánamo was under the total physical control of the United States, American forces at Guantánamo were subject to constitutional limits and statutory rules, including treaties such as the Geneva Accords that were incorporated into American law. The executive, the Court added, cannot simply execute a lease agreement with a foreign government to “contract away” constitutional provisions. While there may be times when the Court must abstain from certain questions concerning the boundaries of sovereignty, Kennedy insisted, “to hold that the political branches have the power to switch the Constitution on or off at will” is quite another thing altogether. Such a position “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”¹¹

The Bush administration’s legal theories appeared to be making little headway with the Court. The cases made clear that the Court would not allow the administration on its own and without the correct statutory support to do these things as extensions of some sort of broad constitutional authority—whether an extension of the commander-in-chief power, the “take care” clause, or a general Article II, unitary executive claim. But the *national government*, the executive *together with* Congress, most certainly could do these things. And because Congress proved more than eager to hand the president just about any authorization the White House sought—the USA PATRIOT Act of 2001, the Homeland Security Act of 2002, the Military Commissions Act of 2006, the Home-grown Terrorism Prevention Act of 2007, the 2008 Telecom Immunity Bill/Foreign Intelligence Surveillance Act Amendments—the Court’s rulings seemed to pose hardly any serious barrier to the executive’s policy goals. The rulings did, however, pose a very serious barrier to the broader effort of the Bush-Cheney legal team to shift and redefine the default assumptions that would govern the separation of powers for years to come.

Obama: Old Wine in Old Bottles?

The Bush administration’s overreach in attempting to reset the default assumptions on executive power had begun to produce a clear backlash by the time Barack Obama took the stage in Chicago on November 4, 2008, as president-elect. Any hope that the

10. “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.”

11. *Boumediene v. Bush*, 533 U.S. ____ (2008).

Bush-Cheney agenda on executive power might take root and flower in the short term, any possibility that their efforts to reset the defaults might take quick and solid hold with the courts, would now depend upon the Obama administration.

Entrenchment of the Bush-Cheney doctrine, of course, seemed unimaginable in the aftermath of the Obama campaign. After all, Obama had repeatedly distanced himself from the Bush-Cheney position on everything from signing statements to Guantánamo, from warrantless wiretapping to extraordinary rendition. And those headed for high-level positions in the Obama Justice Department, including Dawn Johnsen and Marty Lederman, had spent years attacking John Yoo and the theories of executive prerogative that had emerged from the Office of Legal Counsel (Barron and Lederman 2008).

Less than six months into the new administration, many of Obama's staunch supporters have been surprised—even appalled—that the new president not only had failed to fully repudiate many of the Bush-Cheney legal policies, but in some instances, actually seems to be embracing and extending those policy choices (Gerstein 2009; Goldsmith 2009a, 2009b; Greenwald 2009a, 2009b; Herbert 2009; Savage 2009a). In areas ranging from the assertion of the state secrets privilege in efforts to shut down lawsuits over warrantless wiretapping (*Al-Haramain v. Obama*; *Jewel v. NSA*) and extraordinary rendition (*Mohamed v. Jeppesen Dataplan*) to those concerning lawsuits over detention and treatment at Guantánamo (*Bostan v. Obama*) and the reach of habeas corpus to Bagram Air Force Base in Afghanistan (*Al Maqaleh v. Gates*), as well as the continuing use of signing statements, the new Obama administration's policies in a number of areas that were of intense interest during the campaign certainly do appear less dramatically different than one might have expected. Does this suggest that Obama actually will salvage and enhance the Bush-Cheney legal legacy?

Early evidence suggests the answer is no. There is a critical difference between policy and the legal foundation on which that policy is constructed. The policies may be quite similar, at least in the first few months of the new administration, but the legal legacy will turn on the underlying legal arguments, the legal foundation on which these policies are built. Here we find a dramatic difference between Obama and Bush. Both are clearly interested in maintaining strong executive power, but whereas Bush built his claims on broad constitutional arguments, insisting that the executive could act largely unhampered by the other branches of government, the Obama administration has made clear that its claims to power are built on statutes passed by Congress, along with interpretations and applications of existing judicial doctrines. It may be the case, as one of the Bush administration's leading Office of Legal Counsel attorneys argued, that far from reversing Bush-era policies, the new administration "has copied most of the Bush program, has expanded some of it, and has narrowed only a bit" (Goldsmith 2009a). But what is profoundly different are the constitutional and legal default foundations on which these policies, and the assertions of executive power to enforce them, are built.

Obama, like virtually every chief executive in American History, seems committed to building and holding executive power. But unlike Bush, Obama is developing a far more traditional approach to this task, building his claims not on constitutional asser-

tions of inherent power, but rather interpreting and applying existing statutes and judicial doctrines or, where needed, seeking fresh and expansive legislative support for his claims.

In the various cases concerning those captured and held in the years since 9/11, ranging from challenges to habeas corpus to extraordinary rendition, from warrantless wiretaps to the suppression of photos documenting torture in Abu Ghraib, the legal foundation has shifted in important ways. Unlike Bush, who asserted “a unilateral, inherent, sweeping theory of Commander-in-Chief power,” the Obama administration pursues its policy by “getting congressional authorization statutes” (Greenwald 2009a). White House spokesman Robert Gibbs, in fact, noted that “[w]hile the administration is considering a series of options” concerning military detainees, for example, “none relies on legal theories that we have the inherent authority to detain people” (Savage 2009b).

New Wine in Even Older Bottles

Far from setting new default assumptions, the Obama administration seems determined to head back to the famous steel seizure categories outlined by Justice Jackson in the 1952 *Youngstown* case. In a speech at West Point, Obama attorney general Eric Holder insisted that while his staff was struggling with how to handle detainees from Guantánamo who are too dangerous to release, and yet cannot be easily prosecuted in federal court, “I pledge that the ultimate solution will be one that is grounded in our Constitution, based on congressional enactments, in compliance with international laws of war, and consistent with the rule of law” (Holder 2009). A survey of the Obama administration’s legal arguments in three legal/policy domains illustrates this pattern: (1) Guantánamo and the power to detain; (2) secrecy and the Freedom of Information Act; and (3) state secrets, warrantless wiretaps, and suits over extraordinary rendition.

Guantánamo and the Power to Detain. Here the Obama administration insists that it continues to work to develop its own comprehensive policy, but in the interim, given that there are pending cases before the U.S. District Court for the District of Columbia, the Obama Department of Justice has filed papers in which its reliance is thoroughly and totally placed on congressional statutes. In a “Respondents’ Memorandum Regarding the Government’s Detention Authority,” the Department of Justice says, categorically, that “[t]he United States bases its detention authority as to such persons on the Authorization for the Use of Military Force (AUMF),” passed by Congress in 2001.¹² The government then cites the Supreme Court ruling in *Hamdi v. Rumsfeld*, which relied not on Bush claims to inherent executive authority, but rather on the AUMF as providing statutory authority. In fact, the administration memo references the AUMF 28 times in the 12-page document. “Congress authorized the President. . . .” and “This authority is derived from the AUMF. . . .” and detention “in this armed conflict is consistent with the AUMF. . . .” (Department of Justice memo, “In Re: Guantánamo Bay Detainee Litiga-

12. Pub. L. 107-40, 115 Stat. 224 (2001).

tion”). Nowhere in this memo is there any mention of the commander in chief, Article II, the unitary executive, or prerogative power. In fact, to the degree that the administration does suggest there needs to be deference by the courts, it is deference to the political *branches* (plural) and not to the executive or the commander in chief (DOJ memorandum, footnote 2, p. 8).

In an Associated Press interview on July 2, 2009, President Obama acknowledged the Court’s determination that Guantánamo detainees “have habeas rights, and that means that they are able to answer charges and have legal representation. We’re going to be able to prosecute a sizable number of those who are being held in our U.S. courts,” he said, arguing that the “military commissions structure that we are setting up, I think, will meet the demands of our legal traditions.” Asked whether he might use executive orders to establish this framework, Obama replied that he was “not comfortable with doing something this significant through executive order. I think it is very important that the American people and Congress, in conjunction with my administration, come up with a structure that is not only legitimate in the eyes of our constitutional traditions, but also in the eyes of the international community, because part of our task in defeating these extremists is winning over allies and populations that right now feel as if we haven’t been living up to our highest ideals.”¹³

Secrecy and the Freedom of Information Act. Here Obama’s supporters have been aghast (Greenwald 2009b). Bush administration critics eagerly anticipated that Obama would shine a bright light on the previous administration’s legacy of torture by releasing photos from Abu Ghraib prison. The Obama administration, however, was deeply concerned that these photos might stir up violent anti-American reactions around the world, and in Iraq and Afghanistan in particular, where reaction might put American troops in jeopardy. In the U.S. Senate, South Carolina Republican Lindsay Graham joined with Connecticut’s Joe Lieberman to attach an amendment to the military appropriations supplemental funding bill in June 2009 that would allow the president, and the Pentagon, at their discretion, to classify and suppress any photos “relating to the treatment of individuals engaged, or captured or detained” by U.S. armed forces after September 11, 2001. The amendment was widely denounced by civil libertarians. In terms of the policy itself (withholding the photos), it certainly did not appear to represent the sort of change many thought they would get with the new administration. But what did represent real change was the legal arguments on which this policy was built. Under Bush, the administration relied on its own strained interpretation of the Freedom of Information Act (FOIA), which was the basis for the suit seeking the release of the photos (*ACLU v. Department of Defense*). Under Obama, rather than insist on a reinterpretation of FOIA, the solution seems to be to work with Congress to pass an explicit statute that would formally delegate the power to withhold these photos.

In an exchange with Attorney General Eric Holder during Senate Judiciary Committee oversight hearings on June 17, 2009, Senator Graham made it clear that there was

13. Associated Press transcript of an interview with President Barack Obama, July 2, 2009. Available at http://news.yahoo.com/s/ap/20090702/ap_on_go_pr_wh/us_obama_ap_interview_text.

a strong desire to achieve this policy goal through legislation. “Do you agree with me,” Graham asked Holder, “that it would be the preferred route, in terms of impressing the Court, that Congress would act on this subject matter, rather than an executive order?” To which Holder replied, “Yes. I think that having Congress act would be a preferred way” to proceed. Graham then went on to make clear that legislation in his view was needed, because then it would be a perfectly “reasonable interpretation of the Freedom of Information Act as it exists today” to order the release.¹⁴

State Secrets, Warrantless Wiretaps, and Suits over Extraordinary Rendition.

Another arena in which the Bush administration left behind an extensive legacy of legal challenges for Obama concerns the administration’s ability to shut down or limit the reach and scope of lawsuits that might force disclosure of information that the administration believed posed a real risk to national security.

A series of cases concerning warrantless wiretaps (*Jewel v. NSA* and *Al-Haramain v. Bush*—now *v. Obama*), as well as a case concerning a suit against a private company accused of facilitating illegal treatment as part of a Central Intelligence Agency program of extraordinary rendition to third countries (*Mohamed v. Jeppesen Dataplan*), have been moving up and down between the U.S. District Court for the Northern District of California and the Ninth Circuit Court of Appeals, which supervises that district. In all of these cases, Bush—and now the Obama administration—has invoked something called the “state secrets doctrine” to block the release of information they insist would jeopardize national security (Fisher 2006).

The state secrets doctrine allows the government to withhold evidence in situations where the government asserts that disclosure would threaten national security. It has been invoked dozens of times since its first modern application in the 1953 case of *United States v. Reynolds*, but following 9/11 it has been invoked with far greater frequency (A. Frost 2007). This seems unsurprising—what is more significant is that it has been invoked not simply to block the release of particular documents or other pieces of evidence, as it was initially designed to do, but under the Bush administration, the doctrine was invoked to dismiss cases entirely, blocking lawsuits against the government as well as government contractors and private firms. Amanda Frost argues that when the government invoked the state secrets doctrine in the 1970s and 1980s, it did so “by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.” The Bush administration’s response, Frost argues, “differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs” of warrantless wiretapping (2007, 1939-40).

As long as federal courts were receptive to these more expansive claims—as was a district court in Virginia, a decision that was upheld by the Fourth Circuit Court of Appeals in 2007 (*El-Masri v. Tenet*)—this would seem to suggest the executive’s growing power was taking root. But the overreach, the effort to expand a doctrine meant to block

14. Oversight of the Justice Department, hearing of the U.S. Senate Judiciary Committee, June 17, 2009. The amendment was stripped from the supplemental bill in the House. It then passed in the Senate as a separate piece of legislation. As of early July, it was still being debated in the House.

the production of specific pieces of evidence into one designed to make entire challenges and cases simply disappear, could ultimately backfire and end up more significantly narrowing rather than expanding executive power.

Though the saga of *Al-Haramain Islamic Foundation v. Bush* (now *v. Obama*) is far from over (a new round of arguments is scheduled for September 23, 2009), *Al-Haramain* suggests another way in which the Bush-Cheney legal legacy may actually end up undercutting rather than expanding executive authority.

Al-Haramain is an Islamic charity that sued President Bush and others, alleging that the organization and its members had been the victims of illegal surveillance and wiretaps, in violation of the Foreign Intelligence Surveillance Act (FISA). They believe this to be so because they were inadvertently given a secret document in 2004 by the Treasury Department that apparently made this quite plain. The Bush administration, and now Obama as well, assert that this document cannot be released or used in court. Both have invoked the state secrets doctrine as the reason why the document should be suppressed, and further, why the case itself should simply be dismissed.

For most of the years of the Bush administration, federal courts were quite willing to accept their state secrets claims and dismiss cases as requested. But as the Bush administration reached its last few years, some federal judges began to resist these demands. *Al-Haramain*, in fact, nicely illustrates one of the ways in which the Bush administration, far from expanding and embedding unquestioned executive power, may have overreached, bringing about a judicial backlash that may actually leave a legacy of reduced, rather than expanded executive power and autonomy.

Bush, and now Obama, have continued to resist the district court's orders to produce documents that might allow the *Al-Haramain* case to proceed, provoking the chief judge of the U.S. District Court for the Northern District of California (Vaughn Walker) to become increasingly strident in his orders and rulings against the government. Far from accepting the blanket claims of state secrets, both the district court and now a panel of the Ninth Circuit Court of Appeals have insisted that while the state secrets doctrine might preclude the use of the document, there is actually a statute (FISA) that may, in fact, preempt the use of the state secrets doctrine. In the conflict between a judicially constructed doctrine and a statute, the statute would trump. Because of this, Judge Walker issued clear orders to the government to produce the disputed documents for his review under the FISA rules.¹⁵ When the Obama administration failed to comply, Walker issued new orders, threatening the government with sanctions.¹⁶ Finally, the Obama administration responded on May 29, 2009, and filed yet another brief on August 20, 2009, in which they again asked the Court to dismiss the case, this time pleading that the Court should not make sweeping decisions about executive power in a case concerning "a now lapsed program where an actual case or controversy cannot be established."¹⁷

15. Order of the Court *In Re: National Security Agency Telecommunications Records Litigation*, Docket 06-1791, U.S. District Court for the Northern District of California, April 17, 2009.

16. Order of the U.S. District Court for the Northern District of California, May 22, 2009.

17. Notice Motion/Memorandum Government's 4th Motion Dismiss/Summary Judgment; Opposition to Plaintiffs' Motion Partial Summary Judgment *Al-Haramain v. Obama*, August 20, 2009.

Meanwhile, in the extraordinary rendition case of *Mohamed v. Jeppesen Dataplan*, the administration has again run into a Ninth Circuit weary of accepting blanket claims of state secrets that would require the dismissal of the entire case, rather than merely the suppression of particular pieces of evidence. If the Ninth Circuit's now far more limited understanding of the state secrets doctrine prevails, the Obama administration well understands that what has emerged as a rather robust tool for the executive to quash difficult, embarrassing, and even dangerous cases may be lost. The Obama administration lawyers have now asked the Ninth Circuit for an *en banc* hearing by the full court. "No other court of appeals has so restricted the state secrets privilege," the Obama appeal states, adding that "[t]his unprecedented view of the privilege . . . will significantly hamstring the Government's ability to prevent the disclosure of highly sensitive state secrets through litigation."¹⁸

The state secrets privilege is something the courts created—and thus the courts can remake it, narrow it, or expand it as they choose. In 2007, the U.S. Senate Judiciary Committee considered a new law that would actually govern this doctrine, but it never got a floor vote. That bill has been reintroduced this year, and a similar bill is now under consideration in the House. Without clear legislation, however, this dispute will have to be resolved between the administration and the courts. In the event that the Obama appeal fails, and the doctrine returns to its pre-9/11 dimensions, or perhaps is trimmed even further, we might have the first real opportunity to see whether the Obama administration is willing to make a stand against the courts, and refuse to abide by court orders, insisting instead, much as one might imagine the Bush-Cheney team likely would have done in the first few years after 9/11, that the administration's judgment must prevail over judicial rulings.

The evidence we have so far, however, suggests this is unlikely. In every other area (and to date in this one as well), the Obama administration has been clearly committed to working with existing statutes and judicial doctrines, and where these are lacking, to seek new laws, and to argue for favorable interpretations of existing doctrine. Far from asserting bold new doctrines of executive power, the Obama administration has so far seemed intent on going back to the more traditional approach—using existing statutes, pressing and pulling Congress and the courts to read these in a light favorable to the administration, rather than insisting on unreviewable executive power.

The Bush-Cheney Legal Legacy: Less than Zero?

While the Ninth Circuit panel decision narrowing the application of the state secrets doctrine may well be reversed, the ruling suggests another way in which the Bush-Cheney legal legacy could actually end up producing a more, rather than a less, constrained executive (Wittes and Goldsmith 2009). Not only did the Bush administration lose key cases, but their underlying theories, the default assumptions they insisted were embedded in the Constitution itself, were rejected by the Court. It is one thing to

18. Petition for Rehearing or Rehearing *en banc* in *Mohamed v. Jeppesen Dataplan*, June 12, 2009.

assert power—it is another to press the Court to rule on those assertions. Rather than shifting the default assumptions toward greater executive autonomy, they pressed the Court to make decisions that have actually shifted the defaults back—away from the more executive-oriented *Dames & Moore* decision and back toward the classic definitions laid out by Justice Jackson in the steel seizure case. Another president someday may choose to revive the Bush-Cheney legal legacy, but there are now significant legal decisions that will have to be overcome and reversed.

One of his first tasks at the Justice Department, Attorney General Eric Holder told his audience at West Point, was to choose which portraits of former attorneys general to place on the walls of his office. One of the portraits he chose, Holder said, was that of former attorney general and Supreme Court Justice Robert Jackson—the author of what Holder noted was “perhaps the most important court opinion on presidential power in the last century.” Jackson’s concurring opinion in the *Youngstown* steel seizure case, Holder said, “remains the gold standard to this day for defining the extent to which the president can operate consistent with the rule of law. Jackson’s standards are as informative today as they were prescient fifty-seven years ago” (Holder 2009).

By returning to the more traditional approach to executive power, the Obama administration may well be able to build that power on a firmer and more lasting foundation, one that has been the bedrock on which many other powerful chief executives have been able to leave their branch of government legally stronger than it was when they took over.

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