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George W. Bush as Chief Executive

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Those who observed President Bush in office were struck by his self assurance, his confidence in his "gut" judgment, his lack of self doubt, his impatience with lengthy policy debate, and his willingness to delegate large swaths of public policy to Vice President Dick Cheney. These characteristics can lead to certainty in decision making, but they may also prematurely constrain the range of options considered in addressing far-reaching decisions of state. While President Bush was able to make important policy decisions with confidence and dispatch, his approach to the use of executive power had some drawbacks. Important decisions, particularly in his first term, were often made without the depth of policy analysis or consultation within the administration that previous presidents displayed. Often when disagreement or reservations were expressed by experts and professionals within the executive branch, they were ignored or dismissed. In addition, President Bush was committed to an expansive approach to the constitutional prerogatives of the presidency, and he asserted his right to ignore the usual checks and balances built into the separation of powers system.

This Chapter will examine several cases of policy decisions that illustrate these characteristics. To illustrate President Bush's unwillingness to subject his policy preferences to expert scrutiny, it will examine his order that created military commissions to prosecute suspected terrorists in November 2001 and his decision to disband the Iraqi army in May 2003. His penchant to ignore or dismiss the judgment of professionals in the executive branch will be illustrated by his decision to suspend the Geneva Conventions in the war on terror and his insistence that Saddam was connected to al-Qaeda and 9/11, despite CIA evidence to the contrary. Finally, his broad assertions of presidential power will be illustrated with his order to the National Security Agency to conduct surveillance on Americans, without the warrants required by law, and his unprecedented use of signing statements. Most of these policy decisions were made and carried out through Vice President Cheney's mastery of the levers of power within the executive branch of the US government (Gellman 2008).

I. Lack of Consultation

This section will first consider President Bush's Military Order of 13 November 2001 to establish military commissions to try terrorist suspects in the war on terror, a decision that was tightly held to a few lawyers in the White House until the order had been signed. It will then take up the decision to disband the Iraqi army in May of 2003, which drastically reduced the ability of American forces to provide security in Iraq and made the anti-coalition insurgency much more effective.

a. The Military Commissions Order

The decision-making process that led to the issuance of President Bush's military commissions order in November 2001 illustrates the unwillingness of the administration to consult even its own political appointees about the wisdom of proposed policies. The administration feared that there might be some objection and that the president and vice president might be forced to alter their original policy plans. Ironically, such consultation might have avoided the legal and political trouble this decision caused them.

The small group of lawyers preparing the order felt that normal trials, whether civilian or under the Uniform Code of Military Justice, would afford too many legal protections to terrorists, and thus were "not practicable," so the order required that military commissions be established entirely within the executive branch to try suspected terrorists (Bush 2001). In the order, President Bush declared that any non-citizen "whom I determine" was or abetted a terrorist could be "detained at an appropriate place" by the secretary of defense and tried by military tribunals created by the secretary (Fisher 2005: 168). Evidence could be admitted that would "have probative value to a reasonable person," possibly including that obtained by torture. The order also declared that no court would have jurisdiction to hear an appeal to a military commission's decision or consider a writ of habeas corpus.

An interagency working group had been examining the legal implications of how to handle detainees who might have been members of the Taliban or al-Qaeda. It was led by Pierre Prosper, ambassador at large for war crimes. National Security Advisor Condoleezza Rice and Secretary of State Colin Powell knew that the Prosper committee was working on the issue and believed that they would have some input in drafting the order. However, in late October 2001 Vice President Cheney determined the process was taking too long and short circuited it by ignoring and secretly bypassing the committee (Gellman and Becker 2007).

The order was drafted by David Addington, the vice president's legal counsel, and purposefully kept secret from the rest of the administration. Addington forcefully expressed his attitude toward consultation: "Fuck the interagency process," he opined (Mayer 2008: 80). One of the few lawyers who did see the draft said that it "was very closely held because it was coming right from the top" (Gellman and Becker 2007). One might expect that such an important and far-reaching order would involve consultation with administration officials who had expertise or who would be involved with implementing the order. But Cheney gave strict instructions that others in the White House and cabinet be bypassed, specifically Rice, Powell and their lawyers.

Military lawyers were also generally excluded from commenting on the draft of the military order. Rear Admiral Donald J. Guter, the Navy Judge Advocate General, said "I can't tell you how compartmented [sic] things were. This was a closed administration" (Golden 2004). On 9 November, four days before the president signed the order, Department of Defense General Counsel Jim Haynes allowed a small group of lawyers, headed by Lawrence J. Morris, to look at a draft of the order, but they were not allowed to have a copy or take notes. At the last minute, Army Judge Advocate General Major General Thomas Romig called a group of military lawyers together over the weekend to try to make some changes, but their efforts were unavailing (Ragavan 2006: 37; Golden 2004).

On 13 November Cheney had Addington take the draft to the White House staff secretary to put it in final form in strict secrecy. Once the order was put into a formal document, Cheney took it to Bush in the Oval Office and the president signed it immediately. White House aides present said they did not know that the vice president had

been involved in the drafting of the memo. Thus Cheney had engineered the president's approval and signature without any policy process or sign off by relevant White House and cabinet officials, most importantly National Security Adviser Rice and Secretary of State Powell. On the evening of 13 November, when CNN broadcast that the military order had been signed by the president, Colin Powell exclaimed "What the hell just happened?" and Rice sent an aide to find out about the order (Gellman and Becker 2007).

The order was important because it created a new category of "enemy combatant" to avoid the "prisoner of war" designation that would have invoked the Geneva Conventions. People could be labeled enemy combatants at the president's discretion. In accord with the president's subsequent decision to suspend the Geneva Conventions made the following month, discussed in detail below, enemy combatants would not be entitled to the protections of the Geneva rules, either for prisoners of war or for others held at the mercy of opposing forces. This determination led to the abuse and torture of detainees. If the draft order had been circulated more widely, the administration might have avoided the Supreme Court's 2006 ruling in *Hamdan v. Rumsfeld* that struck down the military commissions plan because it was not set up in accord with the Geneva Conventions or US law, including the Uniform Code of Military Justice.

b. Disbanding the Iraqi Army

Once U.S. forces had captured Baghdad, Iraq several key decisions were made that gravely jeopardised US success in Iraq. First, Paul Bremer alone was made the supreme US authority in Iraq. Second, the decision was taken to bar from government work those who ranked in the top four levels of Saddam's Baath party and the top three levels of each government ministry. Third, it was decided to disband the Iraqi army and replace it with a new army built from scratch. These fateful decisions were made against the advice of military and CIA professionals and without consulting important members of the president's staff and cabinet.

The decision to give Bremer sole authority in Iraq, rather than his sharing it with Zal Khalilzad, as had been planned, was made by President Bush during an informal lunch with Bremer and without consulting his secretary of state or national security adviser (Gordon and Trainor 2006: 475). According to Powell, "The plan was for Zal to go back. He was the one guy who knew this place better than anyone. I thought this was part of the deal with Bremer. But with no discussion, no debate, things changed. I was stunned." Powell observed that President Bush's decision was "typical." There were "no full deliberations. And you suddenly discover, gee, maybe that wasn't so great, we should have thought about it a little longer" (Cohen 2007).

The decision by Bush to put Bremer fully in charge led to the first of the other two blunders. In order to rid the country of any vestiges of Saddam's brutal regime, Bremer issued his de-Baathification Coalition Provisional Authority Order Number 1 on 16 May 2003. The order involved up to 85,000 civilian, managerial-level technocrats who managed the economic and energy infrastructure of the country. Despite Under Secretary of Defense Douglas Feith's assertion that the decision had been cleared in an interagency process, the military had a distinctly different understanding of what the policy had been and thought that the CPA order cut too deeply into the administrative infrastructure of the country. CIA Director George Tenet noted his agency "knew nothing about it until de-Baathification was a fait accompli... Clearly, this was a critical policy decision, yet there was no NSC [National Security Council] Principals meeting to debate the move" (Tenet 2007: 426). The lack of an NSC meeting to deliberate fully before President Bush's decision was characteristic of his presidency.

The third key decision was to disband the Iraqi army, which threw hundreds of thousands out of work and immediately created a large pool of unemployed and armed men who felt humiliated by and hostile to the US occupiers. According to one US officer in Baghdad, “When they disbanded the military, and announced we were occupiers – that was it. Every moderate, every person that had leaned toward us, was furious” (Ricks 2006: 164). The pre-war plans of the State department, the Army War College and the Center for International and Strategic Studies had all recommended against disbanding the army (Fallows 2004: 74).

In a NSC meeting on 12 March 2003 there had been a consensus that the US forces would use the Iraqi army to help provide internal and external security in post-war Iraq. But one week after the de-Baathification order, Bremer issued CPA Order Number 2 on 23 May 2003 dissolving the Iraqi security forces. There had been an NSC meeting in which Bremer, via teleconference, had casually mentioned his intentions, but other participants did not conclude that President Bush had made a decision about disbanding the army.

Importantly, Colin Powell was out of town when the decision was made, and he was not informed about it, much less consulted. Even President Bush did not remember deciding. When asked in 2006 by his biographer, Roger Draper, about the decision, Bush replied, “Well, the policy was to keep the army intact. Didn’t happen” (Draper 2007: 211, 433). “Yeah, I can’t remember, I’m sure I said, “This is the policy, what happened?”” (Andrews 2007). What is known is that the decision was made against the judgment of military planners and without consultation with Secretary of State Powell, CIA Director Tenet or Chair of the Joint Chiefs of Staff General Richard Myers.

The security forces included 385,000 in the armed forces, 285,000 police in the Interior Ministry and 50,000 in presidential security units (Ricks 2006: 162, 192). Of course, those in police and military units that were Saddam’s top enforcers, such as the Special Republican Guard, had to be barred from working in the government. But many officers in the army were professional soldiers, and the rank and file enlisted soldiers could have constituted a source of stability and order.

Both de-Baathification and disbanding the security forces fuelled the insurgency by alienating hundreds of thousands of Iraqis who could not support themselves or their families, and by undermining the infrastructure required for social and economic activity. They also ensured that there was insufficient security to carry on normal life and created more insurgents who were angry at the US, many of whom had weapons and were trained to use them. It is probable that a more thorough consultation process could have given President Bush a much more realistic understanding of what the likely consequences would be.

II. Ignoring Professional Advice

The problem of failing to consult more broadly within the administration was often compounded by President Bush’s tendency to ignore or dismiss the advice of expert political appointees and career professionals on important policy matters. This section will illustrate this tendency by examining Bush’s decision to suspend the Geneva Conventions in the war on terror and his rejection of the CIA’s conclusion that there was no meaningful link between Saddam Hussein and al-Qaeda.

a. Abandoning the Geneva Conventions

In autumn 2001 the Bush administration felt tremendous pressure not only to pursue those

who had committed the 9/11 atrocities but also to prevent future attacks, which it assumed were in the planning stages. In order to obtain crucial intelligence, the United States would have to depend on the interrogation of prisoners to discover plans for future attacks. Thus, some thought that the traditional interrogation techniques developed by the US military and limited by the strictures of the Geneva Conventions would not be sufficient. In late 2001 and early 2002 the administration went about exempting US interrogators from the Geneva rules. In addition, the administration wanted to ensure that its interrogators did not get charged with war crimes; the US war crimes statute referred to the Geneva rules, and if Geneva did not apply, the statute was unlikely to be invoked regarding the harsh treatment of detainees.

The Judge Advocate Generals of the services (JAGs or TJAGs), however, were not consulted about the decisions (Sands 2008: 32). That is, those who, because of their training and years of experience, were among the most informed and qualified lawyers on the laws of war, were excluded from consultations on this important decision. As David Addington reportedly said, “Don’t bring the TJAGs into the process, they aren’t reliable” (Sands 2008: 32). President Bush made his decision on 8 January 2002 and Secretary Powell was informed on 18 January while in Asia (Mayer 2008: 123; DeYoung 2007: 368).

When Powell returned to the US, he objected to the policy of abandoning the Geneva Conventions. In a 26 January memo he argued that “It will reverse over a century of policy... and undermine the protections of the law of war for our troops, both in this specific conflict and in general; It has a high cost in terms of negative international reaction... ; It will undermine public support among critical allies” (Powell 2002). He also noted that applying the Conventions, “maintains POW status for US forces... and generally supports the US objective of ensuring its forces are accorded protection under the Convention.”

Despite Powell’s memo, but in accord with the Justice department’s and his counsel’s recommendations, President Bush signed a memorandum on 7 February 2002, stating: “Pursuant to my authority as Commander in Chief... I... determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.” The memo argued that the Geneva Conventions apply only to states and “assumes the existence of ‘regular’ armed forces fighting on behalf of states,” and that “terrorism ushers in a new paradigm” that “requires new thinking in the law of war.” The memo also stated that “As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva” (Bush 2002, emphasis added).

Suspending the Geneva rules drastically changed US policy on the treatment of prisoners and reversed firm Defense department guidelines on prisoner treatment during war. time It allowed the use of aggressive techniques of interrogation used by the CIA and military intelligence at Guantanamo that were later, in autumn 2003, transferred to the prison at Abu Ghraib. The president had been successful in exempting interrogators from having to conform to the Geneva rules (although the Court would later overturn the president in Hamden) and consequences were profound: the harsh interrogations of detainees by US personnel aided the recruitment of terrorists and drew the opprobrium of US allies and adversaries.

b. Insisting on a Link between Saddam and al Qaeda

Immediately after the 9/11 attack, much of the US public believed that Saddam Hussein was responsible or connected in some way, and statements by the president and other administration officials reinforced this impression over the next several years. Within twenty-four hours of the attack, President Bush told White House terrorism adviser Richard Clarke several times to look into “any shred” of evidence of a link, despite Clarke’s report that the intelligence community had concluded that al-Qaeda was not behind the attacks (Clarke 2004: 30-33). In September 2002 Secretary of Defense Donald Rumsfeld said evidence for the link was “bulletproof,” “factual” and “exactly accurate” (Schmitt 2002). In his 7 October 2002 address, President Bush asserted, “we’ve learned that Iraq has trained al-Qaeda members in bomb-making and poisons and deadly gasses.” The main items of evidence adduced to prove the relationship were an asserted meeting of hijacker Mohamed Atta with an Iraqi intelligence official in Prague on 9 April 2001 and the confession under aggressive interrogation of Ibn al-Shaykh al-Libi, who had been a senior member of al-Qaeda. However, the CIA and FBI found no evidence of the alleged Prague meeting, and in February 2002 the Defense Intelligence Agency judged that al-Libi’s statements were suspect because he could not provide credible details about the types of weapons involved, the Iraqis he dealt with, or the location of the meetings, and was, in addition, subjected to torture to obtain his confession (Isikoff 2004; Jehl 2004b; Priest 2004; Levin 2005). Libi later recanted his claims in February 2004 after being returned to US custody at Guantanamo Bay. In the President’s Daily Brief of 21 September 2001 the CIA reported that there was no evidence demonstrating a link between Saddam and al-Qaeda (Waas 2005), but Secretary Rumsfeld and Vice President Cheney continued to claim a connection, and on 25 September 2002 President Bush said, “You can’t distinguish between al Qaeda and Saddam when you talk about the war on terror” (Waas 2005).

Paul Pillar, who was in charge of coordinating the US intelligence community’s assessment of Iraq from 2000 to 2005, concluded that “the greatest discrepancy between the administration’s public statements and the intelligence community’s judgments concerned... the relationship between Saddam and al Qaeda. The enormous attention devoted to this subject did not reflect any judgment by intelligence officials that there was or was likely to be anything like the ‘alliance’ the administration said existed” (Pillar 2006). Thus the administration’s decision to go to war in Iraq was based in part on its conclusion that Saddam was allied with al-Qaeda – a conclusion explicitly challenged by the intelligence community, especially the CIA and the Office of Intelligence and Research within the State department.

III. Broad Assertions of Constitutional Authority

The modern tradition of constraining the power of political executives has deep roots in Anglo-American governmental traditions. The Magna Carta of 1215, Habeas Corpus Act of 1679, English Bill of Rights of 1689, Common Law, and other documents and traditions of the un-codified British constitution all provided precedents upon which the framers of the US Constitution drew. The writing of the US Constitution also benefited from the centuries of struggle between the British monarch and parliament over the control of public policy. The US Constitution created a separation of powers system in which the legislature is clearly superior to the executive in the formulation of public policy. Article II of the Constitution also provides that the president “shall take care that the laws be faithfully executed.” This section will examine President Bush’s assertion that he could ignore the law and order secret surveillance in the United States and his broader assertion that he could selectively ignore

parts of laws that he claimed impinged on his prerogatives as chief executive.

a. NSA and the Terrorist Surveillance Program

Shortly after 9/11 President Bush ordered the National Security Agency (NSA) to listen-in on conversations between al-Qaeda suspects in foreign countries and people within the United States. Public law permits the NSA to monitor calls and other transmissions in foreign countries, but the Foreign Intelligence Surveillance Act of 1977 (FISA) required that all domestic wiretapping or surveillance be undertaken pursuant to a warrant, and set up a special court for that purpose. President Bush asserted that he had the inherent authority as commander-in-chief to disregard the law and order surveillance in the domestic United States without obtaining a warrant issued by FISA judges.

Bush's actions were problematic because the fourth amendment protects citizens against unreasonable searches and seizures without a warrant, and FISA set up a special court for the consideration of warrants for electronic surveillance, if probable cause is shown that the suspect is likely to be an agent of a foreign power. The act covers any wire, radio, or other communication "sent by or intended to be received by a particular, known United States Person who is in the United States." And in three cases a warrant is not even required: (1) if the attorney general determines that the communication is among foreign powers or their agents and "there is no substantial likelihood that the surveillance will acquire the contents of any communication of which a United States person is a party;" (2) if the attorney general determines that there is insufficient time to obtain a warrant, but in such a case a FISA judge shall be notified within seventy-two hours (changed from twenty-four hours on 28 December 2001); and (3) surveillance can be conducted without a warrant for fifteen days after Congress declares war. It is also worth noting that FISA provides a strong presumption in favour of the president; a FISA court judge "must" issue a warrant under a set of relatively liberal circumstances.

It is not as if President Bush did not have the means to undertake the NSA spying within the law. He could have sought FISA warrants for that very purpose. If speed was of importance, the NSA could have carried out the surveillance and come back to the FISA court within seventy-two hours for retrospective authorisation, as provided for by the law. Or if the law, as written, was too narrow to allow the kind of surveillance deemed necessary, such as data mining, the president could have asked Congress to change the law – as he eventually did in 2007. President Bush did none of these things, however, even though between 1978 and 2005 the FISA court had approved more than 18,000 requests for warrants and disallowed only five, suggesting that requests for warrants by the administration would almost certainly have been granted. Instead, he secretly ordered the NSA to conduct the surveillance without warrants and then, when his actions were disclosed, asserted that the Constitution's article II commander-in-chief clause gave him the authority to ignore the law. President Bush's belief that he had the constitutional authority to undertake such warrantless surveillance amounts to a claim that the executive has the authority to ignore the law if he determines that it is in the interest of national security to do so.

The above episode illustrates the importance the Bush administration placed on secrecy and its unwillingness to comply with the law and subject itself to the checks and balances built into the Constitution. The irony is that the surveillance would have been unremarkable if only the administration had complied with the law and sought the required warrants, which almost certainly would have been granted by a pliant FISA court.

b. Signing Statements

A signing statement is a written statement by the president about a bill that he has just signed into law. Often these statements are hortatory and either praise or criticise the purpose of the just-enacted law. The Bush administration, however, frequently used signing statements to declare that the president was not bound by the bill that he had just signed. Although many other presidents had issued signing statements, Bush used them to an unprecedented extent, issuing more than 1,000 challenges to provisions in 150 laws in his first six years in office (Savage 2007). He used signing statements to assert the unilateral and un-reviewable right of the executive to choose which provisions of laws to enforce and which to ignore. For instance, he used them to indicate that he did not feel bound by all of the provisions of laws regarding: reporting to Congress pursuant to the Patriot Act; the torture of prisoners; whistle-blower protections for the Department of Energy; the number of US troops in Columbia; the use of illegally gathered intelligence; and the publication of educational data gathered by the Department of Education (Savage 2007: 228-249).

The implications of these sweeping claims to presidential authority are profound and undermine the very meaning of the rule of law. Despite the Constitution's grant of lawmaking power to Congress, the Bush administration maintained that executive authority and the commander-in-chief clause could overcome virtually any law that constrained the executive. President Bush thus claimed unilateral control of the laws. If the executive holds that it is not subject to the law as it is written but can pick and choose which provisions to enforce, it is essentially claiming the unitary power to say what the law is and the "take care" clause of article II is effectively nullified.

Even though some limited circumstances might justify the president not obeying a law – such as President Lincoln's decision to suspend habeas corpus during the civil war to maintain the union and protect the Constitution – expanding those limited circumstances to more than 1,000 threats to not execute the law constituted an arrogation of power by President Bush. The Constitution does not give the president the option to decide *not* to faithfully execute the law. If there is a dispute about the interpretation of a law, the interaction of the three branches in the constitutional process is the appropriate way to settle the issue. The politics of passage, the choice to veto or not, and the right to challenge laws in court all are legitimate ways to deal with differences in interpretation. But the assertion by the executive that it alone has the authority to interpret the law and that it will enforce the law at its own discretion threatens the delicate constitutional balance established by the founding fathers more than two centuries ago.

Conclusion

The patterns that emerges from an examination of the actions of President Bush are secrecy, even within his own administration; the exclusion from deliberation of qualified executive branch experts and disregard for their judgments; and the assertion of extraordinary constitutional authority of the president. Colin Powell, particularly, was marginalised by the White House staff and the Vice President. Ironically, Powell arguably had more relevant experience than any of the other NSC principals: two tours of combat experience in Vietnam, chairman of the joint chiefs of staff under Presidents G.H.W. Bush and Clinton, national security adviser to President Reagan, and secretary of state to President Bush.

The above problems were exacerbated by the failure of the president to bring together his major staffers and departmental secretaries and deliberate about the wisdom of many decisions. The decision to go to war in Iraq itself was never considered in a formal meeting of the NSC principals, for example.

Arguably the decisions examined in this Chapter were unwise. The military commissions order designed a flawed process that was invalidated by the Supreme Court. The NSA's surveillance, which could have been undertaken easily within the law, became a scandal and constitutional confrontation when it was revealed that the president had ignored the law. The abandonment of the Geneva Conventions led to the abuse and torture of detainees in the war on terror. The insistence by the administration that there was a link between Saddam and al-Qaeda helped convince Americans that the war was justified, but was exposed as an exaggeration or fabrication. And President Bush's use of signing statements made extremely broad claims to unilateral presidential authority..

Broader consultation would not necessarily have led to different outcomes, but listening to dissent from his own political appointees and the considered judgment of career professionals might have exposed President Bush to alternative judgments about the consequences of his decisions. Even if one posits that Bush did not and would not abuse his executive power, his claim to be able to ignore the law set a dangerous precedent that future presidents might use to justify their own claims to power.

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