

## **President Bush as Chief Executive**

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As chief executive, the president is formally responsible for the execution of the laws and the management of the executive branch. This does not mean that the president personally directs most executive branch activities, but the president or presidential surrogates, often political appointees, oversee and supervise the most important activities of the executive branch. Presidents are personally most directly involved with the management of the White House staff, policy making at the top levels of the executive branch, and the place of the presidency in the constitutional system. This chapter will examine several of President Bush's actions as chief executive at these three levels of presidential responsibility. Although only a few executive actions will be analyzed, these policies had far reaching, historic consequences and are among the most important of the Bush administration: the war in Iraq, detainee policy, and claims to constitutional executive power.

The first section will examine decision making in the White House about two key decisions of historic importance: the decision to go to war in Iraq and the decision to suspend the Geneva Conventions. In making each of these decisions, important White House staff or cabinet members were excluded or marginalized. The second section will deal with two key decisions to carry out the above policies: deciding how to occupy Iraq and how to interrogate detainees in the war on terror. In each of these cases, the administration ignored the advice of career professionals in the military services. The third section will examine President Bush's extraordinary claims to executive power under the Constitution in several important policy areas. In each of these cases President Bush tried to exclude the other two branches of government, Congress and the federal court system from controlling or overseeing his decisions.

The argument of the chapter is that President Bush's approach to his executive responsibilities reveals a reluctance to consult widely about important decisions regarding national security, even among his own political appointees. Some of his major policy decisions tended to dismiss or not weigh heavily the judgments of career professionals in the executive branch. And his approach to his role in the constitutional system was expansive and exclusionary; that is, he tended to minimize the role of Congress and the federal courts and make extraordinary claims to constitutional presidential authority.

## **I. Managing White House Policy Making**

Public policy at the presidential level is so complex, and the organization of the White House is so differentiated, that a regular policy process is virtually essential to good policy making. The process should not be rigidly bureaucratic, but for important decisions there should be a procedure in place to ensure that all of the relevant White House and Cabinet officials have an opportunity to “sign off” on proposed policies. As a matter of prudence the president should want to ensure that his or her decision is based on the full range of relevant information (George 1972; Pfiffner 2005).

On some of the most important decisions of the Bush administration, it appears that no systematic policy process was followed and that key people who should have had an opportunity to make their views known to the president were excluded or marginalized. Of course, a fully informed president will not necessarily make wise decisions, but an ill-informed president is more likely to make mistakes.

This section will examine two key decisions made by President Bush and argue that there were important shortcomings in the way that he made these decisions – primarily the exclusion or marginalizing of key personnel or the absence of a full airing of the issues and deliberation with all of the principals involved.

### **A. Deciding to Go to War in Iraq**

The most important decision with respect to Iraq was the decision that the invasion of the country was necessary in order to depose Saddam Hussein. In the decision to go to war in Afghanistan President Bush deliberated openly with his war cabinet, and followed a rational process in making the major decisions in a relatively short time period. In contrast, the decision to invade Iraq seems to have been made over the course of a year or so and was characterized by incremental and disjointed rather than comprehensive decision making along the way. President Bush had probably made up his own mind about war sometime early in 2002, but other members of his administration became aware of his decision at different times over the next year.

President Bush did not make public his decision to pursue Iraq until the State of the Union message on January 29, 2002, though even then he was somewhat vague about the way in which he stated his intention. (In November 2001 he had ordered Donald Rumsfeld to prepare operational plans for a war against Iraq.) Bush announced his decision with a high level of generality with his inclusion of Iraq, Iran, and North Korea in what he called an “axis of evil.” In the speech Bush declared: “I will not wait on events while dangers gather. I will not stand by as peril draws closer and closer (Bush 2002a).” In April the administration started talking about “regime change” in Iraq, and Bush told a British reporter, “I made up my mind that Saddam needs to go” (Woodward 2004, 119).

According to State Department Director of Policy and Planning Richard Haass (who had worked on the NSC staff on Middle East issues for George H. W. Bush),

Condoleezza Rice told him that the president had made up his mind by July 2002. Haass said that he broached the issue of war with Iraq with Rice: “I raised this issue about were we really sure that we wanted to put Iraq front and center at this point, given the war on terrorism and other issues. And she said, essentially, that that decision’s been made, don’t waste your breath” (Lemann 2003, 36).

On August 5, 2002, at Powell’s initiative, Rice arranged for him to spend two hours with the president in order to explain his own reservations about war with Iraq. He argued that war with Iraq would destabilize the whole Middle East; an American occupation would be seen as hostile by the Muslim world; and an invasion of Iraq should not be undertaken by the United States unilaterally. Powell didn’t think the president understood the full implications of an American invasion. He told the president that if the United States invaded Iraq, it would tie down most of the army and the United States would be responsible for twenty-five million people: “You will become the government until you get a new government” (Woodward, 2004, 150-151).

The relative informality of the decision-making process is illustrated by the way the president informed his secretary of state that he had made up his mind. The president asked Rice and White House counselor Karen Hughes their opinion about going to war with Iraq, but he didn’t ask Powell his opinion. Once he finalized the decision to go to war, Bush immediately informed Rumsfeld, but not Powell. In fact, the president informed Prince Bandar, the Saudi Arabian ambassador to the United States, of his decision before he informed Powell (Woodward 2004, 151-152, 165). The president had to be prompted by Rice to inform Powell that he had made up his mind to go to war. So, on January 13 the president brought Powell in for a twelve-minute meeting to inform him of the decision to go to war and ask him to support his decision. The president stressed that it was a “cordial” conversation and that “I didn’t need his permission” (Woodward 2004, 269-274). The deliberations about war were not definitive enough or inclusive enough for the secretary of state (the only NSC principal with combat experience) to know that President Bush had made the decision to go to war.

The seeming lack of deliberation is striking. Though there were many meetings on tactical and operational decisions, there seemed to be no meetings where the entire NSC engaged in face-to-face discussions of all the options including the pros and cons of whether or not to go to war. In part, this may have been due to the shift in Rice’s role away from the honest broker role she played in the decisions about Afghanistan. According to John Burke, in the decisions about Iraq, Rice did not act as a broker (Burke 2005b). Instead, the president decided to use her talents as a confidant and articulator of his views.

## **2. Suspending the Geneva Conventions**

The Geneva Conventions were drafted after World War II, party in response to Nazi atrocities committed against war-time captives. In the fall of 2001, however, 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 they assumed were

in planning stages. In order to obtain crucial intelligence, the United States would have to depend much more on the interrogation of prisoners to reveal plans for future attacks. Thus the traditional interrogation techniques developed by the U.S. military and limited to the strictures of the Geneva Conventions would not be sufficient, in the Bush administration's judgment. In late 2001 and early 2002 the administration went about exempting U.S. interrogators from the Geneva rules

The purpose of the suspension of the Geneva Conventions by the administration was to ensure that captives in the war on terror did not have to be treated according to the Geneva rules; thus interrogators could apply harsh interrogation techniques to gain intelligence on terrorist activities. In addition, the administration wanted to ensure that its interrogators did not get charged with war crimes; the U.S. War Crimes statute referred to the Geneva rules, and if Geneva did not apply, the war crimes statute was unlikely to be invoked regarding the harsh treatment of detainees. As White House Counsel Alberto Gonzales stated in a memo to Bush: "A determination that GPW is not applicable to the Taliban would mean that Section 2441 [War Crimes Act] would not apply to actions taken with respect to the Taliban" (Gonzales 2002).

The decision was made when Colin Powell was out of the country, and when he objected upon his return, his warnings were ignored. Suspending the Geneva Agreements drastically changed what had been U.S. policy for the treatment of prisoners since George Washington told his troops not to abuse British captives. It also reversed what had been firm DOD guidelines for the treatment of prisoners during war time. The president was successful in exempting interrogators from having to conform to Geneva rules, but the Supreme Court in its *Hamdan* decision ruled that the president is required to abide by the Geneva Treaty.

The Judge Advocate Generals of the services, however, were not consulted about the decision to abandon the Geneva Conventions (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 being consulted on this important decision. In addition, the JAGs were much more concerned about the effect of abandoning Geneva on U.S. soldiers than were White House lawyers.

## **II. Managing the Executive Branch**

The White House staff exists to facilitate decision making by the president, but most policies have to be implemented by the departments and agencies of the executive branch. The president is the chief executive officer of the United States and has authority (within the law) over the implementation of public policy. Thus the relationship between the direct representatives of the president in the White House and cabinet officers who administer the major departments is crucial to successful implementation of public policy. Likewise, good relationships between the president's political appointees and the career services, which actually carry out policy, is essential. The consequences of the policy victories for President Bush treated in the first section led to administrative failures which were often due to the fact that career professionals were either excluded

from having input into policies about which they were expert or their advice was ignored by political appointees. Examples of these problems of implementation include military decisions about how to conduct the Iraq war and the decision to use certain “alternative interrogation techniques” to extract intelligence from detainees suspected of terrorism.

### **A. Deciding how to Occupy Iraq**

Once military victory in Iraq had been achieved, several key decisions were made that gravely jeopardized U.S. chances for success in Iraq: 1) the decision to make Paul Bremer alone, the supreme U.S. authority in Iraq; 2) the decision 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 ministry; and 3) the decision 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 Paul Bremer sole authority in Iraq without the co-representative of the President, Zalmay Khalilzad, as had been planned, was made by the president during an informal lunch with Bremer without consulting his Secretary of State or National Security Adviser (Gordon and Trainor 2006, 475). According to Colin 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 important vestiges of Saddam’s brutal regime, Bremer issued his de-Baathification order (Coalition Provisional Authority Order Number 1 of May 16, 2003). This included up to 85,000 people who constituted the civilian, managerial-level technocrats who managed the economic and energy infrastructure of the country. Despite Undersecretary of Defense for Policy 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. The CIA was not consulted, and George Tenet said, “In fact, we knew nothing about it until de-Baathification was a fait accompli . . . . Clearly, this was a critical policy decision, yet there was no NSC Principals meeting to debate the move” (Tenet 2007, 426). The lack of an NSC meeting to fully deliberate before President Bush’s decision was characteristic of the Bush presidency.

The second key decision was to disband the Iraq army. This move threw hundreds of thousands out of work and immediately created a large pool of unemployed and armed men who felt humiliated and hostile to the U.S. occupiers. According to one U.S. 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 prewar 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 74).

In a NSC meeting on March 12, 2003 there had been a consensus that the U.S. 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 May 23, 2003, which dissolved 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 Colin Powell, Chair of the Joint Chiefs of Staff General Myers, or CIA Director George Tenet.

The security forces included 385,000 in the armed forces, 285,000 in the Interior Ministry (police), and 50,000 in presidential security units (Ricks 2006, 162, 192). Of course those in police and military units (e.g. the Special Republican Guard) that were Saddam’s top enforcers 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 constituted a source of stability and order.

Both the de-Baathification and the disbanding decisions fueled the insurgency by: 1) alienating hundreds of thousands of Iraqis who could not support themselves or their families; 2) by undermining the normal infrastructure necessary for social and economic activity; 3) by ensuring that there was not sufficient security to carry on normal life, and 4) by creating insurgents who were angry at the U.S., many of whom had weapons and were trained to use them. It is probable that a more thorough consultation process, including military leaders, before these decisions were made would have given President Bush a much more realistic understanding of what the likely consequences would be.

## **2. Deciding How to Interrogate Detainees**

There were three key decisions that determined that the treatment of terrorism suspects would not be handled according to traditional U.S. policy. The first was President Bush Military Order of November 13, 2001, which said that the president could designate terrorist suspects as “enemy combatants” who could be detained indefinitely, who would have no access to civil courts, and who would be tried for war crimes by military commissions. The second was the suspension of the Geneva Conventions,

discussed above. And the third was the decision by Donald Rumsfeld to allow a range of interrogation techniques that went beyond those allowed by the Geneva Conventions.

The Military Order by President Bush on November 13, 2001 was handled very closely and controlled carefully by Vice President Cheney. Because Cheney did not want any changes or challenges to his draft of the order, he explicitly excluded National Security Adviser Rice, Secretary of State Colin Powell, and drastically limited any input from military lawyers in the Department of Defense. Cheney was successful in getting the order signed by the president without any changes, but the decision led to a flawed legal framework for dealing with detainees in the war on terror that depended on military commissions not authorized by law.

The combination of these two key decisions, along with Rumsfeld's decisions about interrogation techniques, led to the torture and abuse of detainees at Guantanamo, Bagram Air Force Base in Afghanistan, and Abu Ghraib in Iraq. The methods authorized by Rumsfeld exceeded those specified in the Army Field Manual on interrogations, FM 34-52. Army training involves familiarity with the Geneva Conventions, and interrogation techniques allowed in the field manual range from kindness to trickery, but none of them approach physical abuse or torture.

In the summer of 2002, with hundreds of detainees at Guantanamo, the administration was frustrated by the dearth of actionable intelligence being obtained by the interrogation methods that were in force at Guantanamo and which conformed to the Geneva Conventions. Administration lawyers and the military intelligence leadership at Guantanamo, began to explore additional techniques based on U.S. training for soldiers who would be in danger of capture by the enemy. The approach of the training was to subject U.S. soldiers in training to the types of torture techniques that were used by the Chinese on captured U.S. pilots in order to get them to falsely confess to committing atrocities. U.S. trainers trained Guantanamo interrogators in how to "reverse engineer" the resistance training received by U.S. soldiers into counter-resistance methods for getting terrorism suspects in Guantanamo to reveal more intelligence. Strenuous objections by military lawyers for the services were ignored by Rumsfeld, when he approved the techniques.

These techniques were then codified in a memorandum signed by Donald Rumsfeld that authorized the use of a range of techniques that would have been forbidden by traditional policies. His December 2, 2002 memorandum authorized the use of stress positions, hooding, isolation for up to 30 days, deprivation of light and auditory stimuli, and 20 hour interrogations, removal of clothing, and the use of dogs to intimidate detainees. According to Lawrence Wilkerson, chief of staff to Colin Powell at the time, Rumsfeld's handwritten appendage to the December 2 memo sent the message that anything goes in the interrogation of suspected terrorists; it said "Carte blanche , guys" (Mayer 2006, 7).

After serious objections from a range of lawyers in the Pentagon that the techniques probably violated both U.S. and international law, Rumsfeld withdrew the

memo on January 15, 2003 and appointed a Working Group of lawyers to examine the legality of interrogation techniques. The Working Group was closely controlled by political appointees and ignored the objections of career military lawyers. The working group (without notifying the military lawyers who dissented) recommended a list of techniques on April 4, 2003, and Rumsfeld approved some of them on April 16. Hooding, stress positions, and the use of dogs were dropped, and dietary manipulation, environmental manipulation, and sleep adjustment were added; isolation was retained.

Although the dry, legal terms used in the memoranda do not seem excessive, the actual implementation of these techniques by young, untrained soldiers and contractors resulted in extremely harsh treatment of detainees that amounted to torture at Guantanamo, Bagram Air Force Base in Afghanistan, and Abu Ghraib in Iraq. That a number of detainees died after being beaten and suffocated, demonstrated that the treatment was indeed harsh (Schmitt 2004; Allan 2006). It might be argued that the legally authorized techniques, if carefully applied, would not necessarily amount to torture, but the consequences of authorizing harsh treatment predictably led to excesses in implementation.

### **III. Managing Presidential Power**

As argued in the first section, President Bush's style of decision making was characterized by secrecy, severely limiting consultation, and lack of full deliberation. The unfortunate consequences of the truncated policy making process were described in the second section above about the war in Iraq and treatment of detainees. This section will examine how President Bush approached presidential authority under the Constitution. It will argue that in important ways he exceeded his authority as president and threatened to undermine the separation of powers system with his claims to exclusive executive power. In some areas of public policy, President Bush has favored strict construction of the Constitution, yet in the area of executive power, he has been eager to expand the reach of the presidency. From the beginning of their terms of office President Bush and Vice President Cheney felt that, since the 1970s, presidential power had been unduly constrained, and they determined to leave the office constitutionally stronger than when they came to office. Although most presidents have been determined to protect the constitutional position of the presidency, President Bush moved not only to protect his prerogatives, but also to expand them.

After the atrocities of 9/11, the president had the duty to protect Americans. The problem, however, was that President Bush pushed the reasonable duties of the executive beyond the bounds that the Constitution established. He imprisoned hundreds of suspected terrorists indefinitely without charging them and denied them the opportunity to argue their innocence before an independent judge. He allowed, and arguably encouraged, interrogating them with harsh interrogation techniques that many consider to be torture. He claimed the unilateral authority to conduct surveillance secretly on Americans without obtaining warrants required by law. And he asserted that he was not bound by provisions of laws that he, himself deemed to impinge on his executive authority.



## **A. Suspending the Geneva Conventions and Torture**

George W. Bush has been the only U.S. president to defend publicly the right of United States personnel to torture detainees. Probably the president did not intend for U.S. personnel to commit the egregious acts of torture that resulted in the death of many detainees. But he did argue that U.S. personnel needed to use aggressive techniques when interrogating prisoners captured in the war on terror. Despite declarations that “we do not torture,” the aggressive interrogation procedures that were used by U.S. personnel (military, CIA, and contractors) in Guantanamo, Afghanistan, and Abu Ghraib are considered by most of the world to be torture. The Bush administration, in determining the legal basis of interrogation policy, used a narrow and technical definition of “torture” set forth in an Office of Legal Counsel memorandum of August 2002. President Bush vigorously argued that it was essential to the war on terror to continue to pursue “the program” of aggressive interrogation when he argued against the Detainee Treatment Act of 2005 and in favor of the Military Commissions Act of 2006.

Despite Article I, Section 8 of the Constitution, which provides that Congress shall have the power “To make Rules for the Government and Regulation of the land and naval Forces,” the Bush administration denied that the president could be bound by public law with respect to torture. According to this argument, Congress cannot regulate presidential actions when he is acting as commander in chief, nor can any law prohibit the president from using torture. Any law intending to do so “must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority” (Bybee 2002, 34).

## **B. The Privilege of Habeas Corpus**

In 2003 and 2004 the Bush administration incarcerated hundreds of persons who were suspected of cooperating with the Taliban regime in Afghanistan and fighting U.S. troops. The administration argued that those incarcerated had no right to appeal to U.S. courts for writs of habeas corpus and that the courts had no jurisdiction to make judgments on these executive branch actions. President Bush was asserting authority that had been denied English kings since before Magna Carta (1215). Article I of the Constitution provides 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.” Note that this provision was placed in Article I, which deals with the powers of Congress, not in Article II, which specifies presidential authority.<sup>1</sup>

The president’s military order of November 13, 2001 provided that enemy combatants would be tried by military commission and that the only appeal they could make would be within the executive branch. That is the detainees would be charged by the executive, imprisoned by the executive, tried by the executive, and any appeal would be decided within the executive branch. The administration argued strenuously in court that U.S. courts had no jurisdiction to hear habeas appeals. When prisoners in Guantanamo attempted to make habeas corpus appeals, the administration argued that as

enemy combatants they had no such right and that the president alone could determine their fate.

The Supreme Court delivered several setbacks to President Bush's claims to executive power. In *Hamdi vs. Rumsfeld* ( 542 U.S. 507, 2004) the Court ruled that U.S. citizens had the right to challenge their imprisonment at Guantanamo in court. In *Rasul vs. Bush* (542 U.S. 466, 2004), the Court held that non-citizens could challenge their detentions through habeas corpus petitions. And in *Hamdan vs. Rumsfeld* (126 S.Ct. 2749, 2006) the Court ruled that the president was bound by the Geneva Conventions. And in *Boumediene vs. Bush* (No. 06-1195), the court ruled that detainees in Guantanamo had a constitutional right to habeas corpus.

### **C. Warrantless Electronic Surveillance by the National Security Agency**

In December 2005 the *New York Times* revealed that the Bush administration had been secretly monitoring telephone calls and e-mails between suspected foreign terrorists and people within the domestic United States without the warrants required by law. President Bush ordered the National Security Agency to set up the Terrorist Surveillance Program in the fall of 2001. The legal right of the executive branch to conduct electronic surveillance on foreign intelligence targets is not in dispute, but the right of the government to secretly eavesdrop or wiretap suspects within the United States without a warrant is limited by the Fourth Amendment and the law. The applicable law was the Foreign Intelligence Surveillance Act, which was passed in 1978 in reaction to wire tapping abuses in the 1970s. FISA required that any surveillance of persons in the United States could be undertaken only after a warrant was received from a special court set up to examine national security warrant applications.

The administration argued that getting a FISA warrant was too cumbersome and slow and thus it had to set up a secret program for the National Security Agency to conduct the warrantless surveillance in secret. The record of the FISA court, however, does not seem to indicate that the administration had trouble obtaining warrants. From the time that the court was created in 1978 to the end of 2005, it issued 18,748 warrants and refused only five (Baker & Babington 2005). If speed was an issue, FISA provided that surveillance could be commenced immediately and the executive could come to the court within 72 hours for a retroactive warrant.

The question here is not whether there was a serious threat from terrorism or whether the government ought to be able to wiretap U.S. citizens without a warrant. It may or may not be good policy to allow the government to conduct such surveillance, but the constitutional process for making such decisions entails the legislative process and judicial interpretation of the law. President Bush claimed that, despite the laws enacted by Congress and duly signed by the president, he had inherent authority to ignore the law and set up a secret surveillance program that could act without warrants. The question is one of constitutional presidential authority versus the constitutional rights and duties of the other two branches. The Constitution does not give the president the authority to ignore the law. The wisdom of surveillance policy is a separate issue.

Jack Goldsmith, President Bush's conservative Director of the Office of Legal Counsel, who was involved with policy making regarding the Terrorist Surveillance Program, said: "After 9/11 they [Cheney and his counsel David Addington] and other top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret abased on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations" (Goldsmith 2007, 181)

#### **D. Signing Statements**

Although many other presidents had issued signing statements, President George W. Bush used signing statements to an unprecedented extent. He issued more than 1000 constitutional challenges to provisions in 150 laws in his first six years in office (Savage 2007). He used signing statements to assert the unilateral and unreviewable 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 U.S. troops in Columbia; the use of illegally gathered intelligence; and the publication of educational data gathered by the Department of Education (Savage 2006; 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 granting lawmaking power to the Congress, the Bush administration maintained that executive authority and the commander in chief clause can overcome virtually any law that constrains the executive. President Bush was thus claiming unilateral control of the laws. If the executive claims 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. The "take care" clause of Article II can be effectively nullified.

Even though some limited circumstances might justify the president not obeying a law, expanding those limited circumstances to more than 1,000 threats to not execute the law constitutes an arrogation of power by the president. 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 constitutional balance set up by the Constitution.

#### **Conclusion: President Bush as Chief Executive**

As chief executive, President Bush did not subject some of his most important decisions to systematic deliberation. At the implementation stage, he and his political

appointees often did not consult with or heed the advice of uniformed and civilian professionals. At the constitutional level, President Bush aggressively asserted extraordinary claims to exclusive executive authority and argued that his actions could not be limited by the other two branches of government.

In the terms of the criteria set out in this book, President Bush was a very effective politician whose skill led to tactical victories, but his policies resulted in strategic blunders that will haunt the United States for generations. Although at the personal level, President Bush adhered to the moral standards of sexual probity and decorous behavior, his misleading of the country in gaining support for the war in Iraq (Pfiffner 2004) and his encouraging and condoning of torture (Pfiffner 2008; 2009) were profound moral failures.

Perhaps the most important principle established by the Supreme court during the Bush presidency was Justice Sandra Day O’Conner’s statement in the majority opinion in *Hamdi*: “We have long since made 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.”

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<sup>1</sup> Defenders of President Bush's policies have pointed out that President Lincoln suspended habeas corpus at the beginning of the Civil War. Lincoln took his action in April 1861 when Congress was not in session. When it returned to Washington in July, Lincoln asked Congress to ratify his action, and it did. Lincoln did not assert that, as president, he had the constitutional authority to deny habeas corpus (Pfiffner 2008, 94-97).