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## **The Constitutional Legacy of George W. Bush**

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The Framers of the Constitution came to the Constitutional Convention in 1787 with a strong ambivalence toward executive power. On the one hand, they had fought a war to gain independence from England and were determined not to create a system of government that led to abuse by an overly ambitious executive. They knew that, throughout history, executives consistently sought more power, which often led to tyranny. On the other hand, their experience with the Articles of Confederation illustrated the difficulties arising from the lack of an energetic executive. In addition, they had a decade's experience with the weak executives created by the individual states, and they were well aware of the abuses of the state legislatures after the Revolution.

Their solution to this dilemma was to create a separation of powers system in the Constitution that featured an executive independent of legislative control, with governmental authority shared among the three branches. They expected that Congress would be the driver of national policy and that the president would provide energy and accountability in the execution of public policy. During the nineteenth century, with a few exceptions, their expectations were fulfilled, with Congress dominated national policy making.

In the twentieth century, however, the effect of two world wars, the cold war, more sophisticated weaponry, and the speed of communications led to presidential domination of the use of force and military engagement. Despite the Constitution's designation of most war powers, other than commanding the armed forces, to Congress, Presidents continued to dominate the use of force. The atrocities of 9/11 intensified the tendency to centralize power in the presidency and created powerful incentives for presidents to take aggressive measures against potential terrorist threats in order to ensure that another terrorist attack did not occur on their watch.

This paper will examine the assertions of constitutional power of President George W. Bush and argue that he established significant precedents that have enlarged the range of future presidential discretion. The actions of President Obama in national security have illustrated how important the Bush precedents were. As Senator, Obama often criticized Bush on constitutional and policy grounds. But when he became president, although he curbed some of President Bush's excesses, he adopted similar policies and extended some of them in policies concerning indefinite detention, electronic surveillance, and signing statements. Obama reversed Bush policies on the use of torture during interrogations, but Obama's executive orders could not bind future presidents.

This paper will first consider President Bush's main claims to extraordinary constitutional authority. It will then take up President Obama's continued use of most of those claims.

## **President Bush and Executive Power**

From the beginning of their terms of office President Bush and Vice President Cheney felt that, since the reassertion of congressional prerogatives in the 1970s, presidential power had been unduly constrained. As Vice President Cheney said: "The feeling I had [during the Ford years], and I think it's been borne out by history, that in the aftermath, especially of Vietnam and Watergate, that the balance shifted, if you will, that, in fact, the presidency was weakened, that there were congressional efforts to rein in and to place limits on presidential authority."<sup>1</sup> They determined to leave the office constitutionally stronger than when they came to office, and the atrocities of 9/11 gave them the opportunity to expand significantly executive power in the national security arena.

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

After the US invasion of Afghanistan, several hundred men suspected of terrorism were turned over to US troops (five percent were captured by US troops), and incarcerated at the US base at Guantanamo Bay, Cuba.<sup>2</sup> When ordinary interrogation did not produce the "actionable intelligence" that the administration expected, interrogators used brutal procedures to coerce information from them. These procedures, derived from the torture of American prisoners in the Korean War in order to produce false confessions, were used on terrorist suspects at Guantanamo, Bagram Air Force Base in Afghanistan, and Abu Ghraib prison in Iraq. In addition, separately authorized "enhanced interrogation techniques" (EITs) were used by the CIA on other "high value" detainees. These techniques, considered by most of the world to be torture, were employed as a matter of administration policy, and were not merely the rogue activities of a few overly ambitious interrogators.

George W. Bush was the only U.S. president to defend publicly the right of United States personnel to torture detainees (though he denied that EITs were torture). Probably the president did not intend for U.S. personnel to commit the egregious acts of torture that resulted in the death of some 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," many of 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.<sup>3</sup> The Bush administration, in determining the legal basis of interrogation policy, used a narrow and technical definition of "torture" set forth in the Justice Department's Office of Legal Counsel (OLC) memorandum of August 2002.<sup>4</sup> President Bush vigorously argued that it was essential to the war on terror to continue to pursue "the program" of coercive interrogation when he argued against the Detainee Treatment Act of 2005.

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 OLC memos, Congress cannot regulate presidential actions when he is acting as commander in chief, nor can any law prohibit the president from using torture. “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”<sup>5</sup>

## **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. 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.

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 corpus 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. In *Hamdan vs. Rumsfeld* (548 U.S. 557, 2006) the Court ruled that the president was bound by the Geneva Conventions. And in *Boumediene vs. Bush* (553 U.S. 723, 2008), the court ruled that detainees in Guantanamo had a constitutional right to habeas corpus.

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

After the abuses of domestic governmental surveillance by presidents of both parties were revealed by the Church Committee in 1975, Congress passed the Foreign Intelligence Surveillance Act (FISA) to ensure accountability and due process. Presidents

had previously ordered domestic surveillance of American citizens based on their own interpretation of executive authority. The FISA was created to limit surveillance of domestic activities to cases in which there was evidence of foreign espionage. The Act created the Foreign Intelligence Surveillance Court (FISC) to review surveillance programs, judge their legality, and issue warrants (orders) to surveil individuals believed to be connected to foreign powers.

A month after 9/11, in October, 2001, President Bush secretly created the President's Surveillance Program (PSP), and authorized the National Security Agency to monitor communications related to foreign intelligence that were coming into or going out of the United States. Under FISA, communications passing into or out of the United States via wires or cables would have required a FISC order. But President Bush issued the order based on his interpretation of his constitutional authority as president.

In 2004, after senior Justice Department officials threatened to resign over the bulk collection, of metadata of the communications of Americans without warrants, President Bush suspended the program for several months while his administration searched for a new legal justification for the program. They were successful in persuading the FISC to approve of the program under another legal authority.<sup>6</sup> In 2005 the *New York Times* revealed that the National Security Agency had been collecting a broad range of communications of Americans without the required warrants (orders) by the FISC, raising the issue of the constitutional protections of the Fourth Amendment against unreasonable searches and seizures and the requirement for warrants based on probable cause.

In 2006 the USA Patriot Act was amended and interpreted to allow bulk collection of metadata on US citizens' communications, who were not suspected of wrongdoing, making legal what had been previously prohibited by FISA. Section 215 of the USA PATRIOT Act, as interpreted by the Foreign Intelligence Surveillance Court, allows NSA to collect "metadata" from virtually all telecommunications companies' phone records in the United States. Metadata includes the time and place of a call, the recipient and duration of the call. According to Michael Hayden, former Director of NSA and later CIA, the information gained from metadata can be extremely accurate and informative: "we kill people based on metadata. But that's not what we do with this [domestically acquired] metadata."<sup>7</sup>

In 2008 Section 702 of the Foreign Intelligence Surveillance Act was amended to allow NSA to obtain the content of communications without a warrant if the "target is reasonably believed to be a non-US person located outside the United States."<sup>8</sup> These communications can be stored by NSA and searched without warrants, even if the persons were US citizens and not suspected of any wrongdoing. Senator Obama voted for the amendments to Patriot Act in 2006 and for the 2008 FISA Amendments. Critics of US surveillance policies argue that Section 702 of FISA and Section 215 of the Patriot Act allow the surveillance of persons in the US about whom the NSA, CIA, or FBI have no suspicion of illegal connection with foreign powers.

Once the communications of US persons are stored in NSA data bases, these persons can be queried without warrants. Thus the surveillance and storage of data about

presumably innocent persons without warrants arguably violates the Fourth Amendment to the Constitution, which guarantees that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause . . . .”

One basic difference between defenders of mass collection of surveillance data and its critics is their differing time perspectives. Defenders of collecting bulk data argue that, as the NSA Inspector General reported, there are rigorous, executive branch constraints in place and that the programs are not used for illegitimate surveillance of Americans. And critics of the programs are often willing to concede that the programs are not being abused in the present. But the danger is that in the future, politicians (such as Lyndon Johnson or Richard Nixon) or lower level workers will be tempted to use the data available to them to spy on individuals or groups that disagree with US policies or for partisan political purposes.

The broader point here is that President Bush asserted the authority to ignore the law and created a program of domestic surveillance that was forbidden by law. When it was exposed, he argued that it was within his executive authority to do so. When that argument was not seen as compelling, he convinced Congress to grant the president authority, as interpreted by the FISC, to continue the surveillance he had initiated. President Bush established a precedent for much broader surveillance of Americans (without warrants) than had existed before his presidency.

#### **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 more than 150 laws in his first six years in office. He used signing statements to assert the unilateral 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 physical coercion of prisoners contrary to the Detainee Treatment Act of 2006; 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.<sup>9</sup>

The implications of these sweeping claims to presidential authority are profound and call into question 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 could 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 carrying out a law, expanding those limited circumstances to more than 1,000 threats to not execute the law was an unprecedented (at least in volume) claim 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.

### **President Obama and Executive Power**

In general, President Obama has not been as assertive as President Bush in asserting executive authority based on the constitutional power of the president. In justifying his actions as chief executive, President Obama has tended to rely on public law rather than his own executive authority. Nevertheless, he did not roll back President Bush's claims as a matter of constitutional law. As a matter of policy, he admitted that enhanced interrogation techniques amounted to torture and that they were illegal. But the use of torture to extract information from a number of detainees at Guantanamo limited his ability to try them in court or military commission for terrorism. During the Bush administration, Congress had authorized President Bush's monitoring of domestic communications by the National Security Agency, and President Obama did not decide to limit significantly the programs. Obama continued to issue signing statements to protect executive discretion, though not nearly as often as had President Bush. President Obama did, however, expand executive power in other areas of constitutional dispute, including the expanded use of drones to conduct targeted killings of suspected terrorists, and stretching the use of the Authorizations to Use Military Force (AUMF) to justify military action without congressional approval.

#### **A. Obama and torture**

In his campaign for the presidency Barack Obama criticized the Bush administration for its interrogation policies and promised to close the prison at Guantanamo if he were elected. After he won, he moved to keep his promises in order to create "a clean break from business as usual."<sup>10</sup> Two days after his inauguration, on January 22, he mandated the closing of the Guantanamo Bay detention facility "as soon as practicable, and no later than 1 year from the date of this order."<sup>11</sup> The same day he issued an executive order directing the CIA to adhere to the policies specified in the Army field manual on interrogation, all of which comply with the Geneva Conventions; no "enhanced interrogation techniques" (EITs) could be used in interrogations.<sup>12</sup> He was severely criticized by former Vice President Cheney and accused by the former head of the CIA Clandestine Services of "unilaterally disarming" the United States by forbidding enhanced interrogation techniques.<sup>13</sup>

Before Obama became president, there was bipartisan support for closing the Guantanamo Bay prison, which had become an international symbol of US abuse of detainees. Despite an executive order directing that the prison be closed within a year of his inauguration, Congress passed several measures making it difficult or impossible for Obama to follow through on his intention. Congress also made it exceedingly difficult for Obama to transfer detainees out of Guantanamo, either into the continental United States for trial or to other countries. Thus Obama made genuine attempts to fulfill his campaign promise to close Guantanamo but was prevented from doing so by votes in Congress by members of both parties.

Later in his first year, his administration decided to prosecute some Guantanamo detainees in the federal court system (as the Bush administration had done) and to hold the trial of Khalid Sheik Mohammed in New York City.<sup>14</sup> Republicans attacked Obama for each of these decisions, and political pressure from both parties forced him change his stance on civilian trials for terrorism suspects and the venue of trying them. Thus President Obama firmly rejected the Bush administration's interpretation of the law that allowed harsh interrogations and issued clear executive orders to prevent its use.

## **B. Obama and Indefinite Detention**

When he was still a Senator Obama criticized the Bush administration for detaining terrorist suspects without trial (though he limited his comments to US citizens). "I reject the Bush Administration's claim that the President has plenary authority under the Constitution to detain U.S. citizens without charges as unlawful enemy combatants. The detention of American citizens, without access to counsel, fair procedure, or pursuant to judicial authorization, as enemy combatants is unconstitutional."<sup>15</sup>

When Obama took office, the US prison at Guantanamo Bay, Cuba still held about 240 prisoners. A number of those who were left had been treated abusively during interrogations, thus making their prosecution legally dubious because either they had been tortured or evidence against them had been gathered through coercion. As a result, President Obama was faced with the dilemma of freeing detainees, some of whom were guilty of terrorist acts and might return to attack the United States, or holding them in prison indefinitely without trial.

Common Article 3 of the Geneva Conventions requires that defendants be tried by regularly constituted courts, and Obama initially delegated the decision about how to prosecute detainees to Attorney General Eric Holder. But when Holder announced his decision to try suspected terrorists in Article III courts, the political heat was so intense that he stepped back and ordered a detailed review of the Guantanamo detainees and how they should be dealt with.

In its analysis the Obama administration determined that most of the approximately 240 detainees remaining in Guantanamo could be set free without undue risk to the United States. About 33 could be tried in court for crimes, either by military courts or Article III courts. But the remaining 35, had to be held indefinitely without trial because their

prosecution was compromised by the fact that evidence against them was obtained through torture or they had themselves been tortured. Most problematic with respect to executive prerogative, was Obama's decision that some Guantanamo prisoners would be held indefinitely without trial. Even though Obama was not as assertive of executive prerogative as president Bush, he was stuck with a policy that runs against the grain of US constitutional values.

Thus President Obama was faced with the dilemma of releasing probable terrorists or detaining them indefinitely because they could not be properly prosecuted for any crimes they may have committed. In a speech at the National Archives, Obama addressed this problem. "Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. . . . We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted [because they had been tortured], but who nonetheless pose a threat to the security of the United States. . . . Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture -- like other prisoners of war -- must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone."<sup>16</sup>

In a traditional war between nation states, prisoners can be detained in order to keep them off of the battlefield until the end of the war. Since the hostilities set off by the 9/11 attacks on the US are not likely to end soon, those prisoners in Guantanamo who are still dangerous to the US but cannot be prosecuted for crimes must be imprisoned indefinitely. Indefinite imprisonment without trial is antithetical to basic constitutional guarantees of due process, but there seems to be no clear solution to this issue.

### **C. Obama and NSA Surveillance**

When Barack Obama was a Senator he asserted that President Bush exceeded his legitimate executive authority when he ordered surveillance of Americans without warrants. "The Supreme Court has never held that the president has such powers. As president, I will follow existing law, and when it comes to U.S. citizens and residents, I will only authorize surveillance for national security purposes consistent with FISA and other federal statutes."<sup>17</sup> By the time Obama became President, the status of NSA surveillance had been changed to legalize the programs.

As described above, between 2005 and 2009 Congress broadened the range of surveillance of Americans by the NSA. Senator Obama voted to reauthorize and amend the Patriot Act in 2006 and for the 2008 FISA Amendments that legalized the NSA surveillance programs that had been initiated by President Bush under his own claimed authority as president. President Obama continued these programs, the extent of which were secret from the public.

In August 2013 President Obama, prompted by disclosures by Edward Snowden of the extent of NSA surveillance of Americans, created a special President's Review Group on Intelligence and Communications Technologies. The Review Group was highly critical of the large scale storage of Americans' communications that was collected "incidentally" during the legitimate surveillance of foreign targets.<sup>18</sup> In addition, in January of 2014 the Privacy and Civil Liberties Oversight Board (PCLOB) issued a report that severely criticized the legal basis for the FISC interpretation of section 215 of the Patriot Act.

According to the PLOC Board, the FISC, in defense of its ruling, has maintained "that essentially the entire nation's calling records are 'relevant' to every counterterrorism investigation. . . . This position is untenable."<sup>19</sup> The bulk collection of metadata is dubious for both legislative and constitutional reasons. Almost by definition, bulk metadata cannot be "relevant to an authorized investigation," since the data are collected in bulk and do not pertain to a specific investigation. In effect, the 215 program amounts to a general warrant, which is specifically rejected by the Fourth Amendment to the Constitution.<sup>20</sup>

As a result of public concern at the previously unknown scope of NSA surveillance of Americans who were not suspected of criminal activity, President Obama ordered a more careful use of the data by NSA and supported passage of the USA Freedom Act, which would have eliminated the bulk collection of telephone metadata under Section 215 of the Patriot Act. The bill was narrowly defeated by a filibuster in the Senate in late 2014.

Thus despite his skepticism about NSA surveillance of Americans, after becoming president, Obama came to be convinced that NSA's collection of bulk communications data on all Americans was both constitutionally acceptable and necessary for national security. After the Snowden revelations, he favored significant changes in the law, but chose not to institute those changes by himself. The legacy of President Bush's decisions about domestic surveillance of Americans became authorized in law and accepted by a president of the opposite party as necessary. American concerned about civil liberties and privacy do not argue that NSA's huge databases of domestic communications have been abused by the Bush or Obama administrations. But given precedents of abuse in American history, addressed by the Church Committee in 1975, the danger of future abuses is troublesome.

#### **D. Obama and Signing Statements**

Before he was president, Senator Obama denounced President Bush's use of signing statements. "That's not part of his power, but this is part of the whole theory of George Bush that he can make laws as he goes along."<sup>21</sup> Further, "I will not use signing statements to nullify or undermine congressional instructions as enacted into law. The problem with this administration is that it has attached signing statements to legislation in an effort to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation. The fact that President Bush has issued signing statements to challenge over 1100 laws – more than any president in history – is a clear abuse of this prerogative."<sup>22</sup>

After President Obama's inauguration, the White House issued a statement establishing his approach to signing statements. He noted public concern over the use of signing statements and declared that "Constitutional signing statements should not be used to suggest that the President will disregard statutory requirements on the basis of policy disagreements." He promised to "act with caution and restraint, based only on interpretations of the Constitution that are well-founded." And he ordered executive departments and agencies not to act pursuant to previously issued (i.e. by President Bush) signing statements without consulting with the Department of Justice.<sup>23</sup>

Although President Obama did not use signing statements nearly as often as President Bush – issuing more than 30 in objections to provisions in 20 laws -- he argued that they were occasionally necessary when there was a serious disagreement about the constitutional authority of the president and Congress. For instance, in passing the National Defense Authorization Act for FY 2012, Congress made indefinite detention of terrorist suspects legal. Section 1021(c) (1) of the NDAA for FY2012 allows the president to keep apprehended persons who were directly involved in the 9-11 attacks to be detained "without trial until the end of the hostilities authorized by the Authorization for the Use Military Force" of 2001. Section 1022, (b) (2) allows indefinite detention also for *persons* who "substantially supported" al Qaeda or "associated forces" in attacks against the US (emphasis added).<sup>24</sup>

Obama objected to the broad provisions of section 1021, and issued a signing statement, arguing that it provided too much leeway for the US government to detain US citizens arrested on American soil indefinitely without trial. In signing the bill into law, Obama released a signing statement, saying, "my Administration will not authorize the indefinite military detention without trial of American citizens." He further objected to section 1022 saying that it "seeks to require military custody for a narrow category of non-citizen detainees who are "captured in the course of hostilities authorized by the Authorization for Use of Military Force." He also said, "I reject any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat."<sup>25</sup> Obama wanted to preserve his flexibility to try suspected terrorists in Article III courts, rather than relegating all trials to military courts.

Obama also took exception to the National Defense Authorization Act for FY 2014, he stipulated in a signing statement: "The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."<sup>26</sup> Obama acted on his interpretation of the Constitution in 2014 when he traded several Guantanamo detainees for the release of Army Sgt. Bowe Bergdahl in Afghanistan. Instead of notifying Congress 30 days in advance as required in the 2014 NDAA, he kept negotiations secret until the prisoner exchange was accomplished, arguing that notification would have jeopardized the negotiations.

Most presidents throughout US history have issued signing statements, though they were primarily hortatory and symbolic. Occasionally Congress does pass laws that arguably impinge on presidential constitutional authority. But the Reagan administration began to use signing statements more strategically, and President Bush used them

systematically in a strategic way, that is, not merely when there was an exceptional challenge to presidential authority in a law. President Bush took this practice to extremes, both in volume and in intent. Obama's more sparing use of them will not prevent future presidents from issuing them as aggressively as President Bush. The executive branch now has significant precedents for future presidents to use in order to avoid congressional intent.

## **Conclusion**

In summary, President Bush broke new constitutional ground in authorizing coercive interrogations, denying suspected terrorists the privilege of habeas corpus,<sup>27</sup> warrantless surveillance of Americans, and the excessive use of signing statements.

One of the most far-reaching legacies of President Bush is the legitimating of the use of torture during interrogations. After the Abu Ghraib revelations, Congress passed the Detainee Treatment Act of 2005. Section 1003 of the Act provides that "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."<sup>28</sup> After signing the DTA bill into law, President Bush used language in a signing statement indicating that he did not feel bound by the law. The signing statement declared: "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 . . . ."<sup>29</sup> In addition, an Office of Legal Counsel memorandum issued by the Bush administration claimed that the president is above the law when acting as commander in chief. "In order to respect the President's inherent constitutional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority."<sup>30</sup>

Despite the fact that President Obama rejected the use of torture, some political leaders, particularly former Vice President Cheney, insisted that EITs were essential to US national security.<sup>31</sup> Most of the Republican candidates for president in 2012, also endorsed the use of enhanced interrogation techniques. Thus future presidents may accept the legal judgment of the Bush administration that laws cannot bind presidents acting as commander in chief if they choose to use enhanced interrogation techniques during interrogations.

The Supreme Court reversed President Bush and Congress in deciding that habeas corpus could not be suspended except by Congress "in Cases of Rebellion or Invasion." Future presidents will find it more difficult to imprison suspects without oversight by the judiciary.

Warrantless surveillance of Americans has been authorized in law. Congress might eliminate parts of the programs through laws similar to the USA Freedom Act that was almost passed by Congress in 2014. Presidents can dial back NSA programs through

executive orders, and although President Obama supported a bill significantly curtailing some programs, President Obama did not make major changes himself. Under pressure to prevent any further terrorist attacks, and assurance by the intelligence community that massive surveillance is essential to national security, future presidents will likely continue aggressive surveillance programs.

Although President Obama reduced significantly the use of signing statements for purposes of challenging the constitutionality of portions of public laws, he admitted that they were sometimes legitimate. It is likely that future presidents will continue the practice, and there is no easy way to ensure that presidents use them responsibly and with restraint.

In areas other than the above policies, President Obama pushed the boundaries of the Constitution. He significantly increased the volume and scope of drone strikes, including the targeted killing of US citizens. He stretched the use of authorizations to use military force. He attempted to use recess appointments in unprecedented ways, though the Supreme Court reversed him. He also pushed constitutional boundaries in his use of executive privilege, immigration policy, and use of the state secrets privilege.

The assertions of executive authority by President Bush laid a foundation upon which future presidents could build in their own claims of executive power. The balance of executive power between Congress and the president does not seem to act as a pendulum swinging back and forth between the branches, but rather as a ratchet: once a president has acted in the national security area and has claimed executive authority to do so, Congress has seldom been willing or able to reassert congressional control. Most often this is due to the lack of political will by members of Congress, particularly during the era of polarization characterizing the early 21<sup>st</sup> century. Members of the president's party in Congress are unwilling to rein their president, and the opposition party is unable to command the majorities necessary to do so.

Future presidents will use precedents set by Presidents Bush and Obama to justify the pursuit of their own policy preferences, sometimes in secret, and sometimes when Congress will not go along with their priorities. The Framers of the Constitution were right in thinking that executives would try to expand their own autonomy. That is why they created a separation of powers system. The primary way to ensure that future presidents will not overreach is for Congress to act as an institution to protect its constitutional authority. But with the current polarization of Congress, it is difficult to convince members of Congress to confront a president of their own party. The Supreme Court can occasionally slow presidential aggrandizement, as it did with habeas corpus and recess appointments, but judges most often let the other two branches fight over their constitutional prerogatives without intervening. It is likely that future presidents will continue to stretch their executive powers and unlikely that Congress will stop them.

### Note:

This paper is drawn in part from previous publications, including: *Power Play: The Bush Presidency and the Constitution* (Washington, Brookings, 2008); *Torture as Public Policy* (Paradigm Publishers: Boulder, CO: 2010); “Decision Making in the Obama White House,” *Presidential Studies Quarterly* (June 2011), pp. 244-262.

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### Endnotes

<sup>1</sup> Kenneth T. Walsh 2006. “The Cheney Factor,” *U.S. News & World Report* (January 23), p. 48.

<sup>2</sup> Mark Denbeaux and Joshua Denbeaux, “Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data,” (April 2005), available at: <http://law.shu.edu/aaafinal.pdf>, No. 1, pp. 1, 2.

<sup>3</sup> For details on these issues, see James P. Pfiffner, *Torture as Public Policy* (Boulder, CO: Paradigm Publishers, 2010).

<sup>4</sup> “Memorandum for Alberto R. Gonzales, Counsel to the President,” *Re: Standards of Conduct for Interrogation under 18 U.S.C. sec. 23240-2340A*, from Jay S. Bybee, Assistant Attorney General, Office of Legal Council, Department of Justice (August 1, 2002), pp. 3-12. <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1>.

<sup>5</sup> “Memorandum for Alberto R. Gonzales, Counsel to the President,” *Re: Standards of Conduct for Interrogation under 18 U.S.C. sec. 23240-2340A*, from Jay S. Bybee, Assistant Attorney General, Office of Legal Council, Department of Justice (August 1, 2002), p. 35. <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1>

<sup>6</sup> For details on the threats to resign, see Pfiffner, *Power Play: The Bush Administration and the Constitution* (Washington: Brookings, 2008), pp. 182-185. On policy changes and the law, see Office of the Inspector General of the National Security Agency, Central Security Service, Working Draft ST-09-0002 (24 March 2009), classified TOPREFORM, SECRET//STLW//COMINT/ORCON/NOFORN, pp. 37-39; <http://www.scribd.com/doc/162439434/090324-Draft-NSA-IG-Report-Working-Draft-Office-Of-The-Inspector-General-NSA-24-March-2009>; see also Laura K. Donohue, “FISA Reform”, *Georgetown Law*, (The Scholarly Commons, 2014), p. 4; <http://scholarship.law.georgetown.edu/facpub/1318/>.

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- <sup>7</sup> Lee Ferran, “Ex-NSA Chief: ‘We Kill People Based on Metadata,’” (May 12, 2013). <http://abcnews.go.com/blogs/headlines/2014/05/ex-nsa-chief-we-kill-people-based-on-metadata/>
- <sup>8</sup> Privacy and Civil Liberties Oversight Board, “Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (as amended), July 2, 2014, pp. 1-4.
- <sup>9</sup> See Pfiffner, *Power Play*, pp. 194-228.
- <sup>10</sup> Sheryl Gay Stolberg, “On First Day Obama Sets New Tone. *New York Times* (January 21, 2009).
- <sup>11</sup> White House, Office of the Press Secretary, “Executive Order: “Ensuring Lawful Interrogations,” (January 22, 2009).
- <sup>12</sup> White House, Office of the Press Secretary, Executive Order: “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” January 22, 2009).
- <sup>13</sup> Jose Rodriguez, Jr. (with Bill Harlow). 2012. *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (NY: Threshold Editions, 2012), p. 70.
- <sup>14</sup> For details, see James P. Pfiffner, “Decision Making in the Obama White House,” *Presidential Studies Quarterly* (June 2011), pp. 244-262.
- <sup>15</sup> Charlie Savage, “Barack Obama’s Q & A,” *Boston Globe* (December 20, 2008). <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>
- <sup>16</sup> White House, “Remarks by the President on National Security,” National Archives (May 21, 2009). <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>
- <sup>17</sup> Charlie Savage, “Barack Obama’s Q & A,” *Boston Globe* (December 20, 2008), <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>
- <sup>18</sup> President’s Review Group, *Liberty and Security in a Changing World*, Report and Recommendations of the President’s Review Group on Intelligence and Communications Technologies (December 12, 2013), pp. 11-12.
- <sup>19</sup> Privacy and Civil Liberties Oversight Board, “Report on the Telephone Records Program Conducted under Section 215 of the PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (January 23, 2014), p. 60.
- <sup>20</sup> Laura K. Donohue, “Bulk Metadata Collection: Statutory and Constitutional Considerations,” *Harvard Journal of Law and Public Policy*, Vol. 37 (2014), p. 898.
- <sup>21</sup> Real Clear Politics, “Obama 2008: Bush Used Signing Statements to ‘Accumulate More Power,’” (April 18, 2011); [http://www.realclearpolitics.com/video/2011/04/18/obama\\_2008\\_bush\\_used\\_signing\\_statements\\_to\\_accumulate\\_more\\_power.html](http://www.realclearpolitics.com/video/2011/04/18/obama_2008_bush_used_signing_statements_to_accumulate_more_power.html)
- <sup>22</sup> Charlie Savage, “Barack Obama’s Q&A,” *Boston Globe* (December 20, 2007) <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/4>.
- <sup>23</sup> White House, Office of the Press Secretary, “Memorandum for the Heads of Executive Departments and Agencies; Subject: Presidential Signing Statements,” (March 9, 2009).
- <sup>24</sup> White House, “Statement by the President on H.R. 1540,” (December 31, 2011).
- <sup>25</sup> White House, Office of the Press Secretary, “Statement by the President on H.R. 1540, (December 31, 2011).

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<sup>26</sup> White House, Office of the Press Secretary, “Statement by the President on H.R. 3304,” (December 26, 2013). <http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304>.

<sup>27</sup> Although President Lincoln suspended habeas corpus during the Civil War, he did not claim unilateral authority to do so. He did it as a military necessity when Congress was out of session. When Congress returned, he asked for their approval. The important difference is that Lincoln admitted that only Congress could suspend habeas corpus; Bush claimed the authority on his own executive power. For further analysis, see James P. Pfiffner, “Federalist No. 70: Is the President Too Powerful?” *Public Administration Review* (December 2011), pp. 112-117.

<sup>28</sup> The Act defines cruel, inhuman, or degrading treatment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United State Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment done at New York, December 10, 1984.” Source: H.R. 2863, Department of Defense Appropriations Act, 2006 (Enrolled as Agreed to or Passed by Both House and Senate), P.L. 109-148, Title X.

Found at <http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414>:

<sup>29</sup> The White House, “President’s Statement on Signing of H.R. 2863, the ‘Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.’” December 30, 2005. Found on White House website, <http://www.whitehouse.gov>.

<sup>30</sup> “Memorandum for William J. Haynes II, General Counsel of the Department of Defense,” Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States.” from John C. Yoo (March 14, 2003), p. 13. See also, “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency from Jay S. Bybee, Assistant Attorney General, Office of Legal Council, Department of Justice (August 1, 2002); Subject: “Interrogation of al Qaeda Operative.” Found at: <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1>.

<sup>31</sup> See particularly, Jose Rodriguez, Jr. (with Bill Harlow), *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (NY: Threshold Editions, 2012).