Georgia State University Law Review

Volume 25
Issue 2 *Winter 2008*

Article 5

3-21-2012

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Recommended Citation
McGinnis, John O. (2008) "Losing the Law War: The Bush Administration's Strategic Errors," *Georgia State University Law Review*: Vol. 25: Iss. 2, Article 5.
Available at: http://digitalarchive.gsu.edu/gsulr/vol25/iss2/5

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LOSING THE LAW WAR: THE BUSH ADMINISTRATION'S STRATEGIC ERRORS

John O. McGinnis*

INTRODUCTION

The Bush Administration's legal performance in the war on terror was much like its performance in the war in Iraq. In both cases it had plausible objectives, but employed mistaken, often counterproductive and occasionally foolish strategy. The Bush Administration itself has admitted mistakes in Iraq.[1] But it is also important to describe the errors in its legal strategy to which it has not yet admitted so that future administrations will not suffer similar defeats in the courts of law and the courts of public opinion.

The errors in the Bush Administration's legal strategy had common roots. One was an ideological focus on bolstering executive power and a consequent lack of pragmatic flexibility in choosing tactics that would maximize the chances of gaining public and judicial acceptance of its framework for detention, interrogation, and trial of terrorists as well as surveillance of individuals residing in America. The Administration repeatedly failed to recognize that reliance on executive authority alone entailed a high risk of defeat at the hands of the Court.

Second, the Administration underestimated the magnitude of the risk that the Court would curb the President's discretion, because it radically misunderstood the changed legal environment for litigation in the twenty-first century. Every aspect of American life has seen

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1. In 2006, Bush, along with British Prime Minister Tony Blair, admitted "major misjudgments in execution of Iraq war . . . ." David E. Sanger & Jim Rutenberg, *Bush and Blair Concede Errors, But Defend War*, N.Y. TIMES, May 26, 2006, at A1.

Produced by The Berkeley Electronic Press, 2008

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increasing legalization[2] and as a result of this trend even discretion in the war on terror would likely be seen through the prism of legalism that applies to domestic criminal law. Moreover, foreign elites, particularly European elites, would seek to influence our judiciary so as to tie down what they regard as a dangerous hegemon.

The third systematic error was a failure to recognize that all Administrations tend to lose power as they age,[3] and wars run a high risk of exacerbating that loss as the conflict proves less popular than it was at the initial stage. Of course, the scandals at Abu Ghraib[4] and the specific setbacks in Iraq could not have been predicted. But an Administration's legal high command—and here I speak particularly of the White House Counsel and Attorney General and not those simply defending the policies in court—must be particularly mindful of the general downside risks so as to minimize the worst possible outcomes.

As a result, the Administration would have been well advised to take every step to bolster its legal position as early as practicable. It could have done that by securing from Congress framework legislation for detention, military tribunals, surveillance, and perhaps even interrogation. Because citizens are generally most supportive of an Administration at the beginning of a conflict (a phenomenon so well know among political scientists that is has been given the name "rally around the flag effect"[5]), the terms of trade of the Administration with Congress would have been likely favorable,

2. For a discussion of several aspects of the increase in American civil litigation, see Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

3. Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L. J. 2611 (2006) (arguing that the incumbent president's political party tends to lose power in mid-term and off-year elections as voters blame the president for national woes).

4. In 2004, reports emerged that American military personnel physically, sexually, and psychologically abused detainees at the Abu Ghraib prison in Iraq. *See* Scott Higham and Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees' Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A01. The Taguba Report, the result of the military's inquiry into events at Abu Ghraib, is available at http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html.

5. *See* William D. Baker & John R. Oneal, *Patriotism or Opinion Leadership?: The Nature and Origins of the "Rally 'Round the Flag" Effect*, 45 J. CONFLICT RESOL. 661 (2001). *See also* Matthew A. Baum, *The Constituent Foundations of the Rally-Round-the-Flag Phenomenon*, 46 INT'L STUD. Q. 263 (2002).

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even when the Senate was controlled briefly by the Democrats in late 2001 and 2002, not to mention in 2003 when Republicans took over both Houses and the United States was still savoring victory in Iraq. To be sure, nothing is certain in the legislative process and deals would have had to have been struck, but it seems very likely the Administration early on could have obtained legislation that would have met its strategic objectives.

The consequences of eschewing Congress and relying on vindication of executive power in court have been grave. Far from strengthening executive power, the Administration's policies generated a series of Supreme Court defeats that have weakened it.[6] These losses contributed to a public perception that its policy for dealing with captured terrorists was in disarray, and still worse, that the United States was entrenching on liberties as never before, when the reality is that the war in Iraq and the war on terror has trenched on liberties less than previous wars and even the detainees at Guantanamo had greater protections at trial than their counterparts in earlier wars.[7] The unnecessary reliance on executive power also permitted foreign critics to claim that President Bush was a lone ranger in his approach to detention of enemy combatants, whereas early endorsement by Congress of specific polices would have underscored the reality that he reflected the consensus of the American people at the time.

Let me stress at the outset that the Administration's errors were ones of prudence and judgment, not morality or ethics. After September 11, the United States was confronted with a new kind of enemy made all the more fearsome in an age of weapons of mass destruction. The Bush Administration's lawyers had to confront novel kinds of questions without a clear legal map. These errors do not make their service any less patriotic and admirable.

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6. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (finding that a United States citizen held as an enemy combatant had a due process right to contest his detainment); Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that district courts could hear habeas claims of Guantanamo Bay detainees); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the military commissions established by the Bush Administration violated the Uniform Code of Military Justice and the Geneva Conventions).

7. This point is ably made in Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 288 (2002).

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Yet some law professors have unfortunately called the work of these lawyers incompetent to the point of being unethical.[8] Amnesty International has even suggested that some of the lawyers be investigated for war crimes.[9] The translation of legitimate disputes about law into matters of ethics and criminal law is an attempt to cut off the legitimate debate by which law is made in a democratic and pluralist society. Amnesty International has never provided any showing that the Administration lawyers' arguments were made in bad faith or lacked a basis in law, even if they were rejected by some courts and other scholars.[10]

I. GETTING SOME BIG THINGS RIGHT

Before analyzing the Bush Administration's strategy on the war on terror, it is important to reject some lines of critique made popular by its opponents. First, critics are wrong to suggest that terrorism only requires enhanced law enforcement rather than the use of war powers. Second, critics are also wrong to suggest that the United States is bound by international law even if that law is not incorporated into our domestic law.

The 9/11 attack on the United States was an act of war no less than Japan's attack on Pearl Harbor. Al-Qaeda was a military organization

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8. *See* Kathleen Clark, Ethical *Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L. SEC. L. & POL'Y 455, 463 (2005) ("The substantive inaccuracies of the Bybee Memorandum are so serious that they implicate the legal ethics obligations of its authors.").

9. " . . . Amnesty International calls upon state bar authorities to investigate the Administration lawyers alleged to be involved in the torture scandal for failing to meet professional responsibility standards. The attorneys who wrote various legal opinions that may have provided cover for subsequent crimes and who should be investigated include [former Assistant Attorney General for the Office of Legal Counsel Jay] Bybee and David Addington, General Counsel to Vice President Cheney; Robert Delahunty, former Special Counsel in the Office of Homeland Security, and three attorneys in the Office of Legal Counsel—John Yoo, former Deputy Assistant Attorney General, Patrick Philbin, Deputy Assistant Attorney General, and Jack Goldsmith, former Assistant Attorney General. We also call on the Justice Department's Office of Professional Responsibility to make public the findings of its investigation into the Bybee memo." Amnesty International USA, Statement of Dr. William F. Schulz Executive Director, ANNUAL REPORT (2005), available at http://www.amnestyusa.org/annualreport/statement.html.

10. David McGowan of the University of San Diego has superbly discussed these issues in depth in his recent article, *Decency, Due Care, and Lawyering in the War on Terror*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975124.

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that was attempting to harm and disrupt the United States as a nation-state rather than simply harm individuals. As such, the action against it cannot be understood within a law enforcement paradigm, because that paradigm presupposes that the actors are within the bounds of civil society. Instead, Al-Qaeda and other Islamic terrorists act in a world that predates civil society, because between such strangers there is no common government responsible for law enforcement. Al-Qaeda and its members are not part of our social compact and thus do not enjoy the rights that derive from it. Al-Qaeda's lack of recognition as a nation-state does not make it a part of the social compact. The Bush Administration is as right to make war on Al-Qaeda as Thomas Jefferson was on the Barbary pirates of his day.[11]

Any administration should scrupulously adhere to all constitutional laws that have been enacted through our carefully wrought procedures of bicameralism and presentment. International law can, of course, become binding as well when the President and the Senate agree to ratify a treaty or when Congress decides to incorporate the norms of international law into a statute.

But when the critics of the Bush Administration denounced it for violating international law, they did not confine themselves to complaints about international rules that have become domestic obligations. They complain, for instance, that Bush violated a norm of customary international law in invading Iraq or violated an interpretation of the United Nations Charter proclaimed by other nations or international bodies even if the United States has a different interpretation.[12] They argue that the United States should follow interpretations of treaties of international bodies and committees in its treatment of enemy combatants.[13]

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11. For a discussion of Jefferson's dealings with the Barbary states, *see* GERHARD CASPER, SEPARATING POWER 45–67 (1997).

12. *See* Henry H. Perritt, Jr., *Iraq & the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L & COM. 149, 163 (2004).

13. *See* Peter Jan Honigsberg, *Protecting the Nation at the Expense of Individuals? Defining the Scope of U.S. Executive Power at Home and Abroad in Times of Crisis Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 U.C.L.A. J. INT'L L. & FOREIGN AFF. 1, 24–25 (2007).

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The Administration has no obligation to follow such norms. First, the Supremacy Clause of the United States Constitution makes the supreme law of the land only treaties and statutes, and only the legal interpretations of our domestic courts or other institutions designed by the domestic political branches.[14] But it is more than a formal error for the United States to consider itself bound by international law unratified by the political branches. Such "raw" international law has a large democratic deficit.[15] It does not emerge from any democratic process but is instead shaped by unrepresentative elites in the form of international law professors or international jurists who sometimes hail from authoritarian nations. Democracy has its defects, but elections and open debate give us the assurance that norms that our political branches choose are likely superior than those that emerge from the uncertain process of international law.

Indeed, American law is not only likely better than unratified international law for Americans because of its democratic provenance, but in many areas is also likely to aid foreigners. Because of the position of the United States as the dominant economic and military power in the international system, it has strong incentives to provide international public goods, such as appropriate detention of international terrorists, that benefit foreigners as well as Americans. Thus, the Administration has not only been doing Americans a favor when it does not allow international law to constrain the President's otherwise lawful discretion, it has been doing a service for citizens around the world.

II. DETENTION

The United States faced three issues in adapting the war paradigm to hold prisoners of war captured in the war on terror. First, unlike conventional wars, prisoners taken in the war against Al-Qaeda and other organizations are generally not in uniform and sometimes do

14. U.S. CONST. art. VI, cl. 2.

15. *See* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1193–1224 (2007) (describing in far more detail the huge democratic deficit that besets international law).

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not in fact proclaim their allegiance to their organizations.[16] Their uncertain and often opaque identity creates a greater risk that individuals will be captured in error. Second, the war against Al-Qaeda does not have as clear a stopping point as conventional wars, because conventional wars generally can be ended by capturing the enemy's territory. In particular, because these combatants are part of an irregular army and cannot be forced by their own domestic law to persist in fighting, that length of detention may extend long after their allegiance to the cause has dissipated.

The third difference affecting detention between conventional war and the war on terror is more general. The Bush Administration should have realized that it would face a much more concerted legal effort to release these prisoners than Administrations in previous conventional wars faced. The precedents limiting the Administration relied upon were generally from World War II era.[17] Yet since that time federal courts have constrained government discretion in running schools[18] and prisons[19] and ordered states to raise taxes.[20] In 2000, they decided a Presidential election.[21] It is a short step to bringing more judicial regulation to war, particularly when that war is not conventional and may appear more closely related to law enforcement. Moreover, since that time the world has become smaller: some of the Justices of the Court have been increasingly interested in making sure that the Court takes into account a transnational perspective on constitutional jurisprudence —one that garners respect for United States around the world and respect for themselves in their international networks of peer jurists.[22]

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16. *See* PAUL L. WILLIAMS, AL QAEDA: BROTHERHOOD OF TERROR vii-viii (2002).

17. *See* In re Yamashita, 327 U.S. 1 (1946); Ex Parte Quirin, 317 U.S. 1 (1942).

18. *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738 (2007); Dayton Bd. of Ed. v. Brinkman, 439 U.S. 1357 (1978); Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U.S. 483 (1954).

19. *See* Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).

20. *See* Missouri v. Jenkins 495 U.S. 33 (1990) (holding federal courts could require school districts to levy taxes in excess of limits set by state statute to fund school desegregation plan).

21. *See* Bush v. Gore, 531 U.S. 98, 121 (2000).

22. *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (holding unconstitutional state laws allowing the death penalty for juveniles, relying in part on near unanimity of foreign courts against the death penalty for juveniles). *See also* Frederick Schauer, *Authority and Authorities,* 94 VA. L. REV. 1931 (2008) (essay on the propriety of federal courts citing foreign law); Harris Meyer, *Justice Kennedy*

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In light of these potential problems, the Bush Administration should have immediately acknowledged the differences that unconventional wars made to the legal framework for holding detainees and tempered the anomalies through the generous use of legal process, with military tribunals providing the initial process. Because of the legal climate and the possibility that its war effort would become unpopular and thus more liable to legal attack, it should also have sought, as soon as practicable, Congress' endorsement of these legal structures through framework legislation that would have supplemented the military process with review by Article III courts under a deferential standard.

Unfortunately, however, the Bush Administration took a grudging approach to the granting of process and resorted to unilateral strategies that were easily portrayed as lawyers' tricks. For instance, at first the Administration argued that it had no obligation to give any substantial process to determine whether those caught on the battlefield were in fact enemy combatants, even if they were United States citizens. This was a mistake even as matter of theory, not to mention prudence. The key question determining whether the war or law enforcement paradigm should apply is whether the individual's action should be judged inside or outside our social compact. A citizen is within our social compact and should be treated within the war paradigm only if he has chosen to be an enemy combatant. He certainly deserves substantial process to challenge his status before being treated as outside the pale.

Thus, there was a substantial risk that the Court would hold, as it did in *Hamdi v. Rumsfeld*, that an American citizen had a right to substantial process to challenge his designation as an enemy combatant.[23] Indeed, in *Hamdi* only a single justice, Justice Clarence

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Wades Into International Waters Again, DAILY BUS. REV., May 17, 2005, *available at*: http://www.law.com/jsp/article.jsp?id=1116246912761; Sandra Day O'Connor, *Remarks at the Southern Center for International Studies*, Oct. 28, 2003, http://www.southerncenter.org/OConnor_transcript.pdf (stating that legal conclusions reached by the international community, "although not formally binding upon our decisions, should at times constitute persuasive authority in American courts.").

23. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

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Thomas, would have automatically deferred to executive determination on Hamdi's combatant status.[24]

While the Court directly resolved only the question of a United States citizen's due process rights, the Bush Administration should have extended this right at the outset to noncitizens as well. By showing it was scrupulous in taking care not to have incorrectly detained noncombatants; the Administration could have forestalled criticism and showed that its regime was not lawless, but carefully considered. Even more importantly, the more internal process it gave on such key issues, the less likely the Supreme Court would hold that individuals had full rights to habeas corpus. Some swing Justices, like Stephen Breyer, care about preventing errors and are not much concerned about the rubric under which that error correction occurred. In *Hamdi* itself, the Court indicated that the military tribunals, at least in the first instance, might provide sufficient process for a challenge to enemy combatant status.[25]

For similar reasons, the Administration should have from the outset publicly provided a process for determining when individuals were no longer substantial threats or could provide substantial information. Because members of Al-Qaeda are irregular enemy combatants, not common criminals, the United States cannot be put to the choice of trying these detainees and releasing them to the battlefield to fight again. But their irregular nature makes it less clear that they will fight again: no territorial power can compel them. A process for reviewing their dangerousness and information value might even have given detainees incentives to rethink their commitment to jihad and consider how they could make concrete commitments to show that they would not go back to the fight.

Whatever the Administration did, however, lawyers in the United States were going to file lawsuits on behalf of the prisoners seeking more and better process and rights indistinguishable from Americans accused of crimes. The basic response of the Administration to this prospect was to keep detainees at Guantanamo. Because Guantanamo

24. *Id.* at 579.
25. *Id.* at 538.

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is not part of the United States and yet controlled by it, these legal strategists believed it was the perfect place to hold the prisoners more easily than they could in foreign territory, and yet be immune from the reach of United States courts. To split metaphysical sovereignty from control was extremely clever, but it was clearly vulnerable to attack as a legal fiction. Although the Supreme Court fifty years ago refused jurisdiction over habeas claims in a case that arose in Allied occupied Germany,[26] such precedent cannot be relied on to hold up when translated to a new context in a high profile case like this one. Thus, the Supreme Court's decision in *Rasul v. Bush*, in which it insisted on taking jurisdiction of habeas cases at Guantanamo, should have been seen as a substantial risk.[27]

It is the Bush Administration's legal strategy that in large measure has made Guantanamo a symbol of lawless in the Administration's war on terror. Its creation under these circumstances suggests to the outside world that the United States was playing legal games rather than following principles of law. And because the Administration was making these decisions without legislative input, it could be portrayed as eccentric and malevolent rather than a faithful agent of the American people.

Instead of resorting to a legal slight of hand, the Administration should have gone to Congress to bolster its case. If Congress had from the beginning endorsed the framework for holding detainees outlined above, the Court would have been unlikely to disturb this settlement. The reasons for such deference are both doctrinal and practical. As a doctrinal matter the Court gives substantial deference to Congress's weighing of the costs and benefits of various procedures. In a recent book, Professor Eric Posner and Adrian Vermeule suggest that the Court should give this kind of deference in the cases concerning terrorism to the executive, because the Court's institutional competence in devising responses to terrorism is much less than that of the executive.[28] But the executive may not have the

26. Johnson v. Eisentrager, 339 U.S. 763, 790–91 (1950).
27. 542 U.S. 466, 478 (2004).
28. ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE (2006).

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appropriate incentives to make the tradeoff between liberty and security. It is more likely to discount all liberty interests because of its recognition that the greatest risks to its political standing come from a lapse in security, however improbable the cause, rather than from complaints about liberties foregone.

More importantly from a strategic perspective, whatever degree of deference the Court should give to the executive as matter of normative principle, as a matter of realpolitik the Court is much more reluctant to disturb the judgment of Congress than a decision by the executive. Such action would fly much more clearly in the face of the popular will.

Moreover, such a framework statute would have also permitted the United States to hold these prisoners, as they did German prisoners and other previous captives, in the United States, thus dispensing with the negative symbolism of a place that can easily portrayed as a legal netherworld. It may be argued that the Administration still needed a jurisdiction outside the territorial United States to make prisoners' habeas petitions less likely to succeed. The content of rights protected by habeas, however, have been historically flexible and context dependent.[29] If the courts were satisfied that the prisoners were getting the amount of process that Congress judged reasonable for enemy prisoners, they would be unlikely to require substantive changes.

It might be argued that my view that the Bush administration could have avoided Court defeats by obtaining congressional enactment of their polices into law is undermined by the Supreme Court's decision in *Boumediene v. Bush* in 2008.[30] After judicial defeats, the Bush Administration had finally gone to Congress to get a framework for detention of captured terrorists [31] and a framework for military tribunals to try them.[32] Nevertheless, in *Boumediene* the Court held

29. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2095-96 (2007) ("But absent clear statutory guidance, habeas courts have mostly operated within the Common Law Model, fusing a commitment to the protection of liberty with a flexible spirit attentive to institutional realities and the balance of equities.").

30. 128 S. Ct. 2229 (2008)

31. Detention Treatment Act of 2005, 119 Stat. 2739.

32. Military Commissions Act of 2006, 28 U.S.C.A. 2241.

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the Congress's decision in the Military Commission Act to cut off review of habeas petitions of those detained was unconstitutional.[33] In the course of this holding, it also stated that the legal process, including review by the appellate court, provided by Congress in the Detention Act, did not provide a sufficient substitute for the rights of habeas corpus.[34]

In my view, however, this defeat actually confirms that the Bush Administration made a grave error in failing to have gone to Congress earlier. One does not have to be strong realist to believe that the result would likely have been different if the Bush administration had gotten the same legislation passed in 2001 or early 2002. First, the legal challenge would have arisen when the memory of 9/11 was very fresh. In contrast, by the time the Court decided the case in 2008 the nation had not been attacked for almost seven years and the memory of the threat had receded. Second, an earlier court challenge of a congressional settlement t would have arisen when Bush was a relatively popular President, favored for reelection, or newly reelected. Instead, the challenge to the congressional framework came when President Bush was the lamest of lame ducks.

Third, if the challenge had come earlier at a time when President Bush had eschewed reliance solely on his own executive power and had sought congressional input into and ratification of his policies before judicial defeat, he would have had reputation for greater conciliation and moderation. Instead, by the time *Boumediene* was heard, he had lost the respect of legal elites, because of extravagant legal claims such as those embodied in the so-called torture memo and the resulting adverse publicity. After such events the Supreme Court was less likely to trust the administration with discretion vouchsafed by the congressional enactments it belatedly obtained. Finally, by 2008 the Court had been emboldened by the praise it had received for previous decisions rejecting unilateral Bush administration policies. Had the Court faced the same issues in 2003 or even 2005, it would have been less certain of the reception of a

33. *Id.* at 2240
34. *Id.*

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decision adverse to an administration backed by Congress and thus would have faced a very different calculus in deciding whether to uphold the congressional settlement.

The ready availability of a congressional solution raises the question of why it was not sought. One rational explanation is that the Administration thought that using Congress would detract from its project of using the crisis to bolster executive authority. In particular, Vice President Cheney, who had seen the decline of executive authority occasioned by Watergate and Vietnam, spoke out frequently of the need to restore executive power.[35] This strategy, however, was imprudent. First, it was not likely to succeed. The Supreme Court had only two consistent supporters of executive power—Justices Scalia and Thomas.[36] Even Chief Justice Rehnquist, who had worked in the Office of Legal Counsel—an office dedicated to preserving that power, had ruled against the executive in such important cases as the Independent Counsel Act,[37] and had celebrated the Court's curbing of executive overreaching in *Youngstown Sheet & Tube Co. v. Sawyer.* [38]

But second, it is a mistake to risk substantial harm to an important policy to build up precedents for an undefined future eventuality. The interpretation of executive power has waxed and waned over the course of American history, dependent largely on Justices' reaction to the felt necessities of the time and the constellation of political power in Congress and in the nation. Even had the Bush Administration won a victory for the executive branch in the context of detention, it would be distinguished away, if future justices believe that circumstances warrant.

35. Peter Baker & Jim VandeHei, *Clash is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1.

36. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

37. Morrison v. Olson, 487 U.S. 654 (1988).

38. WILLIAM REHNQUIST, THE SUPREME COURT, HOW IT IS, HOW IT WAS 94 (1987).

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III. INTERROGATION METHODS

Once again the Administration had serious issues to address in determining the interrogation methods to be used on those detained. On the one hand, any administration should have wanted to be able to use interrogations methods that would elicit information to stop attacks on the order of 9/11. On the other hand, any administration should have been eager to show that the United States acted humanely with respect to even egregious wrongdoers and in particular followed the strictures of the Torture Convention. Restraint and adherence to our own laws underscores the attractiveness of our civilization in the global battle of ideas against radical Islam. This American tradition goes back to the Revolutionary War when George Washington insisted that the American army take prisoners even after Hessians slaughtered his soldiers without quarter at Fort Washington.

That balance might have been best struck again by going to Congress and seeking framework legislation. Congress should, and would, have authorized the Administration to use harsh interrogation methods short of torture in the circumstances where such methods were necessary to get information to forestall attacks. A system requiring personal and recorded authorization by a Cabinet official in specific cases would provide substantial safeguards that these methods would be used only selectively and where necessary. To be sure, this authorization would have been a messy process and would have publicized the Administration's methods, when secrecy could itself have value by making it harder for the enemy to prepare for questioning. But nothing on a matter as controversial as this is kept secret long in Washington and when Congress set limits to the Administration's interrogation process as it did in 2006 it was also a messy process. The deliberation and consensus that Congress could have provided earlier on would have educated the world to the reasons that such interrogations were needed in the interest of the safety not only of the United States but of other nations that were threatened by the mass slaughter of modern terrorism.

But whether or not the Administration chose to go to Congress to reinforce the legality of its interrogations methods, it could hardly

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have chosen a worse strategy than it pursued. In a memo written to Alberto Gonzales on August 1, 2002, the Office of Legal Counsel provided a general interpretation of the the Torture Convention by limiting the concept of torture to the infliction of physical pain "equivalent in intensity to the pain accompanying serious physical injury such as organ failure or impairment of bodily function."[39] According to the memo, the only psychological harm that amounted to torture would be that leading to psychological harm "leading to significant duration, e.g. lasting months or even years."[40] Finally, the memo concludes that the President has the constitutional authority to set even those strictures aside if they impaired his ability to order interrogations pursuant to his authority as commander in chief.[41]

It is not my purpose here to dispute these conclusions as a legal matter, but to show that whatever their correctness, the memo was utterly counterproductive and should have been seen as such at the time. Indeed, my strongest reaction as a former official at the Office of Legal Counsel was not that of other observers who attacked the legal analysis or even the morality of the memorandum. Instead, I saw it as a bureaucratic blunder committed not so much by the attorneys at OLC but by the White House Counsel and others in the Administration who asked for this kind of analysis.

First, to anyone who has worked in the collaborative process of the executive branch, it was clear that this memo would be leaked, and leaked at the most inconvenient time to the Administration. One rule I had at the Office of Legal Counsel was to consider how the phrasing and framing of a memo I wrote would look on the first page of the *Washington Post*. It would not take much imagination to see that the abstract analysis and sweeping language in its statutory analysis would allow opponents of the Administration to paint the analysis as radical and unbounded. When its statutory analysis was combined with the claim that the President has authority to disregard the limitations of the Torture Convention whenever he thought this

39. *See* Memorandum for Alberto Gonzales from Jay Bybee, Acting Assistant Attorney General, Re: Standards for Interrogation under 18 U.S. C. §§ 2340–2340A. (August 1, 2002).

40. *Id.*

41. *Id.*

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was necessary as a commander in chief, it was easy to predict a political firestorm that undermines support for harsh interrogation tactics and more generally harmed the Administration's legal credibility.

Assuming that the Administration chose not to obtain a framework authorization statute for Congress, a far better way to achieve the Administration's objectives would have been to catalogue the kind of interrogation methods that the Administration actually wanted to use and explain in some detail why those methods would not amount to torture. This memo would have been a far more limited and less controversial opinion, although some would still have disagreed with its analysis. It could also have omitted the unnecessary claim that the President could in some circumstances disregard the convention.[42] This sweeping claim seems to have been motivated by an interest in restoring general executive branch authority. But it is fanciful to believe that unilateral declarations by the Office of Legal Counsel, known as the foremost defender of executive power, can accomplish this goal. And by putting that expansion of executive power in the context of harsh treatment of detainees, the memo set back the cause which it was trying to promote.

IV. WAR CRIMES TRIALS

The Administration again had legitimate objectives in establishing military tribunals to prosecute some of the detainees for war crimes. It wanted to bring those who violated the laws of war to justice and deter subsequent violations. But it did not want to use the Article III court system and all its protection. To do so would have exposed national security information in some cases. But more fundamentally, our trial system would have taken a very long time and provided a panoply of rights that are important to protect individual liberties

42. In fact, a subsequent memo from the Office of Legal Counsel revoking the 2002 memo expressly stated that it was unnecessary to reach the issue of the President's constitutional authority. *See* Memorandum for the Deputy Attorney General From Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004).

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within civil society, but should not be extended to irregular combatants whose activities lie outside the social compact. Swift military justice is part of the necessary shock and awe against war criminals.

But the Administration has succeeded in conducting only a very few war crimes trials. One reason for the delays was that the Administration's first set of rules for conducting the trials faced such vigorous criticism that they were sent for revisions.[43] And even after revision many military lawyers within the Administration objected to some of the provisions, creating a kind of bureaucratic inertia that delayed indictments. But the most important reason for delay were the war criminal defendants' successes in the lengthy constitutional litigation over the procedures. In *Hamdan v. Rumsfeld* the Court held that some of the Administration's procedures violated the Uniform Military Code of Justice as well as Article III of the Geneva Convention which, according to the Court, Congress had made applicable to military tribunals.[44]

This signal defeat was quite possibly related to previous mistakes in legal strategy. Strikingly, the Court gave no deference to the Administration's interpretation of either the Uniform Military Code of Justice or Article III of the Geneva Convention, despite precedent for deferring to the executive's interpretation of treaties and statutes governing the military.[45] Whatever the doctrinal categories of deference, the general credibility of executive branch positions will hugely influence the actual degree of deference the Court applies. This had been damaged by previous Administration legal analysis, like that contained in the memo on interrogations, that the Administration itself had since repudiated.

In *Hamdan* itself, Justice Breyer noted that "[n]othing prevents the President from returning to Congress to seek the authorization he believes necessary."[46] Of course, the President would not have had to return to Congress and would not have faced substantial bureaucratic

43. Neil A. Lewis, *U.S. Alters Rules for War Crime Trials*, N.Y. TIMES, Sept. 1, 2005, at A1.
44. Hamdan v. Rumsfeld, 548 U.S. 557, 624–26 (2006).
45. *See* Ex Parte Quirin, 317 U.S. 1 (1942).
46. *Hamdan*, 548 U.S. at 636.

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foot dragging had he sought congressional authorization for the military tribunals in the first place. He almost certainly would have gotten the procedures he desired, because even after the Supreme Court defeat in *Hamdan*, he got most of the procedures he had sought with some exceptions, including restrictions on the use of hearsay and classified information.[47] But the President was in a stronger political position in 2003 and probably even in 2001 than at the end of 2006.

V. SURVEILLANCE

The Bush Administration also had a choice about whether to obtain express authorization to undertake surveillance of individuals in the United States who were in contact with those in or near the battlefields of terrorism. It decided to rely instead on the President's authority as commander in chief and the general authority of the statute that authorized the Administration to undertake military actions against the terrorist organizations.

It was a mistake not to obtain express congressional authorization for surveillance when it could have been easily been obtained. Indeed, it may have run more substantial risks to rely on executive authority in this regard than in the area of detentions and interrogations for two reasons. First, Congress had already passed framework legislation in the Foreign Intelligence Surveillance Act ("FISA") that regulated the authority of the executive to wiretap individuals residing in the United States.[48] That legislation by its terms appears inconsistent with the authority exercised by the Administration because it requires warrants which the Administration has not sought. It appears to contemplate its applicability in time of war, because it provided additional time to obtain such warrants in wartime. Second, because this surveillance was being undertaken of residents in the United States there was an even greater risk that

47. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

48. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

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courts would not extend precedent to protect executive discretion in this new kind of war.

The Bush Administration did finally seek congressional authorization and on July 10, 2008, Congress amended FISA.[49] But by waiting the Bush Administration in this area as in others harmed its reputation for fidelity to law and thus made the judiciary less likely to trust it with discretion or rule in its favor in close cases.

CONCLUSION

The Bush Administration's legal strategy in the war on terror was deeply flawed. Because of its interest in establishing powerful precedent in favor of executive powers, it took bold positions that carried substantial risks of judicial repudiation and failed to obtain legislative endorsement at times of political opportunity. As a result, the Supreme Court said on two occasions the President was acting illegally, confirming an impression the President was a rogue operator outside established law and popular opinion. The lesson for future administrations seems clear. First, recognize that we live in a time of much more activist courts even in the era of foreign affairs. That fact may be bemoaned but it cannot be ignored and the reality of their possible interventions must be factored into strategy from the outset. Second, rely more on Congress than on courts, particularly when the President enjoys support in the initial stages of the conflict or his party controls Congress.

It is the executive's power to persuade from a position of strength rather than formal legal powers that is the President's greatest asset. But it is generally a wasting asset and thus the President should translate it into more lasting legislative tools before its dissipation. The President may have lost the war in Iraq because he did not call in enough troops after the fall of Baghdad. He had substantial losses his legal wars because he did not call on citizens through their representatives to rally around a new, but carefully circumscribed,

49. *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

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system of wartime detention and surveillance in a struggle whose battlefields and duration have no clear limits.

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