

CHAPTER ONE

A GOVERNMENT OF LAWS OR MEN?

“Power tends to corrupt, and absolute power corrupts absolutely.”

—Lord Acton

From 2002 to 2005 the Bush administration argued that it could imprison an American citizen (Jose Padilla) indefinitely, deny him access to a lawyer or his relatives, deny him the constitutional right to appeal for a writ of habeas corpus, and subject him to solitary confinement and extreme sensory deprivation. This claim was based on the president’s authority alone.

From 2002 to 2004 hundreds of detainees in the war on terror were imprisoned at Guantánamo and Abu Ghraib; some were subjected to inhumane treatment, and some were even tortured. During the war on terror, more than forty persons detained by the United States died at the hands of U.S. personnel. Many of the incidents of torture and abuse grew out of President Bush’s claim that he could suspend the Geneva Conventions and authorize the use of harsh interrogation techniques on those suspected of terrorism. The suspension of the Geneva Conventions was based on the president’s authority alone.

From 2001 through 2006 President Bush ordered the National Security Agency (NSA), without the warrant required by law, to conduct surveillance on American citizens thought to be communicating with foreign suspects of terrorism. This order was based on the president’s authority alone.

During his first six years in office, President Bush issued signing statements that challenged the constitutionality of more than 1,000 provisions of laws enacted by Congress. The signing statements intimated that the president had authority not to execute those challenged provisions of laws. These assertions were based on the president's authority alone.

The purpose of this book is to examine these actions by President Bush and to argue that his claims were extraordinary. He claimed powers once asserted by kings—but the Constitution deliberately divides those powers and ordains that they be shared among the three branches of government. The constraints that the framers placed on the executive branch were not arbitrary or whimsical decisions on their part; they were based on carefully considered judgments about human nature and political power. In designing an elaborate system of shared powers, the purpose of the framers was to create a government that had enough power to govern, but that power was limited in its scope, especially with regard to individual rights and liberties. The framers were particularly concerned to ensure that the government did not degenerate into a tyranny, and they carefully constrained executive power to prevent tyranny from occurring. President Bush fundamentally challenged the separation of powers framework established in the Constitution. This book is an attempt to analyze how this happened and explain why it is a threat to republican government.

The concern here will not be with the wisdom of President Bush's policies but rather with the constitutional issues they raise. Congress provided President Bush with the authority to conduct a "war on terror." Regardless of whether members of Congress were misled by his assertions about WMD, most of them did not examine the evidence themselves and took the president's words at face value. The war in Iraq may have been unwise, but it was constitutionally legitimate. This book instead will focus on President Bush's actions that raise serious constitutional issues; the argument will be that he has exceeded his constitutional authority as president by asserting unilateral authority over decisions that the Constitution requires to be shared with Congress and the judiciary.

In his actions as president, George W. Bush challenged the basis of the separation of powers system. He and Vice President Richard Cheney chafed under the constraints placed on the presidency by the Constitution.

They felt that the congressional reaction to the “imperial presidency” of Presidents Johnson and Nixon went too far in tilting the balance of policy-making power toward Congress. They particularly saw the presidency as being illegitimately constrained by laws that did not allow the president free enough rein to deal with the challenges of the post-9/11 world. The atrocities of 9/11 gave them the opportunity to shape the separation of powers system to fit their own vision of the rightful balance among the three branches—with the president clearly in charge, particularly in national security matters. The Bush administration worked consciously and systematically to make the executive more independent of the other two branches by asserting presidential prerogatives and by shielding its actions from scrutiny by the public or the other two branches.

As the framers of the Constitution expected, the other two branches resisted being marginalized—but not too much or too effectively. President Bush was able to get through Congress a number of laws that provided congressional sanction for the actions that he claimed were his own constitutional prerogatives—the Authorization to Use Military Force, the PATRIOT Act, the Military Commissions Act, and revisions of the Foreign Intelligence Surveillance Act. The American public had been traumatized by 9/11 and was willing to give broad discretion to a president who promised to protect them. The fear of another attack like 9/11 was probably the primary factor in President Bush’s electoral victory in 2004. A brief look at television campaign ads will confirm the appeal to fear that was central to the campaign.

The broad fear in the American public about national security was reflected in congressional campaigns and in voting patterns in Congress. Republicans, with a narrow majority, felt that it was their duty to support President Bush by passing most of the legislation he sought. Most Democrats felt that they needed to support President Bush’s claims to executive power in national security issues, either because they believed that his initiatives were necessary for national security or because they feared the political consequences of resisting him. Even though President Bush’s overall legislative record was mixed, he was highly successful in legislation touching on national security issues. The Republican Congresses from 2001 through 2006 did not undertake any major investigations of the executive branch.

The war against al Qaeda in Afghanistan was seamlessly extended into a war to depose Saddam Hussein in Iraq, and President Bush convinced many Americans that Iraq was the central front in the global war on terrorism. Even when the Democrats took control of Congress in 2007, they were not able to impede President Bush's policies in Iraq. The Bush administration was able to resist the legislature's efforts to investigate its policy leadership with claims of executive privilege, and the courts were stymied by the "state secrets" privilege.

This book will argue that President Bush has undermined the constitutional balance among the branches in four policy areas:

—by denying the writ of habeas corpus to people deemed to be "enemy combatants";

—by suspending the Geneva Conventions and allowing and encouraging harsh interrogation methods that amounted to torture;

—by ordering surveillance of Americans without obtaining a warrant as required by law; and

—by issuing signing statements that declare that the president has the option not to enforce parts of laws that he believes interfere with his executive authority.

These actions threaten fundamental rights and the rule of law in the United States and call into question the meaning of the Constitution and its limits on executive power. The Constitution constrained executive power for very good reasons, and the Bush administration has ignored those constraints in extraordinary ways. This book will argue that President Bush's actions, if allowed to stand as precedents, will encourage future presidents to ignore the other two branches in important ways and that this aggrandizement of executive power threatens fundamental freedoms and dangerously concedes to the president powers that the framers did not intend the executive to have.

These rights and liberties have ancient roots in Anglo-American jurisprudence and history and should not be abandoned lightly. The framers embedded constraints on executive power in the Constitution because they understood that executives are ambitious and tend to aggrandize power. Abandoning the constitutional constraints on executive power has led to abuses of power in the Bush administration, and if allowed to stand, threatens to distort the Constitution in ways that will lead to unfettered power at the disposal of future presidents. As the

framers foresaw, there is no guarantee that only good individuals will be elected president.

President Bush has argued that the United States faces a new kind of war since the attacks of 9/11, against an enemy that is not a nation-state but that is loosely organized in cells that have allegiance to al Qaeda. These cells, Bush has warned, are determined to use terrorism to attack the United States. The Bush administration argued that we are engaged in a new type of warfare that requires us to embrace the “dark side” in our battle, and enhanced presidential power is the only way to deal effectively with these new threats. The executive must have the flexibility to detain enemy fighters without interference by courts, use harsh interrogation methods to interrogate suspected terrorists, engage in electronic surveillance at its discretion, and ignore congressional constraints on its actions.

President Bush was right that al Qaeda presents a serious threat to the national security of the United States and that novel means must be used to counter that threat. He was also correct that the president has the duty to protect the security of Americans. Certainly the president has the authority to capture suspected terrorists and imprison them. Certainly the president has the authority to interrogate the suspected terrorists. Certainly the president has the authority to conduct surveillance on foreign suspects and, with warrants, surveil people in the United States who are suspected of terrorism. And certainly the president has the right to make reasonable judgments about the extent of executive authority within the Constitution. But the extent of his claims to presidential power exceeds the bounds of the Constitution. Congress as well as the president has the duty to “provide for the common defense.”

In addition, in the months immediately after 9/11, the Bush administration had legitimate fears that there might be another attack, and the president felt he had to do everything he could do to protect the nation. Thus extra-constitutional actions at that time were understandable. But after several years, the need to continue to ignore the law regarding wiretaps disappeared (there was time to obtain warrants or amend the law). Holding detainees indefinitely without charge became less tenable, especially since there was no hope for any quick end to the war on terror. As the years passed, the need to use torture in order to discover a “ticking time bomb” was attenuated, particularly in Iraq, which had no connection to the 9/11 atrocities.

The problem, however, was that President Bush pushed these reasonable rights and duties of the executive beyond the bounds that the Constitution established. He imprisoned hundreds of suspected terrorists indefinitely without charging them and denied them the opportunity to argue their innocence before an independent judge. He allowed, and arguably encouraged, interrogating them with harsh techniques that many consider to be torture. He claimed the unilateral authority to conduct surveillance secretly on Americans without obtaining warrants required by law. And he asserted that he was not bound by provisions of laws that he himself deemed to impinge on his executive authority. In contrast, the argument of this book is that the Constitution placed constraints on executive authority for important reasons, and that although the framers understood that the executive would act quickly in emergencies, such as “sudden attacks,” they did not intend that the Constitution be suspended during wartime. After tracing the heritage of Anglo-American individual rights and the hard-won rights of the legislature to constrain arbitrary executive actions, this book will examine each of these claims to extraordinary power by President Bush.

In order to understand the importance of the constitutional constraints on executive power, it is necessary to examine the origins and development of individual rights and shared constitutional power. Thus the second chapter of this book will provide a brief overview of how executive power can be legitimized and constrained. Ideas in political philosophy provide the justification for the legitimate exercise of governmental power and the reasoning behind constraining its exercise. Understanding the development of the major ideas about executive power in Anglo-American political thinking will illuminate why the framers wrote the Constitution the way they did and how President Bush’s actions depart from constitutional limits.

Chapter 2 will examine some of the key ideas about political power that influenced the framers of the Constitution. Niccolò Machiavelli, Thomas Hobbes, John Locke, and Baron de Montesquieu were familiar to the framers, and their ideas provide key insights into how royal power came to be limited in England and how the framers used those ideas in writing the Constitution. Machiavelli and Hobbes justified granting absolute power to princes and kings—to executives. Locke fundamentally changed the direction of western thought by arguing that governments

are legitimately based on the consent of the governed and that executives were bound by laws passed by legislatures. Montesquieu insightfully emphasized that freedom was only possible if governmental powers were separated and not united in one institution or person.

The third chapter will trace the English origins of individual rights back to Magna Carta, which declared the principle that the king was bound by law and could not imprison people without due process of law. It took centuries of struggle before that principle was guaranteed in practice. It also took centuries and a bloody civil war before Parliament gained enough power to pass laws that bound the king of England. Chapter 3 will examine the rise of Parliament from a council advisory to an absolute monarch to a legislature that could constrain royal power, to a legislature that could exert sovereign power. The right of the legislature to bind the executive was fundamentally challenged by President Bush in the twenty-first century.

Chapter 4 will explain how the framers of the U.S. Constitution adapted the ideas, traditions, and constitutional premises from England and made them distinctly American. The framers wrote many of the individual rights of Englishmen into the U.S. Constitution, but they rejected the British governmental structure and created a separation of powers system. In designing the balance among the three branches, the framers carefully limited executive power so that the United States would not suffer from executive domination as England had for centuries. In particular, the framers decided that the powers of war be shared between the legislature and the executive and that the presidential powers during wartime are constrained by the Constitution. President Bush upset this balance with his assertions of unilateral authority.

With this background about the origins and development of individual rights, legislative powers, and constraints on the executive, the book will shift to an examination of how George W. Bush challenged these principles of constitutionalism and the rule of law. One of the premises of the framers was that those in governmental office will seek to aggrandize their own power. They realized that times of war presented particular challenges to the rule of law and to limits on executive actions. During crises the people are often willing to sacrifice ancient freedoms in the hope of more security. Although trade-offs between security and freedom often have to be made during times of war, the Constitution provides that the

balancing must be done with the participation of all three branches, not by the president alone.

Chapter 5 will review the ancient right of English citizens who were imprisoned by the executive to have that action reviewed by an independent judge to assure that the imprisonment was legal and based on reasonable evidence. It will examine the legal battles over the right to writs of habeas corpus by detainees held by the administration, particularly in Guantánamo. If this fundamental right is denied to those accused of terrorism, legal precedent will be established that will allow the executive to imprison those accused of other crimes and deny them the judicial protections that have been enjoyed by people in England and the United States for centuries. The chapter will illuminate the practical importance of this right by examining several cases of “the wrong man” problem—people imprisoned by the Bush administration who turned out to be demonstrably innocent of the crimes of which they were accused.

Chapter 6 will examine the Bush administration’s assertion of the authority to subject suspects of terrorism to harsh interrogation techniques that most of the world considers torture. President Bush argued that the attacks of 9/11 brought to the United States a new kind of war in which the enemy, by attacking civilians, did not respect the traditional canons of warfare. The administration argued that since the terrorists did not abide by the traditional rules of warfare, the United States had the right to abandon the constraints of the Geneva Conventions, which, they argued, were relevant only to traditional conflicts between signatories of the Conventions.

This initial decision to abandon the Geneva constraints cascaded into a series of memoranda and policy directives that led to the torture and inhumane treatment of captives by U.S. personnel. With evidence of harsh treatment and torture mounting, the administration defended itself by arguing that these methods of interrogation were necessary to prevent future attacks and by declaring that the aggressive techniques did not amount to actual torture. Chapter 6 will examine the legal arguments the Bush administration used to justify its interrogation techniques and argue that torture is very difficult to control once the strictures of hard-and-fast rules against it have been eroded.

President Bush also argued that, because the nation was under attack, he had the constitutional right, as president, to ignore the law forbidding

wiretapping without a warrant. The framers thought the danger of government intrusion into the privacy and personal effects of individuals was so important that they prohibited it in the Fourth Amendment to the Constitution, which provides that (with certain exceptions) the executive must obtain a warrant from a judge before it can search the home, papers, or communications of a suspect. The Foreign Intelligence Surveillance Act (FISA) of 1978 required that the president get a warrant from a special court before wiretapping in the United States for national security reasons.

Despite the Fourth Amendment and the FISA law, President Bush ordered the National Security Agency to listen in secretly on the conversations of persons in the United States whom it thought were communicating with possible terrorists abroad. Although the trade-off between privacy and security represented by his decision may have been reasonable, the threat to the constitutional balance came from President Bush's assertion that, as president, he had the authority to make the decision secretly by himself, despite the law requiring warrants. That the administration could have easily accomplished its goals within the law or asked Congress to amend the law, underscores President Bush's claim to extraordinary power under the Constitution to ignore the law and the other two branches. He felt that, as president, he had the authority to act on his own rather than asking Congress to change the law. Chapter 7 will conclude that this assertion of unilateral authority by President Bush presents a fundamental challenge to the rule of law.

The rule of law itself was directly challenged by President Bush's use of signing statements, which are analyzed in chapter 8. When a bill is signed into law, a president may issue a signing statement in which he comments on the significance or meaning of the statute. In many cases this practice presents no problem, but when a signing statement is used to declare that the president might not enforce parts of the law that he claims interfere with his own constitutional prerogatives as president, the rule of law is undermined.

Other presidents have issued signing statements, some that challenged the constitutionality of a law, but President Bush used them to an unprecedented extent to indicate that he might decide not to execute faithfully the law when he claimed that it conflicted with his own authority under the Constitution. While all previous presidents combined

issued fewer than 600 challenges to laws in signing statements, President Bush issued more than 1,000 in his first six years in office. Chapter 8 argues that this assertion of executive prerogative threatens the very foundation of the rule of law and the balance of power among the three branches of government.

The other two branches have not been entirely passive during President Bush's aggrandizement of presidential power, but they have not been very effective in countering his actions. The Supreme Court, in particular, has thrown a few roadblocks in his way, but they may turn out to be merely speed bumps, if Congress and the Supreme Court do not follow up. The Supreme Court invalidated the military commissions President Bush established through executive discretion alone and not through law. Court decisions have also declared that the judiciary is entitled to play a role in the determination of fundamental rights, such as habeas corpus, under the Constitution. They have challenged President Bush's right to incarcerate detainees indefinitely without allowing them a writ of habeas corpus or charging them with a crime.

Congress, in contrast, has acted primarily as a facilitator for President Bush's aggrandizements. One important exception was passage of Senator John McCain's proposed Detainee Treatment Act (DTA), which outlawed torture by U.S. personnel anywhere in the world. But this apparent victory against President Bush's policy on interrogation was diluted by restrictions placed on habeas corpus petitions from Guantánamo inmates. Congress further ratified some of President Bush's questionable policy decisions by passing the Military Commissions Act (MCA). This law further undercut the habeas corpus privileges for imprisoned terrorist suspects, and it also allowed President Bush to define what interrogation techniques would be allowed under Common Article 3 of the Geneva Conventions. President Bush's executive order implementing the provision interpreted Common Article 3 so as to give the CIA permission to employ a range of harsh interrogation techniques that, though classified, would be considered torture by much of the world.

President Bush was also able to win a victory in 2007 when Congress passed a revision of the FISA law that governed the use of wiretapping without a warrant of people in the United States. The new legislative authority allowed President Bush to engage in many of the practices that he previously undertook against the law under his own claimed

constitutional authority. The legislative sanction provided by these laws (DTA of 2005, MCA of 2006, and FISA amendments of 2007), though making President Bush's prior policies legal, did not eliminate the threat to the Constitution from unrestrained executive power. The fundamental Constitutional issue arose not as much from the actual policies that he undertook as from his claim that he had the constitutional authority to decide public policy himself and exclude participation or oversight by the other two branches.

The denial of habeas corpus deprived terrorist suspects of the opportunity to demonstrate that they were not guilty of crimes or that they had been seized mistakenly. But the broader threat came from President Bush's assertion that he could designate people to be enemy combatants and deny them the right to appeal to a court for a writ of habeas corpus. Congress can suspend habeas corpus during a rebellion or invasion, but President Bush claimed the constitutional authority to deny it to suspects unilaterally, at his own discretion.

The torture of detainees at the hands of U.S. personnel certainly deprived the victims of their human rights, but the broader, constitutional threat came from President Bush's assertion that he could set aside the Geneva Convention Treaty, ignore U.S. law, and subject people he declared to be enemy combatants to harsh interrogation techniques considered by many to be torture.

The threat to the civil liberties of those in the United States whose constitutional rights were violated by NSA wiretaps was probably minor. But the assertion by President Bush that he had the constitutional authority to ignore the law and secretly order the wiretaps threatened the constitutional balance and the rule of law.

Most of the signing statements issued by President Bush probably did not lead directly to his refusal to execute the laws. But his use of them asserted, in principle, that he could ignore any provision of law he deemed to impinge on his own constitutional authority. The long-term implications of signing statements constituted a claim that presidents cannot be bound by the law and can refuse to execute any law that limits executive power under their own interpretation of Article II.

Only a formal rejection of these claims by a coordinate branch of government will refute the extraordinary claims President Bush made. Such a rejection might come if the Supreme Court ruled that the limitations on

habeas corpus by President Bush and Congress violate the Constitution. Or Congress might pass laws forbidding interrogation techniques that the Bush administration claimed were not torture, for instance by requiring the CIA to conduct its interrogations according to the Army field manual on interrogations. In 2008 Congress did pass such a law, and President Bush vetoed it. Or Congress might pass the FISA requirements again and insist that the president obtain the required warrants before wiretapping persons in the United States. Signing statements may be litigated, but a broad judicial or legislative remedy to the problem is difficult to envision.

One might conclude that the threat to the Constitution is no longer a problem and the cases have become moot, since Congress has effectively legalized in statute some of what President Bush had been doing. But this line of reasoning misses the constitutional point. The real problem was President Bush's assertion that, as president, he had the constitutional authority to do what he had been doing already. He did not relinquish or renounce his claims to constitutional authority in pushing for congressional approval of his actions; he merely bowed to the political necessity of seeking congressional approval. He went to Congress out of prudence, not principle. The precedents of his constitutional claims, unless effectively challenged, will remain "loaded weapons" that future presidents can use to justify their own unilateral assertions of executive power. The conclusion of the book will take up the issues of the rule of law and constitutionalism and argue that they have both been imperiled by President Bush's actions.