Law vs. Presidential Power in the Bush Administration's Antiterrorism Policies: One at the Expense of the Other

Nancy Kassop
Professor and Chair
Department of Political Science and International Relations
State University of New York at New Paltz
New Paltz, New York

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Thank you, Professor Cox, for that introduction. It is an honor to be invited to give the Clifford Barclay Memorial Lecture at the LSE this year. I knew Clifford Barclay, and I am sure he would be quite pleased to know that a robust exchange of views is being conducted in his name.

I am delighted to be with you tonight to talk about the presidency (thank goodness, it's not about the vice-presidency!).

It is either a consequence of great planning or someone's idea of wicked irony that our discussion tonight of presidential power happens to fall on the day that the US celebrates as "President's Day." That celebration began historically as two separate holidays: one devoted to Lincoln's birthday on February 12, and the other to George Washington's birthday on February 22, but somewhere along the way, the two merged into one, and the references to Lincoln and Washington were abandoned.

Well, on this President's Day, I would say that much more than recognition of Lincoln and Washington has been cast aside, when it comes to assessing the current state of the American presidency. Rather, what has been jettisoned is the carefully calibrated structure of government that James Madison designed in 1787. Government power, according to Madison in *Federalist #51*, was to be limited and checked through a system of overlapping and shared authority. Each branch would monitor and watch over the other two to insure that no branch overstepped its bounds. Power existed in a finite equation: the more claimed by one branch, the less there was for the other two. That risk of losing power to a co-equal branch was reason enough for each one to jealously guard its own authority while keeping the

other two honest and accountable.

If Madison were alive today, he would be astonished and dismayed at the size, structure and powers of the modern presidency. But he would mostly fault Congress and the courts for their lack of institutional responsibility and vigilance in performing their checking and balancing role, and, thus, for allowing presidential power to expand precipitously.

So, this is really a tale of three branches: a grab for power by the executive, and dereliction of duty by Congress and the courts. More bluntly, this is a story of executive aggrandizement, legislative acquiescence and judicial abdication.

The title of tonight's talk, "Law vs. Presidential Power in the Bush Administration's Antiterrorism Policies: One at the Expense of the Other," was chosen months ago, as a catch-all that I assumed would probably describe any number of actions by the Bush administration. I had no idea at that point that a controversy would erupt a couple of months later over the use of the National Security Agency for warrantless domestic surveillance in the US. I just figured that there were more than enough examples already to illustrate how the Bush administration had used **power** to obliterate and steamroll over **law.**

The title was a very deliberate and intentional one, because it expressed succinctly what I saw as the governing strategy of the Bush administration. The domestic surveillance controversy, then, represents only the latest example, although perhaps, the most damaging one, of an approach that treats the **law** as inconvenient when **power** is on your side.

So, what I would like to do tonight is to address this issue of **law vs. power** with you, and give you my impressions of how this simple dichotomy is a consequential shorthand for the Bush administration's strategy for fighting terrorism.

And, in fact, it's a pretty simple strategy. It can be summed up in what could be a sub-sub-title of this talk:

<u>Governing Without Congress or the Courts – or – the Hypnotic Effect of the Words "Commander-in-Chief"</u>

On a variety of fronts, the administration's position is that the president has exclusive and absolute power in times of war, and that neither Congress nor the courts can interfere with or restrict that power.

It did not have to be this way – and it has never been so in the past.

One note that I should insert here:

And that is – that it might be easy to dismiss what I'm going to say tonight as a red-meat anti-Bush speech. But, in fact, the motivation behind my remarks is a lot more serious and substantive than that.

I study the presidency, and within that field, I study presidential power, and within *that* field, I study the constitutional aspects of presidential power. My fellow colleagues and I have watched the Bush presidency for five years now, and I would venture to say that there is universal acknowledgement among us that this administration's interpretation of the scope of presidential powers is the most extreme position on executive authority that has ever been articulated – and it has never been accepted by the courts as legitimate or constitutional.

What I propose to do is the following:

1) provide some examples of how the president has ignored or bypassed Congress (except when Congress gives him what he wants);
2) provide some examples of how the president has written off the courts as having any role to play here – although, increasingly, the courts are rejecting that position, and are starting to reclaim a role for themselves – and when they DO act, they are NOT giving the president what he wants;
3) show you why this marginalizing of Congress and the courts has been a mission of this administration from the start; and
4) identify a few key architects of this administration's position or mission – in other words, link people to policies.

Consequently, what I hope to demonstrate is that there is a seamless meshing in this administration of **political mission**, **constitutional interpretation** and **operative behavior.**

In short, they are succeeding in implementing the vision they had from the start, and it is a vision that does substantial damage to the office of the presidency and the principle of institutional balance, which we in the US have always assumed would protect us from tyranny.

Let's start with some examples of bypassing Congress:

1) Bypassing Congress

The examples here are ones that come easily to mind:

- indefinite detention of uncharged foreign national enemy combatants at Guantanamo Bay
- presidential creation of military tribunals for those enemy combatants that he so designates to be tried under procedures he determines
- executive branch definition of which interrogation techniques constitute "torture"
- presidential decision to decline to use the Foreign Intelligence Surveillance Act (FISA) as a method for authorizing warrantless wiretapping for communications of or with suspected Al Qaeda members

Let's consider some of the patterns that have emerged here:

1) the first two examples - indefinite detention and military tribunals - grow out of an executive order issued by President Bush on November 13, 2001, entitled "The Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism."

That executive order laid out the president's policies he intended to use in pursuing and treating terrorist suspects who were not US citizens. Although it did not specify the use of Guantanamo Bay as a holding place for terrorist suspects, the decision to use Guantanamo was, itself, indicative of the administration's strategy to find a location for wide-scale and long-term detention that would be beyond U.S. legal jurisdiction.

In fact, this tactic backfired, as the Supreme Court determined in a June 2004 decision, *Rasul v. Bush*, that detainees housed at Guantanamo were, in fact, entitled to bring cases in federal district courts to challenge the grounds for their detention.

The simple point to make here is that, rather than authorize by executive order what were obviously going to be highly provocative and controversial policies, it would have been far more politically expedient and on sounder constitutional footing if President Bush had come to Congress to ask it to establish these policies by legislation. Historical precedent would have been on his side, since Franklin Roosevelt during World War II asked Congress for similar powers, and got all that he asked for (perhaps, not Roosevelt's finest hour, as it included the relocation and internment of Japanese-Americans, but the larger point here is that FDR understood that these were Congress's policy choices to make, not his alone).

The ultimate conclusion here? Both of these policies, indefinite detention and military tribunals, are under constitutional challenge currently in the federal courts, with cases due to be heard in the U.S. Supreme Court and the District of Columbia Circuit Court of Appeals in late March. The executive order that authorizes them is at the heart of the administration's antiterror policies, and when it is finally tested in court, I think it will be found to be constitutionally vulnerable.

2) the other two examples – executive branch definition of torture and presidential refusal to use FISA and, instead, to create a separate and legally questionable system of domestic wiretapping - share the same quality of President Bush's declining to use either existing laws or to modify them by legislative amendments – and, rather, to take matters into his own hands and assert that he has unilateral authority to decide not to use existing law and to substitute, instead, his own version of law to authorize these actions.

The ultimate conclusion here?
On torture, the embarrassing public release of internal executive branch memos two years ago put the administration on the defensive, prompted it to scale back its torture definition, and moved Congress to reassert and clarify its statutory definition of torture.

On the NSA wiretapping, three separate actions on this issue were announced just last Thursday.

- One committee in the House of Representatives announced that it will conduct hearings into the legal justification of the program, while
- a Senate committee pulled back its initial plan to examine the policy when the White House agreed to work with the committee to craft legislation and to provide program briefings to a larger number of members of Congress.
- Perhaps, even more damaging to the administration's position is a lower federal court decision last Thursday that ordered the Justice Department to turn over its internal memos and opinions on the spying program to three watchdog groups. The request was made when reports surfaced that there was internal disagreement within the Justice Department on the constitutionality of the program – and that the president went ahead with it, anyway, despite opposition from key legal advisors in that department, including then-Attorney General John Ashcroft.

So, on all four of these issues, the White House is paying a price for its unilateral action.

One broader consequence here is that – when the president overreaches, he may end

up jeopardizing the very security he claims is the most important responsibility of a president to protect.

In this vein, some of the enemy combatant cases are starting to bring additional claims that either the use of torture or the gathering of evidence against these defendants by illegal wiretapping under the NSA program fatally taints the government's cases here, and should result in their dismissal.

Wiser heads would and should have counseled the president that policy overreach can come back and bite you. If these combatants really are the "very bad guys" that our leaders say they are, then it would make more sense for those leaders to be sure that the policies they devise to go after these men are ones that will pass legal muster and not backfire by resulting in the release of the very people we have branded as "evil and dangerous."

3) Let's turn to the courts, and examine the president's assertion that the courts have no role to play in judging wartime policies

Here, there are repeated statements by Justice Department lawyers in government briefs in five cases (*Hamdi, Rasul, Padilla,,Guantanamo Detainee Cases, and Hamdan*) that all reiterate explicitly or implicitly that the president will not tolerate interference by the courts in these matters.

Here are some examples:

Hamdi (case of an American citizen captured in Afghanistan in late 2001 fighting with the Taliban, and imprisoned in a military brig in the US [not Guantanamo] who petitioned the courts for release under a writ of habeas corpus):

The Justice Department argued in its briefs that "Courts have an extremely narrow role in reviewing the adequacy of the government's return in a habeas action, such as this, challenging the quintessentially military judgment to detain an individual as an enemy combatant in a time of war. A court's inquiry should come to an end once the military has shown ….that it has determined that the detainee is an enemy combatant."

The position here is that the courts should defer to the president when he operates under his Commander-in-Chief authority, and that when the military captures a person on the battlefield, that is both the beginning as well as the end of the inquiry.

Moreover, a key element in the Bush administration's legal strategy is that the nature of terrorism has made the whole world a "battlefield." The boundaries are infinite – there are no geographical limits to the battlefield in the war on terror. The consequence, then, is that terror suspects can be apprehended anywhere in the world, including in the U.S.

The Hamdi case is also the one where, in the Supreme Court's answer to the president's arguments, Justice Sandra Day O'Connor issued her emphatic and much-quoted line that "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

What was equally stirring were the few sentences preceding this one, where she said, "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances….Indeed, the position that the courts must forgo any examination of the individual case ….cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government…. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

Hamdan: (the case of an enemy combatant from Yemen who was captured in Afghanistan in late 2001, who has been described as Bin Laden's driver, was detained at Guantanamo Bay and is one of the handful of individuals that President Bush has designated for trial by military commission – in his case, charged with conspiracy to commit various war crimes)

Hamdan challenged his detention and enemy combatant designation in a petition for habeas corpus, and the government motioned to dismiss the suit on the basis that the president had inherent authority as Commander-in-Chief to designate, detain and subject to military tribunals non-US citizen enemy combatants who did not meet the criteria for prisoners of war under the Geneva Conventions.

The ruling by the district court judge in that case, Judge Robertson, had two parts to it: 1) that the military tribunals, as provided in Bush's November 13, 2001 executive order, were unconstitutional because their procedures were "contrary or inconsistent" with the procedures required in court-martials (this part of the case has been appealed, and will be heard in the US Supreme Court on March 28); but 2) the second part of his ruling was equally significant, and provided a compelling

metaphor for this larger issue of the president substituting his power for law and of the president pushing aside judicial bodies.

Robertson noted that the Geneva Conventions required that combatants captured on the battlefield are presumed to be prisoners of war unless and until a "competent tribunal" determines that they are *not.*

In 2002, President Bush, on the advice of Justice Department lawyers (and over the objections of State Department lawyers and officials, including then-Secretary of State Colin Powell) determined on his authority as Commander-in-Chief that he alone could make a blanket ruling that Al Qaeda members automatically did not meet the requirements for prisoner of war status.

If they had been permitted prisoner of war designation, they would have been entitled to 1) being formally charged with war crimes, and 2) being tried by a court-martial, which would have included far greater procedural protections than in a military tribunal, whose procedures and rules are whatever the military or executive branch decides they should be.

Thus, Robertson rejected Bush's blanket ruling here on the non-applicability of Geneva to Al Qaeda, and, further, ruled that since no competent tribunal had as yet determined whether Hamdan was or was not a prisoner of war, he was at the very least entitled to the judgment of such a tribunal – and "the president was not a tribunal" and could not make the judgment that only a court could make.

Thus, so far, we can sum up the legal foundation for the Bush administration's actions, across a number of cases, as some combination of the following two documents and one constitutional claim.

These are:

- the September 18, 2001 **Authorization for the Use of Military Force in Afghanistan (the AUMF)**
- the **November 13, 2001 executive order**
- **a constitutional claim of inherent executive authority based on the fact that the president is Commander-in-Chief**

Let's take a closer look at the use of force authorization and the constitutional claim.

1) The administration maintains that the **Authorization for the Use of Military Force in Afghanistan**, the resolution that Congress passed within a week after

> September 11, 2001, provides expressed or implied power for a president to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks ….or harbored such organizations or persons."

The argument is extended even further - that since Congress authorized the president to engage in military hostilities, that authorization logically permits a president to also take actions short of war, thus, including detention, enemy combatant designation, and warrantless domestic wiretapping, to fight terrorism. The greater power, it was argued, necessarily embraced the lesser.

But the opposing argument here is that the authorization to use military force is just that – and nothing other than an authorization to use military force – and that authority to detain prisoners indefinitely and without rights or to order warrantless wiretapping needed to be enacted with specificity.

That argument was then countered by government attorneys with the second prong supporting the president's power to act in wartime:

That is:
2) that the president's power as **commander-in-chief** provides any and all authority he needs to do anything he thinks will further national security. Commander in chief authority, they argue, is broad enough and limitless enough to meet any necessity. As such, then, it negated any need for further specificity or further authorization from Congress to take specific acts. It was, as Lyndon Johnson might have described it (in the way that he described a comparable authorization to use military force in his own administration, the Gulf of Tonkin Resolution) "like Grandma's nightshirt. It is big enough to cover everything."

If both of these arguments - authorization to use force and commander-in-chief - have a familiar and current ring to them, it is because they are the same ones used by the administration to justify the National Security Agency domestic surveillance program.

Let's take a closer look at this Commander in Chief authority, and see how other presidents have used it – and how courts have interpreted its scope.

If you read the words of Article II in the US Constitution carefully, you will note that they say: "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual

service of the United States."

That provision gives the president a title, “Commander in Chief,” but no specific list of powers that he can exercise in that capacity. It also suggests that the president is not "Commander in Chief" all of the time, but only "when called into the actual Service of the United States." As Alexander Hamilton wrote in *The Federalist No. 69*, "The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the nation." It is Congress, then, that calls the president into service as Commander in Chief when it declares war or authorizes the use of force by statute.

The Framers of the U.S. Constitution could not have been clearer: the decision to go to war belongs to the deliberative branch of government, Congress, because declaring war is a political and legislative decision to move the nation from a state of peace to a state of war. Only then does the president "command" the troops and conduct military operations. Hamilton also described the president's commander in chief power as "amount(ing) to nothing more than the supreme command…of the military and naval forces, as First General and Admiral of the Confederacy" (*Federalist #69*). But as law professor Louis Henkin has noted, "Generals and admirals, even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others."

Thus, there is a clear division of authority between the institution charged with making the political decision to go to war and the institution charged with commanding the troops, once war is underway.

It is undoubtedly true, however, that this is a sterile, purist vision of the Constitution, and that war-making today no longer works this way, in practice, and has not functioned in this manner for quite some time. This change in the office came not from FDR, the president and wartime leader to whom the origin of the modern presidency is most often attributed, but, rather, from Harry Truman. Although Roosevelt acted, at times, on his own authority, he never claimed that the Commander in Chief clause gave him unilateral or inherent authority to use military force, and he never asserted that there was no need to go to Congress because his role as Commander in Chief gave him all the authority he needed. Instead, historian Arthur Schlesinger, Jr. notes that Roosevelt conducted "extensive and vigilant consultation--within the executive branch, between the executive and legislative branches, among leaders of both parties and with the press" before taking some of his most controversial actions.

In an earlier war, Abraham Lincoln came closer to what is sometimes called a "constitutional dictatorship" than any other president, but even though he acted independently at the onset of the Civil War while Congress was in recess by calling forth the militia, suspending the writ of habeas corpus and ordering a blockade of Southern ports, he brought his actions to Congress immediately afterwards to ask for its authority retroactively. Lincoln understood that he was using Congress's authority and not his own. Congress, for its part, passed legislation that approved and legalized all of the acts that Lincoln had taken at the start of the war.

Similar to Roosevelt, Lincoln, also, never claimed that he possessed sole power to act. He acknowledged openly that he had acted beyond the constitutional powers of the presidency and that he needed Congress's approval to ratify his actions. Thus, although he may have acted under powers of both the president *and* Congress, he did not act *outside of* the Constitution, and he subjected his actions to the will of Congress at the first available moment.

It is Harry Truman, though, who bears the distinction for being the first president to make such sweeping claims when he sent U.S. forces to Korea in 1950 without congressional authorization, and then defended his related decision to use that power domestically to seize private steel mills in 1952, based on his inherent authority as commander in chief during wartime. That claim opened the door for future presidents to assert that the decision to use military force rested in the White House alone. What a distance we have traveled since Hamilton and Madison, who would not recognize – and certainly would not dignify – such a claim as consistent with the Constitution.

Truman’s actions established a precedent for presidents to ignore and bypass what had previously been understood and honored as baseline constitutional requirements. Thus, the shift in constitutional approach from Lincoln and Roosevelt to Truman was significant, if not tectonic. Most importantly, it signaled a new interpretation of the commander in chief clause as a source of executive war-making authority, independent of Congress.

But Truman's new paradigm did not survive judicial scrutiny when he turned his Commander in Chief power inward and claimed inherent power domestically to seize a private industry in order to continue steel production to support the war effort. This is the famous and recently re-discovered Supreme Court case of *Youngstown Sheet and Tube Co. v. Sawyer* (also known as the *Steel Seizure Case*) of 1952, that was the subject of intense debate in the Senate Judiciary Committee hearings on the confirmation of the newest Supreme Court justice, Samuel Alito, as well as at the recent Senate Judiciary Committee hearings on the National Security Agency

domestic surveillance program.

It was no surprise to many constitutional scholars that *Youngstown* has figured so prominently in contemporary discussions of the Bush administration's wartime policies. It is the quintessential Supreme Court case on inherent presidential power.

What is surprising, though, is how the administration has managed to make lemonade out of lemons. By that, I mean that the Court's decision in *Youngstown*, technically, determined that a president did *not* have inherent authority and could *not*, as Commander in Chief, act in violation of a law of Congress or contrary to the express or implied intent of Congress. And, yet, the Bush administration makes these very claims – that a president *does* have inherent authority, and that he *may* act contrary to a law or the intent of Congress when the national security requires it.

There is no starker expression of this position than a memo written by a Justice Department lawyer, John Yoo, in the Office of Legal Counsel, 2 weeks after September 11th, which, among its many controversial and extreme positions, the most striking were that the president's inherent authority permitted him to deploy military force preemptively and that Congress could not "place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response." "Grandma's nightshirt," indeed!

In addition, Yoo has been credited with the concept of the "commander-in-chief override," permitting the president, on his own authority, to determine that a law is unconstitutional if it constrains the president's actions in the national security sphere, and permitting him to disregard it and to refuse to enforce it, and to refuse, also, to be to be subject to any further action by Congress or the courts. This is utterly contrary to every principle of constitutional government.

Let's try to pull some of these strands together.

If the Bush administration strategy is that Congress and the courts have a minimal role, if any, to play in the antiterrorism policies, then with what are we left?

Executive branch exclusivity – the view that the executive branch is the only one to be trusted because protecting national security is too critical to leave to other branches.

That's a practical argument, not a constitutional one – and it is one that the Framers

of the Constitution anticipated – and rejected, in the same way the courts have rejected it….the Framers fully understood that the Constitution they created would operate in war as well as in peace, and they provided ways to trigger emergency powers when the government needs and requests them. Congress may suspend the writ of habeas corpus, in times of rebellion or invasion, and Congress can authorize the use of emergency powers when circumstances warrant that.

What a president may *not* do is to order his own emergency powers, contrary to existing laws.

So, as in the case of the FISA law, at least, initially, after September 11, the president asked Congress to amend the law when it passed the PATRIOT Act to provide better intelligence-gathering ability – and Congress responded by giving the president and intelligence agencies all of the enhanced capabilities they requested. Congress has responded eight times with amendments to the FISA law, so the president has gotten almost everything he has asked for, but the president never asked Congress to authorize domestic warrantless wiretapping. He went ahead and did it, anyway.

The president did not get what he asked for, at the time of passage of the September 18 Authorization for the Use of Force in Afghanistan. As recounted in a recent New York Times op-ed piece by then-Majority Leader of the Senate, Tom Daschle, he writes:

"On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to 'deter and pre-empt any future acts of terrorism or aggression against the United States.' Believing the scope of this language was too broad and ill-defined, Congress chose instead on September 14, to authorize 'all necessary and appropriate force against those nations, organizations or persons the president determines planned, authorized, committed or aided' the attacks of September 11. With this language, Congress denied the president the more expansive authority he sought, and insisted that his authority be used specifically against Osama bin Laden and Al Qaeda."

Daschle continues, "Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words 'in the United States and' after 'appropriate force' in the agreed-upon text. The proposed wording from the White House would then read as giving the president 'all necessary and appropriate force in the United States and against those nations, organizations, persons the president determines planned, authorized, committed or aided the terrorist attacks that occurred

on September 11.’”

According to Senator Daschle, “this last-minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted authority to act – but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.”

The facts of this exchange between a president and Congress are virtually parallel to the facts in the Youngstown case with President Truman that I mentioned a short while ago. There, Congress had considered giving Truman authority to seize domestic industries in times of emergencies. Congress rejected that proposal, but Truman seized anyway. The basis for the Supreme Court’s decision in that case was that the president could not do what Congress had not authorized him to do – and even more precisely, what Congress had considered and denied him authority to do. The president’s authority, the Court said, was to enforce the laws that Congress made, not to make his own laws. There should be a lesson there for the present administration. I wonder who will tell them……

And – to the final part of this picture…

What drives such a strategy of executive branch exclusivity - what and who?

The answers are quite simple and clear: it is an exceptionally well-defined and calculated effort to centralize power in the White House and, thus, to draw it away from the other two branches and even from other parts of the executive branch that are not reliable partners in supporting White House policies.

The strategy of centralization began with the Nixon White House, continued through the Reagan years, and, lest you think this is a partisan critique, you can be assured that it was practiced in the Clinton White House, as well.

The acknowledged and unabashed architect of that strategy is Vice-President Cheney, who never fails to repeat his mantra that “we want to leave the office of the presidency stronger than we found it.” Cheney is unashamed to state on the record that he thinks that recent presidents (including the Republicans’ beloved Ronald Reagan) squandered presidential power and let it slip from their hands, and that it is the mission of the present administration to repair the damage and to restore the lost powers of the office.

A typical Cheney quote is the following: “I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job…..The presidency is weaker today as an institution because of the unwise compromises that have been made over the last 30-35 years.”

One plausible explanation for this is that Cheney witnessed first-hand when he was President Gerald Ford’s Chief of Staff after Nixon’s resignation the restraints imposed on the presidency by a Congress and the courts who wanted to shrink an imperial presidency that had gotten out of control. Throughout the mid-1970s, there was a remarkable spate of legislation that reasserted congressional power, and that imposed strict oversight over the president, requiring him to report to Congress frequently so it could keep a watchful eye on him.

Some of those laws are: The War Powers Act of 1973, the Budget and Impoundment Control Act of 1974, the National Emergencies Act of 1976, the Hughes-Ryan Act of 1974, the Ethics in Government Act of 1978, the Federal Election Campaign Act of 1976, and….. the Foreign Intelligence Surveillance Act of 1978.

The common denominator for all of these laws is that each one has failed to achieve its objective of reforming the system, and one of the reasons for that is that most presidents serving under these restrictions resented being restrained under law, and tried to find ways to operate around them.

Cheney is now in a position to react – and with a vengeance - to that congressional reassertion, a reaction that has been building for decades under both Republican and Democratic presidents alike. It has manifested itself in what I call “the arrogant presidency,” and is the successor to the imperial presidency.

And Cheney has a skillful associate to help him pull this off – his former counsel to the office of the vice-presidency, David Addington, who only recently was moved upstairs to replace Scooter Libby as Cheney’s Chief of Staff, when Libby resigned after being indicted.

Addington is a 48-year old lawyer who has worked as a counsel to the Defense Department, to the CIA, and to the House foreign affairs and intelligence committees during the Iran-contra inquiry of the 1980s, an experience that many who know him say shaped his iron will to never again allow Congress to tie the president’s hands. He was the chief author of the Bush administration’s controversial detention, interrogation and surveillance policies, and bears the description – by his Republican friends – as “Cheney’s gatekeeper,” “the ideological enforcer,” and “the hardest of

the hard-core." One reporter quipped, "Where there has been controversy over the past 5 years, there has often been Addington."

Addington is a staunch proponent of the theory of "the unitary executive" – a theory that posits the president's complete authority in wartime and that views as illegitimate and unenforceable any statute that infringes on the president's authority.

If his is not a household name to you, don't worry – you are not alone, and that only means that his determined efforts to fly under the radar and to stay in the shadows have succeeded. He is legendary around Washington for declining to be interviewed or photographed by the media.

One final point deserves to be mentioned here, and that is – that, to pursue this strategy of centralization of power in the White House, the Bush administration has used an exceptionally clever tactic, but one that has risks of backfiring.

Not only did they pull power into the White House staff and away from executive branch departments and Cabinet secretaries – but the truly innovative part was to take people who had served on the White House staff in the first term, and place them in Cabinet positions in the second term. I am referring here to Secretary of State Condoleezza Rice and Attorney General Alberto Gonzales.

Especially, in Gonzales's case, this tactic carries inherent risks – in that he is now in a position where the policies he helped to fashion as Counsel to the president in the first term are being challenged in the courts in the second term, and, as Attorney General, he is likely to be called upon to defend them or to investigate them. Thus, in his job as the chief law enforcement official of the country, he brings with him an intimate knowledge of the policies he may be asked to investigate. It will be difficult to deliver impartial justice under those circumstances.

Finally, the scorecard for separation of powers and checks and balances in the current context seems to be, that, in the five years since September 11th, Congress has been mostly asleep at the wheel, either delegating overly broad and unclear power to the president or none at all, while the president simply filled in the vacuum, either by executive order or by excessive claims of constitutional authority, exhibiting no sense of hesitation that he perhaps might need the participation of Congress to assure the constitutionality of his actions.

Congress is starting to wake up, in small, incremental steps, to the realization that it has an institutional role to play. But only when members of the president's own party

start to speak out and take independent stands will public opinion demand accountability by and from the system.

The courts have been the venue for the deeper inquiries on these policies, and the Bush administration has done all it could to derail these efforts. The Supreme Court addressed a trio of important cases in June 2004 (*Rasul*, *Hamdi* and *Padilla*, although there was no substantive decision in *Padilla*, and it is, as we speak, under consideration by the Court for a possible second hearing), and its decisions resulted mostly in sharp rebukes to the president. The Court, then, is starting to apprehend the enormity of the exclusive powers the president has claimed.

Now, we have "Terrorism 2 " cases – the second round – as well as two new Supreme Court justices. By late June of this year, we may have more answers from the Court, especially on the constitutionality of military tribunals and indefinite detention, and on the president's authority to provide for these by executive order alone.

In conclusion, presidents have grabbed Congress's war power for themselves, Congress has not been effective in reclaiming its lost power, and the courts have only started to engage in this constitutional dialogue. The actions of this president have eroded the cornerstones of the Constitution and the system of a government of limited powers that it established. And, yes, President Bush's strategy would stun Madison and Hamilton by the certitude with which he proclaims the singularity of his office and its powers. They would not be pleased by this current state of the presidency – and neither should we.

Thank you.