

# THE PRESIDENTIAL POWERS: HOW FAR DO THEY GO? THE ATTACK ON AMERICAN IDEALS

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September 11, the twin towers, a monument to Americas' supremacy fell in an instant covered by smoke and dust. One after the other they crumbled and the war on terror begun. Since that day the president of the United States has permitted by executive order some extraordinary measures. Wire tapping on American citizens has been authorized, torture has been deemed necessary and Guantanamo has been changed to suit this purpose. Controversy has arisen in these matters do to the fact that opponents have stated that these measures are either illegal or contrary to core American values. This paper will explore both sides of the argument and arrive at a conclusion.

Jane Mayer contends that the Bush's response to the 9/11 attacks, the putative War on Terror has been carried out using methods which are contrary to American "ideals". These actions were perpetrated by the passage of the Patriot Act and specific actions that Jane Mayer and others claimed overstepped the boundaries of this legislation.

In no particular order, these acts include;

- the indefinite incarceration of prisoners, including preteens, with minimal or any reasonable proof of guilt; \
- the domestic surveillance program involving wiretapping of American citizens without empowering the court to make sure that the government ascertain that the conversations being intercepted actually involve a target in the investigation;
- the torture of prisoners;
- the jailing of US citizens as enemy combatants without charges;
- the delay for notice of search warrants to be delayed for *an indefinite* reasonable time.;
- the abuse of the current material witness statute, improperly detaining material witnesses indefinitely without rights in accordance with criminal statutes.;
- the use of the FISA courts to obtain business records relevant to national security

As will be detailed these acts directly abrogated either perceived elements of the Constitution or treaties with foreign governments which indirectly conflicts with constitutional responsibilities.

## The Case for the Prosecution

The rationale for the attacks on the Administration's actions is based on two separate but interlinked aspects; the legal and the ideological.

The essence of the American government is dictated by the Constitution of the United States and its Amendments, which must be passed by two thirds of both Houses of

Congress and ratified by 75% of the state legislatures. Many of the first Amendments to the Constitution were adapted from the 1791 Bill of Rights. Lowi et al segregated the Bill of Rights into Civil Liberties ( I-VI, VIII) which protect the citizenry from overzealous government and Civil Rights which essentially protects the citizenry from abuses by other citizens.

Three branches of government were designated, with the overall goal of having a system of checks and balances. The Legislative branch was empowered to enact specific laws, raise taxes, borrow, provide for national transportation and post, regulate copyrights, declare war, raise and provide for the military. The federal judiciary was set to oversee these laws and ensure they were in keeping with the constitution, It has jurisdiction in interstate matters be they between individuals or states. The executive branch (Presidency) was empowered to command the military, make treaties, appoint judges and to “preserve protect and defend the constitution of the United States.” Of all the branches, the duties and or rights of the presidency are left most vague and therein lies the crux of the disputes we are to review.

The Fourth Amendment prohibits the government from “unwarrantable search and seizure” for persons’ houses, papers and effects. In 1978 the Foreign Intelligence Surveillance Act was established to provide warrants under special circumstances from communications between or among foreign governments and political organizations acting inside US borders. The Justice Department must provide proof that the target is “agent of a foreign power”. When expediency is important wiretapping may begin 72 hours before a warrant is physically obtained. During wartime, 15 days is allowed. If neither Congress nor the court is consulted, the wiretap must be withdrawn and all evidence destroyed. Under this act, a separate court order was required for each communications carrier( aba). The government argued that with the proliferation of carriers, (eg email, cell phones, blackberries, messaging etc) a single warrant was needed that allowed the government to tap the person, not the phone. The ACLU deems this an infringement on the civil liberty as there is insufficient judicial oversight is in place to preclude abuse.

Section 505(a) of the Patriot Act allows for an expansion in the use of National Security Letters, to be issued without a court order. These letters allow for the FBI to subpoena business records that are not necessarily those of a foreign power or its agent and are not SOLELY based on an American’s exercise of his First Amendment rights. This section was declared unconstitutional by a federal court in the case of Doe vs. Ashcroft under the Fourth Amendment protection against unreasonable searches and seizures. Further, it was also held to violate the First Amendment’s rights of free speech and association. Proposals for changing these National Security Letters are under way.

The 1986 Electronic Communications Privacy Act allowed government a reasonable delay notification of some forms of electronic communication held by a third party. It requires ISPs and phone companies to supply client records without telling their customers. Section 213 of the Patriot Act allows for so called “sneak and peak” warrants, which permit police to delay the notice indefinitely to prevent an “adverse result”. Although the American Bar Association accepts that it is merely codifying current jurisprudence it also sees the potential for abuse under the Fourth Amendment. This is a case of being outside the spirit of the law – where one would consider it being contrary to the “ideals” of the democracy.

Congress has legislated the Material Witness Statute allowing for the detention of a material witness to a criminal proceeding if his presence cannot be secured by a subpoena. The ACLU contends that the use of these detentions for grand jury proceedings is a ruse, as they are not criminal proceedings and hence infringing on the citizens's right of habeas corpus. In fact, in *Hamdi vs. Rumsfeld*, the plaintiff was found to be entitled to due process, specifically in contesting neutral decision status before a neutral decision maker.

Perhaps the most obvious accusation arises from the suspension of the writ of habeas corpus (Article 9 clause 2)—the right of people to be held indefinitely by a government. It dates back to 12<sup>th</sup> century English Common Law. Critics of the Patriot Act contend that the executive has illegally mandated suspension of habeas corpus by holding prisoners at Guantanamo and other secret locations. In finite terms, the constitution specifies that habeas corpus can only be suspended for civil war or insurrection. And, although these prisoners are not American citizens, and therefore may not have the rights of citizens, there is still room to debate whether the conditions of their incarceration is contrary to the spirit if not the letter of American law. Furthermore, there is a perceived conflict in which Tribunals administering justice to these individuals, allow the executive branch to make law, handle prosecution and then render final judgment.

And finally, we have Ms. Mayer's cause celebre, the use of torture on enemy combatants. The United States Constitution, even according to Attorney General Mukasey in his confirmation hearings, prohibits torture under the Fifth (self incrimination), Eighth (cruel and unusual punishment) and Fourteenth Amendments (deprive an individual the equal protection of the laws etc.). It has been interpreted that the due process rights include barring evidence-gathering techniques that "shock the conscience" (*Rochin Vs. California- 1952*) (10 national review online oct. 26).

The accusations of torture also imply that the United States is in contravention of the Geneva Conventions prohibiting torture and cruel, inhuman and degrading treatments ratified by the US in 1992 and 1994. It must be remembered that Article VI paragraph 2 of the constitution states "all treaties made... under the Authority of the United States shall be the supreme Law of the Land. Hence, under this supremacy clause, it can be argued that the Executive could be held responsible for upholding foreign treaties as part of his constitutional responsibilities. Now there should be a distinction into what was authorized by the executive branch, what was actually carried out in the detention centers and what was eventually admitted to and or defended by the administration. These distinctions will be clarified in the following section.

Furthermore, Ms. Mayer contends that the rules for captured enemy combatants changed with the Iraqi War. Where previously Article 5 tribunals were held "guaranteeing prisoners the fundamental right to be individually charged and to confront the evidence in a fair process", these rules were abandoned after 9/11. The captives were deemed "illegal" enemy combatants and as they were part of a "failed state" no longer were subject to Geneva Convention rules signed by sovereign states.

The Case for the Administration

The accusations are numerous and multifaceted. The defence is in three parts. The first is a global defence based on a specific interpretation of the constitution. The second reflects particular responses to particular accusations. The third is a plea of guilty, but in extenuating circumstances for some particular aspects of the case.

However first, we must preface this discussion on the assumption that the United States (and Western Civilization) is at war, and has been at war for over decades, against an array of nation states and clandestine organizations. Starting with the WTC bombing of 1993, through the embassy bombings in 1998, the U.S.S. Cole attack (2000) and culminating but not ending in 9/11 (2001) Al Qaeda has been prominent in these attacks. However, Syria, Iraq, Libya and the Sudan have given refuge and financing to terrorist attacks not directly affiliated with Bin Laden's group (eg. Lockerbee (1998) and Beirut Marine bombing (1983)). And this war has been like no other. Most of the combatants are dressed in civilian garb, and suicidal attacks have become a primary tactic rather than an exception. Children, ambulances and women have all been used as mechanisms of delivery. Civilians rather than the military may now be primary targets. The normal rules of engagement are being rewritten on a daily basis. Studies at West Point concerning Napoleonic tactics against the guerilla warfare in Spain are obsolete.

The Patriot Act was legislation passed in a bipartisan manner by both Houses of Congress (only one Senator opposed) and signed into law on October 26, 2001. As such, two branches of government essentially concurred that special Tools were needed to "Intercept and Obstruct Terrorism".

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The Bush Administration has not necessarily "set aside long-standing federal statutes barring torture, indefinite detention, and warrantless spying" (12 kings and presidents) as FAO Schwartz and AZ Huq contend. In response, it is proposed that these actions are merely extensions of the Patriot Act over already standing statutes and the an expansive interpretation of them vis a vis executive power. Under the unitary executive interpretation, as the President is responsible to "preserve protect and defend the constitution" he is given this broad based mandate without specific definition. Judge Sam Alito and others interpret the Constitution to mean that the executive branch has as its mandate all those as yet undefined powers to fulfill his duties. Refer to comments mad Justice Jackson on a case (1952) before the Supreme Court;

"We may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A half century later, the world is a much small place, and the time frame for making decisions has shrunk accordingly.

John Yoo (11,14) of the Justice Department, contends that the centralization of authority is particularly "crucial in matters of national defense, war and foreign policy where a unitary executive is in the best position to evaluate threats, consider policy choices and mobilize national resources". Day to day choices in a time of war are no place for long winded public discourse.

However, if we are questioning whether current acts are in opposition to the ideals of the state – the term ideals is so vague as to at times be either pretentious or irrelevant. What good are ideals if there is anarchy? What good are ideals if they endanger society as a whole. The real ideal of the American system is that checks and balances provide an ideal government. In this context, perhaps the best source of this defense is Alexander Hamilton’s Federalist Paper #70. “Energy is the leading character of good government”. Furthermore, he adds; “It is essential to the protection of the community against foreign attacks.” It is not less essential to the steady administration of the laws, “to the protection of property against the enterprises and assaults of ambition, of faction and of anarchy”. Herein, lies the ideal – to preserve the greater good, sometimes the president has the responsibility of acting. Thus, the republic was set up with “the favor of a single executive and a numerous legislature”. “Decision, activity, secrecy and dispatch will characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number”. Let us for one moment concentrate on the word: SECRECY. In times of war one does go about discussing strategies in the public domain. And the more involved in the decision making process the more likely leaking of sensitive information. Even in researching this paper many sensitive documents that should have never seen the light have been used to build the case against the administration, no less so the Red Cross report upon which most of Ms. Mayer’s thesis is based.

The elaboration of the global justification can now be summarized. Article II of the Constitution “designates the president as commander-in-chief and gives him authority over foreign affairs”. Chief Justice Roberts has ruled that Mr. Bush has broad authority to try foreigners before military commissions. Congress implicitly authorized President Bush to “use all necessary and appropriate military force” - the AUMF resolution of Sept. 14, 2001 (14-1. The preamble to the resolution states that president has the authority to “deter and prevent” terrorist attacks on the United States. Hence, all three branches of the government have signed on to the fact that the original assumption that the United States is at war, and the reign of normalcy is temporarily suspended.

The second step is to look at particulars. The contention that expansion of the FISA authority is unwarranted can be countered by the Moussaoui case where the FBI did not believe it had enough evidence under current statutes to inspect the computer files of a suspect foreign national. Under current rules, the data on the computer may have been sufficient to prevent the 9/11 attacks. Note; the Supreme Court has never ruled that the president does not ultimately have the authority to collect foreign intelligence either in the US or elsewhere (14 washington post kristol). This is not a question of ideals. It is a matter of preserve and protect.

The case of Yaser Esam Hamdi highlights the debate on confinement of an American citizen imprisoned as a foreign combatant. The incarceration was permitted although appeals were permitted with respect to designation as foreign combatant “based on law-of-war principles”.

The case against holding foreign combatants without rights is based on the fact that constitutional rights do not apply outside the borders of the United States. What makes their status even more vague is that in many instances they are non-uniformed and not even affiliated with a functional government or specific country.

The expansion of wiretapping authorizations, increased access to business records and library requests are justified by the precedent set by George Washington when he deemed it necessary to intercept British mail during the American Revolution. The administration has also used the AUMF as fulfilling the requirements for the exceptions to the FISA, allowing him greater latitude in interpreting the provisions of that act.

Last but not least, we return to the controversy of torture. The case is made that as part of the executive branch's war on terror "the United States sanctioned government officials to physically and psychologically torment US held captives making torture the official law of the land in all but name".(15-1 page 7-8). Let us first assume that much of what was leaked from the purportedly secret Red Cross report is true. We must now dissect the accusations into those which are government policy and those which are the result of personal decisions made by military personnel on the spot.

With reference to the latter, the Schlessinger Report on the Abu Ghraib prison controversy found that the case for Permission and Limits of Interrogation Techniques (note not Torture) is based on the contention of a ticking time bomb. This leaked memo from the Justice Department argued that torture may be legitimized to prevent an immediate threat to human life. A "third party who has no humane alternative to obtain information to save lives" would recognize that there are occasions when violating norms are understandable though not necessarily correct. For example, one officer reported himself for the following infraction; he fired a gun near a detainee's head, a Geneva Convention violation, but one that saved the lives of his soldiers.

As for the defense of the general policy we must resort to definition of law. While both aforementioned Geneva treaties were passed by congress, the Senate explicitly added; cruel, inhuman and degrading treatment (CID) was to be defined according to the interpretation of the 5<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments – i.e. American Constitutional law. According to defenders of the administration, Section 2340 of the federal criminal code defines torture as "specifically intended to inflict *severe* physical or mental pain or suffering" and subsequently as causing "intense, lasting and heinous agony". It also describes mental pain as "prolonged mental harm". It also prohibits: inflicting or threatening to inflict severe pain or suffering, sing or threatening to use mind altering drugs; threatening imminent death of the captive or a third person. The bottom line is that the waterboarding (an interrogation technique that simulates drowning) while admitted to by the military had as yet to be defined as torture. In 2005, after the revelation from Abu Ghraib, Congress enacted the McCain Amendment which confirms that the constitution is applicable extraterritorially and essentially redefines CID to include waterboarding. Subsequently in 2006 the Military Commissions Act that made clear that detention and interrogation were subject to American law, not Article 3 of the Geneva Conventions.

However, let us return to the ticking time bomb scenario as a microcosm of the duties men at war, be it at the field level, or at the executive level. Remembering Hamilton's designation of the executive as a position of energy or action, let us remember that in 1790 the time frame for decision making for National Security probably took weeks from the time information arrived from overseas to the time a response was given. The global war on terrorism is now being fought against remote control bombs instead of regiments of troops transported in ships and arrayed the open field. Technology has not only shrunk the universe. It has also developed weapons of mass

destruction that in the hands of unscrupulous purveyors of terror could poison, infect irradiate hundreds of thousands in a matter of minutes. Time is constantly ticking. Lives are in danger.

The third aspect is that of limited culpability.

The system of checks and balances does work. The framers of the constitution did provide for judicial recourse to excesses of executive power proving that the president is not beyond the law. During the Korean War, President Truman attempted to seize steel companies in order to insure the flow war supplies. He was blocked. In general, the response of government to events typifies the aspect of the branch. The legislative and judicial branches tend to side (though not always) with the rule of law, while the executive branch requires discretionary interpretation because of its need for immediate reaction.

The Hamdi case indicates recourse is available to detainees. The officer in Iraq essentially turned himself in and accepted military justice after he shot the gun off near the detainee's head. Doe vs. Ashcroft struck down part of section 505a of the Patriot Act. The laws concerning torture were defined and extended extraterritorially.

Finally, the defense of waterboarding has been proven inadequate, and legislation has delineated the limits that the executive branch and military can take in extracting information from captured enemy combatants. However, the ultimate reason I contend that this still proves that American ideals have not been corrupted is just because the situation has been recognized and rectified by the very structures that caused it.

The logic? In the course of human events, all men make mistakes. In times of crisis, mistakes are more likely to be made. The key is that recourse must be available to rectify mistakes, and through the course of the last few years, corrections have been implemented.

Conclusion:

The invocation of ideals as a basis for the existence of a person or a state is a utopian dream, but its perfect implementation is impractical in reality. No society can exist with unfettered freedoms. For example, people cannot walk around bare naked even though this limits their rights of expression. People cannot make incendiary hate speeches even though this limits their freedom of speech. People cannot make human sacrifices even though this may limit their freedom of religion. As a consequence, the empowerment of Congress of Sept. 14, 2001 and the extraordinary privileges accorded the President by the Constitution in time of war were set in place to confirm that the maintenance of the rights of the rest of society takes precedence. In fact, I would consider that the true ideal of the United States is that it has a system of laws based on checks and balances this balance of the rights of the few vs. the rights of the many can maintain an equilibrium. And within these checks and balances, it is government's responsibility to preserve and protect the Constitution of the United States. The United States is at War. This war threatens the civil liberties of all its citizens. The great satan must be destroyed and in the place of democracy a system of law is to be imposed. Basic rights of all citizens are in danger of this new enemy. Go down the list. Religious freedom – obviously extinct. Rights of assembly, free speech etc. – one visit to Saudi Arabia will dispel any doubts. Elements of this enemy have used nerve gas on its own

citizens. Nuclear proliferation has been attempted by Iraq (lest we forget Osisris) and now Iran. Hamas, Hezboullah, Al Fatah have all been responsible for the death of American and other foreign nationals abroad. Libya just turned over 30 tons of chemical weapons to the United Nations. NSA has investigated illegal distribution of nuclear material from the old soviet republics. In this new world, the executive of the United States is in a far more perilous position than Franklin Delano Roosevelt was when he ordered the mass-internment of Japanese American citizens during WWII.

Alexander Hamilton was prophetic when he stated in the Fderalist No. 70 (19)that “Men oppose a thing, merely because they have no agency in planning it, or because it may have been planned by those they dislike.” “They seem to think themselves bound in honor and by all motives of personal infallibility to defeat the success of what has been resolved upon contrary to their sentiments.” The debate on the issues has descended into a cacophonous row of partisan politics. It is hard to remember that the Patriot Act was passed by massive majorities in both Houses of Congress. During the Reagan administration, a congressional committee investigated the Iran-contra affair and submitted a report (Schultz pg 159) split “sharply on partisan grounds” with the minority report supporting the Reagan administration and condemning unlimited Congressional power. In March 1999, President Clinton approved the unilateral bombing in Kosovo (to prevent genocide) without clear Congressional authorization. Many of those same congressmen who voted against Reagan’s actions, affirmed Clinton’s, and now again condemn Bush’s imperial presidency. The key word in all this is partisan.

The system of law is one of evolution. The laws of war have changed. The laws of fighting these wars are also in flux. Is there a perfect solution to defining this change? Obviously not. Mistakes have been made. But therein, lays the glory of the system of checks and balances. Court challenges have been pursued – some won, some lost. Laws have been modified and will be modified by Congress.

My contention is that Ms. Mayer has too narrowly defined the term ideals. She is missing the forest for the trees. For our purposes, the Constitution is the Ideal. I describe it as a symbiotic system made up of three parts. For the system to survive all three elements must work together. The current crisis has come to prove that this Ideal is still a vibrant system. It evolves over time; with each of the three components nurturing their partners and helping the others perform optimally. It is because the system can survive, that all those rights and other ideals that are derived from within it can also survive.



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