

**The Dismantling of the Rule of Law in the United States:
Systematisation of Executive Impunity,
Dispensation from Non-derogable Norms, and
Perpetualisation of a Permanent State of Emergency**

by

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I declare that The Dismantling of the Rule of Law in the United States: Systematisation of Executive Impunity, Dispensation from Non-derogable Norms, and Perpetualisation of a Permanent State of Emergency is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

Scholars of human rights and constitutional law have described in great detail the abuses perpetrated by the armed forces and secret services of the United States in the context of the ‘war on terror’. There is copious literature explaining why these violations of fundamental human rights are not justifiable, and why they are not consistent with international treaties or that nation’s constitution.

This thesis builds upon this research, but strikes out in a new direction. It does so by asking whether these abuses, combined with the changes to the legal order of the United States that made them possible, have produced a qualitative transformation of its constitutional structure. In particular, this thesis tracks the empowering of the executive. Increasingly, whenever it purports to act in the interests of national security, the executive claims the authority to act unilaterally in a manner that overrides even non-derogable rights.

These novel constitutional reserve powers, which this thesis demonstrates were derived from President Nixon’s theory of the executive, were used to justify indefinite arbitrary detention, torture, mass surveillance without warrants, and extra-judicial execution. This thesis seeks to determine if the constitutional crisis inaugurated by this theory of executive supremacy over the laws has been terminated, or whether it has continued into the Obama Administration.

If this theory is current within the executive branch, and especially if the violations of *jus cogens* norms has continued, it signifies a cross-party consensus about a paradigm shift in American constitutionalism. Accordingly, given the fact that the abuse of executive supremacy is what led to the development of the rule of law, this thesis will ask the question of whether the United States is being governed in accordance with its basic minimum norms.

This thesis explores whether the executive is still subject to checks and balances from the legislature and the judiciary, such that it cannot violate non-derogable rights at will and with impunity. If the contrary proposition is true, it demonstrates that the crisis of the rule of law in the United States is ongoing, and this permanent state of exception demands significantly more scholarly attention.

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THE DISMANTLING OF THE RULE OF LAW IN THE
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EMERGENCY

Chapter 1

INTRODUCTION

1 INTRODUCTION TO CHAPTER ONE

After the attacks of September 11, 2001, the United States launched several initiatives that are either at the outermost limit of what international human rights law allows, or over this line. These involved systematic violations of non-derogable rights. Four examples stand out. First, killing those considered terrorists with drone strikes, in areas that are not currently the site of armed conflict.¹ Second, continued indefinite detention of prisoners given the novel classification of ‘enemy combatants’ at the Guantánamo Bay detention camp, over ten years after the 9/11 attacks.² Third, torture of those prisoners and detainees held elsewhere, some of whom were seized by the intelligence agencies far from combat zones.³ Fourth, rules authorising the military to

¹ UNHCR ‘Report of the Special Rapporteur Philip Alston 2010/24’ A/HRC/14/24/Add.6

² Human Rights Watch *No Direction Home* (Human Rights Watch 2009) 17-22

³ Human Rights Watch *Getting Away with Torture* (Human Rights Watch 2011)

hold suspects accused of providing material support for terrorism, so that they do not receive the protections of the criminal justice system.⁴

Special Rapporteur Philip Alston noted in his 2010 study on targeted killings that ‘the U.S. adopted a secret policy of targeted killings soon after the attacks of 11 September 2001’. This program sanctioned targeted killing in other nations, which were not in armed conflict.⁵ Estimates of civilian casualties in Pakistan alone range to ‘many hundreds’.⁶ He concluded that the justification for the use of drone strikes in Pakistan, Yemen, and other countries ‘does not address some of the most central legal issues’ they present, including ‘the scope of the armed conflicts in which the US asserts it is engaged, the criteria for individuals who may be targeted . . . and the existence of accountability mechanisms’.⁷ After discussing International Humanitarian Law, Alston concluded that ‘these factors make it problematic for the US to show that . . . it is in a transnational non-international armed conflict’. Therefore, these killings are unlawful.

Despite this criticism, the United States dramatically expanded this program during the presidency of Barack Obama, both in scale and in scope. For the first time, American citizens are now subject to extra-judicial killing. ‘American[s] . . . are placed on a kill or capture list by a secretive panel of senior government officials . . . there is

⁴ Congressional Research Report, *National Defense Authorization Act* (Congressional Research Report 2012) 18-23

⁵ Alston *supra* n 1, 7

⁶ Ibid, citing New America Foundation, *Analysis of US Drone Strikes in Pakistan, 2004-2010*, <<http://counterterrorism.newamerica.net/drones#2010chart>> accessed 26 May 2014

⁷ Alston *supra* n 1, 8

no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate.'⁸

On the fifth anniversary of the Guantánamo Bay detention camp, Amnesty International described it as a human rights scandal.⁹ 'International law has been flouted from the outset. None of the detainees was granted prisoner of war status, nor brought before a competent tribunal to determine his or her status, as required by the Third Geneva Convention. None has been granted access to a court to challenge this lawfulness of his detention. The International Covenant on Civil and Political Rights (Article 9), to which the United States is a party, mandates this access.'¹⁰

After seven years of the detainment camps' existence, the United States Supreme Court held in *Boumediene v. Bush* that detainees must have a 'meaningful opportunity' to obtain writs of *habeas corpus*.¹¹ However, the Court gave the executive 'reasonable time' to begin combatant status review tribunals. It 'waffled again on the ultimate standards, announcing that certain accommodations can be made to reduce the burden

⁸ Mark Hosenball 'Secret panel can put Americans on a kill list' *New York Times* (New York, 5 October 2011 <<http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005>> accessed 26 May 2014

⁹ Amnesty International *Human Rights Scandal* (Amnesty International Commission on Human Rights 2004)
<web.archive.org/web/20060712192510/http://web.amnesty.org/library/Index/ENGIOR410242004?openandof=ENG-USA> accessed 26 May 2014

¹⁰ *Ibid*

¹¹ *Boumediene v Bush* [2008] 553 US 723, 779 (United States Supreme Court)

habeas corpus proceedings will place on the military'.¹² The Supreme Court's 2012 decision not to overturn *Latif v. Obama*¹³ reduced the chances of obtaining the writ to nearly nothing. In *Latif*, the D.C. Circuit held that 'federal judges must "presume" that government intelligence reports used to justify detention are reliable and accurate.'¹⁴

There is ample evidence that Guantánamo detainees were tortured. There is also substantial documentation to prove that cabinet level officials approved. 'Based on this evidence, Human Rights Watch believes there is sufficient basis for the US government to order a broad criminal investigation into alleges crimes committed in connection with the torture and ill-treatment of detainees Such an investigation would necessarily focus on alleged criminal conduct by the following four senior officials—former President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and CIA Director George Tenet'.¹⁵ In his autobiography, former President Bush admitted authorizing the waterboarding of detainees.¹⁶ It should be noted that waterboarding 'is a relatively recent name for a form of water torture that dates to at least the Spanish Inquisition'.¹⁷

¹² Kim Lane Schepple, 'The New Judicial Deference' [2012] *Boston University Law Review* 89, 141-142 (internal quotations removed)

¹³ *Latif v Obama* [2011] 666 F3d 746 (D.C Circuit)

¹⁴ Erwin Chermersky 'Losing interest' *National Law Journal* (Washington, 25 June 2012)

¹⁵ Human Rights Watch *supra* n 3, 70

¹⁶ George W. Bush, *Decision Points* (Crown Publishers, 2010) 170

¹⁷ Human Rights Watch *supra* n 3, 54

Despite this evidence, the Obama Administration has refused to prosecute anyone for approving or carrying out this torture. It also failed to prosecute a former CIA official who spoke openly of destroying evidence of torture in violation of a court order.¹⁸ The Supreme Court has refused to disturb a D.C. Circuit opinion that held that no U.S. court has jurisdiction over claims of torture by the Guantánamo detainees.¹⁹ Additionally, the Military Commissions Act of 2006 immunised the torturers.²⁰ Owing to the complete failure to create accountability for torture and ill-treatment of detainees, it continues. Prisoners at Camp Seven are held in conditions that do not comply with the minimum standards of Article Three of the Geneva Conventions.²¹ Evidence obtained using torture is considered competent by Combatant Status Review Tribunals. Intelligence files that are considered presumptive evidence of guilt contain evidence obtained by torture. A prisoner was “leashed like a dog, sexually humiliated and forced to urinate upon himself” before implicating himself and other prisoners. . . those claims [implicating others] appear in the other[] [detainees] files “without any caveat”.²²

¹⁸ Mark Mazzetti and Charlie Savage, ‘No criminal charges sought over CIA tapes’, *New York Times* (New York, 10 November 2012)

¹⁹ *Al-Zahrani v Rodriguez* [2012] 669 F3d 315 (D.C. Circuit)

²⁰ Military Commissions Act 2006, Public Law 109-366 section 7(e)(2)

²¹ Peter Masciola, ‘Bullets in Furtherance of Meeting’ <<http://www.defenselink.mil/pubs/App11.pdf>> accessed 26 May 2014; *see also* Charlie Savage ‘Guantanamo Conditions Slip’ *New York Times* (New York, 24 February 2012)

²² Amy Davidson, ‘Wikileaks: the uses of Guantanamo’ *The New Yorker* (New York, 25 April 2011)

During the Bush Administration, lawyers working for the executive branch made strong claims. They wrote memoranda claiming the President possesses a unilateral power to authorise the seizure and detention of United States citizens accused of support for terrorism.²³ The military held and tortured José Padilla, an American, for four years.²⁴ During his detention, the Supreme Court evaded reviewing his case.²⁵ Congress approved of this conduct. It passed legislation in 2012 approving military detention of anyone accused of providing material support for terrorism. The legislation does expressly allow for military detention of citizens arrested within the nation's borders.²⁶ However, 'an amendment that would have expressly barred citizens from long-term military detention was considered and rejected'.²⁷

²³ John Yoo and Robert Delahunty 'Authority for Use of Military Force to Combat Terrorist Activities Within the United States' (Washington, Office of Legal Counsel, 23 October 2001); Patrick Philbin, 'Legality of the Use of Military Commissions to Try Terrorists' (Washington, Office of Legal Counsel (6 November 2001)

²⁴ 'Mr. Padilla's Reply to the Government's Response to the Motion to Dismiss for Outrageous Government Conduct,' *United States v. Padilla*, Case No. 04-60001-Cr-COOKE/BROWN S.D. FL., (Miami, 4 October 2006) 6

²⁵ Jenny Martinez, 'Process and Substance in the "War on Terror" [2008] Columbia Law Review 1013, 1039

²⁶ Congressional Research Service *supra* n 4, 16

²⁷ *Ibid*

The right not to be killed without due process, not to be subjected to indefinite arbitrary detention, and not to be tortured are all peremptory norms.²⁸ Therefore, the United States' compliance with fundamental human rights law following the 9/11 attacks is, at the least, an open question. Unfortunately, the absence of these rights does not provide a basis on its own for judging whether a nation now has a fundamentally different constitutional order. In order to assess the transformation of the legal regime of the United States since the 9/11 attacks, this thesis must make reference to another concept. The thesis will determine whether the rule of law allows for a binary categorisation of nations, in a way that other norms related to human rights cannot. The conclusion that a nation is not a rule of law state differs from the observation that it does not comply with particular norms, leading to different implications about its status in international affairs.

This thesis will detail the crucial political and legal developments in the United States following the 9/11 attacks. It will explain how these catalysed an unaccountable presidency, which the nation's legislature or its courts cannot restrain. In no small part, this was due to the failure to resist problematic theories of the executive constitutional reserve powers in times of crisis. The thesis will detail how these theories became dominant within the executive branch after the 9/11 attacks. It will also illustrate how they were implicitly ratified by Congress and the courts over the following decade.

To prove the importance of resisting these theories to the rule of law in the United States, the thesis must detail their history. In particular, the thesis will describe how Nixon Administration officials had nearly destroyed the rule of law by using them to

²⁸ American Law Institute, *Restatement of the Law Third, Restatement of The Foreign Relations Law of the United States* (American Law Institute Publishers 1987) section 702

create an unaccountable ‘Imperial Presidency’. Subsequently, it will explain how the 9/11 attacks allowed the Bush Administration, which contained Nixon-era officials to redeploy theories of presidential power in a crisis. These officials argued the 9/11 attacks and the passage of the Authorization for the Use of Military Force Against Terrorists²⁹ activated a broad range of implicit presidential powers. In particular, this thesis will detail these assertions of powers to authorise indefinite military detention,³⁰ warrantless wiretapping,³¹ torture,³² and targeted killing.³³

This thesis will then show how these theories came to become legally effective. It will show this is largely because of the inaction of the other branches of government. First, it will demonstrate how Congress bolstered the executive, by giving it statutory powers whenever the executive’s assertions of reserve powers were untenable. It will show how this legislation also implicitly recognized these theories. These legislative

²⁹ Authorization for the Use of Military Force 2001, Public Law 107-40115

³⁰ Yoo and Delahunty *supra* n 23; Philbin *supra* n 23

³¹ John Yoo, ‘Memorandum for the Attorney-General from John C. Yoo’ (Washington, Office of Legal Counsel 2 November 2001)

<http://www.aclu.org/files/assets/NSA_Wiretapping_OLC_Memo_Nov_2_2001_Yoo.pdf> accessed 26 May 2014

³² John Yoo, ‘Memorandum Opinion for the Deputy Counsel to the President: The President’s Constitutional Authority to Conduct Military Operations and Nations Supporting Them’, (Washington, Office of Legal Counsel 25 September 2001)

<http://dspace.wrlc.org/doc/bitstream/2041/70942/00110_010925display.pdf> accessed 30 May 2014

³³ Jo Becker and Scott Shane, ‘Secret “Kill List” Proves a Test of Obama’s Principles and Will’ *New York Times* (New York, 29 May 2012)

actions normalised problematic arguments about presidential authority. Congress comprehensively dismantled these clear limits on the executive power, which had preserved the rule of law in the United States for almost thirty years. This thesis will show that Congress also neutered the oversight structures and accountability-reinforcing mechanisms created in the wake of the Watergate crisis.

This thesis will also explain how and why the judiciary abandoned its responsibility to hold the executive branch accountable. It will correct the prevailing account of the judicial review of indefinite detention and torture at Guantánamo. It will demonstrate the courts deliberately adopted a ponderous pace that allowed the executive branch to evade review of its most egregious abuses. This thesis will show how the courts also tacitly accepted the executive's theories of its reserve powers. It will also describe how the courts developed doctrines that ensured these theories could not be challenged successfully in the courts.

This thesis will show that the result is an executive that now has the powers described by the Bush Administration's lawyers. These powers allow the executive to violate non-derogable norms without fear of correction or redress. It will also demonstrate in passing there is negligible disagreement on these issues between the Obama and Bush Administrations. The thesis will explain the creation of this 'bipartisan consensus' between the two American political parties on the unrestrained executive.³⁴ Finally, this thesis will show that the executive branch has been able to lay the foundation for the robust use of these powers in future crises. The theory that the executive can wage aggressive war on its own authority, is now also uncontested.

³⁴ Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press 2010)

The executive can now create the conditions that allow it to extend its powers, seemingly without limit. As the thesis will explain, this constitutional order does not comply with the minimum requirements of the rule of law state.

2 PURPOSE OF THE STUDY

The purpose of this study is to demonstrate that the American state has undergone a qualitative change in the years following the 9/11 attacks. The thesis will demonstrate that it now falls outside of the category of states that are governed by the rule of law. It will show that this transformation is not merely the product of the abrogation of prevailing, or even unanimously-observed, human rights. Rather, this conclusion is possible because the executive branch violates non-derogable human rights with impunity, without any possibility of effective control.

3 AIMS OF THE STUDY

This thesis aims to create an operational definition of the minimum norms of the rule of law state. This definition will allow for a conclusive answer to the question of whether or not a country that engages in gross human rights abuses is being governed in accordance with the rule of law. To that end, the thesis aims to demonstrate that there is no live dispute among scholars as to two minimum norms of the rule of law state. The first is that the executive must be subjected to effective legal and political oversight. The second of these is that non-derogable rights may never be violated. Accordingly, it will be possible to conclude that if the executive has the power to violate *jus cogens* norms with impunity, it is not a rule of law state.

The thesis aims to identify the definitive standards for both of these minimum norms. The list and definition of non-derogable rights are not controversial. These are found in the ICCPR, the Siracusa Principles, and the Paris Minimum Standards. The thesis aims to explain why the International Commission of Jurists' reports on the rule of law provide the definitive standards for control over the executive. It will explain why these standards are both uncontroversial and useful. The thesis aims to demonstrate that these requirements provide an operational definition for this second minimum requirement of the rule of law state.

The thesis will demonstrate how these requirements are addressed in the United States. Namely, it will explain how the separation of powers found in the Constitution of the United States is one possible way to implement the requirements found in the reports of the International Commission of Jurists. It also aims to show how these principles were eroded during the twentieth century, to the point that they needed to be reinforced with a superstructure of laws.

Finally, the thesis aims to demonstrate that the developments that took place after the 9/11 attacks were a deviation from the baseline of executive accountability established in the wake of the abuses of the Nixon Administration. In order to do so, the thesis will explain that in the twenty-first century, the United States fails to meet the criteria of the rule of law state, as enumerated in the next section.

4 STRUCTURE OF THE STUDY

The remainder of this chapter will demonstrate that while in some respects the concept of the rule of law is essentially contested, there is general agreement about what constitutes its essence. The history of the rule of law demonstrates that its historical core is the regulation of the activities of the executive by the other branches of

government and the ability to hold it accountable to clear legal standards, particularly when its activities implicate citizens' non-derogable rights. The next sections will demonstrate that it is possible to draw upon this consensus to create a global 'yardstick' that allows an observer to judge whether any given nation is a rule of law state.

Chapter two addresses the question of whether the constitutional order of the United States that existed between the time of the Nixon Administration and the 9/11 attacks was wholly consistent with the rule of law principles being used to judge its contemporary non-compliance. This thesis will demonstrate that it was, as Congress and the courts clearly rejected theories of unbridled presidential power in the wake of Watergate and the findings of the Church Commission.³⁵ In that era, these branches proved to be effective checks on the enlargement of executive power. The most notable demonstrations of that efficacy were the rulings in *United States v. Nixon*³⁶ and the passage of legislation that made the President accountable to Congress for his actions in national security matters, including the Hughes-Ryan Act and the War Powers Resolution of 1974.³⁷

Establishing that the elements of the American constitutional order constraining the executive branch between 1974 and 2001 were largely congruous with the minimum requirements outlined in the Commission's reports is essential to this thesis for two

³⁵ United States Senate Select Committee on Intelligence, 'Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities' (United States Senate Select Committee on Intelligence, 1976)

³⁶ *United States v. Nixon* [1974] 418 US 683 (United States Supreme Court)

³⁷ Hughes-Ryan Act 1974, Public Law No 93-559 section 32; War Powers Resolution 1974, Public Law 93-148

reasons. First, it will demonstrate that the conception of the rule of law that is being used here is not an inappropriate measure. Rather it will be argued that when functional, the protections found in the provision of the separation of powers from the Constitution of the United States' separation of powers is one possible embodiment of the criteria for the rule of law being used in this thesis. Second, this will demonstrate that the failure to abide with these domestic constitutional restraints might also constitute a more problematic abrogation of legal order, as Chapter 1 will demonstrate that the failure to meet these requirements constitutes a *prima facie* case that the state should not be considered to be governed by the rule of law.

Chapter three will discuss the overbroad delegations of authority from the legislative branch to the executive, particularly the Authorization for the Use of Military Force Against Terrorists.³⁸ It will focus on the question of whether the executive is still responsible to the legislature after these cumulative delegations of broad powers. This chapter must also discuss the executive's appropriation of legislative authority, which has not been checked by Congress. Special attention will be paid to the doctrine and use of executive signing statements accompanying legislation. Significant attention will also be devoted to the use of Department of Justice's Office of Legal Counsel as binding interpretations of the law within the executive branch. Both of these sets of sources were used to justify such actions as the targeted killing of American citizens and to make claims that the executive branch possesses constitutional powers that cannot be overruled by legislation. This thesis must then answer the related question of whether the executive branch's ability to make proclamations with the force of law

³⁸ Authorization for the Use of Military Force 2001, Public Law 107-40115

is subject to any checks and balances, as these are essential to the separation of powers and for the rule of law that they protect.

Chapter four will discuss the judiciary's responses to the executive's assertions of its self-assumed powers to violate non-derogable rights. The key question to be answered is whether the courts have been willing, when able, to rebuke the executive branch's interpretation of its pre-eminence in matters of national security in principle, or whether they have restricted themselves to narrow holdings that address only the most problematic overreaching, or even to evasion of their responsibility to review allegations of violations of non-derogable rights. To that end, this thesis will address the issue of whether the courts, and in particular the Supreme Court of the United States, have acted to enforce the constitutional and statutory restrictions on executive authority. Particularly, this thesis will discuss the restrictions erected in the aftermath of the Watergate crisis, and the question of whether judgements that have been interpreted as rebukes to the executive have actually limited its freedom of action or created any accountability for the serious and systematic failure of the executive to observe the laws. This thesis will also examine other restrictions on executive authority imposed by the other branches of government that protect the rule of law, and the *jus cogens* norms that it is bound by these laws and restrictions to observe.

Key Supreme Court cases this chapter will discuss include *Hamdi v. Rumsfeld*,³⁹ *Rumsfeld v. Padilla*,⁴⁰ and *Boumediene v. Bush*.⁴¹ Another important issue to be discussed is whether the Supreme Court has proven itself unwilling to review rulings

³⁹ *Hamdi v Rumsfeld* [2004] 542 US 507 (United States Supreme Court)

⁴⁰ *Rumsfeld v Padilla* [2004] 542 US 426 (United States Supreme Court)

⁴¹ *Boumediene v Bush* [2008] 553 US 723 (United States Supreme Court)

of lower courts that have given judicial imprimatur to the executive branch's expansive interpretation of its power. Examples of these rulings include the decision in *Al-Aulaqi v. Obama* and the D.C. Circuit's decisions in the *habeas corpus* cases brought following *Boumediene*, particularly *Latif v. Obama*,⁴² *Kiyemba v. Obama*,⁴³ and *Al-Zahrani v. Rodriguez*.⁴⁴

Chapter five will seek to explain the inadequate responses from the other branches of government. It will demonstrate that both the judiciary and legislative branch have been compromised. This will show that effective oversight is no longer possible. Accordingly, this chapter will be able to conclude that the twenty-first century crisis of the rule of law is not temporary, as was the case in the Nixon Administration. As the two other branches cannot restrain the executive, even when it violates non-derogable rights, the United States is no longer a rule of law state. The first sections of this chapter will explore the process by which the executive fostered a deferential judiciary. It will detail the colonization of its highest branches with jurists who were closely connected and loyal to the executive. In particular, it will demonstrate that the executive has filled the benches of the nation's highest courts with former officials, who possessed no public record of their extensive support for executive supremacy. The remainder of this chapter will focus on Congress' failure to address the executive's assertions that it can violate non-derogable rights. This chapter will discuss the apparent inability of the judiciary to address claims that the executive branch has exceeded its powers or used them in a manner that implicates citizens' non-derogable rights. Particular attention

⁴² *Latif v Obama* [2012] 677 F3d 1175 (D.C. Circuit)

⁴³ *Kiyemba v Obama* [2009] 561 F3d 509 (D.C. Circuit)

⁴⁴ *Al-Zahrani v Rodriguez* [2012] 669 F3d 315 (D.C. Circuit)

must be paid to jurisdiction-stripping statutes, such as the Detainee Treatment Act of 2005⁴⁵ and the Military Commissions Act of 2006.⁴⁶ These statutes purport to deprive the judiciary of the right to review certain classes of claims, including petitions for the writ of *habeas corpus*. This chapter will also address an important counter-argument to this thesis' conclusion, advanced by defenders of the unbounded power possessed by the American President, notably Eric Posner and Adrian Vermuele.⁴⁷ They have argued that checks and balances are unnecessary to a stable constitutional order that serves to protect rights, since the executive branch is purportedly restrained by the political process itself.

Chapter six will recapitulate the findings of the preceding chapters in brief, explaining their importance to the key conclusions related to the question of whether the United States should continue to be considered a rule of law state.

5 IS A GLOBAL 'YARDSTICK' POSSIBLE?

This thesis must produce operational definitions of its key concepts,⁴⁸ so that its assessment of whether or not the United States does not measure up to the criteria that define a rule of law state is not merely a subjective assessment, but rather a test that compares the nation's governance against measurements that are both defined in

⁴⁵ Detainee Treatment Act 2005, 119 Statutes 2739

⁴⁶ Military Commissions Act 2006, amending United States Code, title 18, section 2241(e)

⁴⁷ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011) 176-205

⁴⁸ Estela G. Adanza, *Research Methods: Principles and Applications* (Rex Publications 2011) 21

advance of the assessment, and which are acknowledged by the legal community as the relevant ‘yardstick’ for this measurement. Accordingly, the task for this thesis’ first chapter is to provide a clear definition of the rule of law and the pertinent concepts out of which it is constituted.

5.1 Rule of Law: A Constitutional Concept Shaped by History

This dissertation treats the rule of law as a constitutional concept, rather than describing the related concept in jurisprudence. This is because it this thesis aims to outline the necessary features of a functional constitutional order, instead of describing the features of a legal system from the point of view of legal philosophy. This approach is appropriate because ‘the Rule of Law is a historic ideal’ and fulfils that function with contemporary political debates.⁴⁹

Tamanaha described the rule of law as a constitutional concept that ‘congealed into existence in a slow, unplanned manner that commenced in the Middle Ages, with no single source or starting point.’⁵⁰ It is a constitutive concept, one that has acquired its meaning through its historical development. Since the concept was not created by reference to a comprehensive theory, it cannot be understood without reference to history. The thesis’ explanation of the history of the rule of law is central to its identification of a normative ‘yardstick’ that measures a state’s compliance. Understanding how the concept is rooted within constitutional history will help this

⁴⁹ Richard H. Fallon Jr. “‘The Rule of Law’ as a Concept in Constitutional Discourse’ (1997) 97

Columbia Law Review 1

⁵⁰ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 15

thesis to avoid certain problems that make a functional definition of the normative core of the rule of law impossible. As Shklar noted, ‘contemporary theories [of the rule of law] fail because they have lost a sense of what the political objectives of the ideal of the rule of law originally were and have come up with no plausible restatement.’⁵¹

In particular, this historical focus will assist this thesis’ identification of the minimum requirements of the rule of law. The circumstances of this concept’s emergence, and especially the constitutional crises that precipitated its development, identify the normative core of the rule of law. This thesis will explain how the state of affairs that existed before and during the creation of the rule of law state defines its minimum requirements.

This section will demonstrate that the rule of law state is properly defined by reference to its antithesis. Historically, the opposite of the rule of law state is one governed by an executive who is unaccountable to the courts or to a legislature.⁵² This fact, if coupled with the next section’s operational definition of the essential methods of control over the executive, will allow the thesis to create this thesis’ ‘yardstick’.

5.2 The Medieval and Early Modern Pre-history of Rule of Law

Tamanaha developed his historically-based definition of the rule of law by building on the works of legal historians. Central among these are the efforts of Kenneth

⁵¹ Judith N. Shklar, *The Rule of Law: Ideal or Ideology* (Carswell 1987)

⁵² Leo Strauss, *Liberalism Ancient and Modern* (University of Chicago 1968) 75

Pennington⁵³ and Harold Berman.⁵⁴ These historians describe the tension in the Middle Ages between powerful monarchs and the legal theorists who sought to constrain their powers. There was a prolonged legal struggle between the monarchy and the nobility over the scope of royal authority.⁵⁵ The result of this process was a stable legal order in which '[t]he principle foundation upon which medieval political theory was built was the principle of the supremacy of law.'⁵⁶ In England, the process that led to this state was the passage of Magna Carta as a statute.⁵⁷

This legal order, which was characterised as a mixed monarchy or *dominium politicum et regale*, was destabilized during the Early Modern era. Monarchies became more powerful as commerce and roads made more centralised control possible. This development frequently led to the development of absolute monarchies, predicated on theories of royal supremacy.⁵⁸

These theories had their adherents in England during the Early Modern era.⁵⁹ However, Parliament's defeat of the Royalist cause during the English Civil War meant

⁵³ Kenneth Pennington, *The Prince and the Law 1200-1600* (University of California Press 1993)

⁵⁴ Harold Berman *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 2009)

⁵⁵ Tamanaha *supra* n 50, 15-27

⁵⁶ Anthony Matthews, *Law. Order and Liberty in South Africa* (University of California Press 1972) 6

⁵⁷ Magna Carta 1297

⁵⁸ Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge University Press 2009)

⁵⁹ Thomas Sorrell, *The Cambridge Companion to Hobbes* (Cambridge University Press 1996)

that they would never be put into practice. The Glorious Revolution established the constitutional order for the remainder of that era. The English Constitution now constrained the executive firmly. In particular, after the reign of Queen Anne virtually all reserve powers could only be exercised on the advice of a government responsible to Parliament.⁶⁰

The constitutional histories of the nineteenth century lauded Parliament's triumph over the executive. The works of the Whig historians praised the English constitution, and in particular its restraints on the executive. In particular, this was the theme of Lord Macauley's *History of England from the Ascension of James II*.⁶¹ Samuel Rawson Gardiner's work on the English Civil War also attests to the fact that this was the orthodox view of the English Constitution at that time.⁶² This viewpoint was not merely dominant at the time, but unchallenged.⁶³ The essential feature of these histories was their glowing portrayal of the triumph over the executive.

In addition to Macauley and Gardiner, the lawyer and historian Henry Hallam shaped the nineteenth century view of the English Constitution. His *Constitutional History of England* argued that the English subject's greatest liberty was not to be governed

⁶⁰ George Barnett Smith, *History of the English Parliament, Volume Two* (Ward, Lock, Bowden and Company 1892)

⁶¹ Thomas Babbington Macauley, *The History of England from the Ascension of James II* (Longmans, Green, and Company 1889)

⁶² Samuel Rowson Gardiner, *History of the Great Civil War, 1642–1649* (Longmans, Green, and Company 1888)

⁶³ Herbert Butterfield, *The Whig Interpretation of History* (W. W. Norton 1965)

arbitrarily.⁶⁴ This volume was so influential that it was described in the early twentieth century as “one of the text-books of English politics, to which men of all parties appealed.”⁶⁵

Before the twentieth century, the rule of law had not been defined in theoretical terms. Rather, it was seen as a desirable product of a process of historical development. Historians, jurists, and lawyers lauded Parliament’s installation of a new dynast, who claimed he came to the throne in order to relieve the people of the oppression of an executive who “subjected them in all things . . . to arbitrary government . . . contrary to law . . . and to that express provision that no man shall lose his life . . . but by the law of the land.”⁶⁶ They celebrated England’s Constitution as one that restrained the executive, especially from violations which it defined as non-derogable.

The first influential definitions of the rule of law were produced during this period. This concept in constitutional law was shaped by this history and the way in which this history was interpreted at that time. The next section will discuss Dicey’s formative definition. It will explain how this definition is linked with certain political objectives. These can be understood by reference to the constitutional history that he drew upon

⁶⁴ Henry Hallam, *The Constitutional History of England* (Longmans, Green and Company 1827) 441

⁶⁵ Edmund Robertson, ‘Hallam, Henry’ in *Encyclopaedia Britannica* (Hugh Chisholm, ed.) (11th ed 1911) 852

⁶⁶ Declaration of the Prince of Orange, October 10, 1688, reprinted in *A Kingdom Without a King: The Journal of the Provisional Government in the Revolution of 1688* (Robert Beddard ed.) (Phaidon 1988) 145-149

when creating it. After this has been discussed, the thesis will be able to defend its definition of the normative core of the rule of law.

5.3 The Pre-History of Rule of Law and its Ongoing Influence

Dicey's functional definition of the rule of law is as follows:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law. . . the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals The notion that . . . affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts . . . is utterly unknown to the law of England.⁶⁷

The definition has three elements. The rule of law forbids the exercise of arbitrary power, it subjects officials to the law, and bars the executive from setting up special courts when citizens bring claims against the executive. It is evident anyone acquainted with the English legal history described in the last subsection that this definition did not spring from Dicey's forehead fully formed. Rather, it is a highly conventional Victorian interpretation of the limitations on power imposed by the English constitution, which was connected with an orthodox view of the nation's history, particularly the legal history of the seventeenth century.

Dicey was a serious student of legal history. Unlike those who advanced their criticism of his definition of the rule of law under the banner of analytical jurisprudence, he believed that the essential features of law could be explained by reference to its historical development. "[T]he English Constitution is historical in being in a special

⁶⁷ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1915) 120-21.

sense the immediate result of conditions that govern English history.”⁶⁸ In a footnote to this passage, Dicey laments what he sees as the failure of the English people to recognize the importance of “the English history of tradition & its influence”. Accordingly, it is imperative to approach this definition with a sense of the meaning that its words acquire when seen in the light of the historical tradition upon which he drew heavily.⁶⁹

The first indicators of the importance of legal history to Dicey’s constitutional theory are his use of ‘arbitrary power’ and ‘prerogative’. These terms have a precise meaning in the context of seventeenth and eighteenth century constitutionalism.⁷⁰ They link Dicey to a constitutional tradition that is particularly concerned with control over the executive. This continuity is demonstrated by Dicey’s particular attention to the executive’s reserve powers, and its subjection to the law in the regular courts.

Dicey’s definition of the rule of law is more than merely influential. It is foundational.⁷¹ In discussing the modern history of this concept, H. Patrick Glenn notes that ‘the notion of the rule of law dates at least from Dicey’s adoption of it, arguing notably for submission of executive authority to review by superior courts of

⁶⁸ Albert Venn Dicey, *General Characteristics of Existing English Constitutionalism*, in *General Characteristics of English Constitutionalism: Six Unpublished Lectures* (Peter Raina, ed.) Peter Land, 2009, 65

⁶⁹ Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 17

⁷⁰ John Phillip Reid, *Constitutional History of the American Revolution: The Authority Of Law* (University of Wisconsin Press 1993)

⁷¹ Stephane Beaulac, ‘The Rule of Law in International Law Today’ in Gianluggi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart Publishing 2009) 197-224

general jurisdiction'.⁷² It is scarcely an exaggeration to argue that later definitions of the rule of law as a constitutional concept are glosses on Dicey's. This claim is not true within the field of jurisprudence, however. Their arguments against Dicey will be discussed in the next subsection. At present, this dissertation will continue by discussing the influence and ongoing importance of Dicey's definition in global constitutional law.

The Universal Declaration of Human Rights of 1948 states that 'human rights should be protected by the rule of law.'⁷³ However, the Declaration does not define this concept, despite identifying it as necessary to the preservation of human rights. There is no binding international definition of the rule of law, although some comments from the leaders of the international community provide an indication of how the concept is defined in practice. In 2004, the Secretary General defined the rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁷⁴

⁷² H. Patrick Glenn, 'Sustainable Diversity in Law' in Brian Z. Tamanaha, Caroline Mary Sage & Michael J. V. Woolcock (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 98

⁷³ UNGA Res 217 A(III) (1948) Universal Declaration of Human Rights

⁷⁴ UNGA 'Report of the Secretary-General, Strengthening the Rule of Law 49/519 (1994) paras 5(a)-(c), 5(k)

This language was drawn from a report of the Secretary-General to the General Assembly delivered in 1994, which also provides that nations seeking to develop into rule of law states should also possess ‘a strong constitution, which . . . incorporates internationally recognized human rights and freedoms’.⁷⁵ Notice that this definition starts with the Diceyan definition, which is found in the first sentence. The second sentence contains further requirements, many of which are the subject of debate between legal philosophers, as discussed in the next subsection. The introduction of these additional requirements with the phrases ‘it requires, as well’ provides some indication of the relationship between the requirements found before and after these words. Those which come after are intended to promote or to realize what is found before, namely the submission of all authority to regular law.

The Secretary-General and the General Assembly’s formulations bear witness to Dicey’s enduring influence and to the fact that the glosses to Dicey in global constitutional law have added to his definition, rather than subtracting from it. It also demonstrates that prevailing definitions have both a core and a periphery, where the peripheral rules serve to implement or protect the essential Diceyan elements. The only addition to the core found in these definitions is the caveat that this accountability shall be ‘consistent with international human rights norms and standards’.

The prevailing conception of the rule of law promoted by international organizations contains more than just the features necessary for the neutral adjudication of disputes and for holding the state itself responsible for legal wrongs. It also refers to substantive provisions that define a set of wrongs that will be actionable, which are connected to the evolving definition of human rights. However, these standards add little to Dicey’s

⁷⁵ Ibid

definition. This is because the human rights standards that are applicable in every circumstance are minimal, universally recognized, and recognized by as non-derogable even in Dicey's era.

5.4 The Rights Protected by Core of the Rule of Law

The pre-history of the rule of law involved struggles against an executive that claimed the power to kill, torture, and to detain its subjects indefinitely. The first of these rights was established as non-derogable in England by Clause 29 of the Magna Carta of 1297. Repeated confirmation of this statute which elevated it above any other, giving it constitutional status.⁷⁶ A century before Dicey, Blackstone confirmed that it was central to the rule of law and non-derogable:

This natural life . . . cannot legally be disposed of or destroyed by any individual . . . merely upon their own authority. . . . [T]he constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. . . . To bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.⁷⁷

Torture on the order of the executive was banned in England shortly before the Civil War. This was accomplished by a statute now known as the Act Abolishing the Star Chamber 1641, which was at the time formally styled 'an act for the regulating of the privy council, and for taking away the court commonly called the star-chamber'.⁷⁸ After Parliament eliminated the jurisdiction of the Privy Counsel in the form of the Council

⁷⁶ Ryan Patrick Alford, *Rule of Law at the Crossroads* [2011] Utah Law Review 1203, 1244-1250

⁷⁷ William Blackstone, *Commentaries on the Laws of England: Volume One* (Nabu Press 2010), 146-47.

⁷⁸ Act Abolishing the Star Chamber 1641

Board, it was no longer possible for it to issue writs that authorized racking and other forms of torture.⁷⁹

Prolonged arbitrary detention by the executive was eliminated by the passage of the Habeas Corpus Act 1679, which closed several existing loopholes in earlier legislation.⁸⁰ The act specified that a writ from the executive could no longer be considered sufficient cause for detention. It also prevented the executive from moving prisoners in order to avoid the jurisdiction of the court to which a petition for the great writ was submitted.⁸¹ While the right to the writ could be suspended, this could only be done by Parliament and not the executive.

These rights were all firmly established within the English constitutional tradition by the time Dicey created the modern definition of the rule of law. They were also featured heavily in the works of the Whig historians which Dicey drew upon heavily when creating his definition. In setting up the rule of law as the antithesis of ‘prerogative’ and ‘arbitrary power’, Dicey was operating within a tradition where these three rights were unarguably non-derogable by the executive.

The international human rights standards which define the concept of the rule of law within global constitutional law add very little to what was present in Dicey’s era. The only rights established as non-derogable by the ICCPR are, in addition to those

⁷⁹ Ryan Patrick Alford, ‘The Star Chamber and the Regulation of the Legal Profession 1570-1640’

(2011) 51 *American Journal of Legal History* 690, 723-726, David Jardine, *A Reading on the Use of Torture in the Criminal Law of England* (Baldwin and Cradock 1837)

⁸⁰ Habeas Corpus Act 1679, Habeas Corpus Act 1640

⁸¹ *Ibid*

discussed above, the prohibition on slavery and servitude, imprisonment for debt, retroactive punishment, legal personhood, and freedom of thought, conscience, and religion.⁸² All of these rights were protected by law in England at the time Dicey formulated his definition.⁸³

Both Dicey's definition and that of the United Nations implicitly recognize that the protection of these non-derogable rights is the essence of the rule of law. In Dicey's case, this becomes clear when one considers the constitutional tradition in which he participated, and its relationship to English legal history. In the case of the United Nations, one might note that General Comment 29 to the ICCPR states that Article 4's provisions are "essential for the maintenance of the . . . rule of law."⁸⁴

Accordingly, it is possible to conclude that the protection of non-derogable rights from the executive, even during times of crisis, is the normative core of the rule of law. This was the problem that the rule of law was meant to address, and which it continues to address. Additions that expand its reach should not distract from this fact. However, controversies over the extension of the scope of the rule of law's protections have created significant controversy. This has led some scholars to question if the concept of the rule of law continues to have a stable meaning. The next section will demonstrate that the normative core of the rule of law remains intact and uncontroversial. It will also

⁸² ICCPR, Articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18.

⁸³ Slave Trade Act 1807, Debtor's Act 1869, Act of Parliament (Commencement) Act 1793, Married Women's Property Act 1893, Roman Catholic Relief Act 1829, Jews Relief Act 1858, Universities Tests Act 1871

⁸⁴ General Comment 29 to the ICCPR para. 16

demonstrate that these scholarly debates implicitly confirm that there is no debate about the normative core of the rule of law, but only about how far it should be extended.

5.5 Jurisprudential Debates About Rule of Law Confirm its Core

This thesis addresses the rule of law as a concept in global constitutional law, and not the related concept in jurisprudence. However, scholars in jurisprudence have called into question whether the concept can serve a useful function within constitutional law. Accordingly, this thesis must briefly address their arguments. This section will show that the debate in jurisprudence about the rule of law does not establish that the concept cannot serve as a useful yardstick. Rather, they demonstrate that there is no disagreement about the normative core of the rule of law, and its desirability.

Within legal philosophy, the key dispute in the mid-twentieth century about the meaning of the rule of law relates to the debate between positivists and natural law theorists.⁸⁵ At the most fundamental level, it is a dispute about whether there is a connection between law and morality.⁸⁶ This disagreement is important to the rule of law because this concept implies that there are more and less desirable legal regimes, and this may require moral in addition to legal judgment.⁸⁷

⁸⁵ Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (University of Chicago Press 2001) 186-222

⁸⁶ Sanne Taekema, *The Concept of Ideals in Legal Theory* (Springer 2003) 197-206

⁸⁷ Frank I. Michaelman, 'Constitutionally Binding Social and Economic Rights as a Compelling Idea, in *Social and Economic Rights in Theory and Practice* (Routledge 2015)

The criticism of the concept of the rule of law in jurisprudence can be traced to the reception of Lon Fuller's assertion that positivist approaches in legal philosophy did not adequately account for all of the necessary features of a legal system.⁸⁸ Fuller contended that the rule of law, which he presents in the form of the principle of legality, was essential to any legal order worthy of the name.⁸⁹ The principle of legality requires that there be fixed laws, rather than merely someone who enforces his or her personal preferences.

Fuller's equation of the rule of law with the principle of legality accords with another influential twentieth-century definition of that concept. Friedrich Hayek stated that 'stripped of all technicalities th[e] [rule of law] means that government in all its action is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances'.⁹⁰

Positivist legal philosophers did not take issue with this type of description. Indeed, Jeremy Waldron notes that H.L.A. Hart did not disagree, despite the fact that Fuller's

⁸⁸ Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 593

⁸⁹ *Ibid*

⁹⁰ Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 54

definition was prompted by Fuller's disagreement with Hart.⁹¹ Waldron notes that in 'a little known essay', Hart wrote the following:

The requirements that the law . . . should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions) . . . should be publically promulgated and easily accessible . . . are usually referred to as the principles of legality. The principles which require courts, in applying general rules to particular cases, to be without . . . bias . . . are referred to as rules of natural justice. These two sets of principles define the concept of the rule of law.⁹²

Waldron also points out that Hart took a similar position in his book *Law, Liberty, and Morality*.⁹³ When discussing the offense of conspiracy to corrupt public morals, he notes that 'the particular value which they sacrificed was the principle of legality'.⁹⁴

Naturally, Hart and other positivist legal philosophers did not agree with all of Fuller's positions. The key disagreement was whether or not the principle of legality demands recourse to moral principles. This dispute, which is of critical importance in jurisprudence, is of no importance to this thesis. This thesis is not concerned with whether the rule of law requires a moral foundation, or whether it is desirable. Instead, this thesis is an empirical evaluation of the constitutional order of the United States. However, for this measurement against the 'yardstick' of the rule of law to be meaningful, that concept must not be internally inconsistent. At the conclusion of the

⁹¹ Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1135

⁹² H.L.A. Hart, 'Problems of Philosophy in Law', in Paul Edwards (ed) *The Encyclopedia of Philosophy Volume Five* (Prentice Hall 1967) 264

⁹³ Waldron *supra* n 91, 1146

⁹⁴ H.L.A. Hart, *Law, Liberty, and Morality* (Stanford University Press 1963) 12

Hart-Fuller debate, there was as yet no evidence that the concept itself was unstable. Instead, both parties agreed that it was essential to constitutional legitimacy. Additionally, there was a consensus about the contents of the rule of law, namely rules of general application and neutral adjudication.

Unfortunately, fifty years after the Hart-Fuller debate, there is no such consensus about the meaning of the rule of law as a concept in jurisprudence. Jeremy Waldron has noted that in that field of jurisprudence, the concept of the rule of law has been the subject of such intense disagreements that it should be considered an essentially contested concept. He meant that it was not merely a concept which is hotly debated, but rather one about which agreement is impossible.⁹⁵ Tamanaha has also noted that there is no agreement amongst its leading legal philosophers as to precisely what it means.⁹⁶ However, the terms of this debate confirm the last section's conclusion about the normative core of the rule of law.

The late twentieth-century debate about this concept centres on one question. Namely, whether a state can be characterized as being governed in accordance with the rule of law if it merely provides for neutral adjudication of disputes, without stipulating that citizens possess fundamental rights that the state is bound to respect. The substantive, or 'thick' theory of the rule of law asserts that the procedural or 'thin' version of the concept is insufficient.⁹⁷ However, the advocates of 'thick' theories of

⁹⁵ Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept?' (2002) *Law and Philosophy* 137

⁹⁶ Tamanaha *supra* n 72, 4

⁹⁷ Michael Neumann, *The Rule of Law: Politicizing Ethics* (Blackwell Publishing 2002) 3-6

the rule of law do not dispute that the components of the ‘thin’ theories are also necessary. While there is no agreement on the question of which rights the state must respect, there is no disagreement about the importance of the principle of legality.

Another source of dispute is whether the legislature of a sovereign state possesses the power to change the laws and to abrogate citizens’ rights.⁹⁸ This can also take the form of an argument over whether a written constitution that prevents the legislature from passing statutes that would violate fundamental rights is a necessary element of the rule of law.⁹⁹ However, there is no disagreement on the need to restrain the executive from ignoring duly enacted law, in accordance with the non-arbitrariness principle. As Arthur Goodhart argued, ‘when we turn from the control of the legislative power by the rule of law to the control of executive power we are on less controversial ground because all jurists—certainly in Western countries—agree that this is an essential part of government under law’.¹⁰⁰

The terms of these debates in legal philosophy demonstrate the implicit consensus about its normative core. There has been no decisive break between the meaning of the concept of the rule of law in jurisprudence with that of the equivalent term in constitutional law. Dicey’s definition was not destabilized in the late twentieth century. Instead, there are numerous arguments about whether the rule of law should guarantee

⁹⁸ T. R. S. Allan, ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44 *Cambridge Law Journal* 111

⁹⁹ T. R. S. Allan, *Law Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1993)

¹⁰⁰ Arthur Goodhart, ‘The Rule of Law and Absolute Sovereignty’, (1958) 106 *University of Pennsylvania Law Review* 943, 955

further protections, or whether by definition it must protect certain rights. As noted in the last section, the extension of the rule of law to the protection of non-derogable rights is uncontroversial. This state of affairs exists because these are *jus cogens* norms that are common to mankind, to which states have also bound themselves to observe in international instruments such as the ICCPR.

Accordingly, the thesis can proceed towards its empirical evaluation of the constitutional order of the United States. Relying on this consensus of the normative core of the rule of law, the next section will move to the next preliminary step. This involves creating an operational definition for these minimum standards. The next two subsections will accomplish this at two levels of specificity. The subsection immediately following will lay out the general requirements for control over the executive branch, such that it cannot behave in an arbitrary fashion without concern for the laws. This will require a discussion of the basic minimum standards of supervision and oversight of the executive, as established by the International Commission of Jurists. The final subsection of this chapter will discuss the ways in which the United States has created this oversight regime in its municipal law. It will demonstrate that the separation of powers is the means by which the United States has put into place the measures deemed necessary by the ICJ to ensure the existence of the rule of law.

5.6 Rule of Law Applies to Matters Involving ‘National Security’

There is another debate on the meaning of rule of law outside of constitutional law that this thesis must address briefly. It is located primarily within political science, and relates to the boundaries of the rule of law. Certain political theorists, some working at the intersection between political science and law, have argued that the rule of law is

of limited application to situations when the executive is responding to threats to national security.¹⁰¹

These theorists' arguments for why the rule of law should be read to have this implicit limitation on its applicability are largely outside of the scope of what this thesis must address. This is because their arguments about why this limitation is necessary or desirable would require this thesis to depart from its normative evaluation of the United States to engage in a political argument about the importance of a rule of law without broad exceptions. However, it is appropriate to note here that the limitations that these theorists advocate appears to be inconsistent with the rule of law as a concept in global constitutional law.

One critic of a rule of law that is limited to situations that do not involve national security has argued that:

It was a commonplace of classical political theory that assertions of threats of this kind are endemic to constitutional states, since this is the manner in which the executive branch of government typically seeks to extend its powers. Consequently, constitutional theorists across millennia (many of whom were known to and respected by the Framers) have rejected the emergency-based rationale for the expansion of executive powers. Indeed, it will be demonstrated below that the development of both the notion of constitutional government and the rule of law often stems from resistance to these claims on the part of consuls, emperors, and kings.¹⁰²

¹⁰¹ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be

Constitutional?' (2003) 112 *Yale Law Journal* 1011, see also Michael Stokes Paulsen, 'The Constitution of Necessity', (2004) 79 *Notre Dame Law Review* 1257

¹⁰² Ryan Patrick Alford, 'Is an Inviolable Constitution a Suicide Pact?' (2014) 58 *Saint Louis University Law Review* 355, 359

Accordingly, these theorists' definition of the rule of law would not be consistent with the historical context of its emergence, and would destabilize its normative core. On a more pragmatic note, David Dyzenhaus has noted that any exception:

exception . . . introduced into legal order and treated as such, will spread. If the minister is a law unto himself in respect of national security, there is no principled reason to hold that anyone has a legitimate expectation, procedural or substantive, or for that matter to retain any of the entitlements that judges have crafted in putting together the modern law of judicial review.¹⁰³

6 THE ICJ'S DEVELOPMENT OF A 'YARDSTICK'

As illustrated above, 'the demand that the executive be subject to the laws was the main postulate of the rule of law state.'¹⁰⁴ This fact, according to Kletacatsky, was the reason the International Commission of Jurists decided to focus on control over the executive when establishing the minimum standards of a rule of law state. This section will establish that the ICJ has created an operational definition of these basic norms. Afterwards, it will be possible to hold the separation of powers created by the Constitution of the United States up to this standard. By doing this, the thesis will determine if the unaltered constitutional order of the United States was a rule of law state.

The Commission, hereinafter referred to as the 'ICJ', provided the relevant guidelines in the International Commission of Jurists' resolutions and reports from its Congresses held during 1955 in Athens, during 1959 in New Delhi, during 1961 in

¹⁰³ David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 Australian Journal of Legal Philosophy 1, 41

¹⁰⁴ Hans Kletacatsky, 'Reflections on the Rule of Law and in Particular on the Legality of Administrative Action', (1963) 4 Journal of the International Commission of Jurists 209

Lagos, and during 1962 in Rio de Janeiro. This thesis will rely on the ICJ's particular conception of the necessary controls over the executive for several reasons. First, it is entirely compatible with the approach adopted in the last section. Second, its definition is the result of a consensus developed by jurists from many different nations. The ICJ surveyed over 75,000 lawyers from 25 countries in preparation for the conferences that created its definition of the rule of law.¹⁰⁵ Third, because this definition has proved influential, as the ICJ's reform efforts have catalysed rule of law-related reform efforts by the legal profession around the world, something which attests to the popularity of its definition of the rule of law.¹⁰⁶ While the ICJ's definition of the rule of law has been criticized by legal philosophers such as Joseph Raz,¹⁰⁷ these criticisms do not relate to the topic of the control of the executive.

6.1 The ICJ's Prohibition on the Executive Legislating

The Rio Report specifies that legislation delegating the authority to make rules to the executive must 'carefully define the extent, [and] purpose of the intended rules', while standing committees of the legislature should scrutinize and report on the rules

¹⁰⁵ Howard Tolley, *The International Commission of Jurists: Global Advocates for Human Rights* (University of Pennsylvania Press 1994) 69

¹⁰⁶ *Ibid* 74-77

¹⁰⁷ Joseph Raz, 'The Rule of Law and its Virtue' [1977] *Law Quarterly Review* 195, 211. Raz argues the rule of law only extends to guarantees of procedural fairness, and takes issue with the claim that a rule of law state must protect its citizens against violations of *jus cogens* norms — a philosophical cavil that has no traction in practical jurisprudence.

and their enforcement.¹⁰⁸ The proceedings of the Rio Congress indicate that the Commissioners were concerned with the problem was ‘the possibility of encroachments by the executive’, which ‘could arise for reasons of expediency, or from a desire for greater power’.¹⁰⁹ Accordingly, its approach to limitations on executive power was not merely a response to the possibility of an inadvertent delegation of overbroad discretion to the executive, but to the reality that there are powerful incentives for any executive branch to enlarge its own authority in a manner that might upset the balance of powers inherent in any constitutional order.

6.2 The Requirement of Judicial Review of Executive Action

As noted above, the Rio Congress focused on challenges to the rule of law presented by abuses of state power by the executive branch. The report of the Committee on Control by the Courts and the Legislature over Executive action noted that ‘the existence of effective safeguards against the possible abuse of power by the Executive is an all-important aspect of the Rule of Law.’ Accordingly, it mandated that an ‘inviolable right of access to the courts’ must exist ‘whenever the rights, interests, or status of any person[s] are infringed or threatened by executive action.’¹¹⁰ It provides a more explicit formulation than what is found in the conclusions of the Lagos

¹⁰⁸ International Commission of Jurists, *Executive Action and the Rule of Law: A Report on the Proceedings of the International Congress of Jurists, Rio de Janeiro, Brazil* (reprinting the conclusions of the New Delhi Conference, the conclusions of the Lagos Conference and the conclusions of the Rio Congress, along with the proceedings of the Rio Congress) (1962: International Commission of Jurists)

¹⁰⁹ *Ibid*, 111

¹¹⁰ *Ibid*, 27

Congress, which set up only ‘minimum requirements’ for judicial review of administrative or executive action, namely adequate notice of pending action, full disclosure of the reasons for such action, and a ‘fair hearing’ in which ‘the grounds given by the Executive for its action shall not be regarded as conclusive but shall be objectively considered by the court.’¹¹¹

The Rio Congress further specified that in addition to *ex ante* determinations of the legality of executive action, the judiciary should have ample powers for *ex post facto* review of that conduct, whenever this is challenged by a citizen who is affected by this action. Its report specified that courts should have broad powers when sitting in judgment on claims alleging executive abuses. Accordingly, the judiciary must not only be empowered to determine whether ‘the Executive acts within the powers conferred upon it by the Constitution and [whether] such laws are not unconstitutional’, but also to examine whether the executive’s discretion ‘has been exercised in a proper and reasonable way and in accordance with the principles of natural justice’, and whether ‘the powers validly granted to the executive are not used for a collateral or improper purpose’.¹¹² In order for the courts to be able to make this determination, the report mandates that ‘it should be for the Court to decide whether any claim not to disclose State documents is reasonable and justified’.¹¹³

These criteria have sufficient substantive content to provide a clear ‘yardstick’ against which the avenues of judicial review of executive action can be compared.

¹¹¹ Ibid, 17

¹¹² Ibid, 27

¹¹³ Ibid

However, one might criticize this mandate of judicial control over the executive for being too vague, not on the basis of the standard against which the executive will be judged, but rather on the question of whether it fails to define the type of executive action that should be considered reviewable. Speaking of the requirement for judicial review contained in the Rio Report, Anthony Matthews has noted that it ‘either claims too much for the rule of law by suggesting that legal remedies are (or should be) available for every prejudicial executive action; or it avoids the question of precisely when an actionable invasion of rights, interests of status takes place’.¹¹⁴

Accordingly, Matthews suggests that the rule of law requires only that there be ‘limited and specific requirements for the legal control of the executive’, namely that the executive should be prevented by the judiciary from abrogating basic civil rights.¹¹⁵ His approach is consistent with that of this thesis. Namely, he outlined the minimal criteria, so that there can be no disagreement on the basis of these differing models of the rule of law. There can be no disagreement, even where more ample review of executive action might be thought by some jurists to be desirable, that if judicial review is a necessary component of the rule of law, that this should extend at the very least to claims that the executive has or will deprive a citizen of their non-derogable rights. However, the ICJ also noted that this important safeguard of citizens’ rights can be easily circumvented if the judiciary itself can be controlled. This is because the right to bring these cases matters little if the judges are little more than creatures of the executive branch.

¹¹⁴ Anthony S. Matthews, *Freedom, State Security and the Rule of Law — Dilemmas of the Apartheid Society* (Juta and Co. 1986), 25

¹¹⁵ Ibid

Accordingly, the Act of Athens states that judges must ‘resist any encroachments . . . on their independence’¹¹⁶ in order to be able to enforce the provisions of the rule of law that depend upon their scrutiny of the executive. The New Delhi Report specifies the conditions under which judges must work in order for the judiciary to be considered independent. The preconditions for independence are that judges are appointed in accordance with a procedure that involves the judiciary, and receive adequate remuneration, which should be fixed and inalterable during a lifelong term of office.¹¹⁷

The Resolution of Rio noted that the ICJ needed to address the ‘the independence of the judiciary . . . and its freedom from control, direct or indirect, by the Executive.’¹¹⁸ The Rio Report concluded that the judiciary must also have adequate authority for judges to be considered independent. It states that the judiciary ‘must be given the jurisdiction to determine *in every case* upon application whether the circumstances have arisen or the conditions have fulfilled, under which such power [delegated from the legislature to the executive] is to be or has been exercised.’¹¹⁹ This formulation implies that the courts must have the final word when determining their jurisdiction over the executive. In other words, they must have a Kompetenz-kompetenz power.¹²⁰

¹¹⁶ ICJ *supra* n 108, 3

¹¹⁷ ICJ *supra* n 108, 12

¹¹⁸ ICJ *supra* n 108, 23

¹¹⁹ ICJ *supra* n 108, 17 (emphasis added)

¹²⁰ See Anne-Marie Slaughter, Alec Stone Sweet and Joseph H H Weiler, *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing 1998) 92-103

This jurisdiction must extend to every possible claim of infringement of non-derogable human rights by the executive, and includes the power to determine whether evidence sought from the government by the plaintiff can be properly withheld in the interest of state security.¹²¹ The jurists responsible for the Rio Report also reaffirmed that the review of executive action should not be reserved to special tribunals, but ‘entrusted to the ordinary or the administrative courts’.¹²²

It should be noted that these reports contain no exceptions in these requirements of an independent judiciary and legal profession for times of crisis or even for states of emergency. The Act of Athens further states that jurists should enforce the rule of law ‘without fear’.¹²³ However, the greatest challenge to this requirement relates to the pressure put on the justice system during these periods, and accordingly the ICJ has discussed the challenges to the rule of law that relate to states of emergency in detail.

6.3 The ICJ on the Legislative Oversight During an Emergency

The last requirement is vital to ensuring the rule of law remains in place during any state of emergency. The Rio Report reiterates that in a constitutional state, the proclamation of such a crisis does not suspend all of the laws and abrogate every fundamental right. Rather, the state of emergency exists within a legal framework.¹²⁴ The executive must act in accordance with legislation that remain in place during an

¹²¹ ICJ *supra* n 108, 27

¹²² ICJ *supra* n 108, 107-08

¹²³ ICJ *supra* n 108, 3

¹²⁴ Matthews *supra* n 114, 265

emergency. The New Delhi Report also states that the legislature may not abrogate fundamental human rights.¹²⁵

7 Separation of Powers as Implementation of the Rule of Law

Within domestic American legal discourse, the concept most often employed when discussing constitutional safeguards against abuses of authority and excessive accumulation of power in a manner that damages the integrity of the legal system is not the rule of law, but the separation of powers. This is largely the result of the time when the Constitution of the United States was created. The phrase ‘rule of law’ was popularized after 1787, whereas before that date, the concept that this phrase describes was normally described by reference to the political structures advocated by proponents of limited monarchy. In Anglo-American jurisprudence, the terminology that described the sort of constitutional order that protected the supremacy of law over the rule of men was usually referred to as a ‘mixed’ or ‘balanced’ constitution.¹²⁶

The genesis of this idea within the Anglophone jurisprudential tradition lies in the response to monarchs who attempted to govern in a manner that was not consistent with England’s traditional mode of governance, which was not absolute monarchy, but rather *dominium politicum et regale*.¹²⁷ The monarch’s key constitutional function was not to make law or to act as a judge, but rather to execute the laws. Unfortunately, under a mixed constitution no clear barriers to the monarch’s usurpation of these other functions

¹²⁵ ICJ *supra* n 143, 8

¹²⁶ M J C Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 36-43

¹²⁷ John Fortescue, *The Governance of England: Otherwise Called the Difference Between an Absolute and a Limited Monarchy* (first published 1714, Lawbook Exchange 2010) 109-13

of government existed.¹²⁸ The reaction to the early Stuarts' overreaching created the demand for a constitutional order that limit royal powers. '[After 1649] [t]he idea that the King should be limited to the exercise of the executive function was now well understood.'¹²⁹

'When the Restoration came in England it all but swamped the new doctrine [of separation of powers] by assimilating it . . . to the complex theory of the balanced constitution; in the America of 1787 the doctrine of the theory of checks and balances was modified . . . by the theory of checks and balances drawn from the older conception of English constitutional theory.'¹³⁰ The approach of the American revolutionaries, who in framing the new country's mode of government were influenced strongly by Montesquieu and Blackstone, was to create a more rigid division of responsibilities between the branches.¹³¹

This theory of the separation of powers grants the legislature exclusive authority to make law, the executive only the power to enforce it, and to the judiciary it gives the ability to referee disputes, and to determine whether the actions of the other branches of government comply with the constitution's commands. This approach is outlined explicitly in the Constitution of the United States. The exclusivity of Congress' law-making power is explained at the beginning of Article I. 'All legislative Powers herein

¹²⁸ J. W. Gough, *Fundamental Law in English History* (Oxford University Press 1955) 66-79

¹²⁹ Vile *supra* n 126

¹³⁰ *Ibid* 133

¹³¹ *Ibid* 110-15

granted shall be vested in a Congress of the United States'.¹³² In order to prevent the President from enlarging the scope of his own powers, Article II makes it clear that the constitution invests him with 'executive powers', which are specifically enumerated in section four.¹³³ Article III vests the judicial power of the United States exclusively in the judiciary. It is granted in section one to the federal judiciary and section two specifies that 'the judicial power [thus vested exclusively in the courts] shall extend to all cases in law and equity'.¹³⁴

It is a simple matter to illustrate that the intention of this constitutional design was to prevent the accumulation of power within one branch government, as contemporary writings by its key authors urging its ratification say so, and these tracts pay special attention to the problem of executive aggrandisement. James Madison, who is commonly called the 'Father of the Constitution'¹³⁵ justified the proposed constitution's separation of powers by reference to principles of fundamental justice. 'No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial

¹³² Constitution of the United States of America, article 1

¹³³ Constitution of the United States of America, article 2, section 4

¹³⁴ Constitution of the United States of America, article 3, sections 1 and 2

¹³⁵ Ralph Ketcham, *James Madison: A Biography* (University of Virginia Press 1971) 229

determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?’¹³⁶

On this same subject, in the Federalist No. 47 he argued that ‘The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny’, and quoting Montesquieu he put the question as follows. “When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.” Further, in the same letter Madison argues “[w]ere the power of judging joined with . . . the executive power, *the judge* might behave with all the violence of *an oppressor*.” Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.’¹³⁷

Alexander Hamilton explained the importance of judicial review of the constitutionality of the laws in Federalist No. 78. He argued that ‘where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental’.¹³⁸ Accordingly, we can see in the American constitution a clear commitment to the principles of the supremacy of law and to checks on the

¹³⁶ James Madison, ‘Federalist Number Ten’, in Clinton Rossiter (ed) *The Federalist Papers* (1st paperback edition, Penguin Putnam 1991) 47

¹³⁷ Ibid 271

¹³⁸ Ibid 436

powers of the government in an organic law establishing the nation's constitutional order.

This thesis will demonstrate that of the executive's enlargement of powers in the twenty-first century, combined with the other branches' acceptance of that aggrandizement, subverts the Constitution of the United States. The executive definitively rejected the core principles of the rule of law embedded within it, which are found in the principles of the separation of powers and judicial review of unconstitutional law-making. This separation of powers is the operationalization of the principles of control over the executive specified in the ICJ's reports within the United States. Accordingly, the subversion of these principles, when it empowers the executive to violated non-derogable norms with impunity, is also the destruction of the rule of law in the United States.

8 CONCLUSION

This chapter of this thesis has defined its central objective. Its goal is to demonstrate that the United States has not been governed in accordance with the rule of law since the changes to its mode of government that were implemented after the 9/11 attacks. It has outlined how it will go about proving this point. This will be done by demonstrating that the two other branches of the American government have abandoned their role as checks on the executive during this period, fatally undermining the principles of the separation of powers that previously prevented the executive branch from violating citizens' non-derogable rights with impunity. This chapter also defined the concept of the rule of law that will be used when judging these changes to the country's constitutional order, and outlined the particular criteria against which the oversight and control of the executive branch must be judged. As these goals, definitions, and

operational criteria have all been set forth, this thesis can now proceed to the empirical examination of the changes that have taken place and to the normative assessment of this transformation.

Chapter 2

THE HISTORICAL DEVELOPMENT OF THE RULE OF LAW IN THE UNITED STATES

1 INTRODUCTION

The first chapter outlined a defensible definition of the rule of law that this thesis can use as a ‘yardstick’ to judge the United States after the 9/11 attacks. However, this thesis does not aim solely to produce a normative judgement. It must also explain how this transition was possible for a country that was once an exemplar of a rule of law state. This task includes a consideration of a narrower issue, namely how it is possible that a nation could remain within the norms of the rule of law for centuries before abandoning its limitations.

To address these issues adequately, it is necessary to discuss the crises that periodically tested the durability of the constitutional order of the United States throughout its history. It will become apparent in this chapter that the design of the American republic, and, in particular the separation of powers that safeguards its rule of law, was a response to its framers’ fears of particular sorts of crises. They believed that these types of emergencies would reinforce the power of the executive. Accordingly, without certain safeguards, the nation would begin to take on the characteristics of tyranny that the American revolutionaries revolted against.

As this chapter will describe, the separation of powers that restrained the executive was powerful enough to resist the sorts of temporary crises that characterized American political life during the nineteenth and early twentieth centuries. However, as the framers predicted, the factor that tends to catalyse the growth and increased power of

the executive most effectively is a state of prolonged war. The United States did not encounter this state of affairs until the mid-twentieth century.¹

1.1 The Resiliency of the Rule of Law from 1787 to 1940

Until the twentieth century, the rule of law was protected adequately by the separation of powers defined in the Constitution of the United States.² In the first one hundred and fifty years of the nation's existence, Congress and the courts checked the powers of the President as its Framers intended.³ Although ambitious presidents attempted to expand their powers during crises, they were repeatedly rebuffed, from the earliest days of the American republic.⁴

The Framers contemplated the possibility of these sorts of crises, and believed that the design of the Constitution was sufficiently robust to resist the dangers to the rule of law that would ensue. While they were concerned about the ability of the executive branch to enlarge its own powers and to become unaccountable,⁵ the Federalists who exercised a decisive influence on the framing believed in a science of politics that would

¹ Note that the United States was actively involved in the First World War only during its final year, and the American Civil War, its most prolonged war until the Second World War, lasted only four years.

² Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner 2004) x-xv

³ Gene Healey, *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Cato Institute 2008) 46

⁴ *Ibid* 38-45

⁵ Alexander Hamilton, 'Federalist No. 8', in Charles R. Kesler and Clinton Rossiter, (eds) *The Federalist Papers* (Mentor 1999) 36

allow them to construct a system that could preserve a stable constitutional order.⁶ They found another possibility more worrisome. Like many other political theorists before them, they were concerned with the impact of prolonged warfare on the balance of powers.⁷ Alexander Hamilton noted that '[i]t is of the nature of war to increase the executive at the expense of legislative authority', as it necessitates 'strengthening the executive arm of government, in doing which their constitutions would acquire a progressive direction towards monarchy'.⁸ This was an alarming prospect. It is clear that the isolationism and general disengagement from European controversies⁹ during the early years of the republic was driven by the fear that prolonged warfare would distort the separation of powers that ensured that their constitutional order was 'a government of laws and not of men'. As Hamilton argued:

Safety from external danger is the most powerful director of national conduct . . . the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to the institutions which have a tendency to destroy their political and civil rights.¹⁰

Hamilton also noted that since warfare empowered the President and led to dangers to civil rights, there was a persuasive rationale for taking the powers of war and peace

⁶ James Madison, 'Federalist No. 10', in Charles R. Kesler and Clinton Rossiter (eds), *The Federalist Papers* (Mentor 1999) 45-52

⁷ Healey *supra* n 3, 28-33

⁸ Hamilton *supra* n 5, 36

⁹ Neutrality Act 1794, ch. 50, 1 Statutes 38; Neutrality Act 1817, 3 Statutes 370, section 1 (1817); See Jules Lobel, 'Covert War and the Constitution', (2012) 5 *Journal of National Security Law and Policy* 393, 398-399

¹⁰ Hamilton *supra* n 5, 35

out of the hands of the executive, as these powers would subject it to excessive temptation. He argued that '[t]he history of human conduct does not warrant that exalted opinion of human virtue which would make it wise to commit interests of so delicate and momentous a kind . . . to the sole disposal of . . . a President'.¹¹ Hamilton, in short, thought that since the executive branch could enlarge its powers during a prolonged war, the power to declare war must be jealously guarded by Congress. James Madison argued in 1793 that 'war in fact is the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states . . . to disarm this propensity of its influence'.¹²

Accordingly, Madison also concluded that Congress hold the exclusive power to declare war, since its powers would not be increased, but rather diminished by a prolonged state of conflict. Madison later intimated that a President might create a foreign crisis merely to increase his domestic powers, noting that 'Perhaps it is a universal truth, that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad'.¹³ As this chapter will demonstrate below, the Framers' fears were not misguided. Accordingly, the contemporary relevance of

¹¹ Ibid 419

¹² James Madison, 'Letters of Helvedius', Nos. 1-4, in *Letters and Other Writings of James Madison Volume Two* (J. B. Lippincott & Co. 1865) 67

¹³ James Madison, 'Letter to Thomas Jefferson of May 13, 1798', in *Letters and Other Writings of James Madison Volume Two* (J. B. Lippincott & Co. 1865) 141

executive unaccountability after the executive's creation or manipulation of crises as a threat to the rule of law deserves serious consideration.

Alexis de Tocqueville foresaw the possibility as well. He predicted that '[i]f the existence of the American Union were perpetually threatened . . . the executive would assume an increased importance'.¹⁴ He, like Madison, underlines the conflict of interest that would be created if the executive branch managed to obtain control over the field of foreign affairs such that it could bring the nation to war by either overt or covert means. This problem was apparent to many political thinkers during the nineteenth century.

The prophecies about the danger of the temptation to create an empowered executive finally came to pass in the twentieth century. At this time prolonged warfare and sustained alarms of danger from abroad, whether real or pretended, were used as a means by which the executive branch enlarged its own powers and curtailed liberty, in a manner that threatened the separation of powers and the rule of law. America broke decisively from its pattern of isolation in 1941, and over the course of the next thirty years of warfare the powers of the chief executive grew to the point that they could be described aptly as those of an 'imperial presidency'.¹⁵ What must be demonstrated in this chapter is that these wars imperilled the rule of law, and why. This demonstration will require an explanation of how these wars were entered into or enlarged owing to decisions made by the executive branch alone. It will also require a description of how the executive enlarged its powers during this crisis period so decisively that, at its zenith, it effectively removed itself from effective oversight and control of the

¹⁴ Alexis de Tocqueville, *Democracy in America*, vol. 1, (George Adlard 1839) 130

¹⁵ Schlesinger *supra* n 2, 100-187

legislature and the judiciary. It will be demonstrated that it did so in a manner that the previous chapter demonstrated was entirely incompatible with the minimum requirements of the rule of law state.

1.1.1 Rule of Law from Framing to 1860: Constitutional Supremacy

The first clear example of attempted executive aggrandizement is instructive. As President, Thomas Jefferson attempted to become the ultimate arbiter of constitutional questions, in an attempt to supplant the Supreme Court, which he derided once in office.¹⁶ Attempting to pursue political ends in the courtroom, he sought to withhold documents from the defence during a politically motivated treason trial.¹⁷ The Supreme Court rejected his arguments for an executive role in legislative and constitutional interpretation in *Marbury v. Madison*.¹⁸ Chief Justice Marshall did the same when disposing of Jefferson's claims of executive privilege against subpoenas, in *United States v. Burr*.¹⁹ During the early years of the republic, the judiciary quickly proved itself to be an effective check on the executive. John Marshall established that the judiciary was a co-equal branch of government with a special responsibility to

¹⁶ Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 7 H. A. Washington (ed) (Taylor & Maury 1854) 178

¹⁷ Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Elephant 1989) 71-72); Gary Wills, 'The Strange Case of Jefferson's Subpoena' *New York Review of Books* (New York, 2 May 1974)

¹⁸ *Marbury v Madison* [1803] 5 US 137 (United States Supreme Court)

¹⁹ *Burr v United States* [1807] 25 FCas 30 (Central District of Virginia Circuit Court)

protect citizen's constitutional rights against invasion by the other branches of government.²⁰

²⁰ Lawrence M. Friedman, *A History of American Law* (Touchstone 2005) 86

1.1.2 The Rule of Law in the 19th Century: Tested, but Unyielding

During the next century, the Civil War would put separation of powers to the test, by offering compelling rationales for the expansion of executive powers beyond the bounds of accountability to the law and the other branches of government. President Abraham Lincoln unilaterally suspended *habeas corpus* at the beginning of this conflict, but he acknowledged that his action was irregular and that it required Congress' sanction.²¹ Furthermore, the executive's decision to try alleged conspirators before military tribunals while the civilian courts remained open was rebuked by the Supreme Court in *Ex Parte Milligan*.²² Accordingly, the four years of civil war did not result in substantial changes to the separation of powers. As had been the case with other crises, presidential assertions of emergency powers and allegations of superiority over the other branches of government were soon forgotten after the danger receded.²³

After the Civil War, Congress soon re-established its power to punish executive encroachments of its authority to set government policy. President Andrew Johnson was impeached for attempting to undermine Congress' policies by dismissing officials in a manner that violated the Tenure of Office Act of 1867,²⁴ which it passed over Johnson's veto. This action demonstrated that the legislative branch was determined not to allow the executive to interpret legislation in a self-serving manner that enlarged

²¹ Jonathan Hafetz, 'A Different View of the Law: Habeas Corpus during the Lincoln and Bush Presidencies', (2008) 12 Chapman Law Review 439, 444-446

²² *Ex Parte Milligan* [1866] 71 US 2 (United States Supreme Court)

²³ Schlesinger *supra* n 2, 66

²⁴ Tenure of Office Act 1867, 14 Statutes 430, section 154

the President's powers.²⁵ Johnson believed that the Act was unconstitutional, and argued that because of that fact he still possessed the power to dismiss Secretary of War Edward Stanton, who was implementing Congress' Reconstruction policy of using the military to enforce its laws enfranchising African-Americans. The impeachment side-lined Johnson, destroying his credibility and his ability to influence policy. On this basis, one can conclude that the legislature proved itself an effective restraint on executive usurpation during the nineteenth century.

2 THE COLD WAR PRESIDENCY AND THE RULE OF LAW

Between 1941 and 1971, a period in which the United States was continuously at war, either hot or cold, the executive branch exceeded the limits of what the Constitution allowed. It did so by starting new wars on the President's own initiative, wiretapping political activists, and preventing bills limiting the executive's powers from becoming laws. At the same time, the oversight and regulation of the other branches of government withered during this slow process of aggrandizement.²⁶ The presidential unaccountability that this created²⁷ was the genesis of the severe constitutional crisis that erupted during the Nixon Administration. At that time, the executive used these broad powers in a manner that openly side-lined both the

²⁵ Ibid 71-75

²⁶ Ibid 61

²⁷ Schlesinger *supra* n 2, x

legislature and the courts, until these branches acted decisively to restore the separation of powers.

This chapter of the dissertation will describe in detail both the creation and the dismantling of the imperial presidency. It will demonstrate that the rule of law was put into serious peril, but after the reassertion of congressional and court oversight, the United States was governed in accordance with the requirements of the rule of law. This state of affairs persisted until the emergence of a new state of prolonged warfare inaugurated by the 9/11 attacks. As noted above, the four following subsections of this chapter will describe a set of developments in turn. First, it will outline the growth of unchecked presidential powers between 1941 and 1968. Second, it will detail the use of these powers by President Nixon, and how this constituted a decisive break with the rule of law, owing to his rejection of any oversight or control. Third, it will chronicle the discovery of the scope of the abuse of presidential powers during this period, as they were later detailed by the Senate Select Committee on Intelligence, hereinafter described as the ‘Church Committee’. Fourth, it will describe how Congress and the courts’ reaction re-implemented the rule of law.

This will demonstrate that during a period of prolonged war, the executive was able to obtain broad delegations of power that made it effectively immune from oversight and control from the other branches in the way that the Constitution and the rule of law require. During this period, the rule of law was undermined to the point that the executive could violate citizens’ non-derogable rights with impunity. The backlash to Nixon’s abuses, however, reinforced and entrenched the rule of law in the domestic law of the United States. Accordingly, the evaluation of the rule of law in the United

States after the 9/11 attacks can focus on the willingness of Congress and the courts to protect these features of the rule of law in a turbulent and belligerent era.

Until the twentieth century, the United States pursued an isolationist foreign policy.²⁸ Outside of crises like the Civil War, the executive branch was presented with few opportunities to expand its powers, much less expand them to the point that it could violate citizens' non-derogable rights without facing scrutiny and rebukes from Congress and the courts. The decision to commit American troops to battle in Europe in 1917 was controversial, and the one year of warfare did not yield any opportunities for the executive to gain or to use executive powers that might destabilise the rule of law.

In the early years of the Second World War, it appeared likely to many observers that the United States would remain neutral, and thereby avoid a political crisis.²⁹ The nation shifted suddenly into crisis governance after a devastating surprise attack. The attack on Pearl Harbour plunged the United States into a state of war that would transition repeatedly from 'hot' to 'cold', but as will be demonstrated below, the nation remained in a constant state of emergency. This attack also inaugurated a shift away from the requirements of the rule of law, such that even the most fundamental rights of citizens, to due process, to be free from prolonged arbitrary detention, and even to life itself, were abrogated by the executive without any resistance from other branches of

²⁸ Eric A. Nordlinger, *Isolationism Reconfigured: American Foreign Policy for a New Century* (Princeton University Press 1995) 12

²⁹ Ronald E. Powaski, *Toward an Entangling Alliance: American Isolationism and Europe 1901-1950* (Greenwood 1991) 110

government, and without any redress. As this chapter will illustrate, this would remain the norm until this process reached its logical terminus during the Nixon administration.

Between 1941 and 1968 the executive branch acquired extensive powers that far exceeded what was granted by Article II of the Constitution of the United States.³⁰ This gradually made it unaccountable, defeating the purpose of the separation of powers that safeguards the rule of law and guarantees citizens' protections against violations of *jus cogens* norms by the executive branch. While these powers were initially used only infrequently, they created a precedent.³¹

As noted above, the crisis period began with the attack on Pearl Harbour, an act so shocking to Americans that it allowed President Franklin Roosevelt to take unprecedented action in a political atmosphere that precluded any resistance or criticism.³² The President was able to assume to himself broad new powers, which were in the main not derived from Congress, but instead from Declarations of National Emergency that he issued.³³ These national emergency powers authorized the President to 'seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law . . . and, in a variety of ways, control

³⁰ Healey *supra* n 3, 89-104

³¹ Schlesinger *supra* n 2, 176

³² Christine Ann Lobasso, 'Elevation of the Individual: International Legal Issues that Flow from the American Internment of the West Coast Japanese during World War II', (1998) 8 *Touro International Law Review* 45

³³ Schlesinger *supra* n 2, 115

the lives of United States citizens'.³⁴ The Second World War allowed Roosevelt to assume supplementary powers that were not expressly delegated by Congress, which is in tension with the requirements of the rule of law as outlined in the last chapter.

Roosevelt believed that he also possessed emergency powers owing to his status as the Commander-in-Chief in wartime, and because of his inherent duty to 'take measures to avert a disaster which would interfere with the winning of the war'.³⁵ Roosevelt elevated this duty above the laws. In one early example, he told Congress that if agricultural provisions of the Emergency Price Control Act were not repealed within three weeks, he would refuse to enforce the statute.³⁶ Congress capitulated to this unwarranted assertion of executive power. More regrettably, the Supreme Court did likewise when Roosevelt took actions that deprived American citizens of their right to be free from arbitrary detention and from death sentences imposed without due process. These actions that illustrate the implications of the abrogation of the rule of law.³⁷

On May 19, 1942, all American citizens of Japanese ancestry were ordered to leave their homes and relocate to internment camps, pursuant to the Civilian Restrictive Order. This order was authorized by Executive Order 9066, itself issued three months earlier by the president.³⁸ It should be noted that the Office of Naval Intelligence earlier

³⁴ Congressional Research Service 'National Emergency Powers' (Congressional Research Service 2007) 1

³⁵ Remarks of Franklin D. Roosevelt to Congress of 27 September 1942, quoted in Schlesinger *supra* n 2 115

³⁶ *Ibid*

³⁷ William H. Rehnquist *All the Laws But One* 136-137, 184-202 (Knopf 1988) 137-38, 184-202

³⁸ Executive Order No. 9066, 7 Federal Register 1407 (25 February 1942)

found that there was no evidence that Japanese Americans were involved in any clandestine activity at that time. Despite the fact that this vitiated the rationale of internment, Solicitor-General Charles Fahy withheld this evidence from the Supreme Court, in violation of his duty of absolute candour.³⁹ However, the Supreme Court appeared predisposed to rule in the government's favour during the internment cases that followed, especially after Congress acted quickly to rubber-stamp this 'most shameful abuse of power'.⁴⁰

Certain Justices believed that the internment was unconstitutional, as it was recognized some forty years later.⁴¹ Despite that belief, they failed to follow Chief Justice Marshall's example in standing up to executive overreaching. Instead, they defended broad presidential powers in wartime even when they are unconstitutional on their face. Justice Jackson wrote in dissent that 'defense measures will not, and often should not, be held within the limits that bind civil authority in peace', as 'military decisions are not susceptible of intelligent judicial appraisal'.⁴² To meet the basic requirements of the rule of law state, a nation must have a judiciary empowered to stand up to the executive when it violates citizens' non-derogable rights. However, a dangerous precedent was set during the Second World War, when both the executive and public opinion were aligned against the Justices. If this same dynamic can be seen

³⁹ Neal Katyal (Acting Solicitor General of the United States), 'Confession of Error: The Solicitor-General's Mistakes During the Japanese-American Internment Cases (20 May 2011) <blogs.justice.gov/main/archives/1346> accessed 26 May 2014

⁴⁰ Schlesinger *supra* n 2, 115

⁴¹ *Korematsu v United States* [1984] 584 FSupp 1406 (Northern District of California)

⁴² *Korematsu v United States* [1944] 323 US 245 (United States Supreme Court) (Jackson J)

at work outside of a transient crisis, it calls into question whether the state is in compliance with the basic requirements of the rule of law state.

Another example of the Courts' abdication of responsibility during the intense political pressure created by the fear, anxiety and hatred fomented when the United States was propelled into the Second World War is found in its *Ex Parte Quirin* opinion.⁴³ This opinion discussed the military trial of eight alleged German saboteurs, one of whom was an American citizen, captured shortly after arriving in the United States by submarine. Rather than trying these prisoners in the civilian courts, as *Ex Parte Milligan* requires, Roosevelt convened a secret military tribunal for an unconstitutional purpose. The tribunal process was designed to introduce otherwise inadmissible evidence, in order to secure a favourable verdict.⁴⁴

The Supreme Court, when presented with a petition for a writ of *certiorari* after the denial of writs of *habeas corpus*, went to great lengths to accommodate Roosevelt, even announcing the denial of relief almost immediately, and before deciding upon the rationale for their decision. After the Court declined the petition, but before it publically explained its reasoning in this momentous case, Justice Jackson circulated a draft opinion. This opinion influenced the development of the Court's deferential approach in the cases challenging executive power that were to follow.⁴⁵ In it, Jackson argued that the treatment of prisoners of war was an issue related to foreign policy and

⁴³ *Ex Parte Quirin* [1942] 317 US 1 (United States Supreme Court)

⁴⁴ Glenn Sulmasy, 'Ex Parte Quirin and Military Commissions under the Obama Administration', (2010) 41 University of Toledo Law Review 767, 773

⁴⁵ Jack Goldsmith, 'Justice Jackson's Unpublished Opinion in *Ex Parte Quirin*', (2006) 3 Green Bag Law Journal (2nd series) 223, 226

national security with which the President was entrusted, and which the court was not competent to second-guess. This approach set a precedent for the Court's later attempts to maintain its legitimacy when it chose not to decide cases involving invasions of citizens' non-derogable rights. The Justices now possessed the raw material out of which they could build a doctrine of deference to the executive in matters involving the military and national security. To do so, the Court developed a tactic, to be deployed when faced with controversial cases when there was no popular or political support for challenging the other branches of government. Its strategy was to 'use[] procedural rules to avoid decisions of substance'.⁴⁶

In addition, despite the fact that the type of military tribunal at issue in *Quirin* was not provided for by statute, Jackson argued 'the President had *inherent* authority to create military commissions', 'a remarkable analysis [that] hints at an exclusive Commander-in-Chief power without any citation of authority'.⁴⁷ The published decision also distinguished *Ex Parte Milligan* by stating that in the case at bar, the petitioners were 'unlawful combatants',⁴⁸ despite this having only been proven in a trial that lacked due process. It ruled in this manner despite this being the key fact that the petitioners contested in their request for the writ; they were motivated to seek an order transferring them to civilian court because it would allow them to prove otherwise. Again, this proved to be a dangerous precedent for cases in the future that make claims

⁴⁶ S Scheingold, *The Law in Political Integration: The Evolution and Integrative Implications of the Regional Legal Processes in the European Community* (Harvard University 1971) 21. Scheingold was referring in particular to the European Court of Justice.

⁴⁷ Goldsmith *supra* n 45, 227

⁴⁸ *Quirin supra* n 43, 30-31

related to arbitrary and indefinite detention. It provided the basis for the executive to claim that the judiciary possessed no right to review its own determination of the facts that the petitioners claim were wrongly decided, even if the executive branch's procedure did not comply with the principles of natural justice.

If in wartime the executive possessed, after declaring a national emergency, the unreviewable authority to refuse to enforce statutes, to imprison thousands of American citizens, and to unilaterally designate citizens as enemy combatants who could be tried and executed without due process and without access to the civilian courts or writs of *habeas corpus*, it seems possible to conclude, on the basis of the definition established in chapter one, that the United States was not a rule of law state during the Second World War and its aftermath. Here, the executive violated citizens' non-derogable rights not to be subjected to prolonged arbitrary detention, to have access to the courts, and ultimately, not to be killed.

Despite these manifest failures to conform to the minimum standards of the rule of law, no one made the argument that the United States was, at that time, not a rule of law state. This omission can be attributed to two factors. First, criticism of the President and Commander-in-Chief during wartime was considered tantamount to sedition. Second, because many hoped that this was merely the result of a transient crisis, such as that which led Lincoln to suspend *habeas corpus*. Admittedly, there is a distinction between a state that is temporarily out of compliance with the requirements of the rule of law and one which is no longer a rule of law state. The facts that this thesis must turn to here relate to what happened when the emergency never ended. It can then

discuss the implications of this to the status of the rule of law in the United States at that time.

2.1 From Hot War to Cold: New Challenges to the Rule of Law

In the wake of American triumph in the Second World War, the failures of the rule of law were quickly forgotten, as no one had any interest in calling attention to actions they thought were aberrational. Even the victims of Japanese internment were anxious to ignore and forget the injustices that they suffered. Congress briefly reasserted itself against the executive branch, which also was weakened considerably by the succession of Harry Truman. It should be noted that at this time, Vice President Truman was elected to that office only three months prior to Roosevelt's death. He lacked an independent power base in national politics. His approval rating fell to 33% by September of 1946.⁴⁹

This formal return to the strictures of the rule of law made possible by the weakness of the American executive outside of times of crisis was very tenuous, as that year also heralded a new conflict, which was soon labelled the cold war. 'The end of the Second World War brought the customary diminution of power But this time the diminution was brief. The Cold War, by generating a climate of sustained and indefinite crisis, aborted the customary reversion of power to the coordinate branches'.⁵⁰ While

⁴⁹ Roper Center for Public Opinion Archives, 'Job Performance Ratings for President Truman', *Roper Center for Public Opinion*,
<http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Truman#.UJWMCoaTZpg> accessed 26 May 2014

⁵⁰ Schlesinger *supra* n 2, xv

the nature of this crisis was initially unclear, it was soon recognized as an existential threat to the United States. Accordingly this emergency became the justification for ever broader assertions of unreviewable executive powers, the termination of which waited for some resolution of what appeared to be an irresolute conflict between the 'free' and communist spheres of influence.⁵¹

1947 also witnessed the birth of the Central Intelligence Agency, which will hereinafter be referred to as the 'CIA'. This agency soon became a key tool for the executive, as it allowed for great freedom of action without any accountability. This unaccountability involved a failure to provide for effective legislative oversight of incredible discretionary powers, which included the ability to direct the CIA's private armies and to catalyse new wars and expand those already in progress.⁵²

The Berlin blockade quickly demonstrated that minor skirmishes between the two blocs had the capability to develop into a conflagration. The development of a Soviet nuclear arsenal in 1949 showed that this could invite a level of destruction that was previously unimaginable. The invasion of South Korea by an army equipped by the Soviet Union led President Truman to declare a national emergency, because 'world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world'.⁵³ This state of emergency would remain in effect until 1978.⁵⁴ The declaration gave the executive specific extraordinary powers, but these

⁵¹ Healey *supra* n 3, 93-94

⁵² Schlesinger *supra* n 2, 167

⁵³ Presidential Proclamation No. 2914, 15 Federal Register 9029 (19 December 1950)

⁵⁴ See United States Code, title 18, section 1601

were less significant to its political fortunes than the political climate the Cold War created. As will be described below, this new atmosphere allowed the executive branch to assume powers that dwarfed those emergency powers that were expressly delegated. 'From the start, the Cold War fostered an overarching sense of crisis. By 1947, the concern of the nation was focused on the perceived threat posed by Soviet expansionism . . . the first comprehensive analysis of the nation's position after World War II predicted an indefinite period of foreign relations crisis and recommended a massive military expansion . . . [which] echoed throughout the Cold War'.⁵⁵

Truman set another important precedent that greatly expanded executive power when he committed American forces to battle without a declaration of war, or even implicit congressional approval.⁵⁶ In fact, Truman decided not to seek it, relying instead on a constitutional case that 'was far from conclusive'.⁵⁷ However, Congress failed to react, as 'Korea beguiled the American government first into an unprecedented claim for inherent presidential power to go to war and then into an ill-advised resentment against those who dared bring up the constitutional issue'.⁵⁸ The political atmosphere of the Cold War prevented Congress from challenging this overreaching, which clearly contradicted the Constitution's War Powers Clause.⁵⁹ This set a

⁵⁵ Jill Elaine Hasday, 'Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War' (1996) 5 *Kansas Journal of Law and Public Policy*, 137

⁵⁶ Healey *supra* n 3, 89-91

⁵⁷ Schlesinger *supra* n 2, 133

⁵⁸ *Ibid* 135

⁵⁹ Constitution of the United States, article 1, section 8, clause 11

precedent that continued throughout this prolonged crisis, which was used to justify such actions as the American invasion of the Dominican Republic in 1965.⁶⁰ Congress uncovered President Johnson's misleading comments about the circumstances of that latter invasion, but he was not held accountable.⁶¹ The legislature failed to exercise oversight or hold the executive responsible. Congress felt that this would expose it to negative public opinion and the charge that it was 'soft' on Communism. Congress also feared that its defence of the principle of legislative oversight and the constitutional limits of executive power would be characterized as nothing more than a cover story for purportedly unpatriotic and ideologically suspect motives.

Truman received one major setback. The Supreme Court ruled against him in *The Steel Seizure Case*.⁶² The Court held that the executive did not have the power to seize private property except when it was given that right explicitly by Article II of the Constitution or by statute, although the fractured plurality makes it very difficult to determine the case's holding and legal effect. The majority opinion restated the traditional rule that the President possessed no power to act except where explicitly authorized by congress, but the concurring opinions made it clear that this holding did not have a support of the majority of the Justices. This lack of consensus illustrated a momentous shift in the Court's theory of the Constitution,⁶³ which can best be explained by the political climate created by the Cold War. Edward Corwin applauded

⁶⁰ Ibid 178

⁶¹ James L. Sundquist, *The Decline and Resurgence of Congress* (Brookings Institution 1981) 239-241

⁶² *Youngstown Sheet & Tube Co v Sawyer* [1952] 343 US 579 (United States Supreme Court)

⁶³ Ken Gormley, 'Foreward: Truman and the Steel Seizure Case: A Symposium', (2002) 41

the concurring opinions, arguing that ‘Nature abhors a vacuum; so does an age of emergency’,⁶⁴ making it clear that he thought that the executive simply must have implied constitutional powers. This argument directly contradicts the Framers’ views on the powers given the executive. It also ignores their well-founded fears of how such powers could be used to destabilize the separation of powers that is an essential element of the rule of law.

Nevertheless, these concurrences did set some limitations on executive power, as the Constitution would not bear the interpretation that the executive could act directly contrary to statute. The President still could not defy clear congressional orders, as Truman had when seizing the steel mills. However, this limitation was taken only to apply in domestic matters, where the Court held the Commander-in-Chief Clause conferred no authority,⁶⁵ leaving the President largely unimpeded in his ability to regulate foreign affairs when Congress remained silent.⁶⁶ This reservation to domestic affairs can also be explained by reference to the unwillingness of the other branches of government during the Korean War to be seen as impediments in the struggle against communism. This view would have impaired their popular legitimacy in this highly charged political atmosphere.

In foreign affairs, the President could rely not only on the power to mobilize and control the military, but also on his ability to direct the CIA, which was used to

⁶⁴ Edward S. Corwin, ‘The Steel Seizure Case: A Judicial Brick Without Straw’ (1953) 53 Columbia Law Review 53, 66

⁶⁵ Schlesinger *supra* n 2, 143-147

⁶⁶ *Zemel v Rusk* [1965] 381 US 1 (United States Supreme Court)

overthrow a number of foreign governments during the Cold War, namely those of Iran, Guatemala, Egypt, Chile, and Laos.⁶⁷ Executive orders:

[H]ad, in effect, amended the National Security and Central Intelligence Acts by a long series of Top Secret NSC directives, thereby creating a ‘secret charter’ to which the Agency became far more responsive than to the statutes themselves. Though the CIA was persistently, ingeniously and sometimes irresponsibly engaged in undertakings that confronted the nation with the possibility of war [i.e., provoking the Cuban missile crisis], Congress had no effective means of control or of oversight or of even finding out what the Agency was up to.⁶⁸

As described in the previous chapter, this failure of oversight is not in accordance with the minimum requirements of the rule of law. Here, the power to conduct covert operations was delegated to an agency that reported only to the chief executive. No limitation were set on those powers, even where it was apparent that misuse or even overuse of those powers could lead the nation in to war —precisely the sort of conflict of interest for the executive branch that the Framers feared.

On this evidence, it is possible to conclude that between 1950 and 1968, the executive branch was acting in ways that violated fundamental precepts of the rule of law. That said, there were still some checks on the executive branch during this period, such that it might be said that the nation had not diverged significantly from the rule of law. The president, at least in domestic matters, was still nominally responsible to the other branches of government, which consecutive presidents chose to evade rather than to openly defy.⁶⁹ Citizens subjected to serious abuses that implicated the rule of law, such as the threat of arbitrary detention, were able to challenge the executive successfully in the courts. Following *The Steel Seizure Case* and other key cases from

⁶⁷ Schlesinger supra n 2, 167

⁶⁸ Ibid

⁶⁹ Schlesinger supra n 2, 151-187

this period the courts continued to police the actions of the executive when they acted in a way which directly contradicted the law of the land. Notably, in *Joint Anti-Fascist Review Committee v. McGrath*⁷⁰ the Supreme Court declared the unconstitutionality of the executive branch's blacklists barring alleged communists from government employment, and banned them in *Peters v. Hobby*.⁷¹

Accordingly, it can be concluded that Congress was inclined to give the executive freedom of action. Congress was concerned about being outflanked politically and vilified for impeding the intelligence agencies' and the military's ability to fight a cold war against a shadowy communist enemy that many American citizens believed was lurking in every corner, both at home and abroad. It could do so and retain some legitimacy and a justification for its efforts owing to its continued ability to pass domestic legislation that responded to the interest of its constituents and competing interest groups. However, the judiciary faced a more difficult dilemma.

The courts could not abdicate their responsibilities to monitor and control the executive's actions where they implicated the constitutional rights of citizens without a fatal loss of institutional legitimacy. The federal judiciary's key mandate since *Marbury v. Madison* has been the enforcement of constitutional limitations on the other branches of government. As such, its decisions can usually be described as accommodations of competing values. On one side, it wanted to allow the executive to have some freedom of action where this was universally popular, despite the fact that the disputed action was often unconstitutional and in conflict with core principles

⁷⁰ *Joint Anti-Fascist Refugee Committee v McGrath* [1951] 341 US 123 (United States Supreme Court)

⁷¹ *Peters v Hobby* [1955] 349 US 331 (United States Supreme Court)

of the rule of law. On the other, it could not allow the executive complete freedom to ignore either congressional or constitutional commands without consigning itself to irrelevance.⁷²

The Supreme Court's protection of the constitutional rights of alleged communists being mistreated by the executive at the height of McCarthyism sent a strong message that the judiciary would continue to assert its relevance. The federal judiciary remained an effective, although by no means perfect, forum for those challenging violations of their civil rights during the Cold War, at least whenever the executive's actions could not be ignored without putting the courts' institutional relevance into question. An accommodation was achieved during the Cold War. Namely, as long as the implications of its control over the intelligence agencies and the military was ignored by the other branches of government, the executive branch continued to comply with the commands of Congress and the courts. Accordingly, there was no assertion immediately following *The Steel Seizure Case* of a constitutional theory that would give the executive branch pre-eminent powers to act in the interest of national security.⁷³

Covert evasion of the requirements of the rule of law, however, would not be sufficient for an Administration that was determined to take radical action when faced with opposition from the legislature and judiciary. As will be described below, the

⁷² This analysis draws upon neofunctionalist theories of judicial decision making (which are themselves derived from neorealism in political science); these theories 'explicitly brought political interests into the judicial calculus'. Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001) 40-45

⁷³ David Gray Adler, 'The Steel Seizure Case and Inherent Presidential Power', (2002) 19 Constitutional Commentary 155, 160

executive branch proved willing to take actions that would unilaterally expand its own power at the expense of the other branches that were charged with restraining it. It would then be impossible for the legislature and the judiciary to ignore this overreaching, without permanently conceding the role in overseeing and restraining the executive, as required by the rule of law. Richard Nixon seized the horns of this dilemma, those of admitting either defeat or provoking what theretofore were quiescent branches of government. He insisted on escalating the Vietnam War in the face of determined opposition from Congress and the populace. The consensus about enlarged presidential powers during the Cold War would crack under the strains of this conflict. Afterwards, the introduction of a period of *détente* would provide an opportunity to return the nation to a state of affairs in which a robust separation of powers served to guarantee the rule of law.

The stage was now set for a confrontation between the executive on one side and the legislature and the courts on the other. This would be the decisive test of whether or not an executive empowered as it was in the course of the Cold War was consistent with the rule of law. Nixon would attempt to use all of these powers to create an unaccountable executive, even when he took actions that enlarged his own powers unilaterally and asserted directly that the executive was above the law. If Nixon were to have succeeded in this endeavour, it would have been evident not only that there was no rule of law in the United States during a crisis. It also would have been clear that this was a permanent state of affairs, with no apparent means of reversal. However, as the next section will demonstrate, by this time the other branches were now aware that they would lose all of their own constitutional powers if they did not restore the executive to a state of legal accountability. This, however, would require a constitutional crisis over the right of the executive to declare war, bar legislation even

when passed over his veto, and to derail investigations into many other abuses. It would end in Nixon's resignation.

3 THE BATTLE OVER AN UNACCOUNTABLE PRESIDENCY

President Nixon inherited the responsibility for the Vietnam War from his predecessors. President Johnson obtained some measure of congressional approval for committing American troops to battle, in the form of the Gulf of Tonkin Resolution.⁷⁴ Nixon was elected on a promise to end the war. It should be noted that his predecessor had initiated peace talks that might have succeeded, were they not sabotaged by Henry Kissinger, on Nixon's orders.⁷⁵ Once in office, Nixon decided to escalate the war. For this he was alone responsible, as Congress did not countenance any expansion. However, the war was deeply unpopular by the time that Nixon assumed control. Accordingly, the executive could no longer rely on reflexive support for war-making predicated upon popular support for anti-communist measures. Nevertheless, Nixon was determined to escalate the conflict as part of a set of policies about which only he and his closest personal advisors were aware. His inability or unwillingness to create any support in Congress for his policies set the stage for significant conflict between the branches of government, which were catalysed by a more aggressive use of the executive powers his predecessors had accumulated during the Cold War, where these

⁷⁴ Southeast Asia Resolution 1964, Public Law 88-308

⁷⁵ See Mark Lisher 'In Tapes, LBJ accuses Nixon of treason' 2008-12-05 *Austin American-Statesman* (Austin, 5 December 2008)

<<https://web.archive.org/web/20081208104725/http://www.statesman.com/news/content/news/stories/local/12/05/1205lbtapes.html>> accessed 26 May 2014

powers were now being directed against the legislature and the courts themselves, in a way that challenged their continuing relevance in a direct and unmistakable manner.

In March of 1969 Nixon ordered secret bombings of Cambodia. This involved assigning targets within Vietnamese air space as a cover story, and then issuing substitute orders to pilots specifying new locations in Cambodia after they launched their aircraft. '[F]alse reports on each mission were filed through regular channels', such that "only a few United States officials were aware of the B-52 operations in Cambodia".⁷⁶ 'The State Department, the Secretary of the Air Force, and the Air Force Chief of Staff were all kept ignorant of the bombing, as were the relevant congressional committees'.⁷⁷ This was not legal, but there was no immediate fallout, as the secrecy of Operation Menu was maintained for almost another three years. However, as this led to the fall of the neutral Sihanouk regime and the North Vietnamese decision to support the Khmer Rouge, Nixon decided to follow up the bombing with a ground assault in April of 1970, something which could not be kept secret.

Nixon announced the invasion to the American people on television, arguing that despite the fact that there was Congressional authorization, he possessed not only the right but a duty to launch this offensive into a neutral nation. He argued that 'I shall meet my responsibility as Commander-in-Chief of our Armed Forces to take the action

⁷⁶ Andrew Rudalevige, *The New Imperial Presidency* (University of Michigan Press 2005), 80 quoting Larry Berman, *No Peace, No Honor: Nixon, Kissinger, and Betrayal in Vietnam* (Georgia State University Press 2001), 50-51

⁷⁷ Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2008), 67

necessary to defend the security of our American men'.⁷⁸ He argued that '[t]he legal justification . . . is the right of the President of the United States under the Constitution to protect the lives of American men'.⁷⁹ This theory of a constitutional reserve power to protect the nation vested in the executive implied that congressional authorization was wholly unnecessary. It was also a harbinger of assertions to come.

Nixon's invasion of Cambodia was prompted by the fact that its neutralist government was allowing the North Vietnamese Army to use areas that bordered South Vietnam as a route for the transportation of arms and as a staging area for attacks. Nevertheless, as it was far from certain whether he would obtain the necessary support from Congress to widen the war in Indochina dramatically, he chose to put the legislature on the horns of a dilemma. They could either allow him to continue over their protests and risk irrelevance, or they could flout the danger of appearing patriotic at the very moment that American soldiers were in harms' way. The latter course of action risked their popularity, even though Nixon was responsible for the decision to place the troops in that dangerous position in the first instance.

The risks associated with the second course of action were apparently perceived by Congress to be too large to run, but this moment still marked a turning point in its relations with the executive branch. As popular support for the war weakened among the populace, and the tendency to rally behind the President subsided, Congress took ever more bold steps in opposing executive usurpations of legislative power. It did so

⁷⁸ Schlesinger *supra* n 2, 187

⁷⁹ *Ibid*

because it learned that they were running a much larger risk though inaction. There was now a very real danger that they could be side-lined permanently.

3.1 Restraining Executive War-Making: The WPR

Both the legislature and the country as a whole reacted in shock to Nixon's unilateral escalation of the Vietnam War. Senator Javits spoke for many legislators when he argued that 'the President has apparently defined his authority as Commander in Chief in such a broad and comprehensive manner as to intrude upon, and even pre-empt, the powers reserved so explicitly to the Congress under the Constitution'.⁸⁰ Student protests erupted nationwide, and these were transformed into a student strike after National Guardsmen and police officers shot and killed unarmed protesters at Kent State and Jackson State Universities.⁸¹ The anti-war movement soon became a serious threat to the Nixon Administration.

Congress reacted to the invasion of Cambodia by revoking the Gulf of Tonkin Resolution in January of 1971. When voting, members noted that this would 'deprive[] the President of his legal authority to carry on the [Vietnam] war'.⁸² In response, Nixon turned to the head of the Office of Legal Counsel of the Department of Justice, William Rehnquist, to provide a justification of his theory that the Commander-in-Chief Clause authorized him to continue the war, which was quickly forthcoming, despite the fact

⁸⁰ Sundquist, *supra* n 61, 250, quoting Senator Jacob Javits' remarks as recorded in the Congressional Record of 1 May 1970

⁸¹ Rudalevige *supra* n 76, 81

⁸² Schlesinger *supra* n 2, 187

that Rehnquist's 'case was persiflage',⁸³ i.e., frivolous. Perhaps not surprisingly, Rehnquist was later nominated by Nixon to be Chief Justice, which, as will be discussed in chapter four, set a dangerous precedent of the executive arranging for the appointment of reflexively pro-administration jurists to the body that would scrutinize its theories of executive power. Nixon would use the same logic for the initiation of a massive bombing campaign in another neutral country, Laos, which was done not merely to impair the transit of Vietnamese forces, but to intervene in a domestic conflict by destroying the Pathet Lao.⁸⁴

Nixon was at this point engaging in the second of the three categories of action outlined by Justice Jackson in *The Steel Seizure Cases*, which held that executive authority was strongest when they acted with congressional authorization, but that less deference was due when they intervened where Congress was silent. Shortly, he would venture into the third category, by taking actions the legislature expressly forbade. He did this despite Jackson's admonition that this could never be considered constitutional.⁸⁵ As will be demonstrated below, Nixon soon resolved to prevail over both Congress and the Courts, and to destroy the separation of powers, replacing it with what Theodor Lowi called a 'plebiscitary presidency'⁸⁶ that was accountable periodically to the electorate, which is incompatible with the rule of law, as outlined in chapter one.

⁸³ Ibid 191

⁸⁴ Ibid 203

⁸⁵ *Youngstown supra* n 62, 637-38 (Jackson, J. concurring)

⁸⁶ Healey *supra* n 3, 7-9

Schlesinger and Lowi argued that Nixon intended to create an executive branch that was not accountable to any other part of government, not even, theoretically for violations of citizens' non-derogable rights, but which was only accountable periodically to the electorate. By the beginning of Nixon's second term, the executive was in a position to attempt to do so because it seized or expanded upon its delegated powers, and because Nixon now refused to recognize any attempts to control his freedom of action or to remove or trim these grants of power. His officials flouted legislative and court oversight by refusing to provide candid testimony, and he later interfered with investigations into his conduct more directly. Nixon developed a theory, which will be explained below, that purportedly established that he need not comply with laws of which he did not approve. He developed another theory that allowed him to prevent bills that were against his interests from being passed into law. As will be explained below, this is the point at which Congress was compelled to resort to sterner measures.

In 1972 Congress began to consider bills that would explicitly require the President to obtain its approval before committing troops to battle,⁸⁷ to explicitly forbid actions like Nixon's unilateral invasion of Cambodia. The War Powers Resolution of 1973 gave the executive a sixty-day deadline for obtaining legislative approval for military action.⁸⁸ It was 'acclaimed as a triumph of congressional self-assertion', but Nixon clearly indicated that he intended to ignore it, as he argued 'any attempt to make such alterations [to his purportedly constitutional reserve powers] by legislation alone is

⁸⁷ Schlesinger *supra* n 2, 302

⁸⁸ War Powers Resolution 1973, Public Law 93-148

clearly without force'.⁸⁹ In the winter of 1973, the executive again ordered heavy bombing on Cambodia in support of the Lon Nol government, and not merely to protect American troops in Vietnam, relying this time exclusively on a theory of the executive's constitutional powers.⁹⁰ In response, Senator Fulbright commented that he 'retain[ed] total confidence in the ability of this administration to come up with some specious legal justification . . . the Nixon administration has shown that it will not be gotten the better of by anything so trivial as a law'.⁹¹

Nixon's failure to comply with a clear command from the legislature would await the reckoning of all his unconstitutional actions. However, it was now clear that Nixon was not restrained by the Constitution itself, as it was clear from its text that he could cite no basis to declare or expand wars, especially against Congress' explicit command. It was now obvious that the legislature needed two things. First, it required much more effective oversight, so that it could remain aware of how the executive was using its powers in an illicit manner even when the administration sought to disguise that fact. Second, it required enforcement mechanisms to call the executive to heel when it was found to be abusing its powers. As will be demonstrated in the next subsection below,

⁸⁹ Schlesinger *supra* n 2, 434

⁹⁰ Rudalevige *supra* n 76, 83

⁹¹ Sundquist *supra* n 61, 256

the problem was that the executive exercised delegated powers which were so great that it could argue that Congress could not lawfully restrain it.

3.2 Congress' Response to Distortions of the Legislative Process

During the final years of Nixon's presidency, Congress finally roused itself to deal with other assertions of unconstitutional executive powers. Two of the most problematic implicated Congress' control over legislation and spending, namely impoundment and the pocket veto. The first of these challenged the legislature's competence to spend tax monies, a power explicitly committed to Congress by the Constitution's Taxing and Spending Clause.⁹² The second challenged Congress' ability to pass any legislation at all, by ignoring the manner in which the Constitution's Presentment Clauses⁹³ indicated that the legislature could override his failure to sign a bill into law.

Nixon followed his predecessors in claiming a right not to spend money which Congress allocated for particular purposes, although he initially claimed that this was justified by the need to balance the federal budget. However, it was clear by 1972 that Nixon was using this process to derail policies that he did not like, even when these were outlined in duly enacted laws, and to assert legislative powers he did not possess in order to reward loyalists and punish his adversaries in Congress, who were increasingly bold in confronting him over his escalation of the conflicts in Indochina.

⁹² Constitution of the United States, article 1, section 8, clause 1

⁹³ Constitution of the United States, article 1, section 7, clauses 2-3

In doing so, Nixon ‘breached the rule usually followed by his predecessors of avoiding a direct and open flouting of the will of Congress.’⁹⁴

‘Here, as in other areas, Nixon upped the ante at the outset by defining his powers as inherent and nonnegotiable’,⁹⁵ relying on advice from the OLC that argued that ‘substantial latitude to refuse to spend’ flowed from the ‘executive power vested in [Nixon] by the Constitution’.⁹⁶ ‘Deputy Attorney General Joseph T. Sneed grounded the president’s power on a combination of constitutional and statutory language but left little doubt that in the department’s opinion, the inherent powers were sufficient.

While the OLC could be counted upon to be generally supportive of the chief executive’s positions owing to its status as part of an agency located under his direct control, the process of politicization of this office accelerated during the Nixon Administration. It argued that ‘To legislate against impoundment even in the domestic area would deprive the President “of a substantial portion of the ‘executive power’ vested in him by the Constitution”’.⁹⁷ A federal court noted that ‘if the power sought

⁹⁴ Sundquist *supra* n 61, 203

⁹⁵ Rudalevige *supra* n 76, 89

⁹⁶ Joseph T. Sneed, ‘Memorandum of Deputy Attorney General Joseph T. Sneed to the Senate Committee on Separation of Powers: Presidential Authority to Impound Appropriated Funds’, (Washington, Office of Legal Counsel, 6 February 1973) 10-11

⁹⁷ Sundquist *supra* n 61, 208, quoting the testimony of Deputy Attorney-General Joseph T. Sneed of 7 February 1973 before the Senate Governmental Operations and Judiciary Committee

here were found valid, no barrier would remain to the executive authorizations if he deemed them . . . to be contrary to the needs of the nation'.⁹⁸

In addition to frustrating congressional policies by impounding duly authorized funds, Nixon attempted to derail the passage of whole acts of legislation when he could, by failing to return bills he refused to sign to Congress so they could attempt to override his veto. This was wholly unprecedented, and had the potential of not merely delaying the passage of the bills, but of denying Congress any power to legislate entirely.

Article I, Section 7 of the Constitution states that the President may either sign a bill into law or return it unsigned to Congress within ten days whenever the legislature is in session. In 1938, the Supreme Court held in *Wright v. United States* that Congress could appoint representatives to accept bills when it was in session but temporarily adjourned.⁹⁹ In 1970, however, Nixon decided not to return a bill to Congress after it appointed a representative to receive it, in precisely the manner *Wright* approved.¹⁰⁰ Had he done so, his veto would clearly have been overruled, as this bill was passed in the Senate with a vote of 64 to 1 and in the House of Representatives by 345 to 2, where only two-thirds majorities would be required to override his failure to sign the bill into law.¹⁰¹ For the first time, but not the last, Nixon asserted that he possessed the power

⁹⁸ *Local 2677 v Phillips* [1973] 358 FSupp 60 (District Court for the District of Columbia)

⁹⁹ *Wright v United States* [1938] 302 US 583 (United States Supreme Court)

¹⁰⁰ Schlesinger supra n 2, 244

¹⁰¹ Ibid

to prevent a unanimous Congress from passing legislation, despite the Constitution explicitly specifying that it possessed the power to override his objections.

This tactic and numerous other measures were elements of ‘the Nixon revolution [which] aimed at reducing the power of Congress at every point along the line and moving towards rule by presidential decree’.¹⁰² This of course was necessary, since no consensus supporting his policies existed in either Congress or the population as a whole. Indeed, from 1970 onwards his Administration was under sustained pressure and was the subject of continuous protests and other forms of popular resistance.¹⁰³ At this stage, an impasse was clearly on the horizon. The executive was committed to extra-constitutional extensions of its own power, which clearly invaded the prerogatives of the legislature. However, this was made possible owing to Congress’ failures during the course of the Cold War. Congress gave such broad discretion to the executive that it was unclear whether domestic law did, in fact, allow the legislature and the courts to survey and regulate the president’s activities when he claimed otherwise. However, the full range of the executive’s secret and unreviewable powers was yet to come to light. After the full range of discretion and domestic power that flowed from the ability to control the intelligence agencies’ clandestine activity became

¹⁰² Ibid 246

¹⁰³ Seymour M. Lipset, ‘Polls and Protests’, (1971) 49 *Foreign Affairs* 548, 550-553

clear, there would be a new sense of urgency in their efforts to re-implement the rule of law.

3.3 Nixon's Trump Card: Control over the Intelligence Agencies

In order to reinforce his power against his enemies, Nixon turned to the intelligence agencies, which during the Cold War became tools the President could use at his discretion and in secret. As will be demonstrated below, he used this power to overturn governments and assassinate unfriendly foreign leaders, while Congress remained blithely unaware. During the early phases of this conflict, many citizens were swept up due to over-inclusive definitions of 'subversives' or 'threats to national security', but under Nixon these agencies were used to specifically target people for whom he harboured personal animosity, often merely because they threatened his political agenda. These actions were illegal, but they could be undertaken owing to pervasive secrecy. This secrecy was made possible by the lack of congressional oversight.

The executive's unilateral control over the intelligence agencies made possible the most grievous abuses of the Nixon Administration, but it also led to his downfall. There is evidence that Nixon made use of his personal control over the secret services from 1970 onwards. In 1970, he ordered the head of the CIA to organize a coup in Chile,¹⁰⁴ actions which Henry Kissinger, his closest advisor, oversaw personally.¹⁰⁵ Nixon

¹⁰⁴ Central Intelligence Agency, 'CIA Notes on Meeting with the President on Chile', (*National Security Archive*, 15 September 1970) <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/ch26-01.htm>> accessed 26 May 2014

¹⁰⁵ Central Intelligence Agency, 'CIA Operating Guidance Cable on Coup Plotting', (*National Security Archive*, 16 October 1970) <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/docs/doc05.pdf> > accessed 26 May 2014

frequently confused constitutionally protected dissent with subversion, and radicalism with communism. The temptation to use these capabilities against personal enemies became substantial as his struggle to impose his unilateral will intensified.¹⁰⁶ Nixon's first authorization for illegal wiretapping was a response to leaks about the secret bombing of Cambodia, as he feared, correctly, that this information threatened to reinvigorate the anti-war movement.¹⁰⁷ To justify this activity, his Attorney-General claimed that the chief executive possessed 'inherent presidential power to tap without warrants in the interest of *domestic* security'.¹⁰⁸ Again, the chief executive was relying on self-serving advice from an executive branch official, although it could be argued that such a prominent figure would want to protect their good name and would thus be restrained from offering strained interpretations of the constitution.

By the time that Nixon sought to wiretap his personal opponents, the Supreme Court had already rejected Nixon's argument that the executive was the only branch competent to decide whether he was using his surveillance powers in the interest of national and domestic security. The likely reason was because the Court recognized that the executive's theory of the interpretation of its own powers would reduce the judiciary to irrelevance. In the *Keith Case*,¹⁰⁹ the Court addressed this issue squarely after John Mitchell refused to disclose the source of electronic surveillance information. Mitchell argued that the applicability of an exception to the requirement for a warrant

¹⁰⁶ Schlesinger *supra* n 2, 257

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid* (emphasis added)

¹⁰⁹ *United States v United States District Court* [1972] 407 US 297 (United States Supreme Court)

when ‘a clear and present danger to the structure or existence of the government’¹¹⁰ was a question that only the President could decide.

The executive’s allegation of an existential threat to the nation appeared quite questionable, however, as the defendants were members of a Detroit collective described as ‘radical counter-culturalists’ who advocated ‘rock and roll, dope, sex in the streets and the abolishing [sic] of capitalism’.¹¹¹ The judge at the trial court disagreed with Mitchell’s conclusions about unreviewable executive discretion, noting that the lack of disclosure was a critical violation of the defendants’ due process rights, and ordered the information to be released.¹¹²

When the appeal reached the Court, Justice Douglas outlined the stakes of this dispute about the executive’s inherent powers, noting that ‘if the Warrant Clause [of the Fourth Amendment to the Constitution] was held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion’.¹¹³ The Supreme Court’s unanimous decision was a stinging rebuke to the constitutional theory that Nixon was increasingly relying upon, as it indicated that all of the Court’s members understood how Nixon’s theory that he could interpret the scope of his own powers was

¹¹⁰ Omnibus Crime Control and Safe Streets Act 1968, Public Law 90-351

¹¹¹ Meiklejohn Civil Liberties Institute, *Landmark Cases Left Out of Your Textbooks: Herein Restored by the Original Lawyers and Litigants and by Meiklejohn Legal Interns* (Meiklejohn Civil Liberties Institute 2006) 46

¹¹² *United States v Sinclair* [1971] 321 FSupp 1074 (District Court for the Eastern District of Michigan)

¹¹³ *United States v United States District Court* [1972] 407 US 325 (United States Supreme Court) (Douglas J)

an assault on the rule of law that threatened the Court itself. Justice Powell's opinion held that executive discretion of this sort would constitute 'unchecked surveillance power', noting the implications of a lack of oversight. Nixon was 'saying that the President, on his own motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of government'.¹¹⁴ Unbeknownst to Justice Powell, this was far more than a *reductio ad absurdum*. In fact, the intelligence agencies were civil rights activists in this manner, as the subsequent revelation of the warrantless wiretapping of Martin Luther King, Jr. would later confirm.¹¹⁵

The decision was significant both because of the explicit nature of the president's claims and the fact that the judiciary presented a united front against executive overreaching. The Supreme Court's opinion was not merely a rejection of the executive's contention that it could judge whether its wiretapping fit into a statutory exception allowing it not to seek a warrant, rather it took a more general view, in line with the requirements of the rule of law. It held that broad 'presidential discretion . . . is inconsistent with the [Constitution]. Neither the President nor the Attorney General can act as [a] neutral and detached magistrate' when it is in its interest to construe its

¹¹⁴ Ibid 315 (Powell, J quoting Senator Gary Hart)

¹¹⁵ United States Senate 'Senate Committee to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans', S. Rep. No. 94-755, book 2, 7 (1976)

own powers broadly.¹¹⁶ The executive branch was stunned by decision, as ‘When Keith came to the Court, President Richard Nixon had appointed four new Justices considered to be law-and-order conservatives sympathetic to the President's position on wiretapping. In fact, one of those new appointees, Lewis F. Powell Jr., had prior to his appointment penned a controversial op-ed article supporting wiretapping in national security cases a few months before Keith was decided.’¹¹⁷ Both the ‘public and the press saw this [as] stunning’,¹¹⁸ but in fact it was predictable from the point of view of functionalist institutional theory. Nixon’s arguments directly challenged the Court’s core justification, its special competence to interpret and adjudicate constitutional disputes, implicitly threatening to reverse *Marbury v. Madison*. This no jurist could accept, even one who was so inclined to law and order as Lewis Powell.

Nixon had no intention of complying with the Court’s holding in the *Keith Case*. However, faced with the possibility that official records created by the intelligence agencies might be made available to those they prosecuted, Nixon was compelled to create his own secret unit within the White House, which would pursue his personal enemies without obeying even the minimal restrictions that bound the intelligence agencies. Members of this ‘Special Intelligence Unit’, better known as the White House ‘Plumbers’, were later caught breaking in to plant recording devices at the headquarters of the Democratic National Committee within the Watergate Hotel, and within a week

¹¹⁶ Tracey Macklin, ‘The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case’ (2008) 41 University of California Davis Law Review 1259, 1289

¹¹⁷ Ibid 1264

¹¹⁸ Ibid 1263

after their arrests Nixon ‘approved a plan to have the CIA obstruct the FBI investigation into the burglary’.¹¹⁹ Unfortunately for Nixon, this conversation was conducted within a room that automatically recorded all discussions.

Nixon attempted to withhold the incriminating tapes from the Special Prosecutor appointed to investigate Watergate, but the Supreme Court ruled against him in *United States v. Nixon*.¹²⁰ It is important to note that Nixon used these proceedings to articulate his theory of unchecked executive power, and that the Court’s rejection of this theory proved vital to the preservation of the rule of law in the United States. If they had not done so, the executive would have retained the power to determine whether it was in compliance with the requirements of the Constitution. Within such a legal regime, the executive branch would be able to use this power to operate with impunity even when it violated non-derogable rights, as it would then be the judge of its own cause. This is precisely the opposite of what the rule of law requires.

In essence, the Court ruled that the President should not be allowed to determine whether the documents are irrelevant or too sensitive to divulge. Rather, the judiciary should have the last word when the President asserts a privilege.¹²¹ This is an affirmation of one of the key principles of the separation of powers and the rule of law, that no man should be the judge of his own cause. This decision was a vital step towards the re-establishment of the rule of law in the United States after years of erosion during the Cold War. The Supreme Court again declared that it possessed the power to determine whether the executive was violating citizens’ rights. However, the battle

¹¹⁹ Rudalevige supra n 76, 93

¹²⁰ *United States v Nixon* [1974] 418 US 683 (United States Supreme Court)

¹²¹ Shane supra n 77, 123

would not be won until the legislature followed suit, taking back the delegations of legislative power that far exceeded what the rule of law allows, and re-imposed oversight and legislative regulation of these powers.

3.4 Nixon's Resignation as Restoration of the Rule of Law

As this subsection will make clear, Congress' attempts to remove Richard Nixon from office were not merely a response to his obstruction of the investigation of the Watergate. The Judicial Committee of the House of Representatives passed the Articles of Impeachment against Nixon for destroying the separation of powers that serves to protect the rule of law in the United States by constraining the executive. Article 2 of these Articles alleged that he 'repeatedly engaged in conduct violating the constitutional rights of citizens' by misusing the intelligence agencies to compile information intended to 'prejudice the constitutional right of the accused to fair trial', and that 'in disregard of the rule of law, he knowingly misused the executive power'.¹²² Article 3 states that 'in refusing to produce these papers and things [viz., the tapes of incriminating conversations] . . . [Nixon] interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives'.¹²³

This indictment highlighted the fact that Nixon abused the extensive executive powers that it assumed to itself during the Cold War in a manner that impinged upon citizens' constitutional rights, and condemned him for having attempting to avoid the oversight of Congress and the courts when they investigated these abuses.

¹²² Judiciary Committee of the House of Representatives, Articles of Impeachment of Richard Nixon, House of Representatives No. 1305, 93rd Congress 2nd Session, section 2 (1974)

¹²³ Ibid, section 3

Unfortunately, Nixon denied Congress the opportunity to prove these charges against him by resigning before he could be tried in the Senate. However, a meaningful opportunity to address these abuses presented itself after Nixon's resignation. Congress could take advantage and ensure that the powers that Nixon abused would be permanently denied to the executive. It could also restore meaningful oversight over the executive in the manner that the rule of law requires. Congress did so, and this would constitute a large part of its legislative agenda over the next five years.

As will be demonstrated below, the success in this legislative agenda created a new framework for the rule of law. The legislative grants of discretion to the executive branch, particularly in the most dangerous areas, such as control over the military and the intelligence agencies, were now limited and oversight over these limitations was retained by Congress. The legislature and the judiciary also asserted explicitly that the executive would not have the final say over whether it was complying with these restrictions on its powers. After these changes are set forth, this thesis will demonstrate that these brought the United States back into compliance with the minimum requirements set forth by the ICJ. It remains to be seen if this compliance would persist into the next period of crisis, in which the executive would again be empowered to test these limitations.

4 REIMPLEMENTATION OF THE RULE OF LAW 1974-80

The Congressional resurgence that allowed for the reimplementation of the rule of law did not happen overnight. It took concerted action to close all of the loopholes in the broad grants of discretionary power that the executive exploited during the course of the Cold War. However, by the end of this process, both oversight and a means of holding the executive responsible were now guaranteed. This took place over the

course of several stages of legislative and judicial action, beginning with the reclamation of the ability to declare war and the destruction of the executive's purported legislative powers.

As noted above, even before Nixon's fall Congress wrested back formal control of war powers from the executive branch. Soon afterwards, Congress, 'led by a bipartisan coalition in the Senate, forced Nixon to accept a legislatively imposed cut-off of funding for military activity in Indochina as of August 15, 1973'.¹²⁴ Congress exercised its power of the purse to terminate American involvement in Indochina, another bill prevented monies from being used for 'reconstruction',¹²⁵ in order to prevent back-channel military funding, and finally, the WPR served to prevent the creation of another military crisis that would empower the executive. Support for further measures wresting control back from the executive branch was quite broad by April of 1973. As Representative Gillis Long stated:

The President has overstepped the authority of his office in the actions he has taken. Congress will not stand by idly as the President reaches for more and more power Our message to the President is that he is risking retaliation for his power grabs, that support for the counter-offensive is found in the whole range of congressional membership.¹²⁶

The reckoning arrived later that month, but it did not end with Nixon's resignation. This merely cleared the field for the attempt to subject the executive branch to limitations. 'Congress, having battled Nixon the president, was now ready to turn its

¹²⁴ Shane *supra* n 77, 63

¹²⁵ *Ibid*

¹²⁶ Rudalevige *supra* n 76, 102 quoting the remarks of Representative Gillis Long on the floor of Congress

attention to the institution of the presidency'.¹²⁷ This was essential, as all of the levers of power that Nixon used to subvert the separation of powers, and thus, the rule of law, remained in place. Accordingly, it appeared to be merely a matter of time before another President would make the same use of them as Nixon, thereby imperilling the rule of law and the relevance of the other branches of government. The next phase of the struggle focused on taking control of the legislative process, into which the presidency intruded during the Cold War. Congress was aided by the Supreme Court in this endeavour. The Court consolidated all of the legal challenges to impoundment under the caption of *Train v. City of New York*.¹²⁸ The Supreme Court's unanimous ruling against the executive in that case was a 'clear defeat for the administration', and other courts interpreted it as holding that 'the executive [was] trespass[ing]' into law-making and this could not be permitted, as this would 'make impossible the attainment of the legislative goals' set forth by Congress in its bills.¹²⁹

The *Train* decision served to ratify Congress' passing of the Impoundment Control Act,¹³⁰ which was designed to protect the legislature as a 'viable institution' in the face of concerted action aimed at creating a 'presidential government'.¹³¹ The Act,

¹²⁷ Rudalevige supra n 76, 100

¹²⁸ *Train v New York* [1975] 420 US 35 (United States Supreme Court)

¹²⁹ *Campaign Clean Water Inc v Train* [1975] 489 F2d 498. (Fourth Circuit Court of Appeals)

¹³⁰ Congressional Budget Act and Impoundment Act 1974, Public Law 93-344

¹³¹ Louis Fisher, *Congressional Abdication on War and Spending* (Texas A&M Press 2000) 119, quoting Senator Sam Ervin's speeches from the floor.

combined with the Congressional Budget Act of 1974,¹³² placed Congress firmly back into control over its spending powers, as the Constitution mandated.¹³³ Congress ‘recaptured from the executive its constitutional role in controlling the power of the purse’,¹³⁴ that power that allowed Congress to terminate the Vietnam War.

Addressing executive interference within the legislative process was only the beginning of Congress’ efforts. Another battle in its campaign to restore the rule of law involved a struggle to impose statutory restrictions on the executive, which would clearly underline the illegality of the type of violations for which Nixon was forced to resign. Alongside this struggle was another related effort to establish the mechanisms of oversight that would serve to bring any such violations to its attention. ‘When the House Select Committee on Committees held its hearings on structural reform of the House of Representatives in 1973, no single weakness commanded more attention than “the failure . . . really to engage . . . in anything like the beginning of an adequate oversight function”’.¹³⁵ To make it possible for the legislature to police the limits of executive discretion, however, it would first need to set clear limits on these delegated powers, as the rule of law requires.

This Congress accomplished through a series of laws limiting the executive passed between 1974 and 1980, which would then be enforced by a new committee structure, which will be described in section five below. In implementing this reform agenda,

¹³² Congressional Budget Act and Impoundment Act 1974, Public Law 93-344

¹³³ Rudalevige *supra* n 76, 128-130; United States Constitution article 1, section 8, clause 1. See also *United States v Butler* [1936] 297 US 1 (United States Supreme Court)

¹³⁴ Rudalevige, *supra* n 76, 130, quoting the remarks of Senate Budgetary Chair Brock Adams

¹³⁵ Sundquist *supra* n 61, quoting Committee Reform Amendments 1974, House Report 93-916

Congress created bodies that were specifically charged with ensuring the executive branch did not overstep the boundaries of the powers delegated by the legislature.

4.1 Establishing Clear Statutory Limits on Executive Discretion

One of the ways in which the defective separation of powers was deficient in meeting the minimum obligations of the rule of law related to the broad grants of discretionary authority by the legislature to the executive during the Cold War. These grants were so broad that it was often impossible to determine if the executive was exceeding its powers, due either to the vagueness of the provisions or the utter failure to specify what the executive could not do in support of these very general directives. As will be demonstrated below, Congress brought the executive back into line with what the ICJ requires with respect to delegated authority by passing statutes that clearly specified what the executive could not do, in particular, explicitly barring violations of non-derogable norms, and by creating other laws that would make it impossible for the executive to hide any such abuses.

The Privacy Act of 1974¹³⁶ responded to such abuses as Nixon's scrutiny of his enemies' tax returns, which warranted a mention in the Articles of Impeachment, and created limitations on governmental use of private information provided to agencies for limited purposes. Citizens' right to control over these records was further underlined by the 1974 amendments to the Freedom of Information Act.¹³⁷ Now citizens could request the files compiled on them by government agencies, even intelligence agencies. It should be noted that the subsequent release of these files shocked many activists and

¹³⁶ Privacy Act 1974, Public Law 93-579

¹³⁷ Freedom of Information Act 1966, Public Law 89-554

politicians, and helped to catalyse support for a sweeping reform of the intelligence agencies' oversight, which will be discussed in the following subsection.

The Privacy Act also confirmed the principle of judicial oversight over executive decisions that affected citizens' rights, as '[j]udicial review of executive determinations that something needed to be kept secret was now authorized,' over President Ford's veto of the legislation.¹³⁸ This legislation had the effect of making it more difficult for the executive branch to operate in secret, something which it relied upon when using the intelligence agencies in ways that contradicted relevant statutory law, while avoiding any oversight from Congress. The increased likelihood of abuses being uncovered by individuals targeted by the executive, and the possibility of subsequent congressional investigations and censure, was a clear victory for the rule of law.

In response to Nixon's attempt to exploit statutory exceptions that referred to national emergencies, Congress sought to restrain all of the executive's emergency powers. The clear priority, however, was the emergency power that allowed for the violation of one of citizens' most important non-derogable rights, the right not to be subjected to prolonged arbitrary detention. The Internal Security Act of 1950,¹³⁹ which was passed at the beginning of the Cold War, allowed for executive detention of the type to which Japanese-Americans were subjected during the Second World War. These provisions, which were also known as the Emergency Detention Act, were never invoked during the Cold War. However, some feared at the time that Nixon might

¹³⁸ Rudalevige supra n 76,106-08

¹³⁹ Internal Security Act 1950, 64 Statutes 993

invoke its provisions as the turmoil catalysed by the escalation of the Vietnam War increased.¹⁴⁰

Congress was spurred to action by a grassroots movement fearful of Nixon's discretionary power under this statute to subject American citizens to indefinite detention without trial. These fears which were later revealed to be quite warranted, given the creation of a report by the director of the Federal Emergency Management Agency at the Army War College in 1970 that called for the detention of 'up to 21 million "American Negroes" in the event of a national black militant uprising'.¹⁴¹ Accordingly, Congress passed the Non-Detention Act of 1971.¹⁴² The Act explicitly barred any and all executive authorization of mass internment.

The executive branch's powers under the state of emergency declared by Truman in 1950 to invoke discretionary powers were terminated by the National Emergencies Act of 1974.¹⁴³ This Act also served to prevent any future emergency from becoming indefinite, by requiring the President to justify the declaration of any national emergency to Congress. The legislature asserted its power to override the executive's determination, thereby terminating the broad powers contained in 470 statutes that

¹⁴⁰ Masumi Izumi, 'Prohibiting "American Concentration Camps": Repeal of the Emergency Detention Act and the Public Historical Memory', (2005) 74 *Pacific Historical Review* 165, 170-178

¹⁴¹ Christian Smith, *Resisting Reagan: The U.S. Central America Peace Movement* (University of Chicago Press 1996), 310

¹⁴² Non-Detention Act 1971, Public Law 92-128

¹⁴³ National Emergencies Act 1974, Public Law 94-412

granted discretion to the executive in the event of a national emergency.¹⁴⁴ The president's ability to order sanctions against foreign nations on his own initiative, which was a simple matter during the pendency of Truman's Declaration of National Emergency, was also limited by the passage of the International Emergency Economic Powers Act of 1977,¹⁴⁵ which was 'designed to constrain emergency economic powers over the regulations of international and domestic financial transactions and to limit the latter to periods of declared war'.¹⁴⁶

Presidents were able to use their power to restrain trade with nations they deemed to be enemies of the United States in a manner that took control of foreign policy entirely out of Congress' hands. This state of affairs was not in conformity with the rule of law, as this invaded the legislature's exclusive prerogative of law-making. Emergency powers also allowed the executive to breach minimal rule of law norms in more dramatic ways, such as when they were used by President Roosevelt to violate the non-derogable rights of Japanese-Americans not to be subjected to prolonged arbitrary detention. Accordingly, it was essential that the emergency powers law be reformed to conform to the ICJ's criteria.

¹⁴⁴ Congressional Research Service, 'Martial Law and National Emergency' (2005) 1; Senate Committee on Government Operations and the Special Committee on National Emergencies and Delegated Emergency Powers, 'The National Emergencies Act'

¹⁴⁵ International Emergency Economic Powers Act 1977, Public Law 95-223

¹⁴⁶ Rudalevige *supra* n 76, 114

5 THE CHURCH COMMITTEE'S CALL TO ACTION

There were a number of serious violations of citizens' non-derogable rights committed by the executive branch that would have called into serious question whether the United States was a rule of law state between 1941 and 1973. However, these abuses did not come to light until after Watergate, as previously the executive possessed unquestioned and unreviewable control over these agencies.

When various committees began to investigate the secret activities of these agencies, the abuses that came to light quickly catalysed a movement to make the executive branch accountable for its conduct of covert affairs. The executive branch did not need to rely upon emergency powers when taking action that violated citizens' fundamental rights, if they instead used the simple expedient of employing the intelligence agencies. This was possible largely due to the unilateral modification of these agencies' charters, itself made possible by the fact that there was no reporting structure in place to allow for legislative oversight of these grants of discretionary authority.¹⁴⁷

There was, however, some impetus for intelligence reform in the period immediately following Nixon's resignation, as the Church Committee revealed that these agencies facilitated the White House Plumbers' illegal surveillance, which included providing false identities to the Watergate burglars, and the electronic equipment required for bugging and wiretapping.¹⁴⁸ This momentum would be accelerated significantly by

¹⁴⁷ Frederick Schwarz and Aziz Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (W.W. Norton and Company 2007), 50-53

¹⁴⁸ *Ibid* 120

other revelations of unlawful activity, which were repugnant both to popular opinion and the rule of law.

5.1 The Committee's Outline of Structural Problems and Solutions

The exposure of the problems related to a broad grant of discretionary and unreviewable authority over the intelligence agencies to the executive would not itself help to bring the United States back into line with the rule of law. In order for the executive branch to be subjected to the oversight and control of the legislature when it exercised delegated authority over these agencies, legislation repealing the earlier vague and overbroad delegations would need to be passed. The Church Committee did much, however, to illustrate how vital this reform was to the rule of law.

By the time its final report was published, the Committee rejected a theory of renegade intelligence agencies, faulting instead the 'senior officials who were responsible for controlling intelligence agencies [who] generally failed to assure compliance with the law' after they 'delegat[ed] broad authority' by invoking 'national security' or 'subversion'.¹⁴⁹ Looking back after the Committee's findings were supported by other subsequently declassified documents, scholars have concluded that 'ultimate responsibility was fixed with presidents, attorneys-general, and other high executive branch officials'.¹⁵⁰ In particular, Senator Walter Mondale identified the key problem that led to the abuses detailed in the report as 'presidential unaccountability to the law' since 'the grant of power to the CIA and these other agencies is, above all, a

¹⁴⁹ Church Committee Report, book 2, 137, 265

¹⁵⁰ Schwarz and Huq *supra* n 147, 44

grant of power to the President.’¹⁵¹ The Committee’s report made it clear that in allowing unreviewable executive control over the intelligence agencies, the legislature enabled the executive’s violation of one of the key norms of the rule of law state.

The ultimate aim of the Church Committee was to ‘determine what secret governmental activities are necessary and how they best can be conducted under the rule of law’.¹⁵² In keeping with the American conception of how the rule of law is best protected, the Committee proposed legal restraints on the executive’s discretion when directing the activities of the intelligence agencies, as ‘power must be checked and balanced . . . the preservation of liberty requires the restraint of laws, and not simply the intentions of men’.¹⁵³ However, it remained to Congress as a whole to determine how best it might constrain the executive branch with legal restraints on its discretion and to impose oversight to ensure these limitations were observed. A statutory regime that served these ends would be developed during the four years following the issuance of the Church Committee Report.

The Church Committee clearly understood that the rule of law required that the executive not be able to use the intelligence agencies in secret, as this led to violations of non-derogable rights. In articulating its message clearly, it helped to catalyse the legislative reform that re-implemented the rule of law in the United States, a state of affairs that would last until the crisis precipitated by the 9/11 attacks, where the statutes passed in response to the Church Committee’s report would be the first targets of an

¹⁵¹ Kathryn S. Olmstead, *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI* (University of North Carolina Press 1996) 88, 96

¹⁵² Church Committee Report, section 18, 1

¹⁵³ Church Committee Report, book 2, v

executive branch determined to re-establish its dominant position of unreviewable authority, with the secrecy and efficiency of the intelligence agencies used as a rationale for abandoning this statutory regime.

6 REFORMING THE CIA, THE NSA, AND THE FBI

The Church Committee's Report revealed that the executive's unilateral and unchecked control over the intelligence community allowed it to plan and execute operations that threatened the rule of law in secret. 'Unsurprisingly, one of the Committee's main points was the need for clear laws to guide and limit the intelligence agencies. In 1976, the CIA, the NSA, and the FBI all lacked detailed statutory mandates . . . the NSA was entirely a creature of executive branch regulations'.¹⁵⁴ This meant that since Congress frequently issued to the executive a blank cheque, via a delegation of power merely to use these agencies in the interests of 'national security', the executive could create regulations that empowered ever more problematic conduct. When doing so, the staff of these agencies began to regard their violations of the law as unproblematic, owing to the fact that this behaviour was not challenged by Congress. However, this sort of challenge was impossible at the time, as the executive insisted that it had the right to withhold the evidence of this from the legislative committees that nominally possessed the responsibility of oversight. Accordingly, the first step towards crafting delegations of legislative authority for the operations of these agencies that

¹⁵⁴ Schwarz and Huq *supra* n 147, 51

were in conformity with the ICJ's criteria would be for Congress to create statutory charters outlining clearly what these agencies could and could not do.

One major reform of intelligence activity was the requirement that the NSA's wiretapping would now be comprehensively supervised by the judiciary. This mandate was created by the Foreign Intelligence Surveillance Act of 1978, herein after referred to as 'FISA'.¹⁵⁵ This was in part a reaction to Nixon's argument that he possessed an inherent presidential power to conduct wiretapping in the interest of both national and domestic security, which led to similar abuses as his unwarranted scrutiny of private citizens' tax records. The scale of the latter was revealed when intelligence records were released pursuant to Freedom of Information Act requests, hereinafter referred to as 'FOIA requests', and the subpoenas of the Church Committee. Congress' reaction was forceful. Representative William Cohen noted that '[w]hen the chief executive of this country starts to investigate private citizens who criticize his policies . . . the rattle of the chains that would bind up our constitutional freedoms can be heard'.¹⁵⁶

¹⁵⁵ Foreign Intelligence Surveillance Act 1978, Public Law 95-511 (hereinafter 'FISA')

¹⁵⁶ J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (Ohio University Press 1999)

541, quoting Representative William Cohen

7 CONCLUSION

While the creation of this new oversight apparatus was a victory in the struggle for the rule of law, the possibility of legislative control did not guarantee that this would be effective. Senator Frank Church opined that while oversight, and, in principle, the power to enforce clear restrictions on the use of these delegated powers and to police any abuses now existed, '[p]olitical will can't be guaranteed. The most we could do was to recommend that permanent surveillance be established. We did that knowing that the Congress being a political animal will exercise its surveillance with whatever diligence the political climate of the time makes for'.¹⁵⁷

That said, in the political climate after Watergate, the political will to supervise and discipline the intelligence agencies was evident. 'By the end of the decade [the 1970s] Congress had appeared to have made its point. There could be no more secret wars, no more secret covert operations, not even secret scandals . . . the attitude of defiance toward the legislature's claims that characterized the later years of the Nixon administration was gone'.¹⁵⁸ It remained to be seen how long this newly restored separation of powers allowing for oversight and control of the executive branch's use of the intelligence agencies in national security matters would last. At this point it remained unclear whether Congress could weather the storms of a new political climate, in which legislators' attempts use these powers would be challenged. In particular, during the Reagan administration, exercising this oversight would require them to

¹⁵⁷ Frank Smist Jr., *Congress Oversees the United States Intelligence Community, 1947-1989* (Knoxville, University of Texas Press 1990) 81, quoting interview of Senator Frank Church by Frank Smist, Jr. of 23 April 1983

¹⁵⁸ Sundquist *supra* n 61, 331

withstand challenges from a resurgent executive, buoyed by a high level of public support.

The effect of these new mechanisms of legislative oversight can best be judged by reference to the Iran-Contra scandal, which will be discussed in the next section. It will describe how the executive was prohibited from using the official channels within the intelligence services when it attempted to derail Congress' foreign policy agenda and ignore laws that were passed to prevent unilateral executive action. It will also illustrate that the legislative branch by this point possessed the capacity to quickly uncover the extent of the wrongdoing, and to hold very senior officials of the executive branch responsible, in the manner that the rule of law requires in order to maintain accountability. The executive was now subjected to oversight, and the next section will demonstrate that this control met the criteria specified at the Rio and Lagos congresses of the ICJ. Furthermore, the mechanisms thus imposed proved robust enough to function during a non-emergency period. The question that will remain to be asked after comparing this control to the formal requirements of the ICJ is whether these would be sufficient during a prolonged crisis, such as that which was inaugurated by the 9/11 attacks.

That said, at the end of this period of resurgence, scholars doubted whether this trend would continue. Writing in 1978, Harvey Zeidenstein argued that 'Unlikely in the near term, but not in the more distant future, is the reassertion of presidential primacy The conditions for this scenario would include one or more of the following: the dimming of Vietnam and Watergate in Congress' institutional memory . . . and some severe crisis or emergency . . . comparable to the Depression or World War II, in which

Congress gave the President virtual *carte blanche*'.¹⁵⁹ As the next chapter will demonstrate, Zeidenstein was correct. Although there were many challenges to the framework that was created between 1973 and 1980 during the two decades that would follow, due to such events as the Iran-Contra crisis and the bombing of Serbia,¹⁶⁰ this framework remained largely intact. Rather, 'it is George W. Bush's presidency that provides the clearest, because most openly claimed and aggressively argued, case of presidential unilateralism in the post-Watergate era.'¹⁶¹ The next sections of this thesis will demonstrate that this clarity has continued unabated into the Presidency of Barack Obama, and that this unilateralism has taken the United States outside of the rule of law paradigm, as defined in chapter one.

Chapter 3

OVERBROAD AUTHORITY GIVEN TO AND APPROPRIATED BY THE EXECUTIVE AFTER THE 9/11 ATTACKS

1 INTRODUCTION

The restoration of the rule of law after Congress and the courts erected clearer legal restrictions on the executive proved relatively stable from 1974 to 2001.¹ However,

¹⁵⁹ Harvey G. Zeidenstein, 'The Reassertion of Congressional Power: New Curbs on the President', (1978) 93 *Political Science Quarterly* 393, 409

¹⁶⁰ Rudalevige *supra* n 82, 196-203

¹⁶¹ *Ibid* 212, 511

¹ Brian R. Dirck, *Waging War on Trial* (ABC-CLIO 2003) 71-74

during this period members of Presidents Nixon and Ford's senior staffs were unhappy both with the failure of the United States to make aggressive use of its military and the reduced role of the executive during this period of relative peace.² As this chapter will demonstrate, this faction, commonly known as the 'neo-conservatives',³ argued that the reassertion of the constitutional order characterized by the separation of powers and the rule of law was unconstitutional, owing to the limits it placed upon the executive's ability to take action it deemed to be in the interest of national security.

As will be described below, the 9/11 attacks catalysed a remarkably broad delegation of legislative authority from the legislature. This chapter will demonstrate that this single piece of legislation alone placed the United States' compliance with one of the core principles of the rule of law into question. The initial grant of authority by the legislature to the executive was a text that was given a number of expansive glosses in what amounted to executive law-making, in the form of signing statements and the opinions of the Department of Justice's Office of Legal Counsel. During this period, unrestrained and unsupervised executive law-making, which was specifically marked out by the ICJ as antithetical to the rule of law,⁴ was used to justify radical departures from the most fundamental norms, both international and domestic in nature.

Finally, this chapter will demonstrate that this executive law-making and the assumption of unsupervised emergency powers was not merely aimed at securing freedom of action to violate the aforementioned *jus cogens* norms. Rather, the

² James Mann, *Rise of the Vulcans: The History of Bush's War Cabinet* (Viking 2004) 10, 12, 100

³ *Ibid* 90-94

⁴ International Commission of Jurists, *The Rule of Law in a Free Society: A Report* (International Commission of Jurists 1959) 217-218

executive now aimed to succeed where Nixon failed, creating a state of affairs in which the executive would not be accountable to the other branches of government. Accordingly, it will be possible to conclude at the end of this chapter that the constitutional order of the United States risked being abrogated in perpetuity if Congress and the courts would not reassert themselves vigorously. At that point, this thesis will then move to the assessment of the responses of the judiciary and the legislature, respectively.

2 EXECUTIVE RESISTANCE TO THE NEW RULE OF LAW

As demonstrated in chapter two, the rule of law was restored by 1980, owing to the imposition of statutory restraints on the executive and permanent oversight to ensure that vague delegations of power were never again used to violate non-derogable rights, or as part of an attempt to create an unaccountable presidency. While the political climate created by the revelation of the ‘Watergate horrors’ and the Church committee’s report on the gross abuses of the intelligence community created a near consensus that this was necessary, these changes were bitterly resisted by some executive branch officials.⁵

Foremost among those whom this chapter must discuss is Dick Cheney, who would occupy a number of prominent positions inside the executive branch at key moments in its recent history. This is not only because of his central role in the presidential administration at that time which was the first to be affected by the congressional resurgence, although this is significant. Cheney was Gerald Ford’s Chief of Staff, ‘an

⁵ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown, and Company 2007) 34-37

extraordinarily powerful position'⁶ within the executive branch. However, what is even more significant is the fact that while serving in that position, Cheney developed the strategy for the executive's eventual counteroffensive. As Vice-President, he would also be the key to putting it into place, after the 9/11 attacks.⁷

This section will demonstrate that Cheney was consistent in resisting the congressional resurgence and attempting to restore to the executive branch the powers it possessed during the Nixon Administration. It will further demonstrate that he was at the centre of a group of officials that would occupy critical positions in the executive branch after the 9/11 attacks, especially in the Office of Legal Counsel. This group included John Yoo and Jay Bybee. Within the Department of Defense, this group included Donald Rumsfeld and Paul Wolfowitz. These organizations would formulate and implement theories of executive power that are incompatible with the rule of law.

Cheney became White House Chief of Staff directly following Nixon's resignation. Accordingly, he received 'his chance to wield the powers of the presidency from high in the executive branch hierarchy just as those powers had come under fierce assault'.⁸ On Ford's behalf, Cheney opposed the Freedom of Information Act and the Church committee's attempts to obtain information on the executive's role in the CIA's

⁶ Ibid 26

⁷ Charlie Savage, 'Takeover: Return of the Imperial Presidency', (2009) 48 Washburn Law Journal 299, 306

⁸ Savage *supra* n 5, 26

assassination campaigns.⁹ Following the Democratic Party's return to the White House in 1976, Cheney entered the legislature.

Despite the change of parties occupying the executive branch, Cheney's views on its supremacy remained constant. 'Throughout its fights to expand presidential power at the expense of the legislative branch, the White House would find no greater ally than Representative Cheney'.¹⁰ He acted in this capacity most notably when the other branches of government, exercising an oversight and accountability-creating function essential to the rule of law, investigated and punished the executive for the Iran-Contra Scandal, as discussed in chapter two above.

2.1 Cheney's Minority Report on Iran-Contra and its Significance

The majority report of Congress' Iran-Contra Committee was clear on the wrongfulness of the executive's conduct. It noted, '[t]he common ingredients of the Iran and Contra policy were secrecy, deception, and disdain for the law'. The culpable officials 'undermined a cardinal principle of the Constitution' and the 'most significant check on Executive power'. Executive 'officials viewed the law not as setting boundaries for their actions, but raising impediments to their goals. When the goals

⁹ Ibid 26-37

¹⁰ Ibid 50

and the law collided, the law gave way'.¹¹ Cheney, however, broke ranks with his own party leadership in disavowing the report and its conclusions.¹²

To do so, Cheney revived theories about inherent presidential power that dated to the Nixon Administration.¹³ Like Nixon, Cheney argued that Congress and the Courts simply possessed no authority to operate a check on the presidency when he purported to act in the interests of national security. It must be remembered that Nixon stated that 'any action a President might authorize in the interests of national security would be lawful'.¹⁴ This position was unconstitutional, and it was fundamentally antithetical to the rule of law that it protects.¹⁵ Ignoring this, Cheney argued that his position simply must be constitutional, as he held that the imperatives of national security required a concentration of power within the executive branch.¹⁶

Using this reasoning, Cheney condemned all the statutes that set limits on what the executive branch's actions in the field of national security, particularly when this involved the intelligence agencies. He argued 'the President has the authority, without

¹¹ *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Random House 1988), quoted in Theodore Draper, *A Very Thin Line* (Hill and Wang 1991) 17-24

¹² *Ibid* 375-462 (minority report)

¹³ See *supra* chapter two

¹⁴ Church Committee Report, book 4, p. 166

¹⁵ Ryan Patrick Alford, 'Is an Inviolable Constitution a Suicide Pact?' (2014) 58 *Saint Louis University Law Journal* 355

¹⁶ Remarks of Richard Cheney for the minority, in Report of the Congressional Committees, *supra* n 11, 360

statute, to [order covert operations] . . . Congress cannot . . . invade an inherently presidential power'.¹⁷ This meant that any statutes or court orders to the contrary could simply be ignored. The Iran-Contra Minority Report that Cheney commissioned made it clearer what these inherent powers entailed. According to the report 'the Constitution allocated "powers of deployment and use of force," as well as "negotiations, intelligence gathering, and other diplomatic communications', and accordingly, the "president's inherent powers' . . . allowed the executive to act 'when Congress was silent and even, in some cases, where Congress had prohibited an action.'"¹⁸

As demonstrated above, this was a reassertion of Nixon's view, which was contrary to and contradicted by the Supreme Court's decision in *The Steel Seizure Case*, the Articles of his impeachment, the Constitution itself, and finally by numerous statutes passed after Watergate.¹⁹ Furthermore, if Nixon and Cheney were correct, then there would be no rule of law in the United States, at least according to the International Commission of Jurists' definition, as the executive would be able to make its own rules, which were given the force of law. It would also be able to ignore the other branches that were charged with supervising the constitutionality of the exercise of the rules and emergency powers that it invoked.²⁰ However, before the 9/11 attacks Cheney's view was clearly in the minority, even within his own party. This is illustrated by the fact

¹⁷ Richard Cheney, 'Covert Operations: Who's in Charge?' *Wall Street Journal* (New York, 8 May 1988)

¹⁸ Frederick Schwarz and Aziz Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (W.W. Norton and Company 2007) 160-61

¹⁹ *Youngstown Sheet & Tube Co. v Sawyer*, [1952] 343 US 579 (United States Supreme Court)

²⁰ See *supra* chapter 1

that the senior Republican Senator on the Iran-Contra Committee described Cheney's report as 'pathetic'.²¹

Despite the unpopularity of these views, Cheney persisted in advocating them. He also made the claim that the War Powers Resolution is unconstitutional, despite the fact that it merely reiterates what is found in the Constitution's Declare War Clause.²² Extending his view that the President possessed a 'constitutionally protected power of withholding information from Congress',²³ which would make the legislative oversight the rule of law requires impossible, he argued that the executive could launch covert operations and initiate military action without informing Congress, as only the President can decide 'when it is safe to tell Congress about them'.²⁴ 'Cheney hence rejected *any* legislative limits on executive power in national security matters'.²⁵ As Nixon's resignation under threat of impeachment made clear, the executive might apply the convenient label of 'national security matters' to any program it might undertake, even if what was envisioned was a mass violation of citizens' non-derogable rights in support of a drive to elevate the executive above all legal limitations. This is simply a rejection of the rule of law. Consistent with these views, Secretary of Defense Cheney counselled President George H. W. Bush to ignore the constitutional

²¹ Savage *supra* n 5, 56

²² Ibid 61

²³ Minority Report of the Iran-Contra Committee, in Report of the Congressional Committees, *supra* n 11, 160

²⁴ Savage *supra* n 5, 60

²⁵ Schwarz and Huq *supra* n 18, 160

requirements for the use of force that the War Powers Resolution merely reiterated. He ‘urged Bush to launch the Gulf War without asking Congress for authorization’.²⁶

In Cheney and Nixon’s view of inherent presidential reserve powers, this was acceptable, but this does not answer the question of why this was desirable. Cheney’s unpublished writings provide the key. In them, he argued that Congress does not like to authorize war, and accordingly the ‘War Powers Act tilt[s] the balance away from a patient, measured application of force either towards a quick strike or inaction’.²⁷

For this argument to be logically valid, one must make explicit the hidden premise. It is that war, or, as Cheney euphemistically described it, the ‘measured application of force, is desirable. Once that is done, the argument for expansive executive powers can be stated as a complete syllogism. The second premise is that the executive is more likely to use the power to declare war than the legislature. The conclusion is that the executive must have been given the power to commit the nation’s troops to battle, despite the law to the contrary. As this section will make clear, the desirability of war was a minority view, but it was shared by a number of former executive branch officials and foreign policy experts who would return to prominence shortly before the 9/11 attacks.

²⁶ Savage *supra* n 5, 61

²⁷ Richard Cheney, ‘Congressional Overreaching in Foreign Policy’,

<<http://s3.documentcloud.org/documents/339579/congressional-overreaching-cheney.pdf>> accessed

30 May 2014

2.2 PNAC's Blueprint for Executive Supremacy in Foreign Policy

To understand why Cheney believed that war is desirable, one must turn to the discourse of the neo-conservative policymakers with whom he is closely associated. Many other executive branch officials from the Nixon and Reagan years are on record supporting Cheney's view that war is desirable, as signatories of a document entitled 'Rebuilding America's Defenses: Strategies, Forces, and Resources for a New Century', a report commissioned by a think-tank known as the Project for the New American Century, hereinafter referred to as 'PNAC'. Its drafters and signatories included many who would return to power in the administration of George W. Bush, namely Cheney, Secretary of Defense Donald Rumsfeld, Deputy Director Paul Wolfowitz, Chairman of the Defense Policy Board Advisory Committee Richard Perle, and Under-Secretary of State for Arms Control and International Security Affairs John Bolton, among many others.²⁸

The report argued that war is desirable whenever America's pre-eminent position in global affairs was challenged, or merely when its interests are threatened. It must do so, the report argues, because this is the most effective means by which the United States could maintain its hegemony, which, its authors argued, was imperilled. Accordingly, PNAC's report contained 'plans for an era of American global domination, for the emasculation of the UN, and an aggressive war against Iraq'.²⁹ It

²⁸ Project for the New American Century, 'Rebuilding America's Defenses: Strategies, Forces, and Resources for the New Century' (2000), <<http://www.webcitation.org/5e3est5IT>> accessed 30 May 2014

²⁹ Ebrahim Afsah, 'Creed, Cabal or Conspiracy — The Origins of the current Neo-Conservative Revolution in US Strategic Thinking', [2003]German Law Journal 901, 903

noted that to achieve this goal, what was needed was principally ‘a foreign policy that boldly and purposefully promotes American principles abroad; and national leadership that accepts the United States’ global responsibilities’.³⁰ However, the authors made mention of the inertia that would make it difficult for Congress to authorize ‘simultaneous major theater wars’; progress toward that goal would be slow ‘absent some catastrophic and catalyzing event—like a new Pearl Harbor’.³¹ When George W. Bush was elected, there was no sign of such an event on the horizon. The crisis precipitated by the arrival of such an event would be all the more useful an opportunity for the executive branch, or at the least for those officials who wanted to disregard the rule of law after it was re-established by the congressional resurgence. These officials wished to re-create a state of affairs in which the executive was unbounded by the laws and free of any oversight from the legislature.

3 IMPETUS FOR EXECUTIVE AUTHORITY AFTER 9/11

President George W. Bush was elected in 2000 after a campaign in which he ‘spoken frequently of the diminution of presidential power’, something which he pledged to oppose, saying ‘I’m not going to let Congress erode the power of the executive branch. I have a duty to protect the executive branch from legislative encroachment’.³² Bush’s press secretary clarified that this meant he ‘wanted to restore . . . the executive authority

³⁰ John Ehrenberg et al., (eds), *The Iraq Papers* (Oxford University Press 2010) 21 (reprinting the PNAC ‘Statement of Principles’ of 3 June 1997)

³¹ *Ibid* 51

³² Andrew Rudalevige, *The New Imperial Presidency* (University of Michigan 2005) 211

that the President had been able to exercise'.³³ However, the controversial circumstances of his victory³⁴ were such that he did not possess much political capital in the first phase of his presidency. In addition, Bush was confronted with the opposing party's majority in the House of Representatives, and with a Democratic Party minority in the Senate that was large enough to prevent bills from passing, owing to the Senate's complex rules for invoking cloture.³⁵

This stalemate ended abruptly on September 11, 2001. It is difficult to exaggerate the immediate and overwhelming response of the American public to the events of that date. To say that the psyche of the nation plunged into a profound state of shock would not be an overstatement. On 9/11:

Rumors flew as people stayed glued to their television sets and their cellphones, watching endless replays of the crumbling towers—of the desperate people on the upper floors leaping to their deaths . . . speculation was reported [on television] as widely as fact. Were there more targets? Was Washington burning? Media reports suggested car bombs at the State Department and fires on the Mall, with tens of thousands dead in New York.³⁶

One must remember that not only was the United States unaccustomed to sizeable terrorist attacks, a substantial portion of its population believed that their nation was unassailable. For over two centuries, its home continent was safe from attack from its

³³ Ibid

³⁴ *Bush v Gore* [2004] 531 US 98 (United States Supreme Court)

³⁵ Rules of the Senate of the United States No. 22

³⁶ Rudalevige *supra* n 32, 213. On a personal note, the author recalls that many of his students were too frightened to return to classrooms for more than a week after the attacks, and were outraged at the suggestion that classes should recommence. Any suggestion of a return to normality at that time was treated as sacrilege.

enemies. Many of its citizens attributed this to divine providence.³⁷ It seemed as if the majority of the populace were suffering from post-traumatic stress disorder for months afterwards, existing in a state where even the briefest and most oblique reminders of the events of 9/11 could bring back the terror they experienced that day, such that ‘television producers rushed to digitally remove the Twin Towers [of the World Trade Center] from segments shot before 9/11 to be aired later. They feared the viewers would be traumatized . . . by the sight of the towers’.³⁸ This state of anxiety was further enervated by what seemed to be a new phase of attacks using weapons of mass destruction. Panic ensued after weaponised anthrax was discovered in letters at various locations, along with the message ‘09-11-01 This is next take penacilin [sic] now death to America death to Israel Allah is great’.³⁹

Predictably, a frightened and angry population rallied behind President Bush. In his first speech after the attacks, he announced the inauguration of what he described as an epic battle between the forces of good and evil, that he was to lead:

[T]his is the world’s fight. This is . . . the fight of all who believe in progress and pluralism . . . I will not forget the wound to our country and those who

³⁷ Stephen Webb, *American Providence: A Nation with a Mission* (Continuum 2004) 20-27

³⁸ Barbara Kirshenblatt-Gimblett, ‘Kodak Moments, Flashbulb Memories: Reflections on 9/11’, (2008) 47 *The Drama Review* 11, 12

³⁹ United States Department of Justice <<http://www.justice.gov/amerithrax/docs/a-post-letter.pdf>> accessed 30 May 2014

inflicted it. I will not yield, I will not rest, I will not relent in waging this struggle for freedom and security for the American people.⁴⁰

A week earlier, Bush's approval ratings were at approximately 50% of the electorate. After the speech they were at roughly 90%. One of the most liberal legislators conceded that in the wake of this speech, the President possessed support for almost 'anything that he wants to do'.⁴¹

The 9/11 attacks were precisely the cataclysm that the PNAC report contemplated. This would allow for the two interconnected objectives detailed by Cheney to be realised at once, namely stronger executive power and a new era of war. 'The unfolding crisis provided an opportunity to expand presidential power'⁴² and much like the attacks on Pearl Harbour, they cleared the way for involvement in a war that seemed unthinkable only days before. The authors and signatories of the PNAC report quickly understood the nature of this opportunity. '[E]ven as the Pentagon building was still burning on the morning of September 11 . . . [Secretary of Defense] Donald Rumsfeld told his aide Stephen Cambone . . . "Hard to get a good case. Need to move swiftly. Near term target needs—go massive—sweep it all up, things related and not"'.⁴³ These notes, released only years later, pursuant to requests filed under the Freedom of Information Act, appear to indicate that Rumsfeld was aware that the executive, if it

⁴⁰ Rudalevige *supra* n 32, quoting President Bush's speech of September 14, 2001

⁴¹ *Ibid*, quoting Representative Maxine Waters

⁴² Savage *supra* n 5, 76

⁴³ Ahmed Rashid, *Descent Into Chaos: The U.S. and the Disaster in Pakistan, Afghanistan, and Central Asia* (Viking 2008) 64

moved swiftly to take advantage of the new political climate, would be able to strike targets, like Iraq, that were unrelated to the terrorist attacks.

This interpretation is confirmed by the comments Richard Clarke, the National Coordinator for Counterterrorism, about a meeting held on September 12, 2001. ‘At first I was incredulous that we were talking about something other than getting al-Qaeda. Then I realized . . . that Rumsfeld and Wolfowitz were going to try to take advantage of this national tragedy to promote their agenda about Iraq’.⁴⁴ This would be a difficult endeavour, as a drive for an aggressive war unrelated to the 9/11 attacks produced a significant anti-war movement, which threatened this agenda and the Administration itself, just as the anti-Vietnam War movement threatened Nixon’s. War could empower the executive, but it also might contain the seeds of an administration’s destruction, as Nixon’s forced resignation demonstrated.⁴⁵

Cheney, a keen student of executive power in American history, was determined not to repeat Nixon’s mistakes. This would be vital, as the executive branch now led the nation towards what the neo-conservative executive branch officials understood to be an open-ended era of warfare, against not only those who sponsored terrorism, but those who stood in the way of continued global hegemony. Nixon understood how war could empower the executive. During the Vietnam War he almost succeeded in becoming permanently unaccountable to the law and to the other branches of government, in a manner that clearly violated the fundamental norms of the rule of law.

⁴⁴ Richard A. Clarke, *Against All Enemies: Inside America’s War on Terror* (Free Press 2004) 30

⁴⁵ See *supra* chapter 2

However, he did not use the tools of repression effectively against his opponents, and this led to his downfall.⁴⁶

Nixon deemed wiretapping, harassment, and even the threat of widespread arbitrary detention necessary, but they created a backlash from the other branches of government. If these powers could instead be obtained from Congress, a key source of opposition could be pre-empted. The key would be to obtain authorizations for the use of force and other measures that were much more explicit than the Gulf of Tonkin Resolution, a slender legislative reed upon which Nixon relied to his detriment.⁴⁷ The executive would seek that authorization on the day following the 9/11 attacks, in the form of what appeared merely to be an authorization for the use of military force, but which the executive would subsequently argue, allowed for all the aforementioned Nixonian measures, which would have taken the United States outside of the rule of law if the other branches of government did not intervene.

3.1 The Authorization for Use of Military Force Against Terrorists

The key piece of legislation delegating broad and vague powers to the executive branch was passed within days of the 9/11 attacks.⁴⁸ The legislative history of the Authorization for the Use of Military Force of 2001, hereinafter referred to as the ‘AUMF’, reveals that the executive branch actively attempted to shape the discretion

⁴⁶ Michael Genovese, ‘Impeachment of Richard Nixon’ in *The Encyclopedia of the American Presidency* (Facts on File 2010) 267

⁴⁷ Arthur Schlesinger, Jr., *The Imperial Presidency* (Mariner, 2004) 187

⁴⁸ Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (University of Michigan 2005), 215

they were accorded such that it would effectively free it of any restrictions whatsoever. The AUMF, despite being narrower than initially envisioned when passed, was ultimately invoked in defence of purportedly implicit delegations of incredible power. However, in its original form presented to Congress on September 12, 2001, it is very broad.⁴⁹

‘The language . . . prepared by the White House [] would have given the President power to ‘deter and pre-empt future acts of terrorism or aggression against the United States.’⁵⁰ ‘It would have seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world, without having to seek further authority from Congress.’⁵¹ This formulation would have effectively handed the executive branch the power to declare war in perpetuity. The President would not have needed the approval of Congress to go to war in Iraq, or indeed to invade any other nation, if he indicated that he believed that it would ‘pre-empt’ ‘aggression’, whether this might come from the distant future or in forms of aggression that fall short of traditional *casus belli*.⁵²

It should be noted that this would have constituted a delegation of power broad enough to allow the executive to commit the crime of aggression, known since

⁴⁹ United States Congressional Record, 107th Congress, 1st Session, October 1, 2001, S9949-S9551; see also Congressional Research Service, ‘Authorization for Use of Military Force in Response to the 9/11 Attacks: Legislative History’ (Congressional Research Service, 16 January 2007)

⁵⁰ Rudalevige *supra* n 32, 216

⁵¹ Congressional Research Service *supra* n 49, 2

⁵² *Ibid*

Nuremburg as the ‘supreme international crime’.⁵³ This would also have allowed the executive to do so on its own initiative, in any situation where the executive sought fit to rely on its novel theory of pre-emptive self-defence, which was itself a gross distortion of fundamental norms of international law. President Bush also asserted that he possessed constitutional power to do that exactly that, even without congressional approval. This claim was later set forth in the National Security Strategy of the United States published on September 17, 2002:

[T]he first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats.⁵⁴

The executive did not succeed in its effort to convince Congress to rubber-stamp its theory of a constitutional reserve power that would allow the executive to commit the nation to ‘pre-emptive’ warfare. This would make it necessary for the executive to attempt to create additional sources of authority that surpassed even the broad statutory delegation. This will be discussed in section four below. Significantly, ‘Congress limited the scope of the President’s authorization to use military force . . . to military actions against only those international terrorists and other parties directly involved in

⁵³ *United States v Goering* [1946] 41 American Journal of International Law 186

⁵⁴ The National Security Strategy of the United States of America (22 September 2002)

<mssarchive.us/NSSR/2002.pdf> accessed 14 May 2014

and aiding or materially supporting' the 9/11 attacks.'⁵⁵ It also added that 'Nothing in this resolution supersedes any requirement of the War Powers Resolution'.⁵⁶

In this manner, Congress avoided a 'wholesale, perpetual delegation of the war power'.⁵⁷ However, as will be demonstrated below, however, even this limited delegation of power may not be compatible with the rule of law's requirement that such delegations of power must be carefully constrained and scrutinized after the fact. However, what was clear even as this bill was passed is that the executive sought complete freedom of action, by seeking to insert language that would prevent Congress from questioning the way in which it exercised the unfettered discretion that it sought.

When the Senate was preparing to pass a bill which trimmed the authorization to those who instigated or supported the 9/11 attacks, the executive attempted to broaden its scope in another key fashion. Namely, it tried to obtain authority to use military force and authorize military detention inside the United States, in a manner that were clearly foreclosed by various statutes, some of which responded to Nixon's abuses, such as the Non-Detention Act. Others, such as the Posse Comitatus Act of 1878,⁵⁸ were even more firmly rooted in American law.⁵⁹

⁵⁵ Congressional Research Service *supra* n 49, 3

⁵⁶ Authorization for the Use of Military Force Against Terrorists 2001, Public Law 1070-40

⁵⁷ Gene Healey, *Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Cato Institute 2008) 153

⁵⁸ Posse Comitatus Act 1878, 20 Statutes 152 (1878)

⁵⁹ Matthew Hammond, 'The Posse Comitatus Act: A Principle in Need of Renewal', (1997) 75 Washington University Law Quarterly 953, 956-961

It is telling how the executive attempted to use the political environment created by the fresh crisis to achieve its objective, which purportedly created substantial time pressures. The Senate voted on the bill after only two of its members spoke on it.⁶⁰ With respect to the executive's drive to obtain authorization to employ the military within the United States, former Senate Majority Leader Thomas Daschle noted that:

Literally minutes before the Senate cast its vote, the administration sought to add the words 'in the United States and' after 'appropriate force [against those nations, organizations of persons he determines planned, authorized or committed or aided the terrorist attacks] in the agreed-upon text. 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.

Congress rejected this and accordingly the AUMF does not supersede those earlier restrictions on the use of military force within the United States. However, as will be described below, this clear legislative history would not prevent the executive from arguing that it contained an implicit authorization for this action.

The AUMF was not the blank check for war the executive sought, which it would later claim could be found in other sources of law. It also did not free the executives from the constraints of the War Powers Resolution, the Non-Detention Act, and other explicit protections against the executive taking on powers that would give it unlimited discretion without any possibility of effective oversight or control by the other branches of government.⁶¹ Nevertheless, the AUMF was a victory for an executive intent on obtaining significant freedom of action in after the 9/11 attacks.

⁶⁰ Healey *supra* n 57, 153-54

⁶¹ Staff of the Majority of the Members of the House of Representatives Judiciary Committee, *The Constitution in Crisis: The High Crimes of the Bush Administration and Blueprint for Impeachment* (Skyhorse 2007), 130-131

First, it should be noted that Congress authorized military force against non-state actors, something which was ‘unprecedented in American history, with the scope of its reach yet to be determined’.⁶² As subsequent subsections of this chapter will demonstrate, this allowed the executive to continue to use military force for a longer period. This also allowed the executive to create a political climate that was conducive to its attempts to expand its own powers at the expense of the rule of law. Second, Congress authorized the executive to take action against countries, organizations and individuals that were yet to be determined.⁶³

This second feature of the bill was problematic in itself, but the breadth of the discretion granted to the executive is even more notable. One must note that it was the executive alone who was given the authority to make this the central decision about military action. The AUMF explicitly states that ‘the President is authorized to use force against’ those ‘*he* determines’ to have been involved with the 9/11 attacks. While the members of Congress clearly believed that they were authorizing a limited campaign against those who were responsible for one particular terrorist attack, and, possibly, Afghanistan as the nation that harboured them,⁶⁴ the language of the bill made it possible for the executive to expand this into approval of a broader struggle, much

⁶² Congressional Research Service, ‘Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications’, (Congressional Research Service 2011) 14

⁶³ Authorization for the Use of Military Force Against Terrorists 2001, Public Law 1070-40 (18 September 2001), at section 2(a) (‘the President is authorized to use . . . force against those nations . . . he determines . . . aided the terrorist attacks . . . or harbored such persons’)

⁶⁴ Peter M. Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2008), 93

as the Gulf of Tonkin resolution empowered Nixon to escalate hostilities far beyond what was envisioned by the legislators that approved it. However, Bush now possessed significantly more legal authorization for his actions.⁶⁵

For the AUMF to serve the purposes that the executive envisioned, as evidenced by the original draft presented to the legislature, the executive would need to find a way to ignore its explicit words. By the beginning of the Bush Administration, a set of infrequently applied techniques now existed that would allow the executive to put the laws into force as the executive wished they read, rather than according to their actual text.⁶⁶ These were the signing statement and the OLC memorandum.

As this chapter will demonstrate, these statements and memoranda would allow the executive branch to enlarge its own powers and to effectively remove itself from the oversight and control of the other branches of government. This was done in a manner that this chapter will demonstrate is not in accord with the minimum requirements of the rule of law. In addition, it will show that they specifically violate the constraints on executive law-making, as set forth by the ICJ, namely that the executive's own rules and emergency powers were not subject to restraints by the other branches of government. However, before demonstrating how these techniques offend against the rule of law, this chapter must describe them. After this has been completed, it will be possible to specifically detail how they were used to shape the meaning of the AUMF, to allow for much more than what Congress intended.

⁶⁵ Gary Minda, 'Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War', (2007) 53 Wayne Law Review 943, 953-954

⁶⁶ House Judiciary Committee Majority Staff, *supra* n 61, 185-190

The following section will show how the limited authorization for the use of military force was construed by the executive as the inauguration of a state of prolonged war, against organizations and nations it could determine in its sole discretion, which allowed the executive to regulate all of the ‘incidents’ of warfare. This argument was used to authorize a number of illicit practices, many of which constituted violations of non-derogable rights. Namely, the executive argued that the AUMF allowed the executive to create military tribunals that lacked the basic elements of fundamental justice, to arbitrarily detain persons for indefinite periods, after asserting that they would be tried by those commissions, to torture those who were thus detained, and to create a vast system of warrantless surveillance which was designed to produce suspects who might then also be subjected to this irregular and unconstitutional jurisdiction. As this system was predicated upon violations of *jus cogens* norms by the executive, it will be clear that if this was not addressed by the other branches of government, the United States cannot be considered to be in compliance with the basic norms of the rule of law.

4 EXECUTIVE LAW-MAKING CONSTRUING THE AUMF

Cheney, along with the other veteran executive branch officials who returned to the White House in the Bush Administration, understood the levers of power that the executive could use against Congress, many of which emulated the Nixonian strategies that placed the United States outside of the boundaries of the rule of law.⁶⁷ As was the case with the Gulf of Tonkin Resolution,⁶⁸ the AUMF could be construed to imply

⁶⁷ See *supra* chapter two

⁶⁸ Southeast Asia Resolution 1964, Public Law 88-408

authorization for many activities that it did not explicitly mention.⁶⁹ The executive's goal would be to direct its officials to interpret the document as the President and his close advisors indicated. As these officials took their orders from the president, this was a simple matter.⁷⁰ The difficulties would lie in making these implausible interpretations of this legislation appear authoritative, and where this was impossible, keeping these secret. As this section will demonstrate, there are two main methods by which the executive can frustrate or subvert Congress' legislative intention. The first is the signing statement, wherein the executive purports to reveal the true construction of a bill that Congress just passed. In these statements, the executive purportedly clarifies how the law it describes should be executed.⁷¹

The signing statement as a formal tool of statutory interpretation was developed in order that this process might appear to produce a document that had the status of law, as the executive purportedly fixes a single authoritative meaning to the supposedly ambiguous statute at one point in time, rather than as it sees fit on a case by case basis.⁷² However, as the next subsection will make clear, the signing statement can be more

⁶⁹ Gene Healey, *The Cult of the Presidency* (Cato Institute, 2008) 154

⁷⁰ Rachel Ward Saltzman, 'Executive Power and the Office of Legal Counsel', (2009) 28 *Yale Law and Policy Review* 449-462

⁷¹ American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Report of 8 August 2006, <<http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf>>, 14-28 accessed 30 May 2014

⁷² Charlie Savage, 'Last Word: The Constitutional Implications of Presidential Signing Statements' (2007) 16 *William and Mary Bill of Rights Journal* 1, 18-19

opaque than the law it purports to interpret. As will be demonstrated below, this allows the executive great discretion, such that it can be said that it used an illicit procedure to make law, in such a way that it regains unfettered freedom of action to act against the wishes of the other branches of government, thus destabilising the rule of law.

There is another method of executive law-making used to expand upon the AUMF to be discussed here. That method is the use of the memoranda of the Department of Justice's OLC. While these memoranda might be used merely to embellish the interpretations the executive gave to legislation, the second subsection will explain how the executive branch's internal memoranda came to acquire the status of laws. This allowed the OLC to write memoranda that could go even further than signing statements in frustrating Congress' intent as will be detailed below. Following Cheney's logic, which vitiated that of Justice Jackson in *The Steel Seizure Case*, the executive encouraged the OLC to write memoranda that directly contradicted what the legislature ordered, thus allowing the President to do what Congress prohibited.

Both of these methods were used to construe the AUMF in a number of problematic ways, which contradict both the ICJ's limitation on executive law-making and the requirement that the executive be accountable to the other branches of government. Accordingly, it will be possible to conclude at the conclusion of this chapter that if the legislature and the judiciary did not react adequately to these attempts by the executive to make laws that effectively gave it unfettered discretion then the United States cannot be considered a rule of law state, as in that situation the executive would be able to commit violations of citizens' non-derogable rights with impunity.

This chapter will also establish the significance of the next two chapters' discussion of Congress and the courts' responses to the executive's claims, especially the claims that that it could make laws that frustrated oversight and accountability for what it

labelled as national security activities. Before beginning that discussion, this chapter will have made it clear that the rule of law required a vigorous response from these branches, on the penalty that they be permanently eclipsed by an imperial presidency, one that surpassed even Nixon's designs.

4.1 The Development and Use of Presidential Signing Statements

Signing statements are letters written by the President that in certain cases are attached to bills when he elects to sign those bills into law. Until the presidency of Ronald Reagan, these statements did not purport to have any legal significance. Rather, they served only a rhetorical purpose. Accordingly, only seventy-five statements were issued over the course of the two centuries that preceded his inauguration. After Reagan revitalized the practice, he, George H.W. Bush, and Bill Clinton together issued two-hundred and forty-seven signing statements. Then Assistant Attorney General Walter Dellinger noted that at this point, they were no longer being issued for a rhetorical purpose, but were used to order the executive branch in a contentious manner, either by shaping the interpretation of key terms in the law, or by asserting that the law should not be enforced owing to its purported unconstitutionality.⁷³ Both of these new uses are in tension with the rule of law.⁷⁴ This would become clearly apparent when President George W. Bush began to use these after the 9/11 attacks to

⁷³ Walter Dellinger, 'Memorandum to the Counsel to the President, The Legal Significance of Presidential Signing Statements', (Washington, Office of Legal Counsel, 3 November 1993) <<https://web.archive.org/web/20140113185128/http://www.justice.gov/olc/signing.htm>> accessed 30 May 2014

⁷⁴ American Bar Association, Report of the Committee on Separation of Powers Adopted by the House of Delegates August 8, 2006 *supra* n 71

define the scope of his powers under the AUMF to act in the interests of national security.

This use of signing statements during his Administration was notable both in terms of the purposes of these statements and their sheer volume. ‘Bush . . . broke all records, using signing statements to challenge about 1,200 sections of bills over his eight years in office, about twice the number challenged by all previous presidents combined’. This figure was eighty times more than the combined total of all the statements issued before the Reagan Administration.⁷⁵ In addition, he claimed explicitly that ‘his constitutional power as head of the executive branch gives him the right’ to do so.⁷⁶ Signing statements have a dual role. They allow the President to signal his intention that he will not execute the statute as written, and they also allow him to articulate a controversial theory of his powers under the Constitution. Both are problematic, both in theory and in practice. As will be demonstrated in the next two chapters, the precedent set by Bush was embraced by Obama, who has outpaced every President other than his predecessor,⁷⁷ and used them in a manner that is just as problematic.

The American President plays a role in the legislative process, having been given a limited role, namely to sign or veto bills, and to propose laws. Scholars have pointed

⁷⁵ Charlie Savage, ‘Obama Looks to Limit Impact of Tactic Bush Used to Sidestep New Laws’, *New York Times* (New York, 9 March 2009)

⁷⁶ Faith Joseph Jackson, ‘The Constitutionality of Presidential Signing Statements,’ (2009) 35 *Journal of Legislation* 1, 9

⁷⁷ Eli Lake, ‘Obama Embraces Signing Statements After Knocking Bush for Using Them’, *The Daily Beast* (4 January 2012) <<http://www.thedailybeast.com/articles/2012/01/04/obama-embraces-signing-statements-after-knocking-bush-for-using-them.html>> accessed 30 May 2014

out that ‘the Framers took great pains to limit and qualify this power through the painstaking process of enactment, [which was] embodied in Article I, section 7, clause 2.’⁷⁸ These ‘[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.’⁷⁹ The Constitution also assigns him the duty to *faithfully* execute the laws.⁸⁰ The use of the signing statement as means of making law, in particular by nullifying legislation, is inconsistent with the separation of powers that is at the heart of both the Constitution and the rule of law’s mandate. This practice grants to the executive a legislative power far in excess of what the Constitution granted, namely the power to propose and veto bills.

4.1.1 The Signing Statement of the AUMF and its Significance

Given the fact that the AUMF gave the executive very broad powers to declare and war and expand it, it may seem surprising that it was deemed necessary to widen the scope of this delegation by means of a signing statement. Despite this fact, the executive did issue a significant signing statement. To adequately understand the executive’s drive to become paramount and unaccountable after 9/11, which centred

⁷⁸ Marc N. Garber and Kurt A. Wimmer, ‘Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power’, (1987) 24 *Harvard Journal on Legislation* 349, p. 372

⁷⁹ *INS v Chadha* [1983] 462 US 919, 965 (United States Supreme Court)

⁸⁰ William D. Popkin, ‘Judicial Use of Presidential Legislative History: A Critique’, (1991) 66 *Indiana Law Journal* 699, 702-704

on the tacit declaration of an open-ended era of war, one must first be clear on the importance of the statement appended to the AUMF.

As usual, the statement purports merely to be explaining the text of the legislation. In fact, it expanded the executive's freedom of action significantly. Whereas the AUMF itself gives the executive freedom to use the military without oversight, it at least attempted to define some limits to such uses of force, by specifying that the executive was authorized to target only the nations involved in the 9/11 attacks, or in sheltering the perpetrators. On the contrary, the signing statement claimed that the AUMF 'recognizes the seriousness of the terrorist threat to our Nation' without noting that the statute was a response not to the threat of terrorism in general, but rather that it referred to the acts of one terrorist group in particular, namely al-Qaeda. The signing statement goes on to state that the AUMF is a response to the nation's commitment not merely to 'a direct, forceful, and comprehensive response to these terrorist attacks', but also to a military response to 'the scourge of terrorism against the United States *and its interests*'.⁸¹

4.1.1.1 The AUMF Signing Statement: Authority over the Residuum of al-Qaeda

Accordingly, the signing statement represents the difference between the legislative contemplation of military force directed at al-Qaeda and the 'war on terrorism', which is unlimited in time or space. Insofar as any attack that influences the global markets has an impact on the United States, terrorism in any corner of the globe can then be said to threaten that nation's interests. This signing statement effectively transforms

⁸¹ Statement of the President of 18 September 2001 on signing the Authorization for the Use of Military Force, in *Public Papers of the Presidents of the United States, George W. Bush*, 2001, book 2, (Washington, U.S. Government Printing Office, 2003) 1124-1125 (emphasis added)

an authorization for attacks against a specific set of wrongdoers into a charter of unlimited war.

This interpretation did not end with the Bush Administration. Indeed, there is ample evidence that now that the Obama Administration has embraced this vision of a ‘war on terror’ as articulated not by the AUMF, but rather by Bush’s signing statement, which was not repealed or otherwise disavowed. The best evidence of this proposition stems from the speech of Jeh Johnson, General Counsel of the Department of Defense at the Oxford Union on November 30, 2012. In this address, Johnson states that the war against al-Qaeda ‘and associated forces’ is an unconventional conflict, against an unconventional enemy, and will not end in conventional terms’. It should be noted that the term ‘associated forces’ is not found in the AUMF. It will be demonstrated below that it plays an increasingly important role in the executive’s arguments that it is empowered to use military force worldwide on its own initiative.

Johnson goes on to rule out how the war against terrorism might end. He flatly denies any possibility that al-Qaeda would renounce terrorism, stating that ‘Al Qaeda is not in that category’. A negotiated end having been ruled out by fiat, he states that ‘I can offer no prediction about when this conflict will end, or whether we are, as Winston Churchill described it, near the “beginning of the end.”’ He then details what criteria the executive branch would use to decide whether it has destroyed the enemy, at which point a war would presumably be considered won. ‘[T]here will come a tipping point – a tipping point at which so many of the leaders and operatives of al

Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States’.

4.1.1.2 The AUMF Signing Statement’s Creation of Affiliates of al-Qaeda

This would seem to put some meaningful limit on the war on terror, even if it still lies entirely within the executive branch’s discretion to determine whether this ‘tipping point’ has been reached. However, close attention to this sentence reveals this to be an illusion. The key problem is the inclusion of the word ‘affiliates’. The executive, in both the Bush and Obama Administration, has affixed this label to groups that have no connection to those responsible for the 9/11 attacks. For instance, the terrorist group known as al-Shaabab was deemed by the executive to be an affiliate of al-Qaeda, although the group is an indigenous offshoot of one of the factions in Somalia’s civil war. It is difficult to take seriously the claim that this group presents a threat of a ‘strategic attack’ to the United States, of the type contemplated by the AUMF.

Furthermore, al-Shaabab was only designated a terrorist group in 2008.⁸² According to the intelligence agencies within the executive branch, it then merely ‘affiliated’ with a set of individuals that had no direct connection to the 9/11 attacks. That latter group is known as Ansar al-Sharia/Al-Qaeda in the Arabian Peninsula, which is comprised primarily of Yemeni tribesmen. However, as al-Shaabab was a designated terrorist group which already was being subjected to sustained drone strike

⁸² United States Department of State, Designation of al-Shabaab as a Foreign Terrorist Organization, 73 Federal Register 31, Public Notice 6136 (26 February 2008)

campaigns before this purported affiliation with Ansar al-Sharia, this affiliation was used to justify the prior use of military force directed against it retroactively.

The executive's freedom of action in designating 'affiliates' of new franchises of al-Qaeda is facilitated by the fact that it is very difficult to determine whether reports that clandestine groups did in fact identify with al-Qaeda are drawn from objective sources, or whether they simply represent the say-so of the intelligence agencies the executive controls. Similar comments could be made about purported affiliates in locations such as Mali, Niger, and Nigeria. Experts in area studies have also questioned the executive's assertion that these groups should be considered affiliates of al-Qaeda,⁸³ rather than merely threats to the United States' omnipresent regional interests.

Al-Qaeda and its affiliates are rather like Theseus' ship. Its parts are replaced repeatedly, but it sails on. The question of whether it should be considered to be the same organization is never asked, despite the very tenuous relationship between, for example, a Tuareg guerrilla movement challenging the government of Mali and the group of largely Saudi terrorists who executed the 9/11 attacks. By introducing the idea that the AUMF applies equally to the 'affiliates', the signing statement made possible a series of low-intensity wars on multiple continents. Finally, the United States has broadened its reach even further by claiming that the AUMF's authorization also applies to 'associated forces', which are not even affiliates of that group, but which have 'entered the fight alongside al Qaeda and are co-belligerent with al Qaeda in

⁸³ Ken Menkhaus, 'Somalia: State Collapse and the Threat of Terrorism' (Routledge, 2004), 65; see also Scott Baldauf, 'What is Somalia's al-Shabaab?' *Christian Science Monitor* (Boston, 26 October 2011)

hostilities against the U.S. *or its coalition partners*’, a definition that now expands the ‘interests’ of the United States to encompass those of its allies.

This is a far cry from the relevant statutory text, which is the actual grant of discretionary authority. If the executive continues to be able to make this argument about ‘affiliates’ and ‘associated forces’, then there may never be an end to the general declaration of war against terrorism that the executive crafted out of the AUMF in its signing statement. One prominent legal scholar commenting on Johnson’s speech noted that the ‘AUMF [as construed by the executive] identifies the affiliates of al-Qaida as the enemy, as well as al-Qaida itself’. ‘As long as those affiliates remain in existence, the United States will be at war with them. And because “al-Qaida” has become a kind of brand that any group can lay claim to, al-Qaida affiliates will be around as long as radical Islam is’.⁸⁴ On this basis, the war on terror, itself an expansion of delegated powers that offended against the rule of law, was thereby expanded into a war against an ideology, which can be defined ever more broadly by the executive.

It should also be noted that this interpretation does not only authorise limited attacks such as drone strikes against members of these groups. The construal of the AUMF to allow military force to be used against these affiliates also purportedly allows for conventional wars to be commenced against any nation that the executive concludes is sheltering a member of this proliferating and unlimited set of terrorist groups. For example, the executive is currently using this rationale to engage in combat operations in Yemen, despite the fact that the international community has noted that the internal

⁸⁴ Eric Posner, ‘The War on Terror Will Ever Be With Us’, Slate Magazine, (11 December 2012)

<http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/12/jeh_johnson_is_wrong_the_fight_with_al_qaida_continues.htm> accessed 30 May 2014

conflict in that country does not rise to the threshold under International Humanitarian Law that would justify the use of military force.⁸⁵

Before discussing the use of OLC memoranda that would construe the AUMF as allowing for the invasion of Iraq, torture, indefinite arbitrary detention, and extra-judicial killing, one final comment must be made about the text of the AUMF and the signing statement expounding upon it. Both of these documents appear to recognize inherent executive reserve powers under the Constitution, despite the fact that these do not appear in its text.

The AUMF's final 'whereas' clause states that 'the President has authority under the Constitution to prevent acts of international terrorism'. This is likely a reflection of the uncontroversial belief that the President has some limited reserve powers in an emergency to act when time is of the essence and Congress cannot react in a timely manner. The signing statement broadens this power. It states that 'the authority of the President under the Constitution [is] to deter and prevent acts of terrorism against the United States', implying that the executive may act even when the threat is not immediate.

This second statement is a reiteration of what Cheney and other Nixon and Ford Administration officials said about the WPR, namely that it was an 'unconstitutional invasion' of executive prerogative. As will be described in the next subsection, this is a fringe theory, which has no jurisprudential support and which contradicts the text of the Constitution's Declare War Clause, and the explanation of its principal author,

⁸⁵ Mary Ellen O'Connell, 'When is a War Not a War? The Myth of the Global War on Terror', (2005)

James Madison.⁸⁶ Congress recognised after the Vietnam War how executive discretion to start wars was entirely incompatible with the rule of law. The previous chapter described how the executive was nearly to destroy the rule of law in that manner. Executive declarations of war would once again destabilise the separation of powers.

The AUMF and its signing statement marked the inauguration of a new crisis for the rule of law in the United States. The document has the characteristics of both the 1950 declaration national emergency and the Gulf of Tonkin resolution. The former strengthened the executive immeasurably, while the latter gave the executive vague and unspecified powers to create wars and crises. The second set of powers allows the executive to catalyse conditions that are favourable to the adoption of even broader authority, and to remove itself from the control of the other branches of government. However, as the arguments in support of this assault on the rule of law were made within OLC memoranda, this chapter must first describe the development of this pernicious form of executive law-making, which itself calls the rule of law into question.

⁸⁶ See e.g. James Madison, *The Writings of James Madison Volume Six* (G.P. Putnam and Sons 1906)

4.2 OLC Memoranda Construing the AUMF & Their Significance

The OLC “has been deemed ‘the most important governmental office you’ve never heard of’”.⁸⁷ It functions in the manner of a private law firm, with the President as its only client. Accordingly, it often presents the President with aggressive interpretations of the law that suit his own purposes. Many signing statements, for example, followed after memoranda of the OLC stated that so-called intrusions into the exclusive domain of the executive branch were unconstitutional.⁸⁸ However, these memoranda can function as a sword, and not merely a shield.⁸⁹ They advise the President that he need not heed the laws as they are written. This has been described as a “‘Get Out of Jail Free Card’” for the party seeking the opinion.⁹⁰ As will be outlined below, OLC memoranda can also specify the particular interpretation of the law that will govern, despite Congress’ intentions to the contrary.

The possibility of executive law-making by the OLC is particularly problematic because this office is both unaccountable to Congress and a highly politicized body. Not only are the head of the agency, but all four of his deputies political appointees of the current president. The tenure of the attorneys who serve under these appointees is

⁸⁷ Bradley Lipton, ‘A Call for Institutional Reform of the Office of Legal Counsel’, (2010) 4 Harvard Law and Policy Review 241, 249

⁸⁸ Christopher May, *Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative* (Greenwood, 1998) 131-49

⁸⁹ See Ross L. Weiner, ‘The Office of Legal Counsel and Torture: the Law as both a Sword and a Shield’, (2009) 77 George Washington Law Review 524

⁹⁰ Lipton *supra* n 87, 250

generally shorter than that of the President.⁹¹ This politicization and the self-serving legal interpretations that it fosters are exacerbated by the fact that these opinions are confidential, protected by assertions of “deliberative prerogative” and attorney-client privilege, despite the fact that they may purport to make law, in addition to opining upon it.⁹²

That said, it is best to begin a survey of the OLC memoranda with a description of how they can serve the President and his agents in a defensive capacity. As a former head of the OLC opined:

It is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong OLC speaks for the Justice Department, and it is the Justice Department that prosecutes violations of criminal law. If the OLC interprets a law to allow a proposed action, then the Justice Department won't prosecute those who rely on the OLC ruling. Even independent counsels would have trouble going after someone who reasonably relied on one It is one of the most momentous and dangerous powers of the government.⁹³

OLC memoranda purportedly interpreting the AUMF were used to violate and to immunize the violation of a number of non-derogable rights, as the next subsections will demonstrate. However, this section will demonstrate that these memoranda were also used for a more fundamental and troubling purpose, namely to prolong and expand the state of emergency that allowed the executive to assume further powers. One particular claim of this nature found in the OLC memoranda was the argument that the

⁹¹ Ibid 254-55

⁹² See Dawn E. Johnsen, ‘Faithfully Executing the Laws: Internal Legal Constraints on Executive Power’, (2007) 54 UCLA Law Review 1559

⁹³ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton and Company 2007) 144

AUMF allowed the executive to order the invasion of Iraq without further authorization from Congress.⁹⁴ It will also demonstrate that this was done in order to build support for an aggressive war and with the additional aim of destabilizing the rule of law.

4.2.1 OLC Memoranda Authorizing an Invasion of Iraq

As was the case before the Gulf War of 1990-91, Dick Cheney resisted the suggestion that the executive should obtain an authorization for the use of military force from Congress. Bush Administration officials were candid about their reasons for avoiding this, at least when speaking anonymously, saying ‘[w]e don’t want to be in the legal position of asking Congress to authorize the use of force when the President already has that full authority’.⁹⁵ The executive was able to take this position because of the memoranda of its own lawyers.

First, they argued that the AUMF ‘encompassed such action’, and second, that the executive possessed reserve constitutional powers that would allow it to do this on its own initiative, were this not the case.⁹⁶ The first argument was quite problematic, as it rested on the Administration’s claims that Saddam Hussein’s regime was sheltering members of al-Qaeda, which did not appear even minimally plausible, owing to the

⁹⁴ John Yoo, ‘Memorandum Opinion for the Deputy Counsel to the President: The President’s Constitutional Authority to Conduct Military Operations and Nations Supporting Them’, (Washington, Office of Legal Counsel, 25 September 2001)
<http://dSPACE.wrlc.org/doc/bitstream/2041/70942/00110_010925display.pdf> accessed 30 May 30, 2014

⁹⁵ Rudalevige *supra* n 32, 219

⁹⁶ *Ibid*

documented hatred between the Baathist regime and Islamism.⁹⁷

Despite this implausibility, the executive argued that Hussein was sheltering ‘terrorists’, and noted that the signing statement did not limit the use of military force to only those individuals involved in planning and executing the 9/11 attacks. This was a rather poor justification, as it turned out that the terrorists to which the executive referred were members of Mujahedin-e Khalq, a group which focused its efforts exclusively on overthrowing the Islamist regime in Iran.⁹⁸ Accordingly, the executive settled upon the theory that Iraq was planning terrorist attacks against the United States, which the signing statement purportedly authorized him to pre-empt, whatever their source. It was argued that this attack might involve the nonexistent weapons of mass destruction, which formed the central premise of the executive’s argument that it was empowered by international law to attack that nation. ‘Secretary of State Colin Powell even raised the alarming prospect that ... pilotless aircraft could sneak into the United States to carry out poisonous attacks on American cities’.⁹⁹

These claims also failed to meet the minimum requirements of plausibility, even in

⁹⁷ Select Senate Committee on Intelligence, ‘Report of the Select Committee on Intelligence on Postwar Findings About Iraq’s WMD Programs and Links to Terrorism and How They Compare With Prewar Assessments’, 8 September 2006 <<http://intelligence.senate.gov/phaseiiaccuracy.pdf>> accessed 30 May 2014

⁹⁸ *People’s Mojahedin Organization of Iran v United States Department of State*, [2004] 182 F3d 17, 21 (District of Columbia Circuit). It should also be noted that the Department of State subsequently delisted the MEK, ‘revok[ing] its designation as a Foreign Terrorist Organization’. ‘Delisting of the Mujahedin-e Khalq’, U.S. Department of State, <<http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm>> accessed 30 May 2014

⁹⁹ Associated Press, ‘Iraqi Drones not for WMD’, *Associated Press*, (Washington, 11 February 2009)

the overheated media environment that followed after the 9/11 attacks. Descriptions of drones that could spread chemical or biological weapons were revealed to be references to a ‘primitive craft — its wings held together by tin foil and duct tape and two wooden propellers — [that] looked more like a high school science project than the “smoking gun” that could spark a war’.¹⁰⁰

Since the executive could not convince the legislature that Iraq was connected with the 9/11 attacks or that it was planning terrorist attacks on the United States, it was forced to argue that it possessed inherent authority to launch an attack against that nation for another entirely different reason. Namely, they argued that Iraq had not divested itself of weapons of mass destruction as the United Nations ordered in 1991. However, the OLC argued that the executive possessed the inherent authority to enforce this command,¹⁰¹ even after the United Nations failed to sanction such an attack on that basis.

In essence, the executive resorted to the argument that it could launch an aggressive war, on its own initiative. The alleged source of law for this proposition was an internal and secret OLC memorandum that argued for the existence of constitutional reserve powers that empowered the executive to act as he saw fit in the interests of national security. This thesis’ description of Congress’ reaction to this remarkable claim will need to be postponed until the next chapter, however, as this chapter must also detail the other troublesome acts of executive law-making by the OLC. In particular, the next subsections will describe OLC memoranda that claimed it was constitutional for the

¹⁰⁰ Scott Peterson, ‘The Case of the Deadly Drone’, *The Christian Science Monitor* (Boston, 13 March 2003)

¹⁰¹ Yoo *supra* n 94

executive to subject people to indefinite arbitrary detention and torture, such that these violations of non-derogable rights could not be corrected by the other branches, which imperilled the rule of law.

4.2.2 OLC Memoranda Creating a Parallel Legal System Devoted to Violating Non-derogable Rights and Prolonging the Emergency

As chapter one demonstrated, Dicey noted when proposing his definition of the rule of law that one of its key features is its guarantee of regular legal procedures for all those accused of crimes, which precludes the creation of special courts controlled by the executive branch that deprive suspects of the basic protections of due process. This subsection and those that follow will demonstrate that the creation of this sort of system was a priority for the executive after the 9/11 attacks. Further, the creation of the system accomplished this via executive law-making, thereby violating two of the minimum requirements of the rule of law. Finally, the chapter will show that this was done as part of a plan to prolong the state of war and political crisis that its architects hoped would allow for a permanent return to the imperial presidency.

The creation of these special executive tribunals and the detention regime created under their jurisdiction at Guantánamo Bay was undertaken with the goal of giving the executive freedom to ignore the most basic safeguards preserved by the rule of law. Foremost among these are the rights to be free from prolonged arbitrary detention and torture. It created this regime to violate these non-derogable rights while immune from all oversight and possible restraint. This is a situation that is not merely a violation of the core norms of the rule of law. Rather, it is the creation of a legal order that is its exact opposite.

In addition, the executive branch had an underlying goal for precisely these violations of non-derogable rights within the detention facilities that struck at the heart of the rule of law: it put these measures into place with the goal of obtaining false confessions that would make the case for further military campaigns, thereby prolonging the state of emergency and allowing for additional consolidation of power within the executive branch. This subsection must discuss the executive's creation of the tribunal apparatus, and then turn to the authorization of prolonged arbitrary detention and torture by means of OLC memoranda, and demonstrate why these presented a serious crisis to the rule of law in the United States.

4.2.2.1 OLC Memoranda Establishing Special Tribunals

The Bush Administration has consistently characterized the commissions which it erected after the 9/11 attacks as normal features of its military justice system, employing orthodox procedures to deal with individuals who traditionally would have been subjected to military trials.¹⁰² Both of these assertions are false, although it is the second proposition that has received the most attention. That said, this subsection must not neglect detailing the problems with the first.

The United States has a system of law known as the Uniform Code of Military Justice, hereinafter referred to as the 'UCMJ'. This code was created by Congress, pursuant to the authority granted by the Constitution's Article I, § 8, in 1950. It is merely the latest iteration of Articles of War established by Congress, which date back to a code enacted in 1806, which itself replaced regulations dating to the Revolutionary

¹⁰² Savage *supra* n 5, 134-38

War.¹⁰³ In addition to providing regulations for the disciplining of members of the armed forces, the UCMJ also specifies that other classes of individuals may be subjected to its jurisdiction, namely, prisoners of war, and details the legal basis for their trial and punishment, i.e., as war criminals.¹⁰⁴

Despite the fact that Congress established the jurisdiction and procedures of the nation's military justice system, the executive, over the protests of many dissidents, including the military's own lawyers,¹⁰⁵ created a new set of procedures after the 9/11 attacks, which would redefine who could be detained and tried, and how they would be treated in custody. This effort began in October of 2001, when lawyers from the White House Counsel's Office were charged with drafting an executive order that would set up the commissions.¹⁰⁶ Even before the OLC gave its imprimatur to the executive's plan, it was decided that the commission would admit 'any evidence "of probative value"' [i.e., no matter how that was obtained. This included statements made during 'enhanced interrogation'], and that the commission's judgments would be subject to 'no review of any U.S., foreign, or international courts'.¹⁰⁷

After lawyers participating in a State Department initiative argued that this would require a specific authorization from Congress, the executive directed its lawyers to

¹⁰³ Journals of the Continental Congress, Articles of War, June 30, 1775

<http://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp> accessed 30 May 2014

¹⁰⁴ Uniform Code of Military Justice, article 18, United States Code, title 10, section 818

¹⁰⁵ Savage *supra* n 5, 137-139

¹⁰⁶ Ibid 134

¹⁰⁷ David Glazier, 'A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions', (2008) 121 *Lewis & Clark Law Review* 148

bypass the State Department and the National Security Council. Vice-President Cheney finalized the order setting up the tribunals over the vociferous objections of the Attorney-General of the United States.¹⁰⁸ ‘Cheney circumvented normal government processes’ in doing so, preventing the relevant officials from making their views known, especially where they might have objected to his views about the proper scope of executive power, which were incompatible with the rule of law.¹⁰⁹ Observers within the executive branch wondered how to finesse the question of presidential authority to order commissions that ignored both a statute in force and the plain text of the constitution. The answer to this was provided by the OLC, which wrote a secret memorandum to that end.

Patrick Philbin had no experience in constitutional law. He had joined the OLC a month earlier with the understanding that he ‘would handle only questions of administrative law’.¹¹⁰ Nevertheless, Philbin was the author of a vital memorandum, entitled ‘Legality of the Use of Military Commissions to Try Terrorists’.¹¹¹ In it, he argued that the AUMF and inherent constitutional reserve powers would each allow the President to establish these tribunals. Notably, the only case that Philbin cites in the summary introducing his argument is *Ex Parte Quirin*. As described in the last chapter, this case involved a gross abuse of justice in which the President initiated an

¹⁰⁸ Savage *supra* n 5, 138

¹⁰⁹ Glazier *supra* n 107, 147

¹¹⁰ Savage *supra* n 5, 136

¹¹¹ Patrick Philbin *supra* chapter 1 n 23,

<<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011106.pdf>> accessed 30 May

2014

ex parte communication with the Chief Justice, indicated that he would not comply with an order to release the defendant, and which ultimately ended with a decision to allow the executive to execute an American citizen, whose conviction depended upon hearsay. It did so in the absence of a judicial opinion justifying this order, as the Justices could not agree on a rationale supporting the executive until several months later.

It should be noted, however, that the AUMF did not explicitly authorize the creation of military commissions. Furthermore Congress expressly defined the jurisdiction and procedure of military tribunals in the UCMJ, in a manner that precluded the executive's plans. Accordingly, the argument of Philbin's secret memorandum was strained and circular. He argued that the UCMJ's text should not be construed as 'restricting the use of military commissions' set up unilaterally by the executive, because if the statute was read that way, this would constitute 'an infringement on core executive powers', thus begging the question of whether these powers existed. This memorandum also inaugurated the trend of using 'contingent constitutional arguments [based on fringe theories of inherent executive powers] to preserve authorization for executive action even in the event that relevant statutes were found to prohibit it',¹¹² an argument that flies in the face of the *Steel Seizure Case* and the minimum requirements of the rule of law, which make it clear that the legislature must have the power to prohibit executive rulemaking, especially when this is done to relieve the executive branch of the burden of complying with *jus cogens* norms or as part of a drive to create an entirely unaccountable presidency.

¹¹² Rachel Saltzman, 'Executive Policy and the Office of Legal Counsel', (2010) 28 Yale Law and Policy Review 439, 445

On November 13, 2001, on the basis of the OLC memorandum, which followed the draft order given to Philbin by Cheney's counsel David Addington, Bush signed the 'Military Order'. While the ostensible rationale for the order was to provide for the trials of the terrorists who plotted the 9/11 attacks, it soon became apparent that the Military Order allowed for a very wide range of activities, against a broad number of possible subjects. The first activity which this section must address, however, is the detention of terrorism suspects in military custody.

4.2.2.2 Memoranda Authorizing Indefinite Arbitrary Detention

The Military Order 'directed the Secretary of Defense to create military tribunals and to take into custody at once anyone the President names as subject to the Order'.¹¹³ The creation of the tribunal's jurisdiction thus justified the immediate detention of anyone whom the executive nominated. The order did not specify that only those suspected of a connection with the 9/11 attacks could be apprehended and detained, it merely required that the executive affirm that it had 'reason to believe' that they are involved in some form of 'international terrorism',¹¹⁴ echoing the signing statement's broadening of the AUMF from retribution against the 9/11 plotters to an unbounded 'global war on terror'. Despite this, the executive promised Congress that the executive

¹¹³ Neal K. Katyal and Laurence H. Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals', (2002) 111 Yale Law Journal 1261

¹¹⁴ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57,833 (13 November 2001)

would imprison only ‘foreign enemy war criminals’,¹¹⁵ a claim that was soon exposed as wholly untrue.

In fact, the executive continually tried to expand the tribunals’ jurisdiction, such that it would have unlimited freedom of action to subject those it nominated to violations of their non-derogable rights. This subsection will demonstrate that the executive attempted to ensure that it would be able to apprehend and indefinitely detain anyone, without restriction, and that this incarceration rises to the level of a violation of the non-derogable right not to be subjected to prolonged arbitrary detention, as the executive refused to provide any timeline for adjudication of its claims, or even any due process at all, by blocking attempts by detainees to obtain judicial review of the executive’s detention orders with petitions for writs of *habeas corpus*.

After the invasion of Afghanistan, the executive quickly obtained prisoners, some of whom were foreigners suspected of involvement with al-Qaeda, at least by those who sold them for bounties to the CIA. The executive claimed that they could hold these prisoners owing to their status as unlawful combatants without first allowing them to prove that this status was inapplicable as required by Protocol I to the Geneva Conventions.¹¹⁶ It did so on the basis of OLC memoranda that interpreted international law in a manner that would allow for complete discretion on the part of the executive.

¹¹⁵ Katyal and Tribe *supra* n 113, 1261

¹¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflict, adopted June 8, 1977, art. 75, 1125 U.N.T.S. 3. While the United States did not ratify Protocol I, it has the status of customary international law and is therefore binding upon it. See Michael Matheson, ‘The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention’, (1987) 2 American University Journal of International Law and Policy 427-428

A draft OLC memorandum, from January of 2002, written by John Yoo, flatly stated that the Third Geneva Convention's protections did not extend either to members of al-Qaeda, and then extended the category of those whom the executive could hold under the commissions' jurisdiction to include even those members of the Taliban's armed forces that fought openly and in an organized fashion, by claiming that because this government was not recognized as legitimate, it were not a continuing party to the Third Geneva Convention.¹¹⁷ The finalized memorandum argued that despite the fact that the Taliban was the *de facto* government of Afghanistan, they were not entitled to the Conventions' protections because it was a 'failed state'. It also argued that even if the Geneva Conventions did apply, the executive possessed the power to 'determine that they [the detainees] all, as a class, could be said to fall outside of the definition of prisoners of war'.¹¹⁸

The Obama Administration has continued all of these policies. First, in May of 2009, the President accepted several key premises of the detention regime, namely that certain prisoners could be held indefinitely without trial, while others could be tried by

¹¹⁷ John Yoo and Robert Delahunty, 'Draft Memorandum for William J. Haynes II: Application of Treaties and Laws to al Qaeda and Taliban Detainees' (Washington, Office of Legal Counsel, 9 January 2002) <<http://www.torturingdemocracy.org/documents/20020109.pdf>> accessed 30 May 2014

¹¹⁸ Jay S. Bybee Memorandum to White House Counsel Alberto Gonzales and Department of Defense General Counsel William J. Haynes II: Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Washington, Office of Legal Counsel, 22 January 2002) <<http://www.torturingdemocracy.org/documents/20020122.pdf>> accessed 30 May 2014

military commissions.¹¹⁹ Later that year, the Administration then revived the then-dormant commissions by initiating new proceedings against five detainees.¹²⁰ Furthermore, the Administration has continued to press the same tenuous arguments for executive supremacy in the litigation brought by detainees seeking writs of *habeas corpus*. In particular, the executive continues to appeal orders that detainees be released, including those which the executive admits are factually innocent. It argued in these appeals that federal district judges lack any power to order the release of detainees who have been properly granted the writ.¹²¹ These cases will be discussed in detail in chapter four.

The Obama Administration, however, has managed to avoid significant criticism for perpetuating these policies, largely because it is perceived to have made a good-faith effort to reverse the course set by the Bush Administration. This is false, but it is an understandable error, given the many statements that the President has made about his desire to ‘close Guantanamo’, something that was a key promise of his electoral

¹¹⁹ Barack Obama, ‘Remarks by the President on National Security’ (21 May 2009)

<<http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>> accessed 30 May 2014

¹²⁰ Department of Justice and Department of Defense Press Release, ‘Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Detainees’, 19 November 2009
<<http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>> accessed 30 May 2014

¹²¹ See e.g. *Kiyemba v Obama* [2010] 605 F3d 1046 (D.C. Circuit)

campaign in 2008 and which he reiterated shortly after being admitted to office.¹²² This misunderstanding stemmed from the supporters of the new presidents' optimism and willingness to read much more into his promises than what was intended.

In fact, President Obama only promised to 'close Guantanamo', that is, to literally shutter the facility. This statement did not imply that he would dismantle the military detention regime. That fact is made perfectly clear by the pertinent executive order, which explicitly charged various departments with identifying new sites at which the same prisoners would be held, on the same authority.¹²³ It was soon leaked that the executive was considering purchasing a disused prison in Illinois to this end.¹²⁴

This plan to relocate Guantanamo quickly ran afoul of bipartisan Congressional opposition, which was made possible by the fact that the proposal would require the expenditure of funds within the United States, something which Congress can control easily through its power of the purse.¹²⁵ This opposition makes it possible for the executive to shift the blame for the failure to 'close Guantanamo' to the legislature, as

¹²² See CBS News, 'Obama Makes Plans to Close Guantanamo', (11 February 2009),

<<http://www.cbsnews.com/stories/2008/11/14/eveningnews/main4606261.shtml>> accessed 30 May 2014

¹²³ Executive Order 13492, 'Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities', 74 Federal Register 4897 (22 January 2009)

¹²⁴ Charlie Savage, 'Plan to Move Guantanamo Detainees Faces New Delay', *New York Times* (New York 9 December 2009) <<http://www.nytimes.com/2009/12/23/us/politics/23gitmo.html>> accessed 30 May 2014

¹²⁵ Ibid

do laws that require certification by the executive when detainees are released to third countries.¹²⁶

This disguises the fact that the executive possesses incontrovertible power to dismantle the entire detention regime by merely releasing every detainee. Under the National Defense Authorization Act of 2011, the President possesses the power to release any detainee, should he invoke ‘reasons of national security’.¹²⁷ The executive could simply do this passively, by not opposing requests for the writ of *habeas corpus*. However, for undisclosed reasons, the Obama Administration has fought hard in the courts to preserve this detention regime, which violates one non-derogable right directly while facilitating the violation of others. This battle will be described in detail in the next chapter. At present, it is merely necessary to note that it has used this battle as an opportunity to reassert claims of executive supremacy that are inconsistent with the rule of law. For example, in 2011 the Obama Administration issued an executive order authorizing indefinite detention, arguing implicitly that it possessed the power to do so, without any delegation of legislative authority.¹²⁸

None of the arguments in support of executive power to create and maintain a parallel regime of indefinite arbitrary detention were well-founded. Accordingly, the

¹²⁶ Charlie Savage, ‘Bill to Ease Transfers of Guantánamo Detainees Moves Through Senate’, *New York Times* (New York, 24 June 2013), <<http://www.nytimes.com/2013/06/25/us/bill-allowing-guantanamo-detainees-to-be-moved-advances.html>> accessed 30 May 2014

¹²⁷ Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111–383

¹²⁸ Executive Order 13567 ‘Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force’, (7 March 2011) <<https://www.fas.org/irp/offdocs/eo/eo-13567.htm>> accessed 30 May 2014

Inter-American Commission on Human Rights, hereinafter referred to as the ‘IACHR’, took issue with this analysis, and pointed precisely to the incompatibility of the executive’s position and the rule of law. The IACHR noted that these memoranda amounted to a grant of *carte blanche* from the executive to itself:

According to official statements from the United States government, its Executive Branch has most recently declined to extend prisoner of war status under the Third Geneva Convention to the detainees, without submitting the issue for determinations by a competent tribunal or otherwise ascertaining the rights and protections to which the detainees are entitled under US domestic or international law. To the contrary, the information available suggests that the detainees remain entirely at the unfettered discretion of the United States Government.¹²⁹

The IACHR correctly concluded that the executive was simply declaring that these detainees were subject to the jurisdiction of its commissions, which were entirely the creature of the executive branch. Not only did the executive set them up in a manner that ignored a statute that remained in force, but it did so via an order that ‘installs the executive branch as lawgiver as well as law-enforcer, and law-applier, asserting for the executive branch the prerogative to revise the jurisdictional design of the system as it goes along’.¹³⁰ As the Supreme Court observed, the ‘blending of executive, legislative, and judicial powers in . . . one branch of government is regarded as the very acme of absolutism’.¹³¹ It is also important to note that this is also the exact opposite of what the rule of law requires.

¹²⁹ *Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)* 41 ILM 532 (2002) (Inter-American Court of Human Rights)

¹³⁰ *Katyal and Tribe supra* n 113, 1266

¹³¹ *Reid v Covert* [1957] 354 US 1, 11 (United States Supreme Court)

The OLC created the legal rationale for a system of executive detention at Guantánamo Bay that resulted in a number of Afghans and other foreign nationals being detained for years, without any semblance of legal process. Rendering this detention completely arbitrary required that it be insulated from any form of judicial review. This was a key objective for the executive when this system was being established. Even before the decision was made to transfer detainees to Guantánamo Yoo and Philbin opined that anyone transferred there would have no access to *habeas corpus*.¹³² They came to this conclusion even before the OLC concluded that the executive possessed the legal power to commit detainees to that facility.

Indeed, the executive's decision to locate the detention facility at Guantánamo Bay was largely motivated by the fact that it believed that the federal courts would not entertain petitions from detainees held there. They decided to erect a 'legal black hole'¹³³ where those who were detained on the say-so of the executive could be held for years without access to the courts. The executive contended that anyone could be held in such a facility, with one exception, namely United States citizens. This was because this was explicitly forbidden by the Non-Detention Act of 1971. However, the OLC soon drafted new memoranda that again stated that executive was simply not bound by that law when it impeded its freedom to act in the interest of national security, and shortly thereafter even American citizens were subjected to prolonged arbitrary detention.

¹³² Philbin, *supra* n 111

¹³³ Johan Steyn, 'Guantanamo Bay: The Legal Black Hole', (2004) 53 *International and Comparative Law Quarterly* 1

On May 8, 2002, a United States citizen named José Padilla was arrested in Chicago pursuant to a material witness warrant issued by a federal court. The following month, President Bush issued an order directing Secretary of Defense Donald Rumsfeld to take custody of Padilla. This was purportedly authorized by OLC memoranda,¹³⁴ which referenced the executive's 'inherent powers as Commander in Chief'.¹³⁵ Similarly, the authority of the Domestic War Powers Memo and the Military Commissions Memo were invoked to authorize the transfer into military custody and detention of Ali Saleh Kahlah al-Marri, a Qatari national in the United States lawfully in possession of a student visa, which should have given him the legal protections due to a citizen, albeit temporarily.¹³⁶ A Senate Judiciary Committee Majority Staff Report described these two cases as follows:

The *al-Marri* case, like the *Padilla* case, has the following features: the civilian arrest of a person lawfully in the United States; the order by the President that the person be turned over to military custody for potentially indefinite incarceration . . . the denial to that individual of legal counsel and other essential aspects of due process to permit him to challenge the bases of his detention; the claim that the President enjoys such powers over the individual's right to liberty as Commander in Chief The implications of the President's view of his power are obvious and ominous: 'This intolerable reading of the law would leave a President free to suspend the rights of anyone, including American citizens.'¹³⁷

¹³⁴ Patrick F. Philbin, 'Memorandum for Alberto R. Gonzales, Counsel to the President: Legality of the Use of Military Commissions to Try Terrorists' (Washington, Office of Legal Counsel, 6 November 2001) <<http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011106.pdf>> accessed 30 May 2014

¹³⁵ Ibid

¹³⁶ See e.g. *Zadvydas v Davis* [2004] 533 US 678, 692-93 (United States Supreme Court)

¹³⁷ Senate Majority Staff Report *supra* n 11, 105, quoting editorial staff of the New York Times, *Tortured Justice*, *New York Times* (New York, 8 December 2008)

It was unclear to many at the time why the executive branch was so committed to creating a legal black hole. They asked how the utility of the Guantánamo Bay Camp could possibly outweigh the considerable loss of respect the United States suffered in the international community, when even the leading jurists of its staunchest allies lined up to condemn this practice?¹³⁸ The answer only became clear after leaks revealed more about the nature of the questioning of its prisoners, and after it was revealed that the OLC was arguing that detainees should not be formally charged or given Geneva Convention protections in order ‘to facilitate interrogations’.¹³⁹ Various memoranda made it clear that the end not only justified the means, it was the reason these means were adopted. White House Counsel Alberto Gonzales wrote that the ‘nature of the new war places a high premium on . . . the ability to quickly obtain information from captured terrorists and their sponsors . . . [this] new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners’.¹⁴⁰ It will be demonstrated below that the executive was determined to free itself of even the most basic international norms, such that it possessed complete freedom of action to violate non-derogable rights, in a decisive break from the rule of law.

¹³⁸ Steyn *supra* n 133

¹³⁹ Rudalevige *supra* n 32, 226

¹⁴⁰ Alberto Gonzales, ‘Memorandum to President Bush: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban’ (25 January 2002) <<http://www.torturingdemocracy.org/documents/20020125.pdf>> 30 May 2014

4.2.2.3 OLC Memoranda Authorizing Torture

Torture was not incidental to prolonged involuntary detention at Guantánamo Bay. While there are many reports of atrocious conditions of confinement and casual abuse by the staff of that facility that would support findings of torture or degrading treatment, these pale in comparison to the techniques that were authorized at the highest level of the executive branch and then employed in order to obtain information from the detainees. Again, this behaviour was specifically prohibited by both domestic and binding international law. Even torture outside of the United States is specifically prohibited by federal law,¹⁴¹ and the Convention Against Torture¹⁴² is both customary international law and ratified by the United States. What this means is that even if the OLC's conclusion that the Geneva Conventions did not apply to the detainees, these instruments should have prevented it. However, once again the OLC proved ready to give the executive complete discretion to engage in violations of non-derogable human rights.

John Yoo drafted a memorandum on behalf of Jay Bybee that concluded that the state of war created by the AUMF relieved the executive of the burden to respect these prisoners' rights. Insofar as the President possessed the power to command the army on the battlefield, Yoo argued, he had unreviewable authority to direct how prisoners should be interrogated. Legislative and judicial 'restrict[i]ons on] the President's

¹⁴¹ United States Code, title 18, section 2340A

¹⁴² United Nations Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (10 December 1984)

plenary power over military operations, including the treatment of prisoners' would, according to Yoo, be 'constitutionally dubious'.¹⁴³

The claim that inherent constitutional reserve powers allowed the executive to authorize torture was put more forcefully in another memorandum written by Yoo and signed by Bybee seven months later. In it, they claimed that '[a]ny effort to apply [laws against torture] in a manner that interferes with the President's direction of such a core war matter thus would be unconstitutional.'¹⁴⁴ Here, the OLC claimed that any laws that Congress might pass to forbid torture would be ineffective. The executive simply could not be restrained by another branch of government when it decided to commit these violations of non-derogable rights. When it came to torture, the executive 'was above the law'.¹⁴⁵ This cannot be reconciled with the rule of law.

The OLC memorandum signed by Bybee explicitly authorizes torture. It also describes waterboarding in detail, as follows. 'In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth'.¹⁴⁶ It should be noted that this is not

¹⁴³ Yoo *supra* n 118

¹⁴⁴ Jay Bybee, 'Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards for Conduct of Interrogation (1 August 2002)
<<http://f11.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>> accessed 30 May 2014

¹⁴⁵ Rudalevige *supra* n 32, 229

¹⁴⁶ Bybee *supra* n 134, 3

‘simulated drowning’ but actual asphyxia, which causes death if the torturer does not carefully monitor the victim’s oxygen levels. It is a sign of these memoranda’s paucity of analysis that they failed to note that waterboarding was recognized as torture both in international law, particularly at the International Military Tribunal for the Far East, where American military judges presided,¹⁴⁷ and in American domestic law.¹⁴⁸ ‘Historical analysis demonstrates that U.S. Courts have consistently held that artificial drowning interrogation is torture, which, by its nature, violates U.S. statutory prohibitions’.¹⁴⁹

Once approved, waterboarding was applied without any sense of proportion. While just one session of this form of torture can leave psychological scars that last for years, a CIA briefing document reveals that one detainee was waterboarded 183 times.¹⁵⁰ This detainee confessed during interrogation that he ‘was responsible for the 9/11 operation, from A to Z’, and that he was responsible for plotting the assassinations of Jimmy Carter and Pope John Paul II’ and the 1993 World Trade Center bombing. It is clear that at least some of these confessions were false, as it is was established beyond

¹⁴⁷ See Evan Wallach, ‘Drop by Drop: Forgetting the History of Water Torture in U.S. Courts’, (2007) 45 Columbia Journal of Transnational Law 468, 484-489, discussing *United States v Nakamura* [1947] (International Military Tribunal for the Far East)

¹⁴⁸ *United States v Lee* [1984] 744 F2d 1124 (Fifth Circuit)

¹⁴⁹ Wallach *supra* n 147, 468

¹⁵⁰ Stanley Moskowitz, ‘Memorandum for the Record: Interrogations’, (Congressional Research Service 30 November 2004)

all reasonable doubt that this last crime was the work of others.¹⁵¹ The detainee himself alleges that he revealed false information ‘to please his captors’, including statements incriminating innocent parties. Even U.S. authorities recognize this to be the case. ‘One CIA official cautioned that many of [his] claims during interrogation were “white noise” designed to send the U.S. on wild goose chases or to get him through the day’s interrogation session’.¹⁵² This, however, has not prevented the OLC from arguing that waterboarding this detainee produced results when justifying the utility of torture. One unfounded claim referenced in subsequent memoranda was that the waterboarding of the aforementioned detainee helped to foil a major plot to destroy Los Angeles’ Library Tower.¹⁵³ This is an illogical assertion, as the plot was abandoned by the conspirators a year before this detainee was captured.¹⁵⁴

¹⁵¹ See, *Havlish v Bin Laden* [2011] 2011 US Dist Lexis 155899 (Southern District of New York), Findings of Fact and Conclusions of Law at para. 94

¹⁵² Richard Bonney, *False Prophets: The ‘Clash of Civilizations’ and the Global War on Terror* (Peter Lang 2008), 265

¹⁵³ Stephen Bradbury, ‘Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees’, (Washington, Office of Legal Counsel, 30 May 2005) 29
<http://web.archive.org/web/20100215233105/http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_0530_2005_bradbury.pdf> accessed 30 May 2014

¹⁵⁴ Timothy Noah, ‘Water-Bored: Al-Qaida’s Plot to Bomb the Liberty Tower Was Not Worth Torturing Anyone Over’, *Slate Magazine* (Washington 29 April 2009)
<http://www.slate.com/articles/news_and_politics/chatterbox/2009/04/waterboredhtml> accessed 30 May 2014

There is no credible information that waterboarding yielded actionable intelligence,¹⁵⁵ which is not surprising, as the leading experts in interrogation have long derided the efficacy of torture.¹⁵⁶ Accordingly, it is difficult to explain the single-minded focus of the executive on promoting this and other methods of torture, especially over the objections of its own military and experienced interrogators from the FBI, the International Committee of the Red Cross, the governments of certain key allies, and the united front of civil society.¹⁵⁷ The executive's motivation becomes clearer when one considers why torture has been used in the past, namely to break detainees' spirits and to extract false confessions. Indeed, waterboarding in particular was identified by Americans as a particularly useful technique for this purpose when it was used by its adversaries.¹⁵⁸

A 2008 Senate Armed Service Committee report identified the particular false confession that the executive was pushing its torturers to obtain from detainees. The executive sought confessions that al Qaeda was sponsored by Iraq during Hussein's

¹⁵⁵ Ali Frick, 'Why Bush's "Enhanced Interrogation" Program Failed', *Think Progress*

<<http://thinkprogress.org/report/why-enhanced-interrogation-failed/?mobile=nc#Ic>> accessed 30 May 2014; see also the comments of former CIA Director Mike Hayden, 'I'm willing to concede the point that no one gave us valuable or actionable intelligence while they were, for example, being waterboarded' <<http://www.weku.fm/post/did-harsh-interrogation-tactics-lead-bin-laden>> accessed 30 May 2014

¹⁵⁶ Philippe Sands, *The Torture Team* (Palgrave MacMillan 2008) 116-120

¹⁵⁷ Jeffrey Kassin, 'United States Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions', (2006) 4 *Cardozo Public Law Policy and Ethics Journal* 450

¹⁵⁸ David Glazier, 'Playing by the Rules: Combating al-Qaeda Within the Rule of Law', (2010) 51 *William and Mary Law Review* 1030

dictatorship.¹⁵⁹ The report details that Department of Defense ‘reverse engineered . . . Cold War communist techniques [e.g., waterboarding] used to secure false confessions’,¹⁶⁰ as a response to pressure from senior executive officials. Major Paul Burney testified before the Committee that ‘while we were there [at Guantánamo Bay] a large part of the time we were focused on trying to establish a link between Al Qaeda and Iraq and we were not being successful in establishing a link between Al Qaeda and Iraq. The more frustrated people got in not being able to establish this link . . . there was more and more pressure to resort to measures that might produce more immediate results.’¹⁶¹

This pressure for torture aimed at producing false confession came from the highest reaches of the executive branch. The Armed Services Committee report details how Deputy Secretary of Defense Paul Wolfowitz called ‘to express concerns about insufficient intelligence production’ at Guantánamo Bay, namely that it had not yielded a link to Iraq. Wolfowitz suggested that the interrogators use more brutal methods. Another intelligence official confirmed this account and specified why these interrogations were so persistent, and why ‘extreme methods were used . . . for most of 2002 and into 2003, Cheney and Rumsfeld, especially, were also demanding proof of

¹⁵⁹ Senate Armed Services Committee, ‘Inquiry of the Treatment of Detainees in U.S. Custody: Report of the Committee on Armed Services of the United States Senate’, 110th Congress, 2nd Session (20 November 2008)

¹⁶⁰ Mark Benjamin, ‘Torture Planning Began in 2001, Senate Report Reveals’, *Salon Magazine*, (Washington, 22 April 2009) <<http://www.salon.com/2009/04/22/benjamin/>> accessed 30 May 2014
see also Sands *supra* n 156, 63, 81, 118

¹⁶¹ Senate Armed Services Committee Report *supra* n 149, 41

the links between al Qaida and Iraq'.¹⁶² Former Chief of Staff to Secretary of State Powell Lawrence Wilkerson also asserted that Dick Cheney personally ordered waterboarding of detainees shortly before the interrogators produced a breakthrough in obtaining the false confession that the executive was seeking in February of 2002.¹⁶³

The torture authorized by the OLC finally produced the desired results. Ibn al-Shaykh al-Libi was waterboarded regularly until he 'confessed' that Iraq trained al-Qaeda members to use chemical and biological weapons. Immediately afterwards, '[al-]Libi's statements became a key basis for the Bush-Cheney administration's claim, in Secretary of State Colin Powell's pre-war United Nations Security Council presentation', which stated that 'Al Qaeda continues to have a deep interest in acquiring weapons of mass destruction . . . I can trace the story of a senior terrorist operative [al-Libi] telling how Iraq provided training in these weapons to Al-Qaida. Fortunately, this operative is now detained, and he has told his story'.¹⁶⁴

Al-Libi soon recanted his statements, however, and the CIA admitted that he 'had no knowledge of such training [in weapons of mass destruction by Iraqi agents] or

¹⁶² Jonathan S. Landay, Report: Abusive Tactics Used to Seek Iraq-al Qaida Link, *McClatchy*

Newspapers, (Washington 21 April 2009) <<http://www.mcclatchydc.com/2009/04/21/66622/report-abusive-tactics-used-to.html>> accessed 30 May 2014

¹⁶³ Lawrence Wilkerson, 'The Truth About Dick Cheney', *The Washington Note* (Washington, 13 May 2009) <http://www.thewashingtonnote.com/archives/2009/05/the_truth_about/> accessed 30 May 2014

¹⁶⁴ Colin Powell, Speech to the Plenary Session of the United Nations Security Council of February 5, 2003 <<http://web.archive.org/web/20070109235502/http://www.state.gov/secretary/former/powell/remarks/2003/17300.htm>> accessed 30 May 2014

weapons and fabricated the statements because he was terrified of further harsh treatment'.¹⁶⁵ He then was seen as a potential embarrassment, and dealt with accordingly. Rather than being put on trial before a military commission, he was transferred to Libya in 2006, despite the fact that refoulement to that country violated the Convention Against Torture's provisions barring the repatriation of those who would be subjected to further abuse.¹⁶⁶

Human Rights Watch rediscovered Al-Libi in a Libyan prison in April of 2009, after having lost track of him when the United States refused to disclose his whereabouts. Within a week of this visit, he was dead of what his captors described as a suicide. However, 'Those with whom Human Rights Watch ('HRW') spoke who knew al-Libi said he was very religious and cited this as the main reason why they were surprised by—and disbelieved—the government's claim that he had committed suicide'.¹⁶⁷ Photographs obtained by HRW show a sheet looped around his neck and attached to the wall, but his feet are 'firmly on the ground' and his body was marked with 'large' and 'dark' bruises and long 'scratches'.¹⁶⁸

¹⁶⁵ Brian Ross and Richard Esposito, 'CIA's Harsh Interrogation Techniques Described', *ABC News*, (18 November 2005) <<http://abcnews.go.com/WNT/Investigation/story?id=132866>> accessed 30 May 2014

¹⁶⁶ UN General Assembly, 'Convention Relating to the Status of Refugees', 28 July 1951, UNTS, vol. 189, art.33, 137

¹⁶⁷ Human Rights Watch, 'Delivered into Enemy Hands: U.S.-led Abuse and Rendition of Opponents to Gaddafi's Libya' (6 September, 2012) <http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf> accessed 30 May 2014

¹⁶⁸ Ibid

His death occurred as the Senate report into torture was nearing completion, something which Colin Powell's former deputy Lawrence Wilkerson insinuated not to be coincidental. He described al-Libi's death by noting that 'al-Libi just "committed suicide" in Libya'. Interestingly, several U.S. lawyers working with tortured detainees were attempting to get the Libyan government to allow them to interview al-Libi'.¹⁶⁹ This assessment is reinforced by the statements of the head of the Washington office of Human Rights Watch, who confirmed that the effect that al-Libi's testimony to the Senate committee might have been very negative for the executive: 'I would speculate that he was missing because he was such an embarrassment to the Bush administration. He was Exhibit A in the narrative that tortured confessions contributed to the massive intelligence failure that preceded the Iraq war'.¹⁷⁰

This narrative illustrates how the OLC memoranda that authorized the prolonged arbitrary detention and torture of these detainees freed the executive of all of the limitations of domestic and international legal obligations, thus vitiating the rule of law. It also clarifies that this was done with a purpose that challenged the rule of law's fundamental norms on an even more problematic fashion. The aim of these violations of non-derogable rights was to make the case for an aggressive war, which would serve to prolong the wartime emergency. This would then allow the executive to entrench its immunity from the law and freedom from the oversight and control of the other branches of government. As the description of the detention and torture of Padilla and

¹⁶⁹ Wilkerson *supra* n 163

¹⁷⁰ Peter Finn, 'Detainee Who Gave False Iraq Data Dies in Prison in Libya', *Washington Post* (Washington, 12 May 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051103412.html>> 30 May 2014

al-Marri make clear, the OLC was determined to give the executive complete freedom of action not only outside of, but within the nation's borders. To illustrate this more adequately, the next subsection must discuss the executive's illicit law-making in its battle against one of the key statutes that made it responsible to Congress and the courts in the course of actions purportedly undertaken in the interest of national security. That statute is the Foreign Intelligence Surveillance Act. It will be demonstrated that the executive was unwilling to tolerate any oversight of its control over the intelligence agencies, despite the obvious dangers to the rule of law that this created, as evidenced by the Watergate crisis described in chapter two.

4.2.2.4 Memoranda Authorizing Intelligence Agencies' Surveillance

One of the most prominent statutory features of the congressional resurgence against the executive lawlessness made possible by unilateral control over the intelligence agencies was the Foreign Intelligence Surveillance Act, hereinafter referred to as 'FISA'. It specified that even if the executive believed it needed to conduct surveillance of citizens in the interests of national security, it needed to obtain warrants. The term "in the interests of national security" had served previously as a nebulous catch-all allowing for complete freedom of action, but after FISA the executive would need to obtain judicial warrants even when it invoked that rationale. Like many pieces of legislation that were passed in the wake of Watergate, FISA reiterated that the executive was subject to the Constitution's clear commands. In this case, the requirement that judicial officers specifically describe and delimit search parameters after probable cause is set out in the Fourth Amendment.

This limitation on executive power was seen as crucial means of preventing the executive from obtaining sufficient leverage to make another push for supremacy and unaccountability. In 1976 Senator Church 'warned that total tyranny would result if the

agency were to turn its awesome technology against domestic communications'.¹⁷¹ Church here was not referring to the FBI or the CIA, but the NSA, an agency devoted to using its massive computing resources to gather vast amounts of data, out of which it might winnow actionable intelligence. It became one of the key tools after the post-Watergate reforms, as '[t]he law has not kept up with communications technology and the technology of spying'.¹⁷² Few could have imagined at that time that the NSA would one day have the resources to record and review every telephone call between the United States and another country.

FISA's warrant requirement ostensibly prevented the NSA conducting a massive surveillance program involving all of the electronic communication within the United States, one which would dwarf Operation Minaret and the other unlawful programs exposed by the Church Commission. After the 9/11 attacks, the executive was clearly unhappy with these restrictions. In October 2001, Dick Cheney asked what sort of program would be possible if the NSA were not constrained by the laws.¹⁷³ After learning about the NSA's capabilities, Cheney presented a draft authorization for surveillance unconstrained by FISA to President Bush. The executive 'did not seek legislation. They would rely on the president's asserted authority as commander in

¹⁷¹ Barton Gellman, *Angler: The Cheney Vice-Presidency* (2008 Penguin) 141, quoting Senator Frank Church, 'Meet the Press', *National Broadcasting Corporation* (29 October 1975)

¹⁷² Philip Taubman, 'Sons of the Black Chamber', *New York Times* (New York, 19 September 1982) <<http://www.nytimes.com/1982/09/19/books/sons-of-the-black-chamber.html?pagewanted>> accessed 30 May 2014

¹⁷³ Gellman *supra* n 171, 142

chief to defy explicit prohibitions of law'.¹⁷⁴ Only later, when the OLC was called upon to provide a minimally plausible justification, it would argue that this was also implicitly authorized by the AUMF.

The argument that the hostilities authorized by the AUMF relieved the executive of the burden of complying with FISA's warrant requirement was implausible on its face. The statute itself expressly considered the possibility of a congressional declaration of war, and stated that this would give the executive only a 15-day grace period before its provisions would return into force. Other contemporaneous legislation, namely the USA PATRIOT Act, as passed on October 26, 2001, altered the time period during which the executive would need to present the warrant application to the judge, but left the requirement itself firmly intact.¹⁷⁵

Once again, John Yoo was asked to provide a legal opinion that would allow the executive to claim that it was not violating the law when it chose to ignore the commands of the legislature and the judiciary. By this time, however, it was clear that the executive was deciding to disregard a statute and the Constitution even before it asked for what purported to be a neutral evaluation and interpretation of the relevant legal framework.

Yoo and Delahunty's memorandum concluded that the United States was a battlefield after the 9/11 attacks, and the new program could therefore be justified as the collection of 'battlefield intelligence'. In a shocking lapse, it failed to even mention FISA. They preferred to address the Fourth Amendment rather than the clarification of the burden FISA imposed on the executive, in a statute that was passed with the

¹⁷⁴ Ibid

¹⁷⁵ Foreign Intelligence Surveillance Act 1978, Public Law 95-511

intention of preventing exactly the sort of program that was currently being implemented.¹⁷⁶ This level of negligence was only possible because these memoranda were classified, despite the fact that they were considered binding law within the executive branch, and because they allowed for the creation of a surveillance program of staggering size and scope.

The program, which was first entitled ‘Total Information Awareness’, quickly became a sprawling enterprise:

The U.S. government was sweeping in e-mails, faxes and telephone calls made by its own citizens, in their own country. Transactional data, such as telephone logs and e-mail headers, were collected by the billions The program branched out from the NSA. Other government agencies, including the CIA, the FBI, and elements of the Defense Department, used information gleaned from the NSA to do additional surveillance. Vehicles could be tagged. Cell phones could be located, even when switched off. Cash machines, credit cards, bank transfers, changes of address, air and hotel and rental car reservations—all of these could help the government track not only the activities but the physical locations of its targets.¹⁷⁷

All of this was illegal, and precisely what Congress banned explicitly in statutes after the scope of the executive’s misuse of the intelligence services and the ‘White House horrors’ were revealed by the Church Committee. The executive decided to overrule FISA, the *Keith Case* and the Fourth Amendment. It did so in secret and then obtained classified advice that could have only approved of such activity either due to manifest bias, ineptitude, or both. Most importantly, it concluded that the executive could take this action because of constitutional powers that it did not possess. Moreover, if it did in fact possess this ability to ignore the laws in the interest of

¹⁷⁶ Yoo and Delahunty *supra* 23

¹⁷⁷ Gellman *supra* n 171, 145-46

national security, the rule of law that was reconstructed after Watergate would no longer exist.

The executive ignored the law in order to erect a regime of surveillance and control that served to make the executive much more powerful, to the point where it began to resemble the Nixon Administration at the peak of its powers- when it was unclear whether it could ever be restrained by the other branches of government. The reaction of Congress and the judiciary, which will be described in the next two chapters below, would determine whether this circumvention of the rule of law would be temporary or permanent. However, before this thesis addresses their responses, it must first lay out the essence of the claim of constitutional reserve power that OLC fleshed out in the above-described memoranda, as a back-up to their argument that the AUMF authorized all of these activities. After the next subsection outlines this in more detail, it will be possible to see how this claim itself is entirely incompatible with the fundamental norms of the rule of law.

5 DEFENDING INHERENT EXECUTIVE RESERVE POWERS

As noted above, the OLC memoranda written between 2001 and 2003 made two sets of arguments. First, that Congress implicitly authorized the violation of non-derogable rights and the abrogation of statutes and treaties when it passed the AUMF. Second, that the executive possessed inherent constitutional reserve powers that allowed it to ignore even the most explicit prohibitions of domestic and international law pertaining to *jus cogens* norms. As noted above, the OLC's arguments about the AUMF are not plausible, given the legislative history of the statute that reveals its limited purpose, and which shows that Congress rejected the interpretation which the executive subsequently gave to the bill.

The OLC's constitutional arguments present more complex issues. It is beyond the scope of this thesis to comprehensively rebut the argument that the Constitution implicitly grants the executive power to ignore it in times of crisis, which is an example of a legal argument that is so contrary to basic norms that it is difficult to even begin to describe its errors. This thesis avoids addressing this directly for two reasons. First, it need only determine that the American legal order would be incompatible with the rule of law were this true, as the OLC claimed. Second, the OLC's arguments on this point were roundly rejected in both academic circles and the legal profession generally.

There is widespread agreement within the American legal profession that the memoranda discussed above were not merely incorrect, but egregiously negligent. One memorandum in particular was the subject of a 'near consensus that the legal analysis was bizarre'.¹⁷⁸ For example, Dean Harold Koh of the Yale Law School described the memorandum authored by John Yoo and signed by Jay Bybee as 'perhaps the most clearly erroneous legal opinion I have ever read'.¹⁷⁹ Another highly qualified observer commented that this memo 'has no foundation in prior OLC opinions, judicial decisions, or in any other source of law'.¹⁸⁰

The reasoning of all of the memoranda written by Yoo, Bybee, and Philbin was so problematic that after the change of administration in 2009, the Department of Justice's

¹⁷⁸ David Luban, 'Liberalism, Torture, and the Ticking Bomb', (2005) 91 *Virginia Law Review* 1425
1444

¹⁷⁹ Trevor Morrison, 'Constitutional Avoidance in the Executive Branch', (2006) 106 *Columbia Law Review* 1189, 1231 (quoting Harold Koh)

¹⁸⁰ David Glenn, "'Torture Memos' vs. Academic Freedom, *Chronicle of Higher Education*",
(Washington, 20 March 2009) quoting former Assistant Deputy Attorney General Jack Goldsmith

Office of Legal Counsel withdrew at least some of these, along with another written by Stephen Bradbury,¹⁸¹ effectively striking down the law that they established within the executive branch, and the Department's Office of Professional Responsibility, hereinafter referred to as the 'OPR', brought an investigation against officials involved in the production of these memoranda for violations of the basic standards of the legal profession.

These senior career members of the OPR concluded that Yoo 'knowingly failed to provide a thorough, objective, and candid interpretation of the law'.¹⁸² 'Yoo placed his desire to accommodate the client [the head of the executive branch] above his obligation to provide thorough, objective, and candid legal advice, and that he therefore committed intentional professional misconduct'.¹⁸³ The OPR also found that 'Bybee knew or should have known that there was a substantial likelihood that the Bybee Memo did not present a thorough, objective and candid view of the law . . . he

¹⁸¹ David Barron, 'Memorandum for the Attorney General Re: Withdrawal of Office of Legal Counsel Opinion', (Washington, Office of Legal Counsel, 11 June 2009)

<<http://www.justice.gov/olc/2009/memo-barron2009.pdf>> accessed 30 May 2014

¹⁸² Office of Professional Responsibility, 'Investigation into the Office of Legal Counsel's

Memoranda Concerning Issues Related to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', (29 July, 2009), 251

<https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf> accessed 30 May 2014

¹⁸³ Ibid 254

acted in reckless disregard of his obligation to provide thorough, objective and candid legal advice'.¹⁸⁴

This investigation took over four years to complete, and the OPR only made its finding of professional misconduct after concluding that no reasonable doubts were possible as to Yoo and Bybee's culpability. However, in what was labelled an 'unusual step', David Margolis, a power broker in the Department of Justice 'who for decades has served as *consigliere* to top Justice officials' known for his 'almost mythic powers of . . . political foresight' decided to overturn this decision.¹⁸⁵ Strangely, this official made the decision 'to weigh Yoo's strongly held views of executive power as evidence against a misconduct finding'.¹⁸⁶ Associate Deputy Attorney General David Margolis was the subject of criticism in the past, after he had allegedly spared well-connected officials in the Department of Justice from ethics investigations, even when their behaviour arguably violated the rules of professional responsibility.¹⁸⁷

Accordingly, Bybee and Yoo, who subsequently retired from government service to serve as a federal judge on the United States Court of Appeals for the Ninth Circuit, and a Professor of Law at the University of California at Berkeley, respectively, were

¹⁸⁴ Ibid 257

¹⁸⁵ Joe Palazzo, 'David Margolis—the Institutional', *Main Justice: Politics, Policy and the Law* (19 April 2010) <<http://www.mainjustice.com/2010/04/19/the-institutionalist/>> accessed 30 May 2014

¹⁸⁶ Ibid

¹⁸⁷ Scott Horton, 'Prosecutorial Ethics Lite', *Harper's Magazine* (New York, 12 January 2008) <<http://harpers.org/blog/2008/01/prosecutorial-ethics-lite/>>

spared any form of sanctions. As they now both serve in positions with lifetime tenure, ‘Judge Bybee and Professor Yoo are home free’.¹⁸⁸

In addition to absolving Yoo and Bybee, Margolis’ memorandum had two other effects. First, it muddied the waters about whether it was proper to authorize techniques of interrogation that clearly amounted to torture. One critic argued that ‘Margolis has codified the principle that we can make up new ethics standards depending on who the lawyers in question are and the exigency of the national security crisis, which isn’t all that different from making up new interrogation standards depending on who the prisoner is, and the exigency of the national security situation’.¹⁸⁹ Second, it left open the question of whether the executive has a constitutional reserve power that allows him to ignore the laws in a crisis. As noted above, if this is true, then the United States cannot be considered a rule of law state.

John Yoo testified before the OPR inquiry that the executive’s power to ignore domestic and international law and to deprive individuals of their non-derogable rights was boundless. In one exchange, Yoo was asked whether the executive could ‘order a village of civilians to be [exterminated]?’ His response was ‘Sure’.¹⁹⁰ As noted, Yoo was not punished for a view of executive powers that could not be more antithetical to the rule of law. He was exonerated because of his purportedly sincere beliefs in the

¹⁸⁸ David Luban, ‘David Margolis is Wrong’, *Slate Magazine* (22 February 2010)

<http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html>

¹⁸⁹ Dalia Lithwick, ‘Torture Bored’, *Slate Magazine* (22 February 2012)

<http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/torture_bored2.html>

accessed 30 May 2014

¹⁹⁰ OPR *supra* n 182, 64

executive's supremacy and unaccountability. Accordingly, even after the change of administration, it was unclear whether this view of inherent constitutional reserve powers was current within the executive, even after it was used to justify the executive's purported power to wage aggressive war and to violate non-derogable rights.

As the attitude of the executive to its accountability to the other branches remains at best ambivalent, the enduring compliance of the nation with the minimum requirements of the rule of law depends upon the reaction of the legislature and the judiciary. However, before turning to this issue, this thesis must first conclusively demonstrate that the framework for executive power that was erected by the executive after the 9/11 attacks cannot be reconciled with the basic elements of the rule of law, as outlined by the International Commission of Jurists.

6 THE 9/11 CRISIS AND THE ICJ'S RULE OF LAW

The aggrandizement of the executive branch following the 9/11 attacks can only be said to jeopardize the United States' standing as a nation governed in accordance with the principles of the rule of law if, after these delegations and assumptions of power by the executive, the four criteria outlined by the International Commission of Jurists were no longer being met.

The changes to the constitutional order of the United States that relate to criteria three and four, as drawn from the Lagos Report, have yet to be discussed. This thesis has yet to discuss the judiciary's response to the assertions of broad executive powers found in the signing statement to the AUMF and the OLC memoranda referenced above. Similarly, this chapter did not discuss Congress' reaction to the executive law-making that invaded the province of the legislature. These responses will be discussed

in the next two chapters, which will demonstrate that the other branches failed to prevent a temporary crisis of the rule of law from ossifying into a permanently broken constitutional order.

Accordingly, this section can only address the proposition that the delegation and assumption of powers by the executive during the post-9/11 crisis violated two of the ICJ's criteria, such that the United States could not be considered a rule of law unless the legislature and the judiciary addressed these failures adequately after 2003, when the immediate crisis passed. To that end, the two subsections below must consider two questions. First, whether the AUMF granted powers to the executive that placed it outside of the control of the legislature, which violates the ICJ's first criterion. Second, whether the executive then itself created emergency powers, in the form of the AUMF's signing statement and subsequent OLC memoranda, which could be invoked in order to relieve itself of any and all control by the other branches of government, in violation of the ICJ's second criterion. After it is demonstrated that these criteria were not met from 2001 to 2003, it will be clear that if the other branches did not act to remedy the situation after this crisis, the rule of law can no longer be considered to be in place in the United States.

6.1 Illicit Law-Making Granting Unbridled Emergency Powers

This chapter also demonstrated that OLC memoranda written from 2001 to 2003 were blatant and self-serving distortions of the existing law, including the AUMF, which created unreviewable emergency powers. These arguments were so problematic because the executive branch insisted that it possessed the right to engage in clearly unlawful activities that violated non-derogable rights. However, after clarifying the executive's motivation for these activities, the most problematic challenge to the rule

of law that these entail becomes apparent. Namely, executive branch officials were determined to use information gleaned from a system that violated a number of *jus cogens* norms, constitutional provisions, and statutes, to extend the political crisis that made further illicit extensions of executive power possible.

This chapter detailed the results of several recent investigations, by the Senate Armed Services Committee, Human Rights Watch, and others, which demonstrated that the executive's underlying motivation for ignoring the law of war and setting up a parallel system of judicial black holes and *ad hoc* military tribunals was to allow for further military action against Congress' express wishes, and which would allow the executive to prolong the crisis. It explained how this would allow the executive to extend its own powers at the expense of the other branches of government even further. To be precise, the goal of Guantánamo Bay and the regime of torture, which senior executive branch officials authorized for use therein was designed to generate false confessions. It was hoped that these would implicate Iraq as an al-Qaeda sponsor, leading to a much larger war, which would itself catalyse further misuse of the intelligence agencies and the creation of a more elaborate system of scrutiny and repression within the United States.

As described above, in order to obtain these false confessions, many prisoners with no connection to al-Qaeda or the Taliban were taken to foreign sites, denied the protections of the Geneva Conventions, denied access to lawyers and the courts, and subjected to torture. These violations of non-derogable rights were substantial, but the most lasting damage to the rule of law stemmed from the OLC memoranda's assertion that the executive could not be prevented from doing so by Congress or the courts.

However, even more hazardous to the rule of law was the dynamic that the executive was attempting to put into place with these acts of executive law-making.

In essence, between 2001 and 2003, the executive was attempting to use illicit emergency powers to create a feedback loop between a state of war and the violation of non-derogable rights. 9/11 made it politically possible to set up the Guantánamo regime, which was explicitly designed to produce information that would extend the crisis into a near-permanent state of warfare in the Middle East. Warfare in Afghanistan gave way, after false confessions and other dubious intelligence reports, to war in Iraq, which might lead to the wars in Syria and Iran that the Project for the New American Century's report advocated. These new wars, if the OLC memoranda written at that time are taken as any indication of the executive's plans, would likely have been followed by further violations of non-derogable rights.

These memoranda also show that the executive speculated that the political climate created by these larger wars would make it more difficult for the legislative and judicial branches to assert that the executive was assuming extra-constitutional emergency powers, or to stand up against a realignment catalysed by a permanent crisis, which threatened to irrevocably destroy the separation of powers that protects the rule of law in the United States. Congress and the courts' political will during this crisis to condemn the signing statement and OLC memoranda would determine whether the rule of law would survive the first decade of the twenty-first century.

7 CONCLUSION: THE RULE OF LAW IN THE BALANCE— THE IMPORTANCE OF CONGRESSIONAL AND JUDICIAL RESPONSES

After the 9/11 attacks, executive branch officials who opposed the imposition of the restrictions on the executive that the rule of law required during the Ford

Administration sought to restore the imperial presidency. These officials, who believed that the executive should have complete freedom of action in national security matters, seized the opportunity that the attacks presented to create an unaccountable presidency during the crisis that existed between 2001 and 2003. This was illustrated by the executive's decision to violate the non-derogable rights of terrorism suspects, by subjecting them to indefinite arbitrary detention and torture, while maintaining that these actions were unreviewable.

These abuses were not merely evidence of a failure to observe the basic norms of human rights, but of a breakdown of the rule of law. According to the ICJ, a nation is not a rule of law state if the executive is permitted to create the rules for its own conduct, if these rules are not subject to being scrutinized and overturned by the legislature or the judiciary.

No grant of rulemaking authority from the legislature may give the executive the final say over decisions that implicate fundamental rights, if the nation is to remain within the boundaries of the rule of law. Unfortunately, the AUMF did precisely this, by allowing the executive to determine which organizations and nations could be attacked and invaded in response to the 9/11 attacks. This delegation of authority was not in keeping with the ICJ's first criterion of the rule of law state.

The ICJ's second criterion is that the emergency powers of the executive must always be limited in scope and duration. This was not the case after the 9/11 attacks. Instead, the executive assumed, on its own initiative, vast emergency powers, bypassing the statutory scheme by which these are normally triggered, and ignoring the law-making process mandated by the separation of powers altogether. Instead, the executive branch wrote its own laws, creating its emergency powers by means of

executive law-making, which the ICJ explicitly condemned as being incompatible with the rule of law.

For this crisis of the rule of law to be more than merely transient, the legislature and the judiciary must abdicate their responsibility to respond to executive overreaching. Accordingly, the next two chapters of this thesis will examine their responses. However, it should be noted that the executive attempted to use the overbroad delegation of power and the emergency powers it granted itself to make this more difficult. It is particularly unfortunate that the ‘intelligible principle’ requirement of the nondelegation doctrine was ‘rendered virtually meaningless’¹⁹¹ after Roosevelt’s victory over the Supreme Court. If John Marshall was right, and there are ‘important subjects which must be regulated by the legislature itself’,¹⁹² surely he, along with his contemporaries among the Framers would have included the right to declare war. As Marshall, Madison, and Hamilton recognized, giving the executive the power to declare war empowers it to destroy every other limit on its authority.

The post-9/11 constitutional crisis was made considerably more intractable by the fact that the executive was using these powers to create and prolong a political environment that would make it more difficult for Congress and the courts to respond. That said, it is clear that if these branches did not respond adequately to the executive’s lawlessness, and in particular to its claim to be empowered by the Constitution to be immune and unaccountable to any restraint, then the United States would no longer be in conformity with the minimum requirements of the rule of law.

¹⁹¹ Ibid 634

¹⁹² *Wayman v Southard*, 23 US 1 [1825] [United States Supreme Court]

Chapter 4

THE RESPONSE OF THE JUDICIARY TO EXECUTIVE OVERREACHING 2003-2012

1 INTRODUCTION

The federal judiciary is charged with ensuring that the executive does not violate constitutional rights. Its response to the lawsuits challenging these violations of non-derogable rights would be central either to terminating or prolonging this state of exception. One might reasonably expect that the judiciary would do what was required of it by both the Constitution of the United States and the rule of law, but twentieth-century American history indicates that the courts may not protect constitutional rights, especially when doing so would be very unpopular. As described in chapter two, this is frequently the case during a serious crisis, when popular opinion falls solidly into place behind the executive.

This chapter will demonstrate that the judiciary's response to the executive's reassertion of dominance after the 9/11 attacks entailed a consistent evasion of their constitutional responsibilities. Even after 2003, the higher levels of the American judiciary became satisfied with asserting its power to enforce the executive's constitutional limitations in purely rhetorical terms. This will be demonstrated through an analysis of the *Boumediene* opinion and the on-going failure to enforce the rights that it announced.

This chapter will make it clear that even after the executive proved it was committed to the on-going violation of non-derogable rights, the judiciary proved itself content to

limit itself to chastising the executive, but producing decisions that only appeared to restrain the executive's freedom of action.

Accordingly, the conclusion will contend that unless these courts adopt a different response to these issues, the only hope for the rule of law stems from the possibility that the legislature might act to re-impose restrictions on executive law-making and forbid the violation of non-derogable rights. Congress could empower the courts to enforce these limitations, in the manner that the rule of law requires.

2 *HABEAS CORPUS*

Long before court challenges to torture and illegal surveillance were brought, the executive's decision to openly defy worldwide opinion and create a parallel system of detention at Guantánamo Bay catalysed a strong reaction from the legal community, which fought a long campaign against indefinite arbitrary detention. Although the Supreme Court's decisions addressing prolonged arbitrary detention are frequently described as victory for the rule of law,¹ close attention to the holdings of these opinions reveals that they have allowed for the continuation and formalization of this detention regime, not merely at Guantánamo Bay, but also in Afghanistan.² In particular, close attention to court decisions reveals that the power to grant the writ of *habeas corpus* has become purely abstract after the D.C. Circuit held that lower courts have no ability

¹ Seth Harold Weinberger, *Restoring the Balance: War Powers in an Age of Terror* (2009 Greenwood) 115-116

² Anthony Gregory, *The Power of Habeas Corpus in America: From the King's Prerogative to the War on Terror* (2013 Cambridge University Press) 257-269

to actually release detainees.³ In addition, captives taken in other parts of the world who are taken to American detention centres in Afghanistan were barred by that court from even requesting a writ, even if this would only have symbolic force.⁴

2.1 The Supreme Court's Delayed and Inadequate Response

The first decision that was described as a rebuke to the Administration was *Hamdi v. Rumsfeld*.⁵ As noted in chapter two, an American citizen named Yasir Hamdi was captured in Afghanistan and imprisoned at Guantánamo Bay, before being transferred to a military prison in the continental United States. His father filed a *habeas* petition on his behalf. In response, the government produced only a 'vague and general declaration'⁶ asserting that Hamdi was a Taliban militiaman. The trial court noted:

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of these designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American Citizens.⁷

On appeal, the Fourth Circuit disagreed, in what was the first of many cases wherein the lower courts would prove willing to defend constitutional rights while appellate

³ *Kiyemba v Obama* [2009] 561 F3d 509 (District of the District of Columbia)

⁴ *Al-Maqaleh v Gates* [2010] 605 F.3d 84 (District of the District of Columbia)

⁵ *Hamdi v Rumsfeld* [2004] 542 US 507 (United States Supreme Court)

⁶ Kim Lane Schepple, 'The New Judicial Deference', (2012) 92 Boston University Law Review 89, 112

⁷ *Hamdi v Rumsfeld* [2002] 243 FSupp2d 531 (District of the District of Columbia)

courts would defer to the executive,⁸ arguing that the ‘constitutional allocation of war powers affords the President extraordinarily broad authority and compels courts to assume a deferential posture.’⁹ It was left to the Supreme Court to decide between these two competing views about whether the judiciary should play any role in policing the constitutional limits of executive power after it invokes a theory of its war powers that is incompatible with the rule of law.

The Court’s fractured plurality opinion, in which Justice O’Connor took the middle position, which was joined by Justices Kennedy, Breyer, and Rehnquist, while Justices Ginsburg and Souter concurred in part and dissented in part, is most often remembered for its assertion of the judiciary’s responsibilities:

[W]e necessarily reject the Government’s assertion that the separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances We have long since made it 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. Whatever power the United States Constitution envisions for the Executive . . . it must assuredly envision a role for all three branches when individual liberties are at stake.¹⁰

However, this stirring defence of the courts’ role in protecting individual liberties seems rather less impressive when reviewed in the context of the Court’s actual holding, which ‘nonetheless found that Hamdi’s [indefinite military] detention was in fact

⁸ Ibid. See also e.g. *Padilla v Rumsfeld* [2003] 352 F3d 695 (Second Circuit), 724 ; *ACLU v NSA* [2007] 436 FSupp2d 754 (District of the District of Columbia), *Ali Ahmed v Obama* [2009] 657 FSupp2d 51 (District of the District of Columbia), *Amnesty International v Clapper* [2011] 667 F3d 163 (D.C. Circuit) (all cases discussed below).

⁹ *Hamdi v Rumsfeld* [2003] 316 F3d 450, 459 (D.C. Circuit)

¹⁰ *Hamdi v Rumsfeld*, [2004] 542 U.S. 507, 535-36 (United States Supreme Court)

authorized.’¹¹ The Court found that Congress implicitly authorized this detention when passing the AUMF, despite the fact that this statute does not appear to contemplate anything other than military strikes themselves.¹² The Court decided to allow the petitioner’s detention to continue, despite the fact that the Constitution’s Suspension Clause requires Congress to pass a statute explicitly authorizing military custody. It should also be noted that the AUMF violates the Non-Detention Act, which the Court failed to even mention. It also ignored the fact that the civilian courts remained open, despite the fact that its earlier opinions held that this fact precluded the use of military commissions.¹³

A second opinion in a case styled *Rasul v. Bush* was released the same day.¹⁴ The primary issue in *Rasul* was whether a civilian court had jurisdiction to review a *habeas* petition filed by a Guantánamo detainee. The executive branch decided to erect that detention camp in part owing to the conclusion of John Yoo and others at the OLC that it was a location that was outside of the reach of any court¹⁵. As Lord Steyn famously

¹¹ Schepple *supra* n 6, 118

¹² Schepple *supra* n 6, 119

¹³ *Ex Parte Milligan* [1866] 72 US 2 (United States Supreme Court)

¹⁴ *Rasul v Bush* [2004] 542 US 466

¹⁵ Patrick Philbin and John Yoo, ‘Memorandum to William J. Haynes, General Counsel, Department of Defense: Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba’, (Washington, Office of Legal Counsel, 28 December 2001)

<<http://www.torturingdemocracy.org/documents/20011228.pdf>> accessed 30 May 2014

said, it was a ‘legal black hole.’¹⁶ The Court’s opinion differentiated this case from *Johnson v. Eisentrager*,¹⁷ which held that American courts possessed no jurisdiction over the claims of German citizens captured by U.S. forces in China and imprisoned in occupied Germany, after being found guilty of war crimes at a military commission convened in Nanking in 1946.¹⁸

The opinion noted that the petitioners in *Eisentrager* received some degree of due process at their trials, while the petitioners faced indefinite detention without any possibility of proving their innocence.¹⁹ Accordingly, the Court held that that ‘§ 2241 [the *habeas corpus* statute] confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.’²⁰

Commentators have described this holding as ‘an astonishing legal victory for the detainees.’²¹ However, it was merely a victory on paper. Not one detainee was released or even placed into conditions of confinement consistent with the Geneva Conventions owing to this ruling, or, as will be demonstrated below, due to the opinions that

¹⁶ Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 *International and Comparative Law Quarterly* 1

¹⁷ *Johnson v Eisentrager* [1950] 339 US 763 (United States Supreme Court)

¹⁸ *Ibid.* 777; see also *Trials of War Criminals*, vol. XIV (1949, United Nations War Crimes Commission)

¹⁹ *Rasul supra* n 14, 476

²⁰ *Ibid.* 483

²¹ *Schepple supra* n 6, 128

followed. The purely preliminary nature of the relief granted by the Court can be best illustrated by reproducing its statement about what it explicitly did not hold:

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.²²

That said, access to *habeas* review seemed to provide the detainees with possible route to release. However, *Hamdi* and *Rasul* merely held that the Guantánamo Bay petitioners must be given an opportunity to assert that they were factually innocent, and that the executive was not providing this due process. However, it was 'the language of the *Hamdi* opinion [that is, its dicta, rather than the holding] that dominated the media's attention,'²³ which reported that the Court dealt a severe blow to the Administration's detention regime.²⁴

These opinions' most stirring passages also distracted the press from a third, rather dry and technical majority opinion released on the same day, which failed to affirm the reasoning of multiple lower court opinions that held squarely that the executive branch could not detain an American citizen arrested within the United States indefinitely and without counsel. In José Padilla's case, the Second Circuit held that 'when the executive acts, even in the conduct of war, in the face of apparent congressional

²² *Rasul supra* n 14, 485

²³ *Ibid* 120

²⁴ See, e.g., Stephen Henderson, 'Detainees Win Access to Courts; Supreme Court Rulings Deliver a Legal Blow to the Administration's Antiterrorism Policy', *Philadelphia Inquirer* (Philadelphia, 29 June 2004)

disapproval, challenges to his authority must be examined and resolved by the Article III courts.’²⁵

Despite the fact that ‘the Padilla case may have seemed the easier one because it was not a battlefield capture and all the judges below had found fault with the detention, the Supreme Court decided to avoid the question.’²⁶

As Jenny Martinez wrote of the *Padilla* litigation as a whole:

The courts’ patience with the government’s procedural games also left open the possibility that other citizens might be similarly detained in the future (particularly in the Fourth Circuit, where the decision finding some legal authority for such detentions remains on the books as a precedent, albeit a weakened one).²⁷

Another commentator noted that the Supreme Court’s ‘odd decision in the case can hardly be understood as anything other than an evasion.’²⁸ The dissenting Justices made it clear that this failure to address Padilla’s claims was an inexcusable failure to restore the rule of law:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. For if this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants.²⁹

²⁵ *Padilla v Rumsfeld* [2003] 352 F3d 695, 724 (D.C. Circuit)

²⁶ Schepple *supra* n 6, p. 115

²⁷ Jenny Martinez, ‘Process and Substance in the “War on Terror”’, (2008) 108 *Columbia Law Review* 1013, 1039

²⁸ Schepple *supra* n 6, 116

²⁹ *Rumsfeld v Padilla* [2004] 542 US 426, 465 (United States Supreme Court) (Stevens, J., joined by Breyer, Ginsberg, Souter, JJ., dissenting)

Another dissent to the companion case noted that ‘the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.’³⁰ Accordingly, the procedural evasion allowed the Court not only to avoid whether the executive branch could imprison Americans indefinitely without trial, but whether it could do so despite the fact that Congress barred this practice. The Non-Detention Act of 1971,³¹ hereinafter referred to as the ‘NDA’, which states that ‘[n]o citizen shall be imprisoned or otherwise detained by the United States except by Act of Congress,’ and despite the fact while:

[T]he Administration has argued that Section 4001(a) [of the NDA] ‘does not apply to the military’s wartime detention of enemy combatants [and that the NDA] . . . has no bearing on the military’s authority to detain enemy combatants in wartime The legislative history does not support that interpretation, which would leave open some inherent presidential power to accomplish the same feat by military means.’³²

The Congressional Research Service’s report on this statute concluded:

The political climate of the Non-Detention Act (fear and anxiety by U.S. citizens of arbitrary imprisonment and detention) combined with the legislative history provide persuasive evidence that the purpose of repealing the Emergency Detention Act and adding the Rainsback Amendment was to strip from the executive branch — both its civilian and military components — of any claim of independent authority to round up, imprison, and detain disfavored individuals.³³

Despite the presence of these pressing issues of paramount concern, owing to Padilla’s alleged error in filing his petition in the wrong court, the majority forced

³⁰ *Hamdi v Rumsfeld* [2004] 542 US 508, 554 (Scalia, J., joined by Stevens, J., dissenting)

³¹ Non-Detention Act 1971, Public Law 92-128

³² Congressional Research Service, ‘Detention of American Citizens as Enemy Combatants’

(Congressional Research Service, 15 March 2004), 2.

³³ *Ibid* 5

Padilla to begin his quest for justice from the beginning, only to have his case made moot by his transfer to civilian custody after he again came before the Supreme Court.³⁴ The outrageousness of the Administration's attempts to avoid review of a crucial issue were so blatant that 'Judge Luttig [of the Fourth Circuit] even stepped down from the bench, amid stories that the Bush Administration had lied about Padilla's involvement in terrorism and had therefore put him in the untenable position of upholding a controversial detention that had no basis in fact.'³⁵ The Supreme Court facilitated this evasion by approving Padilla's transfer out of military custody.³⁶ The Court could have written a judgement clarifying whether the President has the power to detain American citizens indefinitely. On that day it did not, and to date it has failed to do so.

The civil rights organizations that represented the detainees responded to this failure by filing challenges to the constitutionality of the purported congressional authorization of the executive's detention regime. The first of these cases to be decided was *Hamdan v. Rumsfeld*, which challenged the military commissions that were set up by the President in response to *Rasul*.³⁷ The *Hamdan* opinion ruled that these commissions did not meet the minimum standards specified by Congress' last word on how these must be conducted, found in the Uniform Code of Military Justice, hereinafter referred

³⁴ See Human Rights First, 'José Padilla, U.S. Citizen', *In the Courts*

<http://web.archive.org/web/20100217085312/http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_padilla.aspx >

³⁵ Schlepple *supra* n 6, p. 121.

³⁶ *Hanft v Padilla* [2006] 546 US 1084 (United States Supreme Court)

³⁷ *Hamdan v Rumsfeld* [2006] 548 US 577 (United States Supreme Court)

to as the ‘UCMJ’.³⁸ The court decided that either the UCMJ’s incorporation of the Geneva Convention protections or Common Article 3 of the Geneva Conventions itself provided a set of minimum safeguards, which the President could not sidestep.

Despite having held that the tribunals were insufficient as they were then constituted, the plurality opinion left open two courses of action for the executive when defending indefinite military detention. First, the Court seemed to indicate that in some circumstances the President could seek to demonstrate that there was a military necessity that allowed him to deviate from the UCMJ,³⁹ a line of reasoning that seems to implicitly approve of the executive branch’s claims of inherent constitutional powers in wartime.⁴⁰ Second, the Court’s holding seemed to indicate that if Congress authorized new forms of tribunals, this would preclude further judicial scrutiny.

The *Hamdan* decision also did not free any detainees. It restrained its relief to:

requiring that the military commissions be put on hold while Congress took up the matter, [which] only served to delay Hamdan’s trial while not substantially improving the procedures from his point of view During this time, Hamdan was placed in solitary confinement. His lawyers argued that his mental state had deteriorated to the point that he could no longer assist in his own defense.⁴¹

This narrow holding necessitated only the modification of the executive’s system of prolonged arbitrary detention, rather than its abolition. Regardless, the decision was

³⁸ Uniform Code of Military Justice, United States Code title 10 ch. 47

³⁹ *Rasul v Bush* [2004] 542 US 466, 612 (Stevens, J.) (United States Supreme Court) (plurality opinion)

⁴⁰ This was also implicitly supported by the logic of *Boumediene v Bush* [2008] 553 US 723, 794-95 (United States Supreme Court)

⁴¹ Schepple *supra* n 6, 135

once again described by the press as a ‘broad[] rejection of the Bush plan to try detainees.’⁴² As will be demonstrated below, this is not an accurate characterization, unless undue weight is placed upon the opinion’s rhetorical effect. However, the practical impact of the Court’s deference to the executive would not become clear to legal observers until after a series of cases brought by detainees were decided during the following five years.

An effective challenge to a new set of tribunal procedures set up after *Hamdan* would take two more years to wend its way through the courts. In *Boumediene v. Bush*,⁴³ the Court finally asserted that no one could rubber-stamp the president’s plans to deny detainees evidentiary hearings that would meet the requirements of Common Article Three of the Geneva Conventions, unless Congress formally invoked the Suspension Clause to deny the detainees *habeas corpus*. This decision can be seen as a ‘dare[]’ to ‘Congress to suspend the right overtly.’⁴⁴ The Court again seems to implicitly assert that the rule of law only applies insofar as the other branches of government have not explicitly rejected it. This approach can hardly be considered a heroic defence of the

⁴² Linda Greenhouse, ‘Justices, 5-3, Broadly Reject Bush Plan to Try Detainees’, *New York Times*

(New York, 29 June 2006)

<http://www.nytimes.com/2006/06/30/washington/30hamdan.html?pagewanted=all&_r=0> accessed

30 May 2014

⁴³ *Boumediene v Bush* [2008] 553 US 723 (United States Supreme Court)

⁴⁴ Schleppe *supra* n 6, 140

principles of natural justice, which demand access to a neutral arbiter and the opportunity to present one's defence.⁴⁵

At best, the *Boumediene* decision merely sketched out what manner and degree of access to the courts the detainees still possessed in the absence of formal suspension of *habeas corpus*. Kim Schepple described the Court's fundamentally deferential approach to the Administration as follows:

According to the Court 'The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition.' Then the Court waffled again on the ultimate standards, announcing that 'certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ,' without beginning to say what those accommodations could be. At the end of what appeared to be a bold judgment, the lip service to old deference emerged, tempered by the new deference that has come to be the signature of the post-9/11 jurisprudence.⁴⁶

It is important to also remember that it took the Court almost six years to reach this position, and during this period it rejected several opportunities to rule that indefinite executive detention was simply unacceptable, as the Suspension Clause was not invoked by Congress and the civilian courts remained open. In the end, the Court contented itself with merely a pressure valve in the form of tightly restricted opportunities for the detainees to prove their innocence, without even requiring release in that event. This failure to re-establish the rule of law was masked by soaring rhetoric, which unfortunately was followed only by minor adjustments to an inadequate *status quo*.

⁴⁵ Lord Woolf, Jeffrey Jowell and Andy Le Sueur (eds) 'Procedural Fairness: Introduction, History and Comparative Perspectives' in *De Smith's Judicial Review* (Sweet & Maxwell 2007), 317-357

⁴⁶ Schepple *supra* n 6, 141-42

Furthermore, the *Boumediene* decision again provided support for theories of the president's inherent powers in national security, and left open the door for the reassertion of extreme variations on that theme by the executive:

[P]roper deference must be accorded to the political branches The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security Security depends upon a sophisticated intelligence apparatus and the ability of our Armed forces to act and to interdict Our opinion does not undermine the Executive's powers as Commander-in-Chief it has been possible to leave the outer boundaries of war powers undefined.⁴⁷

The Supreme Court's indifference to the outcome of the *habeas* petitions brought after *Boumediene* appears to provide ample support for the conclusion that the Court was more concerned with preserving the appearance than the substance of the rule of law in these post-9/11 cases. After implicitly validating executive detention pending court review of claims of actual innocence and military tribunals, the Court left it to the D.C. Circuit to determine the rules for the hearings in which detainees can prove their innocence.

2.2 The D.C. Circuit's Repudiation of *Habeas Corpus* Relief

The Court's decision to shift the responsibility to supervise the implementation of its purported remedy for prolonged arbitrary detention was telling, since the D.C. Circuit is the most reflexively pro-government of the federal appeals courts, as will be explained in the next chapter. Its bench includes unitary executive theorists such as Laurence H. Silberman, former mentor to John Yoo.⁴⁸ Since then the 'Supreme Court

⁴⁷ *Boumediene supra* n 43, 976-98

⁴⁸ Jess Braven, *The Terror Courts: Rough Justice at Guantanamo Bay* (2013 Yale University Press)

has apparently lost interest in the difficult and important issues raised by the indefinite detention of prisoners at Guantánamo Bay . . . [as] the D.C. Circuit has . . . effectively nullified the Court's decision in *Boumediene*.'⁴⁹

After *Boumediene* was decided, a group of Chinese Uighur detainees filed a petition for *habeas corpus*. These detainees were living peacefully in small villages until they were swept up by bounty-hunters searching for foreigners who could be sold to the American authorities and sent to Guantánamo. The 'government had admitted as early as 2003 that the imprisoned Uighurs were improperly detained and eligible for release.'⁵⁰ However, after concluding that they could not be repatriated to either Afghanistan or China, the executive could not locate a country that would accept them. This presumed that the United States itself was an unsuitable destination, an argument that the executive never articulated.

The petition in *Kiyemba v. Obama* was filed after months of waiting turned into years. In response, the executive branch effectively conceded that it had no basis to detain these men other than unspecified reserve powers, which one judge summarized as follows:

The Executive chose not to file returns to the petitions for writs of habeas corpus for a majority of the petitioners . . . the Executive neither claimed petitioners were 'enemy combatants' or otherwise dangerous, nor charged them with a crime, nor pointed to other statutory grounds for detention, nor presented reliable evidence that they posed a threat to U.S. interests. The Executive did not deny it detained the prisoners. The district court understood the Executive to

⁴⁹ Erwin Chemerinsky, 'Losing Interest', *National Law Journal* (Washington, 25 June 2012)

<<http://www.nationallawjournal.com/id=1202560493349/Losing-interest?slreturn=20140430212937>>
accessed 30 May 2014

⁵⁰ Center for Constitutional Rights, 'Kiyemba v. Obama: Synopsis' <<http://ccr.justice.org/Kiyemba-v-Obama>> accessed 30 May 2014

argue instead that it had extra-statutory ‘wind-up’ authority.⁵¹

Unfortunately for the petitioners, the majority opinion of the D.C. Circuit overturning the trial court’s order to release these petitioners agreed with the executive, and also concluded that the trial court possessed no power to order the release of the detainees,⁵² or even to order the executive to bring its prisoners before the court.⁵³ There is no way to reconcile these conclusions with the right to *habeas corpus* and the rule of law. If the authority to issue the writ has any meaning, it allows a judge to order the executive to produce a prisoner, and if his detention cannot be justified, to order his release. However, in allowing this opinion to stand the Supreme Court has reduced the right to *habeas* trumpeted in *Boumediene* to a charade. Following *Kiyemba* even where the petitioners can prove their innocence, the executive can continue to detain them indefinitely.

Despite the fact that this opinion was affirmed by the barest of margins on *en banc* rehearing, which usually provokes the Supreme Court into accepting review, the Supreme Court declined certiorari. Instead, it issued a statement that admitted that it had no interest in resolving what it apparently considered an abstract question. This question was whether a federal district court had the power to order a petitioner’s

⁵¹ *Kiyemba v Obama*, No. 08-5424, 2 (D.C. Circuit) (Rogers, J., concurring)

<<http://ccrjustice.org/files/2009-02-18%20Kiyemba%20opinion.pdf>> accessed 30 May 2014

⁵² *Ibid*

⁵³ Order, *Kiyemba v Obama*, No. 08-5424 (20 October 2008)

<<http://ccrjustice.org/files/stay%20order.pdf>> accessed 30 May 2014

immediate release when ‘other remedies’ were purportedly available.⁵⁴ It might be argued that with this statement, the Court blots out its fine phrases about the rule of law from its earlier opinions. This argument can be supported by reference to later opinions, which ignore the rhetoric and exploit every possibility for judicial deference to the executive. The majority of these opinions have been authored by the D.C. Circuit.

The Court has also allowed the D.C. Circuit to eviscerate its *Boumediene* holding in ways that are less dramatic than the decision in *Kiyemba*. Whenever the executive has been able to produce some form of evidence, however slight, that would seem to suggest some association between the petitioners and any involvement in hostilities in Afghanistan, the D.C. Circuit has insisted that this justifies their indefinite detention in Guantánamo Bay, even where the district court, which was the finder of fact on the petitions, came to the opposite conclusion. This has created precedents that require trial courts to deny petitions for *habeas* due to this flimsy evidence.

The most problematic of the opinions creating these skewed evidentiary standards was *Latif v. Obama*.⁵⁵ This opinion follows a series of petitions granted by trial courts because of the use of highly problematic witness testimony credited by these detainees’ Combatant Status Review Tribunals, hereinafter referred to as the ‘CSRT’s. In *Ali Ahmed v. Obama*, the trial court granted a petition for the writ where ‘the credibility and reliability of the detainees being relied upon by the government has either been directly called into question by government personnel or has been characterized by government personnel as undermined,’ or ‘based upon multiple levels of hearsay,’ or

⁵⁴ Statement of Breyer, J., joined by Kennedy, Ginsburg, and Sotomayor, JJ.,

<www.lawfareblog/2011/04/supreme-court-denies-cert-in-kiyemba> accessed 30 May 2014

⁵⁵ *Latif v Obama* [2012] 677 F3d 1175 (D.C. Circuit)

‘riddled . . . with equivocation and speculation.’⁵⁶ It also noted that the prosecution relied on testimony by a witness about which there was ‘evidence that [he] underwent torture’ at Bagram Air Base and the CIA’s ‘Dark Prison’, and that as a result he suffered from severe psychological problems, about which the executive apparently knew when it relied upon his testimony.⁵⁷

After this decision was released, it became apparent that every detainee seeking review of their CSRT would be able to make a similar challenge.⁵⁸ At this point, the D.C. Circuit found another way to uphold these rulings, by requiring trial courts to place inordinate weight on the only other evidence routinely used by the military tribunals — confidential intelligence reports. *Latif* held that ‘federal district judges must “presume” that government intelligence reports used to justify detention are reliable and accurate.’⁵⁹ In essence, this allowed the executive to repackage critically flawed witness testimony as intelligence reports, despite the fact that this attenuated the aforementioned hearsay problems even further.

The D.C. Circuit appears to have placed its faith in these intelligence reports owing to the fact that they might be considered the product of careful and systematic

⁵⁶ *Ali Ahmed v Obama* [2009] 657 FSupp2d 51, 57 (District of the District of Columbia); see also Andy Worthington, ‘Judge Condemns “Mosaic” Of Guantánamo Intelligence, And Unreliable Witnesses’, 14 May 2009, <<http://www.andyworthington.co.uk/2009/05/14/judge-condemns-mosaic-of-guantanamo-intelligence-and-unreliable-witnesses/>> accessed 30 May 2014

⁵⁷ *Ibid* 58

⁵⁸ See Jasmeet K. Ahuja and Andrew Tutt, ‘Evidentiary Rules Governing Guantánamo Habeas Petitions: Their Effects and Consequences’, (2012) 31 *Yale and Policy Review* 185, 198-199

⁵⁹ Chemerinsky, *supra* n 49

procedures employed by intelligence professionals. Since these reports and the policy manuals and memoranda that guided their creation were classified, it was unlikely that anyone outside of the intelligence community would ever be in a position to say otherwise. However, a fortuitous leak of this information by WikiLeaks, which is now allegedly the subject of a Grand Jury investigation due to this activity,⁶⁰ exposed the shoddiness of this intelligence. It also revealed why the D.C. Circuit's instruction that these reports were entitled to 'a presumption of regularity' reduced the *habeas* process mandated by *Boumediene* to a travesty of justice.

As the *New York Times* reported after reviewing these leaked files, 'the documents reveal that the analysts sometimes ignored serious flaws in the evidence', including 'that the information came from other detainees whose mental illness made them unreliable'. 'Some assessments quote witnesses . . . but omit the witnesses' record of falsification or misidentification', and fail to note that these statements 'were later withdrawn, often attributed to abusive treatment or torture'.⁶¹ Evidence obtained under torture, which was previously used to justify further wars of aggression, was now being

⁶⁰ Birgitta Jónsdóttir, 'Evidence of a US Judicial Vendetta Against WikiLeaks Activists Mounts', *The Guardian* (Manchester, 3 July 2012) <<http://www.guardian.co.uk/commentisfree/2012/jul/03/evidence-us-judicial-vendetta-wikileaks-activists-mounts>> accessed 30 May 2014

⁶¹ Scott Shane and Benjamin Weiser, 'Judging Detainees Risk, Often With Flawed Evidence', *New York Times*, (New York 24 April 2011), available at: <<http://www.nytimes.com/2011/04/25/world/guantanamo-files-flawed-evidence-for-assessing-risk.html?pagewanted=all>> accessed 30 May 2014

used to justify the detention of those who were tortured to produce it,⁶² in order to keep the details of this ‘intelligence production’ secret, as the next section will detail.

The leak also revealed that the guidelines given to the intelligence professionals preparing the reports were highly flawed, leading ‘analysts [to] seize[] upon the tiniest details as a possible litmus test for risk.’⁶³ For example, the JTF-GTMO Matrix of Threat Indicators For Enemy Combatants lists the following as one of the criteria by which one might conclude that a detainee is a high risk: he ‘[o]perated or [was] captured in an area dominated by al-Qaeda or Taliban forces . . . including but not limited to . . . Kabul . . . Kandahar . . . Konduz . . . Mazar-e-Sharif.’⁶⁴ This memorandum fails to note that these are four out of the five largest cities in Afghanistan.

In essence, these guidelines appear to provide a basis for considering almost anyone to be an enemy combatant. Applying them, one intelligence report ‘suggests a dire use for his pocket calculator, namely “[c]alculators can be used for indirect fire calculations such as those required for artillery fire.’”⁶⁵ It should be noted that the analyst fails to

⁶² Memorandum of Human Rights Watch Submitted to the Foreign Affairs Committee of the Parliament of the United Kingdom, (30 April 2008), 2 (‘military commissions set up to try terrorism suspects at Guantanamo explicitly authorize the use of evidence obtained in cruel, inhuman, and degrading interrogations’)

⁶³ Ibid

⁶⁴ JTF-GTMO Matrix of Threat Indicators for Enemy Combatants

<www.nytimes.com/interactive/2011/04/24/world/guantanamo-guide-to-assessing-prisoners.html>
accessed 30 May 2014

⁶⁵ Shane and Weiser *supra* n 61

note any instances in which al-Qaeda or the Taliban have employed artillery fire after the 2001 invasion.

While this is merely one example of this sort of paranoid reasoning to which a ‘presumption of regularity’ a deference is now owed following *Latif*, it appears that on the basis of the JTF-GTMO Matrix, more than fifty detainees have been assessed as some degree of threat on the basis of, in addition to other bizarre criteria, the possession of a Casio F91W-1 or A-159W wristwatches. ‘JTF-GTMO identified the watch as ‘the sign of al-Qaida,’⁶⁶ as it was allegedly used by al-Qaeda bomb-makers to make timers. The report fails to note that this model of watch has been a “‘huge seller” all over the world’ for over twenty years.⁶⁷ Detainee Usama Hassan Ahmend Abu Kabir told his Tribunal that ‘I have a Casio watch due to the fact that they are inexpensive and last a long time. I like my watch because it is durable. It . . . was waterproof’.⁶⁸

In addition to attributing very peculiar significance to various quotidian items, the Threat Matrix displays further paranoia, by suggesting that innocent explanations were actually a potential sign of sophisticated counter-intelligence training. ‘A prisoner caught without travel documents? It might mean he had been trained to discard them to make identification harder, the guide explains. A detainee who claimed to be a simple farmer or a cook? . . . Those were common Taliban and Qaeda cover stories,

⁶⁶ Threat Matrix *supra* n 64, 4 n9

⁶⁷ Denise Winterman, ‘Casio F-91W: The Strangely Ubiquitous Watch’, *BBC News Magazine*

<www.bbc.co.uk/news/magazine-13194733> accessed 30 May 2014

⁶⁸ Associated Press, ‘Common Casio Watch Becomes Evidence at Guantanamo’, Associated Press (9 March 2006) <<http://www.sddt.com/Search/article.cfm?SourceCode=200603091aq#.UQQqZibLHIU>> accessed 31 May 2014

the analysts were told.’⁶⁹ The ‘Threat Matrix’ forecloses every innocent explanation if detainees refused to cooperate or to explain themselves, this was also evidence of their guilt, as this is noted to be an al-Qaeda resistance technique.⁷⁰ The Threat Matrix is fatally flawed, yet the intelligence reports created following its instructions were held to be so trustworthy that district courts must rely upon them.

2.3 The Supreme Court Fails to React to Denial of *Habeas Corpus*

In his dissent from the decision in *Latif*, Judge David S. Tatel noted that ‘it is hard to see what is left of the Supreme Court’s command in *Boumediene*’.⁷¹ However, the Obama Administration directed the Solicitor-General to submit a brief opposing the petition for certiorari, and the Supreme Court duly declined review. As Hanna Madbak noted:

[T]he question the Supreme Court has refused to answer is whether a detainee truly has a ‘meaningful opportunity’ to challenge his detention if he cannot unseal evidence against him, or if a mathematical evaluation of the evidence allegedly lowers the government’s burden of proof against him even below the low preponderance of the evidence standard.⁷²

The decision to give the D.C. Circuit free reign to ignore *Boumediene* casts doubts on the commitment of the Supreme Court to maintaining the rule of law. In declining review of *Kiyemba* and *Latif*, the Court has been content to allow the limited remedy

⁶⁹ Shane and Weiser *supra* n 61

⁷⁰ Ibid

⁷¹ *Latif v Obama* [2012] 677 F3d 1175, 1215 (D.C. Circuit) (Tatel J dissenting)

⁷² Hanna F. Madbak, ‘U.S. Supreme Court Denies Guantánamo Detainee Cert. Petitions Concerning Habeas Review’, *New York State Bar Association Blog*

<nysbar.com/blogs/ExecutiveDetention/2011/05/> accessed 31 May 2014

afforded by *Boumediene* to become doubly pointless. First, one cannot meaningfully challenge indefinite detention. Second, even if one could, the trial court cannot grant a petitioner's request for release. Once again, Guantánamo Bay can be described as a black hole, from which not even an innocent detainee can escape.

Erwin Chemerinsky, who argued the first petition for *habeas corpus* of the detainees held in military custody, noted that at that time he:

[C]ould not have possibly imagined that more than ten years later . . . the government would still be holding these individuals as prisoners. When the Supreme Court finally ruled in *Rasul v. Bush* and *Boumediene v. Bush* that Guantánamo detainees had a right to seek habeas corpus relief in federal courts, I never could have imagined that this would be a pyrrhic victory and the Court would allow the D.C. Circuit to nullify the availability of habeas corpus.⁷³

Chemerinsky should not be accused of naïveté, as the amount of cynicism appropriate to the Court's jurisprudence can only be discerned in retrospect. It is by now apparent, however, that the timid and halting approach to the problem, and its abandonment of the issue once it faded from public view, can be most easily explained as the result of an attempt not to do substantial justice, but rather to convince the public that justice was being done and that the rule of law was being upheld. The slow timetable itself operated as a pressure valve, periodically dissipating liberal concern for the erosion of the separation of powers. The Court's stirring rhetoric concealed fundamental concessions to executive power, but it nevertheless convinced many that it was protecting non-derogable rights against executive overreaching. It is now clear that this was largely a spectacle for the benefit of the legal profession and others concerned with human rights and the rule of law.

The Court, while preserving the appearance of *habeas corpus* to save its own blushes, has implicitly affirmed the executive's right to indefinitely detain suspects in

⁷³ Chemerinsky *supra* n 49

military custody even without the approval of Congress in certain situations, and has also affirmed the existence of other un-enumerated presidential ‘war powers.’ Some might argue that this does not deserve serious concern, relying on the assumption that the Obama Administration is winding down the military detention regime at Guantánamo. This supposition initially appears to be correct, given the fact that no one has been transferred to that facility since 2008 despite leaving this possibility open.⁷⁴ However, this ignores the fact that the executive has built a replacement, and there may be many other places where detainees are held in secret. This included CIA-run detention facilities known as the ‘black sites’, which were first acknowledged only five years after the 9/11 attacks.⁷⁵ The next section will demonstrate that detainees are still being tortured in these facilities.

2.4 The D.C. Circuit Preserves a Judicial Black Hole

This section discusses the replacement for the Guantánamo Bay detention camp, which is located in Afghanistan. It is located within the Parwan Detention Facility, hereinafter referred to as ‘Parwan’, which is found next to Bagram Airfield. This larger facility is also known as the Bagram Theater Internment Facility. It holds nearly three

⁷⁴ Julian E. Barnes, ‘Will U.S. Send more Detainees to Guantanamo?’ *Wall Street Journal*, New York, (13 July 2011) <<http://blogs.wsj.com/washwire/2011/07/13/will-u-s-send-more-detainees-to-guantanamo/>> accessed 31 May 2014

⁷⁵ BBC News, ‘Bush Admits to CIA Secret Prisons’, (7 September 2006) <<http://news.bbc.co.uk/2/hi/americas/5321606.stm>> accessed 31 May 2014

times as many detainees as Guantánamo did at its peak.⁷⁶ Some of these detainees are not Afghan citizens, or even foreign fighters captured in Afghanistan. They are prisoners who were transferred there, rather than to Guantánamo, after the courts allowed petitioners held at the Cuban base to have access to counsel and the right to file petitions for *habeas corpus*.⁷⁷

Insofar as some foreigners held at Parwan alleged that their transfer to that facility was an attempt to evade the judiciary scrutiny, and as they alleged they were held there for over six years, it was not surprising that trial courts would be receptive to their claims. In *Al-Maqaleh v. Gates*,⁷⁸ a trial court addressed the claims of non-Afghan detainees at Parwan apprehended in Dubai and Thailand, among other places. As in *Boumediene*, the trial court found that attempts to strip the judiciary of its jurisdiction to receive these petitions were unconstitutional,⁷⁹ and that ‘detainees who are not Afghan citizens, who were not captured in Afghanistan and who have been held for an unreasonable amount of time...without adequate process’ were entitled to the writ.⁸⁰

⁷⁶ Spencer Ackerman, ‘U.S. may indefinitely detain secret prisoners held in Afghanistan’, *The Guardian*, Manchester, (30 May 2014) < <http://www.theguardian.com/world/2014/may/30/afghanistan-troops-withdrawal-bagram-detainees>> accessed 30 November 2014

⁷⁷ Adam Goldman and Kathy Gannon, ‘Death Shed Light on CIA ‘Salt Pit’ Near Kabul’ Associated Press (28 March 2010) < http://www.nbcnews.com/id/36071994/ns/us_news-security/#>

⁷⁸ *Al-Maqaleh v Gates* [2009] 604 FSupp 205 (District of the District of Columbia)

⁷⁹ *Ibid* 230

⁸⁰ *Ibid* 235

Unfortunately for the petitions—and for the rule of law in the United States—the D.C. Circuit again disagreed.⁸¹ It ruled that the executive did not have as much control over Parwan as it did over Guantánamo, such that it could distinguish the holding of *Boumediene*, which was that federal courts possessed that jurisdiction.⁸² The court alluded to ‘differences’ between these facilities,⁸³ such as the fact that the United States needed to cooperate with the government of Afghanistan to run the facility, to justify this conclusion. This is very poor legal reasoning. It also ignores the reality of the relationship between America and its client state, which is run by a regime that exists at America’s pleasure. The D.C. Circuit also failed to note that the government of Afghanistan opposes the detention of foreigners at Parwan, of which there are at least fifty,⁸⁴ although the executive refuses to confirm a figure or release details of where and how they were captured, but this is irrelevant in practice, because the tools of the American executive are in no way answerable to Hamid Karzai. As Stephen Vladeck noted when describing how the D.C. Circuit misconstrued *Boumediene*:

Even if [the court’s] logic follows (and I don’t think it does), it’s beside the point To the extent that the United States is simply *not* “answerable” to the government of Afghanistan for the detentions of non-Afghans at Bagram (and the related extent to which the government of Afghanistan has no incentive to

⁸¹ *Al-Maqaleh v Gates* [2010] 605 F3d 84 (D.C. Circuit)

⁸² *Ibid* 95

⁸³ *Ibid* 95-99

⁸⁴ Graham Bowley, ‘United States Puts Transfer of Detainees to Afghans on Hold’, *New York Times* (New York, 9 September 2012), <http://www.nytimes.com/2012/09/10/world/asia/us-puts-afghan-transfers-at-parwan-prison-on-hold.html?_r=0> accessed 31 May 2014

play such a role for non-Afghans captured outside of Afghanistan), the second *Boumediene* factor should militate in *favor* of habeas, not against it.⁸⁵

Not only is the detention regime at Parwan contrary to Afghan law,⁸⁶ but the United States also resisted Afghan demands to transfer the facility to its authority.⁸⁷ The nominal Afghan commander of the facility had no control over who enters or leaves, and he was not allowed to attend any meetings outside of the presence of his ‘advisors’.⁸⁸ This appears to demonstrate both that the executive is not answerable to the nation’s ‘ally’, and that the D.C. Circuit’s ruling distorted not only the law, but the facts. The argument that the Afghan government has any control over these prisoners’ confinement is not supported by any evidence.

The dismissal of the petitions for *habeas corpus* that were pending at the time of the D.C. Circuit’s decision in *Al-Maqaleh* represents ‘the end of the line for the possibility

⁸⁵ Stephen Vladeck, ‘Al-Maqaleh II: Formalizing Boumediene’s Functional Approach to Habeas Jurisdiction’, *Lawfare Blog*, October 2012 <<http://www.lawfareblog.com/2012/10/more-on-maqaleh-ii/>> accessed 31 May 2014

⁸⁶ Quil Lawrence, ‘Afghans Worry Bagram Could Turn Into Guantanamo’, *Morning Edition* (Washington, National Public Radio 4 June 2012) <<http://www.npr.org/2012/06/04/154268385/afghans-worry-bagram-could-turn-into-guantanamo>> accessed 31 May 2014

⁸⁷ Bowley *supra* n 84

⁸⁸ Rod Nordland, ‘Detainees Are Handed Over to Afghans, but Not Out of Americans’ Reach’, *New York Times*, (New York, 30 May 2012) <<http://www.nytimes.com/2012/05/31/world/asia/in-afghanistan-as-bagram-detainees-are-transferred-united-states-keeps-its-grip.html?pagewanted=all>>

of habeas jurisdiction' over black sites.⁸⁹ Accordingly, the executive can now abduct someone at any point on the globe, transfer them to the Black Jail in Parwan, and they can then be subjected to indefinite arbitrary detention, upon nomination by the executive. The detainees have no access to any court, something which the D.C. Circuit approved. However, the creation of another judicial black hole is only the beginning of what it will tolerate. These detainees can also be subjected to torture, as the D.C. Circuit will not adjudicate claims that follow the executive's revival of this practice in Afghanistan. As was the case with prolonged arbitrary detention, torture was formalized and legalized, not least because of the willingness of the D.C. Circuit to ignore violations of non-derogable rights, another demonstration that the United States is no longer in minimal compliance with the requirements of a rule of law state.

3 TORTURE

Lawsuits alleging torture in military custody followed on the heels of the actions challenged prolonged arbitrary detention. This was a predictable sequence, as information about torture at Guantánamo Bay was not made public until revealed in the petitions for *habeas corpus*. Even as the executive made a public spectacle of the fact of the detention, it kept horrific details of this detention regime top secret.⁹⁰

⁸⁹ Benjamin Wittes, 'Comments on *Maqaleh* and *Hamidullah*', *Lawfare Blog* (19 October 2012) <<http://www.lawfareblog.com/2012/10/comments-on-maqaleh-and-hamidullah/>> accessed 31 May 2014

⁹⁰ Patrick O'Neill, 'U.S. Press Blackout at Guantánamo Pierced, Brutal Treatment Exposed', *The Militant*, (Washington, 1 April 2002) <<http://www.themilitant.com/2002/6613/661302.html>> accessed 30 November 2014

However, after their release, many Guantánamo detainees brought suits alleging their jailers tortured them. These suits also named the senior officials who developed and authorized these procedures, who also hoped to obtain false confessions implicating Iraq in terrorist plots. These lawsuits have all been dismissed, although many obtained initial success in trial courts. However, as the appeals of these cases were not followed closely in the media, the judiciary was free to elaborate new doctrines mandating deference to the executive. These doctrines allowed these courts, in particular, the D.C. Circuit, to avoid decisions on the merits in lawsuits alleging torture. It then did so, even when there was no doubt of the relevant facts.

The first set of these cases will demonstrate that the appeals courts were willing to extend ‘qualified immunity’ to those involved in gross abuses of non-derogable rights, as long as these officials purportedly lacked a subjective belief that they were breaking the law. This implicitly affirmed the OLC memoranda authorizing this conduct, since the courts were willing to accept that a rational lawyer could have created such poor legal arguments in good faith, and accepted that this was enough to immunize them.

Discussing the torture cases, Stephen Vladeck argued that they demonstrate the ‘existence of a new national security canon — a body of jurisprudence in which distinct (and sometimes poorly articulated) national security concerns have prompted courts to disfavour relief, even when . . . relief should otherwise have been available the heads-we-win, tails-you-lose quality to this body of decision-making, it is difficult to rebut the conclusion that, at least at the circuit level, more is going on than just faithful application of existing precedent’.⁹¹ One of the clearest examples of the appellate

⁹¹ Stephen Vladeck, ‘The New National Security Canon’, (2012) 61 American University Law

courts' decision to create new doctrine to protect the executive from responsibility for torture is found in the opinion that disposed of the lawsuit brought by José Padilla against John Yoo. This case did not allow the judiciary to use the standard doctrinal arsenal of judicial evasion, since Padilla was a United States citizen, located in the United States, and suing in his own name for conduct that occurred within that nation. However, the Ninth Circuit was more than willing to both misstate the facts and to bend the law in support of a conclusion that absolved Yoo of any wrongdoing.

First, it should be noted that its opinion quibbled with the conclusion of the trial court, whose factual determinations are ordinarily accorded great deference on appeal, namely, that Padilla was tortured. The Ninth Circuit said that Padilla's allegations that his guards subjected him to severe mental and physical harm were 'conclusory', but they did not remand for further fact-finding, since it also determined that even if his mistreatment amounted to torture, the fact 'that such treatment was torture was not clearly established in 2001-2003'.⁹² Second, the court concluded that Yoo's assertion that Padilla was not entitled to the Constitution's protections because the executive's decision to authorize his military detention and torture was not 'beyond debate'.

Accordingly, the court accepted Yoo's argument that, owing to a doctrine known as 'qualified immunity', he was liable for what it characterized a simple misreading of the law in the performance of his duties. This ignores the fact that Yoo was not merely mistaken, or even negligent. As detailed in chapter three above, the OPR concluded that Yoo repeatedly ignored directly applicable law that made it clear he was authorizing illegal acts. It also bears mentioning that the Ninth Circuit was implicitly sitting in judgment not merely on Yoo, but his unindicted conspirator Jay Bybee. Bybee was the

⁹² *Padilla v Yoo* [2009] 670 F3d 540, 548 (9th Circuit)

signatory of Yoo's OLC memoranda, who was likewise investigated by the OPR. Between the time that Yoo wrote the memorandum for Bybee and the filing of Padilla's lawsuit, Bybee was appointed to be the life-long colleague of the judges who decided on the merits of the claims being made against Yoo, and implicitly, Bybee.

The only way to reach this particular result was for the court to secretly put a thumb on the scales of justice, but other appellate courts openly advocated this approach. In a related appeal before Fourth Circuit, which addressed the conduct that occurred within its jurisdiction, the court opined that when assessing arguments such as those made by Padilla against Yoo, the courts should hesitate in construing facts against the government, since 'the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary'.⁹³

This statement renounces the responsibility of the judiciary to adjudicate constitutional claims against the executive, combined with acquiescence to the executive's erroneous theory of the scope of its powers to command the military. It makes the judicial oversight that the rule of law requires impossible. As one academic commentator noted, '[i]f this [invocation of the interests of national security by the executive] is a "special factor" counseling hesitation against inferring a . . . remedy, one is hard-pressed to imagine any challenge to the conduct of national security policy, whether here or overseas, that could survive such a test'.⁹⁴

The suits brought by Guantánamo detainees alleging torture and other abuses were procedurally more complex than Padilla's, since they involved non-citizens and took

⁹³ Ibid 548

⁹⁴ Vladeck *supra* n 91, 1317

place outside of the United States. This did not bode well for their success. However, the Supreme Court decided in *Boumediene* that despite these jurisdictional complications, petitions for *habeas corpus* could be brought to the United States District Court for the District of Columbia.

Accordingly, it seemed likely that trial courts in the District of Columbia would conclude that they had jurisdiction to hear the detainees' tort claims. Unfortunately, while this prediction proved correct, it failed to account for the willingness of the D.C. Circuit to distort the holdings of the Supreme Court and to create new doctrines of executive deference to shut this down, something which the Supreme Court failed to rebuke, even as the D.C. Circuit dismantled its earlier jurisprudence, in the same manner as in the appeals of the *habeas* petitions described in the last section.

Apart from jurisdiction, the most significant procedural hurdle for the detainees bringing these claims was the sovereign immunity of the federal government, since under American law, the government may only be sued when it has expressly permitted plaintiffs to bring against it claims of that nature. Accordingly, Shafiq Rasul and three other British detainees who brought claims alleging 'specific methods and acts of physical and psychological torture' would find that the clearest path to relief was afforded by the Religious Freedom Restoration Act, hereinafter referred to as 'RFRA'.⁹⁵ This is because that statute authorizes suits against the federal government. The trial court concluded that the government should be held responsible since

⁹⁵ Religious Freedom Restoration Act 1993, Public Law 103-141, 107 Stat. 1488 (16 November 1993)

‘[f]lushing the Koran down the toilet and forcing Muslims to shave their beards falls comfortably within the conduct prohibited from government action’ by RFRA.⁹⁶

This much seemed clear, and it would be difficult to argue that even the most intellectually challenged executive branch officials would have recognized that this was prohibited conduct, which would appear to foreclose a qualified immunity defence. However, the D.C. Circuit held that the officials at Guantánamo, despite being aware that this conduct would violate the law if committed in the United States, may have had a reasonable belief that they could not be punished for breaking the law outside of the nation’s borders.⁹⁷ Namely, it held they could have reasonably believed that the OLC was correct and that the detention camps were located within a ‘judicial black hole’. Thus, even though the Supreme Court concluded that this was not the case during the applicable period, Guantánamo was retroactively deemed a zone of immunity because of executive officials’ purportedly sincere belief that it was outside the law.

One year later, the D.C. Circuit proved ready to attack the Supreme Court’s ruling in *Boumediene* more directly. The vehicle for the development of new doctrine that favoured the executive was the case of *Al-Zahrani v. Rodriguez*,⁹⁸ a case brought by the representatives of the estates of two detainees who died at Guantánamo Bay on June 10, 2006, in suspicious circumstances. These representatives alleged that although the executive labelled these deaths suicides, their relatives were killed during interrogations

⁹⁶ *Rasul v Myers*, No. 06-5209 (24 April 2009) (D.C. Circuit)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/1C572595EB3EF7248525780000761C90/\\$file/06-5209-1177375.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/1C572595EB3EF7248525780000761C90/$file/06-5209-1177375.pdf)> accessed 31 May 2014

⁹⁷ *Ibid*

⁹⁸ *Al-Zahrani v Rodriguez* [2012] 669 F3d 315 (D.C. Circuit)

at a secret facility known as Camp Seven, the existence of which the executive formally denies. An investigation by reporters ‘raises serious questions . . . and suggests the U.S. government is covering up details of what precisely happened . . . before the deaths’.⁹⁹ An academic report refuted the official narrative, concluding that ‘there is no explanation for how three bodies could have hung in cells for at least two hours while the cells were under constant supervision, both by video cameras and guards continually walking the corridors guarding only 28 detainees’.¹⁰⁰

The representatives’ allegations were further supported by testimony from four American soldiers, and by the fact that marks were found on the victims’ bodies that are consistent with torture. In addition, a Swiss pathologist noted that one of the victim’s neck injuries were ‘not those he would normally associate with hanging’.¹⁰¹ Despite the seriousness of these claims and the presence of ample evidentiary support, the lawsuit was dismissed, and the D.C. Circuit used the appellate proceedings as an opportunity to make sure that no tort claims brought by former detainees, even if they

⁹⁹ Pete Yost, ‘Questions Raised Over Deaths of 3 Guantanamo Detainees Raised by Magazine

Article’, *Canadian Press* (Toronto 2010)

<<https://web.archive.org/web/20100121041245/http://www.google.com/hostednews/canadianpress/article/ALeqM5h97BGvSdx97hHzNDkUiDzI8JsB7A>> accessed 31 May 2014

¹⁰⁰ Mark Denbeaux et al., ‘Death in Camp Delta’, Seton Hall University School of Law Center for Policy and Research, p. ii,

<http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/gtmo_death_camp_delta.pdf> accessed 31 May 2014

¹⁰¹ Scott Horton, ‘The Guantánamo “Suicides”’: A Camp Delta Sergeant Blows the Whistle’, *Harper’s Magazine*, (New York, March 2010) <<http://harpers.org/archive/2010/03/the-guantanamo-suicides/?single=1>> accessed 31 May 2014

involved shocking allegations of torture or unlawful killing, could ever be heard in any American court.

In *Boumediene*, the Supreme Court rejected the proposition that the detainees could be removed by statute from the jurisdiction of the federal courts. It held that Section 7 of the Military Commissions Act could not prevent the detainees from filing lawsuits. In *Al-Zahrani*, the D.C. Circuit held that the holding of *Boumediene* applied only to petitions for *habeas corpus*, despite the fact that the Supreme Court struck down the entire section that had purportedly stripped the courts of jurisdiction, and despite the fact that this case held that ‘the United States, by virtue of its complete *jurisdiction and control* over the base, maintains *de facto* sovereignty’.¹⁰² There is no logic to the argument that the detainees should possess the constitutional right to *habeas corpus* but no other rights, except an argument premised upon belief that detainees should be deprived them of as many rights as possible, and that the ends justify the means when doing so.

In misconstruing *Boumediene* and other precedents from the Supreme Court, which did not appear to foreclose damages claims owing to the executive’s violation of constitutional rights where there was no alternate remedy or forum available,¹⁰³ the D.C. Circuit set up in its place a rule of remarkable breadth. The new rule is that a detainee cannot bring to an American court any action premised on ‘foreign’ conduct, other than a request for a writ, a meaningless remedy after the D.C. Circuit’s earlier rulings. Citing its opinion in *Kiyemba*, which held that innocent prisoners who were granted the writ possessed no right to be actually released, the court noted ‘not every

¹⁰² *Boumediene v Bush* [2008] 553 US 771, 755 (United States Supreme Court)

¹⁰³ *Minneeci v Pollard* [2012] 132 SCt 617 (United States Supreme Court)

right yields a remedy, even when the right is constitutional'.¹⁰⁴ Here, the right at issue was perhaps the most fundamental of all, the right to life. There could be no clearer example of the courts abdicating their responsibilities. The doctrine which this opinion announced is incompatible with the rule of law.

Owing to the holding in *Al-Zahrani*, it is now simply impossible to bring a claim against the executive if the torture occurred outside of the United States, even if it was in an area exclusively controlled by the agents of the executive, i.e., Guantánamo, Afghanistan, ships on the high seas, or merely in some foreign country that allows its prisons to be used as 'black sites', and which permits the executive's agents to operate freely. For instance, this holding foreclosed actions brought by those abducted and subjected to 'extraordinary' rendition, such as Khaled el-Masri,¹⁰⁵ a German national taken, beaten, and sodomised¹⁰⁶ by the CIA in Macedonia, and tortured in Afghanistan, merely because his name was similar to that of terrorism suspect. He would only obtain relief at the European Court of Human Rights for the relatively minor conduct of the Macedonian authorities who allowed the CIA to kidnap him,¹⁰⁷ while the executive branch's conduct cannot be punished in any court. On the same basis, the D.C. Circuit has also dispensed with the claims of detainees held by the American military in Iraq

¹⁰⁴ Rasul *supra* n 96

¹⁰⁵ *El-Masri v United States* [2007] 479 F3d 296 (D.C. Circuit)

¹⁰⁶ *El-Masri v The Former Yugoslav Republic of Macedonia* [2012] No. 39630/09 (European Court of Human Rights) 13 December 2012, 63

¹⁰⁷ *Ibid*

and Afghanistan, ‘which are generally even more appalling than those that allegedly occurred at Guantanamo.’¹⁰⁸

The judiciary’s unwillingness to put an end to the regime of prolonged involuntary detention, and the torture which inevitably accompanies it, ignores the breakdown of the rule of law that it represents. Executive dominance above the laws has not only been tolerated, it was subsequently ratified in court opinions. While the executive sought to keep its internal legal advice secret, perhaps for fear of being rebuked by the courts, these opinions proved that these anxieties were groundless.

Consequently, a legal regime that sanctions the violation of non-derogable rights has been formalized by the courts. This has various effects, which will be introduced here and discussed in detail below. First, it ties the hands of judges in trial courts, many of whom now openly express dismay that they have been rendered powerless to offer relief to those who are suffering, or who have suffered, grievous harms. Second, it provides a green light for the executive to continue subjecting those it nominates to violations of their non-derogable rights.

3.1 The Response to the Appellate Courts’ Green Light to Torture

This section will demonstrate that the violations on non-derogable rights described above have continued unabated after the transition to the Obama Administration. It will show that the same *jus cogens* norms are being violated, and that this is being done for the same reasons, which serve to further undermine the rule of law. Consideration

¹⁰⁸ Elizabeth Wilson, “‘Damages or Nothing’: The Post-Boumediene Constitution and Compensation for Human Rights Violations After 9/11”, (2001) 41 Seton Hall Law Review 1491, 1512-13

of the executive's on-going attempts to hold prisoners who have been proven innocent sheds some light on why it is committed to perpetuating this regime of prolonged arbitrary detention and torture.

Certain difficult questions must first be raised. Namely, why has the Obama Administration fought so hard to keep detainees at Guantánamo Bay when the President campaigned on a promise to close it? Why does the executive continue to detain prisoners at Camp Platinum, where according to the Chief Military Defense Counsel of the Office of Military Commissions, prisoners are still held in conditions that do not comply with the minimum standards of Article Three of the Geneva Conventions,¹⁰⁹ and where they can be tortured with impunity following *Al-Zahrani*? Finally, why has the Obama Administration argued in 2012 that these detainees should no longer have access to lawyers?¹¹⁰ Why has it constructed the Parwan Detainment Facility? Even without answers, these questions themselves make it evident that the executive is trying to return the detention system to one that no light can ever penetrate so that it can continue to torture detainees.

The Bush Administration's impetus for the creation of this system was the extraction of false confessions. It is impossible to discern any other reason why the Obama

¹⁰⁹ Charlie Savage, 'Guantánamo Conditions Slip, Military Lawyers Say', *New York Times* (New York, 24 February 2012) See also Peter Masciola, 'Memorandum of Col. Peter Masciola, Bullets in Furtherance of Meeting of 4 February 2009', <<http://www.defenselink.mil/pubs/App11.pdf>> accessed 31 May 2014

¹¹⁰ Respondent's Motion To Refer The Counsel-Access Issue For Decision By A Single District Judge And To Hold In Abeyance Former Petitioners Esmail's And Uthman's Motions For Order Concerning The Protective Order, *Abdah v Obama* [2012] No. 04-Civ-1254 (District of the District of Columbia) <<http://images.politico.com/global/2012/07/gitmocounselmotn.pdf>> accessed 31 May 2014

Administration has sought to return its detention and interrogation regime to the level of secrecy that the 2001-2003 OLC memoranda contemplated. That said, there are also indications that detainees are still being held and tortured at Guantánamo and various black sites, most notably at Parwan and other facilities operated by the Joint Special Operations Command in Afghanistan. This should be considered when discussing the executive's attempts to eliminate these detainees access to lawyers and the immunizing of torturers. At Parwan, detainees are held without any access to lawyers, since the D.C. Circuit affirmed that they have no right to petition for *habeas corpus*, and they can be tortured and even killed with impunity, since it also affirmed that they do not have rights that can be enforced in American courts.

There is substantial evidence that the executive is subjecting detainees at Parwan to conditions and interrogation methods that rise to the level of torture. For example, there are multiple reports confirming the torture of detainees at the so-called 'Black Jail', the facility at Parwan operated by the Defense Intelligence Agency's Defense Counterintelligence Field Activity. It is also staffed with personnel from the highly secretive Joint Special Operations Command.¹¹¹ The Open Society Institute has documented its conditions, and noted that they do not comply with the basic guarantees of the Third Geneva Convention. Its report also noted that representatives from the

¹¹¹ Marc Ambinder, 'Inside the Secret Interrogation Facility at Bagram', *The Atlantic*, (Washington, 14 May 2010) <<http://www.theatlantic.com/politics/archive/10/05/inside-the-secret-interrogation-facility-at-bagram/56678/#>> accessed 31 May 2014

International Committee of the Red Cross have been barred from the facility and others that have been designated as Special Operations camps.¹¹²

Congress obtained a significant amount of positive publicity in 2005, when it restricted the military to the techniques of interrogation outlined in the Army Field Manual. This legislation was ‘sold to the public as a return to civilized norms’,¹¹³ but few noted that this action left the executive free to rewrite the manual, something which it did shortly afterwards.¹¹⁴ When President Obama, in a much-heralded executive order¹¹⁵ restricted the CIA to the techniques outlined in the rewritten manual, few noted that Amnesty International concluded that it now contained an appendix that allowed techniques that ‘do not comply with the international law regulations prohibiting torture’.¹¹⁶ Furthermore, the manual continues to rely on a categorization of certain

¹¹² Open Society Foundations Regional Policy Initiative on Afghanistan and Pakistan, ‘Confinement Conditions at a U.S. Screening Facility on Bagram Air Base’, (14 October 2010)

<<http://www.opensocietyfoundations.org/sites/default/files/confinement-conditions-20101014.pdf>>

¹¹³ Jeffrey S. Kaye, ‘How the U.S. Army’s Field Manual Codified Torture – and Still Does’, *AlterNet*, (6 January 2009)

<http://www.alternet.org/story/117807/how_the_u.s._army%27s_field_manual_codified_torture_-_and_still_does> accessed 31 May 2014

¹¹⁴ Headquarters, Department of the Army, ‘Human Intelligence Collector Operations (FM 2-22.3 (amending FM 34-52))’ September 2006 <<https://www.fas.org/irp/doddir/army/fm2-22-3.pdf>> accessed 31 May 2014

¹¹⁵ Executive Order 13491, ‘Ensuring Lawful Interrogations’, (22 January 2009), available online at: http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations

¹¹⁶ Amnesty International, ‘The Army Field Manual: Sanctioning Cruelty?’ (19 March 2009), <<http://www.amnesty.org.au/hrs/comments/20575/>> accessed 31 May 2014

prisoners as ‘unlawful enemy combatants’ whom the executive deems unilaterally not to be entitled to the protections of the Third Geneva Convention, a procedure which itself does not comply with the Geneva Conventions.

It should also be noted that Executive Order 13491, which purportedly prevented the CIA from torturing detainees, also contained an opt-out procedure wherein a ‘Special Task Force’ could propose ‘additional *or different guidance* [than the Army Field Manual] for other agencies’,¹¹⁷ such as the Defense Intelligence Agency, whose procedures would remain classified and would not receive much attention, despite the fact that it is the agency conducting interrogations at the Black Jail at Parwan Detention Facility and other Special Operations camps. ‘Although the CIA’s interrogation program was investigated . . . the Defense Department’s parallel activities have been given little scrutiny’.¹¹⁸ Naturally, when this ‘different guidance’ was adopted, it was classified above ‘Top Secret’. Accordingly, it is unclear what methods the Defense Department has approved for DIA interrogations,¹¹⁹ although one can infer from the fact that certain techniques amounting to torture have been declassified, these methods must be considerably less acceptable, although it is impossible to determine at this time whether particular techniques such as waterboarding have been re-authorized.

The executive has reaffirmed a detention regime involving black sites, secrecy, and torture even at a time when interrogators and intelligence officials continue to reiterate

¹¹⁷ Executive Order 13491, ‘Ensuring Lawful Interrogations’, section 5(e), (22 January 2009)

<http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations> accessed 31 May 2014

¹¹⁸ Ambinder *supra* n 111

¹¹⁹ Ambinder *supra* n 111

that this paradigm does not produce useful intelligence,¹²⁰ something which was clearly evident not long after the 9/11 attacks. There is no explanation proffered for this, although it clearly suggests that this Administration has done so for the same reasons as its predecessor, namely to produce false confessions. It should also be noted that during the Obama Administration, Director of National Intelligence Admiral Dennis Blair continued to credit 'enhanced interrogation' with obtaining 'high value information' from detainees.¹²¹ He made this case after it was already clear that this 'information' was only considered 'high value' at the time because it was helping the executive make the case for a war of aggression against Iraq.

It is as yet unclear why the executive would want to have a system in place that is perfectly designed to produce falsehoods that suit its interrogators, but given the executive's support for operations amounting to war against Syria, the utility of this regime may yet become apparent. This presents another fundamental challenge to the rule of law, as the political climate that such a crisis would catalyse would both retroactively justify the gross violation of non-derogable rights described in this section and further attempts by the executive to solidify its supremacy over the law. The only type of violation of non-derogable rights that can be considered more serious than what has been described above is the executive's premeditated extra-judicial execution of a citizen, on the grounds that it has the power to do this on its own initiative. The next

¹²⁰ Human Rights Watch, 'Letter from Interrogators and Intelligence Officials', (16 November 2010) <<http://www.humanrightsfirst.org/our-work/law-and-security/torture-and-accountability/appendix-m-of-the-army-field-manual/letter-from-interrogators-and-intelligence-officials/>> accessed 31 May 2014

¹²¹ Scott Shane, 'Interrogations' Effectiveness May Prove Elusive', *New York Times* (New York, 22 April 2009) <<http://www.nytimes.com/2009/04/23/us/politics/23detain.html>>

section will demonstrate that the executive did precisely that, and courts refused to prevent this, something which makes it clear that the United States has moved far outside of the confines of the rule of law.

4 TARGETED KILLING

While court challenges to the executive's violation of non-derogable rights began with challenges to prolonged arbitrary detention and only later addressed torture, this can easily be explained by reference to the fact that the torture of detainees was a tightly controlled and highly secretive program designed to produce dubious evidence that would later be labelled 'intelligence' that conveniently supported the executive's arguments for aggressive war. However, the targeted killing program was even more secretive, as it involved acts of war itself, within both Pakistan and Yemen. The Bush Administration inaugurated a program, which was described in chapter three, that authorized drone strikes against suspected terrorists. As chapter one established, despite the fact that the targeted killing program does not comply with basic norms of International Humanitarian Law, the Obama Administration oversaw a tenfold increase in drone strikes.¹²² This program did not lead to much litigation, however, as the cases presented the serious jurisdiction problems described above, and they would also

¹²² See Washington Post, 'Tracking America's Drone War',

<<http://apps.washingtonpost.com/foreign/drones/>> accessed 31 May 2014; see also Chris Woods and Alice K. Ross, 'Revealed: US and Britain launched 1,200 drone strikes in recent wars', *Bureau of Investigative Journalism*, (Washington, 12 December 2012)

<<http://www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars/>>

challenge the use of military force, something which creates the danger of flouting public opinion.

That said, a test case presented itself when the executive, which traditionally kept these programs very secret, openly announced its intention to subject an American citizen to a drone strike. On April 6, 2010, the *New York Times* reported that after a discussion within the National Security Council, President Obama authorized the extra-judicial killing of Anwar Al-Awlaki.¹²³ His father Nasser al-Aulaqi then asked a federal trial court to enjoin the killing¹²⁴. The *Al-Aulaqi* lawsuit was filed on August 30, 2010.¹²⁵

Nasser al-Aulaqi sought a declaratory judgment stating that the targeted killing program, insofar as it targeted U.S. citizens who did not present concrete, specific and imminent threats to life or physical safety, was unconstitutional.¹²⁶ He also sought an order requiring the executive to disclose the criteria used to identify its targets.¹²⁷ The executive filed a motion to dismiss, arguing that the Plaintiff lacked standing to file a claim and that adjudicating the claims would require the court to decide non-justiciable

¹²³ Scott Shane, 'U.S. Approves Targeted Killing of American Cleric', *New York Times* (New York, 6 April 2010) <<http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>> access 31 May 2014

¹²⁴ *Ibid*

¹²⁵ Complaint for Declaratory and Injunctive Relief at Prayer for Relief, *Al-Aulaqi v Obama* [2010] 2010 WL 3478666 (District of the District of Columbia)

¹²⁶ *Ibid* para. 11

¹²⁷ *Ibid*

political questions.¹²⁸ The motion was granted.¹²⁹ However, the court's decision that Nasser al-Aulaqi did not have standing to bring the suit as his son's next friend was paradoxical. The court concluded that such a suit must be brought personally, since 'Al-Awlaki can access the U.S. judicial system by presenting himself in a peaceful manner', a leap of logic that depends on the premise that '[a]ll U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully.'¹³⁰ First, it should be noted this presumes that those administering the targeted killing program will act in accordance with the Constitution, even after the executive has already concluded that its guarantees do not apply to the targeted person. Second, the court opined that Al-Awlaki could turn himself in merely because of its allegation that there is 'there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen.'¹³¹ Since the executive was actively trying to kill him this assertion is highly questionable.

The court also dismissed the suit for presenting a non-justiciable political question. The court rested its reasoning chiefly on the precedent provided by *El-Shifa v. United States*.¹³² In it, the 'D.C. Circuit examined whether the political question doctrine

¹²⁸ Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at para. 19-35, *Al-Aulaqi v. Obama* [2010] 2010 WL 3478666 (District of the District of Columbia)

¹²⁹ *Al-Aulaqi v Obama* [2010] 727 FSupp2d 1 (District of the District of Columbia)

¹³⁰ Ibid 18. The court's spelling of Anwar Al-Awlaki's name has been adjusted to correspond with the way it has been transliterated within this chapter.

¹³¹ Ibid 17

¹³² *El-Shifa v United States* [2004] 378 F3d 1346 (D.C. Circuit)

barred judicial resolution of claims . . . seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike'.¹³³ The court reasoned:

[T]he plaintiff asks this court to do exactly what the D.C. Circuit forbade in *El-Shifa*—assess the merits of the President’s (alleged) decision to launch an attack on a foreign target. Although the ‘foreign target’ happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs’ claims in *El Shifa* apply with equal force here.¹³⁴

Although the court decided that it would not address Al-Awlaki’s claim that he should not be killed without due process, it opined further:

[I]t does not appear that any court has ever—on political question doctrine grounds—refused to hear a U.S. citizen’s claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad. Nevertheless, there is inadequate reason to conclude that Anwar Al-Awlaki’s citizenship—standing alone—renders the political question doctrine inapplicable to plaintiff’s claims.¹³⁵

Owing to this conclusion and the court’s concern that the relief sought ‘would be vastly more intrusive upon the powers of the Executive’ than those typically sought by a petitioner seeking *habeas corpus*, and because ‘the questions posed in this case require expertise beyond the capacity of the judiciary and [since there is a purported need for] *unquestioning adherence to a political decision by the executive*’,¹³⁶ the court held that the claims were non-justiciable. This was presented as a felicitous result that avoided demonstrating ‘a lack of respect due to coordinate branches of government’, and

¹³³ Scott Shane, ‘U.S. Approves Targeted Killing of American Cleric’, *New York Times*, (6 April 2010)

<<http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>> accessed 31 May 2014

¹³⁴ *Ibid* 70 (emphasis added)

¹³⁵ *Ibid* 75

¹³⁶ *Ibid* 77 (internal quotation marks removed; emphasis added)

creating ‘the potentiality of embarrassment of multifarious pronouncements by various departments on one question’.¹³⁷

In summary, the court decided not to examine the merits of a suit brought on behalf of a United States citizen who claimed he was the subject of an executive death warrant issued without due process on two grounds. First, because of speculation and adverse inferences the court concluded that the plaintiff had no standing to bring the suit. It did so despite the fact that this prudential consideration has routinely been waived when ‘human lives are at stake’. American courts have often expressed disdain for the argument that such a case should turn on ‘fine points of procedure or a party’s technical standing to bring a claim’ in that circumstance.¹³⁸ However in this case a judicially-crafted limitation was used to trump constitutional claims of the highest importance.

Second, and more importantly, the case was dismissed because the court did not believe that the judiciary possessed the power to determine the constitutionality of a decision by the President to issue an executive death warrant. Instead, it held that such a decision is best left to the executive branch itself, to which an almost obsequious level of deference is apparently due, even from the courts that were set up to enforce the limitations of the constitution against the executive. Again, this abject abandonment of the judiciary’s most fundamental responsibility simply cannot be reconciled with the rule of law.

¹³⁷ Ibid 72, 77

¹³⁸ *Rosenberg v United States* [1953] 346 U.S. 273, 294 (United States Supreme Court) (Clark, J, concurring for six Justices)

5 SECRECY OF EXECUTIVE ACTION

As described in the sections above, the secrecy of the executive's efforts involving the systematic violation of non-derogable rights was an integral feature of these programs and essential to defeating court challenges, as appellate courts pronounced themselves helpless to proceed in the face of stonewalling by the executive. As this section will demonstrate, sections of the federal judiciary were quick to erect further barriers to court challenges by affirming the right to keep evidence of violations of fundamental rights out of the hands of those who would seek to hold the executive accountable. The judicially created doctrines invoked by the courts when dismissing lawsuits challenging prolonged arbitrary detention, torture, and extra-judicial executions, which include the doctrines of qualified immunity and so-called 'special factors', jurisdictional bars, heightened standing requirements, and the political question doctrine, have all been highly effective means of denying relief to plaintiffs who alleged violations of *jus cogens* norms. Another contributing factor has been the withholding of government records that should have been provided to those bringing the lawsuits pursuant to FOIA requests, or in response to discovery requests made in the course of this litigation.

Given the fact that these lawsuits are now consigned to failure by the judicially created doctrines that facilitate the evasion of any review on the merits of claims against the executive, one might argue that restrictions on public records are superfluous, and thus do not affect the assessment of whether or not the United States is in compliance with the norms of the rule of law. However, this would fail to account for the additional political benefit of keeping certain activities secret.

If the executive branch carries out programs that, if disclosed, would shock the public, maintaining secrecy is integral to preventing the sort of political backlash that

occurred after the revelations of the Church Committee, which helped to restore the rule of law. Accordingly, as the final hope for the restoration of the rule of law in the United States is the prospect of legislative action catalysed by public outrage, the executive's attempts to keep its most dubious programs secret is clearly pertinent.

That said, an exhaustive summary of attempts to obtain information from the executive about programs that violated *jus cogens* norms is outside of the scope of this thesis. Instead, this subsection will detail the efforts of journalists and non-governmental organizations working in the area of civil and human rights to obtain information on the targeted killing program. One of the key cases involved an attempt to obtain information from the executive about the killing of Anwar Al-Awlaki. The proceedings illustrate how the above-described judicially created rules have created a system where it is possible for the executive to keep almost anything secret, even programs that violate the fundamental rights of its citizens. This will provide further proof that the United States can no longer be considered a rule of law state, as the executive cannot be subjected to any form of oversight if it can withhold information about its violations of non-derogable rights at will.

Before discussing how the decisions of appellate courts have made obtaining such information virtually impossible, it should be noted that the executive branch provided the lead to the judiciary. Despite campaign promises to restore transparency, the Obama Administration has done the opposite. One example of this is an executive order that allows for retroactive classification of a document. This means that someone may file a valid request for a government record, but before it is released, the executive can decide that it should have been considered classified and therefore exempt from FOIA, despite the fact that those who created the document saw no need to consider its contents confidential, if 'the original classification authority [in its sole discretion]

determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security'.¹³⁹

The effects of this regime become apparent when one considers *New York Times v. Department of Justice*,¹⁴⁰ which sought information 'about the legal basis . . . for authorizing the targeted killing of Anwar Al-Awlaki'.¹⁴¹ In particular, the suit sought to compel disclosure of an OLC memorandum written in 2010 and signed by David Barron, which 'concluded that Mr. Awlaki could be legally killed'.¹⁴² The quality of the legal reasoning of this memorandum appears highly questionable, since leaks have

¹³⁹ Executive Order No. 13526, 'Classified National Security Information' (29 December 2009) section 1.1(a)(4) <<http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>> accessed 31 May 2014

¹⁴⁰ *New York Times v Department of Justice* [2012], 11 Civ. 9336 (CM) (Southern District of New York)

¹⁴¹ Department of Justice 'Request Under Freedom of Information Act, Nathan Wessler', *American Civil Liberties Union*, (Washington, 19 October 2011), 3 <http://www.aclu.org/files/assets/awlaki_foia_final_2011_10_19.pdf> accessed 31 May 2014

¹⁴² Ibid, quoting Charlie Savage, 'Secret U.S. Memo Made Legal Case to Kill a Citizen', *New York Times*, (New York, 9 October 2011) <<http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>>

confirmed that it failed to even mention a key provision of the Constitution that specifically prohibits extra-judicial execution.¹⁴³

This perception of flawed legal reasoning is not helped by the statements of the Attorney-General of the United States, who defended the program by stating that the due process mandated by the Constitution ‘is not necessarily judicial process’, even when the right being taken away is not Social Security Disability Insurance payments before a judicial hearing,¹⁴⁴ but when a citizen is being deprived of his life after a process¹⁴⁵ conducted by counter-terrorism officials.¹⁴⁶ Other officials from the Department of Justice also asserted on the executive’s behalf that no court possessed any jurisdiction to question whether this deprivation of life was a violation of a citizen’s Constitutional rights.¹⁴⁷ Giving these assertions, disclosure of the legal justification in the OLC memorandum for this program is of paramount importance to the rule of law.

The executive responded to the suit by moving to dismiss it, refusing to confirm or deny the existence of the OLC memorandum because ‘this would cause harm’ by revealing ‘information about the interests, priorities and capabilities of the subject

¹⁴³ Ryan Patrick Alford, ‘The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens’ [2011] *Utah Law Review* 1203, 1271-1272

¹⁴⁴ *Mathews v Eldridge* [1976] 424 US 319 (United States Supreme Court)

¹⁴⁵ It should be noted that the defendants in Star Chamber proceedings had, in fact, significantly more procedural due process. See Ryan Patrick Alford, ‘The Star Chamber and the Regulation of the Legal Profession 1570-1640’, (2011) 51 *American Journal of Legal History* 653

¹⁴⁶ Savage *supra* n 142

¹⁴⁷ Al-Aulaqi *supra* n 129

agencies’.¹⁴⁸ This is a very strange assertion, since the requested document would presumably contain only a legal argument, since that is what it purports to be. In its response to this motion, the New York Times clarified that it ‘seeks only legal analysis, not the details of any operation, past or future, which can properly be subject to redaction, if necessary’.¹⁴⁹ In addition, it noted that the government provided no explanation why ‘legal analysis is properly characterized as a national security secret’.¹⁵⁰

Despite the cogency of the plaintiffs’ arguments, the court dismissed the case, but in doing so exposed the way in which earlier appellate court rulings made it impossible for the plaintiffs to prevail under any circumstances, regardless of the importance of the information they sought to the rule of law. Perhaps owing to this distressing conclusion, the trial court’s opinion lapsed into the first person:

I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain

¹⁴⁸ Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, *New York Times v Department of Justice* [2012] 11 Civ. 9336 (CM) (Southern District of New York)

¹⁴⁹ Memorandum of Law in Support of Plaintiff’s Cross-Motion for Partial Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment, p. 13, *New York Times v Department of Justice* [2012], 11 Civ. 9336 (CM) (Southern District of New York)

¹⁵⁰ *Ibid* 13

actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret.¹⁵¹

The court noted that because the government chose to label the requested documents as classified, a request to the judiciary was fruitless. 'It lies beyond the power of this Court to determine if a document has been improperly classified'.¹⁵² Accordingly, the trial court cannot order the disclosure of 'final policies that have been adopted by the Executive to target individuals and to decide whether or not they can lawfully be killed by Executive fiat'.¹⁵³

What is most notable is that the trial court found that it was compelled to reach this conclusion by the 'thicket of laws and precedents' despite the fact that it appears to have concluded in *dicta* that the targeted killings were in fact extra-judicial assassinations punishable under domestic law. It came to this conclusion after pointing out that the statute forbidding 'Foreign murder of United States nationals . . . contains no exception for the President . . . or anyone acting at his direction Presidential authorization does not and cannot legitimize convert action that violates the constitution and laws of this nation'.¹⁵⁴

The court also noted that the 'literal language of the Fifth Amendment, the Treason Clause, and the cited statutes notwithstanding, the Administration . . . has gone so far as to mount an extensive public relations campaign in order to convince the public that

¹⁵¹ *New York Times v Department of Justice* [2013], 11 Civ. 9336, 4-5 (CM) (Southern District of New York) (emphasis added)

¹⁵² *Ibid* 38

¹⁵³ *Ibid* 60

¹⁵⁴ *Ibid* 18-19

its conclusions [about its authority to order extra-judicial executions] are correct'.¹⁵⁵ Accordingly, the court implicitly argued that despite the fact that the executive authorized covert operations that unlawfully killed citizens and argued at length that it has the power to do so, the court cannot order the executive to release its own rationale, or even compel them to admit formally and on the record that it engaged in these operations.

Unfortunately, as the next section will demonstrate, it is impossible for the victims of state-sanctioned murder and other violations of non-derogable rights to bring successful court challenges without these classified documents. As the trial court noted, 'the Alice-in-Wonderland nature of this pronouncement is not lost on me'.¹⁵⁶ Presumably, the nature of this crisis of the rule of law is such that when the executive construes a law, it 'means precisely what [it] choose[s] it to mean—neither more nor less', as 'the question is which is to be master—that's all'.¹⁵⁷ The trial court might as well have observed that its opinion was the death knell of the rule of law, since it concludes that despite the fact that the executive is committing murder that no court can order it to release the documents that might make it possible for any court to hold it accountable for that crime.

6 UNLAWFUL SURVEILLANCE

In addition to keeping information about the executive out of the hands of those who sought to challenge its violation of citizens' non-derogable rights, the higher courts

¹⁵⁵ Ibid 19

¹⁵⁶ Ibid

¹⁵⁷ Lewis Carroll, *Through the Looking Glass* (Collins Clear-Type Press 1934) 205

systematically empowered the right of the executive branch to gather information about the citizenry. As this section will demonstrate, it also used this power against its critics, and in particular against those who challenged its policies, in an echo of Nixon's abuses. As the last chapter detailed, the executive argued that it could ignore the laws and constitutional provisions restricting warrantless surveillance, owing either to the AUMF or its purported reserve powers, triggered by what it characterized as a state of war. Again, while it is difficult to understand how the authorization to deploy troops in battle implies clearance to eavesdrop on conversations, the OLC was prepared to provide the necessary legal justification. Problematic legal reasoning was simply beside the point, because the relevant memorandum was kept secret, even from the agencies that conducted the surveillance. 'In late 2003, the NSA's General Counsel and the Inspector General sought access to Mr. Yoo's memoranda . . . Mr. [David] Addington angrily rebuffed them'.¹⁵⁸

This tight secrecy was motivated by the audacity and scale of the 'President's Surveillance Program' which dwarfed the Cold War NSA programs in scale. This program was gargantuan. It involved diverting every single personal communication transmitted across the telecommunications companies' trunk lines. The NSA simply inserted a shunt that relayed all of this communications traffic from these hubs to their headquarters, where all of these messages could be parsed.¹⁵⁹ This rendered

¹⁵⁸ House Committee on the Judiciary Majority Staff Report to Chairman John C. Conyers, Jr.

'Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush', (Government Printing Office 2009) 147

¹⁵⁹ Declarations of Mark Klein and Scott Marcus, *Amnesty v Blair* [2008] 08 Civ. 6259 (Southern District of New York)

unnecessary the earlier methods of obtaining this type of data, which often involved knowingly providing false information in warrant applications.¹⁶⁰

While the executive insisted that it was merely conducting surveillance on al-Qaeda terrorists, such that the President's Security Program and other operations might appear to be implied by the AUMF, this mandate was quickly extended. Attorney-General Alberto Gonzales later revealed that the NSA was 'not just targeting terrorists but anyone deemed "affiliated" or "working in support" of terrorists'. One prominent law professor noted that 'this definition casts so wide a net that no one can feel certain of escaping its grasp.'¹⁶¹ These anxieties appeared warranted given a widely publicised statement of the chief executive. As he said before a joint session of both legislative bodies, '[e]ither you are with us, or you are with the terrorists'.¹⁶²

After the 9/11 attacks, peace activists were perceived as not being 'with us', and this led to abuses that continued long after 2001, especially after the executive put into place its strategy of extending the crisis period by launching new wars. In 2005, a leak revealed that the Counterintelligence Field Agency, hereinafter referred to as CIFA, database contained extensive records of spying on the political activity of anti-war

¹⁶⁰ Philip Shenon, 'Secret Court Says F.B.I. Aides Misled Judges in 75 Cases', *New York Times*, (New York, 20 November 2001) <<http://www.nytimes.com/2002/08/23/us/secret-court-says-fbi-aides-misled-judges-in-75-cases.html>>

¹⁶¹ Letter from Laurence Tribe to the Hon. John Conyers, Jr., United States House of Representatives, (6 January 2006)

¹⁶² George Bush, Address to a Joint Session of Congress and the American People, (20 September 2001) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>> 31 May 2014

groups opposed to the Iraq War. In it, innocuous activities, such as a meeting at a Quaker meeting house, were described as a ‘threats’.¹⁶³ The range of targets for this surveillance was also extended to include academics, as ‘military personnel also attended academic conferences and tracked participants’ private statements’.¹⁶⁴ The military intelligence agencies were not alone. ‘CIFA was far from unique. The FBI, returning to its old habits, was also spying on antiwar [sic.] activists . . . the FBI’s Pittsburgh office kept the interfaith Thomas Merton Center under surveillance’ for at least three years¹⁶⁵

What is particularly problematic about this surveillance is that was fed into vast databases and cross-linked, in a manner that the architects of Operation CHAOS, as described in chapter two, could only have dreamed about. ‘One of the CIFA-funded database . . . dubbed “Person Search,” is designed “to provide comprehensive information about people of interest.”’ Presumably, this linked to the PSP’s and other databases, and could provide information about those whom any particular activist called or e-mailed and field reports from undercover agents, and other files, at the touch of a mouse. The Total Information Awareness database was the result of ‘a huge data

¹⁶³ Lisa Myers, Douglas Pasternak, and Rich Gardella, ‘Is the Pentagon Spying on Americans’ *NBC News* (14 December 2005), <<http://www.msnbc.msn.com/id/10454316/#.UPYFgIbLFhE>> 31 May 2014

¹⁶⁴ Frederick Schwarz and Aziz Huq, ‘Unchecked and Unbalanced: Presidential Power in a Time of Terror’ (New Press, 2007) 134

¹⁶⁵ *Ibid* 135

mining scheme ... [that] track[ed] Americans' credit-card transactions, website visits, travel records, bank transactions, and [linked to] other database files at the Pentagon'.¹⁶⁶

The use of these technologies and methods of surveillance against anti-war activists makes it 'disturbingly clear that the mistakes of the past [and in particular, the Nixon Administration] are being repeated once more. Rather than focusing on the *nation's* enemies, intelligence services are trained on American dissenters from the government's policies'.¹⁶⁷

That said, any keen student of Nixon's presidency, including the many located in the executive branch after the 9/11 attacks, as the last chapter pointed out, would have remembered that his efforts to control the anti-war movement were not incidental to his agenda. Rather, as described in chapter two, the Church Committee and other investigations revealed that escalating the Indochina War was an integral part of his attempt to free the executive from all legal restraint and oversight. Accordingly, destroying the movement that stood in the way of an expanded war and concomitant crisis was essential to Nixon at that time. It is entirely possible that Cheney and others saw the movement against the Iraq War in the same manner, given the similarities in their goals. Cast in this light, the assumption that the Bush Administration sought to use the intelligence agencies in the same manner as Nixon and for the same ends does

¹⁶⁶ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown & Co., 2007) p. 115.

¹⁶⁷ Schwartz and Huq *supra* n 159, 135 (emphasis in original)

not appear unwarranted, and this was confirmed by subsequent revelations about these programs.

These efforts to implement surveillance and control would present as serious a challenge to the rule of law as the ‘White House horrors’ that brought about Nixon’s resignation. However, in the absence of a thorough congressional investigation, opponents of the executive who were subjected to unlawful surveillance and other abuses can only turn to the courts.

The first serious challenge to warrantless surveillance of peace activists, scholars and others engaging in constitutionally protected political activity was brought on January 17, 2006.¹⁶⁸ The suit alleged that the ‘NSA engaged in wholesale data-mining of domestic and international communications’ in violation of FISA, and that some of the plaintiffs would have been targeted for surveillance merely because of the topics they researched on the internet.¹⁶⁹ The plaintiffs included the American Civil Liberties Union, owing to its work in connection with the United Nations Working Group on Arbitrary Detention, which involved the investigation of ‘special interest’ detainees who were ‘rendered . . . to detention and interrogation facilities operated by the CIA

¹⁶⁸ Complaint in *ACLU v NSA* [2006] 06 Civ. 10204 (District of the District of Columbia)

<http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf> accessed 31 May 2014

¹⁶⁹ *Ibid* 15-16

outside U.S. sovereign territory', including Khaled el-Masri, whose case was discussed in section three above.¹⁷⁰

The executive's eavesdropping on these privileged attorney-client communications made this legal representation more difficult. Journalists and scholars also alleged that their work investigating law-breaking by the intelligence community, including the NSA, in the case of the author James Bamford, was now more difficult, as their sources believed they were being subjected to warrantless surveillance.¹⁷¹ Owing to these effects on constitutionally protected speech, these plaintiffs alleging violations of their free speech and associational rights, along with violations of the Fourth Amendment, and noted that this surveillance violates the principle of separation of powers because it was authorized . . . in excess of his Executive authority under . . . the United States Constitution and contrary to limits imposed by Congress.¹⁷²

The trial court's ruling in this case was a stirring rebuke to an overreaching executive. Despite the fact that the NSA withheld numerous documents on the assertion of 'state secrets privilege', the court held that this information was not required in order for the plaintiffs to establish their standing, and to make the *prima facie* case of a constitutional violation that would justify an injunction.¹⁷³ On the question of standing, the absence of which was invoked by appeals courts when dismissing claims after the 9/11 attacks, on the basis that plaintiffs cannot prove they were targeted by the

¹⁷⁰ Ibid 18

¹⁷¹ Ibid 44-46

¹⁷² Ibid 59

¹⁷³ *ACLU v NSA* [2007] 436 FSupp2d 754 (District of the District of Columbia)

executive without access to secret documents that cannot be released, the court reasoned as follows:

[I]f the court were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights. The three separate branches of government were developed as a check and balance for one another.¹⁷⁴

Citing the *Keith Case*, the trial court noted that these plaintiffs now complained about the sort of activity that had brought down the Nixon Administration. Furthermore, it noted that Congress had prohibited these practices by FISA, which did not acknowledge any constitutional reserve powers in the executive. It also observed that the Fourth Amendment was itself a response to this sort of executive overreaching, in the form of the general search warrants executed in the American colonies. Quoting the *Steel Seizures Case*, the court reasoned:

[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.¹⁷⁵

The trial court concluded that the PSP was contrary to statute and unconstitutional. In doing so, it refuted the notion that the executive possessed emergency powers that would allow it to ignore duly enacted laws. '[T]he Office of the Chief Executive has

¹⁷⁴ Ibid 771

¹⁷⁵ Ibid 778

itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all “inherent powers” must derive from that Constitution’, which grants the executive no emergency powers.¹⁷⁶ It also concluded that the AUMF could not be construed to support this activity, as this would amount to a general statute implicitly overruling another, FISA, which was more specific.

Unfortunately for the plaintiffs, this ruling was never put into effect. It was stayed immediately and subsequently vacated by the Sixth Circuit.¹⁷⁷ The court held that plaintiffs lacked standing to bring any of their claims, since they could not demonstrate that they were subjected to warrantless surveillance. ‘[B]ecause of the State Secrets Doctrine [the plaintiffs] cannot . . . produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants’.¹⁷⁸ The court did not appear to appreciate the irony of allowing a defendant to frustrate plaintiffs’ constitutional claims by refusing to turn over the documents they need to prove those claims.

Rather than decrying a Catch-22, in the same manner as the trial court in *New York Times v. Department of Justice*, the Sixth Circuit created one. The pattern that emerges from the court challenges after the 9/11 attacks is clear. Plaintiffs are barred by a ‘thicket of precedents’ that block their path to a review on the merits the appellate court

¹⁷⁶ Ibid 781

¹⁷⁷ *ACLU v NSA* [2007] 493 F3d 644 (D.C. Circuit)

¹⁷⁸ Ibid 653

opinions disposing of these claims persist and proliferate, creating precedents that doom future lawsuits challenging violations of constitutional rights.

For instance, a subsequent suit challenging warrantless surveillance filed in the Southern District of New York, *Amnesty International v. McConnell*, was dismissed owing to the plaintiffs' purported failure to demonstrate their standing to sue, in which the decision of the Sixth Circuit in *ACLU v. NSA* was cited multiple times.¹⁷⁹ This is another example of a case in which a clear failure of the executive to comply with its obligations during the discovery process was exacerbated by the circuit courts' willingness to create precedents that deprive the trial courts of any ability to challenge disingenuous assertions of 'state secrets privilege', in the same manner that they were stripped of the ability to challenge the retroactive classification of documents as 'secret' after they become the subject of FOIA requests, as seen in *New York Times v. Department of Justice*.

There are other pertinent examples of this process. During the discovery process, the plaintiffs in *Amnesty International* requested a legal opinion purportedly justifying the FBI's participation in warrantless wiretapping programs. Accordingly, a document which appears to be a legal memorandum from the FBI's general counsel, was disclosed. However, despite the fact that it was initially marked 'Precedence: Routine' and 'All information contained herein is unclassified exc[ept] where shown otherwise', four months after it was written, shortly before it was turned over to the plaintiffs, it was reclassified as 'Secret'. As a result, the legal analysis was redacted from the

¹⁷⁹ *Amnesty International v McConnell* [2009] 646 FSupp2d 633 (D. C. Circuit)

version given to the plaintiffs.¹⁸⁰ It is unclear how a legal analysis could be a state secret, but this was the rationale for the redaction.

This principle is now not only accepted by the courts, but embodied by some of them. One example is found in the decision of the Foreign Intelligence Surveillance Court of Review, hereinafter referred to as 'FISCR', a special court set up to hear appeals of rulings disposing of the challenges of telecommunications providers and other data carriers to the orders of the executive to turn over their customers' private information. The political nature of this special court, whose members are personally selected by the Chief Justice of the Supreme Court, which is at present a highly politicized position, will be discussed in the next chapter.

In 2007, an unnamed telecommunications company refused to carry out the executive's demands that it turn over records without being served with warrants.¹⁸¹ This was a perilous course of action. The former CEO of Qwest Communications argued that it was punished for refusing to comply with such an order by losing out on government contracts worth hundreds of millions of dollars. He was also subsequently

¹⁸⁰ See 'Memorandum of the General Counsel, Federal Bureau of Investigation', (1 October 2010)

<<http://www.aclu.org/files/pdfs/natsec/faafoia20101129/FAAFBI0072.pdf>> accessed 31 May 2014

¹⁸¹ James Risen and Eric Lichtblau, 'Court Affirms Wiretapping Without Warrants', *New York Times*, (New York, 16 January 2009)

<http://www.nytimes.com/2009/01/16/washington/16fisa.html?_r=2&hp&> accessed 31 May 2014

prosecuted for insider trading.¹⁸² The Foreign Intelligence Surveillance Court dismissed these objections, as did FISC on review.¹⁸³

These decisions are made in secret. The public is never even informed that challenges to requests for warrantless surveillance have ever been made. However, in a ‘rare public ruling’, FISC decided to affirm the constitutionality of the program. It did so in an opinion that was itself redacted. Not only are the executive’s justifications for violations of fundamental rights now being withheld from the public, but a court of laws now does the same. It is unclear how this could be reconciled with the rule of law.

These secret opinions demonstrate that certain courts that have become ever more compliant to the demands of the executive. In particular, subsequent sections of this chapter will demonstrate these courts have been amenable to arguments about the need for secrecy that make judicial review of violations of non-derogable rights impossible.

6 JUDICIAL TOLERANCE OF UNILATERAL WAR-MAKING

As earlier sections of this chapter and the last chapter demonstrated, one of the key reasons for the executive’s violation of non-derogable rights was to generate ‘intelligence’ that would purportedly justify aggressive war. As during the Nixon

¹⁸² Ellen Nakashima and Dan Eggen, ‘Former CEO Says U.S. Punished Phone Firm’, *Washington Post* (Washington, 13 October 13 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/12/AR2007101202485_pf.html> accessed 31 May 2014

¹⁸³ *In Re: Directives [redacted text] * Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, [2009] FISC No. 08-01 (Foreign Intelligence Surveillance Court) <<http://www.fas.org/irp/agency/doj/fisa/fiscr082208.pdf>> accessed 31 May 2014

Administration, a vicious circle was a dangerous possibility. Violations of *jus cogens* norms could be used to launch wars, which would then justify more violations of non-derogable rights. Accordingly, the courts' response to the executive branch's destruction of the rule of law after the 9/11 attacks would need to address the executive's claim that it possessed the unilateral right to declare and wage aggressive wars. Just as Nixon's claims to this power needed to be rebuffed in order to restore the rule of law after the invasion of Cambodia, the courts would need to respond to similar claims made after the 9/11 attacks in order to terminate the crisis created by this new state of emergency. Unfortunately, as this section will demonstrate, this was not the case.

The final critical failure after the 9/11 attacks of higher courts to support the rule of law implemented in the congressional resurgence of 1974-1980 can be found in its consistent refusal to give any effect to the War Powers Resolution. The WPR reasserted 'the Constitution's broad textual commitment to Congress's key role in the war-making system'.¹⁸⁴ Section 1542 requires that the executive notify the legislature whenever troops are committed to hostilities. Despite arguments from the executive's own

¹⁸⁴ Bruce Ackerman and Oona Hathaway, 'Limited War and the Constitution: Iraq and the Crisis of Presidential Legality' (2011) 109 Michigan Law Review 453

lawyers and academics who propagate fringe theories about scope of the Constitution's Declare War Clause,¹⁸⁵ 'its constitutionality is not seriously in question'.¹⁸⁶

After this notification, if Congress does not pass a resolution approving the extension of hostilities within ninety days, the executive must withdraw them. While the executive branch argue that this provision is an 'unconstitutional abridgement on the President's unitary power as Commander-in-Chief',¹⁸⁷ during the congressional resurgence even the OLC accepted that it was constitutional.¹⁸⁸ Accordingly, if the President authorizes the military's use of force, even in a rescue mission, he must comply with the WPR. When Congress remained jealous of its constitutional prerogatives, the executive did what the statute required. For example, in 1975, President Ford's conduct during the crisis precipitated by the capture of the *SS Mayaguez* conformed scrupulously to the WPR's requirements.¹⁸⁹

That said, when the executive has failed to comply with the WPR, the courts have consistently refused to enforce it. This is best illustrated by outcome of the lawsuit challenging the unilateral decision of President Obama to intervene during the Libyan

¹⁸⁵ John Yoo, *The Powers of War and Peace* (University of Chicago 2005) 97-100

¹⁸⁶ Brian J. Lithwack, 'Putting Constitutional Teeth Into a Paper Tiger: How to Fix the War Powers Resolution', (2011) 2 National Security Law Brief 2, 4

¹⁸⁷ Ibid 13

¹⁸⁸ Theodore Olson, 'Memorandum Opinion for the Attorney General: Presidential Power to Use Armed Forces Abroad Without Statutory Authorization' (Washington, Office of Legal Counsel, 12 February 1980) <<http://www.yale.edu/lawweb/jbalkin/cases/4aOpOffLegalCounsel185.pdf>> accessed 31 May 2014

¹⁸⁹ Lithwack *supra* n 186, 5

Civil War, by attacking the government and armed forces of Libya. It should be noted that the Security Council Resolution does not itself provide the requisite authorization under the domestic law of the United States,¹⁹⁰ and Congress did not authorize the intervention within sixty days of its initiation as the WPR required.

*Kucinich v. Obama*¹⁹¹ was filed after ‘Speaker [of the House of Representatives John] Boehner sent a letter to President Obama informing him that the ninety-day period under the War Powers Resolution would pass on June 17th and that the President ha[d] failed to comply with the statute’.¹⁹² Despite the fact that the executive failed to comply with both the WPR and the Constitution, the court dismissed the suit. It did so without reaching its merits, relying instead on two judicially-created doctrines described above. These are the doctrines related to standing, as discussed in the cases in the previous section discussing warrantless surveillance, and the political question doctrine, which was invoked to dismiss the claims of citizens subjected to targeted killing, as discussed in section three above.

As the suit was brought by ten members of the House of Representatives who voted for the law that the executive ignored, it would appear that they suffered a cognizable injury. This would ordinarily be enough to justify standing. However, in what appears to be an attempt to evade responsibility for addressing such injuries, the D.C. Circuit has developed a restrictive view of legislator standing. This doctrine holds that the

¹⁹⁰ War Powers Resolution 1973 , Public Law 93-148

¹⁹¹ *Kucinich v Obama* [2011] 821 FSupp2d 110 (District of the District of Columbia)

¹⁹² *Ibid* 113

judiciary should not address the executive's violation of a statute if the issue is still susceptible to 'political resolution'.¹⁹³

This doctrine ignores the fact that the WPR represents the already-existing political resolution of the crisis of the rule of law created by Nixon's arguments that it could declare war on its own initiative. If the executive is willing to ignore a constitutionally valid law, it is unclear why Congress' power to pass another law should be seen as a potential solution to the problem. Once the executive contends that it has the power to ignore the laws in the interests of national security in general, i.e., the OLC opines that any attempt by Congress to restrain the executive's power to declare war to protect the nation would be unconstitutional—what would a statute that explicitly rejects that view accomplish? As Judge Kavanaugh stated in his partial concurrence in *El-Shifa v. United States*:

There is good reason the political question doctrine does not apply in cases alleging statutory violations. If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action. As a result, the court would be ruling (at least implicitly) that the statute intrudes impermissibly on the Executive's prerogatives under Article II of the Constitution. In other words, the court would be establishing that the asserted Executive power is exclusive and preclusive, meaning that Congress cannot regulate or limit that power by creating a cause of action or otherwise.¹⁹⁴

A judicial decision applying the political question doctrine to claims under the WPR would endorse the OLC argument about the executive's unreviewable powers to act in the interests of national security. As such, the only option that might remain for Congress would be to impeach the president. The courts' adoption of the above-

¹⁹³ *Kucinich v Bush* [2002] 236 FSupp2d 1, 23-24 (District of the District of Columbia), citing

Chenoweth v Clinton [1999] 181 F3d 112, 116 (D.C. Circuit)

¹⁹⁴ *El-Shifa v United States* [2011] 607 F.3d 836, 857 (D.C. Circuit)

described view of legislator standing, which serves the same function as the application of the political question doctrine to claims under the WPR, thus puts the legislature on the horns of a dilemma. Congress can either do nothing and tolerate the erosion of the rule of law, or act and risk a constitutional crisis, as the courts stand idly by, in sharp contrast to their conduct during the Watergate crisis, as described in chapter two.

The court adjudicating *Kucinich v. Obama* did not address the political question doctrine, ‘as the Court has concluded that the plaintiffs lack standing to bring the claims alleged in their complaint, it need not proceed to the related issue of whether the plaintiffs’ claims present non-justiciable political questions’.¹⁹⁵ It is clear, however, that the precedents of the Supreme Court and the D.C. Circuit would otherwise have compelled the trial court to find that the issue presented was non-justiciable on that ground. At the outset of the Cold War, the Supreme Court held that ‘[c]ertainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality . . . of the Commander-in-Chief in sending our armed forces abroad or to any particular region’.¹⁹⁶ Despite intervening legislation, the higher courts have cleaved to this position across five decades. The precedents are so well-settled that the trial court in *Kucinich* openly expressed frustration, in another unusual lapse from decorum, with the legislators’ attempt to litigate the issue of whether the executive was complying with the WPR:

[T]he Court finds it frustrating to expend time and effort adjudicating the relitigation of settled questions of law. The Court is simply expressing its dismay that the plaintiffs are seemingly using the limited resources of this Court to achieve what appear to be purely political ends, when it should be clear to them

¹⁹⁵ *Kucinich v Obama* [2011] 821 FSupp2d 110, 124 n 9 (District of the District of Columbia)

¹⁹⁶ *Johnson v Eisentrager* [1950] 339 US 763, 789 (United States Supreme Court)

that this Court is powerless to depart from clearly established precedent of the Supreme Court and the District of Columbia Circuit.

As early in the Cold War as 1950, the Supreme Court believed that it was self-evident why the judiciary should not scrutinize the executive's decision to commit troops to hostilities, a proposition with which many surely agreed owing to the prevailing political climate. That said, the Supreme Court has not explicitly reaffirmed this conclusion after Congress acted to define the precise scope of the legality of any deployment of the military, via the WPR. It need not do so, however, as long as the D.C. Circuit is willing to absolve the executive of its responsibilities under that statute. It has done so,¹⁹⁷ and the trial courts whose opinion it binds have been forced to follow this holding repeatedly.¹⁹⁸

These judicially-created doctrines that allow for these rulings are simply an attempt by the courts to shirk their responsibility to intervene when the executive ignores a statute, which is a basic requirement of the rule of law. As noted above, this is especially important when the executive ignores the law in order to prolong a crisis that will likely empower it to behave lawlessly. The reason why sections of the judiciary are so eager to develop and rely on these doctrines must wait until the next chapter, while the next section must merely demonstrate that the Supreme Court has indeed been quite willing to let the holdings of the D.C. Circuit that threaten the rule of law stand, especially

¹⁹⁷ *Crockett v Reagan* [1982] 720 F2d 1355 (D.C. Circuit)

¹⁹⁸ See e.g. *Lowry v Reagan* [1987] 676 FSupp 333 (District of the District of Columbia); *Sanchez-Espinoza v Reagan* [1983] 568 FSupp 596 (District of the District of Columbia)

when it can do so unobserved, and when this would have little to no effect on public perception of the Court as a guardian of non-derogable rights and the rule of law.

7 THE STRATEGIC DENIAL OF CERTIORARI

The question that remains to be answered after detailing the judiciary's inadequate response to the destruction of the rule of law in the ten years after the 9/11 attacks is how the Supreme Court has managed to preserve its credibility, even as the courts, as described in the sections above, have utterly failed to re-implement the rule of law by holding the executive accountable for its violations of non-derogable rights. It should again be noted here that after deciding *Boumediene v. Bush*, the Supreme Court has not arrested the development of judicially created doctrines that prevent trial courts from reaching the merits of lawsuits alleging violations of non-derogable rights. On June 11, 2012 it disposed of seven cases with one-line orders denying review. In these cases, the D.C. Circuit held that petitioners had no right to *habeas corpus* on the basis of a presumption of regularity that must be extended to patently unreliable intelligence reports.¹⁹⁹ Earlier, the Court declined review of *Kiyemba v. Obama*, in which the D.C. Circuit held that the district courts possessed no power to order the executive to release

¹⁹⁹ *Order Denying the Writ of Certiorari in Latif v Obama, Al-Bihani v Obama, Uthman v Obama, Almerfedi v Obama, Al-Kandari v Obama, Al-Madhwani v Obama, Al-Alwi v Obama* [2012] 132 SCt 2741 (United States Supreme Court)

a detainee who was granted the writ, or even to order the executive to produce the detainee before the court.²⁰⁰

On the same day, the Supreme Court declined review of *Lebron v. Rumsfeld*, which held that José Padilla could not bring a lawsuit against those who ordered him to be tortured, as they were allegedly entitled to qualified immunity in the course of their official duties, which purportedly included authorizing violations of non-derogable rights.²⁰¹ The rights of former Guantánamo detainees to bring these suits was foreclosed by the decision in *Rasul v. Myers*, which held that federal courts had no jurisdiction of these claims. This holding ignored the Supreme Court's decision in *Boumediene*. Despite the openly disdainful tone of this opinion, the Supreme Court declined the petitioners' request for review.²⁰²

These decisions led to serious consequences. Adnan Latif was a Yemeni detainee who argued persuasively that he was visiting Afghanistan in order to obtain free medical treatment from Islamic charities. He alleged that his neurological issues, for which he sought help in Afghanistan, were aggravated by the detention regime, but despite the fact that 'he had been cleared for transfer [i.e., acquitted of wrongdoing] . . . he could see no end to his confinement, and he killed himself'.²⁰³ Further suicides would not be surprising, as:

[A] lawyer who has represented a number of Guantanamo prisoners, said the sense of despair among prisoners overall seems to have worsened since the

²⁰⁰ *Kiyemba v Obama*, [2011] 131 SCt 1631 (United States Supreme Court)

²⁰¹ *Lebron v Rumsfeld* [2012] 132 SCt 2751 (United States Supreme Court)

²⁰² *Rasul v Myers* [2009] 130 SCt 1013 (United States Supreme Court)

²⁰³ Statement of Lawyers Who Represented Adnan Farhan Latif, *Lawfare Blog* (11 September 2012)

<<http://www.lawfareblog.com/2012/09/statement-of-latif-legal-team/>> accessed 31 May 2014

Supreme Court announced in June that it would not review the way courts were handling the men's individual challenges to their confinement. 'There are a lot of guys who are having a really hard time ... Many of them have lost any hope that they are ever going to be released regardless of their status.'²⁰⁴

Lawsuits challenging the targeted killing of citizens have yet to reach the Supreme Court, or even the D.C. Circuit, although its invocation of political question doctrine, which purportedly prevents a citizen from challenging the 'targeting decisions' of the executive branch, was recently allowed to stand in *El Shifa v. United States*.²⁰⁵ The same is true for lawsuits challenging the violation of the War Powers Resolution.²⁰⁶

The Supreme Court did agree to address the doctrines that purportedly justify the executive's failure to respond to requests filed under the Freedom of Information Act and the retroactive classification and redaction of documents sought in discovery during litigation challenging warrantless surveillance.²⁰⁷ However, it decided to do so only after the executive requested this, after it lost an appeal in the Second Circuit that overturned the decision of the district court in *Amnesty International v. McConnell*.²⁰⁸ The Second Circuit ruled that the plaintiffs had standing to sue despite the executive's refusal to turn over documents that would have proved that the plaintiffs were being

²⁰⁴ Ben Fox, 'Guantanamo Bay Prisoner Dies in Detention', *Associated Press*, (Washington, 9 September 2012), <http://www.huffingtonpost.com/2012/09/10/guantanamo-bay-prisoner-dies_n_1871100.html> accessed 31 May 2014

²⁰⁵ *El-Shifa v United States* [2011] 131 SCt 997 (United States Supreme Court)

²⁰⁶ See e.g. *Chenoweth v Clinton* [2000] 120 SCt 1286 (United States Supreme Court)

²⁰⁷ *Clapper v Amnesty International* [2012] 132 SCt 2431 (United States Supreme Court)

²⁰⁸ *Amnesty International v Clapper* [2011] 667 F3d 163 (Second Circuit)

subjected to warrantless surveillance.²⁰⁹ The Supreme Court's decision in this case is still pending, although it is instructive to consider that when it was asked to review the Sixth Circuit's decision that disposed of claims owing to alleged lack of standing and the executive's invocation of the state secrets privilege,²¹⁰ the Supreme Court declined to issue a writ of certiorari.²¹¹

This chapter has outlined a clear pattern of evasion of responsibility, facilitated by the creation of judicially created doctrines that prevent trial courts from reaching the merits of constitutional challenges to the executive. The next chapter will address the question of why these federal appellate courts, particularly the Supreme Court and the D.C. Circuit, created this 'thicket of precedents' that makes it impossible for trial courts to grant substantive relief to those alleging that the executive has violated their non-derogable rights.

8 CONCLUSION: COURTS' COMPREHENSIVE FAILURE

This thesis has demonstrated that in order to be a rule of law state, the executive must not be able to define the scope of its own powers, whether in an emergency or otherwise. Its activities must be confined to legal limits, delimited and policed by the legislature and the courts. This was the common vision of the Framers of the United States Constitution which undergirds its doctrine of the separation of powers, and which guarantees the rule of law (as it is defined by the common consensus of legal scholars, as set forth by the Rio and Lagos Congresses of the International Commission of

²⁰⁹ *Amnesty International v McConnell* [2009] 646 FSupp2d 633 (United States Supreme Court)

²¹⁰ *ACLU v NSA* [2007] 493 F3d 644 (Sixth Circuit)

²¹¹ *ACLU v NSA* [2008] 128 SCt 1324 (United States Supreme Court)

Jurists). However, as chapter two made clear, while the separation of powers can survive transient crises unscathed, the executive is empowered significantly in periods of prolonged war. The second half of the twentieth century saw the United States slipping outside of the rule of law paradigm. If Nixon had successfully implemented his agenda, it is likely that the executive would have become permanently unaccountable for its violations even of *jus cogens* norms, aggressive wars, and possibly even for creating a system of mass prolonged arbitrary detention. However, Congress and the Courts prevented this by resisting his agenda and commencing procedures to impeach Nixon, ending the Indochina Wars, and by passing legislation that formally ended the emergency powers and tightly circumscribed its control of the intelligence community.

As chapter three made clear, the rule of law as re-established in the congressional resurgence of 1974-1980 did not survive the 9/11 attacks intact. The executive was again given wide-ranging emergency powers, which it used to violate non-derogable norms. It then sought to expand its own powers by claiming a non-existent constitutional right to overrule the other branches of government when purportedly acting in the interests of national security. The end result was a set of secret laws that authorized executive branch officials to subject people to illegal surveillance, prolonged involuntary detention and torture, and to launch wars of aggression without any legislative involvement.

After the immediate crisis passed, the question that presented itself was whether this would be a transient crisis of the rule of law like that created by the Civil War, or a permanent state of emergency like that which followed the Second World War, which threatened to create a boundless executive branch that violated non-derogable rights as a matter of course, with no accountability. The answer would await the responses of

the judiciary and the legislature to executive illegality. Would these branches of government reassert themselves, as they had during the Nixon Administration, or would the absence of a response further empower the executive?

The first set of challenges to the new executive resurgence was brought in the courts. As noted above, the third, and perhaps the key, criterion of a rule of law state is that the judiciary must be able to hold the executive accountable when they violate fundamental rights. As this chapter has demonstrated, this is no longer even possible in the United States. Owing to the precedents and new doctrines described in this chapter, in particular, the political question doctrine, the state secrets privilege, and restrictive approaches to standing and jurisdiction that prevent courts from addressing abuse that occurred outside of the nation's borders, the federal courts cannot exercise any oversight or restrain the executive's most serious violations of non-derogable rights.

Accordingly, the executive is free to arbitrarily detain, torture, kill, engage in limitless warrantless surveillance and retroactively classify and withhold information relating to all of these activities. No court at present can even reach a consideration of the merits of lawsuits challenging this conduct, to the frustration of many trial courts that have been presented either with clear evidence of violations on these *jus cogens* norms. These often present compelling cases that the executive has violated their non-derogable rights, which could easily be proven conclusively, if only the records detailing the executive's unconstitutional conduct were not withheld by the executive.

It is as yet unclear why the federal appellate courts would develop doctrines that prevent the judiciary from policing the boundaries of the rule of law. This issue will be discussed in the next chapter, which will examine the ICJ's fourth criterion, namely that the judiciary be willing to restrain the executive, in addition to being formally empowered to do so. Given that this chapter has demonstrated that the Supreme Court

and the D.C. Circuit have taken away the power to restrain executive conduct from the judiciary, what remains for the next chapter is an explanation of why they were willing to aid the executive in dismantling the rule of law. The key to this explanation will be the close connections between these two branches of government, as illustrated by the appointments process, which allows the executive to choose those who will sit in judgment over its attempts to subvert the laws.

At the conclusion of the next chapter, all that will remain is a discussion of whether Congress is likely to react to the end of the rule of law in the United States, or whether any possibility of congressional resurgence has already passed, making this lapse from the ICJ's four criteria effectively permanent.

Chapter 5

EXPLAINING THE FAILURE TO RE-IMPLEMENT JUDICIAL AND LEGISLATIVE OVERSIGHT OF THE EXECUTIVE

1 INTRODUCTION

The third criterion of effective control over the executive in a rule of law state, as detailed by the ICJ, relates to the powers of the judiciary. It holds that the state's organic laws must recognize non-derogable rights and give the judiciary the power to enforce these against the executive. The fourth criterion demands that the judiciary be willing to make use of its powers to enforce these rights.

The formal proscriptions against violations of peremptory norms, which can be found in statutes and in the Constitution itself,¹ require the judiciary to rebuke the executive for the programmatic lawlessness described in the previous two chapters of this thesis. That said, chapter four detailed how lawsuits brought against the executive alleging that it engaged in conduct that clearly violates FISA and the Fourth Amendment have been dismissed without an examination of their merits. Instead, certain appellate courts rejected these claims because of judicially-created prudential doctrines, which place insuperable procedural obstacles before these plaintiffs. This erection of what Stephen Vladeck termed the 'new national security canon'² has made

¹ See *supra* chapter 1

² Stephen Vladeck, 'The New National Security Canon', (2012) 61 American University Law

it impossible to successfully raise matters that are clearly committed to the judiciary by the Constitution and statute. Furthermore, Vladeck has demonstrated that the doctrines that comprise this new canon do not follow the earlier precedents.³ In fact, the ‘new judicial deference’ that they mandate is a radical departure from the rule of law.

This chapter will demonstrate that the best explanation for the unwillingness of these judges to uphold the rule of law is one that partly rests on the dynamics of judicial selection. It will show that the failure to stay within the confines of the minimum requirements of the rule of law is now effectively irreversible, owing to this colonization of the judiciary by the executive branch. At the least, it is irreversible in the absence of a congressional resurgence much like what followed after Watergate.

The possibility that Congress will reassert itself over the executive in the twenty-first century is discussed in section four of this chapter. That section will explain why this is at present virtually impossible, owing to party control over the selection and retention of legislators. Owing to the dominance of party elites closely connected to the aggressive foreign policy which a powerful executive can alone initiate, attempts at legislative oversight have been desultory since the 9/11 attacks. As this section will detail, Congress has empowered executive overreaching instead. These dynamics, illustrated by the legislators’ failure to respond to initiatives that would hold the executive accountable, demonstrate that the probability that the rule of law will be re-established in the United States in the foreseeable future is low.

2 PRESIDENT BUSH’S INCENTIVES FOR DEFERENCE

³ Ibid, see also *supra* chapter 4

Even before 9/11, the importance of a supportive Supreme Court was eminently clear to the Bush Administration. In fact, it had become evident even before President George W. Bush took office, as the Court had secured his installation, after he had failed to secure a majority of either the country's popular or electoral votes.⁴ Instead, he obtained his position after the Court overturned a decision of the Supreme Court of Florida and permitted Florida's Secretary of State to certify a result that did not take into account any of the on-going recounts of disputed ballots.⁵

2.1 The Roberts and Alito Nominations

The *Bush v Gore* decision raised the profile of the Supreme Court more than any other opinion discussed in this thesis.⁶ Unfortunately for the Court, it diminished its image proportionally. As Toobin noted, '[i]n 1974, the justices had risen to the occasion when, in *United States v Nixon*, they ordered the President to comply . . . with the rule of law. Here in a moment of probably even greater significance, the Court as an institution . . . failed'.⁷ This failure could not have been more public or more glaring,

⁴ Martin Metzner et al. *The Miami Herald Report: Democracy Held Hostage*, 173 (Saint Martins Press 2001)

⁵ *Bush v Gore* [2000] 531 US 98 (United States Supreme Court)

⁶ See Christopher P. Banks et al. (eds), *The Final Arbiter: The Consequences of Bush v. Gore for Law And Politics* (SUNY Press 2005)

⁷ Ibid

and as Justice Stevens predicted, the Court suffered a powerful blow to its prestige, which depends on its credibility and impartiality.

As will be demonstrated below, it was evident at that time that a majority of its justices had decided that the damage created by this self-inflicted wound was less important than installing a President with views about the scope and uses of executive power that mirrored their own. The prime movers were those justices who had elaborated a broad theory of presidential powers in general while producing classified memoranda inside the executive branch, and developing theories of inherent reserve powers while working at the OLC in particular, namely Chief Justice Rehnquist and Justice Scalia.

In any event, by 2001 the dependence of the executive on a compliant Supreme Court could not have been clearer, owing to the two cases that bracketed the re-emergence of the rule of law in the United States. These cases are *United States v Nixon* and *Bush v Gore*.⁸ The first demonstrated the power of an independent judiciary to help bring down the executive, while the second illustrated how certain justices, who were rewarded for promoting the powers of the executive with every significant promotion of their career, would take action to put an executive in place who would increasingly depend upon them for legal cover, owing to its drive to dismantle the rule of law.

These developments were foreshadowed by the appointment of several of the senior foreign policy advisors who had served in similar capacities during the last phase of executive resistance to the rule of law. Many of the officials who would serve at the centre of the Bush Administration had previously chafed under the enforcement of the

⁸ *United States v Nixon* [1974] 418 US 683 (United States Supreme Court); *Bush v Gore* [2000] 531 US 98 (United States Supreme Court)

rule of law during the Nixon, Ford, and Reagan Administrations. In addition to those officials discussed in the last two chapters, they included Elliot Abrams, who served successively as National Security Council Senior Director for Democracy, Human Rights, and International Operations, National Security Council Senior Director for Near East and North African Affairs, and Deputy National Security Advisor for Global Democracy Strategy. Abrams had earlier been found guilty of withholding information from Congress.⁹ Another of these officials was John Poindexter, who oversaw the surveillance projects known as Total Information Awareness and the creation of the intelligence databases described in the last chapter. It bears mentioning that Poindexter was convicted after the Iran-Contra crisis on five counts of making false statements to Congress.¹⁰

Those justices who were so inclined might expect further favour if they sanctioned the executive's policies and thus prevented the deposition of the administration they had installed. This dynamic was not new. As noted above, Chief Justice Rehnquist was elevated to that position after embarrassing himself with poorly reasoned and ends-oriented opinions that established him as 'an outspoken proponent of executive power versus the other branches of government'.¹¹ This occurred notwithstanding the executive's passive awareness of his drug problem and the fact that he had possibly

⁹ Cynthia Arnson, *Crossroads: Congress, the President, and Central America, 1976-1993*

(Pennsylvania State University Press 1993) 297

¹⁰ Ibid 299

¹¹ Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Doubleday 2007) 236

perjured himself during the hearings that preceded his appointment as an Associate Justice.

The relationship between the executive and those justices who had always depended upon it for advancement was now symbiotic, and precisely the opposite of the separation of powers upon which the rule of law in the United States depends. The incentives to the executive to further reinforce this dynamic by appointing additional justices who would conform to this pattern were only reinforced by the *Bush v Gore* decision.

Even before his election, Bush had made his views on the relationship between the executive and the judiciary clear:

[Bush] invariably relied on the same catchphrases when describing his favoured judicial philosophy . . . when Bush said that judges were ‘legislating from the bench,’ he meant overturning laws on individual-rights grounds . . . The President—and especially Vice-President Cheney—also felt strongly that judges should not interfere with what they felt were the prerogatives of the executive branch in the conduct of foreign policy or military affairs.¹²

This echoed Nixon’s comments during his election campaign. Furthermore:

No issue mattered more to Cheney than preserving the power of the President . . . The vice-President believed that since the Nixon years the executive branch had steadily ceded authority to Congress, the courts, and even to international institutions, and he made it his mission to arrest that decline.¹³

Their subordinates in the executive branch clearly understood what this meant. ‘Bush’s staff had thought through precisely what stamp they wanted to place on the federal

¹² Ibid 260

¹³ Ibid 277

judiciary—and a network of Scalia and Thomas acolytes was precisely what they had in mind'.¹⁴

The first opportunity presented to the Bush Administration to install a jurist to the Supreme Court who was very deferential to the executive came with the resignation of Chief Justice Rehnquist. The nominee that the subordinate officials brought to his attention was John Roberts. It is notable that few accounts of Roberts' selection by the executive focus on two key factors that allowed Rehnquist and Scalia to pass through the confirmation process unscathed. As will be discussed below, first, he had worked for the executive in various capacities that did not create a record of his views on executive power. Second, he made it clear to the executive that he did indeed support its view that it possessed inherent constitutional reserve powers that place it above the law.¹⁵

A year after his graduation from law school, Roberts became a law clerk to Justice Rehnquist. This is seemingly evidence that he already agreed that the judiciary should show deference to the executive, as this was a hallmark of Rehnquist's jurisprudence, and Justices carefully select their law clerks on the basis of ideological compatibility.¹⁶

¹⁴ Ibid 260

¹⁵ See also Albert Gore, *The Assault on Reason* (Penguin 2007) 228

¹⁶ See Todd C. Peppers and Artemus Ward, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press 2012) 99-107

However, we have no record of the memoranda he wrote in that capacity, since Rehnquist was still alive when he was nominated and thus they remained confidential.¹⁷

Immediately after clerking, Roberts joined the executive branch, taking a position reserved for those who were being groomed for greater things. He was appointed special assistant to the Attorney-General of the United States, having been recommended by Justice Rehnquist, according to the Attorney-General's Chief of Staff, and Roberts' immediate superior at the time, Kenneth Starr.¹⁸ This was a highly political position. His most notable act in that capacity was writing a memorandum that argued that it was possible to eliminate some of the Supreme Court's constitutional jurisdiction, that is, whether the 'power to emasculate the Court' existed.¹⁹ The extreme nature of this advice is demonstrated by the fact that it contradicted the Reagan Administration's OLC's position and the fact that it was ignored by Attorney-General William French Smith, despite the fact that he admitted to possessing 'revolutionary zeal' at that time.²⁰ The next year Roberts began serving as Assistant White House Counsel, which is perhaps the only position where loyalty to the executive is prized even more highly than at the OLC, since this office is not part of the Department of Justice, and as such has no theoretical obligation to do justice, but rather merely to serve

¹⁷ Rehnquist died three weeks before Roberts was formally appointed by the President, but his passing was too late for any of his files to be archived and catalogued before that time.

¹⁸ Geoff Colvin, 'On history's stage: Chief Justice John Roberts Jr.' *Fortune Magazine*, (New York, 3 January 2011) < <http://www.samachar.com/On-historys-stage-Chief-Justice-John-Roberts-Jr-lbdxS5jffia.html>> accessed 31 May 2014

¹⁹ Toobin *supra* 11, 263

²⁰ *Ibid*

the chief executive as faithfully as possible. Naturally, no record of his privileged advice to the executive has been made public.

‘With perfect timing, Roberts left the Reagan White House shortly before the administration nearly imploded during the Iran-Contra scandal’.²¹ However, he returned very shortly thereafter as principal deputy to his mentor Kenneth Starr, who himself is best remembered for serving as Bill Clinton’s investigator and the primary force behind his impeachment, which was due to lies about an extramarital affair. According to Starr, Roberts was ‘my very closest [sic.], most trusted adviser’.²² Again, Roberts’ internal legal memoranda at the Solicitor General’s Office are not public records. Owing to this, and to his failed nomination to the D.C. Circuit in 1992, he avoided ‘amass[ing] an extensive paper trail of controversial decisions’.²³

Roberts was eventually confirmed to a seat on the D.C. Circuit’s bench on May 8, 2003. By the time that he was nominated to replace Chief Justice Rehnquist, Roberts had authored only 49 opinions. Very few of these were controversial, as they generated only three dissents.²⁴ However, one amounted to a clear signal to the executive that Roberts shared its views on inherent reserve powers to ignore existing laws. This case, *Hamdan v Rumsfeld*,²⁵ involved a challenge to features of the military tribunals at Guantánamo Bay, which were erected in response to the Supreme Court’s opinion in

²¹ Ibid

²² Colvin *supra* n 158

²³ Toobin *supra* n 11, 264

²⁴ Congressional Record, Senate, vol. 151, part 16, 21205

²⁵ *Hamdan v Rumsfeld* [2005] 415 F3d 33 (D.C. Circuit)

Hamdi v Rumsfeld.²⁶ In the opinion deciding that case, a bare majority on the Supreme Court had insisted that the detainees receive some form of due process. Accordingly, in *Hamdan*, the petitioner argued that even these new procedures did not comply with the minimum requirements of the Geneva Conventions.²⁷ This was indisputable, but Roberts ruled that ‘the Geneva Conventions cannot be judicially enforced’.²⁸ This holding was later reversed by the Supreme Court, but Roberts ‘had proved himself worthy’ to Cheney nonetheless.²⁹

Shortly after his nomination, Roberts was confirmed by the Senate without difficulty, on a vote of 13-5 within the Senate Judiciary Committee and 78-22 on the floor.³⁰ Toobin concluded that ‘[h]is obvious intelligence [and] abundant qualifications . . . would have made sustained opposition difficult’.³¹ This conclusion is correct, but it should be noted that it rests upon two unstated premises. First, that the Senate should accept that Robert’s executive branch service constituted abundant qualification, as he

²⁶ *Hamdi v Rumsfeld* [2004] 542 US 507 (United States Supreme Court)

²⁷ *Hamdan v Rumsfeld* [2005] 415 F3d 33 (D.C. Circuit). Hamdan’s convictions were ultimately overturned in 2012.

²⁸ *Ibid*

²⁹ Toobin *supra* n 11, 277

³⁰ United States Congressional Senate Reports, no. 15017 (Government Printing Office 2007)

³¹ Toobin *supra* n 11, 278

had barely two years' service as a judge at the time of his nomination to the nation's highest court.

Second, it ignores the fact that 'sustained opposition' might well have been possible if all of his memoranda written while he served the executive were made public. The ranking member of the opposition party on the Senate Judiciary Committee's request for these was rejected on privacy grounds, which that member then described as a 'red herring'.³² Despite that objection, the Committee allowed the confirmation to proceed without receiving the memoranda, rewarding both obstructionism and the winning strategy of grooming compliant justices within the OLC, the White House Counsel and Solicitor-General's Office, and other positions where their legal advice would remain confidential and subject to claims of privilege.

The confirmation of the next Justice would provide further proof that this was the optimal strategy for undermining the independence of the judiciary. As will be demonstrated below, Samuel Alito was another lawyer who had prospered due to his allegiance to the executive. By following the path blazed by Rehnquist, Scalia, and Roberts, he quickly reached the heights of the American judiciary. After one year as a law clerk, he joined the Solicitor General's Office, like Roberts, this was directly after the 'Reagan Revolution', a time when ideological correctness was at a premium. It was there, working alongside those senior figures mentioned earlier in this section, that he 'quickly established himself as an enthusiastic supporter of the Reagan

³² Douglas Daniel, 'White House Won't Give Out All Roberts Memos', *Associated Press*

(Washington, 24 July 2005) <<http://www.truth-out.org/archive/component/k2/item/56052:white-house-wont-show-all-roberts-papers>> accessed 31 May 2014

Administration'.³³ In 1985 he joined the OLC, during the tenure of Attorney-General Edwin Meese, one of Reagan's closest and most ideological advisors, who was implicated during Alito's term of service in the Iran-Contra Scandal.³⁴ He was then appointed to be the chief federal prosecutor for New Jersey, and a mere three years later, given a lifetime appointment to the Third Circuit, at the young age of forty.³⁵

The existence of a fast-track to the judiciary for executive branch officials who agreed that it could expand its powers at will was exposed during Alito's Supreme Court confirmation hearings. When Alito had filed an application for a position within the OLC, he had attached a personal statement. As it was written before he joined the executive branch, it was not protected from discovery by attorney-client privilege. The executive branch lawyers who vetted his candidacy for the Supreme Court had not, however, found this at the National Archives. Instead, it was found by journalists after Bush announced Alito's nomination.³⁶

In this personal statement, Alito pledged fealty to every ideological premise of the Reagan Administration, and insisted that these represent his own core values. 'I am and always have been . . . an adherent to the same philosophical views that I believe are central to this Administration'.³⁷ This quickly became an issue during the confirmation

³³ Toobin *supra* n 11, 311

³⁴ Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-up* (W. W. Norton 2007) 371-386

³⁵ *Almanac of the Federal Judiciary Volume Five* (Aspen 2001) 5

³⁶ Toobin *supra* n 11, 311

³⁷ Samuel Alito, Jr., Personal Qualifications Statement, 15 November 1985,

<<http://news.findlaw.com/hdocs/docs/alito/111585stmnt.html>> accessed 31 May 2014

hearings, as it made clear that Alito was being disingenuous when he claimed that he could address the issue of abortion with an open mind. While he had insisted that he would approach any case that challenged *Roe v Wade*³⁸ with an open mind, he had said in his 1985 statement that, in addition to sharing all of the Administration's views, 'I am particularly proud of my contributions in recent cases in which the government has argued . . . that the Constitution does not protect a right to an abortion'.³⁹ When asked directly by Senator Schumer whether that was still his view, he refused to answer. Toobin described his performance in these hearings by noting that 'Alito was a dreadful witness on his own behalf—charmless, evasive and unpersuasive'.⁴⁰

The significance of abortion in contemporary American politics is impossible to overestimate. Accordingly, it was this discrepancy that defined his confirmation hearings. Indeed, the personal statement is now labelled the 'personal statement on abortion' when it is no such thing.⁴¹ Unfortunately, this distracted the Senators' attention from other assertions in the personal statement that lead one to believe that Alito was nominated for a seat on the nation's highest court precisely because he did not believe in the importance of an independent judiciary. He wrote as follows:

In the field of law, I disagree strongly with the usurpation by the judiciary of decisionmaking [sic] authority *The Administration has already made major strides towards reversing this trend through its judicial appointments, litigation, and public debate, and it is my hope that even greater advances can be made*

³⁸ *Roe v Wade* [1973] 410 US 113 (United States Supreme Court)

³⁹ Alito *supra* n 37

⁴⁰ Toobin *supra* n 11, 315

⁴¹ Alito *supra* n 37

during the second term, especially under Attorney-General Meese's leadership at the Department of Justice.⁴²

From this statement alone, one may reasonably conclude that Alito was allying himself with Nixon, Rehnquist, Cheney's and Roberts' views about the limited powers of the judiciary. As they did, Alito states that he believes that one of the key ways to impose this view is through the appointment of judges who will not challenge the executive's 'decisionmaking authority'. This plausible interpretation becomes more troubling when one considers that Alito's comments appear to indicate his awareness that he was interviewing for a position that would groom him for a judicial appointment.

Alito goes on in his personal statement to say 'I believe very strongly in the supremacy of the elected branches of government'.⁴³ This is a problematic opinion for a future Supreme Court Justice to espouse, as that court is charged by the Constitution to exercise oversight over the elected branches, and to correct them when they overstep their bounds. Alito, when confronted with this at his confirmation hearings, said only that this was 'a very inapt phrase', although it has a clear meaning within the context of Nixon and Rehnquist's influential views on executive supremacy.⁴⁴

Despite his evasive testimony, the failure of the executive to release all of the memoranda he had written, and the clear signals he had given to the executive of his view on its powers relative to those of the judiciary, the Senate did not reject Alito's candidacy. While on paper it appears that the vote confirming him was significantly closer than Chief Justice Roberts', this is misleading. While the final floor vote was

⁴² Ibid (emphasis added)

⁴³ Ibid

⁴⁴ Toobin *supra* n 11

58-42 in favour of confirmation, this result was guaranteed when the discussion on his candidacy was closed.⁴⁵ The vote that actually counted was that which ended the debate, which occurred after a motion for cloture. The margin here was 72-25,⁴⁶ very close to Roberts' totals.

The difference between the tallies on the two votes during Alito's confirmation reveals something significant about the ways in which the Senate's scrutiny of the executive's nominees had by that point become dysfunctional and insufficiently protective of an independent judiciary and the rule of law. A number of Senators voted against confirming Alito on the final vote, but voted in favour of closing the debate, something which they knew would ensure his confirmation. By doing so, they would be able to tell their constituents that they had opposed the nomination, despite the purely symbolic nature of this action. In essence, these members winked at the executive, showing deference but reserving the right to assert that they had not done so, at least to those who do not understand the significance of cloture votes.

Among those who split their votes cynically against a filibuster but later nominally opposed Alito's confirmation were many powerful members of the opposition party such as Daniel Inouye, who would later become the Senate's President *pro tempore*,⁴⁷ and Joseph Lieberman, future Chair of the Senate Committee on Homeland Security and Governmental Affairs.⁴⁸ In addition, the attempt to prevent cloture was effectively

⁴⁵ David S. Rutkus, *Supreme Court Nominations* (Capitol 2005), 45-46

⁴⁶ *Ibid*

⁴⁷ United States Government Manual 2011 (2011, Government Printing Office) 17

⁴⁸ See United States House of Representatives Telephone Directory (Government Printing Office 2007) 318

sabotaged by that party's leader, Harry Reid, who had stated publically that 'everyone knew' he would be unable to gather enough votes to prevent the termination of the debate. Joe Biden, the future Vice-President, ultimately voted against cloture even though he had spoken out publically against an attempt to prevent a vote.⁴⁹ In any event, the effort to avoid cloture was effete, as Senator John Kerry, the future Secretary of State had decided to initiate the campaign while at a skiing resort in Switzerland, something which did not pass unnoticed.⁵⁰ Accordingly, one might plausibly characterise this attempt to block Alito's confirmation as nothing more than political theatre, which diminished the Senate. The Senate's failure to do more to check the executive as the Constitution intended and the reasons for this will be discussed in the next chapter below, in substantial detail.

2.2 Kagan Nomination Confirms the Pattern Crosses Political Lines

As established above in chapter four, the patterns of executive expansion and its claims of supremacy have not been affected by the transition between the Bush and Obama administrations in any fundamental way. As will be demonstrated here, this is also true with respect to the tactics of judicial nomination designed to protect the executive's power, which allowed it to create the parallel detention regime, apply torture, restrict access to the courts, and permit extra-judicial killing, as described in the

⁴⁹ Charles Hurt, 'Biden Says Filibuster on Alito Unlikely; Up-or-Down Vote Expected', *Washington Times* (Washington, 7 November 2005) <<http://www.highbeam.com/doc/1G1-138405459.html>> accessed 31 May 2014

⁵⁰ Charles Babbington, 'Kerry Defends Senate Filibuster on Alito as "A Vote on History"', *Washington Post* (Washington, 28 January 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/27/AR2006012701405.html>> accessed 31 May 2014

last chapter. The key proof for this continuity in the drive for an executive branch which is above the law stems from the choice of Elena Kagan for a seat on the Supreme Court.

In choosing to focus on Kagan's nomination and confirmation, this thesis must justify its choice not to discuss that of Sonia Sotomayor. Sotomayor's nomination can be explained as a departure from the general pattern established by Nixon and Reagan's nominations of Rehnquist and Scalia, as adopted and refined by Bush, as evidenced by the confirmation of Roberts and Alito, just as the nomination of Sandra Day O'Connor can be seen as aberrational in the context of the 'Reagan revolution.' At that time there was an overriding pressure upon the executive, which caused it to momentarily disregard the incentive to create a deferential Supreme Court. In both cases, this pressure came from identity politics.⁵¹

At the time of Reagan's election, there had never been a woman on the Supreme Court's bench. Owing to the success of the feminist movement over the past two decades, the male domination of the nation's highest court could not continue without exacting upon the executive a great political price.⁵² Because of the dearth of Republican-affiliated women with experience at the highest level of the legal profession

⁵¹ Kevin Schultz, *America Unbound* (Wadsworth 2010) 454

⁵² Susan Welch, et al., *Understanding American Government* (Thompson Wadsworth 2008) 448

and with excellent academic credentials, the executive's choice of Sandra Day O'Connor⁵³ was tightly constrained.

Similarly, when Obama was elected, the Supreme Court had never had a Justice of Hispanic origin. Since this demographic group constituted a major voting block that was central to his prospects for re-election, Obama needed to nominate a Hispanic justice, preferably a woman, owing to concerns about gender equity on a still male-dominated Court. Sonia Sotomayor was the obvious choice. She had effectively been a Justice-in-waiting, and undoubtedly would have secured a nomination much earlier had Al Gore's election not been subverted in 2000. Sotomayor was simply the candidate Obama was constrained to nominate, as she was the only candidate who had both the right demographic profile and the judicial and academic credentials, standing head and shoulders above other potential candidates.⁵⁴

Conversely, after the retirement of Justice Stevens, who was the most consistently independent Justice during the Bush Administration, and the least deferential to the executive at that time,⁵⁵ the President had a relatively free choice, such that an observer might easily gauge his priorities by reference to the nominee's characteristics. This

⁵³ O'Connor was a graduate of Stanford Law School serving on the Arizona Court of Appeals at the time. Henry Julian Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court* (Rowman & Littlefield 2008) 266

⁵⁴ Sotomayor had attended Princeton and Yale Law School, and had eighteen years of service in the federal judiciary, including ten on the Second Circuit. See Meg Greene, *Sonia Sotomayor* (ABC-CLIO 2012) 139-147

⁵⁵ Denise L. Hudson, *The Rehnquist Court: Understanding its Impact and Legacy* (Greenwood 2007), 40-42

would provide a leading indication of whether judicial independence or deference to the executive would be prized during the new Administration, and if the latter, whether the executive would resort to the same techniques that were employed by the Reagan and Bush Administrations. The adoption of these techniques would demonstrate that the Obama Administration was likewise committed to the erosion of judicial independence and of the rule of law itself, especially if it chose to nominate an executive branch insider whose record could be obscured with claims of privilege or confidentiality.

At the time of her nomination, Elena Kagan had no judicial experience. Justice Sotomayor was the author of 380 judicial opinions, from which one could glean her approach to the issues and to the separation of powers.⁵⁶ Kagan had no public record, as she had pursued a career within the executive branch.

After clerking, Kagan served two short and undistinguished periods in large-firm legal practice and academia, which merely indicated that she was following a well-travelled road towards a legal position of significance in government. Kagan then began her service within the executive branch as Assistant White House Counsel. Her legal advice to the executive in this position apparently demonstrated sufficient political

⁵⁶ Stevens' lack of deference has been a longstanding feature of his approach to constitutional interpretation and jurisprudence; see generally e.g., Thomas M. Franck, *Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press 1992)

acumen, as she was soon appointed Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council.⁵⁷

As was the case with the other Justices who served as executive branch lawyers before their appointment to the bench, Kagan left government with the change of administration, which highlights the political nature of her work within that department. Her departure underscores this point because lawyers who work in more neutral capacities within the executive branch, i.e., at the Department of Justice, do not typically resign when the opposing party's candidate is elected to the presidency.⁵⁸ Kagan returned to academia, but published very little, something observers concluded was a calculated attempt not to generate a paper trail that would impair her nomination to the nation's highest court. By this point, as in Roberts' case, the executive's ambition to place her in this position was made clear by a failed nomination to the D.C. Circuit.⁵⁹ In 2009, Kagan was appointed Solicitor-General of the United States, the person responsible for arguing the executive's position before the Supreme Court. At the time

⁵⁷ Susan Navarro Smelcer, *From Solicitor General to Supreme Court Nominee* (Diane Publishing Company 2010) 14

⁵⁸ Barry Leonard, *Investigation of Allegations into Politicized Hiring in the Department of Justice* (Diane Publishing Company 2010) 3

⁵⁹ See Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Duke University Press 2003) 392 n 47

of her nomination, Kagan had never argued before any court.⁶⁰ She was nominated to replace Justice Stevens shortly over a year later.

At the time of her nomination, commentators noted that the lack of any evidence of her views on certain key legal issues, including the independence of the judiciary, the separation of powers, and inherent reserve powers purportedly possessed by the executive, was viewed positively by the Administration.⁶¹ This dearth of information was attributable to the fact that ‘her academic career is surprisingly and disturbingly devoid of writings or speeches on most key legal and Constitutional controversies, and . . . she has spent the last year as Obama’s Solicitor General’.⁶²

Nevertheless, there were indications within this scant record that Kagan consistently supported the expansion of executive power. In 2001, a law review article she published addressed the ‘proper limits of executive authority, and the view she advocated was clearly one that advocated far more executive power than had been previously accepted’.⁶³ Neal Katyal noted that there was an essential continuity between the views she expressed in this paper and those advocated at that time within the Bush Administration’s OLC, although her ‘claims of executive power are not limited to the current administration Anticipating the claims of the current [Bush]

⁶⁰ Nina Totenburg, ‘Seen as a Rising Star, Kagan has a Limited Paper Trail’, *National Public Radio* (Washington, 9 May 2010) <<http://www.npr.org/templates/story/story.php?storyId=126611113>> accessed 31 May 2014

⁶¹ Ibid

⁶² Glenn Greenwald, ‘The Case Against Elena Kagan,’ *Salon Magazine* (Washington, 13 April 2010) <http://www.salon.com/2010/04/13/kagan_3/> accessed 31 May 2014

⁶³ Ibid

administration, Kagan argued that . . . the President has the ability to effect comprehensive, coherent change'.⁶⁴ William West, in commenting on Kagan's article, noted that '[s]he is certainly a fan of presidential power'.⁶⁵

This conclusion is firmly reinforced by the statements Kagan made to the Senate during her confirmation hearings for the Solicitor-General's position. At that time:

[S]he agreed wholeheartedly with . . . the rightness of the core Bush/Cheney Terrorism template: namely, that the entire world is a battlefield, that war is the proper legal framework for analyzing all matters relating to Terrorism, and the Government can therefore indefinitely detain anyone captured on that battlefield (i.e., anywhere in the world without geographical limits) who is accused (but not proven) to be an enemy combatant.⁶⁶

This agreement was particularly evident after '[t]here was no daylight between Ms. Kagan . . . and [Senator] Lindsey Graham . . . as he led her through a six-minute colloquy about the president's broad authority to detain enemy combatants.'⁶⁷ For this reason, when the executive's potential nominees for the position as Stevens'

⁶⁴ Neil K. Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within', (2006) 115 *Yale Law Journal* 2314, 2343-2345

⁶⁵ Sasha Isenberg, 'Obama taps Harvard Law School Dean as Solicitor General,' *Boston Globe* (Boston, 6 January 2009); see also Eric Lichtblau, 'Potential Justice's Appeal May Be Too Bipartisan', *New York Times* (New York, 16 May 2009) <http://www.nytimes.com/2009/05/17/us/17kagan.html?_r=0> accessed 31 May 2014

⁶⁶ Greenwald *supra* n 262

⁶⁷ Lichtblau *supra* n 65

replacement were evaluated, the New York Times opined that Kagan ‘supported assertions of executive power’.⁶⁸

It is likely that it was her endorsement of the new detention paradigm, which, as demonstrated in the last chapter, entails an approach to executive power that is not compatible with the rule of law, that accounts for the ringing endorsement she secured from some of the engineers of the Bush Administration’s demolition of the separation of powers, such as M. Edward Whelan III, who was the first head of the OLC during the Bush Administration. Whelan argued that ‘on issues of executive power and national security, Kagan is far from the Left’, and he also approved of her ‘display[] [of] genuine admiration and appreciation for Justice Scalia’.⁶⁹

2.3 The Court’s New Balance of Power on Rule of Law Issues

Owing to Kagan’s academic credentials, her largely confidential record of service to the executive branch, and support of its claims of power, she was confirmed. As she replaced Justice Stevens, who was before his retirement the most able defender of the role of an independent judiciary in enforcing the rule of law’s minimum limitations on

⁶⁸ ‘Possible Candidates,’ *New York Times* (New York, 9 April 2010)

<<http://www.nytimes.com/interactive/2010/04/09/us/politics/20100409-stevens-candidates.html>>

accessed 31 May 2014

⁶⁹ Ed Whelan, ‘Will the Left Oppose Elena Kagan?’ *National Review* (Washington 10 March 2010)

<<http://www.nationalreview.com/bench-memos/49237/will-left-oppose-elena-kagan/ed-whelan>>

accessed 31 May 2014

executive power,⁷⁰ her appointment had the capacity to fundamentally alter the balance of powers between the executive and the other branches of government.

In 2012, the Court declined to exercise certiorari over seven *habeas corpus* petitions in a single day,⁷¹ reaffirming, as demonstrated in the last chapter, a detention and torture regime antithetical to the rule of law. This decision can be explained by the fact that by this time the Court was dominated by Justices who had longstanding connections to the executive. John Roberts is the Chief Justice, while the Senior Associate Justice is Antonin Scalia. They can rely on Clarence Thomas, who happens to be another official from the Reagan Administration, for support. Thomas rarely casts a vote that diverges from Scalia's.⁷² As described above, these three strong supporters of executive deference were soon joined by Samuel Alito and, during the Obama Administration, Elena Kagan. Justices with a history of close connections with the executive now comprise a majority on the Court.⁷³

On the Supreme Court, the majority rules, as Justice Brennan made clear:

At some point early in their clerkships, Brennan asked his clerks to name the most important rule in constitutional law. Typically they fumbled, offering *Marbury v. Madison* or *Brown v. Board of Education* as their answers. Brennan would reject each answer, in the end providing his own by holding up his hand with the fingers wide apart. This, he would say, is the most important rule in

⁷⁰ See *supra* chapter 4

⁷¹ Order Denying the Writ of Certiorari in *Latif v Obama*, *Al-Bihani v Obama*, *Uthman v Obama*, *Almerfed v Obama*, *Al-Kandari v Obama*, *Al-Madhwani v Obama*, *Al-Alwi v Obama* [2012] 132 SCt 2741 (United States Supreme Court)

⁷² Richard Malphurs, *Rhetoric and Discourse in Supreme Court Oral Arguments* (Routledge 2013) 186

⁷³ Toobin *supra* n 11, 327-329

constitutional law. Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you can do anything.⁷⁴

It remains to be seen how these five justices might use this power to aid the executive branch. However, it should be noted that owing to the advent of the executive's successful strategy of appointing Justices who proved themselves while serving within the executive branch, the Court is left with a minority of only three independently-minded Justices who are likely to stand up for the rule of law. These Justices, Ginsburg, Breyer, and Sotomayor, are a minority of three. That number is significant. While Justices can exercise substantial power by forcing the majority to state its views clearly on the record, a minority of three is too small for this purpose, as it takes four justices to accept a petition for appellate review.⁷⁵

As the next section will demonstrate, this dysfunctional pattern of judicial selection is also spreading to the influential circuits that rest directly beneath the Supreme Court in the hierarchy of the American federal judiciary, something which allows the pro-executive majority of Justices to silently uphold executive power, by merely declining review. As noted in chapter four, the circuit court with the greatest amount of oversight over the executive is the D.C. Circuit.⁷⁶ This fact makes it the intermediate appeals court which the executive has the greatest incentive to control. The next section will demonstrate that the same dysfunctional strategies of judicial selection have been

⁷⁴ H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (University of Chicago Press 2008) 16

⁷⁵ Lyle Denniston, 'Is the "Rule of Four" Firmly Intact?' Panel Discussion, Yale Law School, (18 September 2009) <http://www.law.yale.edu/documents/pdf/Clinics/Lyle_Denniston.pdf> accessed 31 May 2014

⁷⁶ See *supra* chapter 4

employed to shape the D.C. Circuit's bench so that it is much more amenable to the claims of power made by the executive, destabilizing the separation of powers and the rule of law.

3 EXECUTIVE BRANCH CONTROL OF THE D.C. CIRCUIT

'The D.C. Circuit has long been thought of as the second most powerful court in the land and a good breeding ground for the Supreme Court'.⁷⁷ The first of these premises gives the executive an incentive to control it. The second premise, the prospect of promotion, provides the means to accomplish that end. This court's importance stems from the fact that it supervises a solitary district court that has jurisdiction over the governmental agencies and officials located in the nation's capital. Accordingly, 'there is a built-in temptation to benefit the agency that can benefit the presiding judge's career.'⁷⁸ Of the Justices now on the Supreme Court, three served previously on the D.C. Circuit, where they did yeoman service and proved themselves worthy. A fourth, Kagan, was nominated for such a position.

The court's power to derail the executive's agenda became clear in the 1970s, as it began to exercise a larger administrative jurisdiction, owing to the Watergate crisis. At the height of the investigation into the Nixon Administration's misconduct, the court exercised its infrequently-used power to undertake *en banc* review of over ten cases involving criminal charges against executive branch officials or their agents.⁷⁹

⁷⁷ Christopher P. Banks, *Judicial Politics in the D.C. Circuit Court* (Johns Hopkins University Press 1999) 4

⁷⁸ Charles Ashman, *The Finest Judges Money Can Buy* (Nash Publishing 1973) 233

⁷⁹ Banks *supra* n 77, 106

Executive control over the D.C. Circuit is, for these reasons, perhaps even more desirable than control over the Supreme Court, since it passes unnoticed. Preventing challenges to the enlargement of its own powers from reaching the Supreme Court allows the executive to avoid scrutiny and prevents that Court from being placed under the pressure that this entails. The Court's failure to review the D.C. Circuit's judgments, even when they approve of executive prerogatives that destabilize the rule of law, are rarely noticed.⁸⁰

Denial of review garners little notice because of the nature of the Supreme Court's docket. It is commonly thought that the Court is overburdened. Between 1970 and 1997, roughly four thousand petitions for certiorari were filed at the Court each year.⁸¹ Throughout this period, the Court granted 'slightly less than four percent' of these requests.⁸² There was a decline, however, in the rate of certiorari granted for cases from the D.C. Circuit during this period, something which Christopher Banks has argued is correlated with the increasing ideological convergence between the two courts.⁸³ This dynamic becomes increasingly apparent over time. By 2009, only slightly more than one per cent of petitions for review of D.C. Circuit decisions were granted.⁸⁴ Banks notes that '[t]his data is persuasive evidence that the United States

⁸⁰ *El Shifa v United States* [2011] 131 SCt 997 (United States Supreme Court) (writ of certiorari denied)

⁸¹ Banks *supra* n 77, 108

⁸² Ibid

⁸³ Ibid 108-110

⁸⁴ Melanie Wachtell and David Thompson, 'An Empirical Analysis of Supreme Court Certiorari Petition Procedures', (2009) 16 George Mason University Law Review 237, 241

Supreme Court has let the D.C. Circuit define the scope of legal policy in administrative law . . . after 1970'⁸⁵

This data also presents some evidence that the D.C. Circuit's decisions to affirm broad executive powers, as described in chapter four, are part of a concerted attempt to take pressure off the Supreme Court, and that this is possible due to a majority of judges on both these courts' benches that support the executive, since 'the Court uses its discretion to deny certiorari more and grant it less, especially if both courts are ideologically compatible in membership'.⁸⁶ While this remains to be demonstrated, more evidence can be adduced in favour of this hypothesis if it can be shown that the executive attempted to create the necessary ideological compatibility by nominating judges to the D.C. Circuit that are amenable to its assertions of broad and troubling powers, in the same manner as it did with respect to the Supreme Court.

There is ample evidence that the executive attempted to gain control of the D.C. Circuit by appointing judges friendly to its aims in the period that followed the congressional resurgence and the concomitant re-imposition of the rule of law. After Reagan's election, it became apparent that he 'was going to have a number of opportunities to change the D.C. Circuit's membership . . . [and] viewpoints on topics like litigant access to courts [and] separation of powers'.⁸⁷ Reagan's first nominee was Robert Bork, one of Nixon's key allies during the Watergate crisis. Bork continued to serve on the D.C. Circuit after he failed to secure confirmation to the Supreme Court.

⁸⁵ Banks *supra* n 77, 114

⁸⁶ Ibid 116

⁸⁷ Ibid 53

He was followed onto the Court by Antonin Scalia and Kenneth Starr, another leading executive branch insider.

After appointing Judge Silberman, Reagan's next nominee was James L. Buckley, then serving in his administration as Undersecretary of State for Security Assistance.⁸⁸ Buckley was previously the President of Radio Free Europe and Radio Liberty. These entities were broadcasters of American propaganda into Eastern Europe and the Soviet Union, which were closely associated with the intelligence services.⁸⁹ This was followed by the confirmation of Laurence Silberman, who served as Acting Attorney General during the Watergate crisis, having recently been promoted from the position of Deputy Attorney General, where he was charged with overseeing the OLC during the dying days of the Nixon Administration. He later served as Ambassador to Yugoslavia, which at the time was a key Cold War battleground. At the time of his appointment he was a member of the General Advisory Committee on Arms Control and Disarmament and the Department of Defense Policy Board.⁹⁰ In essence, these two judges were executive branch insiders with links to the intelligence community.

The rejection of Robert Bork's nomination to the Supreme Court brought more scrutiny to the appointment of radical proponents of the imperial presidency to the D.C. Circuit. However, the aforementioned judges formed a distinct and powerful block on

⁸⁸ Jeffrey Brandon Morris and Chris Rohmann, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Carolina Academic Press 2000) 323

⁸⁹ See G. R. Urban, *Radio Free Europe and the Pursuit of Democracy* (Yale University Press 1997) 46-51

⁹⁰ 'Biographical Entry: Judge Laurence H. Silberman' *United States Court of Appeals for the District of Columbia Circuit* <<http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+++Judges+++LHS>>

the court, which, like the corresponding faction on the Supreme Court, would be strengthened considerably after the 9/11 attacks by the nominees chosen by George W. Bush, namely Janice Rodgers Brown and Brett Kavanaugh.⁹¹ By the time when the detention and torture regime was coming under sustained pressure in the lower courts, the D.C. Circuit could be controlled by this block. The four Reagan nominees, joined by another three confirmed during the Bush Administration, constituted more than half of the judges to whom these critical appeals might be assigned.

As a result of this ideological alignment, the Supreme Court could rely upon the D.C. Circuit to dispose of cases brought by those challenging the executive's policies that undermine the rule of law. The last piece of proof for the argument that this was a concerted strategy comes from the fact that the Supreme Court decided to channel most of these cases to the D.C. Circuit exclusively, in 'one of the most important decisions made by the United States Supreme Court in the terrorism-detention litigation in the past decade', which occurred in an 'all-but-unnoticed "GVR" order'⁹² in *Bush v Gherebi*.⁹³ With this order, the Supreme Court forced all executive detainees to bring suit under the watchful eyes of the D.C. Circuit, despite there being no compelling reason why that should be the case, other than the implicit trust that these cases would be decided in a manner that relieved the Supreme Court of responsibility and scrutiny.⁹⁴ This order served to derail extant challenges in the forums that were the most attentive

⁹¹ See 'Material-Support Law Called Anti-Terror Warning of Choice' in *Issues in Peace and Conflict Studies* (Sage Publications 2001) 384

⁹² Stephen Vladeck, 'The D.C. Circuit After Boumediene' (2011) 41 *Seton Hall Law Review* 1451

⁹³ *Bush v Gherebi* [2004] 542 US 952 (United States Supreme Court)

⁹⁴ *Ibid*

to claims that the rule of law was being undermined by the executive, such as the Second Circuit.⁹⁵

This exclusive jurisdiction, now being exercised not only over claims brought by Guantánamo prisoners but those alleging wrongful conduct from Afghanistan to Germany, has been used to dispose of claims against the executive with increasing regularity. As noted above, the D.C. Circuit has eviscerated the holdings of the much-vaunted Supreme Court opinions that subjected the executive to minimal legal restraints. The foremost among these cases was *Boumediene v Bush*,⁹⁶ which granted petitioners the right to *habeas corpus*. Since *Boumediene* was decided four years after *Gherebi*, the Court knew at the time that the case was decided that the D.C. Circuit would be the court deciding on the proper scope of its holding in practice. Unfortunately, but predictably, the D.C. Circuit subsequently eviscerated *Boumediene*. By the time of *Kiyemba*, it was clear that the ‘constant . . . is the [D.C.] court of appeals’ refusal to apply, or even acknowledge [*Boumediene*].⁹⁷

After the Court declined certiorari to *Kiyemba* and the seven other post-*Boumediene* cases that it disposed of in a single day of one-line orders, it is impossible not to conclude that delegating the responsibility to the D.C. Circuit was part of a calculated strategy of reducing the Supreme Court’s earlier jurisprudence to a mere rhetorical shell. This active or passive collusion between the two courts allowed the minimal legal restraints on the executive branch erected in the line of cases leading to

⁹⁵ See *Rumsfeld v Padilla* [2004] 351 F3d 695 (D.C. Circuit)

⁹⁶ *Boumediene v Bush* [2008] 553 US 723 (United States Supreme Court)

⁹⁷ See ‘A Right Without a Remedy’, *New York Times*, (New York, 28 February 2011)

<<http://www.nytimes.com/2011/03/01/opinion/01tue1.html>>

Boumediene to be dismantled. This was done without significant public attention, which reduces the probability of the popular outrage which catalysed resistance to the executive during the Nixon Administration. In addition, this minimized the risk of harm to the Supreme Court's prestige, which was painstakingly rebuilt in the years following *Bush v Gore*. This encouraged the public to continue to believe in the power of an independent judiciary, which the separation of powers requires and the rule of law in the United States depends on, but which is not actually present. This plan would have been impossible to implement, however, without the pro-executive majorities on both of these courts, which itself required the subversion of the judicial selection system described above in section four.

The previous chapter detailed a troubling pattern of deference by the nation's two most important courts, the Supreme Court and the D.C. Circuit. As Stephen Vladek persuasively argued that the creation of this new 'national security canon' cannot be attributed to normal processes of doctrinal development, the hypothesis explored in this chapter was that this new judicial deference might be explained as a by-product of a breakdown of the mechanisms of judicial selection.

It is now possible to argue that the Supreme Court has effectively been colonized by the executive branch. Not only are there no longer enough Justices committed to judicial independence and the rule of law to overturn a decision that favours the executive, they are not enough to even accept such a case. This fact is of particular importance owing to the colonization of the D.C. Circuit, to which the Supreme Court has directed the cases that challenge the executive's new regime of prolonged involuntary detention, torture, and extra-judicial execution. A ruling of the D.C. Circuit is effectively the final word on challenges to the executive's violation of non-derogable rights, as there are not enough votes for certiorari to the Supreme Court. This process,

as demonstrated above, protects the image of an independent judiciary while denying any publicity to lawsuits challenging the executive.

At this stage, it is possible to conclude that there has been a comprehensive failure of the rule of law in the United States. The executive has been able to determine the scope of its own powers, divorced from legislative oversight. It then assumed emergency powers to violate non-derogable rights, which cannot be challenged in the courts, owing to the existence of new rules that make the Constitution's guarantees meaningless, and higher courts that are entirely unwilling to hold the executive legally accountable, as the rule of law requires.

It remains for this thesis only to determine whether this crisis is likely to be permanent, and to address the objections of those scholars who believe that there are other mechanisms of accountability that might hold the executive accountable. In particular, the possibility of a legislative resurgence must be considered, in addition to the assessment of the likelihood that executive overreaching might again provoke impeachment proceedings.

4 CONGRESS AND THE EXECUTIVE BRANCH

As the executive branch is not subject to any legal control, it can no longer be said that the United States is being governed in accordance with the fundamental norms of the rule of law, as defined by the International Commission of Jurists in the manner described in chapter one. Furthermore, it is by now quite clear that this situation cannot be rectified by the courts themselves. Jurists in the lower courts who have attempted to impose legal sanctions upon the executive have been reversed by the appeals courts that are now firmly controlled by the executive branch.

The question that remains for this thesis to answer is whether these abuses, which mirror in many ways the situation during the Nixon Administration, as described in chapter two, might be curtailed in the near future by a congressional resurgence, in a manner similar to that which re-installed the rule of law in the United States in the years immediately following the Watergate investigations and Nixon's resignation. The legislature continues to possess the formal powers required for it to re-implement the rule of law in the same manner as it did between 1972 and 1976, as addressed in chapter two above.⁹⁸ However, this thesis must discover whether it is likely that these powers are likely to be put to use in the near future.

This section will address whether a congressional re-imposition of the rule of law is likely by analysing the legislature's responses to the revelations of executive overreaching and violations of non-derogable rights in the ten years following the 9/11 attacks, across the administrations of presidents Bush and Obama. It will explore legislative reactions to the exposure of clandestine programs related to involuntary detention, torture of these detainees, illicit wiretapping and the use of agencies explicitly dedicated to foreign intelligence surveillance within the United States, the misuse of dubious intelligence obtained as a result of these abuses, and the executive's initiation of aggressive war in the absence of legislative authorization.

This section will demonstrate that Congress has failed to check and oversee the executive branch in the twenty-first century. Instead, it will show that the legislative branch has continued to extend the discretionary powers of the executive upon request,

⁹⁸ See chapter 2, *supra*, see also House Committee on the Judiciary Majority Staff 'Report to John C. Conyers Jr., Reigning in the Imperial Presidency: Lessons and Recommendations related to the Presidency of George W. Bush' 13 January 2009)

and failed to discipline the executive branch even when it has overstepped these remarkably broad grants. However, the chapter will firstly describe Congress' unwillingness to police the boundaries of the rule of law, as established by the legislation comprising the congressional resurgence discussed in chapter two, and then account for its acceptance of these abuses and the further extensions of unreviewable power by the executive that followed.

4.1 Congress' Response to Arbitrary Detention

The Guantánamo Bay detention camp was not established by legislation, but merely by orders to the military issued by then Secretary of Defense Donald Rumsfeld. Plans for the re-purposing of facilities, which were originally built to house HIV positive Haitian refugees, and its staffing were put into motion on December 21, 2001.⁹⁹ An announcement that prisoners of war accused of terrorism would be brought there was made by the Pentagon on December 27, 2001.¹⁰⁰ Congress' response to this information was remarkably muted.¹⁰¹ The Congressional Record reveals that the first legislative discussion of detention camps, which occurred over a month later, after the traditional Christmas break, came in the form of Senator Ben Nelson's announcement of a bi-partisan fact-finding trip, which had every indication of being a public relations exercise, as Nelson decided in advance to absolve the executive, saying 'I can't imagine

⁹⁹ Karen Greenberg, *The Least Worst Place: The First 100 Days of Guantanamo* (Oxford University Press 2006) 23-26

¹⁰⁰ *Ibid* 38

¹⁰¹ *Ibid*

... that the United States is giving anything other than humane treatment It is certainly going to be the case [sic] of humane treatment'.¹⁰²

Accordingly, despite the fact that the executive decided to revive a facility that was unconstitutional when it housed refugees¹⁰³ without consulting Congress, there were no immediate complaints about the executive's initiative. This was despite the fact that it did so when the legislature, which was not in session, could not respond. Furthermore, since the facilities that dated back to the Haitian refugee crisis were insufficient, executive branch officials submitted a funding request on February 1, 2002 to Congress, which was duly authorized.¹⁰⁴ In the ten years following this, the legislature has never refused to provide funds necessary to run and expand the detention camp. Without these funds, the facility could not operate.¹⁰⁵ As later sections of this chapter will demonstrate, this was merely the first evidence of a general pattern that would emerge, in which the legislative branch would consistently enable the executive's indefinite arbitrary detention of suspects.

Congress later made its support for the parallel detention regime eminently clear after the Supreme Court issued its first opinions challenging the executive's theories about its rights to establish and run this facility and to set up military tribunals without any legislative authorization or oversight. As noted in chapter four, the Court finally

¹⁰² Congressional Record—Senate (24 January 2002) 192

¹⁰³ *Haitian Centers Council v Sale* [1993] 823 FSupp 1028 (District Court for the District of Columbia)

¹⁰⁴ Greenberg *supra* n 99, 177-180

¹⁰⁵ See generally William C. Banks and Peter Raven-Hansen, *National Security Law and the Power of the Purse* (Oxford University Press 1994)

held in 2006 in the case of *Hamdi v Rumsfeld*¹⁰⁶ that the detainees were entitled to the common protections of Article 3 of the Third Geneva Convention, and that Combatant Status Review Tribunals established to determine whether the detainees were ‘enemy combatants’ were not constitutional. This opinion stated that these tribunals were not consistent with existing legislation on military tribunals, in the form of the Uniform Code of Military Justice. In essence, the Supreme Court rejected the OLC’s theory that the executive possessed an inherent constitutional power derived from its all-encompassing ability to trump any law in the interest of national security to erect new military courts without the due process that the Constitution requires, or even with the requirements of natural justice.¹⁰⁷

Congress responded to the Court’s erection of this minor obstacle by passing the Military Commissions Act of 2006. As described in earlier chapters, this statute provided explicit legislative authorization for the executive’s existing practices at Guantánamo, thus nullifying the *Hamdan* and *Hamdi* opinions. It is important to note that the United States was no longer in the state of panic induced by the 9/11 attacks, and numerous criticisms of Guantánamo were lodged by foreign nations and non-governmental organizations, and by the Inter-American Court of Human Rights by 2006.¹⁰⁸ Congress’ response to these objections was to explicitly authorize the ‘judicial black hole’. Foremost among the objections to Guantánamo were allegations that rather

¹⁰⁶ *Hamdi v Rumsfeld* [2006] 542 US 507 (United States Supreme Court)

¹⁰⁷ *Hamdan v Rumsfeld* [2006] 548 US 557, see also *supra* chapter 4

¹⁰⁸ See *supra* chapter 1

than housing ‘the worst of the worst’ terrorists,¹⁰⁹ or fanatics bent on suicide attacks who ‘would chew through hydraulics lines’ of the aircraft transporting them,¹¹⁰ that many of the detainees were clearly factually innocent, and that they were being denied natural justice to hide precisely that fact.¹¹¹

4.2 Congress Regularises the Judicial Black Hole: The 2006 MCA

As this subsection will demonstrate, the Military Commissions Act of 2006, hereinafter referred to as the ‘MCA’, accomplished five things. First, in response to Supreme Court’s determination that the detainees were owed the protection of Article 3 of the Geneva Conventions,¹¹² it created by statute the category of ‘unlawful enemy combatants’, to replace the label of ‘enemy combatants’ that was invented by the OLC in a memorandum that concluded, on the basis of the legal reasoning described in chapter three,¹¹³ that the detainees possessed no rights under the laws of war. Second, it authorized the military commission that the Court held in *Hamdi* could not be

¹⁰⁹ Comments of Donald Rumsfeld, quoted in Ken Ballen and Peter Berger, ‘The Worst of the Worst?’ *Foreign Policy* (Washington, 20 October 2008)

<www.foreignpolicy.com/articles/2008/10/19/the_worst_of_the_worst>

¹¹⁰ Comments of General Richard B. Meyers, the Chairman of the Joint Chiefs of Staff, quoted in Elspeth van Veeren, ‘Clean War, Invisible War, Liberal War: The Clean and Dirty Politics of Guantanamo’, in Alexander Knapp (ed), *Liberal Democracies at War: Conflict and Representation* (Bloomsbury 2013) 94

¹¹¹ See generally Andy Worthington, *The Guantánamo Files* (Pluto Press 2007)

¹¹² *Hamdan v Rumsfeld* [2006] 548 US 557 (United States Supreme Court)

¹¹³ See *supra* chapter 3

established without legislative authorization. Third, in establishing these commissions, it regularized indefinite detention by creating a jurisdiction to which the prisoners could now purportedly be lawfully subjected. Fourth, it stripped detainees of the ability to petition for the writ of *habeas corpus*. Fifth, it endorsed the executive's earlier enlargement of its own powers, in direct response to the Supreme Court's decision that this was unconstitutional and a grave violation of the separation of powers that undergirds the American rule of law.

In creating the status of 'unlawful enemy combatant', Congress chose to deliberately ignore the Geneva Convention, which extends its protections to members of militias and volunteer corps.¹¹⁴ While the MCA appears to recognize this fact, it simply designates by fiat all members of the Taliban and 'associated forces' as unlawful combatants, for reasons that are not explained. Those bearing arms for the *de facto* and effective government of Afghanistan at the time of the 2002 invasion, even when bearing arms openly and as part of a responsible command structure, are defined as 'unlawful enemy combatants', merely because the legislation says so. In drafting this statute, Congress endorsed the executive's view that the members of the Taliban and associated forces, by resisting the American invasion, were terrorists.¹¹⁵ This provided

¹¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, article 4, 75 U.N.T.S. 135

(entered into force 21 October 1950)

¹¹⁵ In doing so, they followed the lead provided by the executive branch, see 'Executive Order 13440, 'Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency' (20 July 2007)

<<https://www.fas.org/irp/offdocs/eo/eo-13440.htm>> accessed 1 June 1, 2014; see also Allison Danner, 'Defining Unlawful Enemy Combatants: A Centripetal Story', (2007) 43 Texas International Law

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the legal basis for a Combatant Status Review Tribunal, hereinafter referred to as CSRT, to conclude that Omar Khadr, who at the time of the alleged offense was a fifteen year old child soldier, was guilty of murder in violations of the laws of war and of material support of terrorism because he threw a grenade at an armed American soldier.¹¹⁶ In addition, the legislation made it clear that it was the executive that was to have the exclusive power to submit someone to the jurisdiction of these tribunals. Any decision of the Secretary of Defense to bring someone to Guantánamo for that purpose was now considered ‘dispositive’ of the issue.¹¹⁷

Both the Geneva Conventions and the Supreme Court’s *Hamdi* opinion make it clear that trials held to determine that status of prisoners must comply with the rules of natural justice.¹¹⁸ The MCA, in establishing the procedures for the military trials or CSRTs, fell short of that mark. It prevented any lawyer without a security clearance from representing detainees,¹¹⁹ which allowed the executive branch to bar any attorney by denying him or her that clearance, as this decision is now unreviewable in the courts.¹²⁰ The MCA prevented defence attorneys from invoking the Geneva Conventions at the

¹¹⁶ Michelle Sheppard, *Guantanamo’s Child* (John Wiley & Sons 2008) 1-3

¹¹⁷ United States Code, title 10, section §948c (d)

¹¹⁸ *Hamdi v Rumsfeld* [2006] 542 US 507 (United States Supreme Court)

¹¹⁹ Marjorie Cohn, ‘Five “High-Value” Guantanamo Detainees Improperly Presumed Guilty’, *TruthOut* <<http://www.truth-out.org/news/item/17367-five-high-value-guantanamo-detainees-improperly-presumed-guilty>>

¹²⁰ The Supreme Court has held that the denial of a security clearance is non-justiciable. *Department of the Navy v Egan* [1988] 484 US 518 (United States Supreme Court)

CSRTs.¹²¹ It stripped away the procedural protections of the Uniform Code of Military Justice, including the right to a speedy trial and the right not to incriminate oneself.¹²² The final provision was particularly problematic, as the next subsection will discuss how Congress determined that alleged confessions obtained using torture were to be admissible in the CSRTs.

That said, it was the MCA's third feature that was the most problematic. In abrogating the detainees' right of appeal, it insulated these tribunals from any challenge before an objective and neutral magistrate. Now, not only was the executive branch the prosecutor, judge and executioner, as the MCA explicitly authorized the imposition of the death penalty,¹²³ it was now unaccountable. This was accomplished via the jurisdiction-stripping provisions, which state that 'No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States [viz. the executive] to have been properly detained as an enemy combatant or is awaiting such determination'.¹²⁴

These provisions stood for something more significant than simple evasion of judicial scrutiny. They were also a legislative endorsement of the OLC's earlier position that only the executive should be able to determine whether someone was properly subject to its jurisdiction, which the executive itself both created and defined.

¹²¹ United States Code, title 10, section §948b (g)

¹²² United States Code, title 10, section §948b (d)(1)(B)

¹²³ United States Code, title 10, section §948d (d)

¹²⁴ United States Code, title 10, section §950j (b)

Shortly before the creation of this Star Chamber, then White House Counsel Alberto Gonzales said that certain protections provided by the Geneva Conventions were ‘quaint’, and thus the executive could ignore them.¹²⁵ In passing the MCA Congress affirmed that ‘the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions’.¹²⁶ This provided authority for the executive’s claim that no other branch of government could judge whether its decision that Article 3 simply did not apply was in error.

What was worse, the same section of the MCA stated that these powers granted to the executive were not, in fact, a delegation of power from the legislature, as this might support an argument that Congress could revoke them. Instead, the legislation specified that these powers were ‘[a]s provided by the Constitution’.¹²⁷ This was entirely in line with Yoo’s memoranda of early 2002, as discussed in chapter three. Here, Congress was not merely over-delegating. Rather, it was disclaiming any responsibility for making sure that the executive faithfully executed the law. The Geneva Conventions, as treaties ratified by the Senate, constitute the ‘supreme law of the land’,¹²⁸ on the

¹²⁵ Alberto Gonzales, ‘Memorandum to the President, ‘Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban’, (Washington, Office of the White House Counsel, 25 January 2002)

<<http://news.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html>>

¹²⁶ Military Commissions Act 2006, Public Law 109-366

¹²⁷ Ibid section 6(a)(3)(A)

¹²⁸ United States Constitution, article 6, clause 2

same level as federal statutes and the Constitution itself.¹²⁹ Congress now apparently agreed with the OLC that it was the executive branch which was empowered to provide binding interpretations of the laws, not the courts, and that its supremacy was derived from the Constitution.

It can hardly be said that in 2006 Congress was in a state of panic, of the sort that reigned three days after the 9/11 attacks when it passed the AUMF. Further evidence that the MCA represented a measured legislative response to the *Hamdi* and *Hamdan* decisions can be found in the record of the debate over the bill. Several amendments that would have provided some degree of legislative oversight of the executive were considered and rejected. Senator Robert Byrd proposed an amendment in the Senate that would have introduced a sunset clause into the legislation, such that the executive's powers to subject those it designated to the jurisdiction of military commissions would have ended in 2011. The amendment was rejected.¹³⁰ In addition, Senator Edward Kennedy offered Amendment 5088 to the Senate Bill,¹³¹ which would have specifically banned the infamous form of torture known as waterboarding. As section three will make clear, the executive remained determined to use statements obtained in this

¹²⁹ See Carlos Manuel Vasquez, 'Treaties as Supreme Law of the Land: Judicial Interpretation of Treaties', (2008)122 Harvard Law Review 599

¹³⁰ Byrd Amendment <<http://thomas.loc.gov/cgi-bin/query/R?r109:FLD001:S60420>> accessed 1 June 2014

¹³¹ Senate Amendment 5088 to Bill 3930 <<http://thomas.loc.gov/cgi-bin/query/D?r109:1:./temp/~r109usu1dE::>> accessed 1 June 2014

manner as evidence against detainees in the CSRTs. Kennedy's amendment also failed.¹³²

The passage of the MCA cannot be attributed to the fact that the party in control of the executive branch possessed majorities in the legislature. During the 109th Congress, the Republican majority in the Senate was only 55-45.¹³³ As described in chapter five, sixty votes are required to pass legislation in the Senate owing to its cloture rules. Accordingly, passage of the MCA could only be assured if five members of the Democratic Party were prepared to vote in its favour. In the end, eleven Democrats crossed the floor. While the party leadership in the Senate cast their personal votes against the bill, a number of the party's power brokers, ensured its passage. Among them were former Vice-Presidential candidate Joseph 'Joe' Lieberman, Senator Frank Lautenberg, and William 'Bill' Nelson, who consistently supported illicit extensions of executive power. The Democratic Party's leadership failed to whip the vote effectively, rendering their own votes against its passage largely symbolic. There were enough votes to prevent cloture, but no filibuster was attempted.¹³⁴ This mirrors the voting

¹³² Voting tally for Senate Amendment 5088 to Bill 3930

<http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00258> accessed 1 June 2014

¹³³ Chris Den Hartog, Nathan W. Monroe, *Agenda Setting in the U.S. Senate: Costly Consideration and Majority Party* (Cambridge University Press 2011) 105

¹³⁴ David Friedman, 'The Democratic Party and the Future of American Politics', (2007) 11 *New Politics* <<http://newpol.org/content/democratic-party-and-future-american-politics>> accessed 1 June 2014

patterns established by the Supreme Court confirmation battles, as described in the last chapter.

4.3 Shoring Up the Parallel Detention Regime: The 2009 MCA

Bipartisan legislative support for executive dominance during the ‘war on terror’ can best be demonstrated by detailing the passage of the Military Commissions Act of 2009. It will hereinafter be referred to as the ‘2009 MCA’. Like its predecessor, the 2009 MCA was a response to a Supreme Court case that put the CSRT process in jeopardy, owing to the fact that the opinion pointed out that its procedures did not comply with the requirements of natural justice.

In *Boumediene v Bush*¹³⁵ the Court held that the MCA’s jurisdiction-stripping provisions were unconstitutional, and rhetorically rebuked, as chapter four concluded, Congress’ capitulation to the executive branch, insofar as the 2006 MCA gave it the ability to determine the scope of its own powers in a manner inconsistent with the rule of law. As the Court noted, ‘to hold that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this court, “say what the law is”’.¹³⁶

In *Boumediene*, the Court recognized that the MCA had made the judiciary appear irrelevant, and it did not wish to suffer any loss in perceived power or esteem. Accordingly, as chapter four indicated, the Court stood up for itself. However, as noted in chapter five and explained in the next section, this decision would mean nothing if the Court was unwilling to supervise the D.C. Circuit, to which the executive would

¹³⁵ *Boumediene v Bush* [2008] 553 US 723 (United States Supreme Court)

¹³⁶ *Ibid* 726

appeal all of the writs of *habeas corpus* granted pursuant to *Boumediene*, owing to the provisions of the Detainee Treatment Act.¹³⁷ Nevertheless, even if the detainees' pleas for release would later fall on deaf ears, the Supreme Court had also made it impossible for the executive to proceed with the CSRTs. The opinion had also held that these tribunals did not grant the detainees an adequate opportunity to prove that they were not enemy combatants. As it did in 2006 following *Hamdi*, Congress came to the rescue by providing explicit legislative authorization for these drumhead proceedings,¹³⁸ thereby granting the executive the power that the Court had said it had unlawfully assumed.

This was not how the 2009 MCA was initially perceived.¹³⁹ At the beginning of the Obama Administration, the executive possessed a substantial amount of good will, and accordingly the press and the public focused on the fact that the Act allowed detainees more procedural rights in the CSRTs than before.¹⁴⁰ However, these observers failed to note that these were not concessions to the detainees, but rather were mandated by the Court. If indeed the Obama Administration wished to continue the Guantánamo

¹³⁷ Detainee Treatment Act 2005, Public Law 109–148

¹³⁸ Military Commissions Act 2006, Public Law 109-366

¹³⁹ See e.g. Deborah Pearlstein, 'Military Commissions, Round 3', *Opinio Juris*, (23 October 2009) <<http://opiniojuris.org/2009/10/23/military-commissions-round-3/>> accessed 1 June 2014

¹⁴⁰ Congressional Research Service, 'Enemy Combatant Detainees: "Habeas Corpus" Challenges in Federal Court' (Congressional Research Service 2011) 21 <http://books.google.ca/books?id=UI4pHjIOEQAC&pg=PA22&dq=mca+2009+more+rights+procedural&hl=en&sa=X&ei=YHg_UoyVHMPuiQLprYCwCQ&ved=0CEcQ6AEwBA#v=onepage&q=mca%202009%20more%20rights%20procedural&f=false> accessed 1 June 2014

show trials, as will be demonstrated below, it needed to make these changes in order to protect the executive from effective challenges in the courts.¹⁴¹ It can also be shown that the reflexive deference of the legislature to the executive was now something supported by both parties, as they demonstrated their uncritical support by approving additional grants of unreviewable discretionary authority whenever the executive was checked by the judiciary.

When the 2009 MCA was proposed, the Democratic Party controlled the executive branch, and possessed majorities in both branches of the legislature. The version of the bill introduced in the House of Representatives was sponsored by Isaac ‘Ike’ Skelton, the Democratic Chairman of the House Armed Services Committee. The Senate version was sponsored by Democratic Party Senator and power broker Joe Lieberman. However, the Democratic Party’s control of the Senate was not absolute. Together with the two independents who voted with their party, they could only count on fifty-nine votes, one short of the supermajority needed to obtain cloture. However, in a turn of events that mirrored the voting on the 2006 MCA, a number of Republican Senators broke with their own party to vote for the bill, which demonstrates that Mitch McConnell and John Kyl, who served as the Republican Party’s leaders in that chamber, chose not to whip in the vote, although they cast personal and largely symbolic votes against it.¹⁴² The roles the party leaders played in the kabuki theatre of symbolic opposition to the executive were simply reversed.

¹⁴¹ This is because the Supreme Court’s decision in *Boumediene v Bush* made further trials under the MCA 2006 impossible. See *Boumediene v Bush* [2008] 553 US 723 (United States Supreme Court)

¹⁴² See Glenn Greenwald, Interview with Senator Chris Dodd, *Salon Magazine* (5 August 2007)

<http://www.salon.com/2007/08/05/dodd_interview/> accessed 1 June 2014

What is most important to note is that because Robert Byrd did not vote against it, the final tally was only sixty-five votes in favour. This is significant, because if the President chooses to veto a bill, a supermajority of sixty-six votes is required to override that decision. However, President Obama duly signed the legislation, making possible the renewal of CSRTs, which also validated detention at Guantánamo pursuant to their jurisdiction. Early proceedings brought after this statute was passed involved the final disposition of Omar Khadr's case. Khadr, as noted in the last chapter was an enemy combatant more properly described as a child soldier. Previously, charges against him were dismissed, new charges were made possible by the MCA.¹⁴³ Another case brought under the new rules was that of Ibrahim al-Qosi, who was ultimately convicted of material support for terrorism for having served as a cook at a training camp in Afghanistan.¹⁴⁴

A discussion of the reasons behind Congress' capitulation to the executive over its unilateral power to manage the new regime of indefinite detention will be taken up in sections six and seven of this chapter. The importance of discerning these factors will be highlighted by the next section, which will discuss legislative support for the executive's position on the right to torture the detainees with impunity, thus also legitimating the immediate purpose of the new parallel detention regime.

¹⁴³ Roza Pati, *Due Process and International Terrorism* (Martinus Nijhoff 2009) 414-424

¹⁴⁴ American Civil Liberties Union, 'Press Release: Al-Qosi Plea Is First Conviction In Broken Military Commissions Under Obama' (7 July 2010) <<https://www.aclu.org/human-rights-national-security/al-qosi-plea-first-conviction-broken-military-commissions-under-obama>>

4.4 Torture Absolved: The Detainee Treatment Act

Chapter three concluded that the true purpose of the Guantánamo detention camp and the black sites was to generate reports that implicated as supporters of terrorism the states that the Bush Administration wanted to invade. The use of torture was considered by high executive officials as critical to generating a *casus belli*. Accordingly, the continued use of torture in these camps was of vital importance to the executive. However, a threat to this process began to emerge as the details of waterboarding and other forms of torture were disseminated.

Fortunately for the executive, Congress was again willing to declare legal many gross abuses of *jus cogens* norms, in this instance, even retrospectively.¹⁴⁵ As noted in the last section, the Senate rejected amendments to the MCA that would have explicitly forbidden waterboarding. This was a continuation of the tacit approval for torture found in legislation, in particular in the Detainee Treatment Act of 2005, hereinafter referred to as the ‘DTA’.¹⁴⁶

Much like the 2009 MCA, the DTA was characterized as a legislative response to executive abuses, one that would purportedly put a stop to unacceptable practices.¹⁴⁷ However, as this section will show, it is better understood in the manner set forth in the previous section, as a Congressional response to challenges to the executive’s crimes,

¹⁴⁵ Thomas McDonnell, *The United States, International Law and the Struggle Against Terrorism* (Routledge 2010) 69

¹⁴⁶ Detainee Treatment Act 2005, Public Law 109–148

¹⁴⁷ See Jules Pfiffner, *Power Play: The Bush Presidency and the Constitution* (Brookings 2008) 159-

and not to the violations themselves. Accordingly, Amnesty International argued that the amendment's loopholes make it clear that torture is now official US policy.¹⁴⁸

These challenges were the direct result of the Abu Ghraib prisoner abuse scandal,¹⁴⁹ wherein numerous photographs of American jailors chaining hooded detainees in 'stress positions', threatening them with dogs, and engaging in sexually-charged humiliation. While the Bush Administration blamed 'bad apples' in the military, the Taguba report¹⁵⁰ revealed that jailors were frequently used to 'soften up' detainees before interrogation using exactly these methods, which were explicitly approved for use at Guantánamo by officials the highest levels of the Administration.¹⁵¹ The parallel detention regime and the torture that was endemic to it spread worldwide.¹⁵²

¹⁴⁸ Alfred W. McCoy, 'Invisible in Plain Sight: CIA Torture Techniques Go Mainstream', *Amnesty International Magazine* (London, March 2006)

<https://web.archive.org/web/20080828174831/http://www.amnestyusa.org/magazine/invisible_in_plain_sight.html> accessed 1 June 2014

¹⁴⁹ See, e.g., Associated Press, 'Vatican calls prison abuse a bigger blow to U.S. than Sept. 11', Associated Press (Washington, 12 May 2004) <http://usatoday30.usatoday.com/news/world/iraq/2004-05-12-vatican-iraqi-abuse_x.htm> accessed 1 June 2014

¹⁵⁰ Antonio Taguba, 'Article 15-6 Investigation of the 800th Military Police Brigade' (30 July 2004) <<http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>>

¹⁵¹ See generally Philippe Sands, *The Torture Team* (Penguin 2008). Donald Rumsfeld had pushed for more lenient standards for 'stress positions', writing 'I can stand for 8-10 hours a day. Why are detainees limited to 4 hours?'

¹⁵² Alfred W. McCoy, 'Torture and Impunity: The U.S. Doctrine of Coercive Interrogation' (University of Wisconsin Press 2012) 414-424

The photographic evidence of the torture and murder of detainees at Abu Ghraib sounded a chord that moved the public more than a thousand volumes of deposition transcripts ever could, and the reaction was visceral.¹⁵³ Again, Congress would need to provide assurances that this was all in the past in order for the ‘enhanced interrogation’ of detainees to continue in the future. Accordingly, Congress publicized the DTA’s provisions requiring all interrogations would now need to be in accord with the provisions of the relevant Army Field Manual, which purportedly did not authorize degrading or inhumane treatment.¹⁵⁴ What passed largely unnoticed is that this again turned over to the executive the rights to define what did and did not constitute torture, since under the executive’s interpretation of its powers, it alone has the power to determine what was included in that manual.¹⁵⁵

Congress could merely have invoked and re-affirmed the legislation which the executive consistently violated, namely the provisions of the United States Code, which

¹⁵³ Douglas V. Porpora, ‘Abu Ghraib and Torture: Whither Dostoyevsky?’, in Porpora et al. (eds) *Post-Ethical Society: The Iraq War, Abu Ghraib, and the Moral Failure of the Secular Society* (University of Chicago Press 2013) 125

¹⁵⁴ Headquarters, Department of the Army, *Human Intelligence Collector Operations (FM 2-22.3)* (Department of the Army 2006) <<https://www.fas.org/irp/doddir/army/fm2-22-3.pdf>> accessed 1 June 2014

¹⁵⁵ The executive branch purports to retain the power to revise the Army Field Manuals and “additional guidance” on the applicability of torture bans to intelligence agencies. See Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* (Simon and Shuster 2006) 245-247, see also Center for Constitutional Rights, ‘CCR Praises Obama Orders, Cautions Against Escape Hatch for Torture’, (22 January 2009) <<http://www.ccrjustice.org/newsroom/press-releases/ccr-praises-obama-orders%2C-cautions-against-escape-hatch-torture>>

‘prohibit[] torture committed by public officials under color of law against persons within the public official’s custody or control . . . [and which] applies . . . to acts of torture committed outside the United States’.¹⁵⁶ Alternatively, it could have reiterated the fact that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter referred to as the ‘Convention Against Torture’ is the supreme law of the land, since it was implemented by federal enabling legislation.¹⁵⁷ Instead, the legislation simply failed to close all loopholes that allowed the ‘cruel and inhuman treatment’ that it purportedly prohibited.¹⁵⁸ Given the detailed guidance that surrounds these international instruments, it is difficult to imagine that this was simply an oversight.

By merely limiting the permissible techniques of interrogation to those listed in the Army Field Manual, which the executive could amend at will, Congress gave the executive the power to reauthorize ‘enhanced’ interrogation. It did so, with Annex M of FM 2-22.3,¹⁵⁹ as described in chapter three. Again, the executive was to serve as the

¹⁵⁶ United States Code, title 18, section 2340A

¹⁵⁷ Congressional Research Service ‘The U.N. Convention Against Torture: Overview of Implementation’, (Congressional Research Service 2009)

¹⁵⁸ Phillip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2013), 271

¹⁵⁹ See Headquarters, Department of the Army, ‘Appendix M: Restricted Interrogation Technique—Separation’, (Department of the Army, 2006)
<<https://rdl.train.army.mil/catalog/view/100.ATSC/10492372-71C5-4DA5-8E6E-649C85E1A280-1300688170771/2-22.3/appm.htm>> accessed 1 June 2014; this document explicitly authorizes the ‘Fear Up’ technique, had previously been understood to authorize such techniques as terrorizing detainees with attack dogs, as pictured in photographs released from Iraq (see photograph of detainee

sole judge of what constituted torture, wholly in keeping with John Yoo's memoranda on the subject, but now this unlimited discretion was to be exercised pursuant to explicit legislative sanction.

The DTA also immunized the torturers, provided that waterboarding and other forms of torture 'were officially authorized and determined to be lawful at the time they were conducted'¹⁶⁰ by the executive branch. Again, Congress acceded to the OLC's argument that the law simply was what the executive said it was, despite the fact that the executive's reasoning could be so poor as to amount to professional misconduct. In addition, the DTA, as modified by the Graham-Levin Amendment,¹⁶¹ specified explicitly that statements that were obtained through torture were to be admitted as evidence in the CSRTs. Collectively, the MCA, the Graham-Levin Amendment, and the DTA itself offered the executive impunity for earlier torture, the ability to introduce statements obtained thereby to justify further detention of the victims of torture, and the power to continue to do the same to detainees, after it modified the definition of torture as it saw fit, respectively.

That said, the executive found even the suggestion that it might require a delegation of authority from Congress to accomplish these goals to be unacceptable. Accordingly,

Mohammad Bollendia being threatened by Sergeant Santos Cardona and his attack dog, at:

<http://rexcurrey.net/dog-torture-terrorism-abu-ghraib1b.jpg>.) The Washington Post revealed that these techniques had been brought to Iraqi detention facilities from Guantánamo. Josh White, 'Abu Ghraib Dog Tactics Came From Guantanamo', *Washington Post* (Washington, 27 July 2005)

<<http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072601792.html>>

accessed 1 June 2014

¹⁶⁰ Public Law 109-163, division A, title 14

¹⁶¹ Senate Amendment 2516, 109th Congress, 1st Session (Senate) section 104 (2006)

the Bush Administration attached a signing statement to the DTA, which stated that '[t]he executive branch shall construe . . . the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power'.¹⁶²

This statement was a bold reassertion of the theory of executive power found in the OLC memoranda discussed in chapter three. Here, it asserted that the Commander-in-Chief possessed inherent constitutional powers over detainees, an assertion that the Supreme Court rejected earlier in *Hamdi*.¹⁶³ However, Congress did not respond to the signing statement, and indeed it endorsed the same arguments in the text of the MCA. However, it was very significant that the executive stated quite boldly its intention not to be bound by a duly enacted legislation, namely the portions of the DTA that outlawed certain techniques of torture. The sections of the DTA barring waterboarding were so unpopular within the executive branch¹⁶⁴ that it decided to openly assert that it did not feel that it needed to pay attention to the law of the land, even when it was enacted specifically to regulate its conduct with respect to non-derogable rights.

¹⁶² George W. Bush, 'President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act 2006' <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html>> accessed 1 June 2014

¹⁶³ *Hamdi v Rumsfeld* [2006] 542 US 507 (United States Supreme Court)

¹⁶⁴ Barton Gellman and Jo Becker, 'Pushing the Envelope on Presidential Power', *Washington Post* (Washington 25 June 2007) <http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/> accessed 1 June 2014

What was even more notable, however, is that Congress, having made the rhetorical point in order to satisfy the public, failed to respond to the effective nullification of the statute's legal effect, which the public could not have noticed.¹⁶⁵ In this way, DTA functioned for Congress in the same manner as *Boumediene* for the Supreme Court: it allowed a branch of government that was under popular pressure to express its displeasure with obvious violations of *jus cogens* norms, but when the executive continued in the same vein, this could simply be ignored owing to the fact that this did not attract any publicity.

The DTA also foreshadowed the nullification of the *Boumediene* opinion, as it contained a provision directing appeals from the CSRTs to the D.C. Circuit.¹⁶⁶ This provides evidence it was clear in 2005 that the D.C. Circuit was more likely to be hostile to the detainees' claims than any other court. This can be deduced from the fact that this provision was placed within a bill that otherwise deprives every other court from hearing petitions for *habeas corpus*, on the theory that this is vexatious and unnecessary. The only plausible explanation for channelling all direct appeals from the CSRTs to this court is that the legislators thought that it could be counted upon to dispose of these in the manner that Congress intended. Simply put, the DTA was designed to keep a judicial black hole where torture occurred in continued operation. In order to do so, Congress affirmed the executive's argument that no other branch of government possessed any power to challenge its actions.

¹⁶⁵ Jane Meyer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (Anchor Books 2009) 321-331

¹⁶⁶ Detainee Treatment Act 2005, section 1005(e)(1)(B)

4.5 Congress' Consent to Executive War-making

The analysis of the parallel detention regime in chapter three concluded that its purpose was to hide torture designed to produce faulty intelligence that could justify aggressive war against targets selected by the executive. By isolating, and then torturing, detainees, the executive could obtain statements that purportedly incriminated other states as sponsors of terrorism. As this thesis has explained in earlier chapters, the destruction of the rule of law in the United States has proceeded with a goal in mind. The desired objective is the preservation of unilateral American hegemony across the globe, even when American popular opinion and legal norms would not allow for the military actions that make this possible. This process also reinforces the power of the executive branch, creating a vicious circle of aggression.

Congress' response to the arguments that the executive possessed unilateral power to engage in aggressive war-making would be as important in 2002—2003 as its response thirty years earlier, when Nixon expanded the Vietnam War dramatically without Congressional sanction as part of his drive to create an 'imperial presidency'.¹⁶⁷ As noted above in chapters two and three, executive war-making is incompatible with the rule of law. It also runs contrary to the Constitution, as the Declare War and the Letter of Marque and Reprisal Clauses give this authority exclusively to Congress.¹⁶⁸ However, the executive seized this power on the basis of its theory of executive

¹⁶⁷ See generally Arthur Schlesinger, *The Imperial Presidency* (Mariner Books 2004)

¹⁶⁸ Article 1, section 8, clause 11

sovereignty over matters of national security.¹⁶⁹ This is a loophole that ultimately destroys the rule of law's essential structure, because it allows the executive to catalyse the circumstances in which it can expand its own powers without any fear of being checked by the other branches of government.

Accordingly, Congress' response to the executive's drive for war in various theatres in the decade following the 9/11 attacks would be of particular importance to either the preservation or the destruction of the rule of law in the United States. The three key examples that will be discussed in this section are the attacks against Libya, Iraq, and Syria.

4.5.1 Congress and the 2011 Intervention into the Libyan Civil War

In February of 2011, protests against Colonel Muammar Gaddafi erupted in Libya. Over the coming months, the movement against his government became an open revolt. There was virtually no lag between the eruption of this civil war and calls by Western leaders for a no-fly zone over the country.¹⁷⁰ Shortly thereafter, the United Nations

¹⁶⁹See e.g. John Yoo, 'Memorandum Opinion for the Deputy Counsel to the President: The President's Constitutional Authority to Conduct Military Operations and Nations Supporting Them' (Washington, Office of Legal Counsel, 25 September 2001)

<http://dspace.wrlc.org/doc/bitstream/2041/70942/00110_010925display.pdf> accessed 30 May 30, 2014, see generally *supra* chapter 3

¹⁷⁰For example, David Cameron called for a no-fly zone on February 28, 2011, less than two weeks after the very first protests in Benghazi against the regime. 'As it Happens: Libyan Uprising February 25', *The Times of London* (London, 25 March 2011)

<<http://www.thetimes.co.uk/tto/news/world/middleeast/article2926163.ece>> accessed 1 June 2014

Security Council quickly approved a resolution to that end on March 17, 2011.¹⁷¹ Within days, the member states of the North Atlantic Treaty Organization were conducting air strikes that were not merely aimed at keeping the Libyan Air Force from bombing civilian targets. Libyan ground forces, especially armoured forces which the rebels could not successfully defeat, were heavily targeted.¹⁷² The aim of the intervention was clearly regime change. NATO achieved its ultimate goal when a convoy transporting Muammar Gaddafi was attacked by an American drone and French fighter jets. Gaddafi was then killed by opposition forces while fleeing the air strikes.¹⁷³

While these military actions were authorized by the Security Council, this does not relieve the executive of the requirement of complying with its municipal law. As noted in chapters two and three, both the Constitution of the United States and its statutory law require the executive to obtain authorization for the use of military force from Congress.¹⁷⁴ As this section will show, the executive, while now headed by a President from the Democratic Party, once again revived a theory of inherent constitutional authority developed within the OLC to evade the requirements of the rule of law. In this instance, it claimed the power to wage war, which is the most problematic instance

¹⁷¹ Ibid

¹⁷² Jonathan Marcus, 'Libya: French plane fires on military vehicle', *BBC News* (London, 19 March 2011) <<http://www.bbc.co.uk/news/world-africa-12795971>>

¹⁷³ Thomas Harding, 'Col Gaddafi killed: convoy bombed by drone flown by pilot in Las Vegas', *The Telegraph*, (London, 21 October 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839964/Col-Gaddafi-killed-convoy-bombed-by-drone-flown-by-pilot-in-Las-Vegas.html>> accessed 1 June 2014

¹⁷⁴ War Powers Resolution 1973, 93–148

of the executive expanding the boundaries of its own powers that can be imagined. This section, however, will focus on Congress' reaction to these claims. What will be revealed fits with the general pattern emerging over the course of this chapter. Namely, when the executive circumvents the restrictions on its power, including those explicitly re-imposed in the congressional resurgence, Congress now simply turns a blind eye or protests in the mildest possible terms. It persists doing so until it is necessary to once again extend legislative delegations of unbounded discretionary power.¹⁷⁵

As the Libyan intervention approached the WPR's ninety-day limit,¹⁷⁶ there were rumblings in Congress about the need for a resolution authorizing military force, although these were curiously muted. Speaker of the House of Representatives John Boehner asked the executive to 'explain the legal grounds for failing to seek Congressional authorization in the 90 days since Mr. Obama informed Congress of the start of the mission in Libya'.¹⁷⁷ That is, rather than challenging the illegality of the executive's actions, he merely extended an invitation to the executive so that it might produce legal arguments that would allow Congress to continue to ignore unilateral executive war-making.

The Obama Administration responded, producing an explanation that was as puzzling and poorly-reasoned as any of the OLC opinions written by John Yoo and his

¹⁷⁵ See, e.g. Glenn Greenwald, 'Administration Tells Congress (Again) - We Won't Abide by Your "Laws"', *Unclaimed Territory*, (26 March 2006)
<<http://glenngreenwald.blogspot.ca/2006/03/administration-tells-congress-again-we.html>>

¹⁷⁶ United States Code, title 50 section 1544(b)

¹⁷⁷ Jennifer Steinhauer, 'Boehner Warns Obama on Libya Operations', *New York Times* (New York, 14 June 2011)

colleagues. Its rationale depended upon a strange distinction between the statutory trigger of the WPR (where the President ‘introduce[s] United States Armed Forces . . . into situations where imminent involvement in hostilities is clearly indicated by the circumstances’) and something allegedly different, which it labelled ‘kinetic operations’. In doing so, the executive pressed the unitary executive theory’s theory of executive power to interpret the law even further than the Bush Administration. When the OLC refused to sign off on this theory, he overrode any advice to the contrary and in so doing departed from the ‘traditional legal process the executive branch has developed to sustain the rule of law for over 75 years’.¹⁷⁸ The press reported on this as follows:

[Attorney General Eric] Holder — concluded that sustained U.S. support for the NATO campaign against Libya . . . including drone strikes — amounted to ‘hostilities’ [that triggered the need for a congressional resolution pursuant to the WPR]. . . . Rather than permit OLC to vet the issue, the White House adopted an unusual and far more informal procedure Obama . . . concluded that he did not need congressional approval . . . [by] reject[ing] the views of Holder and OLC’s acting chief, Caroline D. Krass, he also overruled Jeh C. Johnson, the Defense Department’s chief legal counsel.¹⁷⁹

Here, the executive openly solicited a more pliant opinion within that would support its preferred interpretation of a statute, in the process overruling both the Attorney-General and the head of the office that is charged with producing objective interpretations of the law to guide the executive branch. Of course, avoiding this issue by way of an indefensible legal opinion would only succeed if Congress was willing to turn a blind

¹⁷⁸ Bruce Ackerman, ‘Legal Acrobatics, Illegal War’, *New York Times* (New York, 21 June 2001) A27

¹⁷⁹ Michael Isikoff, ‘On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say’, *msnbc.com* (Washington, 21 June 2011)
<http://www.msnbc.msn.com/id/43474045/ns/politicswhite_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/> accessed 1 June 2014

eye. Despite one member of the House Judiciary Committee labelling the President's interpretation 'ridiculous',¹⁸⁰ no formal protests were made by Congress.

Accordingly, it can be said that Congress' leaders successfully coordinated their efforts with those of the executive branch to avoid exercising oversight over the illicit use of war powers. Here, these powers were exercised quite openly to precipitate the overthrow of a foreign regime in favour of one more friendly to American interests. This was done in the manner that evades the requirements of the WPR, the Constitution, and the rule of law.¹⁸¹ As for the members of the legislature who were less pliant or eager for regime change than John Boehner and John McCain, they were caught between their own leadership, the executive, and the executive's allies in the judiciary. They could not get a bill through Congress' committee structure without the support of the party leaders,¹⁸² and the party leaders were warned in no uncertain terms that if this happened, the results, for Congress, would be dire. It is probably that the executive would publically humiliate the legislators by simply ignoring them, confirming their irrelevance publically:¹⁸³ Secretary of State Hillary Clinton told members of Congress in a classified briefing that 'the White House would forge ahead with military action in

¹⁸⁰ Ibid

¹⁸¹ Philip Elliot, 'Obama trying to sway war-weary public on Syria', *Associated Press*, (Washington, 9 September 2013) <<http://lubbockonline.com/filed-online/2013-09-09/obama-trying-sway-war-weary-public-syria#.UvwToYa4Ono>> accessed 1 July 2014

¹⁸² Charles B. Cushman, *An Introduction to the U.S. Congress* (M. E. Sharpe 2006) 61-68.

¹⁸³ Susan Crabtree, 'Clinton To Congress: Obama Would Ignore Your War Resolutions', *TalkingPointsMemo* (20 March 2011) <<http://talkingpointsmemo.com/dc/clinton-to-congress-obama-would-ignore-your-war-resolutions>> accessed 1 June 2014

Libya even if Congress passed a resolution constraining the mission.’¹⁸⁴ Thanks to the executive’s domination of certain key courts, no legislator wishing to bring a judicial challenge to this collusion would be able to do so, due to the D.C. Circuit’s decision in *Campbell v Clinton*,¹⁸⁵ penned by Judge Silberman, wherein it was held that legislators have no standing to bring a claim that the executive is in violation of the WPR. This decision is effectively the final word on the issue, as any such challenge would need to be brought within the jurisdiction of the D.C. Circuit.

Of course, this particular dynamic between the executive and Congress was made possible by a lack of public opposition to the intervention in Libya, which likely stemmed from the fact that Gaddafi was a longstanding hate figure in the United States and its popular culture.¹⁸⁶ For an exploration of the dynamics at work in diametrically different climate of public opinion, this thesis must turn to the debate over Congress’ Authorization for the Use of Military Force Against Iraq, hereinafter referred to as the ‘Iraq AUMF’.¹⁸⁷

4.6 Congress Deceived? The Executive and the Iraq AUMF

A year and a day after the 9/11 attacks, President Bush spoke at the United Nations, requesting a resolution that would authorize the use of military force, purportedly to

¹⁸⁴ Ibid, see also Robert J. Delahunty, ‘War Powers Irresolution: The Obama Administration and the Libyan Intervention’, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856764>

¹⁸⁵ *Campbell v Clinton* [2000] 203 F3d 19 (D.C. Circuit)

¹⁸⁶ Guy Arnold, *The Maverick State: Gaddafi and the New World Order* (Cassell 1996) 10

¹⁸⁷ Authorization for Use of Military Force Against Iraq Resolution 2002, Public Law 107–243

enforce earlier resolutions related to weapons of mass destruction.¹⁸⁸ While the United States would never obtain this final explicit authorization from the U.N., it was the basis for the executive's request for military authorization from Congress, which was assured that a firm basis for the attack under international law would soon be forthcoming.¹⁸⁹

A bill was put before in the House of Representatives on October 2, 2002. Its text was composed entirely within the executive branch, and it was introduced at the Administration's request by Speaker of the House John Dennis 'Denny' Hastert.¹⁹⁰ The leading co-sponsor of the bill was the head of the Democratic Party in that chamber, House Minority Leader Richard 'Dick' Gephardt.¹⁹¹ The Senate's identical version of the bill was introduced at the executive's request by Senate Minority Leader Tom Daschle and co-sponsored by Trent Lott, the Senate Majority leader.¹⁹²

¹⁸⁸ George W. Bush, 'President's Remarks at the United Nations General Assembly' 12 September 2002 <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/print/20020912-1.html>> accessed 1 June 2014

¹⁸⁹ Daily Mail, 'Bush wins Congress backing over war on Iraq', (16 October 2002) <<http://www.dailymail.co.uk/news/article-142230/Bush-wins-Congress-backing-war-Iraq.html>> accessed 1 June 2014

¹⁹⁰ The Library of Congress, 'Bill Summary & Status, 107th Congress (2001 - 2002), House Joint Resolution 114', <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:H.J.Res114>> accessed 1 June 2014

¹⁹¹ The Library of Congress, 'Bill Summary & Status, 107th Congress (2001 - 2002) House Joint Resolution 114, Cosponsors' <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HJ00114:@@P>> accessed 1 June 2014

¹⁹² The Library of Congress, 'Bill Summary & Status , 107th Congress (2001 - 2002)

The pattern that would emerge whenever the executive sought approval for military action was first established with the Iraq AUMF. The executive branch and the leaders of both parties in the legislature formed a united front against any possible ideological opposition. This included disagreement from both legislators on the fringes of the two parties, i.e., Representatives Kucinich and Paul, Senators Feingold and Chaffee, and from the public. It became evident that the Bush Administration would not allow the weapons inspectors to complete their mission in Iraq, a prerequisite of a Security Council resolution under Chapter VII. At this point, less than a third of Americans supported the executive's new policy of immediate attacks, favouring instead the completion of the inspection process and a diplomatic solution.¹⁹³

Accordingly, when the United States moved to a war footing, the largest coordinated protests in world history were staged on February 15, 2003.¹⁹⁴ Approximately 400,000 people took to the streets in New York City alone, while hundreds of demonstrations took place simultaneously across the country.¹⁹⁵ This was done in the face of obstruction and illicit surveillance by the intelligence community and the deployment

Senate Joint Resolution 45' <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SJ00045:@@P>>
accessed 1 June 2014

¹⁹³ Boothie Cosgrove-Mather, 'Poll: Talk First, Fight Later', *CBS News* (23 January 2003)
<<http://www.cbsnews.com/stories/2003/01/23/opinion/polls/main537739.shtml>>

¹⁹⁴ David Cortright, 'The World Says No: The Global Movement Against War in Iraq', in Thakur Ramesh et al. (eds) *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* (Pearson Longman 2006) 75-91

¹⁹⁵ Sue Chan, 'Massive Anti-War Outpouring', *CBS News* (15 February 2003)
<<http://www.cbsnews.com/stories/2003/02/16/iraq/main540782.shtml>> accessed 1 June 2014

of far more aggressive forms of policing than seen previously, including the ‘kettling’ and mass arrests of peaceful protesters.¹⁹⁶

Doubts about the *casus belli* remained widespread, and reached almost to the top echelons of American society. Criticism came from various quarters, including the higher ranks of the military itself. Time Magazine noted that almost one in three senior officers ‘question[ed] the wisdom of a pre-emptive war with Iraq’.¹⁹⁷ Accordingly, Congressional approval was of crucial importance to the executive, as it would be able to point to this authorization for the invasion when the case for war fell apart, after it became evident that that Iraq no longer possessed a weapons of mass destruction program.¹⁹⁸ The executive knew that its rationale for war was problematic. This was the reason that their intelligence community needed to work so diligently to launder faulty sources and conclusions through their allies’ agencies.

In the case of the story of Iraq’s supposed attempts to buy yellowcake uranium from Niger, this was pushed through Italian military intelligence.¹⁹⁹ The unfounded

¹⁹⁶ New York Civil Liberties Union, ‘Arresting Protest’ (April 2003)

<https://www.aclu.org/sites/default/files/FilesPDFs/nyclu_arresting_protest1.pdf> accessed 1 June 2014

¹⁹⁷ Mark Thompson and Michael Duffy, ‘Donald Rumsfeld: Pentagon Warlord’, *Time Magazine* (19 January 2003) <<http://nufon.tripod.com/0061.htm>> accessed 1 June 2014

¹⁹⁸ ‘Blix Casts Doubt on WMDs’, *The Guardian* (Manchester, 19 May 2003)

<<https://web.archive.org/web/20130827033434/http://www.theguardian.com/world/2003/may/23/iraq1>> accessed 1 June 2014

¹⁹⁹ Carlo Bonini and Giuseppe D’Avanza, ‘Doppiogiochisti e dilettanti tutti gli italiani del Nigergate’, *La Repubblica* (Rome, 24 October 2005)

<<http://www.repubblica.it/2005/j/sezioni/esteri/iraq69/sismicia/sismicia.html>> accessed 1 June 2014

allegations of mobile chemical weapons laboratories made by the informant dubbed 'Curveball'. He was later revealed to be 'the brother of a top aide of Ahmad Chalabi, the pro-western Iraqi former exile with links to the Pentagon'.²⁰⁰ His statements were bolstered by citing the documents of the German intelligence service in which they were found, but the executive did not reveal that those intelligence reports did not evaluate his claims positively.²⁰¹

These claims became the basis for the 'sixteen words' used by President Bush to goad Congress and the American public to war in his State of the Union Address of January 2003, namely '[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa'. They were also the basis for Colin Powell's infamous PowerPoint presentation to the United Nations Security Council.²⁰² The Secretary of State was so concerned about the veracity of the yellowcake allegations that he refused to cite them in that speech.²⁰³ These suspicions were well grounded, as the State Department's Bureau of Intelligence and Research revealed eleven days before the State of the Union address that these allegations were

²⁰⁰ Luke Harding, 'Germans accuse US over Iraq weapons claim', *The Guardian* (Manchester, 2 April 2004 <<http://www.theguardian.com/world/2004/apr/02/iraq.germany>> accessed 1 June 2014

²⁰¹ Ibid

²⁰² United States Department of State, 'PowerPoint Presentation Accompanying the Secretary's Speech at the UN' <<http://www.state.gov/documents/organization/17434.pdf>> accessed 1 June 2014

²⁰³ Arthur Borden, *A Better Country: Why America was Right to Confront Iraq* (Hamilton Books 2008) 45-46

based on forgeries.²⁰⁴ Before his speech, Powell expressed doubts about the mobile weapons laboratories. He continued to do so until he was personally presented with the assurances of the Director of the CIA.²⁰⁵

Congress accepted these assurances uncritically and without independent investigation.²⁰⁶ Accordingly, the bill passed through both chambers in just over one week.²⁰⁷ Numerous amendments that would have limited the grant of unlimited discretion over whether to actually launch the attack were rejected, even as the executive equivocated over whether it might proceed in the event that it could not secure the passage of Security Council resolution under Chapter VII.²⁰⁸ These included the Spratt and Levin Amendments, which would have required such a resolution from the Security Council,²⁰⁹ and the Byrd Amendments, which would have specified that

²⁰⁴ Carl W. Ford, 'Memorandum to the Secretary: Niger/Iraq Uranium Story and Joe Wilson', (7 July 2003) <<http://www.state.gov/documents/organization/122494.pdf>>

²⁰⁵ Joby Warrick, 'Warnings on WMD "Fabricator" Were Ignored, Ex-CIA Aide Says'. *Washington Post* (Washington, 25 June 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/24/AR2006062401081_pf.html> accessed 1 June 2014

²⁰⁶ Richard W. Stevenson, 'Remember "Weapons of Mass Destruction?" For Bush, They Are a Nonissue', *New York Times* (New York, 8 December 2003) <<http://www.nytimes.com/2003/12/18/politics/18PREX.html>> accessed 1 June 2014

²⁰⁷ Library of Congress, 'Bill Summary & Status 107th Congress (2001 - 2002) Senate Joint Resolution 45', <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:S.J.Res45:>> accessed 1 June 2014

²⁰⁸ Donald E. Neuchterlein, *Defiant Superpower: The New American Hegemony* (Potomac Books 2005), chapter 3

²⁰⁹ Clerk of the House of Representatives 'On Agreeing to the Spratt of South Carolina Substitute Amendment, 107th Congress, U.S. House of Representatives' (10 October 2002); Clerk of the House

the legislature was not agreeing that the executive possessed unspecified inherent constitutional powers to go beyond the text of the Iraq AUMF,²¹⁰ and which would have placed a time limit on the use of the authority granted by that statute.²¹¹

Accordingly, when President Bush made the decision to begin the war the Iraq AUMF was passed. Thus, he could assert that he was in full compliance with the WPR and the constitutional requirement of congressional approval for military action.²¹² The executive, however, consistently maintained that it possessed an independent constitutional power to go to war against Iraq. The question that must be answered is why the executive sought this approval despite its own interpretation of its unbounded ability to act in the interests of national security. The answer is simple. The executive did not want to be forced to take full responsibility for the Iraq War, in the event that it

of Representatives, 'On Agreeing to the Amendment (Levin Amdt. No. 4862)', 107th Congress, U.S. Senate (Library of Congress, 10 October 2002)

²¹⁰ Winslow T. Wheeler, *The Wastrels of Defense: How Congress Sabotages U.S. Security* (Naval Institute Press 2004) 220

²¹¹ Michele L. Swerz, *Women in the Club: Gender and Policy Making in the Senate* (University of Chicago Press 2013) 213

²¹² This thesis will not address the argument that the requirements of the Declare War Clause are not met by a statute that is not styled as a declaration of war.

would become deeply unpopular.²¹³ In securing a statutory basis for its actions, it would also insulate itself from criticism from the legislators.²¹⁴

Congress made a very bad bargain with the executive. In exchange for the appearance of continued relevance in foreign affairs, they diffused the executive's responsibility for aggressive war-making.²¹⁵ By means of the OLC's opinions, the executive made it clear that it did not seek the Iraq AUMF owing to matters of principle. However, it appears that Congress failed to understand the executive's true motivation.²¹⁶

The first element of a pattern of manipulation was established with the passage of the AUMF. It remained to be seen whether Congress would prevent the executive from duplicating it. The key question that remains is whether the legislators learned anything from their precipitous and unqualified support for the executive in 2002. After learning that Iraq did not possess weapons of mass destruction, legislators concluded that the intelligence presented to them to justify that assertion was, at the very least, deeply flawed. At this point, the Senate convened a Select Committee, hereinafter referred to

²¹³ See Neal Devins and Louis Fisher, *The Democratic Constitution* (Oxford University Press 2004) 122-126

²¹⁴ Mary Cardaras, *Fear, Power, and Politics: The Recipe for War in Iraq after 9/11* (Lexington Books 2013) 218

²¹⁵ Seth Harold Weinberger, *Restoring the Balance: War Powers in an Age of Terror* (Greenwood 2009) 17-22

²¹⁶ William Boardman, 'America's "Permanent War": The "Authorization to Use Military Force" Forever?', *Global Research* (May 26, 2013) <<http://www.globalresearch.ca/americas-permanent-war-the-authorization-to-use-military-force-forever/5336452>>

as the ‘Senate Iraq Intelligence Committee’ or ‘SIIC’, to investigate the executive’s representations about the Iraqi weapons programs and the way in which these were generated.²¹⁷ The investigation proceeded in two phases, both of which revealed systematic manipulation of the legislators by the executive, something made possible by its control over the intelligence community and an absence of any effective congressional oversight.²¹⁸

The first line of inquiry for the SIIC was the executive’s determined attempts to link Saddam Hussein to the 9/11 attacks. This ‘had been a strongly implied accusation made obliquely against Iraq in Administration statements since 2001’.²¹⁹ These statements were a key pillar of the executive’s case for war, along with allegations related to weapons of mass destruction. However, the Iraq AUMF itself, which was written by the executive, stated that Iraq was ‘continu[ing] to aid and harbor other international terrorist organizations’²²⁰

When pressed, the executive would admit that the intelligence that supported this assertion was limited to proof that Hussein aided the organizations such as the People’s Mujahedeen of Iran, which committed acts of terrorism within the Islamic Republic,

²¹⁷ The formal name for this committee was Select Committee on Intelligence on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq.

²¹⁸ Austin Sarat and Nasser Hussein, *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* (NYU Press 2009) 7-9

²¹⁹ Albert L. Weeks, *The Choice of War: The Iraq War and the Just War Tradition* (ABC-CLIO Books 2009) 68

²²⁰ Authorization for Use of Military Force Against Iraq Resolution 2002, Public Law 107–243, whereas clauses, preamble

and which the United States subsequently protected after the invasion of Iraq, for possible future use against Iran.²²¹ However, the executive continued to promote theories about Iraqi support for al-Qaeda, even after these were discredited by the intelligence community.²²² While Dick Cheney continued making these claims, the President made ambiguous statements about Iraqi support for terrorism. Most of his audience took this to mean anti-American terrorism, owing to the Vice-President's unsupportable allegations. The Senate Iraq Intelligence Committee refuted these claims in the Phase I report, concluding that 'there was no evidence to support Iraqi complicity or assistance' in the 9/11 attacks.²²³

This SIIC also addressed the intelligence related to WMD, the second and apparently more substantive leg supporting the case for war. It concluded that not only was there no evidence that Iraq possessed these weapons, but that the executive consistently distorted intelligence reports to justify its agenda. The first of these conclusions was located in the Phase I report, which concluded that the Secretary of State's case for war was based on 'information provided or cleared by the Central Intelligence Agency (CIA) for inclusion in Secretary Powell's speech [that] was overstated, misleading, or incorrect'.²²⁴

²²¹ James Risen, *State of War* (Free Press 2006) 218-220

²²² Anthony Summers and Robbyn Swan, *The Eleventh Day: The Full Story of 9/11* (Ballantyne Books 2012) 571

²²³ United States Select Senate Committee on Intelligence, 'Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq' (9 July 2004)

<<http://www.gpo.gov/fdsys/pkg/CRPT-108srpt301/pdf/CRPT-108srpt301.pdf>>

²²⁴ *Ibid* 15

The explosive evidence of the executive's pressure on the intelligence analysts to alter their findings, which is the corollary of the directives to the torturers at Guantánamo to produce false confessions about Iraqi involvement as described in chapter three, would remain hidden until the publication of the Phase II report. This was the SIIC's key failure. Senators Rockefeller, Durbin, and Levin made clear that the Committee was forced to put off its consideration of 'how intelligence on Iraq was used or misused by Administration officials in public statements and reports'.²²⁵ Accordingly, 'the Committee's phase one report fail[ed] to fully explain the environment of intense pressure in which Intelligence Community officials were asked to render judgments on matters relating to Iraq when policy officials had already forcefully stated their own conclusions in public'.

The public release of the Phase II reports was delayed until July of 2008. During the three year interval, President Bush was re-elected and served almost all of his allotted final term. In short, the report was held back until it could have no real effect on the executive, since when it was finally released the legislature possessed no clear incentive to hold it accountable, given the fact that the Bush Administration was now in its final four months.

This lengthy postponement was quite unfortunate, since it revealed many facts that seemed to call for more than merely a stern rebuke. First, it concluded that the executive 'repeatedly presented intelligence as fact when in reality it was unsubstantiated, contradicted, or even non-existent. As a result, the American people were led to believe

²²⁵ Ibid 449-464

that the threat from Iraq was much greater than actually existed'.²²⁶ This was only possible because the executive created what amounted to a new intelligence agency that was designed to produce alleged facts that more seasoned analysts would have rejected out of hand. It was because of the revelations of the false assertions generated by the Department of Defense's Office of Special Plans and the termination of internal inquiries into its activities²²⁷ that the SIIC could conclude that the executive crossed the line between 'relying on incorrect intelligence and deliberately painting a picture to the American people that you know is not fully accurate', and in this manner having knowingly 'led the nation into war under false pretences'.²²⁸

Certain delays in the release of this revelatory report are difficult to explain. While the Republican members of the SIIC were able to use procedural tactics to slow the committee's work before 2006, the midterm elections yielded a Democratic majority in the Senate,²²⁹ which should have allowed Senator Rockefeller to proceed swiftly

²²⁶ Michael Heazle, *Uncertainty in Policy Making: Values and Evidence in Complex Decisions* (Earthscan 2010) 122

²²⁷ See Minority of the Senate Select Committee on Intelligence 'Whether Statements by U.S. Government Officials Were Substantiated by Intelligence Reports', in 'Additional and Minority Views, SIIC Phase II Report', (5 June 2009) <<http://www.intelligence.senate.gov/080605/phase2b.pdf>> accessed 1 June 2014

²²⁸ Senate Select Committee on Intelligence, 'Press Release: Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq Press Release of Intelligence Committee Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence', (5 June 2008) <<http://www.intelligence.senate.gov/press/record.cfm?id=298775>> accessed 1 June 2014

²²⁹ Suzanne Struglinski and Lisa Freidman, (eds), *Almanac of the Unelected Staff of the United States Congress* (Bernan Press 2010) 10

towards its completion and release to the public. One possible factor, which will be discussed in the following section, is that the leadership of the Democratic Party wanted to reduce any possible pressure for impeachment,²³⁰ which this chapter will argue was the only remaining method for legislative control of a runaway executive that openly disdains the requirements of the rule of law, in the same manner as the Nixon Administration. However, before addressing this issue, the next subsection will examine whether Congress has internalized the conclusions of the SIIC report, such that it might resist future temptations to give the executive unfettered discretion to wage war. The test that reveals whether it learned the lessons of Iraq would come in the form of the Obama Administration's drive for aggression against Syria in 2013.

4.7 Congressional Gormlessness: An AUMF Against Syria?

The Syrian Civil War began with protests in March of 2011, which were inspired by similar uprisings elsewhere in the Middle East known collectively as the 'Arab Spring'.²³¹ The governing regime's use of the military to suppress protests sparked an armed rebellion shortly afterwards. It appeared very likely from the outset of these protests that the United States would promote regime change, as this was its declared policy. This was the case since at least 2002, when John Bolton added Syria to the Bush Administration's 'Axis of Evil' owing to the conclusion it was a 'state sponsor[[]

²³⁰ See *infra* section 5, see also House Committee on the Judiciary Majority, 'Staff Report to John C.

Conyers Jr., *Reining in the Imperial Presidency: Lessons and Recommendations related to the Presidency of George W. Bush* (13 January 2009)

<http://www.fas.org/irp/congress/2009_rpt/imperial-final.pdf> accessed 1 June 2014

²³¹ See generally Mark L. Haas and David W. Lesch, *The Arab Spring: Change and Resistance in the Middle East* (Westview Press 2012)

of terrorism that [is] pursuing . . . weapons of mass destruction'.²³² Syria was one of the few nations in the region that opposed the American war of aggression against Iraq, souring Syrian-U.S. relations that until then were improving, to the point where a presidential summit in Geneva was possible. Indeed, Bill Clinton met with Bashar-al-Assad.²³³ However, the Obama Administration continued the Bush Administration's policies toward Syria. Additionally, in 2010 it contended publically that Syria was providing missiles to the Hezbollah for use against Israel.²³⁴ In addition, the release of State Department's classified diplomatic cables by WikiLeaks revealed that the United States 'secretly financed Syrian political opposition groups and related projects' from at least April of 2009'.²³⁵

²³² John R. Bolton, 'Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction' (Speech of 6 May 2012) <<http://www.heritage.org/research/lecture/beyond-the-axis-of-evil>> accessed 1 June 2014

²³³ Tanya Reinhart, *Israel/Palestine: How to End the War of 1948* (Seven Stories Press 2002) 74-77

²³⁴ Agence France Presse, 'Syria providing "wider array" of missiles to Hezbollah: US', *Agence France Presse* (Paris, 23 April 2010) <http://www.google.com/hostednews/afp/article/ALeqM5gS-2z3_h12KyrCYwnFyVNwCmYO-A>

²³⁵ Craig Whitlock, 'U.S. Secretly Backed Syrian Opposition Groups, Cables Released by WikiLeaks Show,' *Washington Post* (Washington, 18 April 2011) <http://www.washingtonpost.com/world/us-secretly-backed-syrian-opposition-groups-cables-released-by-wikileaks-show/2011/04/14/AF1p9hwd_story.html>

In the summer of 2012, the head of the CIA and the Secretary of State first proposed that the United States provide arms to and train the rebel forces.²³⁶ It should be noted that during the previous three years, it did so indirectly, by ‘quietly encourag[ing] Saudi Arabia, Qatar and Turkey to ship weapons into the country’.²³⁷ In addition, ‘U.S. special operations troops have been secretly training Syrian rebels with anti-tank and anti-aircraft weapons since late [2012]’.²³⁸ The executive made the decision to move forward openly with these plans in June of 2013.²³⁹ At this point, plans were now being made at the highest levels of the executive branch for a bombing campaign and the enforcement of a no-fly zone over Syria.²⁴⁰ However, it did not openly advocate going

²³⁶ Michael R. Gordon and Mark Landler, ‘Backstage Glimpses of Clinton as Dogged Diplomat, Win or Lose’, *New York Times* (New York, 2 February 2013)
<http://www.nytimes.com/2013/02/03/us/politics/in-behind-scene-blows-and-triumphs-sense-of-clinton-future.html?pagewanted=all&_r=1&> accessed 1 June 2014

²³⁷ Mike Mazzetti, Michael R. Gordon and Mark Landler, ‘U.S. Is Said to Plan to Send Weapons to Syrian Rebels’, *New York Times* (New York, 13 June 2013)
<http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&_r=0> accessed 1 June 2014

²³⁸ David S. Cloud and Raja Abdulrahim, ‘U.S. Has Secretly Provided Arms Training to Syria Rebels Since 2012’, *Los Angeles Times* (Los Angeles, 31 June 2013)
<<http://articles.latimes.com/2013/jun/21/world/la-fg-cia-syria-20130622>> accessed 1 July 2014

²³⁹ Ibid

²⁴⁰ Ibid

to war until two months later, purportedly in response to the use of chemical weapons in Ghouta on August 21, 2013.²⁴¹

The United States seized upon this incident as a *casus belli* for aggressive war-making. As this subsection will demonstrate, in attempting to make its case, the executive used the same playbook as it did in 2002. Congress apparently learned nothing from the Select Committee's reports, as the same tactics achieved the same result. We will see that once again the executive made public statements about WMDs that were unsubstantiated and even contradicted by the nuanced intelligence reports, and in order to bypass these, the executive relied on the 'stovepiping' of intelligence. This involved the creation of special intelligence analysis units controlled at the highest level of the executive branch, which appropriated and interpreted raw field reports without allowing analysts from the relevant agencies that nominally report to Congress to scrutinize or interpret this data. As in 2002, this frequently involved the laundering of this stovepiped information through foreign intelligence agencies, which produced data which could be cited by the executive to Congress, but which it would argue could not be revealed.

The executive hoped that, as in 2002, the credibility of its senior officials presenting intelligence reports would allow it to assemble an international coalition that would give the intervention the appearance of legitimacy, or even the sanction of international

²⁴¹ Hannah Allam, James Rosen and Jonathan Landay, 'U.S. Appears to Weigh Military Response to Alleged Syrian use of Chemical Weapons', *McClatchey Wire Service*, (Washington 25 August 2013) <<http://www.mcclatchydc.com/2013/08/25/200333/us-appears-to-weigh-military-response.html>>

law if the Security Council could not approve a resolution,²⁴² because its processes were ‘broken’ by states that did not agree with the executive’s proposals.²⁴³ As President Obama said in late August 2013:

If the U.S. goes in and attacks another country without a U.N. mandate and without clear evidence that can be presented, then there are questions in terms of whether international law supports it. Do we have the coalition to make it work? And, you know, those are considerations that we have to take into account.²⁴⁴

Unfortunately for the executive, its plans for an international coalition were dashed when the first and most important partner for such an endeavour was relegated to the side-lines by decisive legislative action. The Parliament of the United Kingdom, the United States’ partner in the ‘special relationship’, decided against joining the proposed military campaign. This was ‘disastrous’ to the executive’s initiative, as its ‘plans for air strikes against Syria were thrown into disarray’ by the vote.²⁴⁵ In part this response

²⁴² David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Kluwer Law International 2001) 39-42

²⁴³ Max Fisher, ‘Samantha Power’s Case for Striking Syria’, *Washington Post* (Washington 7 September 2013) available online at:
<http://www.washingtonpost.com/blogs/worldviews/wp/2013/09/07/samantha-powers-case-for-striking-syria/>

²⁴⁴ David Bosco, ‘How President Obama Undermined His Legal Case for Syria Action,’ *Foreign Policy* (Washington, 26 August 2013
<http://bosco.foreignpolicy.com/posts/2013/08/26/how_president_obama_undermined_his_legal_case_for_syria_action> accessed 1 June 2014

²⁴⁵ Paul Lewis and Spencer Ackerman, ‘Obama’s Syria Plans in Disarray after Britain Rejects Use of Force’, *The Guardian* (Manchester, 30 August 2013)
<<http://www.theguardian.com/world/2013/aug/30/obama-strike-syria-britain-vote>> accessed 1 June 2014

can be attributed to doubts about the *casus belli*. As Peter Flatters noted '[w]ith the Prime Minister claiming that intelligence findings were compelling enough to warrant action, the remarkable thing was Parliament's response – namely that it did not believe him, or rather that it insisted on seeing the evidence for itself'.²⁴⁶

It was not surprising that the Members of Parliament took this position on the intelligence findings. What was released to them was a three-page memorandum from the Joint Intelligence Committee, which focused on the conclusion that chemical weapons, referred to in the report as 'CW', were used in Ghouta. On the crucial issue of who used them, it said 'there is no credible intelligence or other evidence to substantiate the claims or the possession of CW by the opposition'.²⁴⁷ Accordingly, MI6's argument can be paraphrased as a syllogism. Namely, all chemical weapons in Syria belong to Assad, chemical weapons were used, and therefore Assad used chemical weapons. Unfortunately, begging the question by assuming the major premise was illogical, since in fact there appeared to be credible evidence that the opposition possessed these weapons, at least to observers like Carla Del Ponte, a member of the International Commission of Inquiry on the Syrian Arab Republic appointed by the UN High Commissioner for Human Rights. Speaking on behalf of the Commission months

²⁴⁶ Peter Flatters, 'Syria shows MPs need independent analysis of intelligence', *Politics.co.uk* (London, 2 September 2013) <<http://www.politics.co.uk/comment-analysis/2013/09/02/comment-mps-must-be-trusted-with-more-intelligence-info>> accessed 1 June 2014

²⁴⁷ Jon Day, 'Memorandum from the Chairman of the Joint Intelligence Committee, 'Syria: Reported Chemical Weapons Use', (29 August 2003), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235094/Jp_115_JD_P_M_Syria_Reported_Chemical_Weapon_Use_with_annex.pdf> accessed 1 June 2014

before the Ghouta attacks, she noted that ‘according to what we have established so far, it is at the moment opponents of the regime who are using sarin gas’.²⁴⁸

Whether or not Del Ponte’s tentative conclusions were correct is beside the point. What is crucial to note is that the British intelligence community completely failed to address them, which if true would have invalidated the central premise of its case for war. It appears that Parliament was entitled to reject such an argument. It remained to be seen, however, whether Congress would simply give the executive the benefit of the doubt, and abdicate its responsibility to oversee and scrutinize the conclusions of the intelligence agencies.

It appears that Congress was only presented with this opportunity because of Parliament’s rebuke to the British executive. Initially it appeared that the executive branch in Washington was prepared to begin the bombing campaign without seeking a congressional resolution. However, after the British declined to join a coalition, it was plainly apparent that the American executive would then have borne all of the responsibility for the intervention, both in the eyes of the world and in domestic public opinion. As in the case of the Iraq War, the proposed aggression was deeply unpopular both at home and abroad. At the end of August 2013, only 29% of those polled favoured ‘the U.S. conducting military airstrikes against Syria in response to reports that the

²⁴⁸ Damian McElroy, ‘UN Accuses Syrian Rebels of Chemical Weapons Use,’ *The Telegraph*

(London, 6 May 2013) <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10039672/UN-accuses-Syrian-rebels-of-chemical-weapons-use.html>> accessed 1 June 2014

Syrian government used chemical weapons’, and only 21% favoured ‘the United States and its allies supplying weapons to the Syrian rebels’.²⁴⁹

Accordingly, on August 31 the executive presented a draft of a bill to Congress entitled the ‘Authorization for Use of United States Armed Forces’.²⁵⁰ It was a considerably broader authorization than the Iraq AUMF. In fact, the better comparator is the Gulf of Tonkin Resolution.²⁵¹ It did not limit the use of force to Syria, but rather ‘within, to or from Syria’, and appears to propose the creation of a worldwide mandate to prevent the ‘use or proliferation’ of ‘chemical or other weapons of mass destruction’ so as to ‘protect the United States and its allies and partners against the threat posed by such weapons’.²⁵² Bruce Ackerman described this draft bill as ‘nothing less than an open-ended endorsement of military intervention in the Middle East and beyond’.²⁵³

In support of the bill, the executive sent Secretary of State Kerry to the Senate. Kerry served in a surprisingly similar role as that played by Secretary Powell ten years earlier.

²⁴⁹ Pew Research Center ‘Poll: Aug. 29-Sept. 1, 2013 N=1,000 adults nationwide. Margin of error \pm 3.7; ABC News/Washington Post Poll. Aug. 28-Sept. 1, 2013. N=1,012 adults nationwide. Margin of error \pm 3.5) <<http://www.pollingreport.com/syria.htm>> accessed 1 June 2014

²⁵⁰ CNN Staff, ‘Text of Draft Legislation Submitted by Obama to Congress’, *Cnn.com*, (31 August 2013) <http://www.cnn.com/2013/08/31/us/obama-authorization-request-text/index.html?hpt=hp_t1> accessed 1 June 2014

²⁵¹ Southeast Asia Resolution, Public Law 88–408; see generally *supra* chapter 2

²⁵² *Ibid*

²⁵³ Bruce Ackerman, ‘Bait and Switch’, *Foreign Policy* (3 September 2013) <www.foreignpolicy.com/articles/2013/09/03/bait_and_switch_obama_syria_congress?page=0,1> accessed 1 June 2014

He presented assertions about WMDs as fact, cited foreign intelligence reports which could not be divulged, and make assertions that were in fact not in line with the available American intelligence reports. This was precisely what the Senate Select Committee found so objectionable about manipulation of intelligence before the Iraq War.²⁵⁴ Kerry made bold assertions about the high level of certainty that the Assad regime was responsible, relying on communications intercepts by German, French and Israeli intelligence that he would not disclose.²⁵⁵ Assertions about British confirmation of technical intelligence on the sarin gas would follow several days later.²⁵⁶

Kerry also clearly hedged his answer when he was asked about whether the executive envisioned American ground troops deploying to Syria. Kerry denied that there were any plans to do so, although he noted that it might be necessary in the event that the United States needed to ‘secure’ the chemical weapons possessed by the Assad

²⁵⁴ See United States Select Senate Committee on Intelligence, ‘Report on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq (Washington, July 9, 2004)’, ‘Report on Whether Public Statements Regarding Iraq by U.S. Government Officials Were Substantiated by Intelligence Information (Washington, June 5, 2008)’

²⁵⁵ Zeina Karam and Kimberly Dozier, ‘Doubts Linger Over Syria Gas Attack Evidence,’ *Detroit News*, 8 September 2013

<<http://www.detroitnews.com/article/20130908/NATION/309080015/Doubts-linger-over-Syria-gas-attack-evidence>>

²⁵⁶ Patrick Wintour, ‘Sarin Gas Was Used In Syrian Chemical Weapons Attack, Says David Cameron,’ *The Guardian* (Manchester, 7 September 2013)

<<http://www.theguardian.com/world/2013/sep/05/sarin-syrian-chemical-weapons-america>>

regime.²⁵⁷ This was presented as though it were a mere detail, although released intelligence reports reveal that Syria has approximately one thousand tonnes of chemical agents, which according to one study would require seventy-five thousand soldiers to assume custody.²⁵⁸

The high probability that ‘boots on the ground’ will ultimately be required is made clear once one demonstrates that Kerry has misrepresented the consensus within the intelligence community on an issue of vital importance.²⁵⁹ When asked about the presence of Salafist or al-Qaeda affiliated militants in the ranks of the Syrian opposition forces, Kerry minimised their importance in a manner that is belied by intelligence reports, which contradict both his figures and the reality of the situation, which is that at that time, the mujahedeen of the al-Nusra Front, allegedly affiliated with al-Qaeda in Iraq and Ayman al-Zawahari, were the most effective and influential force in Syrian

²⁵⁷ Garance Franke-Ruta, ‘American ‘Boots on the Ground’ in Syria? John Kerry’s Facepalm Moment,’ *The Atlantic*, (Washington, 3 September 2013)
<<http://www.theatlantic.com/politics/archive/2013/09/american-boots-on-the-ground-in-syria-john-kerrys-facepalm-moment/279312/>> accessed 1 June 2014

²⁵⁸ Barbara Starr, ‘Military: Thousands of troops needed to secure Syrian chemical sites,’ *Cable News Network* (22 February 2012) <<http://security.blogs.cnn.com/2012/02/22/military-thousands-of-troops-needed-to-secure-syrian-chemical-sites/>> accessed 1 June 2014

²⁵⁹ David Martosko, ‘Revealed: Pentagon knew in 2012 that it would take 75,000 ground troops to secure Syria’s chemical weapons facilities’ (London, 5 September 2013)
<<http://www.dailymail.co.uk/news/article-2411885/Syrias-chemical-weapons-Pentagon-knew-2012-75-000-ground-troops-secure-facilities.html#ixzz2tAsg3ndw>> accessed 1 June 2014

resistance.²⁶⁰ While it is impossible to evaluate the veracity of the foreign intelligence reports upon which Kerry relied, if his use of American reports provides any guide, his speeches have likely distorted them as thoroughly as Colin Powell's did, when he vouched for the Bush administration's claim that WMDs were present in Iraq.

The Senate leadership's response demonstrated that its members learned little if anything from the Select Committee's reports, as they took an immediately favourable attitude towards both Secretary Kerry's presentation and the executive's draft bill.²⁶¹ The Republican leadership, in Ackerman's words, gave it '*carte blanche*'.²⁶² In fact, the Senate amended the bill to explicitly authorize the executive to pursue regime change, by stating that 'the policy of the United States ... [is] to change the momentum on the battlefield in Syria'.²⁶³ As in 2002, the leadership of both parties in both chambers of Congress rallied behind the executive, with Republican Party Senators McCain and Cantor taking the lead in the Senate and the Democratic Party leadership, particularly Nancy Pelosi, whipping in the votes in the House of Representatives. This

²⁶⁰ Reuters, 'Hundreds of Syria Rebels Vow Loyalty to Al-Qaeda Groups,' *Reuters* (Washington 21 September 2013) <<http://www.taipeitimes.com/News/front/archives/2013/09/21/2003572649>> accessed 1 June 2014

²⁶¹ Josh Rogen, 'Senate Breaks Own Rules in Rush to Vote on Syria War' *Daily Beast* (4 September 2013) <<http://www.thedailybeast.com/articles/2013/09/04/senate-breaks-own-rules-in-rush-to-vote-on-syria-war.html>> accessed 1 June 2014

²⁶² Ackerman *supra* n 253

²⁶³ Niels Lesniewski, 'Text of Senate Draft Syria War Authorization', *Congressional Quarterly Roll Call* (3 September 2013) <<http://blogs.rollcall.com/wgdb/text-of-senate-draft-syria-war-authorization/>> accessed 1 June 2014

demonstrates that the legislative branch remains incapable of the oversight of intelligence that is necessary for the effective control of the executive branch that the rule of law requires. In order to determine whether this was merely a lapse, or evidence of a systematic breakdown of legislative oversight, this thesis must explore the reasons behind this failure, which will follow in the next sections of this chapter.

Unfortunately for the executive, the process of securing formal Congressional sanction for an assault on Syria was derailed when the Russian government seized upon a statement by Secretary of State Kerry and made a well-publicized proposal to supervise the destruction of Syria's chemical weapons.²⁶⁴ The Obama Administration lobbied the members of the United Nations Security Council for a resolution requiring Syria to disarm, with threats of force should this timetable not be met, or if the Organization for the Prohibition of Chemical Weapons declares Syria not to be in compliance with the Chemical Weapons Convention.²⁶⁵ Syria forestalled the passage of a motion to authorize force by beginning the process of self-disarmament, although the United States did not abandon its attempts to seek an international authorization for the use of force. Rather, it continued to argue that the disarmament is not proceeding

²⁶⁴ Dave Espo and Julie Pace, 'Obama delays Syria vote, says diplomacy may work', *Associated Press* (10 September 2013) <http://www.ksl.com/index.php?nid=235&sid=26795165&fm=most_popular> accessed 1 June 2014

²⁶⁵ Michael R. Gordon, 'Kerry Presses Security Council to Act on Syrian Arsenal,' *New York Times* (New York 19 September 2013) <<http://www.nytimes.com/2013/09/20/world/middleeast/kerry-challenges-security-council-to-take-syria-action.html>> accessed 1 June 2014

rapidly enough, and that the United Nations should encourage compliance by threatening force.²⁶⁶

However, the resolution the United States proposed, like Resolution 1441,²⁶⁷ would not have been made pursuant to Chapter VII of the United Nations Charter, and thus will not actually authorize the use of force as a matter of international law.²⁶⁸ Russia remained concerned that a ‘tough resolution’ referring to the ability to use ‘all necessary measures’ for its enforcement would nevertheless set the stage for an American attack, using the same rationale employed by President Bush in 2002, when he argued that Resolution 1441 provided the necessary authorization.²⁶⁹

Commentators have argued that the danger of a successful United Nations resolution is:

[T]hat it puts the U.S. on the same path as in Iraq: a cat and mouse game with inspectors, repeated confrontations over compliance, and mission creep that draws the U.S. inexorably into a war. Indeed, a United Nations resolution similar to the French proposal, which sets up a strict schedule for Assad to give up his weapons and includes penalties for noncompliance, would immediately increase America’s military commitments in Syria.²⁷⁰

²⁶⁶ Paul Richter, ‘Kerry warns Syria of Possible U.N. Action Over Chemical Arms Delay’, *Los Angeles Times*, (31 January 2014) <<http://www.latimes.com/world/worldnow/la-fg-wn-kerry-syria-chemical-arms-20140131,0,7658514.story#axzz2tAy3eMqN>> accessed 1 June 2014

²⁶⁷ UN Security Council, ‘Security Council Resolution 1441 (2002) Concerning Iraq’, S/RES/1441 (8 November 2002)

²⁶⁸ United Nations, Charter of the United Nations, 1 UNTS 16 (24 October 1945)

²⁶⁹ Ryan Lizza, ‘Could Obama’s Syria Diplomacy Lead to War?’ *The New Yorker* (13 September 2013) <<http://www.newyorker.com/online/blogs/comment/2013/09/could-obamas-syria-diplomacy-lead-to-war.html>> accessed 24 October 1945

²⁷⁰ Ibid

The SIIC phase two report revealed this is the executive's preferred gambit, and accordingly it is rational to conclude that a Security Council resolution would set the nation on a course towards war which cannot be reversed, but the question that remains is whether Congress could halt this drive to war by voting down a bill for the authorization of the use of military force in Syria. The indications as of October 2013 were negative. It appeared that the executive would not seek statutory approval, but would instead rely on the authority of the Security Council resolution alone, as it did when intervening in the Libyan Civil War. Secretary of State Kerry said that 'said it was for the US to decide whether to attack Syria without congressional endorsement',²⁷¹ and Senate leaders appeared to concur that they would not need to give their approval in the event of a Security Council resolution,²⁷² despite the fact that such a resolution would not be pursuant to Chapter VII, as was the Libyan Resolution.²⁷³

This, however, would in fact be doubly problematic, as the executive would have neither the formal support of international or domestic law for its aggression. The

²⁷¹ Patrick Wintour, 'John Kerry Gives Syria Week to Hand Over Chemical Weapons or Face Attack', *The Guardian* (Manchester, 10 September 2013) <<http://www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry>>

²⁷² Associated Press, 'Administration seeks Congress' support for Syria plan' *Associated Press* (17 September 2013) <[http://www.usatoday.com/story/news/politics/2013/09/17/obama-syria-congress/2829139/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+UsatodaycomPolitics-TopStories+\(USATODAY++Politics+Top+Stories\)](http://www.usatoday.com/story/news/politics/2013/09/17/obama-syria-congress/2829139/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+UsatodaycomPolitics-TopStories+(USATODAY++Politics+Top+Stories))> accessed 1 June 2014

²⁷³ UN Security Council, 'Security Council Resolution 1973 (2011) concerning Iraq', S/RES/1973 (17 March 2011)

Obama Administration, however, clearly believes that it can survive with the support of senior party leaders alone, which it has secured and continues to keep apprised of its efforts.²⁷⁴ This is clearly not in compliance with any form of the rule of law, and a failure to impeach the President should the attack take place would clearly demonstrate that Congress is completely incapable of fulfilling its constitutionally mandated role of overseeing the executive branch. That said, the next section will demonstrate that over the past decade it has become clear that Congress simply will not consider impeachment, even on the basis of the most egregious violations of non-derogable norms and the unilateral expansion of the executive's discretionary powers.

4.8 Congress' Failure to Consider Impeachment

The ultimate technique of legislative control over the executive is the remedy of impeachment, which allows Congress to remove executive branch officials from office.²⁷⁵ The provisions for impeachment might allow for the punishment of an executive that has attempted to become immune from legislative oversight, and this process could also inaugurate the re-installation of the rule of law, as it did at the end of the Nixon Administration, as described in chapter two. Given the continued existence of this process well into the twentieth century, it remains for this thesis to explore whether it could save the rule of law in the United States in the twenty-first.

This section will show that it cannot, by demonstrating that, while still formally in existence, impeachment is by now a moribund method of legislative control, as the events of the last ten years demonstrate that it has fallen into desuetude. It will attempt

²⁷⁴ Associated Press *supra* n 272

²⁷⁵ United States Constitution, article 2, section 4

to detail how the leadership of both parties in the legislature have consistently blocked attempts to invoke this possibility. The reasons for this reticence, which relate to the incentives on legislators to favour war, will be explained in the next section below. Given the failure of Congress to seriously consider the impeachment of President Bush, even after the exposure of serious misconduct, it is possible to tentatively conclude that no assertion of executive supremacy over the laws would provoke this response from the legislature as it currently constituted. In addition, the following sections will also demonstrate that it has become increasingly less likely that Congress will find out about these forms of misconduct, making the existence of a formal remedy for executive malfeasance largely moot.

As was briefly described in chapters one and two, the head of the executive branch can be removed from office following a vote on articles of impeachment in the House of Representatives that commits the President to a trial in the Senate. This procedure was used during Andrew Johnson's administration. Johnson's failure to comply with a single statute was seen by the legislative branch during this era as a matter serious enough to warrant impeachment.²⁷⁶ As noted in chapter three, President Nixon was also the subject of these proceedings, although Nixon resigned shortly before a scheduled vote on the Articles of Impeachment, after he was told by his advisors that it was certain that he would be convicted in the Senate.²⁷⁷ He was to be charged with 'violating the constitutional rights of citizens', 'endeavouring to misuse the Central Intelligence Agency' and committing other abuses 'in a manner . . . subversive of

²⁷⁶ Chester G. Hearn, *The Impeachment of Andrew Johnson* (McFarland & Company 2007) 154-203

²⁷⁷ Bill Rhatican, *White House Under Fire* (AuthorHouse 2005) 399-400

constitutional government'.²⁷⁸ As noted in chapter three, this assertion of legislative superiority over the executive set the stage for the congressional resurgence that reconstructed the rule of law in the United States for the twentieth century.

This section will attempt to show, however, that if Congress wanted to pursue the same course of action following the revelations that the executive branch engaged in similar misconduct as Nixon during the twenty-first century, it has clearly missed its chance. On the basis of the revelations described in chapters three through six, it is impossible to imagine any form of misconduct that could yet occur that would be more deserving of impeachment. Furthermore, it will be demonstrated here that the issue of impeachment was placed squarely before the legislature over the past decade, but the legislators rejected each of these initiatives, thereby demonstrating that this remedy for an overweening executive has been reduced to a vestigial constitutional status.

As described in the last section, efforts to impeach President Bush were impeded significantly by the indefensible delays in the production of the Phase II report of the Senate Select Committee charged with investigating the manipulation of intelligence by the executive to justify an attack on Iraq. However by 2005, certain legislators in the House of Representatives believed that the 'Downing Street Memo'²⁷⁹ revealed that the executive engaged in impeachable misconduct. The memorandum of the minutes of a British Cabinet meeting noted that 'Bush wanted to remove Saddam, through

²⁷⁸ House of Representatives Committee on the Judiciary, 'Impeachment of Richard M. Nixon, President of the United States: The Final Report of the Committee on the Judiciary, House of Representatives' (Government Printing Office, 1974)

²⁷⁹ Matthew Rycroft, 'Iraq: Prime Minister's Meeting, 23 July' (23 July 2002)

<<http://web.archive.org/web/20110723222004/http://www.timesonline.co.uk/tol/news/uk/article387374.ece>> accessed 1 June 2014

military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy'.²⁸⁰

On this basis, Representative John Conyers secured thirty-eight co-sponsors for a resolution calling for an investigation of whether impeachment was appropriate.²⁸¹ Further efforts to this end followed in early 2006, but these were effectively shut down by Speaker of the House Nancy Pelosi, who indicated that 'impeachment was off the table',²⁸² i.e., not approved for the legislative agenda set by the majority party in Congress.²⁸³ It is notable that the Speaker of the House made these statements in response to a resolution seeking an investigation. It appears that Democratic Party leaders decided that whatever sort of evidence that it might unearth, this would be beside the point. The motivation for this refusal to consider impeachment will be discussed in the next section of this chapter.

After SIIC's Phase II report was finally issued, Representative Dennis Kucinich introduced a draft bill containing articles of impeachment against President Bush. The charges included 'interfering with and obstructing Congress's lawful functions of overseeing foreign affairs and declaring war . . . [by] allowing, authorizing and sanctioning the manipulation of intelligence analysis by those under his direction and

²⁸⁰ Ibid

²⁸¹ 109th Congress, House Resolution 365 (Rep. John Conyers, Sponsor)

²⁸² Charles Babington 'Democrats Won't Try to Impeach President,' *Washington Post* (Washington, 12 May 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101950.html>> accessed 1 June 2014

²⁸³ Nancy Zuckerbroad, 'Pelosi Says Democrats Are Ready to Lead', *Associated Press* (8 November 2006) <<http://www.foxnews.com/wires/2006Nov08/0,4670,Pelosi,00.html>> accessed 1 June 2014

control’; ‘declar[ing] the right to detain U.S. citizens indefinitely, without charge and without providing them access to counsel or the courts’; ‘authoriz[ing] . . . as official policy[] [w]ater-boarding, beatings, faked executions’ and other forms of torture; ‘establish[ing] a body of secret laws through the issuance of legal opinions’; ‘authorizing warrantless electronic surveillance of American citizens’; and with having ‘used signing statements to claim the right to violate acts of Congress even as he signs them into law . . . [and having] proceeded to violate the laws the statements claimed the right to violate’.²⁸⁴

As chapters three through six demonstrated, all of these charges were substantiated. However, the House of Representatives, which was still presided over by Speaker Pelosi, a very effective leader of the Democratic majority in that chamber,²⁸⁵ declined to vote on the bill. Instead, this bill was referred to the Judiciary Committee for further consideration, where it was disposed of without fanfare.²⁸⁶

Some indication of why these bills failed can be found in Representative Conyers’ introduction to the report of the House Judiciary’s exhaustive survey of executive overreaching, ‘Reigning in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush’.²⁸⁷ He wrote:

The simple fact is, despite the efforts of impeachment advocates, the support and votes have not been there, and cannot be expected to materialize The

²⁸⁴ Senate Select Committee *supra* n 227

²⁸⁵ Ronald M. Peters, Jr. and Cindy Simon Rosenthal, *Speaker Nancy Pelosi and the New American Politics* (Oxford University Press 2010) 229

²⁸⁶ David Swanson, *Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union* (Seven Stories Press 2009) 129

²⁸⁷ House Committee on the Judiciary Majority Staff *supra* n 98

resolution I offered three years ago simply to investigate whether an impeachment was warranted garnered only 38 cosponsors in the House, and the Democratic leader in the Senate [Harry Reid] labelled it ‘ridiculous’.²⁸⁸

Accordingly, it is clear that the impeachment resolutions introduced by Conyers and Kucinich were blocked by the leaders in each legislative chambers of the party nominally opposed to the one occupying the executive. To understand the motivations underlying this course of action, this thesis must turn in the next section to the explanation of the incentives for the reflexive support for the executive described in this chapter’s last five sections. Once these have been exposed, this thesis can deal with the counter-argument that impeachment might later prove to be an effective means of legislative control.

4.9 Explaining Congress’ Tolerance and Inaction

Scholars describing Congress’ inability to stand up to the executive’s onslaught on its constitutional powers in the ten years following the 9/11 attacks have not been kind to the legislative branch.²⁸⁹ They describe a problematic pattern that begins with its failure to exercise any meaningful role in decision-making on matters that are allegedly related to national security, as ‘members [of Congress] throw off the weight of constitutional responsibility and legislative prerogatives in the face of a difficult decision that pits Congress[] . . . against the executive’s view of the national interest’.²⁹⁰

²⁸⁸ Ibid 12

²⁸⁹ See e.g. Thomas E. Mann and Norman Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford University Press 2008)

²⁹⁰ Jasmine Farrier, *Congressional Ambivalence: The Political Burdens of Constitutional Authority* (University of Kentucky 2010) 112

Prominent theorists such as ‘James P. Pfiffner and Louis Fisher . . . argue that Congress largely abdicated its duties . . . in the face of executive branch exaggeration, obfuscation, and outright falsehoods about imminent danger to the United States from Iraq and the connection between Saddam Hussein and the 9/11 hijackers’.²⁹¹ These scholars argue that this pattern continued throughout the Bush Administration’s term, even after the party in opposition regained control of both houses of the legislature. ‘In 2007—2008, with the Democrats now in the majority, new intelligence policy battles between the White House and Congress [emerged] . . . and, ultimately, after several skirmishes, Bush prevailed’.²⁹² ‘On the rare occasion that Congress led the administration to a different position . . . somehow it allowed itself to be overrun again’.²⁹³

As was argued in chapter three, the same dynamic continues to frustrate congressional oversight over intelligence policy and national security matters during the Obama Administration. While there was considerable dissent within Congress over the course of the past decade, this has not led to a congressional resurgence, despite the egregious nature the misconduct. Jasmine Farrier described the inefficacy of these attempts at oversight and control as follows:

Congressional committees . . . question[ed] the nation’s intelligence problems related to 9/11, the Iraq War, and the administration’s management of the War on Terror in general. Confirmation hearings for new members of the executive branch raised questions about how delegated powers were used. Even scathing

²⁹¹ Ibid 118

²⁹² Ibid 116

²⁹³ Ibid 153

criticism from members of the president's own party in dozens of oversight hearings did not yield . . . changes in policy.²⁹⁴

Instead, those members of Congress who merely 'advocated the House and Senate's traditional prerogatives to review the administration's requests were branded obstructionists, or worse'²⁹⁵ and side-lined by their parties' leaderships at crucial moments, such as when attempts at control over the executive were made in the form of the draft bills and amendments described above. It appears from the foregoing that the only opposition that was tolerated by the party's legislative leadership was rhetorical opposition with no practical effect, which mirrored the ineffectual critiques of the executive's conduct pronounced by the Supreme Court described in chapter four. In both cases, it is simple to demonstrate that these admonitions did not serve the function of preserving the rule of law in the United States.

Any explanation of Congress' failure to check the executive in any meaningful way demands an analysis of the incentives and pressures on its members, whether these come in the form of negative reinforcement that conditions the legislators not to oppose the executive, or positive ones that encourage more active support. This investigation should begin with the question of whether the failure to exercise oversight and control has any consequences for these individuals. Scholars have concluded that it does not.

As Douglas Kriner predicted:

As long as members of Congress can rest secure in their re-election prospects even as popular confidence in Congress as an institution plummets, the impetus . . . will be lacking. Until voters begin to value effective oversight as much as

²⁹⁴ Ibid 159

²⁹⁵ Ibid

academics . . . electoral incentives may continue to trump institutional incentives to protect Congress' power from a wayward executive branch.²⁹⁶

In the three years since Kriner made this prediction, popular confidence in the legislative branch has fallen to its lowest level on record. As of June 13, 2013, only ten per cent of Americans said that they possessed 'a great deal' or 'quite a lot' of confidence in Congress. Not coincidentally, the highest rating for the legislature came directly after the Watergate hearings and President Nixon's resignation.²⁹⁷ However, the likelihood of incumbents being re-elected to either chamber remains both constant and exceptionally high. In 2012, the percentage chance of re-election was at or above ninety per cent for these legislators. This figure is roughly consistent with the mean level over the past twelve years.²⁹⁸

Accordingly, it is possible to conclude that legislators' failure to conduct meaningful oversight of the executive did not affect their ability to remain in office. However, one might argue in response that a legislator may not merely want to remain on the back benches, in a position of little to no prominence or influence. The question of what is required to thrive and succeed in the legislature, including obtaining positions of

²⁹⁶ Douglas Kriner, 'Can Enhanced Oversight Repair the "Broken Branch"', (2009) 89 Boston University Law Review 793

²⁹⁷ Elizabeth Mendes and Joy Wilke, 'Americans' Confidence in Congress Falls to Lowest on Record', *Gallup Politics* (13 June 2013) <<http://www.gallup.com/poll/163052/americans-confidence-congress-falls-lowest-record.aspx>> accessed 1 June 2014

²⁹⁸ Doug Mataconis, 'House And Senate Incumbent Re-Election Rates Top 90%', *Beyond the Beltway*, (13 December 2012) <<http://www.outsidethebeltway.com/house-and-senate-incumbent-re-election-rates-top-90/>> accessed 1 June 2014

leadership within a party, provides insight into the issue of whether there are powerful disincentives to confronting the executive.

The development of these forms of negative reinforcement took place after the congressional resurgence. The historian Walter Karp has suggested that the correct place to begin one's inquiry into the reassertion of executive power is the Carter Administration.²⁹⁹ Karp describes how the tumultuous disruption of the party system after Watergate allowed James 'Jimmy' Carter, the governor of Georgia and an outsider candidate deeply and morally committed to international peace, to prevail over the preferred nominees of the Democratic Party establishment, in particular Henry 'Scoop' Jackson,³⁰⁰ a war hawk and fervent anti-communist.³⁰¹ It should be noted that Jackson later became a key influence on the neo-conservative intellectuals described in chapter three, especially Paul Wolfowitz and Richard Perle. Wolfowitz and Perle were both on Jackson's staff in the early 1970s, and Perle served in this capacity for eleven years.³⁰² Jackson also supported Nixon despite the revelations about his abuses of executive power, and in the wake of the resignation provoked by legislative investigations and the Supreme Courts' decision in *United States v. Nixon* Jackson nevertheless called Nixon 'the first American President toppled by a mob'.³⁰³

²⁹⁹ Walter Karp, *Liberty Under Siege* (Franklin Square Press 1993)

³⁰⁰ *Ibid* 1-18

³⁰¹ Stephen Pelletière, *Israel in the Second Iraq War: The Influence of Likud* (Greenwood Publishing 2010) 16

³⁰² Janice Wedel, *Shadow Elite* (Basic Books 2009) 191

³⁰³ Karp *supra* n. 299, 39

Karp detailed the opposition within Congress and the Democratic Party to Carter's efforts to bring about peace with the Soviet Union, something which will shed significant light on the incentive structures that emerged during the period. As will be demonstrated below, these rewards and punishments continue to influence legislators' inclinations to support the executive branch whenever its foreign policy agenda leads inexorably to war. In particular, Karp detailed how 'one of Carter's first steps was to try to reform the intelligence agency [the CIA]',³⁰⁴ and his attempts to do so, which began with an attempt to remove its director, George H.W. Bush, were blocked by Congress.

Next, this section will detail how Congress failed to support President Carter's efforts to reach a comprehensive disarmament agreement with the Soviet Union, and subjected his plan to transfer sovereignty over the Panama Canal Zone to blistering criticism. This was followed by the unprecedented decision of the members of his own party to attempt to strip a sitting chief executive of his status as the party's nominee in the upcoming presidential election. This section will show that Congress' hostility to Carter can be attributed to its renewed support for aggressive war, which in turn must be explained by reference to the connections between legislators and what President Eisenhower labelled the 'military industrial complex'.

Carter was elected in 1976 after the failure of a 'Stop Carter' alliance involving almost all of the most powerful legislators and party bosses of the Democratic Party, including the Mayor of Chicago and Democrat kingmaker, James Daley.³⁰⁵ As will be detailed below, the opposition to Carter was motivated largely by his desire for peace.

³⁰⁴ Russ Baker, *Family of Secrets* (Bloomsbury Press 2009) 305

³⁰⁵ Karp *supra* n 299, 15-16

Remedial action following the failure to prevent Carter's election would soon follow. A mere nine days after his election, an alliance of politicians and public intellectuals was formed, known as the Committee on the Present Danger. This organization, which was a 'who's who of the Democratic establishment', will hereinafter be referred to as the 'CPD'. It was supported by the leaders of America's trade union federation, and leading industrialists such as Richard Mellon Scaife, a billionaire who gave Nixon an illegal million-dollar campaign contribution.³⁰⁶ The CPD announced a 'declaration of war against Carter's hopes for arms control and improved relations with the Soviet Union', which they repeatedly compared to Neville Chamberlain's policy of appeasement.³⁰⁷

The CPD's central claim was that the Soviet Union was committed to obtaining military supremacy over the United States and defeating it. As in the case of the preparation for the Iraq War and the interventions into the Libyan and Syrian Civil Wars described above, the CIA became a battleground in which competing assessments and interpretations of foreign state's intentions would stand or fall as justifications for aggressive American foreign policy. Congress and the executive were again on the opposite sides of this battle, but on the sides opposite to the positions they would assume in later policy disputes over aggressive war.

Carter refused to allow George H.W. Bush to continue in office as the Director of the CIA, despite Bush's appeals to remain.³⁰⁸ Instead he nominated Theodore 'Ted'

³⁰⁶ Robert Kaiser, 'Money, Family Name Shaped Scaife Burdens of Wealth', *Washington Post* (3 may 1999) A1

³⁰⁷ Karp *supra* n 299, 20

³⁰⁸ Baker *supra* n 304, 305

Sorenson, who was ‘the most important aide the President [Kennedy] had ever hired’.³⁰⁹ Sorenson, like Kennedy, was a proponent of international peace and effective arms control, and was an opponent of the Vietnam War. He was one of the few public figures to commend Daniel Ellsberg for revealing the executive branch’s lies about the Vietnam War by leaking the Pentagon Papers, in actions that prefigured those of Chelsea (formerly Bradley) Manning, Edward Snowden, and the other whistle-blowers described in the next section.³¹⁰ Paradoxically, the CPD and its legislative allies would keep Sorenson from being confirmed to lead the CIA precisely because he was an opponent of falsified intelligence, and possibly because he would have been a powerful ally for Carter, who ‘had been elected with a mandate and an ambition to open up the government’ in response to this sort of manipulation.³¹¹ Sorenson was exceptionally attuned to the pressures on the executive to accede to suggestions for aggressive action, having served under Kennedy during the Cuban Missile Crisis and the demands for rapid escalation of American involvement in Vietnam after the assassination of Ngo Dinh Diem.³¹² Accordingly, it is likely that he would not have provided support for bellicose foreign policy.

On January 13, 1977, the Senate Intelligence Committee examined affidavits from Sorenson in which he asserted that the release of the Pentagon Papers presented no threat to the national security of the United States, and that the classification system for

³⁰⁹ Laurence Learner, *The Kennedy Men: 1901-1963* (Harper Collins 2001) 359

³¹⁰ Ted Sorenson, *Counselor: A Life at the Edge of History* (Harper Collins 2008)

³¹¹ Baker *supra* n 304, 305

³¹² Robert D. Schulzinger, *A Time for War : The United States and Vietnam, 1941-1975* (Oxford University Press 1997) 100

intelligence-related documents was ‘grotesquely overblown’.³¹³ The Senate responded with outrage at this defence of someone who was by now tarred as a traitor. Sorenson’s fate was sealed when the Senate Majority leader, who was a member of Carter’s own party, said at a press conference that he would not endorse Sorenson, without even bothering to inform the President in advance.³¹⁴ As Karp chronicled:

To gauge the full measure of the victory—and of Carter’s stunning defeat—parliamentarians delve into the archives and report that . . . the last time a Senate of the President’s own party had done such as thing was 1925 . . . and the lesson is: How feeble is a President with no party to support him.³¹⁵

After Sorenson’s nomination failed, Carter nominated Admiral Stansfield Turner, who proved to be a ‘fish out of water—actually as unfamiliar with the inner workings of the agency as George H.W. Bush had pretended to be’ who was ‘unprepared for the ruthless internal politics of the CIA’.³¹⁶

Turner was loathed by those intelligence professionals found at the top ranks of their agencies, who remained devoted to the idea that war with the Soviet Union was inevitable. The memoirs of the then-head of French intelligence service give some indication of how heretical any doubts about this proposition were at the time. He wrote, ‘[i]f the head of the CIA began by questioning the power and tenacity of his country’s principal enemy . . . there was little hope for the integrity of the agency’.³¹⁷ Turner was

³¹³ Karp *supra* n 299, 28

³¹⁴ Ibid

³¹⁵ Ibid 29

³¹⁶ Baker *supra* n 304, 305

³¹⁷ Alexandre de Marenches and David Andelman, *The Fourth World War: Diplomacy and Espionage in the Age of Terrorism* (William Morrow & Co. 1992)

opposed by his own deputy, Hank Knoche, who bypassed his superior and communicated through a back-channel to the National Security Council.³¹⁸

In addition, less than a year before Carter took office, Bush appointed a special group of analysts who would produce politicised and faulty raw intelligence at the CIA director's bequest. Their conclusions were not subjected to the normal vetting process, as detailed above when discussing the manipulation of intelligence before the Iraq War, in order 'to get around the analysts who did not sufficiently hype the Soviet threat', and who 'had accurately determined that the USSR was already in decline'.³¹⁹ This group, known as 'Team B', included both Wolfowitz and Paul Nitze, who also served as founding members of the CPD.³²⁰ The stage was thus set for the debate over competing estimations of Soviet military spending and military preparedness, which would itself determine the probability of success for Carter's arms control agenda.

With Knoche in effective control over the CIA, the professional analysts who supported arms control with accurate assessments of Soviet military technology and strategic aims never stood a chance. The CIA soon 'shifted 180 degrees' and produced an estimate that constituted 'a high barrier for the Carter Administration to overcome in its pursuit of arms control', as it turned the Committee for the 'Present Danger[']s] alarms into the new official orthodoxy',³²¹ something made easier by the support of the labour movement. During this period, the AFL-CIO, 'in partnership with right-wing lobbyists

³¹⁸ Baker *supra* n 304, 306

³¹⁹ Ibid. 260; 432

³²⁰ Mike Gravel and Joe Lauria, *A Political Odyssey: The Rise of American Militarism and One Man's Fight to Stop It* (Seven Stories Press 2008) 126

³²¹ Karp *supra* n 299, 27

for U.S. nuclear supremacy' produced a film 'depicting the folly of détente and the menace of arms control'.³²² It appeared that the intelligence community, the think-tanks allied to it, and the labour movement were all in favour of an aggressive foreign policy and concomitant levels of military spending, and thus solidly against Carter. The incentives that produced this hawkish approach will be discussed in the next section of this chapter.

Carter's attempt to formalize the Vladivostok Accords and make them binding was subject to constant obstruction in Congress by the Democratic Senate Majority leader, who even attempted to prevent the President from lobbying the members of his own party with seats in that chamber.³²³ In a bid to block a SALT II treaty, Congress repeatedly forced Carter to ask the Soviets for further concessions, with which they thought no adversary could agree. However, the USSR was in fact under severe economic pressure, as the CIA concluded prior to Team B's formation. Accordingly Leonid Brezhnev agreed to each proposal in turn.³²⁴ Despite the fact that the treaty was never formally ratified by the Senate, the Soviet Union complied with its provisions for the next seven years.³²⁵ Clearly the Soviet Union was not nearly as belligerent as the proponents of increased military spending would have the American public believe, but they succeeded in scuttling any policy initiatives that would expose the possibility of effective peace-making.

³²² Ibid

³²³ Ibid 41

³²⁴ Brezhnev agreed to further concessions on SALT II.

³²⁵ Keith L. Shimko, *Images and Arms Control: Perceptions of the Soviet Union in the Reagan*

Administration (University of Michigan Press 1991) 177

Carter faced considerable opposition to all of his attempts to reduce the aggressive posture of the military, which was especially fierce when he proposed reductions to the footprint of the American armed forces overseas. Congress would seize upon statements from experts or military officials that would reinforce Scoop Jackson and the CPD's chosen narrative. The congressional narrative was that Carter sought to weaken the nation in a manner that was practically treasonous.³²⁶ Four months into his presidency, the commander of United States forces in South Korea, Major General John K. Singlaub, claimed that Carter's plans to withdraw troops would inevitably lead to war.³²⁷ Singlaub later became a full-time critic of initiatives for peace, joining a Democratic congressman from Carter's home state to found the Western Goals Foundation, 'which was supposed to blunt subversion, terrorism, and communism in the United States . . . filling a gap created by the disbanding of House Un-American Activities Commission and what he considered the crippling of the FBI in the 1970s'.³²⁸

The backlash over this redeployment was minor compared to what the President experienced as he negotiated the Torrijos-Carter Treaties, which involved the transfer of sovereignty over the Panama Canal Zone to the country in which it is located by 1999.³²⁹ As Carter recalls of those days in his memoirs:

³²⁶ Karp *supra* n 299, 19-42

³²⁷ *Ibid* 50

³²⁸ Associated Press, 'McDonald's peers note tragic irony', *Associated Press* (2 September 1982)

<<http://news.google.com/newspapers?id=I9kRAAAAIBAJ&sjid=p-4DAAAIAIBAJ&pg=6859%2C844160>> accessed 1 June 2014

³²⁹ Officially, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and the Panama Canal Treaty 1977.

Antagonistic House committees held public hearings even before the negotiations were completed. That summer, a stream of witnesses and some of the committee members had paraded before the television cameras their arguments that the treaty was illegal, unpatriotic, a cowardly yielding to blackmail, a boon for communism and a threat to our nation's security.³³⁰

These battles made it clear that legislative support for the executive after 1976 did not hinge so much on the party affiliation of the legislator and the President or even on the legislator's view of the relative constitutional powers of these branches of government. According to Karp, the President was 'surprised that . . . [Senator] John Stennis would try to weaken his presidency by providing a forum for a few retired military officers to declaim against Soviet threats to the Caribbean, when this self-same Stennis was so strong a champion of a "strong presidency" that he was prepared to lie through his teeth to conceal Nixon's impeachable offenses from the Senate'.³³¹

The perception of Carter as ineffectual and weak on matters of defence and national security was largely responsible for his defeat at the hands of Ronald Reagan in the 1980 Presidential election, which was facilitated by the Democratic Party's remarkable betrayal of Carter by allowing candidates to challenge him in the party's primaries before the presidential election.³³² Reagan managed to project the opposite image, and was quite prepared to antagonize the Soviet Union to that end.³³³ This is well-known, but what is less widely understood is how Congress, including or perhaps especially the

³³⁰ Quoted in Karp *supra* n 299, 59-60

³³¹ *Ibid* 60

³³² Burton Hersh, *The Shadow President: Ted Kennedy in Opposition* (Publishing Group West 1997) 39-42

³³³ James M. Scott, *Deciding to Intervene: The Reagan Doctrine and American Foreign Policy* (Duke University Press 1997) 17-39

members Carter's own party, made this possible by furthering the CPD's narrative of national security, which Reagan successfully appropriated. The question that remains is why these members of the legislature would act in such a manner. Why would they respond so favourably to the attempts of an assortment of public intellectuals, generals, trade union leaders, and industrialists dedicated to increasing military spending and confronting America's purported enemies?

The key to understanding this lies in identifying an appropriate label for precisely this confluence of interest groups, one that was first used by President Eisenhower in his farewell speech to the American people, on the conclusion of his second term as President in 1961. The term Eisenhower used was the 'military-industrial complex', although earlier drafts of this speech used the clearer but less rhythmic phrase 'war-based industrial complex'.³³⁴ In this speech, Eisenhower, a former Supreme Commander of Allied Forces in Europe and architect of the D-Day landings, warned the nation:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence — economic, political, even spiritual — is felt in . . . every office of the federal government . . . we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society. In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists, and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted.³³⁵

³³⁴ John Milburn, 'Papers shed light on Eisenhower's farewell address'. *Associated Press* (10

December 2010) <http://www.usatoday.com/news/nation/2010-12-10-eisenhower-address_N.htm>
accessed 1 June 2014

³³⁵ Dwight D. Eisenhower, 'Military-Industrial Complex Speech', *Avalon Project* (17 January 1961)

<http://avalon.law.yale.edu/20th_century/eisenhower001.asp>

By the end of the Cold War, the arms industry encompassed a much larger portion of the American economy and organised labour than it did in 1961. It remains one of the most profitable industries,³³⁶ and the captains of industry associated with it are among the nation's most wealthy. In addition, the use of American military power props up many other industries, such as the oil industry and others that rely on favourable access to raw materials and foreign markets.³³⁷ It even supports the American economy as a whole, insofar as the status of the American dollar as the world's key reserve currency allows the United States to continue to subsidize its economy even as its public debt reaches unprecedented levels.³³⁸ The Cold War was vital to American capitalism, and this created an incentive for many influential sectors of society to oppose Carter's dovish agenda, which will be explored more fully below.

This does not answer the question of why the drive for military aggression and massive expenditures on arms was successfully defeated by Congress in 1973 and then re-embraced in 1976. Changes in popular opinion are undoubtedly significant. As described in chapter two, the Vietnam War was unpopular by the time of Watergate. However, the key to this issue are the changes that occurred during the interim to the rules that govern donations to politicians. In 1971, Congress passed legislation allowing

³³⁶ Hossein Askari, Amin Mohseni, and Shahrzad Daneshvar, *The Militarization of the Persian Gulf: An Economic Analysis* (Edward Elgar Publishing 2009) 9

³³⁷ Rolf Hackmann, *Globalization: Myth, Miracle, Mirage* (University Press of America 2005) 202-203

³³⁸ Alex Merck, *Sustainable Wealth: Achieve Financial Security in a Volatile World of Debt* (John Wiley & Sons 2010) 96-102

for corporate campaign contributions,³³⁹ which were outlawed in 1907,³⁴⁰ although it continued to forbid any corporation that had existing contracts with the government from doing so or forming a political action committee to that end. This measure barred defence contractors from influencing legislators in one highly effective manner. However, amendments passed in 1974 to the Federal Election Campaign Act of 1971 removed this limitation, and opened the floodgates allowing the defence industry's influence to inundate the political terrain. Further amendments followed in 1977, in response to the Supreme Court's decision *Buckley v. Valeo*,³⁴¹ which struck down many of the remaining limits on campaign contributions as violations of the Constitution's guarantee of free speech.³⁴²

At this point, it increasingly became possible for corporations and labour unions to use unlimited amounts of 'soft' money that supported candidates indirectly, by supporting their stances on issues, rather than the politicians themselves, in theory.³⁴³ The effect on the American politics was predictable, and has continued and accelerated over the course of the following three decades.³⁴⁴ The net effect of this development is that success in American politics is now inextricably linked with fund-raising, which

³³⁹ Federal Election Campaign Act 1971, Public Law 92-225

³⁴⁰ Tillman Act of 1907, 34 Statutes 864

³⁴¹ *Buckley v Valeo* [1976] 424 US 1 (United States Supreme Court)

³⁴² James T. Bennett, *Stifling Political Competition* (Springer 2009) 69-75

³⁴³ Kathleen Hall Jamieson, *Packaging The Presidency: A History and Criticism of Presidential Campaign Advertising* (Oxford University Press 1996) 378-445

³⁴⁴ *Ibid* 446-524

not only secures re-election but also power and influence within parties, as the ability to direct the way in which campaign funds are spent is of vital importance to these organizations.³⁴⁵

As the next section will demonstrate, by the twenty-first century there was a very close nexus between support for war and political success in the United States, for precisely the above-described reasons. This explains how after the congressional resurgence, the legislature can swing between opposition to the aberrational executive branches directed by administrations who supported initiatives for peace and support for those who agitate for war, even at the expense of the credibility of the institution of Congress itself. It will become clear that American federal legislators, owing to the nature of the campaign financing system, have not managed to serve as a check on the executive when it exercises its powers, including those it has appropriated to itself in contravention of the Constitution, in order to violate non-derogable rights so that it might produce justifications for aggressive war. This thesis has attempted to demonstrate that the executive's ability to launch wars on its own initiative is not only a repudiation of the rule of law, but that it makes possible a dynamic in which the executive becomes entrenched against attempts to reinstall the constitutional order, and which catalyses violations of non-derogable rights that protect this position. It demonstrated that the incentives that prevent the legislature from controlling executive war-making are of the highest importance to the rule of law. This highlights the importance of the question of whether it is possible for the legislature to interrupt a self-reinforcing cycle of aggressive war and an unchecked executive's violations of non-

³⁴⁵ Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making* (University of Oklahoma Press 2006) 140

derogable rights. If the answer is no, it is difficult to imagine how the crisis of the rule of law in the United States can be described as other than a permanent state of emergency, with no prospects for a return to constitutional governance in the immediate future.

4.10 Can There be a Rule of Law Without Oversight?

In chapters four, five and six, this thesis indicated that there seems to be ineffective oversight in foreign affairs over the executive branch, and that there are no indications that the judiciary or legislature are capable of re-imposing the checks and balances to discretionary executive power that the rule of law requires, owing to structural problems related to the selection process for both federal jurists and legislators. While this would appear to foreclose the conclusion that the United States is governed in accordance with the minimum requirements of the rule of law, as outlined by the International Commission of Jurists and discussed in chapter one, this thesis must examine an influential contemporary counter-argument. While this thesis will not revisit the definition of the rule of law, it is possible to address these arguments by discussing whether the alternatives that these authors propose for judicial and legislative control over the executive branch are adequate substitutes.

Eric Posner is a Professor at the University of Chicago, and son of Richard Posner, a prominent judge and longstanding proponent of strong executive power.³⁴⁶ Adrian Vermeule is tenured at Harvard University. He previously clerked for Judge Sentelle of the D.C. Circuit, which, as discussed in chapter five, was key to the demolition of the

³⁴⁶ See Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003)

rule announced in *Boumediene*.³⁴⁷ Together, Posner and Vermeule write in The Executive Unbound that despite the absence of effective legal control over the executive, it is nonetheless subject to limitations that should be considered sufficient, even by those who advocate for the rule of law.³⁴⁸ They present this claim in opposition to critics whom they label as liberal legalists who ‘define tightly constrained executive power as an essential element of the rule of law’, a point of view which they do not define adequately,³⁴⁹ although they present David Dyzenhaus as an example of this sort of theorist.³⁵⁰

What is most remarkable about this argument, the most prominent response to constitutional scholars concerned with the massive expansion of executive power and concomitant lack of any checks on these broad grants of discretionary power, is that it concedes most of these scholars’ premises. However, Posner and Vermeule argue that not only is legal control over the executive undesirable, but purportedly impossible, especially during an undefined time of ‘crisis’.³⁵¹ This, they suggest, is partly because

³⁴⁷ Sentelle was also on the appellate panel (along with Judge Laurence Silberman) that reversed the convictions of Oliver North and John Poindexter, who executed the executive branch’s plans to defy Congress during the Iran-Contra crisis, discussed in chapters two and three. *United States v Poindexter* [1991] 951 F2d 369 (D.C. Circuit)

³⁴⁸ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2010) 89-112

³⁴⁹ Louis Fisher, ‘Book Review: Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*’, (2011) 38 *Congress & the Presidency* 347

³⁵⁰ Posner and Vermeule *supra* 348, 90-97

³⁵¹ *Ibid* 5-15

of the apparent need for effective and immediate responses in times of crisis and partly because of the nature of the administrative state, which concentrates more power in the executive branch by necessity. Critics of Posner and Vermeule have pointed out the paucity of this argument.³⁵²

It is also remarkable that Dicey, who created the modern definition of the rule of law precisely because of the prospect of the administrative state, is referenced precisely once in the book, as an example of a ‘liberal theorist’.³⁵³ Jürgen Habermas, who has written extensively and authoritatively on the subject of the problem of authentic political representation and legitimacy in administrative states,³⁵⁴ is not cited at all. In contrast, the Nazi jurist Carl Schmitt is given pride of place as a proponent of executive dominance, as he provides the model for ‘a new [and, for the authors, desirable] political order’.³⁵⁵

The failure to discuss Habermas’ conceptions of civil society and the public sphere are understandable, however, given Posner and Vermeule’s under-developed ideas about public opinion and political responsibility, which posit and depend upon the idea

³⁵² See e.g. Richard Pious, ‘Book Review: Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*’, in [2011] *Presidential Studies Quarterly* 864

³⁵³ Posner and Vermeule *supra* n 348, 5

³⁵⁴ Jürgen Habermas, *Structural Transformation of the Public Sphere* (MIT Press 1991)

³⁵⁵ Posner and Vermeule *supra* n 348, 51-54, 15

that³⁵⁶ the executive branch is always responsive to the wishes of those that vote. This remarkably formalistic and reductive view of the political process, which ignores the importance of campaign financing as discussed in the last section, is oversimplified, even by the standards of rational choice and game theory in political science.³⁵⁷ As Richard Pious notes, '[i]n this entire discussion, there is not a word about bureaucratic or interest group lobbying for such black and grey holes [i.e., explicit and implicit delegations of unreviewable authority to the executive] not a word about iron triangles and issue networks, not a word about political action committees and campaign finance'. The conclusion is also empirically false, as demonstrated by the polling about the Iraq War and the aggressive interventions into the Libyan and Syrian Civil Wars discussed in the last sections.

Another key flaw in Posner and Vermeule's argument that pressure from the electorate is an effective substitute for legal responsibility is the fact that public opinion can only be mobilized against the executive's efforts if these actions are not kept secret. As chapters two and three indicated, the executive has gone to great lengths to keep its violations of non-derogable rights secret. Chapters four and five noted that courts no longer have the right to disclose information on these violations, even to the victims, owing to the creation of prudential doctrines such as the state secrets privilege. Earlier sections of this chapter demonstrated that Congress delayed exposing the pattern of the executive's repeated violations of *jus cogens* norms.

³⁵⁶ See Harvey Mansfield, 'Is the Imperial Presidency Inevitable?' *New York Times* (New York, 11 March 2011) <http://www.nytimes.com/2011/03/13/books/review/book-review-the-executive-unbound-by-eric-a-posner-and-adrian-vermeule.html?pagewanted=all&_r=0> accessed 1 June 2014

³⁵⁷ Ian Shapiro, *Pathologies of Rational Choice Theory* (Yale University Press 1994)

Recent events demonstrate that congressional oversight has become even less effective, as the legislature now assists the executive to keep abuses of its discretionary authority from the public. Congress' response to the disclosure of mass surveillance by the NSA in 2013 is a telling example. After the executive's statutory powers were expanded repeatedly by the Patriot Act³⁵⁸ and various amendments to FISA, it was revealed by Edward Snowden, a contractor for the agency turned whistle-blower,³⁵⁹ that this agency routinely and indiscriminately collected telephone calls, e-mails, and information shared via social media from over one billion people, including American citizens.³⁶⁰ Not only did Snowden reveal a vast illegal and unconstitutional domestic spying program, but he revealed that Director of National Intelligence James Clapper, the United States' most senior intelligence official, lied under oath when testifying about surveillance before a congressional oversight committee. Clapper, when asked by a Senator if 'the NSA collect[s] any type of data at all on millions or hundreds of millions of Americans?' he replied 'No'.³⁶¹ However, after Snowden's revelations, Clapper

³⁵⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001, Public Law 107-56

³⁵⁹ Glenn Greenwald, 'NSA collecting phone records of millions of Verizon customers daily', *The Guardian* (Manchester 6 June 2013) <<http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>> accessed 1 June 2014

³⁶⁰ Ibid

³⁶¹ Glenn Kessler, 'James Clapper's "Least Untruthful" Statement to the Senate,' *Washington Post* (Washington, 12 June 2013) 'http://www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459_blog.html

apologized and admitted his answer was ‘clearly erroneous’, although he defended himself by, saying ‘mistakes happen’,³⁶² echoing Nixon’s famous statement that ‘mistakes were made’.

A small number of legislators called for Clapper to be prosecuted for perjury or obstruction of justice, as was recently the case with the baseball player Roger Clement who lied to Congress about his use of performance-enhancing drugs, and earlier for Oliver North and John Poindexter, although their convictions were overturned by Judges Silberman and Sentelle. They also called for the release of secret OLC memoranda which authorized this type of surveillance, which undoubtedly provided explicit authorization for ignoring both statutory law and the Constitution and establishing beyond doubt that Clapper knew he was not telling the truth before Congress.³⁶³ However, these proposals came to nothing. President Obama said unequivocally to a particularly broad section of the public and in response to Snowden’s revelations that ‘there is no spying on Americans’.³⁶⁴ He then headed off calls for a congressional investigation by announcing an internal executive branch review of whether laws were broken, ostensibly to be overseen by Clapper. Congress accepted this executive-branch review of its own conduct, rather than rejecting it like it did the Rockefeller Commission, as described in chapter two. The President pre-empted calls for Congress

³⁶² Ibid

³⁶³ ‘Letter of Twenty-Six Senators to James Clapper’ (27 June 2013)

<<http://www.theguardian.com/world/interactive/2013/jun/28/senators-letter-james-clapper>> accessed 1 June 2014

³⁶⁴ Greg Henderson, ‘Obama To Leno: “There Is No Spying On Americans”’, *National Public Radio* (Washington, 13 August 2013) <<http://m.npr.org/news/front/209692380>> accessed 1 June 2014

to launch an investigation like Church Committee's. This appears to demonstrate that there is little to no prospect of Congress reinstalling the oversight necessary to the rule of law as it did from 1974 to 1980.

Glenn Greenwald noted that after these revelations, Congress was far more concerned with the purported illegality of making the executive's illegal conduct public than with the wrongdoing that was revealed.³⁶⁵ This is lamentable, as Snowden revealed that it was not only Clapper who lied to Congress, but rather multiple 'senior administration officials'³⁶⁶. He also noted that '[b]eyond its criminality, lying to Congress destroys the pretence of oversight. Obviously, members of Congress cannot exercise any actual oversight over programs which are being concealed by deceitful national security officials'.³⁶⁷ However, instead of focusing on this serious challenge to the rule of law, senior legislators fixated on the whistle-blower, who performed a public service in bringing this mendacity and illegal conduct to their attention. Chairperson of the Senate Select Committee on Intelligence Diane Feinstein called Snowden a traitor,³⁶⁸ and approved of the executive branch's remarkable act of international provocation, interfering with the flight path of a head of state in an attempt to arrest

³⁶⁵ Glenn Greenwald, 'James Clapper, EU play-acting, and political priorities', *The Guardian* (Manchester 3 July 2013 <<http://www.theguardian.com/commentisfree/2013/jul/03/clapper-lying-snowden-eu-bolivia>>

³⁶⁶ Miller *supra* n 176

³⁶⁷ Greenwald *supra* n 365

³⁶⁸ Jeremy Herb and Justin Sink, 'Sen. Feinstein calls Snowden's NSA leaks an "Act of Treason"', *The Hill*, (Washington, 10 June 2013) <<http://thehill.com/blogs/defcon-hill/policy-and-strategy/304573-sen-feinstein-snowdens-leaks-are-treason>> accessed 1 June 2014

Snowden.³⁶⁹ She did so while ignoring the fact that the executive was acting in a way that rendered her committee's oversight merely nominal.³⁷⁰

These divergent and disproportionate responses to the revelations of executive wrongdoing and those that reveal it, is in fact common in twenty-first century America. John Kiriakou, a former CIA case officer and senior investigator for the Senate Foreign Relations Committee was sent to prison for revealing details about the waterboarding of detainees to a journalist.³⁷¹ Private Manning was subjected to conditions the United Nations Special Rapporteur for Torture concluded amounted to cruel and inhuman treatment,³⁷² before being convicted and sentenced to thirty-five years in prison for presenting evidence about activities such as the 'collateral murder' recording. That video documents the killing of unarmed Iraqi civilians and Reuters journalists by an

³⁶⁹ Catherine E. Shoichet 'Bolivia: Presidential Plane Forced To Land After False Rumors Of Snowden Onboard,' *Cable News Network* (3 July 2013)
<<http://www.cnn.com/2013/07/02/world/americas/bolivia-presidential-plane>> accessed 1 June 2014

³⁷⁰ Raju Chebium, 'Feinstein to Review Surveillance Programs: But Critics Expect Little From Hearings,' *Gannet Wire Service* (Washington 24 August, 2013)
<<http://www.statesmanjournal.com/article/20130825/NEWS/308250026/Feinstein-review-surveillance-programs>>

³⁷¹ Steve Coll, 'The Spy Who Said Too Much: Why the Administration targeted a C.I.A. officer', *The New Yorker* (New York, 1 April 2013),
<http://www.newyorker.com/reporting/2013/04/01/130401fa_fact_coll> accessed 1 June 2014

³⁷² Ed Pilkington, 'Bradley Manning's treatment was cruel and inhuman, UN torture chief rules', *The Guardian* (Manchester, 12 March 2012) <<http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>> accessed 1 June 2014

American helicopter gunship.³⁷³ Julian Assange, who helped to bring the video to light, was indicted in secret by an American grand jury,³⁷⁴ in a proceeding that involved no judicial oversight, but merely a presentation by executive branch officials.³⁷⁵ Shama Leibowitz, an Israeli-American lawyer, was convicted for releasing classified documents, which his trial judge admitted having not seen,³⁷⁶ as the executive deemed them too sensitive to reveal *in camera* to a federal court. Leibowitz revealed these in order to document his concerns about ‘aggressive efforts to influence Congress and public opinion . . . regarding strike[s] against nuclear facilities in Iran’.³⁷⁷ Congressional concern with punishing those who reveal executive branch wrongdoing, rather than with its violations of non-derogable norms and plans to launch the wars that reinforce the cycle of unaccountability, demonstrates that the legislative branch will not play the same role that it did after Watergate at any time in the near future.

³⁷³ Al Jazeera, ‘Video shows “US attack” on Iraqis’. *Al Jazeera English* (Doha, 5 April 2010)

<<http://www.aljazeera.com/news/americas/2010/04/201045123449200569.html>> accessed 1 June 2014

³⁷⁴ Michael Hastings, ‘WikiLeaks Stratfor Emails: A Secret Indictment Against Julian Assange?’,

Rolling Stone (New York, 28 February 2013) <<http://www.rollingstone.com/politics/blogs/national-affairs/wikileaks-stratfor-emails-a-secret-indictment-against-assange-20120228>> accessed 1 June 2014

³⁷⁵ United States Department of Justice, *Grand Jury Manual* (Government Printing Office 1991)

³⁷⁶ Maria Glod, ‘Former FBI employee sentenced for leaking classified papers’, *Washington Post*

(Washington, 25 May 2010) <<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052403795.html>> accessed 1 June 2014

³⁷⁷ Scott Shane, ‘Leak Offers Look at Efforts by U.S. to Spy on Israel’, *New York Times* (New York, 5 September 2011) <<http://www.nytimes.com/2011/09/06/us/06leak.html?pagewanted=all>>

Perhaps most disturbingly, the United States has attempted to interfere with the reporters who have helped whistle-blowers bring these abuses to the public's attention. Journalist Glenn Greenwald's courier was held at Heathrow Airport for nine hours pursuant to legislation pertaining to terrorism suspects, during which time he was questioned about Snowden and Greenwald's activities, allegedly at the request of American authorities. All of his files on this story were seized.³⁷⁸ Speaking about the executive branches of the United States and the United Kingdom, the editor-in-chief of the Manchester Guardian noted that '[t]he governments are conflating journalism with terrorism and using national security to engage in mass surveillance. The implications just in terms of how journalism is practiced are enormous'.³⁷⁹ The rule of law itself is affected by this criticism of reporting, as legislative oversight now relies entirely on these exposés of executive wrongdoing, as thanks to these leaks we know that intelligence officials lie to Congress. If there are no whistle-blowers, the executive will not only be able to violate non-derogable rights with impunity, but it will be able to do so in secret.

Greenwald did the legislature a great service, by demonstrating how Congress has been 'blocked' from receiving 'the most basic information' about the activities of the

³⁷⁸ Glenn Greenwald, 'Glenn Greenwald: detaining my partner was a failed attempt at intimidation',

The Guardian (Manchester, 13 August 2013)

<<http://www.theguardian.com/commentisfree/2013/aug/18/david-miranda-detained-uk-nsa>> accessed 1 June 2014 (David Miranda, who carried files between Greenwald and the journalist Laura Poitras, is also Greenwald's domestic partner).

³⁷⁹ David Carr, 'War on Leaks Is Pitting Journalist vs. Journalist', *New York Times*, 25 August 2013

<<http://www.nytimes.com/2013/08/26/business/media/war-on-leaks-is-pitting-journalist-vs-journalist.html?pagewanted=1>> accessed 1 June 2014

intelligence community. The executive has denied it this information about the violation of non-derogable rights. It does so at while executive branch officials perjure themselves about these activities before the legislature and prosecute those who attempts to reveal that fact. Congress' indifference to this blatant manipulation reveals that it has no intention of performing the oversight and control functions over the executive that the rule of law requires.

It is not difficult to demonstrate that it fails to re-impose the rule of law for the same reasons that it pre-empted peaceful overtures to the Soviet Union. The war-based industrial complex is simply too profitable, and it has become excessively easy to influence the legislators with these profits. The military budget of the United States has remained constant at approximately seven hundred billion dollars a year over the past decade,³⁸⁰ most of which is distributed to American defence contractors.³⁸¹ This is a larger figure than the total of all discretionary federal spending.³⁸² In addition to this, there is now a large lobby formed by the contractors who support covert intelligence activities, as the secret 'black budget' for the intelligence agencies, which was leaked by Edward Snowden revealed that approximately fifty billion dollars is spent in this manner annually. The majority of expenditures are made in the form of payments to private sector contractors. This is a figure 'larger than the sums received by the

³⁸⁰ David Isenberg, 'Budgeting for Empire: The Effect of Iraq and Afghanistan on Military Forces, Budgets, and Plans', *Independent Policy Report* (30 January 2007)

<http://www.independent.org/pdf/policy_reports/2007-01-30-budgeting.pdf> accessed 1 June 2014

³⁸¹ Leon V. Sigal, *The Changing Dynamics of U.S. Defense Spending* (1999, Greenwood Publishing) pp. 153-171

³⁸² Alexander DeVolpi et al. (eds), *Nuclear Shadowboxing: Legacies and Challenges*, vol. 2, 5-42

Department of the Interior, the Department of Commerce and NASA this year combined'.³⁸³ Accordingly, the same dynamic of a powerful lobby allying itself with a hawkish executive in a manner that prevents effective legislative oversight as described above with respect to the defence industry can now replicate itself within the private sector arms of the intelligence community.

The war-based military-industrial and intelligence complex is able to exert considerable influence over legislators by means of campaign spending that has also expanded exponentially over the past decade. The Supreme Court's decision in *Citizens United v. Federal Election Commission*³⁸⁴ allowed for so much corporate spending that the head of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe opined that this judgment might create an electoral system that violates the ODIHR's two core requirements of 'giving voters a genuine choice and giving candidates a fair chance', insofar as this ruling 'threatens to further marginalize candidates without strong financial backing or extensive personal resources, thereby in effect narrowing the political arena'.³⁸⁵

³⁸³ Russia Today, 'Snowden reveals US intelligence's black budget: \$52.6 billion on secret programs', *Russia Today* (Moscow, 29 August 2013) <<http://rt.com/usa/snowden-leak-black-budget-176/>> accessed 1 June 2014

³⁸⁴ *Citizens United v Federal Elections Commission* [2010] 558 US 310 (United States Supreme Court)

³⁸⁵ Office for Democratic Institutions and Human Rights 'Press Release: Head of OSCE election body concerned about U.S. Supreme Court ruling on election spending', *Office for Democratic Institutions and Human Rights* (22 January 2010) <<https://web.archive.org/web/20130112213852/http://www.osce.org/odihr/elections/51838>>

This prediction was clearly correct, as major defence contractors took advantage of the new rules to that end. Their power to do so effectively is illustrated by the fact that one conglomerate alone, Koch Industries, distributed up to two hundred and fifty million dollars during the last election cycle, by making full use of the panoply of tax-exempt vehicles, most of which were prohibited from making campaign-based expenditures before the *Buckley* decision.³⁸⁶ The same dynamic is now presumptively at play with respect to garnering support for the intelligence activity that leads to war. It was recently revealed that the ‘lawmakers who upheld NSA phone spying received double the defense industry cash’.³⁸⁷

After the information detailed in this section is given due consideration, it is impossible to conclude, as do Posner and Vermeule, that the executive’s sensitivity to public opinion can make up for the lack of legal restraints on the executive that are otherwise required in a rule of law state. Instead, it is clear that the executive manipulates public opinion by disguising its abuses and aggressively prosecuting those that would reveal them. At the same time, defence contractors and others with a vested interest in helping the executive branch incite the nation to war spend vast amounts of money to shape public opinion and to secure the election of legislators who will not interfere with executive war-making.

³⁸⁶ Alex Seitz-Wald, ‘Koch Brothers Break New Ground in Dark Money’, *National Journal* (Washington, 13 September 2013) <<http://www.nationaljournal.com/politics/koch-brothers-break-new-ground-in-dark-money-20130913>> accessed 1 June 2014

³⁸⁷ David Kravets, ‘Lawmakers Who Upheld NSA Phone Spying Received Double the Defense Industry Cash’, *Wired Magazine* (San Francisco, 26 July 2013) <<http://www.wired.com/threatlevel/2013/07/money-nsa-vote/>> accessed 1 June 2014

5 CONCLUSION: THE EXECUTIVE CANNOT BE CHECKED

The answer to the question of whether Congress has restrained the executive in the decade following the 9/11 attacks is clearly a resounding ‘no’. This was not only true in the shocked aftermath of the attacks. Rather, this state of affairs continued throughout both terms of Presidents Bush and Obama’s administrations. Furthermore, this chapter demonstrates that Congress was not merely negligent in failing to conduct oversight and to restrain the executive when it violated non-derogable rights, but also that it has actively enabled the executive by enacting legislation that broadened its discretionary authority when these administrations’ aggressive agendas were challenged, whether by the courts or the public at large.

In addition, and as described above, Congress has not merely broadened the scope of these grants of discretionary authority that do not accord with the rule of law, as detailed in earlier chapters. The legislature also accepted continued assertions by the executive that it was not subject in any way to oversight by the other branches of government when it argued that it was acting to defend the nation from vague and ambiguous threats. Accordingly, Congress not only authorized continued indefinite arbitrary detention and passed legislation with loopholes allowing for continued torture, it accepted without comment the executive’s statements that it could not be bound by this legislation.

Congress also allowed the executive to set a precedent that it did not need legislative approval for the extended use of force overseas and that it could ignore the War Powers Resolution of 1973. It appears increasingly likely as of late 2013 that the executive will engage in acts of aggressive war against Syria without the approval of Congress, or even a resolution from the Security Council under Chapter VII of the U.N. Charter, without provoking any reaction from the legislature. Like the Supreme Court, Congress

has abdicated all responsibility for overseeing and restraining the executive's powers. Instead, the executive has been permitted to continue to violate a range of *jus cogens* norms as part of its agenda to justify acts of international aggression.

Owing to the release of substantial amounts of evidence that the executive manufactured the case for war with Iraq, Congress was forced to investigate this wrongdoing. It duly reported on this impeachable misconduct. However, the report's release was delayed so as to have no impact, and party leaders made it eminently clear that they would block any attempt to hold the executive accountable. As the general conclusion found in the next chapter will detail, now that the executive claims the power to subject the nation's citizens to indefinite arbitrary detention and extra-judicial execution, there appears to be no line that the executive can cross that will induce Congress to re-introduce the legislative oversight that the rule of law requires.

As this chapter details, this inaction can be explained by exploring the reasons behind Congress' contrary reaction when the executive attempted to achieve durable peace. This led to an examination of the financing of the election campaigns of federal legislators by the war-based industrial complex, a coalition of interest groups bound together by their common desire to profit from continued American aggression. It exercises their ever-increasing control over the legislators' prospects of continued success. This chapter revealed that it obtained this level of control owing to the deregulation of the campaign financing system.

For these reasons, it is possible to conclude at this point that the twenty-first century crisis of the rule of law, characterized by an executive committed to expanding the boundaries of its own power to the point where it can violate non-derogable norms with impunity, is no longer temporary or anomalous. Neither the courts nor Congress is willing to re-impose the limitations that characterize this form of constitutional order.

There is at present virtually no possibility of another congressional resurgence, as the legislative branch appears entirely beholden to those interests groups that support the executive supremacy that makes American aggression possible, even when it is consistently unpopular with the electorate.

This chapter also addressed the argument that public opinion can serve as enough of a check on the executive to salvage the rule of law in the United States, in the absence of the oversight of the judicial and legislative branches, which these theorists admit is now non-existent. This is because it was demonstrated that owing to the executive's control of both the intelligence community, which violates non-derogable rights under the cloak of official secrecy, and the public prosecutors, who have been instructed to bring the most serious charges imaginable against those who bring the executive's wrongdoing to light, it is now as impossible for the public to become adequately apprised of these violations of non-derogable rights as it is for Congress to conduct the requisite oversight.

Accordingly, this thesis can now proceed to its conclusion. After recapitulating the findings of the first six chapters, it will be possible for it to conclude that the United States is no longer governed in accordance with the most fundamental norms of the rule of law, which constitute its most minimal and indispensable requirements. Furthermore, it will conclude that there is no prospect of any termination of this crisis of the rule of law in the near future. Rather, what is more likely is additional extensions of a permanent state of emergency, as further international aggression leads to reinforced executive power and still more violations of non-derogable norms, as part of a self-reinforcing and vicious circle.

Chapter 6

CONCLUSION

1 WHAT THIS THESIS DEMONSTRATED

This thesis addressed the question of whether the United States can still be considered to be governed in accordance with the fundamental norms of the rule of law after the drastic changes to its legal order that took place after the 9/11 attacks.¹ In order to address this question, it was necessary to create an operational definition of the rule of law, to chart the changes against this definition, and further, to determine the likelihood that the abrogation of basic norms of the rule of law, and the constitutional crisis that abrogation created, might soon be terminated by the actions of either the judicial or legislative branches.²

In order to demonstrate the defensibility of this answer, the conclusion will briefly recapitulate the findings of the six preceding chapters in which this thesis formulated a definition of the rule of law with which the United States has been in compliance for most of its history. However, as the following sections will detail, this thesis described how the 9/11 attacks created an environment in which the executive branch was able to enlarge its own powers, such that it was able to violate key non-derogable rights with impunity. These sections will reiterate that the responses of the judicial and legislative branches have not been adequate, and in fact that Congress and the federal courts are

¹ See *supra* section 1.1.2 (chapter one, section 2: all cross-references below follow this format)

² See *supra* section 1.5.2

compromised in such a manner as to prevent them from taking action to re-implement the rule of law.

As this conclusion will indicate, this is an important subject to address because this situation has allowed the development of a state of affairs in which the executive asserts that it possesses power to violate non-derogable rights in the context of the war on terror, which it also reserves the right to define, without any restraint from the other branches of government. This thesis has argued that this is not only inconsistent with the rule of law, but that it creates a real danger of widespread violations of non-derogable norms continuing and becoming the new norm during a future crisis.

The rule of law was the most important legal development of the early modern era. Before to the Early Modern era, the executive claimed only to be morally bound to observe the laws, and that no earthly power could judge it, much less restrain it. In the legal orders that preceded the *rechtsstaat*, it is unclear whether rights as such can really exist, insofar as they are unenforceable whenever the executive finds them particularly inconvenient. The rule of law made possible a set of non-derogable rights, most importantly the right not to be subjected to prolonged detention without a trial, not to be tortured, and not to be executed pursuant to orders issued by the executive on its own authority. *Lettres de cachet*, torture warrants, and acts of attainder were all to be consigned to the dust-bin of history.

The United States has played a leading role in the promotion of the rule of law internationally, which makes its deviation from the basic norms of that legal order particularly troubling. It is unclear whether it can continue to play this useful role on the world stage while it continues to engage in certain practices, such as the operation of the Guantánamo Bay camps and related sites, such as the ‘Black Prison’ at the Parwan Detention Facility, and as it engages in the practice of targeted killing.

This thesis has also attempted to address the question of whether the political context in the United States is such that one might expect that this crisis might soon pass, or whether the new legal order has become entrenched and solidified. If this has indeed become a permanent state of emergency, without guarantees that violations of non-derogable norms can be reviewed and terminated by the other branches of government, then this thesis has raised a number of questions that will need to be addressed in the future.

The key issue to be addressed will be how those interested in international human rights can raise awareness of the fact that the United States is not in compliance with the basic norms of the rule of law, as part of a broader effort to consider how this might be corrected. As this is a complicated problem given the breakdown of its legal order since the 9/11 attacks, this is outside of the scope of this thesis, but the conclusion will outline the problem, which is the essential first step in any attempt to redress the state of affairs that this thesis describes.

2 SUMMARY OF FINDINGS

In chapter one, this thesis demonstrated that the United States committed such serious violations of non-derogable rights in the period following the 9/11 attacks, for which no one has been held accountable, that it is now appropriate to ask whether it is still a rule of law state.³ Chapter two outlined the nation's constitutional framework prior to the 9/11 attacks, which contained a separation of powers that, when enforced, prevented the abrogation of the rule of law in all but transient constitutional crises until the twentieth century. Despite the rupture created by the Cold War, this thesis showed

³ See *supra* chapter 1.7

that from 1974-1980 a constitutionalist resurgence catalysed an enforceable legal order that prevented the executive from overturning the rule of law.⁴ Chapter three addressed the period following the 9/11 attacks in which the Bush Administration evaded all of these restrictions on its powers by means of a legal theory of executive supremacy over the interpretation of the Constitution that invented specious implicit reserve powers, a theory that was adopted in pertinent part by the Obama Administration, which it uses to continue to violate the same *jus cogens* norms with impunity.⁵ Chapter four examined the Supreme Court of the United States' response to this challenge to the rule of law to find that it has been hesitant and minimalistic. Further, the Court's reticence allowed the executive to continue its wrongdoing after token adjustments of policy and administration. These adjustments were approved by certain key appellate courts that have been effectively 'captured' by the executive branch. These courts have produced rulings that fail to uphold the rights announced by the Supreme Court, but the Supreme Court has refused to review them.⁶ Chapter five demonstrated that this systematic and reflexively deferential decision-making by the nation's highest courts can only be explained by reference to the appointment of jurists who are best characterised as executive branch loyalists, who have already proven their reliability through service to the executive in politicized, secretive, and unaccountable positions within that branch.⁷ This chapter also traced the responses of Congress when it was confronted with

⁴ See *supra* chapter 2

⁵ See *supra* chapter 3

⁶ See *supra* chapter 4

⁷ See *supra* chapter 5

concerns about the executive's compliance with the post-Watergate statutes that protect the rule of law. It showed that the legislature failed to restrain the executive and, instead, either passed statutes that further enable the violation of non-derogable rights or ignored the express statements of the executive that it believes it is not bound by the laws.⁸ That chapter detailed in particular how Congress has refused to perform the meaningful legislative oversight that the rule of law requires. This thesis found, in fact, that Congress is incapable of doing so due to the power of the military-industrial complex in American politics and the way it has given incentives to allow the executive to further an agenda that makes possible aggressive war-making.⁹

The following six subsections of the conclusion will outline these findings in more detail. They will revisit the basis for its answer to the question of whether the United States can be considered a rule of law state, and inform its approach to the further issue of whether it is reasonable to assume that this state of affairs is not merely temporary, but instead likely to persist on the basis of the structural flaws identified in the preceding chapters and summarized here.

2.1 The US' Abrogation of Non-derogable Norms After 9/11

The introduction addressed the issue of whether it was appropriate to consider whether the United States, which is often considered the leading champion for human rights and democracy around the world, was no longer a rule of law state. Despite its self-image, over the past decade the United States has been accused by leading human

⁸ See *supra* chapter 5

⁹ See *supra* section 5

rights organizations of systematic violations of *jus cogens* norms.¹⁰ These began with the creation of the Guantánamo Bay detention camp, which was constructed to house persons that are subjected to what has repeatedly been determined to be indefinite and arbitrary detention.¹¹

These detainees, among others, including those held without records as ‘ghost detainees’ at secret prisons known as ‘black sites’ in Afghanistan and Eastern Europe, were subjected to what the executive would also later admit was torture, inasmuch as it involved such actions as waterboarding some detainees hundreds of times. In doing so, the executive made use of a technique that was defined as torture several decades earlier.¹²

Lastly, chapter one described the executive branch’s initiation and increasing reliance on a practice known as targeted killing, in which persons suspected of involvement in terrorism were subjected to extra-judicial execution.¹³ Numerous international observers, including the relevant Special Rapporteur, concluded that this could not be justified under International Humanitarian Law, as it took place outside of

¹⁰ See *supra* section 1.1

¹¹ *Ibid*; see also section 3.4

¹² See *supra* section 1.1, see also section 3.4

¹³ See *supra* section 1.1, 2; see also section 4.4

war zones.¹⁴ Furthermore, this practice violates certain basic guarantees of the Constitution of the United States, especially when applied to American citizens.¹⁵

As the executive branch of a state cannot commit more serious violations of non-derogable rights than indefinite arbitrary detention, torture, and violations of the right to life itself, it was possible for this thesis to conclude on this basis that its central question, namely whether the United States can still properly be considered a rule of law state, was appropriate. Because international instruments make it clear that it is not possible for a state to reserve the right to violate non-derogable rights and maintain this status, the introduction concluded that it was clearly appropriate to address whether the United States is a rule of law state. Most fundamentally, if the executive can commit violations of non-derogable rights with impunity, the state cannot be characterized as being in compliance with the minimum demands of the rule of law, since the rule of law emerged to supplant precisely that state of affairs.¹⁶

Accordingly, the first chapter established the need for this thesis to explore the issue of how it was possible for executive to violate these norms on its own initiative, and to address whether this was evidence of the irreversible decline of a constitutional order that protected the basic norms of the rule of law. This set the stage for the next chapter's discussion of the particulars of the legal framework that the executive needed to undermine in order to seize the power necessary to commit these violations of non-derogable rights without any possibility of being held accountable.

¹⁴ See *supra* section 1.1, 2; see also section 3.4

¹⁵ See *supra* section 1.5.1; see also Ryan Patrick Alford, 'The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens', [2011] *Utah Law Review* 1203

¹⁶ See *supra* section 1.5

2.2 The United States' Failure to Respect Non-derogable Norms

The second chapter of this thesis described how the Constitution of the United States implemented the rule of law in the United States.¹⁷ It described how this constitutional order was durable enough to withstand serious crises, including a civil war, without being fundamentally threatened.¹⁸ However, this chapter subsequently described how the Second World War, which merged seamlessly into the Cold War, created the pretext for a permanent state of emergency that allowed the executive to operate outside of the confines of the rule of law for most of its duration.¹⁹

As chapter two outlined, the Cold War made it possible for the executive to extend its powers beyond all constitutional limits, although mass violations of non-derogable norms did not occur.²⁰ However, this level of restraint was in doubt when the Cold War approached its apex. During the early nineteen-seventies, President Nixon's failure to win the Vietnam War brought America to the brink of a popular uprising against him.²¹ This led to a major constitutional crisis known as Watergate, when it became public knowledge that Nixon used the executive powers enlarged by the Cold War to conduct illicit domestic surveillance on a large scale. It also became known that he considered sweeping measures, including indefinite arbitrary detention, in response to the crisis, which was made particularly acute by exposure of his aggressive and

¹⁷ See *supra* section 2.1

¹⁸ See *supra* section 2.1

¹⁹ See *supra* section 2.2

²⁰ See *supra* section 2.2

²¹ See *supra* section 2.3

unilateral war-making against Cambodia.²² As this chapter detailed at length, owing to Nixon's unpopularity with the people, the prospect of rebellion, and the fact that the other branches were very close to being rendered irrelevant during his drive for an 'Imperial Presidency', the judiciary and the legislature took steps to remove him from office. The Court ordered the executive to turn over the Watergate tapes to the legislative committee investigating his misconduct. That committee then voted in favour of the Articles of Impeachment that forced his resignation.²³

Chapter two then outlined how public exposure of Nixon's attempt to effectively create a presidential dictatorship led Congress and the courts to re-implement the rule of law by creating and enforcing new statutes.²⁴ These statutes explicitly repudiated Nixon's theory of executive supremacy, which he pithily expressed as 'if the President does it, then it is not illegal',²⁵ and the theory of constitutional reserve powers that undergirded it, which were originally formulated by Nixon's chief legal counsel, William Rehnquist.²⁶ Foremost among these legal developments after Watergate that re-established the rule of law were the enactment of the Non-Detention Act, the Foreign Intelligence Surveillance Act, and the War Powers Resolution, along with the creation of legislative oversight committees charged with ensuring that the executive did not

²² See *supra* section 2.3

²³ See *supra* sections 2.3.3 and 2.3.4

²⁴ See *supra* chapter 2

²⁵ Interview with David Frost, printed in the *New York Times* (New York, 20 May 1977) B10

²⁶ See *supra* section 2.3

violate citizens' non-derogable rights, or expand its own powers so that it might again do so in secret.²⁷

This new balance of governmental powers that protected the rule of law from the executive was in actuality the paradigm that existed before the Second World War. The separation of powers, buttressed by the statutes passed during the congressional resurgence, protected the rule of law until the 9/11 attacks. The third chapter of this thesis described the ways in which the safeguards erected by Congress and the courts were dismantled by the executive shortly thereafter.

2.3 The Creation and Maintenance of an Unaccountable Executive

Chapter three detailed a new quasi-legal framework for executive control over intelligence and foreign policy developed within the OLC shortly after the 9/11 attacks. Dusting off theories of implicit constitutional reserve powers that lay dormant since Rehnquist's tenure, a cadre of neo-conservative officials, many of whom were veterans of the Nixon Administration, instructed compliant executive branch lawyers, most notably, John Yoo, to write legally binding memoranda. These secret memoranda purportedly explained how the executive could make unilateral decisions to detain, torture, and kill alleged wrongdoers, and lastly, to launch aggressive wars, all without congressional authorization.²⁸ They also argued that the courts could not review the executive's actions, although these assertions were also isolated from court review by their classification as state secrets.²⁹

²⁷ See *supra* section 2.6.2

²⁸ See *supra* section 3.4.2

²⁹ *Ibid*

In addition to detailing the OLC memoranda setting up a theory of presidential primacy, chapter three also detailed the rise of another form of executive law-making that sought to supersede the statutes that would otherwise restrain it, namely signing statements.³⁰ Rather than secretly overruling the Constitution and laws of the United States, as did the OLC memoranda, the signing statements openly declared that the executive was unwilling to abide by duly enacted laws, including those which limited its ability to violate non-derogable norms.³¹

Chapter three continued by describing the Obama Administration's adoption of this theory of executive supremacy.³² While it repealed some memoranda written by John Yoo and others, the new administration adopted the same theories repeatedly in its own internal regulations. In addition to continuing to issue signing statements, the new executive also adopted identical reasoning to that drawn up by John Yoo in his memorandum on the unilateral use of force.³³ President Obama argued on this basis that he possessed the inherent constitutional authority to unilaterally initiate hostilities against Libya, and the Administration later argued that he was not bound by the War Powers Resolution. His Secretary of State threatened to ignore any legislative action that would seek to restrain his war-making.³⁴

³⁰ See *supra* section 3.4

³¹ *Ibid*

³² See *supra* section 3.4

³³ *Ibid*

³⁴ See *supra* section 6.4

Accordingly, by the conclusion of chapter three, it was possible for this thesis to demonstrate that the Obama Administration is firmly committed to continuing to rule by decree when it comes to the violation of non-derogable rights within what it labels the war on terror. This thesis brought forward the example of a speech by the General Counsel of the Department of Defense to demonstrate this commitment, wherein the General Counsel indicated the executive unilaterally expanded the definition of those subject to Congress' authorization for the use of force.³⁵ This chapter demonstrated that this Administration dramatically expanded the targeted killing program. It also is claiming for the first time the constitutional authority to target its citizens. It continues to assert the same specious arguments to prevent the release of Guantánamo detainees, while pretending that it would prefer to do otherwise.³⁶ Accordingly, at this point it was clear that the constitutional crisis created by executive response to the 9/11 attacks continued into the second decade of the twenty-first century, and that the executive would continue to govern in a manner that was inconsistent with the rule of law, unless the other branches of government were prepared to intervene. Unfortunately, as the next three chapters would explore in detail, other branches did not, and could not intervene.

2.4 The Courts' Failure to Restrain the Executive

Chapter four examined whether, after the immediate crisis period that followed the 9/11 attacks, the federal courts stepped in to restrain the executive branch, such that it would no longer be unaccountable. This required a reappraisal of the role of the

³⁵ See *supra* sections 3.4

³⁶ See *supra* sections 3.4 at and 3.4; see also section 4.2

Supreme Court of the United States from 2003 onwards. While many have argued that the Court's decisions addressing indefinite arbitrary detention at Guantánamo Bay were important rebukes to the executive, careful examination of these decisions revealed that they produced only a rhetorical effect. Critically, they refused to address squarely the issue of whether the executive possessed a legitimate power to expand its own powers.³⁷

In particular, chapter four detailed how the Court also failed to address the most important case that came before it during that era. This is the case of José Padilla. Padilla, an American citizen, was arrested within the United States. He was held and tortured by the military after being classified an unlawful enemy combatant. Despite this set of actions being explicitly barred by statute, the Court avoided deciding the case by invoking the most technical reasons to decline jurisdiction, failing even to rebuke the executive for these gross violations of *jus cogens* norms and its explicit refusal to observe the laws.³⁸

This chapter also demonstrated that the Court was only willing to craft narrow rulings when it overturned even the most problematic administrative decisions. The Court also granted purely nominal relief to those who suffered violations of their non-derogable rights,³⁹ and it left the subsequent enforcement of its decisions to the lower courts. However, when detainees and others began to prevail on these claims at trial, the intermediate-level federal appellate courts intervened, overturning rulings against

³⁷ See *supra* section 4.2

³⁸ *Ibid*; see also *supra* section 3.4

³⁹ See *supra* section 4.2

the executive in connection with arbitrary detention, torture, and warrantless surveillance.⁴⁰

These courts, for reasons that are explored in chapter five, created elaborate doctrines that allow the executive to avoid facing decisions on the merits when it is charged with even the most serious allegations of wrongdoing. These doctrines comprise a set of jurisdictional and evidentiary rules—foremost among them the political questions doctrine and the state secrets privilege—that have made the access to the courthouse that the Supreme Court mandated in its narrow decisions utterly meaningless, as numerous statements of federal trial judges lamenting these doctrines have made clear.⁴¹ Chapter four also demonstrated that it is now impossible for these plaintiffs to obtain information about the abuses to which they were subjected during the discovery process, the absence of which these appellate courts, most notably, the D.C. Circuit, the Seventh Circuit, and the Ninth Circuit, have then used to justify dismissals of these lawsuits.⁴²

Chapter four demonstrated that these doctrines make it impossible for defendants making the most serious allegations against the executive to receive justice—and, in addition, showed that the Supreme Court refused to take jurisdiction over appeals challenging the executive's violation of non-derogable norms.⁴³ Owing to these developments, it was possible for this thesis to conclude that the judiciary can play no

⁴⁰ See *supra* sections 4.2, 4.3, and 4.6

⁴¹ See *supra* section 4.6

⁴² *Ibid*

⁴³ See *supra* sections 4.3 to 4.6

meaningful role in controlling the executive's violation of non-derogable rights, violations which, as the previous chapter demonstrated, continue unabated.⁴⁴ Accordingly, it became apparent that that the statements of the Supreme Court in cases such as *Boumediene v Bush* have only the rhetorical effect of creating a simulacrum of judicial oversight, which disguises the absence of the rule of law.

2.5 Explaining the Development of a Deferential Judiciary

Chapter four exposed the way that decisions of the higher federal courts in recent cases involving challenges to the executive are frequently so poorly reasoned and inconsistent with existing jurisprudence as to be inexplicable except by reference to extra-legal factors. The accumulation of this type of decision suggests that legal oversight of the executive is not possible. Accordingly, chapter five addressed the question of how this state of affairs came to be, despite constitutional requirements that the judiciary perform this task. This issue is vital for this thesis to address because it is not merely a troubling aberration. Rather, it is evidence that allows us to predict whether the judiciary could play a more constructive role in re-implementing the rule of law.

The history of the relationships between the executive and the judiciary that this thesis reviewed began with the courts' role in Watergate. The thesis approached that history in order to answer a question. Namely, what accounts for the remarkably different approaches of the higher federal courts in 1974 and in the twenty-first century? Chapter five concluded that the answer lies in the changing nature of Supreme Court appointments. Its analysis began with an examination of the changes to the

⁴⁴ See generally *supra* chapter 3

appointments process to the higher levels of the federal judiciary during the Nixon Administration, a process which acquired an increasing importance as a result of the Supreme Court's demonstration of its willingness to impede an overweening executive during the constitutional crisis of Watergate.⁴⁵

Shortly before Watergate, the executive began to place jurists onto the benches of the nation's most influential courts because of its faith in their loyalty. Chapter five demonstrated that this process has shaped the Supreme Court of the United States decisively, as it now populated with five judges with close and longstanding connections to the executive branch. This majority of executive branch loyalists comprises Justices Scalia, Thomas, Roberts, Alito, and Kagan. These justices take similar stances on executive powers regardless of the party of the President who nominated them.⁴⁶

By the time of Alito's appointment, the Senate had access to more information about the nominees' approaches to executive power than ever before. In Alito's case, this led to a Senate discussion of the application form Alito submitted for employment within the executive, in which he made clear his views on executive supremacy over the judiciary. His views were so extreme that members of Senate noted that they effectively repudiated the rule of law.⁴⁷ However, despite this, Alito was confirmed as a Justice of the Supreme Court. In addition to the foregoing, chapter five detailed how the Senate confirmed numerous judges with very problematic views of executive power and ties

⁴⁵ See *supra* section 2.3

⁴⁶ See *supra* section 5.2

⁴⁷ See *supra* section 5.2

to the executive branch to courts that are nearly as important, particularly the D.C. Circuit.⁴⁸

This discussion set the stage for the analysis later sections of that chapter. Those sections addressed Congress' failure to take the threat of executive dominance seriously, not merely in judicial confirmations but in all of the areas in which it was charged with the legislative oversight that is essential to maintaining the rule of law. These sections would reveal that the legislative branch was as compromised as the judiciary, although for different reasons, and equally ineffective in thwarting the executive's drive for a new imperial presidency.

2.6 Congress' Failure to Exercise Oversight and its Explanation

Chapter five also discussed Congress' response to the executive's attempts to enlarge its own powers and to render itself immune from all oversight. It revealed that this history is not at all encouraging for those concerned with the erosion of the rule of law in the United States. It began by detailing how Congress supported the executive each time Supreme Court judgements would have otherwise required it to modify its practices, however slightly. In particular, Congress twice allowed the executive to revive the Combatant Status Review Tribunals at Guantánamo Bay, which the executive established and conducted on the basis of its theory of the executive's inherent authority.⁴⁹ The re-establishment of these tribunals gave the detention facility renewed purpose and allowed for such dubious prosecutions as that of Omar Khadr, a

⁴⁸ See *supra* section 5.2

⁴⁹ See *supra* section 6.2, 384-394

fifteen year-old child soldier who threw a grenade after being attacked by American forces in Afghanistan.⁵⁰

This chapter evaluated Congress' rare legislative initiatives to stem the executive's violations of non-derogable rights, and showed how these were easily by-passed by the executive, at which point Congress simply ignored the pertinent signing statements. The most prominent of the examples discussed was the statement attached to the Detainee Treatment Act, which purported to ban torture.⁵¹ In it, the executive openly admitted that it would not change its practices. Members of that executive continued to defend waterboarding as essential to American security. However Congress made an ineffectual and wholly rhetorical response. This, unfortunately, served to persuade the public that torture was now banned. Chapter four demonstrated that it still authorized.⁵² That chapter also discussed Congress's failure to address problems related to the statutory authorizations for the use of force in Afghanistan and Iraq, which were so broad that the executive was able to assert in 2013 that these also allowed them to conduct aggressive military operations in Pakistan, Yemen, and Somalia.⁵³

The final sections of chapter five shifted the thesis focus. At this stage, the thesis begin to inquire into why President Bush was not impeached by Congress, or sanctioned in any way by the legislature. It demonstrated that the House Judiciary Committee provided both chambers of Congress with evidence of far more serious violations than

⁵⁰ See *supra* section 6.2.1, 387-397

⁵¹ *Ibid* 396-397

⁵² See *supra* section 5.4

⁵³ See *supra* section 5.4

those that led to Nixon's resignation, as detailed in the report of the majority staff to Representative John Conyers. As well, Congress possessed successive reports of the Special Senate Committee on Intelligence that investigated the executive's manipulation of pre-war intelligence.⁵⁴ The chapter discussed the attempts by members of the leadership of both parties to block even the discussion of impeachment.⁵⁵

Accordingly, chapter five subsequently sought to explain why Congress, like the courts, has proven itself so willing to stand by while the executive usurped its critical functions. This discussion focused on investigating the means by which legislators attain office and obtain leadership positions in the parties that control Congress. The chapter detailed how ever-increasing amounts of money are required, and noted that the key sources of these funds have been the lobbies associated with military and intelligence contracting.⁵⁶ Chapter five concluded that the rise of what President Dwight Eisenhower labelled the 'military industrial complex' affected American politics on a fundamental level, by catalysing legislators' near reflexive support for the executive's attempts to promote aggressive war.⁵⁷

Chapter five concluded that the existing political-economic structure of the United States prevents the legislature from re-establishing the rule of law in the same manner that it did during the congressional resurgence of 1974-1980. Moreover, the elimination of restrictive campaign finance laws ensures the pre-eminence of the military-industrial

⁵⁴ See *supra* section 5.4

⁵⁵ See *supra* section 5.4

⁵⁶ See *supra* section 5.4

⁵⁷ *Ibid*

complex in forging American foreign policy, which as a result will be consistently aggressive and supportive of violations of non-derogable rights. Foremost among these violations include the creation of a secret detention regime and policies enabling torture that were designed to implicate Iraq as a supporter of terrorism, so that it could be presented to the American public as an appropriate target of an invasion.⁵⁸

3 CONCLUSIONS THAT CAN BE DRAWN

On the basis of the foregoing, it is possible at the conclusion of this thesis to argue that the United States is not in compliance with the fundamental norms of the rule of law state, and that there is no meaningful prospect of the rule of law being restored in the United States in the near future. It is important to be clear about the implications of this conclusion. Furthermore, it is also vital to understand what this does not entail. The United States remains a country where its citizens enjoy broad political and social rights, which are routinely adjudicated in its courts. However, in the context of what it calls the war on terror, the executive detains, tortures and kills those it suspects of links to terrorism in secret, and without review. It continues to expand the scope of its own powers to do so, both geographically and conceptually, by authorizing itself to abduct these suspects worldwide before subjecting them to arbitrary detention with no judicial review in Afghanistan, and by arguing that no other branch of government can challenge its determination that the targeted killing of American citizens is constitutional.

As this thesis has demonstrated, a state with an executive that cannot be prevented from systematically violating non-derogable rights at will cannot be

⁵⁸ Ibid

considered a functioning rule of law state. The fact that the President is nominally accountable to the electorate is immaterial, as there are numerous examples throughout history of elective dictatorships, none of which could ever be considered to be governed in accordance with the rule of law. Additionally, the power of the military-industrial complex over the electoral process makes the mandate of the electorate an increasingly minor constraint on the new imperial presidency.

One final objection that could be offered to this conclusion is that despite the fact that the executive possesses no limitations on its powers, it exercises them sparingly, and largely outside of its own borders. Even despite the war on terror, the executive branch of the United States' government recognizes that its citizens are the bearers of rights, derived from both its Constitution and the international treaty regime. There is no debate on the question of whether citizens possess a broad set of substantive rights. The problem is the creation of constitutional theory that allows the executive to violate non-derogable rights with impunity. Even if it exercises these powers infrequently within the nation's borders at present, it is troubling, as it provides the executive with a set of unreviewable and secret powers to violate *jus cogens norms*, including those of its citizenry, during a future crisis.

What this thesis has demonstrated is that rule of law in general cannot exist owing to the good graces of an unaccountable executive. Benevolent dictatorship is simply inimical to the normative core of the rule of law. Finally, it should be noted that, as chapters two and three discussed, substantial attacks on the United States have always created a climate in which there is considerable pressure on the executive to engage in mass violations of non-derogable norms. The attack on Pearl Harbor led to the involuntary detention of the Japanese-American community, but this did not persist long after the war ended. Conversely, the 9/11 attacks created a parallel detention

regime of detention, torture, and a system of extra-judicial execution that remains firmly in place long after the danger passed.

The United States' failure to comply with the fundamental obligations of the rule of law has created a dangerous state of affairs, in which non-derogable norms are at serious risk of being violated at will. While these violations are infrequent within its own borders at present, the prospect of what might occur in the event of another seriously unsettling act of violence is deeply troubling. Before this occurs, it is vital for those interested in human rights to address how the rule of law has been dismantled, and how to reassemble its legal architecture.

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