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A Law unto Itself?

In an uncertain world, crisis demands executive action. And so 2005, a year of crisis, became a year of executive muscle-flexing, in response to crises ranging from Hurricane Katrina to avian flu to the Global War on Terror. In many ways, the legal debates generated were *déjà vu* all over again. Exorbitant claims of executive power in the War on Terror triggered the strongest clash since the Iran-Contra Affair between a constitutional vision of unchecked executive discretion bottomed on sweeping dicta in *United States v. Curtiss-Wright Export Corp.*[1] and a counter-vision of shared institutional powers symbolized by Justice Jackson's canonical concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:[2] a clash of visions I discussed more than fifteen years ago.[3]

But from this familiar debate, a new twist emerged: The startling notion that executive action is a law unto itself. The policy rationale for executive action, the President's defenders argued, somehow *created* the legal justification for executive unilateralism.

Take, for example, the surprising year-end revelation that the President had ordered the National Security Agency (NSA) to engage in nearly four years of secret, warrantless domestic surveillance of uncounted American citizens and residents, notwithstanding the statutory directive that wiretapping be conducted "exclusive[ly]" within the terms of the 1978 Foreign Intelligence Surveillance Act (FISA).[4] The Bush Administration first vociferously claimed the necessity of wiretapping telephone calls with al Qaeda, and later asserted that the necessity of executive action had legalized the program all along,

1. 299 U.S. 304 (1936).

2. 343 U.S. 579 (1952).

3. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

4. 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862 (2000).

regardless of what the FISA says.[5] Last January during Alberto Gonzales's confirmation hearings–and before the NSA program came to light–Senator Russ Feingold asked the future Attorney General whether he believed the President could violate existing criminal laws and spy on U.S. citizens without a warrant. Mr. Gonzales answered that it was impossible to answer such a "hypothetical question," but that it was "not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes."[6] When questioned about this during recent hearings on NSA surveillance, he answered that he had not misled the Congress, because once the President had authorized an action, it became legal under the President's constitutional powers and thus could not contravene any criminal statutes.[7]

Or take the debate over torture. In its infamous, now-overruled August 2002 torture opinion, the Justice Department's Office of Legal Counsel opined that even criminal prohibitions against torture do "not appl[y] to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority," and that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[8] The opinion further suggested that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers," reasoning that such orders would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities."

Under intense public pressure, President Bush has now backed off such extreme claims, recently telling an interviewer: "I don't think a president can . . . order torture, for example . . . . Yes, there are clear red lines . . . ."[9] But his

5. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006), http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf.

6. Transcript of U.S. Senate Judiciary Committee Confirmation Hearing for Alberto Gonzales (Jan. 6, 2005) (statement of Alberto Gonzalez), http://feingold.senate.gov/statements/05/01/2005106AG.html.

7. Transcript of U.S. Senate Judiciary Committee Hearing on Wartime Executive Power and the NSA's Surveillance Authority (Feb. 5, 2006) (statement of Alberto Gonzales, Attorney General), http://www.washingtonpost.com/wpdyn/content/article/2006/02/06/AR2006020600931.html.

8. Memorandum from the Office of Legal Counsel to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

9. Interview by Bob Schieffer with President George W. Bush (CBS television broadcast Jan. 27, 2006), *available at* http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml.

actions have been far more ambiguous than his words. Congress overwhelmingly enacted the McCain Amendment to the Defense Authorization Act, which forbade U.S. officials from committing torture and cruel, inhuman, or degrading treatment. But even after the President publicly endorsed the law, his presidential signing statement accompanying the Act made only a qualified commitment to follow the new law "in a manner consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive branch."[10]

All of this, of course, brings back eerie memories of Richard Nixon's remark: "If the President does it, it's not illegal." But the more fitting quip may well be Henry Kissinger's: "The illegal we do immediately. The unconstitutional takes a little longer."

Why does the unconstitutional take longer? Because, ironically, the executive branch usually asserts exorbitant claims of executive authority not at times of political strength, but rather, in times of intense political weakness. Executives usually assert unilateral power because they are unsure that Congress will endorse or that the courts will ratify what they feel pressured by circumstance to do. Witness, for example, Harry Truman seizing the steel mills during the unpopular Korean War, Richard Nixon's illegal actions during Watergate, Ronald Reagan's privatization of foreign policy during the Iran-Contra Affair, or George W. Bush's decision, amid plummeting popularity polls, to defend NSA domestic wiretapping. In each case, the executive branch asserted expansive constitutional justifications for unconstitutional actions, but the public's acceptance of those claims eventually turned on whether the Congress acquiesced in, or the courts ultimately approved, the legality of the President's claims.

This point is emerging again in the surreal atmosphere now surrounding the current legislative debate in Washington. On a range of issues, the scope of the executive's unilateral lawmaking power—and the power of the courts to review it—is once again before the Congress. Despite the Administration's acknowledgement that only eight of the 535 Members of Congress were even partially briefed regarding the NSA domestic wiretapping, incredibly, Congress is now considering several proposals that would simply ratify the presidential warrantless wiretapping scheme, without most Members ever understanding the precise contours of past and ongoing wiretapping. With great fanfare, Congress reauthorized the USA PATRIOT Act, apparently oblivious to the fact that its legislative approval would be entirely redundant if

10. President's Statement on Signing H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

the Administration's view of sweeping wartime presidential powers were correct. If the cryptic Authorization for Use of Military Force (AUMF) resolution, enacted in September 2001, indeed authorizes the President to order torture and warrantless wiretaps–which are clearly prohibited by other statutes–then why should Congress even bother passing additional authorizing legislation? Under the President's constitutional vision, whatever he ordered is already legal, *ipse dixit*.

Even as Congress has schemed about new ways to evade meaningful authorization or oversight of executive action, it is also considering several new proposals to exclude or revise independent *judicial* review of executive conduct. Shortly after Congress adopted the McCain Amendment banning torture, it undermined its own actions by passing the Graham-Levin Amendment, which excludes judicial review of torture claims raised by detainees at Guantanamo. Senate proposals are now flying that would limit even further the independent FISA Court's review of NSA wiretapping. And proposed immigration legislation would transfer exclusive jurisdiction over immigration appeals–which have characteristically involved sensitive claims of personal liberty–from the generalist regional circuit courts that have traditionally heard such appeals to the U.S. Court of Appeals for the Federal Circuit which specializes in issues remote from immigration concerns, such as veterans' claims, patents, and trademarks.

In short, the unconstitutional takes longer than the illegal because it takes all three branches, not just one, to create a constitutional crisis. When the President overreaches, he can only remake the law to justify his actions if the Congress also disengages and the courts stay blinkered. But time has taught that speed and efficiency – the Executive's greatest strengths – are not the only policy virtues. As Justice Brandeis wrote, the Framers gave us checks and balances "not to promote efficiency but to preclude the exercise of arbitrary power."[11]

History teaches that *Youngstown*'s constitutional scheme of shared powers represents not just good law, but also good public policy. That scheme is designed not just to prevent the Executive from unilaterally rewriting the Constitution, but to prevent all three branches from escaping their constitutional duties. The engagement of all three branches tends to yield not just more thoughtful law, but a more broadly supported public policy.

The Executive's forte is action, not deliberative lawmaking. When the President tries to remake law by making policy, he usually fails at one or the other. When the executive acts alone and the other branches fall silent, the

11. Myers v. United States, 272 U.S. 52, 293 (Brandeis, J., dissenting).

legitimacy of the executive action too easily falls hostage to the vagaries of the executive's shifting popularity polls.

In sum, if "the President does it," what makes his action legal is neither executive necessity nor the air of crisis that surrounds his response. It is the fact that others who do not work for him–particularly Congress and the courts–have been genuinely consulted about his actions and, when they understand the facts, actually approve them in the eyes of the law.

In times of crisis, all three branches–not just one–have a duty to respond. It is Congress's job, in particular, not just to ratify hasty executive action, but to investigate, to understand the facts, and to pass workable framework legislation to avert future crises. After Vietnam and Watergate, Congress wisely seized that opportunity when it passed framework legislation such as FISA, but it shows no inclination to do so today. As Justice Jackson wrote in *Youngstown*, "[a] crisis that challenges the President equally, or perhaps primarily, challenges Congress."[12] The authority to write the law belongs not to the President acting alone, but is "in the hands of Congress." But in the end, "only Congress itself can prevent power from slipping through its fingers."

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12. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (Jackson, J., concurring).