

**Bush II's constitutional  
and legal theory  
The constitution of  
emergency between law  
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AGUSTÍN JOSÉ MENÉNDEZ

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## **Bush II's constitutional and legal theory The constitution of emergency between law and propaganda**

**Agustín José Menéndez**<sup>1</sup>

“Sometimes (...) the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by departing, temporarily but perhaps drastically, from the law and the Constitution. Since such occasions call for that awesome responsibility and most measured practical reasonableness which we call statesmanship, one could say nothing that may appear to be a key to identifying the occasion or a guide to acting in it”  
John Finnis<sup>2</sup>

“[U]ndisciplined public discussion, unbalanced by unintelligent conclusions from responsible people such as yourselves can have an unintended consequence of making it more difficult to work effectively to the benefit of your Governments and your societies as well as ours”.  
Assistant Secretary of State Daniel Fried to a delegation of Members of the European Parliament<sup>3</sup>

“The problem is not renegade actors; the problem, frankly, is renegade lawyers”  
Philippe Sands debating John Yoo<sup>4</sup>

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<sup>2</sup> *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 275

<sup>3</sup> Joint Briefing to European Delegation during the visit of the TDIP Temporary Committee of the European Parliament to Washington, DC, 11 May 2006, cited in the second report of the Parliamentary Assembly of the Council of Europe, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states’ (the so-called second Marty report), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> p. 63

<sup>4</sup> World Affairs Councils of Northern California, October 31<sup>st</sup> 2005; the recording is available at <http://wacsf.vportal.net/detail.cfm?fileid=4131#>.

## Introduction

This chapter analyses the positive and theoretical aspects of the doctrine of constitutional law put forward by President Bush II since the terrorist attacks of September 11<sup>th</sup> 2001.

The chapter is divided in four parts. First, I claim that Bush II's doctrine of constitutional law can be identified by reference to the four major amendments to the positive constitutional law of the United States that Bush II's attorneys have relied upon when assessing the constitutionality of key policy proposals in the so-called "war on terror".<sup>5</sup> All four amendments would lead to the aggrandisement of the powers to the executive. Bush II's lawyers have claimed that the President can establish in a definitive and final manner who poses a threat to national security and deny her or him some key fundamental rights enshrined in the US Constitution. In particular, the President has acted as if he had the power to (1) order the indefinite arrest of enemy combatants; (2) define at will the scope of the right to privacy of enemy combatants; (3) order the assassination of enemy combatants; (4) order the torture of enemy combatants. Second, I sustain that all four amendments are to be constructed as the intentional and rather consistent application of Bush II's underlying theory of constitutional law, and not as the evolutionary outcome of constitutional practice in the "unbrave new world" in which we would have plunged after the terrorist attacks of 2001.<sup>6</sup> This theory is grounded on the claim that the US constitution is in reality composed of two set of norms, one applicable to "ordinary" citizens and circumstances, the other to enemies and "emergency" or "exceptional" circumstances.<sup>7</sup> The direct democratic mandate received by the President from the People, and the powers which both constitutions invest upon the

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<sup>5</sup> By the phrases "Bush II's lawyers" or the "court lawyers of Bush II", I make reference to the main legal architects of the four constitutional amendments described in section I, who served in the first term of Bush II's administration. From the information which has been rendered public, there are at least five unavoidable lawyers: David Addington, legal counsel to the Vice-President; Alberto Gonzales, legal counsel to the President; James Bybee, assistant attorney general at the Office of Legal Counsel, John Yoo, deputy assistant attorney general at the Office of Legal Counsel, and William Haynes II, legal counsel at the Department of Defence. Further revelations may show the extent to which general attorney Aschroft, legal counsel to National Security Advisor Bellinger or assistant attorney general at the Office of Legal Counsel Goldsmith played similar key roles by means of doing or not doing things. The phrase should not be understood to refer by any means to all legal counsels working for the government. When Bush II's lawyers did not cut short the pre-established decision-making procedures (which they frequently did under the legal cover of the unitary theory of the executive), disagreement with their views was expressed by many lawyers, especially Judges Advocate General and counsels in the Department of State. But not only. Even some of those who had been appointed by the Republicans disagreed. It is rather obvious that a good deal of what is known now is thanks to their disagreements, and to their willingness to bring documents to light which otherwise will remain buried within the administration

<sup>6</sup> As seems to be assumed by many; see, for example, the editorial of *The New York Times*, 'The Must-Do List', of 4 March 2007, available at [http://www.nytimes.com/2007/03/04/opinion/04sun1.html?\\_r=1&oref=slogin&pagewanted=print](http://www.nytimes.com/2007/03/04/opinion/04sun1.html?_r=1&oref=slogin&pagewanted=print).

<sup>7</sup> The universalistic drive of Bush II's theory of constitutional law necessarily entails that any democratic constitution, and not only the US constitution, is to be seen as a dual constitution. Whether this is correct or not is another matter (on which the author takes sides with those who answer in the negative).

executive make of Bush II the paramount power-holder under the emergency constitution. His exceptional powers include the competence to decide when and to what extent the emergency constitution is applicable, and what the contents of the emergency constitution are. As we will see, this comes very close to claiming that the executive is the *puovoir constituent* of the emergency constitution. Indeed, the fact that Bush II had long-standing and clear constitutional views (even if far from consistent and complete) comes a long way to account for the success of Bush II's lawyers in turning a fringe understanding of the Constitution into a mainstream constitutional view. The state of shock in which the citizenry and the political establishment found themselves after 9/11 created the conditions under which a sudden and dramatic change was feasible.<sup>8</sup> Third, both changes in positive constitutional law and in constitutional theory are underpinned by a specific conception of what law is and what it should be. Bush II's lawyers have adhered to an eclectic and formally minimalistic theory, which affirms that the substantive content of all laws results from a concrete substantive will, and consequently, that there is no structural relationship between law and public reason. The eclecticism and minimalism of this legal theory explains why Bush II's constitutional practice and theory has been supported by an "overlapping consensus" of at least three different legal theories (originalism à la Scalia, "modern" natural law à la Finnis, and pragmatism à la Posner). Fourth, it seems to me that there are very good reasons to take very seriously the (massive) consequences of Bush II's constitutional practice and theory, but that should not entail taking seriously his legal and political theories. There are very good reasons to conclude that such theories had always been seen as part and parcel of the propaganda effort to transform constitutional practice, before and after the terrorist attacks of 2001. As Scott Horton has aptly commented on the (in)famous legal advice contained in the legal opinions drafted by John Yoo during his stint at the Office of Legal Counsel, we are faced not so much with learned legal opinions, but with advice proper of *consiglieri* or mob lawyers.<sup>9</sup> Or perhaps, I will add, of the "court lawyers" of European Fascist states, also keen on instrumentalising the form of law at the service of raw power.

These four theses provide us with the proper standpoint from which to contextualise the debate on torture after September 11<sup>th</sup>. Indeed, the bizarre bid for the moralisation and legalisation of torture is but part of the larger effort to transform constitutional law, constitutional theory and legal theory attempted by the lawyers of Bush II. But even if only a part of a more general assault on law as the embodiment of public reason, the torture debate is the key part in the siege on the *Rechtsstaat*. Not only on account of the massive legal and moral implications of the juridification of torture, but also given the fundamental role assigned to torture in the media strategy of the Bush administration. Indeed, the way in which the taboo on torture has been broken is an apt summary of this bleak constitutional period; we should come

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<sup>8</sup> On the pathologies of democratic states after a shocking terrorist attack, see Bruce Ackerman, *Before the Next Attack*, New Haven and London: Yale University Press, 2006.

<sup>9</sup> 'The Green Light', entry in the blog published by Harper's, April 2<sup>nd</sup>, 2008, available at <http://harpers.org/archive/2008/04/hbc-90002779>.

out of it having learnt the lesson that the key pathology of emergencies is the easiness with which law and justice become disconnected.

## I. The four constitutional amendments of Bush II

The first thesis of this article is that one of the key goals of the administration of Bush II has been to radically alter key aspects of US constitutional law so as to expand executive power to the detriment of other institutions and decision-making process.<sup>10</sup> Such changes have resulted in a constitutional practice which seriously harms the right to freedom, privacy, physical integrity and life of both non-citizens and citizens. Moreover, such practice has led to clear breaches of international legal standards, some of which cannot but be qualified as crimes.<sup>11</sup>

Such transformations have been pressed upon as necessary to win the so-called “war on terror”.<sup>12</sup> As will be discussed in more detail in section II,

<sup>10</sup> The best overall description is to be found in Charlie Savage, *Takeover*, Boston: Little, Brown and Company, 2007.

<sup>11</sup> ‘A Review of the FBI’s involvement and observations of detained interrogations in Guantanamo Bay, Afghanistan and Iraq’, available at <http://www.usdoj.gov/oig/special/s0805/final.pdf>, reveals in page xxii that some FBI agents who witness of interrogations at Guantanamo were instructed to open a file documenting “war crimes”. Quite recently, in the preface to the report of Physicians for Human Rights, *Broken Laws, Broken Lives*, available at [http://brokenlives.info/?dl\\_id=5](http://brokenlives.info/?dl_id=5), p. viii, General Taguba (rapporteur of the Taguba report on the abuse of prisoners at Abu Grahیب) has forcefully concluded that: “After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account”. General Hayden has publicly admitted that three detainees were waterboarded (for the reference, see infra, note X). It has been reported that the a confidential report of the Red Cross of 2007 concluded that CIA’s operatives had committed crimes when interrogating detainees. See Scott Shane, ‘Book cites secret Red Cross report of CIA torture of Qaeda captives’, *International Herald Tribune*, 11 June 2008, available at <http://www.iht.com/articles/2008/07/11/america/11detain.php>. Specific details about how interrogations proceeded in the secret prison in Poland have been recently revealed by the New York Times. See Scott Shane, ‘Inside a 9/11 Mastermind’s Interrogation’, *The New York Times*, 28 June 2008, available at <http://www.nytimes.com/2008/06/22/washington/22ksm.html?pagewanted=2&r=1&sq=hayden%20torture&st=nyt&scp=2>. Two recent books have articulated very cogent legal cases. See Michael Ratner, ‘The Trial of Donald Rumsfeld. A Trial by Book’. New York: The New Press, 2008, which summarises the legal case brought by the Center for Constitutional Rights and the European Center of Constitutional Rights against several senior members of the Bush II administration. On the former, see materials available at <http://ccrjustice.org/case-against-rumsfeld>. On the latter, see ‘Extraordinary rendition flights, torture and accountability – a European approach’, available at [http://www.ecchr.eu/index.php?file=tl\\_files/Dokumente/ECCHR\\_ExtraordinaryRendition.pdf](http://www.ecchr.eu/index.php?file=tl_files/Dokumente/ECCHR_ExtraordinaryRendition.pdf); Philippe Sands, *Torture Team*, London: Allan Lane Press, 2008. See also Elizabeth de la Vega, *US v Bush*, New York: Seven Stories Press, 2006 and Vicent Bugliosi, *The Prosecution of George W. Bush for Murder*, New York: Vanguard Press, 2008.

<sup>12</sup> A devastating criticism of the idea of the war on terror is to be found in Bruce Ackerman, ‘This is not a War’, 113 (2004) *Yale Law Journal*, pp. 1871-1907, now contained in Ackerman, *supra*, note 7. The “war” paradigm has been instrumental in similar, even if less deep and less radical transformations, in many other states, including some if not most Member States of the European Union. On the overall process of contagion, see Kim Lane Scheppele, ‘The Migration of anti-constitutional ideas: the post 9-11 globalization of public law and the international state of emergency’, in Sujit Choudhry, *The Migration of*

they are formally presented as temporary deviations from ordinary constitutional standards only applicable in exceptional circumstances. However, it would be wrong to take such characterisation at its face value. On the one hand, the simultaneous affirmation that the “war on terror” is a “long war” which will last for one or more generations (or even hundred years),<sup>13</sup> necessarily implies that these doctrines are intended to endure as if they had been enshrined as formal amendments to the Constitution. On the other hand, the emergency norms are said to be characterised by the fact that they are applicable to a limited set of addresses, i.e. “(unlawful) enemy combatants”. But at the same time this term has been redefined by the lawyers of Bush II so as to designate anybody deemed by the President to be a threat to US national security.<sup>14</sup> This implies that the exceptional or non-exceptional character of the amendments depends on the actual use the President makes of the power he has arrogated himself to declare who is and who is not an enemy combatant. Not only the category could be stretched quite far, but there is no certainty concerning who is supposed to be affected. For these two reasons, we should conclude that what formally look as temporary and exceptional measures are in reality durable constitutional

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*Constitutional Ideas*, Cambridge: Cambridge University Press, 2007, pp. 347-73, available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID943526\\_code271038.pdf?abstractid=943526&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID943526_code271038.pdf?abstractid=943526&mirid=1).

<sup>13</sup> By declaring “war on global terror” and defining the scope as to stop and defeat “every terrorist group of global reach”, Bush II clearly indicated that the war on terror was bound to be a very long war. See Address to a Joint Session of Congress and the American People, 20 September 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. Several officials have estimated this will require between eighteen to fifty years. The Chief of Staff of the Defence Department spoke of a war of fifty years (BBC News, ‘War on terror may last 50 years’, 27 October 2001, available at [http://news.bbc.co.uk/2/hi/uk\\_news/1623036.stm](http://news.bbc.co.uk/2/hi/uk_news/1623036.stm). Or even a hundred (Roger Hardy, ‘Grappling with global terror conundrum’, BBC News, March 15, 2008 reports that a military expert involved in the production of the Counter-Insurgency Manual claimed that the war will last “Thirty years if we get it right (...)A hundred years if we get it wrong”. See [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/7297139.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7297139.stm)). John Yoo, *War by other Means*, New York: Atlantic Press, 2006, 148 speaks of a war lasting a “generation”.

<sup>14</sup> A comprehensive analysis of how the category has been defined by the Bush II Administration can be found in Peter Jan Honigsberg, ‘Chasing “Enemy Combatants” and circumventing international law: A licence for sanctioned abuse’, (2007) *UCLA Journal of International Law and Foreign Affairs*, pp. 1-74. A defence of the category in legal terms in John B. Bellinger III, ‘Unlawful enemy combatants’, available at <http://www.opiniojuris.org/posts/1169000173.shtml>. More recently, see his Reflections on Transatlantic Approaches to International Law, 17 (2007) *Duke Journal of Comparative and International Law*, pp. 513-27; ‘Transcript of Remarks on Enemy Combatants after Hamdan’, 75 (2007) *George Washington Law Review*, pp. 1007-1020; ‘Remarks on the Military Commissions Act’, 48 (2007) *Harvard Journal of International Law Online*, pp. 1-14, available at <http://www.harvardilj.org/online/91>. As is well-known, Bellinger has been legal adviser to Condoleezza Rice since 2001, first during her stint as National Security Adviser and later, during her time as Secretary of State. Although originally US citizens were not deemed to be eligible for designation as enemy combatants (See the military order issued by President Bush of November 13<sup>th</sup>, 2001 on, available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>, especially section 2), the detention of Padilla and Hamdi indicates that the category was later enlarged, and it could eventually include them. This enlargement was ratified when the Supreme Court forced the administration to exclude citizens. And indeed they were again outside the rectified scope of non-judicial detention established by the Military Commissions Act, section VI.

standards, which, as will be seen in section 2, imply a dualistic characterisation of the constitution.<sup>15</sup>

All four amendments are defended on three concurrent grounds, namely, (1) a “dogmatic” interpretation of legal texts, based on the search for the “literal” and “original” meaning of specific provisions; (2) normative arguments which focus on the morality of acting unmorally under extreme circumstances; (3) prudential arguments, concerning the consequences of interpreting constitutional norms one way or the other in the “post 9/11” world in which we are “one bomb away” from disaster.<sup>16</sup>

While the specific dogmatic argument employed varies from one amendment to the other, all of them are characterised by the overplay of philological readings of the literal tenor of legal provisions; and by the invocation of the legislative materials available, to the detriment of teleological and systemic interpretation; as could be expected, this results in an increased scope of discretion by means of blowing the bridges between legal reasoning and critical normative reasoning; indeed, it is a technique which is not so dissimilar to the ones popularised by deconstructionists and other post-modernists.

On what concerns normative arguments, two are frequently invoked. The first claims that given the emergency declared after 9/11, the morality and the legality of actions is no longer to be determined by reference to what the law prescribes, but by the practical judgment of leaders. Not only *inter armas silent leges*, but *inter armas silent mores*. The second reads a moral exception into the scope of the US Constitution, according to which no rights should be granted to those willing to abuse such rights with a view to kill, maim and harm US citizens, the very ones who previously granted them such rights by means of regarding them as protected by the US Constitution.<sup>17</sup> The third is that the existential threat to the political community posed by terrorism creates an obligation on the side of all citizens to comply with, and even support, the decisions taken by the President. Contesting even a plainly unlawful decision is not morally laudable when that could result in undermining the authority of the President during a crisis, and consequently, aggravating the crisis.<sup>18</sup>

<sup>15</sup> In a rather similar same sense to that in which Ernst Fraenkel spoke of a dual state. See *The Dual State: A contribution to the theory of dictatorship*, New York and London: Oxford University Press, 1941.

<sup>16</sup> Paraphrasing (out of context) an Addington's phrase, as remembered by Jack Goldsmith, *The Terror Presidency*, New York: Norton, 2007, p. 181.

<sup>17</sup> See, for example, Yoo, *supra*, note 13, p. 16, 45, 66. See Stephen Holmes, *The Matador's Cape*, Cambridge: Cambridge University Press, 2007, chapter 12, dissecting the advocacy of the need to return to the state of nature (“lawlessness”) to fight enemy combatants who are claimed to be there.

<sup>18</sup> This argument finds expression in the claim that, once a war has started, citizens should rally around the legitimate government even if they disagreed with waging the war in the first place, or even if they keep on disagreeing with the way in which it is being conducted now. In legal circles, it underpins the claim (which grows by the day as I write this chapter) that criticism of Bush II's policies should take into account the “context” in which they were formulated (“the smoking towers”, “the fear of a second attack”). It is claimed that the situation gave rise to a duty on the President's side to do what he did (even if it meant dirtying his own hands) and a duty on citizen's side to follow orders. Even Philippe Sands seems to be

On what concerns prudential arguments, it is claimed that the nature of the “new” terrorist threat is such (usually of the kind that “the smoking gun” could be “the mushroom cloud”)<sup>19</sup> that there is a paramount and overriding public interest in obtaining any information that might help preventing the success of terrorists. This entails not only that the criminal procedure, with its simultaneous affirmation of liberty to do wrong, and retroactive punishment, should be replaced by “preemptive” justice, aimed at rendering impossible the commission of the crime; but also that what used to be characterised as inalienable fundamental rights should now be reweighed and rebalanced so as to render possible the efficient extraction of information from suspected terrorists. Denying the right to habeas corpus, to privacy and even to life and physical integrity is deemed essential to pre-empt new crimes. As a consequence, the chances that military or CIA personnel will ever be prosecuted for war crimes or for any other major violations of the law comes close to nil.<sup>20</sup>

Before considering Bush II's constitutional amendments in detail, it is important to stress that the radical character of this constitutional agenda stems from the fact that this administration has not only acted in ways radically unconstitutional and illegal if judged from the standpoint of positive constitutional norms,<sup>21</sup> but has actually aimed at changing the very content of the said constitutional norms, so as to turn the standards underlying its acts the very contents of positive constitutional law. In brief, we are not dealing with unconstitutional acts undertaken in the “dark side”; on the contrary, we face the explicit promotion of the “dark side” to constitutional normality, to

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of the opinion that the ultimate moral wrong of Bush II's lawyers has been the lack of repentance of what they did given “the context”. See his interview with Bill Moyers, PBS, aired 9 May 2008, transcript available at <http://www.pbs.org/moyers/journal/05092008/watch2.html>: “But there's an even bigger issue at a very personal level. It's not about legality, about criminality. It's about taking individual responsibility. If people like Doug Feith and Jim Haynes had said to me, "Look, Philippe. September the 11th came. The anniversary was coming. We were getting information that there were going to be more attacks. We had people that we were told had information that we need to do something about. And we therefore felt, in those circumstances, it was right to use all means appropriate and necessarily to get the information. But, with the benefit of hindsight, we realize we fell into error, we made a mistake. We accept responsibility for that. We will learn from those mistakes. We'll make damn sure it doesn't happen again." I didn't get that at all. There was not a hint of recognition that anything had gone wrong, nor a hint of recognition of individual responsibility. When you read these chapters, when you read my account with Doug Feith and with others, you will see the sort of weaseling out of individual responsibility, the total and abject failure to accept involvement”..

<sup>19</sup> The expression was coined in the run-up to the Iraq War. See the speech of Bush II in Cincinnati, Ohio, 7 October 2002, available at

<http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>.

<sup>20</sup> Gonzales memorandum of 25 January 2002, available at

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>, p.2. Golsmith, *supra*, note 16,

elaborates on the theme and unintentionally suggests that immunity could also have been a self-regarding concern, i.e. the relevant immunity being that of those ordering indefinite detentions. The Military Commissions Act of 2006 provided a modicum of retroactive immunity by raising the threshold of what a war crime is in US legislation.

<sup>21</sup> See references in note 11

the “bleak but bright side”, if you want.<sup>22</sup> Thus, the crux of the matter is not that a given administration has acted illegally and unconstitutionally (as for example was the case with several administrations during the Cold War, and very significantly the Nixon administration, as exposed by the Church Committee), but that the court lawyers of Bush II have been promoting the legalisation and juridification of criminal acts such as torture or assassination. There is a world of a difference between acting systematically in breach of the Constitution and changing the Constitution so as it would cover illegal acts, and make them worth of constitutional praise. No matter how dangerous and censurable the former pattern of behaviour, it does not necessarily subvert positive and normative standards. When we turn evil into official good we obviously run the risk of poisoning the sinews of political and societal life.<sup>23</sup>

### 1. No Habeas Corpus for Enemy Combatants

The first constitutional amendment advocated by Bush II's lawyers consists in the affirmation of an inherent power of the President as Commander in Chief to order the detention of any person (including US citizens) who has been previously certified as an enemy combatant by the President himself. In particular, the President can deny detainees access to any court. This is the same as saying that no writs of habeas corpus can be subjected to the consideration of federal courts by enemy combatants. The decision of the President to either confine them within military facilities in the United States, or order their transfer to a location outside the United States (whether or not such a location would be under the effective control of United States agents, and whether or not it is a public or a secret detention facility) is final and cannot be reviewed by any other institution or decision-making process.<sup>24</sup>

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<sup>22</sup> The “dark side” is of course the expression used by Vice-President Cheney in the immediate aftermath of September 11<sup>th</sup>. See his interview in Russert's *Meet the Press* of September 16<sup>th</sup>, 2001, available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>. See now Jane Mayer, *The Dark Side*, New York: Doubleday, 2008. The phrase has a long pedigree in several languages; all translations evoke with calculated ambiguity the commission of illegal acts to uphold legality.

<sup>23</sup> Two further observations may be added. The first is that the fact that there has been a sustained attempt at clothing in legal argumentation the subversion of positive constitutional law proves the extent to which constitutional values were (and perhaps remain) entrenched in the political and social life of the United States; so much so that Bush II had to pay homage to the very constitutional law it tried to radically alter. Secondly, the fact that such revolutionary change has been contested and contradicted with legal arguments renders clear that the law is not as flexible an instrument as very frequently is regarded to be, very especially by political scientists of a “positivistic” persuasion. Indeed, some of the harshest critics of the policy followed by Bush II after the terrorist attacks of September of 2001 undermine their critical arguments by their simultaneous affirmation of their belief in the purely instrumental character of law and a strong normative relativism. But if law is as flexible and malleable, and there are no intersubjective standards of critical normativity, why was Bush II so wrong?

<sup>24</sup> Perhaps nobody but Gonzales has captured the essence of the first Bush II's amendment. In an exchange with Senator Specter on 18 January 2007, he claimed that “there is no express grant of habeas in the Constitution. There is a prohibition against taking it away”. See Bob Egelko, ‘Gonzales says the Constitution doesn't guarantee habeas corpus’, *San Francisco Chronicle*, 24 January 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/24/MNGDONO11O1.DTL>.

This first amendment has been shaped by three close interrelated decisions (now exposed in logical, if not chronological order).<sup>25</sup>

The first decision was to deny enemy combatants the right of access both to US ordinary courts and to “standard” US military courts. Anybody who the President has reason to believe is an “Al Qaeda”<sup>26</sup> member or has engaged into hostilities against the United States is not to be brought before an ordinary judge, not even a standard military court, but before a “military commission”, following an expedite procedure characterised by a dramatic reduction of the guarantees of the accused.<sup>27</sup> Although the original text of the executive order excluded from its scope US citizens, two of them were later deemed to be enemy combatants and arrested on the sole authority of the President.<sup>28</sup>

The second decision, complementary of the first, was to deny enemy combatants any legal right whatsoever they claimed on the basis of the

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<sup>25</sup> The general blueprint of the amendment as a whole may be contained in the legal memorandum penned by John Yoo on the immediate aftermath of the terrorist attacks of September 2001, and which remains classified to this day. ‘Authority to use military force to combat terrorist activities within the United States’, of October 23, 2001. See Associated Press, ‘Post-9/11 Memo Indicates View Around Constitution’, *The Washington Post*, 3 April 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03/AR2008040300067.html?hpid=moreheadlines>.

<sup>26</sup> In the following, I always write Al Qaeda between brackets. The reason is simple. There is ample evidence that the assumption that there is a terrorist organization called Al Qaeda in the very same sense that there was an IRA or an ETA, is simply wrong. Indeed, while the radical novelty of the terrorist threat of Al Qaeda is repeated ad nauseam, and is invoked to justify the granting of exceptional constitutional powers to the President during emergencies, it is surprising how it keeps on being assumed that in one way or another it has some kind of coherent internal structure. But as has been proved once and again, Al Qaeda is indeed a very loose network, and many of those who act in their name are mere spontaneous franchisers. See Gilles Kepel, *Jihad*, Paris: Gallimard, 2000 and Jason Burke, *Al Qaeda: The True Story of Radical Islamism*, Harmondsworth: Penguin, 2004. Still, the phrase is used so frequently to refer to “the other side” on the (alleged) war on terror, that is simply inconvenient not to make use of it. Thus I use it, but within brackets.

<sup>27</sup> ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism’, Executive Order of 13 November 2001, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=63124>. See also the op-ed of Alberto R. Gonzales defending the order, ‘Martial Justice, full and fair’, *The New York Times*, 30 November 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9407E6DC153DF933A05752C1A9679C8B63&scp=2&sq=gonzales+martial+justice+fair&st=nyt>. The original idea seems to have come from Timothy Flanigan, then deputy to Gonzales. See Tim Golden, ‘After Terror, a Secret Rewriting of Military Law’, *The New York Times*, 24 October 2004, available at [http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?\\_r=1&oref=slogin&pagewanted=print&position=](http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?_r=1&oref=slogin&pagewanted=print&position=). Flanigan requested a legal opinion from the Office of Legal Counsel of the Department of Justice, which Philbin put together and produced on November 6, 2001. The memorandum remains secret [although the NYT did have access to one copy]. John Yoo affirms in *War by other Means*, p. 205, that he also had a hand in writing the said review. It seems that David S. Addington was instrumental in translating the advice into an executive order while keeping most of the administrations aloof from the project. See Barton Gellman and Jo Becker, ‘A Different Understanding with the President’, *The Washington Post*, 24 June 2007, available at [http://blog.washingtonpost.com/cheney/chapters/chapter\\_1/](http://blog.washingtonpost.com/cheney/chapters/chapter_1/).

<sup>28</sup> On Padilla and Hamdi, see Ackerman, *supra*, note 11, pp. 24ff.

Geneva conventions.<sup>29</sup> The Conventions were said to have been rendered “quaint” and “obsolete” by the emergence of non-state actors capable of fighting an armed conflict against a state.

The third decision consisted in the confinement of the allegedly more “valuable” detainees either in Guantanamo,<sup>30</sup> or, even more frequently in actual practice, in secret prisons (“black sites”)<sup>31</sup> around the world. Else, prisoners were “extraordinarily rendered” to third countries.<sup>32</sup> By doing this,

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<sup>29</sup> On January 18, 2002 Bush issued an executive order (The order is not public, but is cited by Gonzales in his memorandum, see fn 19) accepting the legal advice put forward by Office of Legal Counsel which argued against acknowledging Geneva rights to enemy combatants (John Yoo and Robert J Delahunty to William J Haynes II, ‘Application of Treaties and Laws to al Qaeda and Taliban Detainees’, 9 January 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>). This was followed by the Bybee memorandum of 22 January 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> and the Gonzales’ memorandum of 25 January 2002, *supra*, fn 19. On the latter, see Luisa Vierucci, ‘Is the Geneva Convention on Prisoners of War Obsolete?: The Views of the Counsel to the US President on the Application of International Law to the Afghan Conflict’, 2 (2004) *Journal of International Criminal Justice*, pp. 866-71). The following day, Rumsfeld gave operational instructions to the Army so that combat commanders will proceed accordingly (available at [http://lawofwar.org/Rumsfeld%20Torture%20memo\\_0001.jpg](http://lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg)). But both the State Department and lawyers in the Defence Department and the Army expressed their criticism, and opposed the decision in written (Legal memorandum of William Howard Taft IV, concerning the violation of international laws of January 9, 2002, still classified. Memorandum from Colin Powell, then Secretary of State, of January 26, 2002 in response to Gonzales’ memo of the day before, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>; followed by a memorandum of Taft IV of February 2<sup>nd</sup>, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.02%20DOS%20Geneva.pdf>). However, Bush stuck by his original decision and turned the original advice into policy (available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>).

<sup>30</sup> See ‘Memorandum for William J. Haynes, “Re: Possible Habeas Jurisdiction Over Aliens Held in *Guantanamo Bay*” (signed by John Yoo and [Patrick Philbin](#)), of 28 December 2001, available at <http://www.texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf> and [http://www.pegc.us/archive/DOJ/20011228\\_philbinmemo.pdf](http://www.pegc.us/archive/DOJ/20011228_philbinmemo.pdf).

<sup>31</sup> Dana Priest, ‘CIA Holds Terror Suspects in Secret Prisons’, *The Washington Post*, 2 November 2005, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html). More recently, see [Duncan Campbell](#) and [Richard Norton-Taylor](#), ‘US accused of holding terror suspects on prison ships’, *The Guardian*, 2 June 2008, advancing the contents of the forthcoming Reprieve report on secret prisons. Bush II openly admitted the existence of secret prisons on September 6<sup>th</sup>, 2006. See his statements available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>

<sup>32</sup> Legal memorandum by Yoo ‘The President Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations’, March 13, 2002, which remains classified, but which is mentioned in page 38 of the (infamous) Yoo/Bybee memo on torture of August 2002. On the rendition program, the reports of the Parliamentary Assembly of the Council of Europe and of the ad hoc committee of the European Parliament are essential reading. The two reports from the Parliamentary Assembly of the Council of Europe and related documents are available at *CIA above the law? Secret detentions and unlawful inter-state transfers of detainees in Europe*, Strasbourg: Council of Europe, 2008. The report from the ad hoc committee of the European Parliament is available at <http://www.statewatch.org/news/2007/jan/ep-cia-rendition-cttee-report.pdf>. The webpage [www.statewatch.org](http://www.statewatch.org) is a treasure trove of information on the rendition program. See also the report of the Canadian commission inquiring on the conduct of officials in the Arar case. The factual and the legal reports are available at [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/26.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm) and <http://epe.lac-bac.gc.ca/100/206/301/pco->

Bush II's lawyers thought that prisoners would be located in "law-free" zones, outside the jurisdiction of any court competent and willing to consider writs of habeas corpus, or to determine the legality of the detention otherwise.<sup>33</sup>

The combination of these three decisions carved out a major exception to the Fourth Amendment of the US Constitution.

The new amendment was defended on the simultaneous affirmation that the fight against Al Qaeda and other terrorist organisations was a war in a proper, legal sense, and thus enemy combatants were deemed to be combatants who could be arrested and denied habeas corpus until the war ended (indeed, prisoners of war can be detained as long as the conflict lasts even if they are not accused of any criminal wrongdoing); and that this was such a radically novel type of war that fundamentally new legal norms applied to it.<sup>34</sup> On such a basis, not only the application of ordinary criminal law standards was out of the question, but also the application of the Code of Military Justice or of the Geneva Conventions.<sup>35</sup>

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<http://www.ararcommission.ca/eng/EnglishReportDec122006.pdf> See also Jane Mayer, 'Outsourcing Torture', *The New Yorker*, 14 February 2005, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6?printable=true](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6?printable=true); Stephen Gray, *Ghost Plane*, New York: St Martin Press, 2006; Trevor Paglen, AC Thompson, *Torture Taxi*; ; Guido Olimpo, *Operazione Hotel California*, Milano: Feltrinelli, 2005; ; Claudio Fava, *Quei bravi ragazzi*, Milano: Sperling and Kupfer, 2007. New York: Melville House, 2006. On the growing legal literature, see Sapna G. Lalimalani, 'Extraordinary Rendition meets the US citizen: United States' Responsibility under the Fourth Amendment', 5 (2005) *Connecticut Public Interest Law Journal*, pp. 1-29; Philippe Sands, 'The International Rule of Law: Extraordinary Rendition, Complicity and its Consequences', 4 (2006) *European Human Rights Law Review*, pp. 408-21; Michael V. Sage, 'The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition', 37 (2006) *California Western International Law Journal*, pp. 121-42; Margaret L. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 (2007) *George Washington Law Review*, pp. 1333-1420; David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 (2006) *Harvard Human Rights Journal*, pp. 123-60; 'Extraordinary Rendition and the Humanitarian Law of War and Occupation', 47 (2007) *Virginia Journal of International Law*, pp. 295-356; J. Troy Lavers, 'Extraordinary Rendition and the Self Defense Justification: Time to Face the Music', 16 (2007) *Michigan State Journal of International Law*, pp. 385-409; and given the argument advocated in this chapter, see also James R. Silkenat and Peter M. Norman, 'Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition', 30 (2007) *Fordham International Law Journal*, pp. 535-552

<sup>33</sup> Indeed, it can be argued that the practice (and very especially, rendition) was the disquieting application of the "outsourcing" technique developed by corporations to the "war on terror".

<sup>34</sup> Yoo, *War by other Means*, p. 36: "There was no customary international law on terrorist organizations like Al Qaeda that could launch a devastating international attack. No clear customary international law on megaterrorism like 9/11 existed".

<sup>35</sup> In the very terms of Gonzales in the perhaps decisive legal opinion on the matter: "[T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW (...) In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such thing as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments" (...) More importantly, as noted above, this a new type of warfare (...) and requires a new approach in our actions towards captured terrorists (...) [Neither Geneva nor the administration's stated policy applies] to a conflict with terrorists, or with irregular forces,

This negative argument was supported by dogmatic, normative and prudential arguments. On what concerns the former, Bush II's lawyers denied both that the Fourth Amendment provided a universal right of judicial protection and that the Geneva Conventions (especially Common Article III) reflected a mandatory norm of international law. By means of an allegedly literal interpretation of the norms, they concluded that both the US constitution and the Geneva Conventions only granted protections to those who were part and parcel of the political community; in the former case, the US political community (from which those aiming at undermining it should be excluded);<sup>36</sup> in the latter case, the community of, one guesses, civilised nations, from which Al Qaeda was excluded on account of its methods; while the Taliban were to be regarded as out of its bounds given that Afghanistan was to be regarded as a "failed state", a new legal category applicable to nations that have reverted to the state of nature.<sup>37</sup> Similarly, resort to a new breed of military commissions was justified by reference to the literal interpretation of the ruling of the Supreme Court concerning the constitutionality of the commissions established by Roosevelt to bring to justice the so-called German saboteurs, the famous *Ex Parte Quirin*.<sup>38</sup>

Bush II's first constitutional amendment was very controversial within the Administration. In particular, Judges Advocates General and senior lawyers at the State Department contested each of the three specific decisions in which the amendment consists. This explains why it took so long to draft the actual rules governing military commissions. And also why the saga of decisions of the Supreme Court<sup>39</sup> and of Congress<sup>40</sup> on the matter was assessed rather differently by different actors within the administration.

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like the Taliban, who are armed militants that oppressed and terrorized the people of Afghanistan", Memo of 25 January 2002, *supra*, note 19, pp.2-3.

<sup>36</sup> Yoo, *supra*, note 13, p. 16: "[War] involves a foreign enemy who is not part of the American political community, and so should not benefit from the regular peacetimes rules that define it. Applying criminal justice rules to al Qaeda terrorists would gravely impede the killing or capture of the enemy, as well as compromise the secrecy of the United States's military efforts" and p. 23: "What the critiques fail to mention is that the Geneva Conventions are treaties that apply only to international armed conflicts between the "high contracting parties" that have signed them. Al Qaeda is not a nation-state"; and p. 25: "[the claim that the common Article III reflects international *ius cogens*] ignores the text of the Geneva Conventions itself, which says that these requirements apply only to conflicts "not of an international character". It also ignores the context in which the Conventions were written (...) Tellingly the United States refused to ratify these add-ons, with President Reagan specifically declaring them objectionable because they gave terrorists the protections in warfare due only to honorable warriors". In page 33 he adds that this add up to rejecting "Europe's view of international law" in favour of "our traditional and historical state practices".

<sup>37</sup> This was another term coined by the advocates of strong executive power after the terrorist attacks of 2001. It also played an instrumental role on the run-up to the Iraq war. On this, see the speech of Jack Straw at the European Institute of the University of Birmingham, of 6 September 2002, available at <http://www.eri.bham.ac.uk/events/jstraw060902.pdf>.

<sup>38</sup> 317 US 1 (1942).

<sup>39</sup> In particular, *Rasul*, 542 US 466 (2004) in which the Supreme Court established that under the positive law in force federal courts had jurisdiction to consider challenges to the legality of detention of foreign nationals at Guantanamo. (at p. 475: "The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."; *Hamdi*, 542 US 507 (2004) in which the Court

The direct application of the first amendment resulted in the indefinite detention on the sole authority of the President of thousands of individuals alleged to be enemy combatants in Guantanamo, the circuit of “black sites” in Iraq, Djibouti, Diego García, Poland and Romania, among other places;<sup>41</sup> and the rendition of hundreds of alleged enemy combatants to a handful of countries well known to torture and treat in inhuman, cruel and degrading ways detainees.

## 2. Warrantless Surveillance of Enemy Combatants

The second Bush II's amendment affirms that the President has the power to order warrantless searches, seizures and surveillance of enemy combatants; and that doing so may require and justify “incidental” warrantless searches, seizures or surveillance operations of US residents, or even US citizens.

This second amendment entails a redefinition of the scope of the right to privacy, as enshrined in the standard interpretation of the Fourth Amendment of the US Constitutions. As is well-known, the rulings of the Supreme Court in *Katz*<sup>42</sup> and *Keith*<sup>43</sup>, and the passage of FISA by Congress in 1978,<sup>44</sup> had established that warrantless searches or surveillance operations were unconstitutional, bar extremely exceptional circumstances.<sup>45</sup> In particular,

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affirmed that the Fourth Amendment required that enemy combatants who were US citizens were acknowledged the ability to challenge their detention before an independent judge. In *Hamdan*, 548 U.S. 557 (2006) the Court found that the executive could not establish the specific type of military commissions that it had without Congressional authorization, without deciding whether certain aspects were also in contravention of the US Constitution. In *Boumediene*, not yet reported, available at

<http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf>., the majority of the Court held that the 2006 Military Commissions Act was unconstitutional to the extent that it stripped the plaintiffs of his constitutional right to submit a writ of habeas corpus before a federal judge.

<sup>40</sup> The 2005 Detainee Treatment Act, included in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 119 Stat 2680, at 2739 (see also the signing statement of President Bush, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>) and the 2006 Military Commissions Act, 120 Stat 2600. The Detainee Treatment Act stripped federal courts of jurisdiction to consider writs of habeas corpus filed by Guantanamo prisoners, thus overcoming the ruling of the Supreme Court in *Hamdi*. It allegedly prohibited inhumane treatment of prisoners and ruled out any interrogation technique not authorized by the US Army Field Manual; but the signing statement of Bush II throws doubt on the actual effectiveness of the Act. The Military Commissions Act was approved as reaction to *Hamdan*, and it expressly deprived enemy combatants of the right to file writs of habeas corpus before US courts.

<sup>41</sup> See ‘Polish agents tell of CIA jails’, BBC, 6 September 2008, available at <http://news.bbc.co.uk/1/hi/world/europe/7601899.stm>.

<sup>42</sup> 389 US 347 (1967).

<sup>43</sup> 407 US 297 (1972).

<sup>44</sup> 92 Stat 1783, now codified in Title 50, chapter 26 of the US Code (available at <http://www4.law.cornell.edu/uscode/50/ch36.html>). FISA did not govern physical searches until 1994. See 108 Stat 3423, section 807, at 3443.

<sup>45</sup> The standard reference on the evolution of the law before September 11<sup>th</sup> is Americo R. Cinquegrana, ‘The Walls (and Wires) have Ears: The Background and the First Ten Years of The Foreign Intelligence Surveillance Act of 1978’, 137 (1989) *University of Pennsylvania Law Review*, pp. 793-828. See also William C. Banks, ‘The Death of FISA’, 91 (2007)

FISA contradicted the repeated claims of the existence of an inherent executive power to conduct warrantless surveillance in order to collect foreign intelligence. In institutional terms, this implied affirming that the final word in the weighing and balancing of the right to privacy and conflicting constitutional values, including national security, should be undertaken by courts, not the executive.<sup>46</sup> Thus, only under very exceptional circumstances surveillance within the United States could be legally undertaken without a warrant; and in most of the exceptional cases in which it could be so ordered, judges could monitor the constitutionality of the operation *ex post*.<sup>47</sup>

Bush II's second constitutional amendment is based on the combination of dogmatic, normative and prudential arguments. On what concerns the former, Bush II's advocates have claimed that the proper interpretation of the

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*Minnesota Law Review* 1209-1300. As is rather well-known, the Supreme Court had excluded electronic surveillance from the scope of the Fourth Amendment if there was no physical trespass of property involved in the old case of *Olmstead* [277 US 438 (1928)]. This finding was only refined in *Nardone* [302 US 379 (1937)] in which the Court only ruled out the use of the information derived from the electronic eavesdropping in court. The Second World War and the Cold War resulted in the expansion of number of warrantless surveillance. The Johnson administration tried to rein in their use and to self-impose some limits. But abuses became especially intense during the Nixon Presidency. The Supreme Court stepped in. First, it reversed *Olmstead* in *Katz* [389 US 347 (1967)], bringing electronic surveillance within the scope of the Fourth Amendment, with one Judge concurring with the majority (Justice White) expressly affirming that surveillance for national security purposes could be conducted without a judicial warrant. In *Keith* [] the Court rebuked the statutory regulation enshrined in the 1968 omnibus Act, and affirmed that a judicial warrant was required in all domestic surveillance, even if targets posed threats to domestic security. The ensuing revelations of massive executive abuses brought to light by the Church committee resulted in the passage of FISA, which subjected to specific procedural and substantive standards surveillance undertaken within the United States to protect national security. FISA required each surveillance operation to be approved through specific internal procedure within the Administration, always ending with the certification of the Attorney General, to be monitored by a judge (even if not an ordinary judge, but a specific and specialised FISC judge) and to comply with substantive requirements, aimed at minimizing the effects that surveillance could have upon the fundamental rights of all US persons.

<sup>46</sup> Perhaps the boldest affirmation can be found in *Zweibon v Mitchell*, 516 F.2d 594, 170 U.S.App.D.C. 1), in which the Circuit Court came to affirm that even searches undertaken to obtain foreign intelligence would require a warrant, confining any assumed inherent power of the executive to very exceptional circumstances. See pp. 613-14 of the concurring opinion of Judge Wilkey: "Although we believe that an analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional, our holding need not sweep that broadly".

<sup>47</sup> On what concerns FISA, there are three exceptions. First, the Attorney General can order surveillance to start in an emergency situation, subject to the obligation to report to FISC and to submit a request for a warrant within three days (USC, Title 50, chapter 36, subsection 1, article 1805(f)). Thus, the emergency results in temporary warrantless surveillance, the legality of which is conditioned to *ex post* judicial control. Second, the Attorney general can order the warrantless surveillance of communications transmitted by means exclusively used by foreign powers or among foreign powers, if there is no likelihood that this results in the acquisition of communications to which US persons are party, and adequate minimization procedures are established. The authority of the Attorney General goes unchecked for at most a year, under the condition he transmits the order sealed to the FISC (article 1802). Thirdly and finally, the President through the Attorney General can order warrantless surveillance for a maximum period of fifteen days after Congress has declared war (article 1811).

Fourth Amendment should emphasize the “reasonableness” requirement, which may or may not be satisfied through the approval (and monitoring) of the surveillance by a court.<sup>48</sup> While the substantive standards and the judicial monitoring required by standard positive criminal law make sense in ordinary domestic situations, they are not “reasonable” if applied to foreign intelligence-gathering, and especially so if a war is being waged against foreign enemies. The argument continues that the power to order the warrantless surveillance of foreign agents and foreign enemies is one of the key prerogatives of the President as final responsible of the conduct of foreign policy and as Commander in Chief. Furthermore, if the exercise of such powers results in the warrantless surveillance of a US citizen in US territory, such action should be regarded as fully constitutional, as it is required to exert in an effective manner the constitutional powers assigned to the President. Explicit statutory limitations on the powers of the President (such as those contained in FISA) would be unconstitutional to the extent that they encroach upon his or her inherent powers.<sup>49</sup>

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<sup>48</sup> President Bush's Radio Address of 17 December 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>: “In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks. This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country”. The legal basis of the decision was articulated in the Press Conference of Gonzales and Hayden of 19 December 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>. This was supplemented by a paper of the Department of Justice, ‘Legal Authorities supporting the activities of the National Security Agency described by the President, published on 19 January 2006, available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>. War by Other Means, New York: Atlantic Press, 2007, pp. 99ff; the same argument is also contained in 14 (2007) *George Mason Law Review*, pp. 565-603 and in (co-authored with Sulmasy), ‘Katz and the War on Terrorism’, 41 (2008) *UC Davis Law Review*, pp. 1219-58. Robert Turner, ‘Congress, too, must “obey the law”. Why FISA must yield to the President’s Independent Constitutional Power to authorize the collection of foreign intelligence’, Testimony before the United States Senate Committee on the Judiciary, on Wartime Executive Power and the NSA’s Surveillance Authority II, 28 February 2006, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1770&wit\\_id=5217](http://judiciary.senate.gov/print_testimony.cfm?id=1770&wit_id=5217).

<sup>49</sup> Inherent constitutional authority of the President as commander in chief to order surveillance of a person reasonably believed to be part of Al Qaeda, even if this person is a US person (or citizen) and even if the surveillance takes place within the United States. A) There is a constitutional power stemming from the condition of the President as commander in chief, activated by the act of war which took place on September 11<sup>th</sup> (warrantless surveillance aims at preventing a new armed attack on the US) (p.1-2); historical precedents; warrantless surveillance is typical during states of war (including Roosevelt) (p. 13) The attack has led to a new world, in which we were already partially, due to developments in communications technology (p. 5) The key to the Fourth Amendment is reasonableness, not the existence of a warrant. B) Such a power is confirmed and expanded by the Authorisation to Use Military Force approved by Congress on September 14<sup>th</sup>, 2001; in constitutional terms, the power of the President is to be regarded as being at its height because it is covered by AUMF (p. 10).

The most famous application of the second Bush II's amendment is the *Terrorist Surveillance Program*, launched in October 2001 by order of President Bush.<sup>50</sup> The concrete breadth and scope of the program remains secret. But according to then Attorney General Alberto Gonzales, it affected all communications in and out the United States in which there was reasonable basis to conclude that one of the parties was a member of al Qaeda or some affiliated, supportive or related organisation.<sup>51</sup> It was irrelevant whether US persons or even citizens were party to the communication, or whether the actual surveillance took place within the United States, a clear break with the law and the interpretation of the Constitution before September 11<sup>th</sup>. In addition, the mass of information publicly available supports the conclusion that such a Program was only one among several.<sup>52</sup> Information which has been leaked since seems to indicate that the scope of surveillance was much wider, and included total access to the major switches of telecommunications companies.<sup>53</sup>

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C) FISA cannot limit the inherent power of the President; if that would be the result, it would be unconstitutional as far as it limited such power (p. 3) (p.34ff)

Moreover, it contemplates the possibility that another statute balances the rights and duties at stake in such a way as to guarantee fundamental freedoms through other means (AUMF will be such a statute)

Argument of the Administration as spelt out in Justice Department document on legal authorities

D) Any remaining doubt should be interpreted in favour of the inherent powers of the President (30).

<sup>50</sup> James Risen and Eric Lichtblau, 'Bush Lets U.S. Spy on Callers Without Courts', *The New York Times*, 16 December 2005, available at

<http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=print>. The story has been further expanded in James Risen, *State of War*, New York, Free Press, 2006 and Eric Lichtblau, *Bush's Law, The Remaking of American Justice*, New York: Pantheon, 2008. A succinct factual and legal analysis can be found in 'The NSA Wiretapping Program', 1 (2007) *For the Record*, available at

[http://www.lawandsecurity.org/publications/ForTheRecord/NSA\\_jan\\_07.pdf](http://www.lawandsecurity.org/publications/ForTheRecord/NSA_jan_07.pdf).

<sup>51</sup> Press Conference, *supra*, fn 45

<sup>52</sup> The most spectacular of which was without doubt the so-called Total Information Awareness program, based on massive mining of major public and private databases. See John Markoff, 'Threats and Responses: Pentagon Plans a Computer System that Would Peek at Personal Data of Americans', *The New York Times*, 9 November 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9F05EFD61431F93AA35752C1A9649C8B63&sec=&spon=&pagewanted=print>. It is surprising how little effort has been made to elucidate the relationship between such plans and intelligence activities realized under the UKUSA Agreement, in particular the so-called Echelon network. On the latter, see 'Report [of the European Parliament] on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0264+0+DOC+PDF+V0//EN> and Lawrence D. Sloan, 'Echelon and the Legal Restraints on Signal Intelligence: a need for reevaluation', 50 (2000) *Duke Law Journal*, pp. 1467-1510.

<sup>53</sup> See also the USA today revelations about the government having access to list of phone calls. 'NSA has massive database of Americans' phone calls', USA Today, 5 October 2006, available at [http://www.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm); and revelations by Mark Klein, former employee of AT&T, of access to a major telecommunications switch by the National Security Agency. A revealing interview is available at <http://www.pbs.org/wgbh/pages/frontline/homefront/interviews/klein.html>. And information on the case brought by Electronic Frontier Foundation against AT&T is available at <http://www.eff.org/nsa/hepting>. The first official acknowledgment of the role played by

There was internal disagreement on the soundness of the second Bush II's amendment; and contrary to what was the case with the first, the dissenting voices were not coming from lawyers inside the administration but outside the inner circle of Bush II's administration; even within the "loyalists" some critical voices were raised. This is proven by the tragicomic events surrounding the re-certification of the Terrorist Surveillance Program in March 2004, triggered by the growing doubts within political appointees at the Justice Department about the constitutionality of the program.<sup>54</sup> The exposure of the program in the media led to additional criticism.<sup>55</sup> By January 2007, then Attorney General Gonzales sent a letter to Congress indicating that the activities undertaken under the Terrorist Surveillance Program will now be reviewed by FISA Court under a special arrangement.<sup>56</sup> By then, the administration had decided to change strategy, and obtain "legislative confirmation" of the inherent executive power to conduct warrantless surveillance. Against some odds, the Administration was rather successful in doing so, despite the new democratic majority in Congress. In August 2007, the "Protect America Act" was approved. It broadened the scope of cases within which the executive could order warrantless surveillance.<sup>57</sup> In concrete, it replaced the requirement of a judicial warrant for each specific surveillance operation by the judicial review of the executive guidelines according to which surveillance of foreign intelligence targets "reasonably believed" to be outside of the United States would be conducted. This rendered legal surveillance within the United States (if the target is reasonably believed to be outside the United States) and of US persons, even citizens.<sup>58</sup> The Protect America Act of 2007 had a sunset clause and it expired six months after entering into force. At the time of writing, Congress had just passed a permanent reform of FISA, which would result in the recognition of a wider inherent executive power to order warrantless surveillance and also in the granting of immunity to the companies which have cooperated with the National Security Agency in the conduct of domestic warrantless surveillance since 2001.<sup>59</sup>

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telecommunications companies can be found in Chris Roberts, 'Debate on foreign intelligence surveillance', *El Paso Times*, 22 August 2007, available at [http://www.elpasotimes.com/ci\\_6685679](http://www.elpasotimes.com/ci_6685679).

<sup>54</sup> See the definitive account in Savage, *supra*, note 10, pp. 185-88.

<sup>55</sup> For a sample of the scholarly criticism, see Curtis Bradley, David Cole, Walter Dellinger, Ronald Dworkin, Richard Epstein, Philip B. Heymann et al, 'On NSA Spying: A Letter to Congress', 53 (2006) *The New York Review of Books*, 9 February 2006, available at <http://www.nybooks.com/articles/18650#fn1>; Statement of Harold Hongju Koh before the Senate Judiciary Committee regarding Wartime Executive Power and the National Security Agency's Surveillance Authority, of February 28, 2006; available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1770&wit\\_id=3938](http://judiciary.senate.gov/print_testimony.cfm?id=1770&wit_id=3938); Wilson R. Huhn, 'Congress has the power to enforce the Bill of Rights against the Federal Government: Therefore FISA is constitutional and the President's Terrorist Surveillance Program is Illegal' 16 (2007) *William and Mary Bill of Rights Journal* 537-93.

<sup>56</sup> Letter from Attorney General Gonzales to the Senate Judiciary Committee, January 17, 2007, available at <http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf>.

<sup>57</sup> 12 Stat 552.

<sup>58</sup> 'Shifting the FISA paradigm: Protecting Civil Liberties by eliminating ex ante judicial approval', 121 (2008) *Harvard Law Review*, pp. 2200-21.

<sup>59</sup> For an overall assessment of the (then) pending bill, see Aziz Huq, 'Surveillance Bill: The Worst of all Worlds', *The Nation*, 20 June 2008, available at

### 3. Assassination of Enemy Combatants

The third Bush II's amendment says that the President has the power to order the assassination of enemy combatants.

There was a rather world-wide consensus on the legal prohibition of targeted assassinations in the late XXth century,<sup>60</sup> with the only significant (and as will prove to be the case, significant) exception of Israel.<sup>61</sup> On what specifically concerns the US constitutional practice, the illegal conduct of the CIA during the Cold War<sup>62</sup> exposed by the Church Committee<sup>63</sup> resulted in a further explicit reinforcement of the legal prohibition, enshrined in Executive Orders signed by Presidents Ford, Carter and Reagan.<sup>64</sup> This did not

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<http://www.thenation.com/doc/20080707/huq>. On the final vote, see Eric Lichtblau, 'Senate Backs Wiretap Bill to Shield Phone Companies', *The New York Times*, 10 July 2008, available at

[http://www.nytimes.com/2008/07/10/washington/10fisa.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2008/07/10/washington/10fisa.html?_r=1&hp&oref=slogin).

<sup>60</sup> A review of the way in which international law had evolved before 2001 can be found in Michael N. Schmitt, 'State Sponsored Assassination in International and Domestic Law', 17 (1992) *Yale Journal of International Law*, 609-685 and Ward Thomas, 'Norms and Security: The Case of International Assassination', 25 (2000) *International Security*, pp. 105-33.

<sup>61</sup> Israel seems to have pursued selective assassinations for a rather long time. But it was only with the second Intifada (the al-Aqsa Intifada) that they became standard practice. See J Nicholas Kendall, 'Israeli Counter-terrorism: targeted killings under international law', 80 (2002) *North Carolina Law Review*, pp. 1069-88. The Supreme Court was criticized by a first decision judging the question non justiciable. See Orna Ben-Naftali and Keren R. Michaeli, 'Justice-ability: a critique of the alleged non-justiciability of Israel's policy of targeted killings', 1 (2003) *Journal of International Criminal Justice* 368-405 and 'We Must not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings', 36 (2003) *Cornell International Law Journal*, pp. 233-89. Then it issued a very important ruling on December 11<sup>th</sup>, 2005, which at the same time endorsed and constrained the practice. The judgment is available at

[http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.HTM](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM). A very apt comment is to be found in Kristen Eichensehr, 'On target? Israeli Supreme Court and the expansion of targeted killings', 116 (2007) *Yale Law Journal*, pp. 1873-82; Roy S. Schondorf, 'The targeted killings judgment: A Preliminary Assessment', 5 (2007) *Journal of International Criminal Justice*, pp. 301-9; Amichai Cohen and Yuval Shany, 'A development of modest proportions: the application of the principle of proportionality in the Targeted Killings case', 5 (2007) *Journal of International Criminal Justice*, pp. 310-21; Antonio Cassese, 'On some Merits of the Israeli Judgment', 5 (2007) *Journal of International Criminal Justice*, pp. 339-45.

<sup>62</sup> And the Special Forces. On that regard, see the revealing *Selective Assassination as an Instrument of Foreign Policy*, an Army handbook of the 1960s, timely reprinted by Paladin Press, Boulder: 2002.

<sup>63</sup> The Church Committee investigated concrete attempts to kill Lumumba, Castro, Trujillo, Diem and Schneider (the latter the assassinated Commander in Chief of the Chilean army in 1970). The Committee concluded that selected assassination violated moral precepts fundamental "to our way of life and traditional American notions of fair play". On the Church Committee, see Frederick A. O. Schwarz Jr and Aziz Z. Huq, *Unchecked and Unbalanced. Presidential Power in a Time of Terror*, New York: New Press, 2007, especially part I. The report on selective assassinations is available at

[http://www.aarclibrary.org/publib/contents/church/contents\\_church\\_reports\\_ir.htm](http://www.aarclibrary.org/publib/contents/church/contents_church_reports_ir.htm).

<sup>64</sup> See Executive Order 11905, of 18 February 1976, issued by Ford, section 5(9) available at <http://www.presidency.ucsb.edu/ws/print.php?pid=59348>; Executive Order 12036, of 24 January 1978, section 2-305, available at

necessarily prevent further violations of the law,<sup>65</sup> or for that matter, the periodical reopening of a public debate on the merits of assassinating foreign leaders.<sup>66</sup> A legal memorandum authored by a senior lawyer of the Defence Department (then led by Cheney) already advocated a relaxation of the ban in the late eighties.<sup>67</sup> New legal opinions were requested and produced during the presidency of Clinton, resulting in the first specific endorsement of less “restrictive” standards, such as those upheld in *Infinite Reach*.<sup>68</sup>

Bush II radically altered constitutional practice by means of signing on September 17<sup>th</sup>, 2001 a secret intelligence “finding” (technically a memorandum of notification)<sup>69</sup> in which he authorized selective assassinations.<sup>70</sup> This seems to have been further expanded in 2002.<sup>71</sup> By the spring of 2003 the use of targeted assassinations had become fully normalised, as proved by the far-from-cover attempt to kill Saddam Hussein

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<http://www.presidency.ucsb.edu/ws/index.php?pid=31100>; Executive Order 12333, of 4 December 1981, section 2.11, available at <http://www.archives.gov/federal-register/codification/executive-order/12333.html>.

<sup>65</sup> Michael R. Gordon, ‘Reagan denies raid was meant to kill Qaddafi’, *New York Times*, 19 April 1986, available at

<http://select.nytimes.com/gst/abstract.html?res=F50717FE395B0C7A8DDDAD0894DE484D81&scp=1&sq=reagan+denies+raid&st=nyt>.

<sup>66</sup> Robert F. Turner, ‘Killing Saddam, Would It be a Crime?’, *Washington Post*, 7 October 1990. Former Clinton adviser Stephanopoulos revived the debate at the end of 1997 (‘Why we should kill Saddam’, *Newsweek*, 1 December 1997). This set the tone of some of the claims made after the attacks on the US embassies in Kenya and Tanzania. Congress considered the issue (see Paul Richter, ‘Congress Ponders Whether the U.S. Should Ease Ban on Assassinations’, *Los Angeles Times*, 18 September 1998). The Cole attacks further fuelled the discussion, resulting among other things in a bill proposing a ‘Terrorist Elimination Act’ sponsored by Representative Barr (Republican from Georgia). The latter text is available at <http://www.trialbriefs.com/HR19.htm>.

<sup>67</sup> Memorandum written by W. Hays Parks, Special Assistant for Law of War Matters to The Judge Advocate General of the Army, 2 November 1989, available at

[http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks\\_final.pdf](http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf)

<sup>68</sup> The attack was supposed to target terrorists in Afghanistan and Sudan. It resulted in the destruction of the main and basically unique pharmaceutical plant of Sudan, under the alleged claim (which turned out to be wrong) that it was used to produce chemical weapons. See Barton Gellman, CIA Weighs “Targeted Killing” Missions, *Washington Post*, 28 October 2001, available at <http://www.washingtonpost.com/ac2/wp-dyn/A63203-2001Oct27?language=printer>

<sup>69</sup> Intelligence findings and memoranda of notification are rather peculiar sources of law, peculiar to the specific legal regime of the CIA..

<sup>70</sup> Bob Woodward, ‘CIA Told to Do “Whatever Necessary” to Kill Bin Laden’, *Washington Post*, 21 October 2001, <http://www.washingtonpost.com/ac2/wp-dyn/A27452-2001Oct20?language=printer>. A more detailed account is now given in *Bush at War*, New York: Simon and Schuster, 2002, especially pages 66, 84 and 88. In fact, the very day he signed the order, he said to an audience guards and reserves that he wanted justice, and in concrete that “There’s an old poster out west, as I recall, that said, “Wanted: Dead or Alive”,

the latter being an unequivocal reference to Osama Bin Laden. See <http://www.whitehouse.gov/news/releases/2001/09/20010917-3.html>.

<sup>71</sup> James Risen and David Johnston, ‘CIA expands authority to kill Qaeda leaders’, *New York Times*, 15 December 2002, available at

<http://query.nytimes.com/gst/fullpage.html?res=9403E7DF163DF936A25751C1A9649C8B63&scp=1&sq=authority+to+kill+Qaeda+leaders&st=nyt>. On the legality of the Yemen attack, see Chris Downes, ‘Targeted Killings in an Age of Terror: The Legality of the Yemen Strike’, 9 (2004) *Journal of Conflict and Security Law*, pp. 277-94.

immediately before the open war in Iraq.<sup>72</sup> Manifold assassinations have been conducted since.<sup>73</sup> Quite recently, it seems that Bush II has authorised selected assassinations as part of the cover operations in Iran.<sup>74</sup>

Although it seems that the enshrinement of Bush II's third amendment was so sudden as not to have been preceded by any full-length legal opinion, not even from the Office of Legal Counsel, John Yoo seems to have thought about the issue immediately after the attacks, and has fleshed out his views in favor of the measure in his writings. Given his proclivity to offer oral advice, and his pro-activism in the months immediately following the attacks, it is not far-fetched to assume that his reasoning either reflects or affected the actual decision. The main "dogmatic" argument Yoo advances is that the ban on assassinations as established before September 11<sup>th</sup> was wrongly interpreted, and indeed it was not as unconditional as usually assumed. Moreover, because the attacks of September 11<sup>th</sup>, 2001 were an act of war, and indeed of a new type of war, the assassination of an enemy combatant is no longer a breach of constitutional law, but merely an act of war.<sup>75</sup> In particular, given the new nature of this war, we should not expect major losses of life in traditional combat operations, but rather deaths resulting from terrorist attacks<sup>76</sup> and from "surgical" "targeted killings".<sup>77</sup> In particular, targeted killings should be regarded as constitutional if undertaken

<sup>72</sup> David E. Sanger and John F. Burns, 'Bush Orders Start of War on Iraq; Missiles apparently miss Hussein', *New York Times*, 20 March 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9D02E2D91031F933A15750C0A9659C8B63&scp=2&sq=kill+saddam+hussein&st=nyt>. See also the latter attempt reported by David E. Sanger and Eric Schmitt, 'US Blasts Compound in Effort to Kill Hussein', *New York Times*, 8 April 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9B00E0D61038F93BA35757C0A9659C8B63&scp=1&sq=kill+saddam+hussein&st=nyt>. Josh Meyer, 'CIA expands use of drones in terror war', *Los Angeles Times*, 29 January 2006, available at <http://www.commondreams.org/headlines06/0129-05.htm..>

<sup>73</sup> Opening up what pretends to be a "normative debate". Legal questions have been raised by Daniel Pickard, 'Legalizing Assassination? Terrorism, the CIA and international law', 30 (2001) *Georgia Journal of International Law*, pp. 1-; Joshua Rainers, 'Osama, Augustine and Assassination: The Just War Doctrine and Targeted Killings', 12 (2002) *Transnational Law and Contemporary Problems* 217-40;

Nathan Canestaro, 'American law and policy on assassinations of foreign leaders: the practicality of maintaining the status quo', 26 (2003) *Boston College of International and Comparative Law Review*, pp. 1-32; Howard A. Wachtel, 'Targeting Osama Bin Laden: Examining the legality of Assassination as a tool of US foreign policy', 55 (2005) *Duke Law Journal*, pp. 677-710; Catherine Lotrionte, 'When to Target Leaders', 26 (2003) *The Washington Quarterly*, 73-86; Daniel Byman, 'Do Targeted Killings Work', 85 (2006) *Foreign Affairs*, pp. 95-112. And chapter 3 of Yoo, *supra*, note 13, in which he follows his usual "nominal" argument, especially at pp.60ff.

<sup>74</sup> Andrew Cockburn, 'Secret Bush "Finding" Widens War on Iran', *Counterpunch*, 2 May 2008, available at <http://www.counterpunch.org/andrew05022008.html>.

<sup>75</sup> *Ibidem*, p. 58 and especially pp. 60: "While it bans assassinations, Executive Order 12333 does not define them" and p. 63: "There is no indication that the presidents intended the assassination ban to prevent traditional military operations"

<sup>76</sup> Yoo comes as far as indeed claiming that the terrorist attacks of September 11<sup>th</sup>, 2001 would have been legal had it not been for the fact that the method of the attack was "the hijacking of civilian airliners" (Yoo, *supra*, fn 13, p. 64), a very intriguing and in my view ridiculous claim. A similar one is made regarding the eventual capture of Rumsfeld or Tenet on p. 166.

<sup>77</sup> *Ibidem*, p. 54.

in either “collective self-defence” or (and here is the novelty) in “collective self-preemption”.<sup>78</sup> This renders unavoidable, no matter how much effort is invested in gathering information, that some targets would turn out to be innocent human beings,<sup>79</sup> or that innocent people will be killed as “collateral damage”.<sup>80</sup>

#### 4. Torturing Enemy Combatants

The fourth Bush II's amendment says that the President has the power to decide the interrogation techniques to which enemy combatants are to be subject, no matter whether such techniques are regarded as illegal under international law, on account of their constituting torture or cruel, inhuman or degrading treatment.

As a matter of positive constitutional law, both US law (by virtue of the 1994 Anti-Torture Statute and of the 1996 War Crimes Act)<sup>81</sup> and international law (more specifically in the Convention Against Torture of 1984)<sup>82</sup> establish an absolute prohibition of both torture and cruel, inhuman or degrading treatment.

The scope of such prohibition was reconsidered in a series of legal opinions, leading to the application of interrogation techniques both by military and by CIA personnel. The key legal documents which have been rendered public until now are without doubt the three memoranda of the Office of Legal Counsel,<sup>83</sup> in which not only torture was redefined out of existence, but in which specific techniques of interrogation were discussed in detail, including water-boarding. Questions concerning the legality of techniques of

<sup>78</sup> Ibidem, p. 61.

<sup>79</sup> Ibidem, p. 56-7.

<sup>80</sup> Ibidem, p. 64.

<sup>81</sup> *Anti-Torture Statute*, 108 Stat 382; *War Crimes Act of 1996*, 110 Stat 2104.

<sup>82</sup> See, among others, J. Herman Burgers and Hans Denelius, *The United Nations Convention against Torture: a handbook*, Dordrecht: Martinus Nijhoff, 1988; AHCENE BOULESBA, *The U.N. Convention on Torture and the prospects for enforcement*, The Hague: Kluwer, 1999; Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention against Torture: A Commentary*, Oxford: Oxford University Press, 2008.

<sup>83</sup> Jay S. Bybee to Alberto R. Gonzales, ‘Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A’, of 1 August 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>; Letter of Yoo to Gonzales, regarding “the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives”, of 1 August 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>; Yoo to Haynes II, ‘Memo Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States’, of 14 March 2003, available at [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf). Bybee had addressed an opinion to Haynes II concerning the interplay between the decision to bring detainees before Military Commissions and the admissibility of evidence obtained through interrogation. See ‘Potential Legal Constraints Applicable to Interrogations of Persons Captured by US Armed Forces in Afghanistan’, of 26 February 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf>.

interrogation employed by military personnel were settled in a related set of documents.<sup>84</sup>

The dogmatic argument in favour of Bush II's fourth constitutional amendment was grounded on a rather peculiar interpretation of the literal tenor of the 1994 anti-torture statute. The Bybee/Yoo's memo claimed that an act could only be qualified as torture if it complied simultaneously with two conditions: one objective, the other subjective.<sup>85</sup>

The objective condition was the infliction of "severe harm", either physical or mental. On what concerned physical pain, the memorandum claims that there are no obvious legislative or judicial materials of help in the construction of what "severe" means. This is why resort was made to the (allegedly) only occurrence of the term in the US Code, namely, the definition of the circumstances under which a person is in a medical condition so severe that she should be provided with health assistance, even if uninsured. Even if the memo states that the rationale of the two statutes is very different, it concludes that we should define "severe physical pain" for the purpose of determining whether an action amounts to torture with the criterion which determines entitlement to health assistance, namely "death, organ failure or the permanent impairment of a significant body function".<sup>86</sup> On what regards mental pain or suffering, it is simultaneously required that (1) there is prolonged mental harm, implying a last harm (during months or years) even if not necessarily a permanent harm;<sup>87</sup> (2) It must result from one the specific acts mentioned in the statute, and from no other one.<sup>88</sup> The subjective condition was said to be met when the interrogator "acted with specific intent", or what is the same, "he must expressly intend to achieve the forbidden act" and "the infliction of such pain must [have been] the defendant's precise objective".<sup>89</sup> Specific intent was not present if the

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<sup>84</sup> Diane Beaver to General James T. Hill, 'Legal Brief on Proposed Counter-Resistance Strategies', and 'Legal Review of Aggressive Interrogation Techniques', of 11 October 2002; Haynes II to Rumsfeld, 'Counter-Resistance Techniques', of 27 November 2002, and approved 2 December 2002 by Rumsfeld. The three documents are available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>. Beaver's memo on "aggressive interrogation techniques" is also known as Dunlavey's memo, on account of the fact that it was Major Dunlavey signed the cover letter addressed to the Army command to which Beaver's memo was attached. A compilation of opinions and decisions which helps understanding who and why took decisions has been posted by Senator Levin of the Armed Services Committee, and is available at <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>.

<sup>85</sup> Ibidem, p. 3. The authors assumed that they were being asked to specify these two requirements, and not other conditions which the federal statute established for qualifying a given act as torture (see p. 3). But such other conditions (acting under the colour of the law, or outside the United States) are less essential to our present concerns.

<sup>86</sup> Ibidem, p. 6.

<sup>87</sup> Ibidem, p. 7.

<sup>88</sup> Ibidem pp. 9-12. Namely (a) intentional infliction or threatened infliction of severe physical pain or suffering; (b) administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) threat of imminent death; (d) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

<sup>89</sup> Ibidem p. 3.

interrogator acted with mere “general intent”, meaning that he was conscious that it was reasonably likely that the techniques of interrogation would result in damage satisfying the objective prong of the definition of torture.<sup>90</sup>

Thus, the memo holds that to qualify as torture, it is not sufficient that an act results in a prolonged mental pain or suffering, but it is also necessary that the interrogator wanted to inflict *severe and lasting* mental pain or suffering.<sup>91</sup> Moreover, the action would not amount to torture if the interrogator acted in “good faith”, namely, if he believed that his conduct would not result in an infringement of the law.<sup>92</sup>

The decision to approve certain techniques tantamount to torture according to international standards opened a major debate within the rank and file of lawyers internal to the administration (and even within the inner circle of loyalists to Bush II).<sup>93</sup> This is proven by the fact that during his brief stint as head of the Office of Legal Counsel, Jack Goldsmith (assistant to Haynes II until he was promoted to the OLC, and as such, active collaborator in the affirmation of Bush II's four constitutional amendments) withdrew Yoo's and Bybee's opinions on interrogation techniques.<sup>94</sup>

However,<sup>95</sup> neither the formal guidelines nor actual practice seem to have been altered in view of the wide-range disagreement; it is actually unknown whether torture keeps on being committed as the reader reads these lines.<sup>96</sup> That Bush II's lawyers still stand by Bush's fourth constitutional

<sup>90</sup> *Ibidem* p. 4.

<sup>91</sup> *Ibidem*. p. 8.

<sup>92</sup> *Ibidem*, p. 4.

<sup>93</sup> Sands, *supra*, note 11, pp. 136ff. On the specific role of Alberto J. Mora, General Counsel of the Navy, see Jane Mayer, ‘The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted’, *The New Yorker*, 27 February 2006, available at [http://www.newyorker.com/archive/2006/02/27/060227fa\\_fact?printable=true](http://www.newyorker.com/archive/2006/02/27/060227fa_fact?printable=true). And

<sup>94</sup> As stated in the letter from Daniel Levin, then head of the Office of Legal Counsel, to Haynes II, General Counsel of the Department of Defense, of 4 February 2005, in which Haynes is reminded that Goldsmith had instructed him not to rely on Yoo's memo of March 2003 by December 2003. Goldsmith, *supra*, note 16, pp. 144ff (especially p. 155) confirms that. Bybee's memo was withdrawn in June 2003, after the Abu Grahیب scandal broke out, see *ibidem* p. 158. It was only replaced with an alternative opinion in December 2004, well after Goldsmith's resignation, available at <http://www.justice.gov/olc/18usc23402340a2.htm>. Yoo, *supra*, note 13, pp. 185-6 seems to have resented that, although he (in my view, rightly) claims that changes have been more aesthetical than substantive.

<sup>95</sup> After having expressed his concerns about interrogation techniques to Haynes, General Counsel of the Defence Department, who had endorsed Beaver's memo and presented it to Rumsfeld, and only being answered with vague compromises, Alberto J Mora prepared a draft memo to Haynes and Jane Dalton in which he expressed his view that Beaver's memo was flawed and should be rejected, because the majority of the techniques proposed in Categories II and III violated both US constitutional law and international law standards. The draft memo was sent on January 15<sup>th</sup>. Rumsfeld opted for rescinding the authorization of the techniques, and calling for a new review of interrogation methods. The two said documents are available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf> and <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15b.pdf>. The specific chronology of events is discussed in his memo of 18 June 2004, ‘Statement for the record: Office of General Counsel involvement in interrogation issues’, available at [http://www.aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf).

<sup>96</sup> Mayer, *supra*, note 92, reports that Mora was shown by late January a draft –one guesses, given the dates- of Yoo's legal opinion on specific interrogation techniques (*supra*, fn 80). The said opinion had been solicited by Haynes in what seems hard not to believe was an effort at influencing and perhaps rendering moot the Working Group itself. The draft report of

amendment is proved beyond doubt by the way in which the President has opposed any attempt by Congress to preclude the use of torture. Bush II added a signing statement to the Detainee Treatment Act in 2005 which is hard not to construct as a claim to the constitutional power to declare parts of the act unconstitutional;<sup>97</sup> and more Bush himself recently vetoed a bill of Congress because of the single provision which prohibited any interrogation technique beyond those approved in the Army Field Manual.<sup>98</sup> It is important to add that one month *before the veto*, General Hayden, director of the CIA, had explicitly admitted that at least three detainees had been waterboarded in the past. The White House spokesman added that waterboarding was legal and its use “under certain circumstances” could not be ruled out. As it is also relevant that one month after the veto, it transpired that the National Security Council explicitly approved waterboarding, something which was not only confirmed, but also publicly endorsed, by the President himself.<sup>99</sup>

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March 6<sup>th</sup> basically followed the gist of the opinions put forward by the Office of Legal Counsel, available at <http://news.findlaw.com/hdocs/docs/torture/30603wgrpt.html>. Mora kept on arguing that both Yoo's memo and the draft report of the Working Group were flawed. And so had done Judges Advocate General Romig, Bohr, Sandkhuler and Rives when proposing changes to the draft (their opinions are available at [http://www.dod.mil/pubs/foi/detainees/05-F-2083\\_JAGmemos.pdf](http://www.dod.mil/pubs/foi/detainees/05-F-2083_JAGmemos.pdf)). Even if it was not rendered public, not even known within Army circles, the Working Group produced a final report by April 4<sup>th</sup> (available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>), which only became declassified after the Abu Grahیب scandal broke out. Rumsfeld issued new guidelines concerning interrogation methods by April 16<sup>th</sup>; available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>.

<sup>97</sup> *Supra*, fn 38. Bush claimed that “The executive branch shall construe Title X in Division A of 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, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks”.

<sup>98</sup> See Intelligence Authorization Act for Fiscal Year 2008, Section 327: “No individual in the custody or under the effective control of an element of the intelligence community or instrumentality thereof, regardless of nationality or physical location, shall be subject to any treatment or technique of interrogation not later authorized by the United States Army Field Manual on Human Intelligence Collector Operations”. The full text of the bill can be found at <http://www.opencongress.org/bill/110-h2082/text>.

<sup>99</sup> When the first secretary of Homeland Security, Tom Ridge, expressed his view that waterboarding *was* torture, Associated Press informed that Hayden had forbidden waterboarding only as late as 2006. See ‘Former Secretary on Waterboarding’, New York Times (from AP), 19 January 2008

Greg Miller, ‘Waterboarding Is Legal, White House Says’, *Los Angeles Times*, 7 February 2008, available at <http://www.commondreams.org/archive/2008/02/07/6913/>. White House Spokesman Fratto claimed that the use of waterboarding had been found to be legal under certain circumstances by officials at the Department of Justice, and that the White House had not ruled out using it if a terrorist attack was imminent. Then Hayden, director of the CIA, admitted for the first time concrete instances of waterboarding. Scott Shane, C.I.A. Chief Doubts Tactic To Interrogate Is Still Legal, New York Times, 8 February 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE3DF173BF93BA35751C0A96E9C8B63&scp=5&sq=hayden+waterboarding&st=nyt>. Three prisoners (Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri) would have been waterboarded; the tapes of the interrogations of two of them were the ones confirmed to have been destroyed in December. Then the public learnt that the National Security Council (of which Cheney, Rumsfeld, Powell, Rice and Tent were members) had approved interrogation the specific techniques applied to specific detainees, including waterboarding. See Jan Crawford Greenburg, Howard

## II. The constitutional theory of Bush II

The four amendments proposed and relied upon by Bush II's lawyers are not to be considered as unintended, evolutionary achievements stemming from the "context" in which the political leaders and the citizens of the United States found themselves immediately after the terrorist attacks of September 11<sup>th</sup>. As already advanced in the introduction, it is my claim that they are to be constructed as specific concretisations of a clear if not fully explicit constitutional theory, to which Bush II and the core lawyers in his administration adhered well before the terrorist attacks. Such a theory underpinned the practice, but not so much the formal legal argumentation, of several US Presidents in the postwar period, and very clearly in the case of Richard Nixon.<sup>100</sup> The constitutional theory to which Bush II adhered was also central to the minority report of the Iran Contra affair, with its defence of the whole sabotage campaign by reference to the inherent constitutional powers of the President as commander in chief. The document was signed by then Congressman Dick Cheney, one of whose legal advisors (although not the main intellectual author of the report)<sup>101</sup> was no other than David Addington.<sup>102</sup>

Bush II's constitutional theory rests upon two key premises which redefine the two main sources of limits to presidential action, namely, the US Constitution and international law.

First, the US Constitution is said to contain two different sets of fundamental norms: the ordinary constitution, which monopolises the attention of politicians, scholars and citizens; and the emergency constitution,

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L. Rosenberg and Ariane de Vogue, 'Top Bush Advisors Approved "Enhanced" Interrogation', ABC News, 9 April 2008, available at <http://abcnews.go.com/print?id=4583256>. Two days later, Bush conceded that he was aware of the debates and he approved the conclusions: "I'm aware our national security team met on this issue. And I approved" in by Jan Crawford Greenburg, Howard L. Rosenberg and Ariane de Vogue, 'Bush Aware of Advisers' Interrogation Talks', ABC News, 11 April 2008, available at <http://abcnews.go.com/print?id=4635175>. Quite recently, it has become known that torture techniques were not only "reverse-engineered" from resistance techniques, but that they had actually been tailor-copied from techniques used in the fifties by Mao's 'China'. See Scott Shane, 'China inspired Interrogations at Guantanamo', *The New York Times*, 2 July 2008, available at [http://www.nytimes.com/2008/07/02/us/02detain.html?\\_r=3&hp=&oref=slogin&pagewanted=print&oref=slogin](http://www.nytimes.com/2008/07/02/us/02detain.html?_r=3&hp=&oref=slogin&pagewanted=print&oref=slogin); the authority from which the Chinese techniques were taken was Albert D. Biderman, 'Communist Attempts to Elicit False Confessions from Air Force Prisoners of War' 33 (1957) *Bull N Y Academy of Medicine* 616-625, available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1806204&blobtype=pdf>.

<sup>100</sup> Who famously claimed during an interview with David Frost that: "[W]hen the president does it that means that it is not illegal", transcript in *The New York Times*, 20 May 1977, available at . The video is available as *Frost-Nixon: The Watergate Interview*, London: DDS Media, 2007. See also Arthur Schlesinger Jr, *The Imperial Presidency*, New York: Mariner Books, 2005 (updated with a new preface).

<sup>101</sup> Although the main drafter of the text was another adviser, Michael J. Malbin, now a political science professor at SUNY.

<sup>102</sup> Excerpts from the minority report were published by *The New York Times*, of 17 November 1988, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DE0D6143BF934A25752C1A961948260&sec=&spon=&pagewanted=print>.

which vests the President with massive powers, including what amounts to constitution-making powers, during the times at which the republic is threatened by external or internal enemies.

Second, international law and, more specifically, multilateral treaties and mandatory norms (*ius cogens*), are said to lack legal bite, and be properly characterised as mere behavioural regularities.

### **1. The dual constitution and the constitution-making powers of the President under the constitution of emergency**

The first element of Bush II's theory of constitutional law is the theory of the dual fundamental law. According to it, the US constitution comprises two set, not just one set, of fundamental norms, namely (1) the ordinary constitution, applicable to both citizens and foreigners during ordinary times, in which the political life of the republic proceeds normally; (2) the emergency constitution, applicable during exceptional times, and basically aimed at ensuring the survival of the republic at times of grave crisis, caused by internal or, more frequently, external enemies.

Rather obviously, the "ordinary" constitution is the one enshrined in the vast majority of the provisions of the 1787 Constitution, its formal amendments, and the conventional constitutions which have developed over time.

It is less obvious what the emergency constitution amounts to. Its very existence is grounded on a small set of the provisions contained in the text of the 1787 Constitution; in concrete, the handful of norms which determine what is to be done at times of crisis. The "plaque tournante" is Article II.2 of the Constitution, which is worth repeating at length:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States

This provision, together with the specific stipulations on the extraordinary limits to fundamental rights enshrined in the constitution during emergencies,<sup>103</sup> is said to prove two things, namely: (1) that the text of the 1787 Constitution contains a body of norms distinct from ordinary constitutional norms applicable when the survival of the republic is at stake (i.e. it must be seen as the positive enactment of the dual character of the US Constitution); (2) that the core content of the emergency constitution is institutional, not substantive; or what is the same, that the key provisions of the emergency constitution concern the allocation of power during emergencies, not the actual substantive provisions of the emergency constitution and what a proper response to a threat would look like. This is so because it is simply impossible to phantom what specific threats will endanger democratic life. If that is so, the only thing that can (and must) be done is to determine in an unambiguous and definite manner *who* should be in charge of establishing how the core principles of the constitution are to be preserved by means of temporarily curtailing the fundamental constitutional

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<sup>103</sup> Thus, the Second Amendment establishes that the privilege the writ of habeas corpus should not be suspended but "in cases of rebellion or invasion" if moreover "the public safety" may require it.

guarantees. The 1787 Constitution, as indeed some other Constitutions of “Western” democracies, vests such powers in the President *as Commander in Chief*. The President is at the helm of the executive, characterised by a clear-cut hierarchical structure, by a direct democratic mandate, and by power under the ordinary constitution on the key constitutional competences in emergency situations (foreign policy, defence and intelligence). Thus, it is concluded that the President is the institutional actor better placed to assume the leading role in extraordinary constitutional times. This is why the checks and balances of the ordinary constitution no longer guarantee of the proper formation of the general collective will and the respect of individual rights during emergencies, but become hindrances to the protection of the collective interest in security. The *decisionistic* bias of the emergency constitution does not exclude that, as times pass and the republic faces a series of emergencies, the body of substantive emergency norms would grow, and it would acquire a certain stability.

Finally, the very rationale of the emergency constitution (i.e. ensuring the survival of the republic) necessarily requires that the relationship between the ordinary and the emergency constitution be governed by the latter.

This general theory of the dual constitution is then applied in two steps.

First, it is argued that the terrorist attacks of September 11<sup>th</sup>, 2001 posed a major threat to the republic, and consequently, activated the emergency constitution. Besides their terrorist purpose and consequences, the attacks were tantamount to a declaration of war against the government and the people of the United States, which by itself would have required the use by the President of his emergency powers. Bush II's lawyers tend to add that even if the powers were activated by the very attacks, any remaining doubt should have been dispelled by Congress' Authorisation to Use Military Force of September 18<sup>th</sup>, 2001<sup>104</sup> (which indeed has been specifically invoked as confirmation of the inherent power of the President to deny habeas corpus to enemy combatants and to approve the Terrorist Surveillance Program) and Authorisation to Use Military Force in Iraq<sup>105</sup> (which gave support to the second plank of Bush II's theory of constitutional law, namely, the denial of binding character to international law). In Bush II's lawyers, the authorisations did not grant the President any new power, but merely registered Congress' acknowledgment of what the President was anyway entitled to do.<sup>106</sup> They were not *constitutive* of Bush II's powers, but a mere *endorsement* of the constitution of emergency.

Second, the radically new character of the threat posed by “Al Qaeda” (on the basis already rehearsed in this article) implies that this emergency is like no others. The threat not only comes from a non-state actor, but from one capable of inflicting harm through sneak attacks on a scale that cannot be matched by many sovereign nation-states (or so it is said). This implies not

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<sup>104</sup> 115 Stat 224.

<sup>105</sup> 116 Stat 1498.

<sup>106</sup> Yoo's Memo of 25 September 2005, available at <http://www.justice.gov/olc/warpowers925.htm>, par: “Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”

only that the combat field is as wide and large as American interests are (thus justifying the claim that this is a global conflict) but also that the enemy lacks a clear hierarchical structure and forms an irregular army, or conducts a partisan war; and moreover, it is “hidden” or “embedded” among the population at large (of the world at large, one may add). At the same time, the state of the art in the development of weapons of mass destruction renders cheap and easy to mount mass attacks with very lethal consequences.

If this is so, then the contents of the emergency constitution resulting from previous emergencies may have to be revised and set aside, as they have been rendered “obsolete” and “quaint” by the new threat posed by the new kind of terrorism of “Al Qaeda” (to paraphrase Gonzales’ assessment when providing the President with the definitive legal advice on the applicability of Geneva Conventions to enemy combatants in the war on terror).

The affirmation of generic and sweeping presidential powers under the constitution of emergency, the radical novelty of the emergency following the attacks of September 11<sup>th</sup>, 2001 and the lasting character of the ensuing “war” sustain the following two premises.

First, that the President can and should rewrite the constitution of emergency to adapt it to the new circumstances, in particular, the radical novel character of the external threat. Or to put it differently, the President has a power functionally similar to the *puovoir constituent* residing in the People, only the chief of the executive holds it on what regards the emergency constitution, not the ordinary constitution. But, one should remember, the constitution of emergency is to remain activated for as long as the “war on terror” lasts, and that could well be an awful long time.

Second, that the President may have to depart from the ordinary constitution to a larger extent than in previous emergencies, and consequently, will need to be equipped with new legal instruments to do so.<sup>107</sup>

It is relevant to notice how the so-called “unitary doctrine of the executive” has resulted in Bush’s emergency constitutional practice not only in the claim that the President has the power to review the constitutionality of the statutes passed by Congress, and eventually to set them aside if unconstitutional but also in the affirmation that the President has the power to ignore and left without legal force the rulings of the Supreme Court concerning the constitutionality of a given norm.<sup>108</sup> The role of the President as

<sup>107</sup> Because the emergency is here to stay, and thus the constitution of emergency is also here to be applied for a long time, that Bush II’s constitutional theory endorses a dual constitutionalism in a same very similar to that defined by Ernst Fraenkel when considering the role of law in dictatorships. See Fraenkel, *supra*, note 15.

<sup>108</sup> The “unitary theory of the executive” claims that the US Constitution explicitly invests all executive power in the President; and that the executive is fully co-equal with all other branches of government. From such apparently banal claims, it is derived that no other branch of government can by any means interfere with the hierarchical power the President exerts over the executive department as a whole (which entails, for example, that Congress cannot vest any discretionary power on independent agencies, as that must remain in the hands of the President; or that the courts cannot settle disputes between parts of the executive; for example, between the said independent agencies and any other executive body or institution). More

constitutional interpreter has been given specific legal form through the so-called “signing statements”.<sup>109</sup> While many Presidents had attached short statements to the act of Congress when formally signing it, attorney General Edward Meese III (who served under President Reagan) started the practice of attaching to acts of Congress comments on the way the President considered the text should be interpreted, which were published annexed to the act. But while Meese’s practice opened the path which led to Addington’s signing statements,<sup>110</sup> Bush II’s lawyers have far more ambitious aims in mind. They have mutated signing statements into the legal form through which the President renders its ruling on the constitutionality of acts of Congress. In more than two hundred signing statements to date, Bush II has contested the constitutionality of more than seven hundred legal provisions.<sup>111</sup> The standard phrase is the following “The executive branch shall construe [section, title and name of the act] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief”.<sup>112</sup> The constitutional nature of the widespread use of signing statements is revealed by the fact that Bush II has rarely made use of his veto power. The signing statement is not only a functional equivalent of the line item-veto which has been declared unconstitutional by the Supreme Court,<sup>113</sup> but it is an updated and enhanced instrument, as it renders possible to follow and not to follow at the same time a given legal norm, which is only functional if one supports a dualistic understanding of the constitution.

## 2. International law as a weak social order

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importantly, it also leads to claim that the constitution vests in the President an autonomous power to interpret the Constitution, and as head of the executive, to impose such interpretation as binding upon all officials within the executive branch. That is indeed one of the key explanations of the major role played by the Legal Counsels to President and Vice-President, and also the Office of Legal Counsel of the Justice Department in shaping the constitutional practice and theory of the Bush II’s administration.

<sup>109</sup> See American Bar Association, ‘Recommendation of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine’, available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/20060823144113.pdf>. On the literature, see Philip J. Cooper, *By Order of the President*, Lawrence: University Press of Kansas, 2002, chapter 7; ‘George W. Bush, Edgar Allan Poe and the Use and Abuse of Presidential Signing Statements’, 35 (2005) *Presidential Studies Quarterly*, pp. 515-32; Chad M. Eggspuehler, ‘The S-Words Mightier than the Pen: Signing Statements as express advocacy of unlawful action’, 43 (2007) *Gonzaga Law Review*, pp. 461-511.

<sup>110</sup> It was aimed at rendering clear to all members of the executive branch how the President thought the statute was to be interpreted. And it was also intended as a means of influencing the rulings of the Supreme Court when eventually deciding on the constitutionality of the text. See Cooper, *supra*, note 108, p. 201; see also Sofía E. Biller, ‘Flooded by the lowest ebb: Congressional Reports to Presidential Signing Statements and executive hostility to the operation of checks and balances’, 93 (2008) *Iowa Law Review*, pp. 1067-1133, at pp. 1078ff.

<sup>111</sup> See American Bar Association, *supra*, note 108. For the first term, see Cooper, *supra* (2005), fn 108, at p. 516.

<sup>112</sup> See for example the signing statement attached to the 2005 Detainee Treatment Act, *supra*, fn 38.

<sup>113</sup> *Clinton v. City of New York*, 524 US 417 (1998).

The second key element of Bush II's theory of constitutional law is its peculiar theory of international law, according to which international law *other than bilateral treaties* is a mere authoritative indicator of international practice, but not a source of legal obligations.<sup>114</sup> In brief, it is a weak social order, and does not qualify as law proper.

The argument which underlies this conception of international law is three-pronged.<sup>115</sup>

First, it is claimed that only a fraction of the norms which are formally speaking part of international law can be characterised as legal norms proper. This is so because international law, contrary to what is the case with domestic law, has no autonomous authority. On the one hand, whether a state should comply with customary international law or not is a question which cannot be settled independently of non-legal and non-normative considerations such as what the national interest prescribes, or what consequences follow from non-compliance (and paramountly, whether powerful states will coerce non-compliant states).<sup>116</sup> But if this is so, then customary international law is not really law, but a congeries of behavioural regularities stabilised by mutual interest, cooperation in a prisoner's dilemma situation, or coercion exerted by a hegemonic state.<sup>117</sup> The claim that autonomously binding customary international law can emerge out of a shared *opinio juris* is to Bush II's lawyers a myth contradicted by the empirical observation of international relations. On the other hand, multilateral treaties have no autonomous binding force, but are merely instruments through which states spread information about their mutual intentions.<sup>118</sup> The ultimate proof is to be found in the fact that multilateral human rights treaties have "no salient impact on the effectiveness of human rights."<sup>119</sup> It is perhaps not irrelevant to keep in mind that the four Bush II's constitutional amendments have been criticised either as infringements of multilateral human rights treaties (very significantly, the Geneva Convention and the Torture Convention) and/or of the customary (and mandatory) international law which preceded or outgrew such Conventions (such as the prohibition of torture or the obligation to treat prisoners of war according to certain standards).

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<sup>114</sup> The debate on the legal value of international law is indeed a very old one, which has occupied most leading constitutional lawyers and legal theorists, including Kelsen and Hart, who upheld contrasting views on the matter.

<sup>115</sup> The argument reproduces the formal and articulated criticism of international law among Bush II's lawyers. Even more radical criticisms can be found, as John Bolton's views clearly prove. See for example John R. Bolton, 'Is there "really" law in international affairs', 10 (2000) *Transnational Law and Contemporary Problems*, pp. 1-48. See also Wade Mansell, 'John Bolton and the United States' Retreat from International Law', 14 (2005) *Social and Legal Studies*, pp. 459-85.

<sup>116</sup> Eric Posner and Jack Goldsmith, *The Limits of International Law*, Oxford: Oxford University Press, 2005, p. 10. The book summarises the arguments made by both authors (the latter head of the Office of Legal Counsel as assistant attorney general between 2003 and 2004, the same Goldsmith that withdrew the 2002 Bybee and Yoo's memo and 2003 Yoo's memo on torture, as stated supra).

<sup>117</sup> *Ibidem*, p. 39.

<sup>118</sup> *Ibidem*, p. 105.

<sup>119</sup> *Ibidem*, p. 117.

Second, the role of custom in the international legal order is turned upside down. Not only it does not have unqualified binding legal force, but when it may have that, it is claimed that its actual content cannot but reflect the practice of the United States. This results from a rather idiosyncratic understanding of how the underlying *opinio juris* to an international customary norm is forged. Bush II's lawyers claim that because the United States is the international hegemon, no valid international custom can emerge with the dissent of the United States. Or what is the same, the *de facto* preeminence of the United States in world affairs is transformed into a juridical power to both impose and veto international common action norms.<sup>120</sup>

Thirdly and finally, it is claimed that the President as the *puovoir constituant* of the constitution of emergency can decide in a final and non-reviewable manner whether or not a given international norm should be followed. This argument has in its turn three prongs: (a) the radical novelty of the breed of terrorism that threatens the United States now does not only require innovation on the US constitution of emergency, but also in international standards: “no clear customary international law on megaterrorism like 9/11 existed”;<sup>121</sup> (b) assigning primacy to international over national constitutional standards may be required by the ordinary constitution (as enshrined in article VI.6 of the US Constitution) but is not necessarily part and parcel of the emergency constitution. In determining which standards should be followed to save the republic from an existential threat, the direct democratic mandate received by the President from citizens should empower him to set aside any norm of international law which he considers is an obstacle to ensuring the survival of the polity; (c) in the present context, denying the President the power to overrun international standards would be suicidal because international norms have been instrumentalised by the very enemies that threaten the United States, and have been transformed into means of fighting the United States by means of impeding the well-intentioned use of its power; the utmost expression of this idea is the concept of “lawfare”, “the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.”<sup>122</sup>

<sup>120</sup> Yoo, *supra*, note 13, p. 33: “[W]hy should we follow Europe’s view of international law, why should we not fall back on our traditions and historical state practices?”; p. 37: “There is no world government that legislates and enforces rules on nations. At this moment in world history the United States’ conduct should bear most weight in defining the customs of war. *Our defense budget is greater than the defense spending of the next fifteen nations combined* (...) The United States has used its dominant military position to create and maintain a liberal international order based on democracy and free trade. *US practice in its wars –to maintain global peace and stability- have (sic) primary authority in setting international law on the rules of warfare*” (my italics)

<sup>121</sup> *Ibidem*, p. 36.

<sup>122</sup> The term is said to have been coined by two Chinese colonels, Qiao Liang and Wang Xiangsui, in their *Unrestricted Warfare*, published in China in 1999, and then apparently translated by the Foreign Broadcast Information Service, a branch of the CIA, in 2001 (the text is widely available in the internet; see for example <http://www.terrorism.com/documents/unrestricted.pdf>) The term was then popularised by Charles J Dunlad Jr, at present Deputy Judge Advocate, in ‘Law and Military Interventions:

### III. The eclectic legal theory of Bush II

Bush II's lawyers may not have a self-standing interest on legal theory and on questions such as what law is, what is the relationship between law and morality, or for that matter, law and politics. Still, when developing legal arguments which radically depart from the consensual views on the content of constitutional law, Bush II's lawyers were forced to develop bits and pieces of a theory of law at odds with mainstream theories of constitutional law. What is here described as Bush II's legal theory is not the result of a systematic effort at understanding what law is, but a minimal theory sufficient to provide support to the radical changes in positive law and constitutional theory advanced and relied upon the court attorneys of the President. The basic content of such a theory is a prescriptivist conception of law as the expression of the will of the sovereign, which flatly contradicts the view that legal reasoning should be understood as a special case of critical practical reasoning (and thus, neither a fully discretionary activity, in which moral and prudential arguments can be freely invoked to defeat positive legal norms; nor a fully autonomous, technical activity; but one which in limited but decisive ways incorporates critical normative reasoning).<sup>123</sup> Consequently, the interpretation of legal norms, and very especially of constitutional norms, is at the end of the day a matter of *decision*, not a matter of *reasoning*, according to the theory of law which underlies Bush II's four constitutional amendments.

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Preserving Humanitarian Values in 21st Conflicts', a lecture delivered at the Kennedy School of Government on 29 November 2001, available at <http://www.duke.edu/~pfeaver/dunlap.pdf> and in

'The Role of the Lawyer in War: It Ain't No TV Show, JAGs and Modern Military Operations', 4 (2003) *Chinese Journal of International Law*, pp. 479-92, at p. 480. Although many Bush II's lawyers have borrowed the term from this article, Dunlap limits himself to consider terrorist groups which take advantage of the fact that their enemies, be them states or other non-state actors, restrain their actions out of a willingness to comply with international and domestic legal standards on how to conduct warfare. It took Donald Rumsfeld and Jack Goldsmith to expand the concept so as to claim that the main lawfarers were "European and South American allies and the human rights industry (sic) that supported their universal jurisdiction aspirations" (i.e. the International Criminal Court established by the homonymous Convention). In Goldsmith, *supra*, fn 16, pp. 59ff. Goldsmith explicitly grants that he drafted a memo in 2003 for Haynes II, then General Counsel of the Defence Department, in which he concluded, among other things, that "the ICC is at bottom an attempt by military weak nations that dominated ICC negotiations to restrain military powerful nations", *ibidem*, p. 63. The structural similarity with Robert Kagan's argument in *On Power and Politics*, New York: Knopf, pp. 55 is not surprising.

<sup>123</sup> This is not an affirmation in any sense alien to the US constitutional tradition. On the contrary, the diffusion of legal theories which share this understanding of what the law is cannot but be related to the conception of law which has underpinned US Constitutional law since the 1787 fundamental law was established. And on what concerns the jurisprudence of the Supreme Court, it can be said to have been the in-home philosophy of law of the Warren court, which restored the credit and legitimacy of an institution several tarnished by its opposition to President Roosevelt's New Deal policies. Among others, see Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, New York: Hill and Wang, 1999.

The minimalistic character of Bush II's legal theory is closely related to its eclecticism, which also provides an expanded "base" of support for the concrete constitutional changes advocated.<sup>124</sup>

It is my claim that Bush II's lawyers have borrowed key elements of their legal theory from three distinct (at a deeper level, perhaps incompatible) theories of law, namely: (1) the peculiar bred of positivism that originalist theories endorse (exemplified by the originalism of Scalia); (2) the bred of "modern" iusnaturalism concerned with the nature of positive law (exemplified by Finnis' legal theory); (3) pragmatist theories of law which characterise law as an instrument for other social ends (exemplified by Richard A. Posner's legal theory, applied and developed to emergencies by Eric Posner and Adrian Vermeule).

It may be necessary to underline that I am not claiming that all of these authors would fully agree with either the constitutional amendments or the constitutional theory of Bush II. My two related claims in this regard are more modest. First, it is my view that the eclectic and incomplete theory of law put forward by Bush II's lawyers has been built with bits and pieces of the said three legal theories; whether it makes sense to take bits and pieces from the original complete legal theory or not is a different question, which is irrelevant to the court attorneys of the White House, but may be critical to the original authors of the bit and piece. Second, these borrowings reveal that originalism, pragmatism and (modern) natural law have in common their reduction of law to power, even if such reduction follows different paths and avenues, is the result of different trains of reasoning, and has rather different practical implications (in the case of modern natural law, this is somewhat obscured by the fact that key structural role played by the theory of constitutional emergencies is not matched by a lengthy exposition of its implications). But even then, the ultimate endorsement of prescriptivism creates a potential affinity with theories such as Bush II's constitutional and legal theory. Moreover, such potential affinity has led to a partial, even if critical, endorsement of some of the most controversial aspects of the four constitutional amendments put forward by Bush II in all three cases, as is rendered explicit in the remainder of this section.

### *Originalism á la Scalia.*

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<sup>124</sup> This strategy has structural parallelisms with the strategy underlying the pragmatic legal theory developed by Cass Sunstein over the years, and very especially on his 108 (1995) *Harvard Law Review*, pp. 1733-72; now reproduced in *Legal Reasoning and Political Conflict*, Oxford: Oxford University Press, 1996; 'Constitutional agreements without constitutional theories', 23 (2000) *Ratio Juris*, 117-132; 'Incompletely Theorised Agreements on Constitutional Law', *University of Chicago Public Law Working Paper*, no 147, available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID957369\\_code249436.pdf?abstractid=957369&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID957369_code249436.pdf?abstractid=957369&mirid=1). In political terms, its equivalent is the strategy of government by fringes mastered by Karl Rove, see Gary Wills, 'Fringe Government', *The New York Review of Books*, 6 October 2005, now (slightly) edited into *Bush's Fringe Government*, New York: New York Review of Books, 2006.

Originalism is a breed of legal positivism that affirms that there is an objective meaning of legal norms, to be determined by reference to the authoritative constitutional will. Although the term and the contours of the debate have been shaped in relation to the US Constitution,<sup>125</sup> it is obvious that similar debates concerning the canons of interpretation have taken place in virtually all “Western” legal systems.<sup>126</sup>

Originalism is a theory of law and legal interpretation to which Bush II's lawyers are attracted because it leads structurally to the weakening of the constraints that constitutional law imposes upon the executive. Although formally speaking it promises to offer objective criteria to determine what constitutional law entails, it tends not to hold its promise not only because the will of constitution-makers tends to be extremely difficult to ascertain in an objective manner (thus inviting discretionary interpretation), but also because the identification of law with the will of a given authority (even if power has obtained in “democratic” competition among elites)<sup>127</sup> cracks the door open for the characterisation of law as a congeries of norms, only tied together by their being willed by the sovereign (and not by any regulatory ideal of normative coherence). The idea of law as a system and the companion affirmation that legal arguments have to be coherent unavoidably takes the back seat when one defines the validity and legitimacy of law by reference to commands issued by those in power (no matter whether the substantive content of the command is that willed by the sovereign or that understood to be the will of the sovereign by citizens); consequently, the ruling few have a larger discretion to determine what the law is.<sup>128</sup>

Originalism supports Bush II's constitutional amendments and his constitutional and legal theory in two concrete ways.

First, it allows the attorneys of the White House to claim that what on face value seem to be interpretations of positive constitutional law radically deviant from existing constitutional practice are nothing else than the “restoration” of the “real” set of constitutional norms. Indeed, it provides Bush II's lawyers with a major rhetorical device to claim that what is

<sup>125</sup> See for example Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press, 1997; Steven G. Calabresi (ed), *Originalism, A Quarter-Century Debate*, New York: Regnery Publishers, 2007.

<sup>126</sup> There are several variants of originalism, but Scalia pays attention to two that may be regarded as forming the core of originalism for our present purposes. (See Antonin Scalia, ‘Originalism: The Lesser Evil’, 57 (1989) *University of Cincinnati Law Review*, pp. 849-65). The first claims that the key parameter to interpret constitutional norms (and infraconstitutional norms that must be in compliance with them) is the concrete will of the specific authors of the Constitution and its successive amendments (“the founders” at large). The second affirms that what matters is not what was in the minds of the authors as such, but what could be publicly understood to be their constitutional will. While the former conception is interested in getting at the *subjective constitutional will*, the latter puts a premium on the *intersubjective constitutional will*.

<sup>127</sup> See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, London: Routledge, Kegan and Paul, 1942.

<sup>128</sup> Cf. Ronald Dworkin, ‘On Gaps in the law’ in P. Amselek and N.D. MacCormick (eds.), *Controversies on Law's Ontology*, Edinburgh: Edinburgh University Press, 1991, pp. 84-90; ‘Comment’ in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press, 1997, pp. 115-27; ‘The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve’ 65 (1997) *Fordham Law Review*, pp. 1249-1268.

unconstitutional is not what it is now being advocated in flat contradiction to the consensual view on constitutional law (for example, that the President has an inherent authority to order warrantless surveillance to collect foreign intelligence) but that the consensual constitutional dogma (that any electronic surveillance targeting a US citizen conducted within the United States must be approved by a judge) *is indeed in breach of the Constitution*. In particular, the lawyers of Bush II have frequently claimed that they were just rolling back the unconstitutional limits set by Congress on the executive after Nixon resigned on the verge of being impeached.

Second, originalism provides ground to claim that Bush II's constitutional amendments should be endorsed by anybody believing that the ultimate source of legitimacy of the law is democratic legitimacy. After all, it is generally assumed that the Constitution was authored by the people (by *We the People*), and that it should not be changed but by the people. Because the President claims to be faithfully restoring the true meaning of the constitution against the meddling and elitist judges, and the notables in Congress, he is doing so in the very name of *We the People*. Therefore, Bush II can claim that his theory of law advances the cause of democracy to the extent that it overcomes the elitist prejudices of those who pretend that law is somehow connected with general practical reasoning as exercised by Congress and judges.

#### *Legal Pragmatism à la Posner*

Posnerian legal pragmatism claims that law is to be understood as a set of behavioural regularities concerning the use of state power. Denying any clear-cut distinction between what law is and what it should be, Posner adds that officials should regard law as a means to achieve specific social ends, and thus are well-advised to take decisions in such a way that they maximise social welfare.<sup>129</sup> The alleged “pragmatic” character of this theory derives from its anti-foundational, even anti-theoretical stand and emphasis on practice.<sup>130</sup>

Legal pragmatism *à la Posner* is attractive to Bush II's lawyers because it weakens constitutional constraints upon executive action to the extent that it emphasises the decisionistic and particularistic character of legal reasoning. Not only each specific context must indeed be thoroughly considered if the ultimate end is to maximise social welfare through legal adjudication; but law is the result of *action*, of *action taken by officials*.

Still, the “standard” view of Posner's theory comes hand in hand with an institutional theory which assigns a central role to courts, not legislators. While judges proceed incrementally by means of taking concrete decisions, legislators produce sweeping norms detached from any specific context, and

<sup>129</sup> Richard A. Posner, *The Problems of Jurisprudence*, Cambridge: Harvard University Press, 1990, p. 26; and *Economic Analysis of Law*, Boston: Little and Brown, 1972. His latest statement is contained in *How Judges Think*, Cambridge: Harvard University Press, 2008.

<sup>130</sup> See ‘The Problematics of Moral and Legal Theory’, 111 (1998) *Harvard Law Review*, pp. 1637-1717.

consequently, statutes have a higher propensity to have unintended and negative consequences. To serve the purpose of supporting a theory of expanded executive power, Posner's legal pragmatism has to be reformulated, so that its "court-centric" approach in ordinary times is replaced by an "executive-centred" approach in emergencies. This is a task that Richard A. Posner (Posner senior) himself has undertaken, most notably in *Not a suicide pact*, and which Eric Posner (Posner Junior) and Adrian Vermeule have completed in *Terror in the Balance*. While the unintended consequences of state action are a reason to constrain state action in ordinary times, Posner Junior and Vermeule claim that emergency politics is a different kind of politics, and a different judgment must be passed.<sup>131</sup> In concrete, they argue that the executive is the best-placed institution to preserve the republic during emergencies, on account of the speed, secrecy and decisiveness of its actions.<sup>132</sup> If this premise is true in general, is even truer if the emergency poses a radically new threat, as the present one does, because everything must be rethought from the scratch, and if such is the task, the involvement of Congress and the Courts cannot but be a hindrance,<sup>133</sup> preventing that new measures have a chance to "prove themselves".<sup>134</sup> Therefore, all branches of government (and the citizens themselves) should defer to the executive.<sup>135</sup>

Legal pragmatism offers support to Bush II's constitutional amendments because it provides a theoretical account of why and how we should reconsider from scratch the balance between constitutional fundamental rights and collective interests (which is the underlying purpose of Bush II's lawyers). In the book that ironically marked the launching of a series on inalienable rights, Posner (Senior) claims that "great threat that terrorism poses to national security" renders unavoidable the reweighing and rebalancing of the interest on liberty from government and that on liberty from government restraint".<sup>136</sup> Because during emergencies "the law of necessity supersedes the Constitution"<sup>137</sup> the scope of fundamental rights should be less extensive,<sup>138</sup> because the people at risk of being victims of a terrorist attack are far more numerous than those whose liberties may be curtailed; and the former interest should prevail over the latter under the proviso that liberties are curtailed "modestly".<sup>139</sup> But modesty is in the eye of Posner's beholder, as he claims that (1) all rights (not only habeas corpus, but it *all* rights) could be denied to a foreigner enemy combatant seized abroad and brought into the United States (although he has some reservations on whether foreign residents could be treated similarly (pp. 41 and 58); (2) the right to judicial protection is to be redefined, increasing the length of time during which people could be arrested and held *incommunicado* on the sole authority of the executive (pp. 65 and 73; with reasonable remaining

<sup>131</sup> *Terror in the Balance*, Oxford: Oxford University Press, 2007, p. 21

<sup>132</sup> *Ibidem*, p. 16 and 30.

<sup>133</sup> p. 18.

<sup>134</sup> Richard Posner, *Not A Suicide Pact*, New York: Oxford University Press, 2006, p. 31.

<sup>135</sup> Posner and Vermeule, *supra* n 118, pp. 16 and 45.

<sup>136</sup> Posner, *supra*, nota 121, p. 31.

<sup>137</sup> *Ibidem*, p.70

<sup>138</sup> *Ibidem*, p.8.

<sup>139</sup> *Ibidem.*, p. 41.

undetermined); even citizens could be detained indefinitely if they are terrorists (pp. 67 and 73); (3) trial by military commission is fine even when there is no war (p. 73); (4) People could be required to prove they are not terrorists, instead of prosecutors having to prove they are so (p. 58); (5) And torture could be resorted to if there is a “state of necessity” (p. 12 and 81).

### *Natural Law à la Finnis*

It may seem counterintuitive to claim that modern natural law theory is one of the legal theories which are part and parcel of the eclectic conception of law to which Bush II's lawyers adhere. But leaving aside the rather irrelevant fact that the main exponents of modern natural law theories share with the administration similar views on sexual morality and bioethics,<sup>140</sup> modern natural law theory has not only refocused research agenda on positive law, but has also offered a sophisticated account of the relationship between legal and practical reason.<sup>141</sup> And one would suppose that the structural and substantial connection between law and objective principles of morality defended by Finnis and other modern natural lawyers should provide a standpoint from which to criticise (and heavily for that purpose) the practice and theory of constitutional law followed by Bush II's lawyers.

Still, some key variants of modern natural law offer critical support to Bush II's constitutional and legal theory on one specific (and key) account: its defence of both the dualistic understanding of the constitution and of the need of unframed, unlimited executive rule during emergencies (*inter armis silent leges*). During emergencies, when societies are “threatened with military, economic or ecological disaster”,<sup>142</sup> what the executive decides and pretends to embody into law should be regarded for the time being as a correct moral judgment. It may very well be the case that in those situations “statesmen” *must* depart, “temporarily but perhaps drastically” from the ordinary constitution, and more radically, from the characterisation of law as a repository of public reason, and thus, structurally connected to critical practical reasoning. The shape and extent of the “departure” from the ordinary constitution is something that cannot be predetermined by either legal or moral reasoning, and consequently, it is a matter of judgment to be trusted to “statesmen”.<sup>143</sup> Citizens have an obligation to comply *for the sake of the community*, and scholars, one assumes, have a duty to keep their criticisms for themselves until the crisis comes to an end.

<sup>140</sup> As is well-known, the political agenda of the Bush II administration has included many of the policies favoured by the two leading exponents of modern natural law in the Europe (John Finnis) and the United States (Robert P. George), including active hostility against abortion, stem cell research, same sex-marriage and also on their views on euthanasia. John Finnis, ‘The Good of Marriage and the Morality of Sexual Relations: Some Philosophical Observations’, 42 (1997) *American Journal of Jurisprudence*, pp. 97-134; Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis*, Wilmington, Delaware: ISI Books, 2001; Charles Tiefer, *Veering Right*, Berkeley: California University Press, 2004.

<sup>141</sup> See N. D. MacCormick, ‘Natural Law Reconsidered’, 1 (1981) *Oxford Journal of Legal Studies*, pp. 99-109.

<sup>142</sup> *Ibidem*, p. 246.

<sup>143</sup> *Ibidem*, p. 275. The full quote is reproduced at the beginning of this chapter.

It could be argued that I am making too much out of a short passage in *Natural Law and Natural Rights*. Lack of space prevents me from attempting a deeper analysis of the relationship between Finnis' theory of emergencies and his overall theory, or for that matter, the complex genealogy of this idea, and the relationship in which it is with Aristotle's, Aquinas' and Locke's legal theory. But it seems to me at least possible to claim that Finnis' theory of emergencies is far from being an abstract and marginal gloss to his *Natural Law and Natural Rights*; especially so given that it seems that this theoretical view is the one from which Finnis himself has contributed the debate on the constitution of emergency after 9/11, and more specifically, grounds his comment on the ruling of the House of Lords on the constitutionality of the indefinite detention of certain foreign suspected of being terrorists.<sup>144</sup> By claiming that aliens do not have a right to be treated equally when it comes to the modalities of detention,<sup>145</sup> Finnis confirms that his theory supports the claim that it is *moral* to set aside the constitution during rough times; because of that, a line can be morally drawn between foreigners and nationals, and on such a basis, deny they are equal before the law. But if indefinite detention is allowed, should we not conclude that foreigners may also be treated differently when it comes to torture and assassination? That is an intriguing question which Finnis has as of yet not tackled, but which many readers of his would be happy to see him deal with.

#### **IV. Conclusion: The constitution of emergency between law and propaganda**

This chapter has considered the close relationship between the four key constitutional amendments advocated and acted upon Bush II and the constitutional and legal theories which underlie them.

By claiming that the terrorist attacks of September 11<sup>th</sup>, 2001 plunged us into a new unbrave world, and that this requires the President to exert his inherent powers to rewrite the emergency constitution which lurks behind the ordinary US constitution, Bush II's lawyers have made a case for radical constitutional change. The recent judgment of the Supreme Court in *Boumediene*,<sup>146</sup> the several investigatory committees set up in Congress, and above all, the progressive change of mind of the US public, seem to indicate that the revolution was close to success, but may ultimately fail. But that cannot be taken for granted. *Boumediene* was decided by the narrowest of majorities, Congress lacks a clear goal in its investigations, and the public may get diverted if a new terrorist attack would take place. Moreover, as has been argued in this chapter, the challenge posed by Bush II was not merely

<sup>144</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (HL).

<sup>145</sup> John Finnis, 'Nationality, alienage and constitutional principle', 127 (2007) *Law Quarterly Review*, pp. 417-45, at p. 438: "[The Lords] failed to advert the principle that the nation does not have to accept from foreigners the same degree of risk as it accepts from its nationals (who by reason of their nationality are undeportable), and may obviate the risk from foreigners by their deportation and detention ancillary to deportation"

<sup>146</sup> See *supra*, fn 39.

one of unconstitutional action in the shadows, but a frontal attack aimed at the core of positive constitutional law, constitutional theory and legal theories. Even if the four constitutional amendments will in the long run be rejected, there are clear indications that Bush II's lawyers have been very successful in transforming the very terms of debates in constitutional and legal theory, a success closely related to the overall change they have promoted in public debate and public culture in general. Ten years ago, a debate on the juridification of torture would have been a non-starter; today it is taken to be a serious matter on which reasonable people can reasonably disagree. The failure of Bush II's constitutional amendments may then be merely temporary if his successes in theoretical terms are not also reversed. This is a very good reason to take very seriously Bush II's constitutional and legal theory, and not be contented to disregard it as fringe thought. It is my view that they are no longer fringe theories, and they are extremely dangerous.

Moreover, evidence is coming to light that proves that there is a causal chain between the blatant violations of constitutional and international law and the legal advice provided by key General Counsels within the Administration, and decisively, from the Office of Legal Counsel in the Department of Justice. The legal responsibility of Bush II's lawyers is not a partisan question,<sup>147</sup> but a major issue which should be of concern of all jurists, and of all scholars in general. Although Bush II's lawyers have repeatedly claimed that they limited themselves to describe what the law said, and consequently, they do not have any legal responsibility for what politicians decided to do *within the bounds of what they were advised was legally permissible*, the contrary is well established in law since the Nuremberg Trials.<sup>148</sup>

Having said all that, I will like to conclude saying that it will be wrong to analyse Bush II's constitutional and legal theories as if they were just constitutional and legal theories. By doing that we will not only risk giving

<sup>147</sup> As Cass Sunstein, himself a legal pragmatist, and now advisor to Democratic Presidential candidate Barack Obama, has argued repeatedly (and wrongly). See excerpts from his speech to the Netroots convention in July 2008 available at [http://www.thenation.com/blogs/notion/337598/netroots\\_summit\\_grapples\\_with\\_bipartisan\\_attacks\\_on\\_rule\\_of\\_law](http://www.thenation.com/blogs/notion/337598/netroots_summit_grapples_with_bipartisan_attacks_on_rule_of_law).

<sup>148</sup> In particular, see the judgment in *US v Alstoetter*, which was analysed in depth by James R Miles, 17 (1975) *Air Force Law Review*, pp. 16-41 and Matthew Lippman, 'The Prosecution of Josef Alstoetter et al: Law, Lawyers and Justice in the Third Reich', 16 (1997) *Dickinson Journal of International Law*, pp. 343-434. Alstoetter establishes the basis on which Bush II's lawyers could be prosecuted. See M Cherif Bassiouni, 'Institutionalization of Torture under the Bush Administration', 37 (2006) *Case Western Journal of International Law*, pp. 389-425; José E. Álvarez, 'Torturing the Law', 37 (2006) *Case Western Journal of International Law*, pp. 175-223; David Luban, 'Liberalism, Torture and the Ticking Bomb', 91 (2005) *Virginia Law Review*, pp. 1425-61; Louis-Phillippe Rouillard, 'Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum', 21 (2005) *American University International Law Review*, pp. 9-45; Milan Markovic, 'Can Lawyers Be War Criminals?', 20 (2007) *Georgetown Journal of Legal Ethics*, pp. 347-68; and Christopher H. Schroeder, Prepared Testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties, hearing devoted to Administration Lawyers and Administration Interrogation Rules, Part III, of 18 June 2008, available at <http://www.law.duke.edu/news/pdf/SchroederStatement.pdf>. Sands, *supra*, note 11, pp. 233ff.

them too much undeserved credit, but we will miss the key role they have played in the propaganda effort to transform constitutional and political practice, to smooth the path to the radical changes advocated by the present administration. In short, it seems to me that we have to be aware of the double role of Bush II's theories: as legal theories and as means of propaganda.

The radical remodelling of US constitutional law which derives from Bush II's four constitutional amendments would not have been possible without formally well-formed constitutional arguments. Only equipped with legal arguments, no matter if ridiculous or specious, could the ruling few convince the restless many that the dissenting voices were not to be heard. Because modern societies cannot be integrated by mere force,<sup>149</sup> even the attempt to place the President above the law has to be legitimised by means other than mere force. But when law is instrumentalised in such a way, legal argumentation is corrupted. Substantially speaking, it becomes a sophisticated form of propaganda.<sup>150</sup> The propagandistic subversion of law is far from new. It is in a way typical, as Scott Horton has reminded us,<sup>151</sup> of mob lawyers. And indeed the reduction of law to a mere technique cracks the door open to specious legal arguments.<sup>152</sup> But more worryingly, there are disturbing structural similarities between the constitutional and legal theory of Bush II's lawyers and the constitutional and legal theory of the court lawyers of Fascism and Nazism.<sup>153</sup>

All this should make us reflect, and reflect seriously and deeply. It is precisely because Bush II's constitutional and legal theories were far from new than they transformed so rapidly constitutional practice. And even if the concrete policies advocated were indeed at the fringe of the political and

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<sup>149</sup> As David Hume pointed so long ago: "Force is always on the side of the governed, the governors have nothing to support them but opinion", in 'Of the First Principles of Government', reproduced in *Selected Essays*, 1993, Oxford: Oxford University Press, p. 24.

<sup>150</sup> Indeed, it was only to be expected that the main advocates of Bush II's theory of law would have been keen watchers of the very TV shows which were also part of the propaganda effort, and paramountly, the series 24, to which Bev Clucas devotes a chapter of this book. Sands, *supra*, note 11, names several avid watchers of 24, including Judges Scalia and Thomas.

<sup>151</sup> See *supra*, note 9.

<sup>152</sup> Brian Z. Tamanaha, *Law as a Means to an End: A Threat to the Rule of Law*, Cambridge: Cambridge University Press, 2006.

<sup>153</sup> See Sanford Levinson, 'Torture in Iraq and the Rule of Law in America', 133 (2004) *Daedalus*, pp. 5-9, available at <http://www.amacad.org/publications/summer2004/levinson.pdf>; and Scott Horton, 'The Return of Carl Schmitt', published in *Balkinization*, 7 November 2005, available at <http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>. It is not my intention to draw comparisons between the "war on terror" and other conflicts; or between Bush II and other historical political leaders. That is clearly besides the topic dealt with in this paper. My claim is a more modest one, which focuses exclusively on the way in which Bush II's lawyers have used legal argumentation. It is them and their arguments that I find pertinent to compare with, say, Carl Schmitt (as Sanford Levinson and Scott Horton have already suggested), Karl Larenz, Alfredo Rocco, Sergio Panunzio or Francisco Javier Conde. On the legacy of Fascist theories of law, see Christian Joerges and Navraj Singh (ed.), *Darker Legacies of Law in Europe*, Oxford: Hart Publishers, 2003. And my 'Fascist Law' in Cyprian Blamires (ed.), *World Fascism: A Historical Encyclopedia*, Santa Barbara: ABC-CLIO, 2005.

legal spectrum before 9/11, this chapter has shown that Bush II could rely on the prescriptivist reflexes of well-established, mainstream legal theories, shared by many judges, legal scholars and social scientists.<sup>154</sup> This not only leads to the conclusion that the constitutional failure of Bush II's constitutional revolution may only be temporary, but that the sources of its success lay with legal education and legal theory. Because we had been there already, they (and us) should have known better.

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<sup>154</sup> Similarly, no matter how insightful and aesthetically pleasant may be the works of Michael Foucault, and in general all post-modernist accounts of law, it seems to me that their theorization of structural power blurs normative judgment and leaves us incapable of addressing serious criticisms to lawyers. Post-modernists have tended to stress the continuities between the constitutional agendas of previous presidents and Bush II's. But by missing the key difference, the aim of subverting legal standards themselves, they have ended up "normalizing" the extraordinary, and losing critical bite. This seems to me that can be predicated of the brilliant work of Giorgio Agamben in his *Homo Sacer* series, and very specifically, of his *A Brief History of the State of Exception*, Chicago: Chicago University Press, 2005.