LOSING THE LAW WAR: THE BUSH ADMINISTRATION'S STRATEGIC ERRORS

Introduction.

The Bush administration's legal performance on the war on terror is much like its performance in the war in Iraq. In both cases it had plausible objectives, but employed mistaken, often counterproductive and occasionally foolish strategy. The Bush administration itself has admitted mistakes in Iraq. But it is also important to describe the errors in its legal strategy to which it has not yet admitted so that future administrations will not suffer similar defeats in the courts of law and the courts of public opinion.

The errors in the Bush Administration's legal strategy had common roots. One was an ideological focus on bolstering executive power and a consequent lack of pragmatic flexibility in choosing tactics that would maximize the chances of gaining public and judicial acceptance of its framework for detention, interrogation and trial of terrorists as well as surveillance of individuals resident in America. The administration repeatedly failed to recognize that reliance on executive authority alone entailed a high risk of defeat at the hands of the Court.

Second, the administration radically underestimated the magnitude of the risk that the Court would curb the President's discretion, because it misunderstood the changed legal environment for litigation in the twenty-first century. Every aspect of American life has been increasingly subject to court made rules. As a result of this trend even discretion in the war on terror would likely be seen through the prism of legalism that applies to domestic criminal law. Moreover, foreign elites, particularly European elites, would seek to influence our judiciary so as to tie down what they regard as a dangerous hegemon.

The third systematic error was a failure to recognize that all administrations tend to lose power as they age, and wars run a high risk of exacerbating that loss as they become progressively less popular. Of course, the scandals at Abu Ghrab and the more general lack of success in Iraq could not have been predicted. But an administration's legal high command—and here I speak particularly of the White House Counsel and Attorney General and not of mid-level attorneys on their staff or those simply defending the policies in court-- must choose strategies that take account of the worst possible outcomes. .

As a result, the administration would have been well advised to take every step to bolster its legal position as early as practicable. It could have secured from Congress framework legislation for detention, military tribunals, surveillance, and perhaps even interrogation. Because citizens are generally most supportive of an administration at the beginning of a conflict (a phenomenon so well know among political scientists that is has been given the name "rally around the flag effect"), the terms of trade of the administration with Congress would have been likely favorable, even when the Senate was controlled briefly by the Democrats in late 2001 and 2002, not to mention in 2003 when Republicans took over both Houses and the United States was still savoring victory in Iraq. To be sure, nothing is certain in the legislative process and deals would have had

to been struck, but it seems almost certain the administration early on could have obtained legislation that would have met its strategic objectives. In this regard, the introduction of Patriot Act is the paradigm that administration should have followed. There it received overwhelming support in Congress for the new powers it sought. Its provisions have withstood judicial challenge, and the consensus support of the people's representatives has made its harsh critics seem politically isolated.

The consequences of eschewing Congress and relying on judicial vindication of executive power in Court have been grave. Far from strengthening executive power, the administration's policies generated a series of Supreme Court defeats that have weakened it. These losses have contributed to a public perception that its policy for dealing with captured terrorists is in disarray, and still worse, that the United States is trenching on liberties as never before, when the reality is that the war in Iraq and the war on terror reduced domestic liberties less than earlier wars and even prisoners charged as war criminals had greater protections at trial than those charged previously.[1] The unnecessary reliance on executive power has also has permitted foreign critics to claim that President Bush is a lone ranger, whereas legislative endorsement of specific polices would have underscored the reality that he reflects the consensus of the American people.

Of course, it may be argued that these recommendations suffer from hindsight bias. The administration was faced with a dangerous new kind of enemy after September 1 made all the more fearsome in an age of weapons of mass destruction. The optimal tactics to use against such an enemy were unclear. But recommendations offered here do not depend on any argument that administration misunderstood the enemy, but rather that it misunderstood both the historical patterns of executive branch strength and weaknesses and the modern realities of the judiciary.

Let me stress at the outset that the administration's errors were ones of prudence and judgment, not morality or ethics. The Bush administration's lawyers had to confront novel kinds of questions without a clear legal map. These errors do not make their service any less patriotic and admirable. Yet some critics have unfortunately called the work of these lawyers incompetent to the point of being unethical. Amnesty International has even called for investigation of administration lawyers as war criminals without any showing that these lawyers' arguments were made in bad faith or lacked a basis in law.[2] The translation of legitimate disputes about law into matters of ethics and criminal law threatens to cut off the legitimate debate by which law is made in a democratic and pluralist society.

Getting Some Big Things Right

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[1] This point is ably made in Jack Goldsmith & Cass Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 CONST. COMM 261 (2003).

[2] David McGowan of the University of San Diego has superbly discussed these issues in depth in his recent article, *Decency, Due Care, and Lawyering in the War on Terror*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975124

Before analyzing the Bush administration strategy on the war on terror, it is important to reject some lines of critique made popular by its opponents. First, critics are wrong to suggest that terrorism requires only enhanced law enforcement rather than the use of war powers. Second, critics are also wrong to suggest that the United States is bound by international law even if that law is not incorporated into our domestic law.

First, the 9/11 attack on the United States was an act of war no less than Japan's attack on Pearl Harbor. Al-Qaeda was a military organization that was attempting to harm and disrupt the United States as nation state rather than simply harm individuals. As such the action against it cannot be understood within a law enforcement paradigm, because that paradigm presupposes that the actors are within the bounds of civil society. Instead, Al-Qaeda and other Islamic terrorists act in world that predates civil society, because between such strangers there is no common government responsible for law enforcement. Al-Qaeda and its members are not part of our social compact and thus do not enjoy the rights that derive from it. Moreover, domestic criminal law is simply not adequate to deal with vast conspiracies that enjoy resources equivalent to those commanded by political entities rather than a band of criminals.

Second, administration should scrupulously adhere to international law made binding domestically through the ratification of a treaty or incorporation into a statute. But when the critics of the Bush administration denounce it for violating international law, they do not confine themselves to complaints about international rules that have become domestic obligations. They complain, for instance, that Bush violated a norm of customary international law in invading Iraq or violated an interpretation of the United Nations Charter proclaimed by other nations or international bodies even if the United States has a different interpretation. They argue that the United States should follow interpretations of treaties of international bodies and committees in treatment of enemy combatants.

The administration has no obligation to follow such norms. First, the Supremacy Clause of the United States Constitution makes the supreme law of the land only treaties and statutes and only the legal interpretations of our domestic courts or other institutions designed by the domestic political branches. But it is more than a formal error for the United States to consider itself bound by international law unratified by the political branches. Such "raw" international law has a large democratic deficit.[3] It does not emerge from any democratic process but is instead shaped by unrepresentative elites in the form of international law professors or international jurists who sometimes hail from authoritarian nations.

Indeed, American law is not only likely better than unratified international law for Americans, but in many areas is also likely to aid foreigners. Because of the position of the United States as the dominant economic and military power in the international system, it has strong incentives to provide international public goods, such as appropriate detention of international terrorists, that benefit foreigners as well as Americans. Thus

[3] Ilya Somin and I have just described in far more detail the huge democratic deficit that besets international law. *See* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?* 59 STAN. L. REV. ___(2007).

the administration has not only been doing Americans a favor when it does not allow ungratified international law to constrain the President's otherwise lawful discretion, it has been doing a service for citizens around the world.

Detention

The United States faced three issues in adapting the war paradigm to hold prisoners of war captured in the war on terror. First, unlike conventional wars, prisoners taken in the war against Al-Qaeda and other organizations are generally not in uniform and sometimes do not in fact proclaim their allegiance to their organizations. Their uncertain and often opaque identity creates a greater risk that individuals will be captured in error. Second, the war against Al-Qaeda does not have as clear a stopping point as conventional wars, because conventional wars generally can be ended by capturing the enemy territory. In particular, because these combatants are part of an irregular army and cannot be forced by their own domestic law to persist in fighting, that length of detention may extend long after their allegiance to the cause has dissipated.

The third difference affecting detention between the conventional war and the war on terror is more general. The Bush administration should have realized that it would face a much more concerted legal effort to release these prisoners than those captured in previous conventional wars. The precedents upon which the administration relied were generally from World War II era. Yet since that time federal courts have constrained government discretion in running schools and prisons and ordered states to raise taxes. In 2000, they decided a Presidential election. It is a short step to bringing more judicial regulation to war, particularly when that war is not conventional and may appear more closely related to law enforcement. Moreover, since that time the world has become smaller: some of the justices of the Court have increasingly adopted a transnational perspective on constitutional jurisprudence—one that garners respect for United States around the world and respect for themselves in their international networks of peer jurists.

In light of these potential problems, the Bush administration should have immediately acknowledged the differences that unconventional wars made to legal framework for holding detainees and tempered the anomalies through the generous use of legal process, with military tribunals providing the initial process. Because of the legal climate and the possibility that its war effort would become unpopular and thus more liable to legal attack, it should also have sought Congress' endorsement of these legal structures through framework legislation that would have supplemented the military process with review by Article III courts under a deferential standard.

Unfortunately, however, the Bush administration took a grudging approach to the granting of process and resorted to unilateral strategies that were easily portrayed as lawyers' tricks. For instance, at first the administration argued that it could rely on ex parte assessments by the executive branch to determine whether those caught on the battlefield were in fact enemy combatants, even if they were United States citizens. This

was a mistake even as matter of theory, not to mention prudence. The key question determining whether the war or law enforcement paradigm should apply is whether the individual's action should be judged inside our outside our social compact. A citizen is within our social compact and should be treated within the war paradigm only if he has chosen to be an enemy combatant. He thus certainly deserves a more impartial and deliberate process to challenge his status before being treated as outside the pale.

Thus, there was a substantial risk that the Court would hold, as it did in Hamdi v. Rumsfeld, that an American citizen had a right to a more impartial process to challenge his designation as an enemy combatant.[4] Indeed, in Hamdi only a single justice, Justice Clarence Thomas, would have automatically deferred to the executive's determination on Hamdi's combatant status.

While the Court directly resolved only the question of a United States citizen's due process rights, the Bush administration should have extended this right at the outset to noncitizens as well. By showing it was scrupulous in taking care not to have incorrectly detained noncombatants; the administration could have forestalled criticism and showed that its regime was not lawless, but carefully considered. Even more importantly, the more internal process it gave on such key issues, the less likely the Supreme Court would hold that individuals had full rights to habeas corpus. Some swing Justices, like Stephen Breyer, care about preventing errors and are not much concerned about the rubric under which that error correction occurred. In Hamdi itself, the Court indicated that the military tribunals, at least in the first instance, might provide sufficient process for a challenge to enemy combatant status.

For similar reasons, the administration should have from the outset publicly provided a process for determining when individuals were no longer substantial threats or could provide substantial information. Because members of al-Qaeda are irregular enemy combatants, not common criminals, the United States cannot be put to the choice of trying these detainees and releasing them to the battlefield to fight again. But their irregular nature makes it less clear that they will fight again: no territorial power can compel them. A process for reviewing their dangerousness and information value might even have given detainees incentives to rethink their commitment to jihad and consider how they could make concrete commitments to show that they would not go back to the fight.

Whatever the administration did, however, lawyers in the United States were going to file lawsuits on behalf of the prisoners seeking more and better process and rights indistinguishable from Americans accused of crimes. The basic response of the administration to this prospect was to keep detainees at Guantanamo. Because Guantanamo is not part of the United States and yet controlled by it, these legal strategists believed it was the perfect place to hold the prisoners more easily than they could in foreign territory, and yet be immune from the reach of United States courts. To split metaphysical sovereignty from control was extremely clever, but it was clearly vulnerable to attack as a legal fiction. Although Supreme Court fifty years refused

[4] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

jurisdiction over habeas claims in a case that arose in allied occupied Germany, such precedent cannot be relied to hold up when translated to a new context in a high profile case like this one. Thus, the Supreme Court's decision in Bush v. Rasul[5] in which it insisted on taking jurisdiction of habeas cases at Guantanamo should have been seen as a substantial risk.[6]

It is the Bush administration's legal strategy that in large measure has made Guantanamo a symbol of lawless in the administration's war on terror.
Its creation at least in part for strategic litigation advantage suggests to the outside world that the United States was playing legal games rather than following principles of law. And because the administration was making these decisions without legislative input, it could be portrayed as eccentric and malevolent rather than a faithful agent of the American people.

Instead of resorting to a legal slight of hand, the administration should have gone to Congress to bolster its case. If Congress had from the beginning endorsed the framework for holding detainees outlined above, the Court would have been unlikely to disturb this settlement. The reasons for such deference are both doctrinal and practical. As a doctrinal matter the Court gives substantial deference to Congress's weighing of the costs and benefits of various procedures. In a recent book, Professor Eric Posner and Adrian Vermeule suggest that the Court should give this kind of deference in cases concerning terrorism to the executive, because the Court's institutional competence in devising responses to terrorism is much less than that of the executive.[7] But the executive may not have the appropriate incentives to make the tradeoff between liberty and security. It is more likely to discount all liberty interests because of its recognition that the greatest risks to its political standing come from a lapse in security, however improbable the cause, rather than from complaints about liberties foregone.

More importantly from a strategic perspective, whatever degree of deference the Court should give to the executive as matter of normative principle, as a matter of realpolitik the Court is much more reluctant to disturb the judgment endorsed by Congress as well as the President. Such action would fly much more clearly in the face of the popular will.

Moreover, such a framework statute would have also permitted the United States to hold these prisoners, as they did German prisoners and other previous captives, in the United States, thus dispensing with the negative symbolism of a place that can easily portrayed as a legal netherworld. It may be argued that the administration still needed a jurisdiction outside the territorial United States to make prisoners' habeas petitions less likely to succeed. The content of rights protected by habeas, however, have

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[5] 542 U.S. 466 (2004).
[6] In fact two mid-level lawyers warned that the litigation risk was at least not insubstantial. *See* Memorandum for William B. Haynes, General Counsel, Department of Defense from Patrick C. Philbin & John C. Yoo, Deputy Attorneys General, Office of Legal Counsel, Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (December 28, 2001).
[7] ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE (2006)

been historically flexible and context dependent. If the courts were satisfied that the prisoners were getting the amount of process that Congress judged reasonable for enemy prisoners they would be unlikely to require substantive changes.

The ready availability of a congressional solution raises the question of why it was not sought. One explanation is that the administration thought that using Congress would detract from its project of using the crisis to bolster executive authority. In particular, Vice President Cheney who had seen the decline of executive authority occasioned by Watergate and Vietnam had spoken out frequently of the need to restore executive power. This strategy, however, was imprudent. First, it was not likely to succeed. The Supreme Court had only two consistent supporters of executive power—Justices Scalia and Thomas. Even Chief Justice Rehnquist who had worked in the Office of Legal Counsel, an office dedicated to preserving that power, had ruled against the executive in such important cases as that concerning the Independent Counsel Act,[8] and had celebrated the Court's curbing of executive overreaching in Youngstown. [9]

But second, it is a mistake to risk substantial harm to an important policy to build up precedents for an undefined future eventuality. The interpretation of executive power has waxed and waned over the course of American history, dependent largely on justices' reaction to the felt necessities of the time and the constellation of political power in Congress and in the nation. Even had the Bush administration won a victory for the executive branch in the context of detention, it would be distinguished away, if future justices believe that circumstances warrant.

Interrogation Methods

Once again the administration had serious issues to address in determining the interrogation methods to be used on those detained. On the one hand, any administration should have wanted to be able to use interrogations methods that would elicit information to stop attacks on the order of 9/11. On the other hand, any administration should have been eager to show that the United States acted humanely with respect to even egregious wrongdoers and in particular followed the strictures of the Torture Convention. Restraint and adherence to our own laws underscores the attractiveness of our civilization in the global battle of ideas against radical Islam. This American tradition goes back to the Revolutionary War when George Washington insisted that the American army take prisoners even after Hessians slaughtered his soldiers without quarter at Fort Washington.

That balance might have been best struck again by going to Congress and seeking framework legislation. Congress should and would have authorized the administration to use harsh interrogation methods short of torture in the circumstances where such methods were necessary to get information to forestall attacks. A system requiring personal and recorded authorization by a Cabinet official in specific cases would provide substantial safeguards that these methods would be used only selectively and where necessary. To be sure, such congressional deliberation would have been a messy process and would have

[8] Morrison v. Olson, 487 U.S. 654 (1988).
[9] WILLIAM REHNQUIST, THE SUPREME COURT, HOW IT IS, HOW IT WAS (1988)

publicized administration's methods, when secrecy could itself have value by making it harder for the enemy to prepare for questioning. But nothing on a matter so controversial is kept secret long in Washington and when Congress set limits to the administration's interrogation process as it did in 2006 it was also a messy process. The debate that Congress could have provided at the outset would have helped educate the world to the reasons that such interrogations were needed in the interest of the safety not only of the United States but of other nations that were threatened by the mass slaughter of modern terrorism.

But whether or not the administration chose to go to Congress to reinforce the legality of its interrogations methods, it could hardly have chosen a worse strategy than it pursued. In a memo written to Alberto Gonzales on August 1, 2002, the Office of Legal Counsel provided a general interpretation of the the Torture Convention by limiting the concept of torture to the infliction of physical pain "equivalent in intensity to the pain accompanying serious physical injury such as organ failure or impairment of bodily function."[10] According to the memo, the only psychological harm that amounted to torture would be that leading to psychological harm "leading to significant duration, e.g. lasting months or even years." Finally, the memo concludes that the President has the constitutional authority to set even those strictures aside if they impaired his ability to order interrogations pursuant to his authority as commander in chief.

It is not my purpose here to dispute these conclusions as legal matter, but to show that whatever correctness, the memo was utterly counterproductive and should have been seen as such at the time. Indeed, my strongest reaction as a former official at the Office of Legal Counsel was not that of other observers who attacked the legal analysis or even the morality of the memorandum. Instead I saw it as a bureaucratic blunder committed not so much by the attorneys at OLC but by the White House Counsel and others in the administration who asked for this kind of analysis.

First, to anyone who has worked in the collaborative process of the executive branch, it was clear that this memo would be leaked at and leaked at the most inconvenient time to the administration. One rule I had at the Office of Legal Counsel was to consider how the phrasing and framing of a memo I wrote would look on the first page of the *Washington Post*. It would not take much imagination to see that the abstract analysis and sweeping language in both its statutory and constitutional analysis would allow opponents of the administration to paint the memo as radical and unbounded, undermining support for harsh interrogations tactics as well as the administration's general legal credibility.

Assuming that the administration chose not to obtain a framework authorization statute for Congress, a far better way to achieve the administration's objectives would have been to catalogue the kind of interrogation methods that administration actually wanted to use and explain in some detail why those methods would not amount to torture.

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[10] *See* Memorandum for Alberto Gonzales, Counsel to the President, From Jay Bybee, Acting Assistant Attorney General, Office of Legal Counsel, Re: Standards for Interrogation under 18 U.S. C. 2340-2340A. (August 1, 2002).

This memo would have been a far more limited and less controversial opinion, although some would still have disagreed with its analysis. It should also have omitted the unnecessary claim that the President could in some circumstances disregard the convention.[11] This sweeping claim seems to have been motivated by an interest in restoring general executive branch authority. But it is fanciful to believe that unilateral declarations by the executive branch can accomplish this goal. And by putting that expansion of executive power in the context of what seemed to be an almost limitless power to torture detainees, the memo set back the cause which it was trying to promote.

War Crimes Trials

The administration again had legitimate objectives in establishing military tribunals to prosecute some of the detainees for war crimes. It wanted to bring those who violated the laws of war to justice and deter subsequent violations. But it did not want to use the Article III court system and all its protection. To do so would have exposed in some cases national security information. But more fundamentally our trial system would have taken a very long time and provided a panoply of rights, however important to protect individual liberties within civil society, should be extended to irregular combatants outside the social compact. Swift military justice is part of the necessary shock and awe against war criminals.

But so far the administration has succeeded in conducting only one war crimes trial. One reason for the delay was that administration's first set of rules for conducting the trials faced such vigorous criticism that they were sent for revisions. And even after revision many military lawyers within the administration objected to some of the provisions, creating a kind of bureaucratic inertia that delayed indictments. But the most important reason for delay were the war criminal defendants' successes in the lengthy constitutional litigation over the procedures. In Hamdan v. Rumsfeld the Court held that some of the administration's procedures violated the Uniform Military Code of Justice as well as Article III of the Geneva Convention which, according to the Court, Congress had made applicable to military tribunals.

This signal defeat was quite possibly related to previous mistakes in legal strategy. Strikingly, the Court gave no deference to the administration's interpretation of either the Uniform Military Code of Justice or Article III of the Geneva Convention, despite precedent for deferring to the executive interpretations of treaties and statutes governing the military. Whatever the doctrinal categories of deference, the general credibility of executive branch positions will hugely influence the actual degree of deference the Court applies. This had been damaged by previous administration legal analysis, like that contained in the memo on interrogations, which the administration itself had since repudiated.

[11] In fact, a subsequent memo from the Office of Legal Counsel revoking the 2002 memo expressly stated that is was unnecessary to reach the issue of the President's constitutional authority *See* Memorandum for the Deputy Attorney General From Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable under 18 U.S.C. 2340-2340A. (Dec. 30, 2004).

In Hamdan itself, Justice Breyer noted that the President could "return to Congress to seek the authorization he believe necessary." Of course, President would not have had to return to Congress and would not have faced substantial bureaucratic foot dragging had he sought congressional authorization for the military tribunals in the first place. The administration almost certainly would have been successful, because even after the Supreme Court defeat in Hamdan, it got most of the procedures previously proclaimed unilaterally with some exceptions, including restrictions on use of hearsay and classified information. But the President was in a stronger political position in 2003 and probably even in 2001 than at the end of 2006.

It could be argued that administration's ability to get most of what it wanted by Congress vindicated is strategy to first try to avoid congressional. But the administration would probably have a gotten better deal if it had gone to Congress before its Supreme Court defeat. It could have sought authority for trials of war criminals, while holding out the prospect of going it alone if Congress refused. And it would have avoided the delay in trials caused by the Supreme Court defeat. The legal strategy with respect to war crimes was not the worst aspect of the administration's performance, but it still cannot be counted a success.

Surveillance

The Bush administration also had a choice about whether to obtain express authorization to undertake surveillance of individuals in the United States who were in contact with those in or near the battlefields of terrorism. It decided to rely instead on the President's authority as commander in chief and the general authority of the statute that authorized the administration to undertake military actions against the terrorist organizations.

It was a mistake not to obtain express congressional authorization for surveillance when it could have been easily been obtained. Indeed, it may have run more substantial risks to rely on executive authority in this regard than in the area of detentions and interrogations for two reasons. First, Congress here had already passed framework legislation in the Foreign Intelligence Surveillance Act ("FISA") that regulated the authority of the executive to wiretap individuals resident in the United States. That legislation by its terms appears inconsistent with the authority exercised by the administration because it requires warrants which the administration has not sought. It appears to contemplate its applicability in time of war, because it provided additional time to obtain such warrants in wartime. Second, because this surveillance was being undertaken of residents in the United States there was an even greater risk that courts would not extend precedent to protect executive discretion in this new kind of war.

As of this writing, the Bush administration is now seeking congressional authorization for an expansion of FISA, presumably for its surveillance program, among other things. But its prospects for passage, given the President's extremely weakened political position and ongoing litigation about the program are uncertain. A failure to

obtain authorization now will simply underscore the imprudence of not having gone to Congress earlier, whatever the ultimate outcome of the litigation.

Conclusion

The Bush administration's legal strategy in the war on terror has been deeply flawed. Because of its interest in establishing powerful precedent in favor of executive powers, it took bold positions that carried substantial risks of judicial repudiation and failed to obtain legislative endorsement at times of political opportunity. As a result, the Supreme Court said on two occasions the President was acting illegally, confirming an impression the President was a rogue operator outside established law and popular opinion. The lesson for future administrations seems clear. First, recognize that we live in a time of much more activist courts even in the era of foreign affairs. That fact may be bemoaned but it cannot be ignored and the reality of their possible interventions much be factored into strategy from the outset. Second, rely more on Congress than on courts, particularly when the President enjoys support in the initial states of conflict or his party controls Congress.

It is the executive power to persuade from a position of strength rather than formal legal powers that is the President's greatest asset. But it is generally a wasting asset and thus the President should translate it into more lasting legislative tools before its dissipation. The President has suffered reverses in the war in Iraq because he did not call in enough troops after the fall of Baghdad. He has had substantial losses in his legal wars because he did not call on citizens through their representatives to rally around a new, but carefully circumscribed, system of wartime detention and surveillance.