

The Power of Definition:
How the Bush Administration Created “Enemy Combatants” and Redefined
Presidential Power and Torture

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Abstract

This thesis aims to show the significance the power to define may have. It analyzes the policy process and policy outcomes regarding the status, treatment and form of trial given to the “enemy combatants” during the George W. Bush administration and the War on Terror, and how the Bush administration used its power to define with relative success. The analysis is provided by a close reading of four documents central to the policy process. The four documents are two memoranda from within the executive branch, a presidential signing statement, and an executive order. The policy choices made and the degree the Bush administration used its power to define proved to have significant consequences for the balance of power between the three branches of government, and for the “enemy combatants.” By applying three theories on the policy process, the analyzed documents and their context the thesis attempts to find if the theories may provide additional insight into how George W. Bush ran the executive branch, and why the policy outcomes turned out as they did.

In the aftermath of the terrorist attacks on September 11, 2001, Bush declared a “War on Terror” which led to the invasion of two Middle Eastern countries, Afghanistan and Iraq. The two wars led to an influx of prisoners held by the United States’ military and the Central Intelligence Agency, most prominently in the prison facilities at Guantanamo Bay, the Abu Ghraib prison outside Baghdad and in secret CIA-operated prisons in several undisclosed locations around the world. The influx of prisoners and a need to prevent further terrorist attacks on American soil caused the Bush administration to use its defining powers to initiate a host of controversial policies. Leading among these was the policy choice to remove the protections provided the prisoners by the Geneva Conventions and the United States Constitution, the creation of the “enemy combatants,” and a new and very narrow definition of what constituted torture. Congress and the Supreme Court tried to curb the increased powers the executive claimed, and the policy choices the administration made with regard to the enemy combatants. The attempts made by the two other branches of government gained only limited success for the majority of Bush’s two terms, but the Supreme Court was able to strike some of Bush’s policies down in two central cases; *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*.

After Barack Obama took office he has reversed almost every policy choice the Bush administration made with regard to the enemy combatants, which signals a new course for the executive branch and the United States’ government.

Table of Contents

<u>ACKNOWLEDGEMENTS</u>	<u>II</u>
<u>ABSTRACT</u>	<u>III</u>
<u>TABLE OF CONTENTS</u>	<u>IV</u>
<u>1.0 INTRODUCTION – THE POWER OF DEFINITION</u>	<u>1</u>
1.1 HISTORICAL BACKGROUND FOR THE THESIS	2
1.2 STRUCTURE AND AIM OF THESIS	3
1.2.1 STRUCTURE OF THE THESIS	4
1.3 THEORETICAL FRAMEWORK AND METHOD	7
1.3.1 GROUPTHINK	8
1.3.2 ADVISORY SYSTEMS FRAMEWORK	9
1.3.3 “THE UNITARY EXECUTIVE”	10
1.4 KEY TERMS	13
NOTES TO CHAPTER 1	15
<u>2.0 DISPOSING OF THE GENEVA CONVENTIONS</u>	<u>16</u>
2.1 THE BYBEE MEMO	18
2.2 THE GONZALES MEMO	26
2.3 CONCLUSION	32
NOTES TO CHAPTER 2	34
<u>3.0 BANNING TORTURE BY REDEFINITION</u>	<u>36</u>
3.1 ENEMY COMBATANTS	37
3.2 SIGNING STATEMENTS	39
3.3 THE ABU GHRAIB SCANDAL AND TORTURE	40
3.4 SIGNING STATEMENT TO THE DTA	42
3.5 AFTERMATH OF THE ABU GHRAIB SCANDAL AND THE DTA	46
3.6 GROUPTHINK AND THE ADVISORY SYSTEMS FRAMEWORK	47
3.7 RESPONDING TO HAMDAN	49
NOTES TO CHAPTER 3	50
<u>4.0 INTERPRETATION BY EXECUTIVE ORDER</u>	<u>52</u>
4.1 BATTLE OF THE BRANCHES	53
4.2 EXECUTIVE ORDERS	56
4.3 MOVING TOWARD A MORALLY ACCEPTABLE POLICY? – EXECUTIVE ORDER 13440	57
4.3.1 EXECUTIVE ORDER 13440 – EXECUTIVE DIRECT CONFUSION	58
4.4 THE SUPREME COURT ADDRESSES THE MILITARY COMMISSIONS ACT	65
NOTES TO CHAPTER 4	67

5.0 CONCLUSION	69
5.1 REDEFINING PRESIDENTIAL POWER – THE UNITARY EXECUTIVE	70
5.1.1 A NEW IMPERIAL PRESIDENCY?	74
5.2 REDEFINING PRISONERS OF WAR AND TORTURE	75
5.2.1 REMOVING DUE PROCESS RIGHTS AND GENEVA III PROTECTIONS	75
5.2.2 DEFINING TORTURE	77
5.3 GROUPTHINK AND THE ADVISORY SYSTEMS FRAMEWORK	79
5.4 AFTERMATH: FROM BUSH TO OBAMA	82
5.5 EPILOGUE – REPORT BY THE SENATE SELECT COMMITTEE ON INTELLIGENCE	84
5.5.1 ALI AL-MARRI	85
NOTES TO CHAPTER 5	86
APPENDIX	88
EXECUTIVE ORDER 13440	88
BIBLIOGRAPHY	91
BOOKS	91
WEB-BASED SOURCES	92
ARTICLES AND PAPERS	92
EXECUTIVE DOCUMENTS, LEGISLATION AND SUPREME COURT OPINIONS	95

1.0 Introduction – The Power of Definition

On January 20 2009, one of the most controversial presidencies of our time ended when George W. Bush left the White House. He entered the Oval Office with a very unclear mandate, recorded unprecedented numbers, both high and low, in job approval ratings during his terms in office, witnessed the deadliest terrorist attack on U.S. soil ever, involved the United States in two long and trying wars, alienated former allies, and saw America's reputation in the world plummet before ending his second term in the middle of a financial crisis spanning the globe; his presidency can definitely be said to have been an eventful one. Bush's foreign policy strategy received a great deal of criticism both from foreign and domestic politicians. The choice to define prisoners taken in the War on Terror as "enemy combatants" and to have them tried by military tribunals, as opposed to regular courts martial or in the United States federal court system were among the issues most hotly debated during his time in office. Another debated issue was the decision to detain prisoners as enemy combatants in the prison facilities at Guantanamo Bay (GTMO) and secret CIA-prisons around the globe.

The rhetoric throughout the Bush presidency was that the policy choices, regarding the detainment, treatment and trial of the prisoners taken in the War on Terror, was needed in order to protect the United States from further attacks and in spite of the controversies, the administration maintained its position, and stood by its choices without any apparent remorse. Vice President Dick Cheney exemplified this in an interview with ABC News as late as mid-December 2008 when he defended the use of waterboarding as an interrogation method, while denying that such a treatment constituted torture.¹ Whether or not torture is a matter of definition is highly dubious, there are several pieces of legislation, and international treaties, foremost among them the Geneva Conventions, outlining what constitutes torture. The Geneva Conventions do not spell out an exact definition of torture, so in that respect one could argue that torture is in fact a matter of definition, on the other hand some of the cases brought up in this thesis will challenge that argument. First however it is important to look at the historical background for the War on Terror and some of the controversial policies it resulted in.

1.1 Historical Background for the Thesis

Shortly after the terrorist attacks on September 11, 2001, Congress gave George W. Bush the power to use any means necessary to find and punish the people he determined to be responsible for the attacks. This power was given in the form of a joint resolution by Congress on September 18, 2001 called the *Authorization for Use of Military Force* (AUMF).² Two days later Bush held a speech in the House of Representatives which has been called his “War on Terrorism Address”.³ The terrorist attacks also led to the first ever invoking of the Atlantic Charter’s Article 5 and a subsequent invasion of Afghanistan by a broad coalition of countries in October 2001. The reasons for the invasion of Afghanistan were to find the leader of the al Qaeda terrorist network, Osama bin Laden, and to quash the terrorist training camps in Afghanistan in the process. The coalition quickly toppled the Taliban regime, but their efforts to locate and capture bin Laden proved unsuccessful. This caused Bush and his administration to shift its focus from Afghanistan and bin Laden to Saddam Hussein’s Iraq. Amidst outcries from the UN and its allies the United States built a “Coalition of Willing,” and launched an invasion of Iraq in March 2003. Prior to the invasion Bush had formulated a new strategy in security affairs which has been called “The Bush Doctrine” by scholars. The rationale behind this strategy is what is called “preemptive strikes” or “anticipatory self-defense,” meaning that it is justifiable to attack, or strike first in order to prevent the enemy from striking.⁴ This strategy was used in Iraq because intelligence showed that Saddam Hussein had ties to al Qaeda and that he had weapons of mass destruction (WMDs), and the argument was that it was only a matter of time until Saddam Hussein would use the WMDs. Both Hussein’s ties to al Qaeda, and his alleged possession of WMDs have later been proven to be incorrect, and the administration has admitted to some “untruths” in the speech Colin Powell gave to the UN prior to the invasion.

The two wars in Afghanistan and Iraq resulted in a host of captured individuals suspected of being part of al Qaeda, or being involved in the planning or execution of terrorist attacks. In their eagerness to get as much vital information as possible in as short a time as possible, paired with the fact that a host of the individuals captured were not captured by American or coalition troops, but rather by bounty hunters who turned them over to American troops, it has been argued that a lot of innocent people were caught up in the process.⁵ Many of the captured individuals were sent to the prison facilities at Guantanamo Bay, or secret CIA prisons around the world, some also ended up in the now infamous Abu Ghraib prison outside Baghdad. When the mistreatment and torture that went on in the Abu Ghraib prison became

known in 2004, it caused outcries from humanitarian organizations worldwide, as well as foreign governments and American politicians. Some of the military personnel involved in the treatment of prisoners were tried and convicted by a court-martial in 2005, but these were low-ranking and the entire process seemed unsatisfactory to many. In December 2005 Congress passed legislation regarding the trial and treatment of the prisoners taken in the War on Terror, the so-called Detainee Treatment Act (DTA). George W. Bush effectively nullified the DTA by attaching a signing statement to the bill, and the Supreme Court eventually intervened, in *Hamdan v. Rumsfeld*, in an attempt to provide clear guidelines to what rights the prisoners had and what the executive branch had to with regard to them. This intra-governmental tug-of-war between the branches continued well into Bush's final year as president with the passing of the Military Commissions Act (MCA) in 2006, and the subsequent Supreme Court decision, in *Boumediene v. Bush*, declaring the MCA unconstitutional in June 2008.

1.2 Structure and Aim of Thesis

The aim of this thesis is, as the title suggests, to show that the power to define can have dramatic consequences. In doing that this thesis looks at the policy process regarding the status, treatment and trial of the prisoners taken in the War on Terror, between the terrorist attacks on September 11, 2001 and the Supreme Court verdict in *Boumediene v. Bush* in June 2008. By analyzing four central documents from the process, this thesis aims to show that the Bush administration used its interpretative and defining powers extensively in order to achieve its policy goal. Through the administration's own interpretation of legislation – both domestic and international – it was able to redefine, not only, the status of the prisoners taken in the War on Terror as enemy combatants, but how these enemy combatants were treated in captivity and during interrogations, and how they would be tried. The four documents are analyzed in the context of other pieces of legislation that were central in the policy process. In chapter 2 two memos determining that the prisoners taken in the War on Terror would not be afforded the protections of the Geneva Conventions are analyzed. Chapter 3 analyzes a signing statement attached to the Detainee Treatment Act, which nullifies the act, as well as the debate that occurred between the different branches of government in response to the Abu Ghraib scandal. The outcome of the debate was the Military Commissions Act and a subsequent executive order. The executive order, which continued the interpretations of the Geneva Conventions begun in the memos from Chapter 2, is analyzed in Chapter 4 of this

thesis. The documents were chosen because they represent turning points, or attempted turning points, in the policy regarding the status, treatment, and trial of the enemy combatants.

By using his defining powers Bush was also able to expand presidential prerogatives and powers by redefining them in line with what has been known as “the unitary executive theory.” This theory, as presented in a paper by Christopher S. Kelley to the 63rd Annual Meeting of the Midwest Political Science Association in April 2005,⁶ proved vital in understanding the rationale behind the administration’s choice to act when faced with attempts, by Congress or the judiciary, to rein in their policies regarding the enemy combatants. The thesis also tests two additional theories on decision-making in foreign policy. The first theory is Irving L. Janis’ theories on *groupthink*, which tests whether a policy making group can fall victim to group mentality causing it to seek concurrence between members at the cost of policy debate.⁷ The second is David Mitchell’s theory on how presidents manage the decision-making process and what types of solutions their management-style produces in what Mitchell calls the Advisory Systems Framework⁸ (ASF). All three theories are explained more thoroughly in Chapter 1.3.

1.2.1 Structure of the Thesis

Chapter 2 analyzes some of the internal communication sent between the White House, the Department of Justice (DOJ) and the Department of Defense (DOD) in late January, 2001. The two memos have been chosen because they discuss and affirm why al Qaeda warriors and members of the Taliban regime who had been taken or would be taken later in Afghanistan were not protected by the Geneva Conventions or United States federal law. The most important document analyzed is a memo from Assistant Attorney General Jay S. Bybee to the White House and the DOD, which also opines that the President has a unilateral power to interpret and suspend the Geneva Conventions. In addition a memo from then White House Counsel Alberto Gonzales to George W. Bush reconsidering the findings from Bybee’s memo at the request of Secretary of State Colin Powell is analyzed. The analysis of these documents provides an insight into the decision-making process regarding the treatment the United States would afford the prisoners, and also the rationale behind the administration’s choice of policies. The findings are also applied to the two theories on policy-making processes in foreign policy; Janis’ theory on groupthink and Mitchell’s theory on the Advisory Systems Framework. The findings indicate that a degree of groupthink occurred between the central players in the administration, most notably President Bush, Secretary of Defense Donald

Rumsfeld, and the authors of the memos, Jay Bybee and Alberto Gonzales. There are a few symptoms of groupthink present, but if one applies the strict set of antecedent conditions and key questions Janis provides, the findings do not provide enough evidence of groupthink to conclude that it occurred. The debate and policy decision based on the two memos does provide enough evidence to conclude that Mitchell's assignment of Bush within the advisory systems framework is satisfactory. The analysis of the two documents found enough evidence for Kelley's assertion that the Bush administration embraced the unitary executive theory, which proved to be central in understanding how the administration operated.

Chapter 3 begins with how the administration created a new definition for the prisoners taken in the War on Terror. The term, "enemy combatants," is discussed in terms of its legal precedent and argument by critics, among them Howard Ball, who argues that the term is "legally meaningless."⁹ The creation of the enemy combatants shows that Bush continued to use his defining powers in order to achieve his intended policy goal with severe consequences for many of the prisoners. There is also a brief summary of what a signing statement is, and how it traditionally has been used. The chapter then jumps a few years ahead to the debate caused by the Abu Ghraib scandal in 2004. The scandal became an international media event immediately and a few American politicians, most prominently John McCain, a former prisoner of war in Vietnam himself, vowed to take action in order to stop the maltreatment of prisoners in U.S. custody. He did this by sponsoring a torture ban which was included in an emergency appropriations bill in December 2005. The White House initially tried to block the inclusion of the torture ban, but Bush eventually relented and Congress succeeded in limiting the administrations actions by passing what is now known as the Detainee Treatment Act (DTA) in December 2005. Congress' victory was short-lived, however, as Bush was able to nullify the entire DTA in three sentences in his signing statement to the bill. Bush's signing statement to the DTA is analyzed in this chapter, and it was chosen because it is a direct response by the administration to what Bush viewed as Congressional interference with the policies regarding the enemy combatants. The DTA and the signing statement to it also serve as the beginning of a prolonged tug-of-war between the branches, as the Supreme Court addressed Bush's signing statement in *Hamdan v. Rumsfeld*, the conclusion of which caused Bush to turn to Congress in order to continue with the intended regime for trying the enemy combatants. As the document analyzed in the chapter is a presidential signing statement, an example of direct executive action, it is less likely to have included several people in the process of formulating it. This makes it less likely to find further proof of groupthink, but

when the context of the signing statement, and its subsequent results some new arguments are made. Chapter 3 also shows that Mitchell's Advisory Systems Framework and his theory on how presidents manage the decision-making process does not provide insight in to the policy process directly, but functions as an explanation for how some of the symptoms of groupthink occurred. A presidential signing statement is one of the key characteristics of the unitary executive according to Kelley, and his theory proves to be suitable in understanding the administrations actions.

Chapter 4 begins with a brief summary of what an executive order is and how, why and when it is traditionally used. The controversies surrounding the passing of the Military Commissions Act – less than two weeks before the 2006 Midterm Elections – are included to provide additional context for the policy choices the administration made. The MCA was the administration's response to the Supreme Court's verdict in *Hamdan v. Rumsfeld*, discussed in Chapter 3, and the Act included several controversial provisions which will be discussed. Foremost among them may be what seems like an institutionalization of the principles of the unitary executive, which proves that the administration's power to define presidential powers had grown immensely. Another provision of the MCA stated that the president should issue an executive order in line with the Act, the executive order is analyzed in this chapter. The executive order was signed by George W. Bush in July 2007, and is called: "Executive Order 13440 - Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency." The executive order is closely connected with the previous chapters because it outlines the administration's views on what does and does not constitute compliance with the Geneva Conventions. The analysis shows that the unitary executive interpretations were still present in the administration in spite of the controversies Bush's policies caused with regard to the enemy combatants, and that the power to define still could have significant consequences for the balance of power, and the fate of the enemy combatants. In the preamble to the executive order president Bush refers to the power vested in him by both the AUMF and the MCA in addition to the Constitution and the Delegating Functions in the United States Code. This executive order then relies on powers given to the president by the Constitution, and powers given him after the terrorist attacks, and even on legislation less than a year old at the time of issuance. The language of the executive order seems contradictory in places, and after the analysis one is left with the assumption that the order does in fact not supply anything new or any changes to the existing policies at that point.

The chapter ends with the Supreme Court verdict from the June 2008 decision in *Boumediene v. Bush*, and how President Bush's defining powers seemed to have come to an end.

1.3 Theoretical Framework and Method

The stated aim of this thesis is to look at the processes going on within the executive branch during George W. Bush's presidency, and whether or not Bush's management style affected the policies enacted by the administration, and to show that the policy choices and redefinitions and reinterpretations of legislation, presidential power, prisoner status and torture had dramatic consequences for the enemy combatants, and for the balance of power within the U.S. Government. The methodological approach to this thesis is to do a close reading, or analysis, of four documents, and testing three theories on the presidency against the findings provided by the analysis. By testing the theories the thesis attempts to find further explanations for the policy choices the administration made which are not provided by the analysis.

The thesis includes several web-based sources, and it is important to consider the reliability of this type of source. All the analyzed documents, and the Supreme Court opinions, are retrieved from the internet. The author has determined that the sources the documents are retrieved from are reliable because the legislation and Supreme Court opinions are retrieved from a well known source, FindLaw which publishes all legislation and Supreme Court cases, while the executive order and signing statement are retrieved from a database of presidential documents created by the University of California at Santa Barbara called *The Presidency Project* – which also came as a recommended source by Petter Næss at the United States Embassy in Oslo. A lot of the historical context provided is from articles published in the online edition of several major news outlets like CNN, The New York Times, The Washington Post, and FOX News. For these sources it is important to remember that the news outlets are not objective observers, but may have a political agenda. The way they are used in this thesis does not make any political agenda the news outlet may have a problem, however.

The sources included in this thesis which are not web-based are mostly theoretical books, but Howard Ball's *Bush, the Detainees and the Constitution* is a scathing criticism of the Bush administration's policies regarding the detainees between 2001 and 2006. The book also provides the original texts of the MCA, but as long as the author is aware of Ball's opinion of the policies it should not pose a problem.

1.3.1 Groupthink

Irving L. Janis, a psychologist at Yale University, sought to find explanations for foreign-policy fiascos by looking at group dynamics in policy-making groups. He elaborated on his ideas in the 1982 book *Groupthink* where he investigated the possibility that group mentality could help in explaining policy fiascos by applying them to a number of cases, among them the Bay of Pigs invasion, the escalation of the Vietnam War and the Watergate cover-up.¹⁰ His central argument is that policy-making groups are just as affected and influenced by pressures to conform to the group as ordinary citizens.¹¹ The ambition of this thesis is to test the internal communication within the administration to find if the process was in any way affected by groupthink. Because Janis mainly used his theory to test policy failures, the question of whether or not the policy outcome of withholding Geneva Convention protections from alleged members of al Qaeda and the Taliban can be said to be a failure is pertinent. In light of the amount of controversy, and attempts by Congress and especially the Supreme Court to limit the administration, that came as a result of this initial debate, and final policy outcome, it seems probable that it would be wrong to label it as a success, though the Bush administration is likely to disagree with that argument. This point is further strengthened by the fact that one of Barack Obama's first actions as president was to sign two executive orders which completely reversed the policies Bush had enacted with regard to the enemy combatants. It is important to remember that even though a specific policy outcome can be labeled as a failure, or fiasco, there may not be sufficient evidence to label the outcome as a victim of groupthink, as Janis is quick to point out. He also points out that even though a policy outcome can be said to be a result of groupthink, it may not necessarily be a failure.¹²

To determine whether something has been affected by groupthink, Janis lists eight "symptoms of groupthink," divided into three different types. The two first symptoms are, Type I symptoms, or what he calls "overestimation of the group," that the group shares an illusion that they are invulnerable thus making risks more likely, and that the group has an inherent morality causing it to ignore ethical problems with the chosen action.¹³ The Type II symptoms are symptoms of "closed mindedness," the first of these being that there is a collective rationalization within the group preventing them from exploring alternatives to the course decided upon despite warnings or expert opinions. The second Type II symptom is a stereotyped view of the enemy leaders and the enemy as too evil, stupid or weak to warrant negotiations.¹⁴ The final four symptoms Janis' describes are the Type III symptoms. All these symptoms are what he calls "pressures toward uniformity," and causes the group's members

to self-censor any deviations from the agreed upon course, believe in an illusion of unanimity, pressure members with contradicting or alternative views to conform, and finally that what he calls “mindguards” emerges to “protect the group from adverse information.”¹⁵

In order to conclude that groupthink occurred, a majority of these symptoms need to be present, but even though all eight symptoms are present, there is still need for additional prerequisites, or antecedent conditions, to help facilitate the occurrence of groupthink.¹⁶ Janis lists four such antecedents: (1) insulation of the group making it impossible to confer with experts, (2) the leader of the group (the president) being too strong and exerting too much influence on the other members of the group, (3) a lack of procedures and norms for dealing with the decision-making process, and (4) psychological stress or pressure.¹⁷ If the symptoms and at least one of the antecedent conditions are present, and four additional key questions can be answered, Janis finds that the likelihood for groupthink being present to be big, and in his conclusion he states that “the groupthink syndrome sometimes plays a major role in producing large-scale fiascoes.”¹⁸ Janis’ theory is tested against the individual documents, and their contexts, analyzed in each chapter of this thesis, and then on the entire process as a whole, to find if groupthink, or a degree of groupthink, influenced the policy making process.

1.3.2 Advisory Systems Framework

In *Making Foreign Policy*, David Mitchell focuses more on how presidents manage the decision-making process than how the policies are discussed within the group. The advisory systems framework he outlines consists of four different management styles producing several different solutions. The management styles are put into two categories; they are either formal or collegial, and they consist of either high or low centralization.¹⁹

In a formal structure the president sits at the top of a strictly hierarchical system surrounded by highly specialized advisors and gets presented with filtered information through a “gatekeeper,” who functions as an honestbroker, presenting the different options available to the president. For George W. Bush’s first term this gatekeeper was National Security Advisor Condoleezza Rice, while his main advisors on foreign policy were Secretary of Defense Donald Rumsfeld, Secretary of State Colin Powell and Vice-President Dick Cheney. He also included several others who traditionally were not a part of the advisors around the president according to Mitchell. These were primarily the Assistant to the Vice-President on National Security Scooter Libby, Deputy Secretary of Defense Paul Wolfowitz, and Deputy Secretary of State Richard Armitage.²⁰ These advisors discusses among

themselves without the President taking part before the information is supplied to the President and he makes a decision based on the available options.

In a collegial system the president sits at the centre of a group of advisors and takes part in the discussion. The discussions are often generalized and the hierarchy is not as clear.²¹ Pointing out that Bush stated that he would run the White House like a business; Mitchell expects the decision-making process to conform to a formal management style.²² Mitchell continues by analyzing the first term of George W. Bush as two periods; before and after September 11 2001, and concludes that Bush's management style moved from a formal system with low centralization to one with high centralization, mainly because he became more involved and interested in foreign policy as time went by.²³

The main difference between systems with high centralization as opposed to low centralization is the number of options and amount of information supplied to the president through the gatekeeper. In a formal system with high centralization the gatekeeper only presents the 'best' option to the president while excluding differing views, this option is often geared towards the president's preferences by the gatekeeper and produces what Mitchell calls a "dominant solution." In a formal system with low centralization the gatekeeper presents all available, and equally good, options to the president who then either makes a decision based on his world-views and values – what Mitchell calls a "dominant-subset" – or the situation ends in a "deadlock" between options that cannot be reconciled. In a system with low centralization, the president's advisors also have an option to circumvent procedure and appeal directly to the president in order to secure ones own option as the best one.²⁴

For the purpose of this thesis Mitchell's theory proves to serve more as an addendum to Janis' theory on groupthink more than anything else.

1.3.3 "The Unitary Executive"

The unitary executive is a theory on presidential power which began developing under Ronald Reagan as a result of the perceived assault on the Presidency after Richard Nixon and Watergate.²⁵ Christopher S. Kelley says that George W. Bush was the first president to reference the unitary executive directly, and that he used the term 95 times in signing statements, executive orders or in response to Congressional resolutions in his first four years as president.²⁶ Even though Bush is the first president to reference the term, Kelley argues that he merely formalized a process which begun during Ronald Reagan's presidency in the early 1980s.

The main tenet of “the unitary executive”-theory is that it rests upon what Kelley calls “coordinate construction,” meaning that the President, and his administration, believes that all three branches of government have the power and duty to interpret the Constitution,²⁷ and that this power rests on the Take Care Clause and the Oath Clause under Article II of the U.S. Constitution.²⁸ The principle of “coordinate construction” is shown to be a form of “executive judicial review,” in this thesis. The unitary executive also rests upon what Kelley calls departmentalism, meaning that the president is the only person vested with executive power, and that he therefore must have complete control over the executive branch in terms of delegating powers and functions, and hiring, replacing and removing subordinate officers.²⁹ This thesis shows that Bush followed these principles to a large degree, and that he used coordinate construction extensively in his pursuit of his policy goals.

Some scholars, Kelley mentions Steven Calabresi and Christopher Yoo, date the unitary executive back to the administration of George Washington, but Kelley disagrees and argues that the unitary executive was “championed by (...) the Federalist Society, a group of conservative lawyers who (...) worked in the Nixon, Ford, and Reagan White Houses.”³⁰ The fact that the unitary executive stems from a group of conservative lawyers is interesting in terms of the number of “neo-cons” in the Bush administration, making it more likely that the use of unitary executive principles were influenced by the more conservative forces in Bush’s administration. If the unitary executive is a conservative ideology, it is to be expected that George W. Bush would embrace the theory and its principles.

In addition to coordinate construction, the unitary executive operates under the impression that the environment is hostile, causing the unitary executive to aggressively push constitutional boundaries in order to protect what is perceived as the prerogatives of the executive office, Kelley calls this aggressive pushing of boundaries “venture constitutionalism.”³¹ There are several other aspects of the unitary executive, among them control over the regulatory process, and an increased role for the Office of Management and Budget (OMB), but these aspects of the unitary executive are not relevant in the context of this thesis.

The Bush administration’s adherence to the unitary executive theory is most clearly evinced in a speech by Alberto Gonzales, then-White House Counsel, and author of the Gonzales Memo analyzed in Chapter 2 of this thesis, to the American Bar Association in 2002:

The Framers in the *Federalist Papers* spoke explicitly about the need for a unitary executive presidency precisely to allow for bigger effectiveness and accountability in the conduct of our foreign and military affairs.³²

As this thesis shows, the statement made by Gonzales is exactly what the Bush administration argued in terms of fighting the War on Terror, and its policies regarding the enemy combatants.

The two main features of the unitary executive in practice is the extensive use of signing statements to protect presidential prerogatives³³, and controlling the executive branch by controlling information, or the regulatory process to avoid infringements.³⁴ There is no doubt that George W. Bush embraced the use of the signing statement as Kelley provides statistics for the number of times signing statements have been used since the presidency of James Monroe. In the period from Monroe to Jimmy Carter, the signing statement was used a total of 109 times to protect presidential prerogatives or direct executive agencies. For the presidencies of Ronald Reagan, George H. W. Bush, and Bill Clinton the number of uses skyrocketed to 396, while in George W. Bush's first term alone he made 435 signing statements, the majority of which were protest to what Bush perceived as infringements on the prerogatives of the unitary executive office.³⁵

There seems to be little doubt about Kelley's argument that George W. Bush used his first term to consolidate the principles of the unitary executive, and Kelley argues that Bush governed unilaterally on many occasions during his first term.³⁶ This thesis includes events, examples, and documents from Bush's second term as well as from his first term, and the findings in this thesis support Kelley's arguments.

1.4 Key Terms

The Geneva Conventions are discussed a great deal in this thesis and the Third Geneva Convention specifically. It is important to note that the Third Geneva Convention, or Geneva III, refers to what is officially called the *Convention Relative to the Treatment of Prisoners of War*. The other three Geneva Conventions are not included to any large degree in the thesis, and as such, any reference to the Geneva Convention – without the plural ‘s’ – is a reference to Geneva III. Any reference to the Geneva Conventions – with the plural ‘s’ – refers to all four Conventions as a whole. As Geneva III includes 143 articles as well as additional appendixes – or annexes – any reference to “common article 3” or “Article 2” for instance is a reference to the article under Geneva III unless stated otherwise.

In the memo sent by Alberto R. Gonzales to George W. Bush on January 25, 2002, which is analyzed in Chapter 2, Gonzales refers to “Geneva Convention III on the Treatment of Prisoners of War (GPW),” this is a reference to Geneva III as well, meaning that any reference Gonzales makes to GPW is a reference to Geneva III.

High Contracting Party refers to the signatory nations of the Geneva Conventions, or the nations which have ratified, but not signed it.

The Bybee Memo in this thesis refers to a memo sent from the OLC by Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales and William J. Haynes II on January 25, 2001. This is not identical to the more famous “Bybee Memo” titled “Re: Standards of Conduct for Interrogation under 18. U.S.C. §§ 2340 – 2340A” of August 1, 2002. Any reference to this second memo will be titled “the Bybee Torture Memo” or “the Torture Memo.”

Enemy Combatants is a term coined by the Bush administration to define the prisoners taken in the War on Terror. An enemy combatant is not a prisoner of war, nor a lawful- or unlawful combatant as referred to by the Geneva Conventions. The term was coined to create a new standard for the detained persons, and the term is discussed thoroughly in Chapter 3 of this thesis.

Waterboarding is an interrogation method used by the U.S. Military during interrogations of prisoners in the War on Terror. Waterboarding is a form of simulated drowning where the suspect is strapped to a board with the head lowered and a cloth covering the face – or mouth

and nose – then water is poured onto the cloth to cause suffocation.³⁷ The administration argued that this did not constitute torture as the interview with Dick Cheney exemplified, but the argument has received harsh criticism from several sources; among them the Human Rights Watch.³⁸

A Presidential Signing Statement – or simply a signing statement – is a statement attached to the President's signature when he signs a bill into law. The signing statement has been used as a tool to interpret legislation, and direct the executive branch in how to implement the legislation, by presidents since Ronald Reagan according to scholar Philip J. Cooper.³⁹ Signing statements may have other more ceremonial uses as well and are discussed more in Chapter 3 of this thesis.

Executive Orders are orders issued unilaterally by the President of the United States for several different reasons. An executive order has the same status as law, but only as long as it is not revoked. An executive order can be revoked by the sitting president by issuing a new executive order revoking the old one. We see an example of this in the conclusion of this thesis. Executive orders can also be overturned by the Supreme Court, or by Congress passing legislation overriding the executive order. Chapter 4 discusses some of the reasons why executive orders are issued, and different uses for them.

Military Commissions, in the context of this thesis, are the Bush administrations intended way of putting the prisoners to trial. The military commissions would operate outside the normal rules and procedures of a federal trial, or a court martial, leaving the prisoners with significantly less protection than they would normally have been given. The Military Commissions Act, passed in 2006, also allowed the use of secret evidence, or evidence obtained through coercion to be brought before the military commission.

Habeas Corpus, or the writ of habeas corpus, is an old and central part of English common law, which allows a person imprisoned by a government to challenge his imprisonment by submitting a request to a judge. The judge may then issue a writ of habeas corpus allowing the prisoner to meet before a court which will determine if the imprisonment was lawful or not.⁴⁰

Notes to Chapter 1

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- ¹ Jonathan Karl, "Exclusive: Cheney Holds Hard-Line Stance", *ABC News*, December 15, 2008, <http://abcnews.go.com/WN/story?id=6464919&page=1> (Accessed February 19, 2009).
- ² Michael Nelson, editor, *The Evolving Presidency: Landmark Documents 1787-2008* (Washington, D.C., CQ Press, 2008), 297. – Nelson writes that the authorization came three days after the attacks; however the joint resolution was not passed by Congress until September 18.
- ³ *Ibid*, 291.
- ⁴ *Ibid*, 298.
- ⁵ Howard Ball, *Bush, the Detainees, and the Constitution: The Battle over Presidential Power in the War on Terror* (Lawrence: University Press of Kansas, 2007), 38.
- ⁶ Christopher S. Kelley, "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency," paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association April 7-10, 2005, Chicago, IL.
http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/5/9/4/pages85947/p85947-1.php (Accessed March 27, 2009).
- ⁷ Irving L. Janis, *Groupthink* (Boston: Houghton Mifflin Company, 1982).
- ⁸ David Mitchell, *Making Foreign Policy: Presidential Management of the Decision-Making Process* (Aldershot: Ashgate, 2005).
- ⁹ Ball, *Bush, the Detainees, and the Constitution*, The argument is made in the note #2 to the introductory chapter of Ball's book on page 233.
- ¹⁰ Janis, *Groupthink*.
- ¹¹ *Ibid*, 7.
- ¹² *Ibid*, 11.
- ¹³ *Ibid*, 174
- ¹⁴ *Ibid*, 174
- ¹⁵ *Ibid*, 175
- ¹⁶ *Ibid*, 176
- ¹⁷ *Ibid*, 176-177.
- ¹⁸ *Ibid*, 177.
- ¹⁹ Mitchell, *Making Foreign Policy*, 25.
- ²⁰ *Ibid*, 177-78.
- ²¹ *Ibid*, 24.
- ²² *Ibid*, 45. For a comprehensive explanation of the different management styles in Mitchell's framework see page 24-27.
- ²³ *Ibid*, 198.
- ²⁴ *Ibid*, 26-27.
- ²⁵ Kelley, "Rethinking Presidential Power," 3.
- ²⁶ Kelley, "Rethinking Presidential Power," 1.
- ²⁷ *Ibid*, 4.
- ²⁸ *Ibid*, 6.
- ²⁹ *Ibid*, 5.
- ³⁰ *Ibid*, 10-11.
- ³¹ *Ibid*, 11-12.
- ³² *Ibid*, 26.
- ³³ *Ibid*, 26-27.
- ³⁴ *Ibid*, 40.
- ³⁵ *Ibid*, 31.
- ³⁶ *Ibid*, 54.
- ³⁷ Scott Shane, "A Firsthand Experience Before Decision on Torture," *New York Times*, November 7, 2007, <http://www.nytimes.com/2007/11/07/us/07waterboard.html> (Accessed April 3, 2009).
- ³⁸ Human Rights Watch, "CIA Whitewashing Torture" www.hrw.org, November 20, 2005, <http://www.hrw.org/en/news/2005/11/20/cia-whitewashing-torture> (Accessed April 3, 2009).
- ³⁹ Philip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas, 2002), 201.
- ⁴⁰ Ball, *Bush, the Detainees, and the Constitution*, 1-2.

2.0 Disposing of the Geneva Conventions

Two months after the invasion of Afghanistan by Coalition forces and the Afghani Northern Alliance militia in October 2001, the Taliban government was toppled. The initial military success caused an influx of prisoners held by the United States military, and a subsequent need to decide how to deal with the new prisoners. Among the prisoners were members of both al Qaeda and the Taliban and in the beginning of 2002 the Bush administration reached a policy decision regarding the manner these prisoners should be treated and tried. The policy debate also included discussions of the extent the administration had to be concerned about international and domestic legislation, mainly the Geneva Conventions and the War Crimes Act. President Bush had signed a military order on November 13, 2001, determining that any prisoner found to have ties to al Qaeda would be tried by military commission and subject to a potential sentence of life in prison, or death.¹ In the military order Bush also ordered that the prisoners should be treated as humanely as possible with no adverse treatment based on the prisoners' religion, gender, race, wealth and similar criteria being inflicted upon the prisoner.² As for the applicability of the Geneva Conventions and domestic law for these prisoners the policy was outlined and decided upon in January 2002.

One of the earliest available documents from within the administration regarding the prisoners taken in Afghanistan is Secretary of Defense, Donald Rumsfeld's message to the Joint Chiefs of Staff (JCoS), which is dated January 19, 2002.³ Rumsfeld's message is not analyzed here, but it gives an indication of the policy the administration had chosen:

The United States has determined that Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949.⁴

The policy decision was based on a legal opinion issued by the Department of Justice (DOJ) on January 18, 2001.⁵ This chapter analyzes two memos from the debate that occurred within the administration with respect to the Geneva Conventions' – especially the Third Geneva Convention, or Geneva III's – applicability to the prisoners taken in Afghanistan. The analysis provides an explanation for how and why the administration was able to decide that al Qaeda and Taliban prisoners would not be afforded the protections given by Geneva III. The analysis indicates that the policy choice to not apply the Geneva Conventions to the detainment of al Qaeda and Taliban prisoners was to some extent influenced by elements of "groupthink." Irving L. Janis presented his theory, which supposes that policy making groups are influenced

by group mentality and a pressure to conform, in *Groupthink* in 1982.⁶ The analysis also indicates that David Mitchell's argument that George W. Bush's place in Mitchell's "Advisory Systems Framework" (ASF) is correct. Mitchell places presidential management of the decision making process into a framework of either high or low centralization, with either a collegial or a formal management style – and argues that Bush moved from a formal system with low centralization to a formal system with high centralization during his first term.⁷

The first analysis is of a memo (the Bybee Memo) sent by Assistant Attorney General Jay S. Bybee from the Office of Legal Counsel (OLC) to the General Counsel to the President, Alberto R. Gonzales and to the General Counsel to the Department of Defense, William J. Haynes II.⁸ This memo, sent on January 22, 2002, outlines the opinion held by the DOJ with regard to the applicability of the Geneva Conventions and United States federal law on prisoners taken in the War on Terror. The Bybee Memo contains several examples of the principles Christopher S. Kelley outlines in his paper on "the unitary executive,"⁹ and indicates that the Bush administration embraced the unitary executive at an early stage, in line with Kelley's argument. Most evident in the Bybee Memo is the unitary executive principle of "coordinate construction" – the belief that all branches of government have the right and duty to interpret legislation in a way similar to judicial review – which Kelley says is one of the main pillars of the unitary executive theory.¹⁰ The analysis shows that the opinion held by the DOJ and echoed by Rumsfeld in the message to the JCoS, quoted above, was reached through a series of loopholes and interpretations of the text of the Geneva Conventions and the U.S. Constitution.

After the DOJ's opinion was issued and Bush had decided upon a policy in line with what the Bybee Memo outlined, Secretary of State Colin Powell asked President Bush to reconsider the policy decision and decide that the Geneva Conventions' prisoner of war status would be applied to al Qaeda and the Taliban, and that the protections it provides would only be removed after a case-by-case review of the prisoners.¹¹

The second memo (the Gonzales Memo) analyzed in this chapter was sent by Alberto Gonzales, on January 25, 2002, to George W. Bush reconsidering the findings of the Bybee Memo as Powell requested. The memo reconsiders the findings from the Bybee, but concludes that the opinion issued by the Bybee Memo is satisfactory, and that the Military Order issued by President Bush in November 2001 will ensure that both al Qaeda and Taliban prisoners will be treated in line with the Geneva Conventions even if Geneva III, and the protections it provides, will not be applied to the prisoners.¹² By analyzing the two memos, the rationale and legal arguments for Bush's policy choices are made clear and it is possible to

obtain a picture of what would be the policies in the years to come, regarding the status, treatment, trial, and applicability of the Geneva Conventions to the prisoners taken in the War on Terror. The analysis is limited to two memos for several reasons; first of all a more extensive analysis of additional memos would in all likelihood reproduce the facts found in the Gonzales and Bybee Memos, secondly this debate took place between the White House, the DOJ and the DOD. The lone dissenter in the debate seems to be the State Department, represented by Colin Powell, who did not really protest in any significant way, but only asked for a reconsideration of the opinion presented in the Bybee Memo.

2.1 The Bybee Memo

The Bybee Memo discusses the applicability of the Third Geneva Conventions on al Qaeda and Taliban members captured in Afghanistan, and whether any deviations from the text of Geneva III may be in violation of either the Geneva III or the War Crimes Act – “the WCA” – (18 U.S.C. §2441), which Bybee finds to be the most relevant federal law as it incorporates “several provisions of international treaties governing the laws of war.”¹³ The conclusion is found in the very first paragraph of the memo in which Bybee states: “We conclude that these treaties do not protect members of the al Qaeda [and that the] President has sufficient grounds to find that these treaties do not protect members of the Taliban militia,”¹⁴ Bybee also emphasizes that the memo is not intended to direct policy, but only serve as the DOJ’s legal opinion on the matter.

Part I of the Bybee Memo outlines the background and gives an overview of the WCA and the Geneva Conventions as a whole. At the time of writing the detention facilities at Guantanamo Bay (GTMO) was still under construction, but Bybee understands that the temporary facilities, though some may argue that they violate Geneva III provisions, “meet minimal humanitarian requirements.”¹⁵ It is understandable that it may be difficult to provide satisfactory facilities immediately after an unexpected terrorist attack and subsequent invasion of a territory half a world away, but the fact that the OLC seems satisfied with aiming for “minimal requirements” from the beginning may prove indicative of the years to come. The following paragraphs outlines what the WCA was intended to do when it was passed, and Bybee concludes that the most important consideration to be taken with regard to the WCA is that it criminalizes “grave breaches” of the Geneva Conventions. He continues by quoting what Geneva III defines as a “grave breach”, and finally concludes that “Only by causing

great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial, or forcing them to serve in the [U.S.] Armed Forces, could the United States actually commit a grave breach.”¹⁶ Any other form of deviation from or “non-grave breach” of the text of Geneva III can not be criminalized under the WCA. The WCA also criminalizes violations of common article 3 of the Geneva Conventions as a war crime, but Bybee concludes that the requirements of article 3 are “much less onerous and less detailed than those spelled out in the Conventions as a whole.”¹⁷ Again the reader is struck by what seems to be an attempt to find the easiest possible and “least onerous” way out of the situation the prisoners ‘has put the United States in,’ and not an attempt to find a responsible and legal way to handle the prisoners. In a few short paragraphs Bybee has outlined that short of harming, torturing, killing or forcing prisoners to serve in the Army, the WCA can be disregarded. He then moves on to what common article 3 of Geneva III says, and for what type of conflict it is valid. He begins by stating that common article 3 is a complement to common article 2, which applies to declared war, or other types of armed conflict, between two or more high contracting parties.¹⁸ Because common article 3 refers to conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,”¹⁹ Bybee concludes that it refers to cases of civil war, meaning that common article 3 is not valid or applicable at all for the prisoners taken in Afghanistan. This view is supported by both “Geneva contemporary” legal scholars and what Bybee refers to as “commentators”. However another viewpoint on common article 3 is brought up by Bybee when he refers to a decision from the International Criminal Tribunal for Former Yugoslavia in the case *Prosecutor v Tadic* where the tribunal found that common article 3 is a “catch-all” that refers to any conflict not covered by common article 2.²⁰ Bybee strongly rejects this interpretation of common article 3 for several reasons, primarily because if the parties to the Geneva Conventions had intended common article 3 to be a catch-all provision, Bybee argues that they would have used clearer language. He argues that such an interpretation ignores both the text and context the United States ratified the Conventions in, and since a conflict like the one in Afghanistan was unforeseen at the time of drafting, it was not taken into account by the drafters and therefore the conflict cannot be covered by common article 3. This also means that the conflict in Afghanistan is not covered by the WCA since, according to Bybee, common article 3 and the relevant provisions of the WCA mentioning common article 3 only refers to cases of civil war.²¹ Bybee’s opinion is a good example of coordinate construction, that the executive interprets legislation to make it preferable to the executive’s goals. By reading both the WCA and Geneva III the way he does, Bybee removes any potential legal

obstacles that would occur if the President were to make a policy choice in line with the memo.

In Part II of the memo Bybee discusses the application of Geneva III and the WCA to members of al Qaeda. Resting on the findings from Part I, Bybee finds that al Qaeda and its associated members are not protected by the WCA or Geneva III, nor are the legislation applicable to al Qaeda for three reasons.

First he notes that since al Qaeda is neither a state, nor a High Contracting Party, al Qaeda members are not eligible for protections under common article 2 of the Geneva Conventions, regarding armed conflict between High Contracting Parties. However Bybee brings up common article 4 which states that prisoner-of-war (POW) status must be afforded to: “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements” and “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”²² There is a possibility that al Qaeda would fall into a one or both of these categories as they can arguably be said to be a militia or a volunteer corps, but Bybee rejects that common article 4 provides al Qaeda members with POW status because he reads common article 4 as having no jurisdiction in its own and that it only serves as an addendum to common article 2 regarding war between High Contracting Parties. Because Bybee has already determined that the conflict in Afghanistan is not covered by common article 2, this means that common article 4 has no bearing on the DOJ’s opinion.

Secondly common article 4 sets out a few requirements for militias or volunteer corps to be qualified for POW status, the most important being that they have a “fixed distinctive sign recognizable at a distance” and that they “[follow] the laws and customs of war.”²³ It would be safe to assume that al Qaeda does not carry a fixed and distinctive sign making them recognizable as al Qaeda members, and Bybee argues that they most certainly did not follow the laws of war as they “hijacked civilian airliners, took hostages, and killed them.”²⁴ A counterargument to Bybee’s opinion may be that the terrorists who actually hijacked the planes on September 11, 2001 are dead and the al Qaeda members who were taken in the subsequent invasion of Afghanistan may not be to blame for the actions of a now deceased few of their network. This is not a point Bybee discusses, but Bybee is probably right that it is unlikely that the al Qaeda members taken in Afghanistan operated under the customs and laws of war.

Bybee's third and final point for why al Qaeda members do not qualify for application of Geneva III and the WCA is relying heavily on the findings in Part I on the memo. Since common article 3 only refers to cases of a "non-international character" – what Bybee concluded to be instances of civil war – and since the operations against al Qaeda and the Taliban in Afghanistan is not a civil war, and because the conflict is of an international character, this effectively precludes any application of common article 3 and in turn the WCA. In Bybee's own words "the military's treatment of al Qaeda members is not limited either by common article 3 or [the WCA]."²⁵ This final opinion is based exclusively on Bybee's own reading of Geneva III, and again leaves the impression that the goal for the United States is to provide as little as possible to their prisoners because it makes it easier. It also serves as additional proof of the executive interpreting legislation to suits its needs.

In Part III of the memo Bybee discusses the application of the Geneva Conventions to the Taliban militia. He begins by saying that whether Geneva III applies to the trial and detention of the Taliban or not "presents a more difficult legal question," than Geneva III application to al Qaeda does.²⁶ The main arguments for "non-application" of Geneva III is that even though Afghanistan is party to all four Geneva Conventions, and has been since 1956 – something that would imply Geneva III protections and also trigger the WCA – Afghanistan can arguably be defined as a failed-, or rogue state, and that the Taliban either relied too heavily on al Qaeda to be an effective government, or that al Qaeda controlled the Taliban thus disabling any governmental functions the Taliban had. He also questions whether the Taliban can be said to have been a government at all and not just another terrorist organization.²⁷ Bybee finds that the President is in his full right to suspend any treaty obligations toward Afghanistan because: "Under Article II of the Constitution, the President has the *unilateral power* to suspend whole treaties or parts of them *at his discretion*" (emphasis added).²⁸ He defends this position by quoting Thomas Jefferson stating that Congress has normally deferred foreign affairs to the executive, and that conducting foreign affairs is an exclusively executive power, barring a few "negative[s] by the senate [sic]."²⁹ However one of the few negatives granted the Senate by the Constitution is the conduction of treaties with other nations, making the "unilateral power" under Article II of the Constitution highly debatable. Bybee's interpretation of the Constitution is again in line with Kelley's description of coordinate construction under the unitary executive theory, as Bybee interprets Article II of the U.S. Constitution to include presidential powers that are not mentioned. If Bybee's interpretation is correct, there would be no need for the Senate to be included in the

conduction of treaties since the President could ignore any treaty ratified by the Senate. The interpretation would still leave the Senate with the power to block treaties, but would also give a newly elected president the power to pick and choose which treaties he would adhere to and which he would ignore, a power that is unlikely to have been intended by the founding fathers, and making long-term planning in foreign relations an impossibility.

In the latter paragraphs of Part III, Bybee considers a suspension of Geneva III obligations toward Afghanistan in light of international legislation. He brings up the Vienna Convention as an example of customary international law (CIL), and that both lower U.S. federal courts, and the State Department have shared the view that a breach of “treaties of a humanitarian character” is a breach of CIL. However Bybee’s argument is that the United States is not party to the Vienna Convention, and even if customary international laws are broken, domestic laws are not.³⁰ Additionally the Geneva Conventions common article 1 binds the “High Contracting Parties to respect and try to ensure respect for [the Geneva Convention] in all circumstances”³¹, meaning that regardless of the actions of the opposing party to an ongoing conflict, the Geneva Conventions must be honored at all times. Bybee finds that this reading of common article 1, and the Vienna Conventions “cannot be correct”, because “[t]here is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension [of them].” He continues: “if the drafters [of Geneva III] believed the treaties could not be suspended, while allowing for withdrawal and denunciation, they could have said so explicitly and easily in the text.”³² This interpretation brings up a very interesting paradox in Bybee’s reasoning, as he apparently needs textual proof from the Geneva Convention in order for an interpretation of it to be correct, while at the same time he believes that the President has the implied, unilateral power to suspend any treaty under the U.S. Constitution without any textual proof from the Constitution of that implied power. In other words Bybee demands textual proof to accept limits on U.S. and presidential power from international legislation while he seems to have no need of the same from the U.S. Constitution when it comes to expanding U.S. and presidential power.

In the conclusion of Part III of the memo Bybee discusses the application of Geneva Conventions as a matter of policy. He writes that “[T]he President may determine that (...) in order to encourage other States to comply with the principles of the Geneva Conventions. [I]t serves the interest of the United States to *treat* al Qaeda or Taliban detainees as if they were prisoners of war, even though they do not have any legal entitlement to that *status*. We express no opinion on the merits of such a policy decision.”³³ It is difficult to avoid seeing an implied message in this quotation that though it would probably look good to treat the

prisoners in line with Geneva III, there is no need. Bybee also argues that if the President chooses as a matter of policy, not law, to adhere to the Geneva Conventions, the possibility of prosecuting members of the Taliban torturing American prisoners emerges. Though exactly where this prosecution is to take place is somewhat puzzling as the United States does not recognize the International Criminal Court. Presumably Bybee means that the Taliban can be prosecuted in the federal court system or by military commission.

The final point Bybee makes is that there are several occasions since World War II when the United States have decided that Geneva III does not apply by law, however they have always acted consistent with Geneva III or applied it as a matter of policy, and therefore always provided for prisoners as if they were entitled to POW status.³⁴ This final point adds some confusion to Bybee's reasoning as it shows that the U.S. has always provided for its prisoners, even when it did not have to. This seems to be in direct contradiction with the impressive legal justifications Bybee has supplied up to this point in the memo. The conclusion may be a tentative attempt by Bybee to underscore the fact that even though Bybee and the OLC believe that the United States is in its full right to suspend Geneva III with regard to Afghanistan, al Qaeda and the Taliban, such a suspension has never been done before. In other words it may serve as a warning that a policy decision resulting in the dismissal of the WCA and Geneva III will be a journey into uncharted waters.

In Part IV Bybee moves on from the legal applicability of Geneva III to the Taliban and al Qaeda, to the requirements made by Geneva III regarding detention facilities and conditions. He opens by stating that if the President should choose not to suspend Geneva III obligations towards Afghanistan, and in turn al Qaeda and the Taliban, there are still reasons to deviate from the text and requirements of it. The first reason is that deviations from Geneva III may be justified as a matter of self-defense and "some basic doctrine of force protection."³⁵ Quoting Article 51 of the U.N. Charter,³⁶ Bybee opines that because the United States was attacked on September 11, 2001, it has a right to defend itself. This right extends to taking certain measures to protect the soldiers guarding prisoners, taken in the War on Terror, "who pose a threat to [the soldiers'] lives and safety"³⁷ even if these measures were to deviate from Geneva III requirements. He continues his argument by stating that: "as a matter of domestic law, *the United States armed forces can modify their Geneva III obligations to take into account the needs of military necessity to protect their individual members*"³⁸ (emphasis added). In hindsight it is hard to imagine how a prisoner at GTMO could pose a serious threat to any guard even when it was still a temporary facility, though assuming that Bybee's

unlikely assertion that the guards were in danger was correct, the self-defense argument seems valid in both in terms of international and U.S. domestic legislation. His other argument, that the U.S. armed forces can modify its Geneva III obligations, is less convincing however. Presumably Bybee believes that because the President is the Commander in Chief under the constitution, and because the President has the unilateral power to interpret treaties according to Bybee, this leaves the armed forces with the option of modifying its obligations. Such a reading of the U.S. Constitution and Geneva III effectively grants the executive branch of government with an almost unlimited ability to revise and interpret legislation which was almost certainly not intended by the drafters of the Constitution or Geneva III. This would also be a significant expansion of the President's powers, and serves as another example of how the administration used principles from the unitary executive again and again in order to achieve its desired goal.

Moving on to what status the Taliban prisoners would have if the President chooses to uphold U.S. obligations under Geneva III, Bybee still contests that they may not receive POW status. Providing that the President chooses to uphold Geneva III obligations, the conflict in Afghanistan would fall under common article 2 which would extend its jurisdiction to include common article 4 entitling all prisoners taken to POW status. Bybee moves right on to how this provision can be circumvented saying that the President can simply "determine categorically that all Taliban prisoners fall outside article 4," because "[u]nder Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation."³⁹ Again the principles of coordinate construction and implied powers are brought up to defend what the President can and cannot do, but what is even more interesting with this specific quote is that Bybee adds a notation to his argument to provide a precedent for the President's interpretative powers under the constitution. The notation refers to a memo sent from John C. Yoo and Robert J. Delahunty of the OLC to the National Security Council (NSC) on November 15, 2001 titled "Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty."⁴⁰ In other words the precedent for the implied presidential power comes from Bybee's own deputy at the OLC and is, at the time of the Bybee Memo, two months old. As legal precedents go this seems unconvincing at best, but Bybee continues: "A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for [common] article 5 tribunals."⁴¹ This is another dramatic increase of presidential powers, and highly controversial, since this would mean that there is no need for the judiciary in foreign policy. If the president can simply determine that any prisoners taken by the U.S. military is

not eligible for protections from Geneva III or domestic legislation, both domestic and international courts become superfluous since the president has determined that the prisoner can be tried by military commission set up by the military order described earlier in the chapter.

Having determined that even if the president should decline to suspend Geneva III obligations to Afghanistan the Taliban prisoners does not have POW status or the right to a status review, Bybee uses the next four paragraphs of the memo to remove any further legal hindrances potentially set up by Geneva III or the WCA. In summary the determinations made by Bybee should the president uphold Geneva III obligations while categorically determining that no Taliban prisoners are entitled to POW status are as follows. Firstly if the DOD should decide that the Taliban had always violated the requirements set out by common article 4 – recognizable sign etc. – a categorical rejection of POW status by the President is justified. This would mean that the executive branch would have to determine that the conflict in Afghanistan is a conflict between two state parties, covered by common article 2. This would not invoke common article 4 however since Bybee already has “proved” that it has no jurisdiction on its own. Secondly such a determination would not trigger the WCA since the WCA only “criminalizes grave breaches of the Geneva Conventions or violations of common article 3” and because “[i]f the President were to find that Taliban prisoners did not constitute POWs under article 4, *they would no longer be persons protected by the Convention*”⁴² (emphasis added). Because the Taliban prisoners are not POWs, nor in fact protected by the Convention at all, their treatment can not be a grave breach of the Geneva Conventions. Thirdly since the President has determined that the conflict is a common article 2 conflict, common article 3 will not apply at all since Bybee has rejected the opinion that it is a “catch-all” provision and only refers to civil wars, “therefore any violation of its terms would not constitute a violation of the WCA.”⁴³

The summary in the paragraph above shows an impressive ability to find loopholes in legislation and then using them for all they are worth. Not only is Bybee able to determine that some provisions of Geneva III and the WCA are not applicable regardless of what policy choice the President makes, he is also able to “prove” that Taliban forces are not protected by the Geneva Conventions regardless of the Presidents suspension of the same Conventions with respect to Afghanistan. What he refers to as a “difficult legal question” in the beginning of Part III of the memo ends up with the opinion that no legislation, international or domestic, can protect the Taliban prisoners, as long as the President defines the prisoners as not being protected by Geneva III.

The memo builds up an impressive legal argument in favor of its findings, but the reader is left with the feeling that the importance of getting away with doing as little as possible, and interpreting any form of legislation so it fits the administration's agenda overrides any other concerns. The findings also rest on implied powers and interpretations to such an extent as that without them any legal defense or justification found in the memo disappears.

2.2 The Gonzales Memo

The Gonzales Memo is a short outline of what the DOJ found in the Bybee Memo, why Colin Powell requested the reconsideration and then a list of points weighing the pros and cons of following the legal opinion expressed in the Bybee Memo, before a new list of points gives Gonzales' conclusion of this reconsideration. In the first paragraph Gonzales writes: "I understand that you [President Bush] decided that GPW does not apply and, accordingly, that al Qaeda and Taliban detainees are not prisoners of war under the GPW."⁴⁴ The fact that Gonzales understands that Bush had already made a decision in line with the Bybee Memo is important to keep in mind as it may have influenced Gonzales' conclusion if the policy process was influenced by groupthink.

In the second paragraph Gonzales writes that Colin Powell has requested that the president reconsider Bybee's findings and conclude that GPW – or Geneva III – does apply to the Taliban and al Qaeda. This would be a complete reversal of the decision Bush had already made, and is indicative of how strongly Powell disagreed with the findings of the Bybee Memo. According to Gonzales, Powell consented that "al Qaeda and Taliban fighters could be determined not to be prisoners of war (POWs) but only on a case-by-case basis following individual hearings before a military board."⁴⁵ This means that Powell insists on following Geneva III, as the status review Powell refers to is the same as what is outlined in article 5 of Geneva III, and the same article that Bybee concluded could be circumvented by a categorical determination by the President that no al Qaeda and Taliban fighters were POWs. These few sentences of the memo tells a significant story because they give an understanding of both the process, decisions made, and protests occurring within the executive branch regarding the initial decision of how the detainees should be treated, and what legal protections they were entitled to. The fact that Gonzales outlines what the DOJ opined in the Bybee Memo, and also how and why Colin Powell protested Bush's subsequent policy decision may indicate that Bush ran the administration like a business as David Mitchell proposes.⁴⁶ By repeating the

findings of the Bybee Memo, and describing the debate caused by Powell's protest, Gonzales functions as a filter of information, what Mitchell calls a "gatekeeper," and it also indicates that the conflict and debate within the administration took place below the level of the President, which is in line with Mitchell's description of a formal system with a high level of centralization.⁴⁷ However in Mitchell's system the President is not necessarily made aware of the conflict, as differing views are excluded,⁴⁸ and Mitchell also presumes that the role of gatekeeper is filled by then National Security Advisor, Condoleezza Rice.⁴⁹ Whether or not Gonzales can be labeled as gatekeeper in this situation is not readily apparent, but it is probable that it would be incorrect as Gonzales was the General Counsel to the President, and only one of many advisors when the memo was written. Even though Gonzales as gatekeeper and the conflict being brought to the attention of the President by Gonzales may not conform to Mitchell placing Bush in a formal, highly centralized system, does not necessarily mean that Mitchell is wrong. What the Gonzales Memo does serve as an example of is that it seems that Bush were running the White House like a business, where the leader (President) chooses the option he sees as best after being presented with a few available options.⁵⁰

Continuing the memo Gonzales moves on the legal background and begins by noting that Bush as president has "the constitutional authority to make the determination (...) that the GPW does not apply to al Qaeda and the Taliban."⁵¹ This is a repetition of the implied powers described in the Bybee Memo, but as opposed to the Bybee Memo Gonzales does not make reference from which part of the Constitution this authority derives. Gonzales then repeats the prime findings of the Bybee Memo, that Bush could choose to apply Geneva III as a matter of policy, that Geneva III does not apply to al Qaeda, and that the president can determine categorically that Geneva III does not apply to the Taliban because Afghanistan was a failed state, or because the Taliban was a terrorist organization.⁵² The closing paragraph of this section of the memo states that the interpretation made by the OLC (Bybee) in this case is definitive, and that the "Attorney General is charged by statute with interpreting the law for the Executive Branch."⁵³ The Attorney General can, and has, delegated this authority, which extends to both domestic and international legislation, to the OLC. "Nevertheless, you should be aware that the Legal Adviser to the Secretary of State [William H. Taft IV] has expressed a different view [than the opinion provided in the Bybee Memo]."⁵⁴ By adding the final sentence as an afterthought, Gonzales arguably can be said to relegate the State Department to a whiner who does not work with the team. It seems like Gonzales only mentions it to alert the President to the fact that not everyone is pulling in the same direction, which may be an indication of one of the symptoms of groupthink listed by Janis. By relegating the differing

view to an afterthought of the majority opinion within the administration, Gonzales effectively tries to silence the opposing view even if he mentions it. This is what Janis calls a Type III symptom of groupthink indicating a pressure to conform to the majority opinion, though this pressure is not directed to the dissenters in the State Department it indicates to the President that the differing view is of little importance.

Gonzales continues by listing the positive ramifications of adhering to “what I understood to be your earlier determination that the GPW does not apply to the Taliban.”⁵⁵ The first point he makes is that by deciding that Geneva III does not apply to al Qaeda and the Taliban is that such a decision would preserve flexibility in the conflict. Because the War on Terror is a new kind of war it is important to quickly obtain information from terrorists to prevent further attacks on the U.S. Gonzales argues that quick information gathering is in fact so important that “[it] renders obsolete Geneva’s strict limitations on questioning (...) and renders quaint some of its provisions.”⁵⁶ Further Gonzales observes that even though some of the “quaint provisions,” like providing athletic uniforms and scientific instruments to prisoners, does not extend to prisoners who are not POWs, a determination of non-application will remove any arguments for case-by-case status reviews and keep options open for future conflicts in which it may be more difficult to determine the enemy’s POW status.⁵⁷ By only naming the “quaint provisions” and not the potential humanitarian ramifications of non-application of Geneva III, Gonzales effectively relegates the entire Geneva Conventions from an important piece of human rights legislation to an old and silly piece of unnecessary protections. It is also an indication that the administration believes that the maltreatment of a few “bad guys” is acceptable in order to prevent potential harm coming to the U.S. If that is the case it is an example of “The Bush Doctrine” in action. By preemptively detaining a prisoner without providing him with the necessary protections afforded POWs in order to stop the prisoner of potentially harming the United States, the administration acts in line with the Bush Doctrine.

The second positive ramification of non-application as Gonzales sees it is that it “Substantially reduces the threat of domestic criminal prosecution under the [WCA].”⁵⁸ It is understandable that the administration is interested in avoiding any form of criminal prosecution for their actions regardless of their intention, so this is definitely a positive ramification for the administration. Gonzales continues by saying that because the WCA includes undefined language, for instance that it prohibits “outrages upon personal dignity and inhumane treatment,”⁵⁹ and because it is difficult to predict what would violate this prohibition, Gonzales deems it easier to decide upon non-application. Additionally because it

is difficult to foresee future needs in the war on terror, and to predict the motivations of prosecutors to bring “unwarranted charges” against the administration, the safest thing is simply to avoid the whole situation by choosing non-application.⁶⁰ The entire point of avoiding prosecution under the WCA indicates that the administration knows it is moving in legal grey areas and believes that someone is out to “get” the administration. Kelley argues that this behavior is another aspect of the unitary executive, as the unitary executive assumes that it operates in a hostile environment and needs to protect itself.⁶¹ It seems astounding that Gonzales believes that “inhumane treatment” is an unclear wording, even though the language of the WCA does not clearly define what constitutes inhumane treatment, it is safe to assume that the administration has an idea of what it means, especially when considering Bush’s military order calling for humane treatment of prisoners. The administration’s actions in the years after these memos were sent do indicate that “humane-” and “inhumane treatment” were malleable terms however.

After pointing out that the positive ramifications of non-application were flexibility and avoiding prosecution, Gonzales moves on to the negative ramifications. It is unclear whether these arguments were made by Colin Powell in his request for reconsideration, but Gonzales lists several arguments for reversing the decision not to apply Geneva III to the prisoners. Without going into significant detail he lists a total of seven points: (1) non-application has never been done before, (2) it would be impossible for the U.S. to invoke Geneva III if enemy forces mistreated U.S. or coalition forces captured, (3) the WCA could not be used to prosecute the enemy, (4) non-application would likely provoke “widespread condemnation [from] allies and in some domestic quarters,”⁶² (5) it may encourage others to find loopholes in their Geneva III obligations, (6) other countries would be less inclined to hand over terrorist suspects to the U.S., and finally (7) it could undermine U.S. military culture “which emphasizes (...) the highest standards of conduct in combat.”⁶³ This list is impressive and seems more persuasive than the positive ramifications, and helps to underline that the determination made by the OLC in the Bybee Memo may not be all that desirable since it would be like heading into uncharted waters while removing all protections from American personnel, encouraging others to condemn the United States, do the same as the United States, or damage soldier morale. Gonzales immediately tackles these negatives with counterarguments and finds that the negative ramifications are unpersuasive reasons to reconsider and reverse the president’s decision. Saying that the argument regarding how non-application has never been done before is technically incorrect, as it was determined that Geneva III did not apply in George H. W. Bush’s invasion of Panama in 1989, it was only

determined that as a matter of policy that Geneva III would be followed with respect to “regular foreign armed forces.”⁶⁴ Gonzales understands this to mean that they would not apply Geneva III to non-regular forces, like al Qaeda and the Taliban were in the Afghanistan conflict.

Moving on to the arguments of being unable to prosecute the enemy for maltreatment, and encouraging others to find loopholes, Gonzales observes that as long as Bush intends to treat the prisoners humanely this gives the U.S. the power to insist on similar treatment for their soldiers. At the same time if Geneva III is not applicable the U.S can still prosecute their adversaries for war crimes using other statutes and laws than the WCA and Geneva III.⁶⁵ It is unclear why the same statutes and laws can not be used to prosecute Americans, but Gonzales does not address that. He concludes his point by noting that “our adversaries in several recent conflicts have not been deterred by GPW in their mistreatment of captured U.S. personnel, and terrorist will not follow GPW rules in any event.”⁶⁶ Though that statement in all likelihood is correct, it does not invoke the image of a moral, military and political leader of the world. Even if the administration assumes that the opposition is too evil, or indifferent to follow the Geneva Conventions it does not justify ignoring the same conventions, it only helps to underline that what the administration is doing may not be the best policy. The assumption that the opposition will not follow Geneva III is another symptom of groupthink. Janis calls this a stereotyped view of the enemy as being too evil to warrant negotiation. Though it is unlikely that al Qaeda or the Taliban would agree to negotiate with the United States, or that the United States would negotiate with terrorists, the administration seems to have decided upon a stereotype in line with what Janis describes.⁶⁷ It may also be an indication of another symptom Janis describes as an “unquestioned belief in the groups inherent morality,” which may cause the group to ignore ethical or moral consequences of its decision.⁶⁸

As for the condemnation from allies and domestic sources, Gonzales concludes that there is already some criticism out there because of Bush’s decision to withhold POW status from the detainees, and as long as the U.S: “reassur[es] them that we fully support GPW *where it is applicable*,”⁶⁹ (emphasis added) the negative effects of condemnation from allies will be lessened, or not come at all. Several factors will still continue to constrain U.S. treatment of the detainees because it is committed to “treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW,” and “minimum standards of treatment universally recognized by the nations of the world.”⁷⁰ One could argue that as long as one intends to treat the prisoners in

line with the principles of Geneva III while upholding “minimum standards of treatment universally recognized,” it may be easier to simply apply Geneva III after all. It is also interesting that the United States promises to treat the detainees humanely, while it at the same time is uncertain of the meaning of “inhumane.”

Moving to the final point of undermining military culture, Gonzales concludes that this will not happen as the military will “apply the principles of GPW because that is what you have directed them to do,”⁷¹ presumably in the military order of November 13, 2001. Again this makes the reader wonder if application of Geneva III would be just as easy as the intended policy of non-application with humane treatment.

The Gonzales Memo only serves as an affirmation of the Bybee Memo, though it provides a presentation of the dissenting opinion of Colin Powell even if the dissenting opinion is not written by Powell’s hand. It also implies that, at least initially, it was the policy of the administration to treat the prisoners humanely, which may not necessarily be a redeeming factor when we know what eventually happened to some of the detainees. By concluding with the same opinion as was outlined by Bybee in the first memo, and the decision President Bush had already made, Gonzales provides another symptom of groupthink. Janis writes about shared illusions of unanimity within the group causing self-censorship.⁷² When writing the memo Gonzales already knew that the President had made a decision based on the opinion of the Bybee Memo, and may have been influenced to such a degree by the President’s policy decision that he simply gave the President what he believed that the President wanted to hear. If that is the case, then David Mitchell’s argument that Bush moved from a low to a high form of centralization becomes more convincing as well. When describing the different forms of solutions the systems within ASF produce, Mitchell writes that formal systems with either high or low centralization will produce solutions that are geared towards the president’s world views and preferences, but in a system with high centralization conflict is discouraged and not brought to the attention of the President.⁷³ By including Powell’s request and arguments for reconsideration, Gonzales does not exclude the conflicting view, but he does gear his final conclusion towards what the president has already decided, which would be largely in line with a formal system with low centralization, or what Mitchell calls a “dominant-subset” solution.⁷⁴

2.3 Conclusion

The two memos analyzed in this chapter does several things, the most significant of which is to remove any protections provided by the Geneva Conventions from al Qaeda and Taliban prisoners taken in Afghanistan, effectively leaving the prisoners without any protections at all apart from the U.S. Constitution. Though the protection provided by the Constitution is significant, the memos also showed that the unitary executive principle of coordinate construction was largely accepted within the administration, meaning that the President would be able to interpret or define the Constitution in a way as to not provide protection to the detainees. Gonzales also wrote in his memo that “inhumane treatment” was unclear language and hard to define, meaning that the administration believed that the definition of “humane” and “inhumane” were up for discussion as well, and as long as the administration believed it had the power to interpret the Constitution, the protections provided by it became even more uncertain.

There seems little doubt that the unitary executive principles presented by Kelley were in use in the first term of George W. Bush’s presidency. The extensive use of coordinate construction indicates as much, as do the apparent belief within the administration that the President had to protect himself and the executive branch from a hostile environment in which the other branches of government could potentially bring charges against the administration.

One can find several symptoms of groupthink in the policy debate that occurred regarding the application of the Geneva Conventions to al Qaeda and Taliban prisoners. Even though the two memos do not discuss alternatives to the final policy outcome to any large degree, the Gonzales Memo describes how the Colin Powell and State Department lawyers protested the initial decision made by Bush, but effectively relegates the opposing arguments to nuisances not worth considering. The symptoms of groupthink which are found – belief in the group’s inherent morality, stereotyped views of the enemy, and an illusion of unanimity – do not provide enough evidence to make it possible to conclude that groupthink occurred however. Janis’ includes four antecedent conditions and writes that groupthink is unlikely to occur without these.⁷⁵ Two of these antecedent conditions are unlikely to have been present in the policy choice of non-application of Geneva III, these are the insulation of the policy-making group making it impossible to confer with experts,⁷⁶ and that the policy making group was under psychological stress or pressure.⁷⁷ With respect to the first antecedent condition it is hard to argue that Bybee and Gonzales were unable to confer with experts, as they essentially can be said to *be* experts in so far as the fact that they are both lawyers and the

memos discuss different legal hurdles presented by non-application of Geneva III. Regarding psychological stress or pressure it is hard to say whether the President, Gonzales, or Bybee were exposed to that, but the military situation in Afghanistan at the time the memos were written was still under control and there are no indications that the situation was particularly stressful. Janis also writes that one must answer four key questions in order to conclude that groupthink occurred, one of the questions is whether or not the antecedent conditions are present.⁷⁸ As long as the antecedent conditions were not, it would be difficult to conclude that groupthink occurred, but it may be safe to say that some degree of groupthink was present in influencing the policy outcome.

With respect to Mitchell's ASF, there are indications that George W. Bush moved from a formal system with low centralization towards one with high centralization, just as Mitchell argues. The discussion that took place was presented to the President in the Gonzales Memo, but the opinions in both memos were geared towards what the President wanted, and Bush did not partake in the debate to any large degree. There is also evidence that Bush ran the White House as a business, which is in line with a formal system in Mitchell's framework.

The title of this thesis indicates that there is a lot of power in the ability to define. The two memos analyzed in this chapter show just that in several ways. The Bybee Memo argued that the Taliban could not be defined as a government, and that Afghanistan could be defined as a failed state. The consequence of those definitions was that the administration decided not to provide POW-status and –protections to the Taliban prisoners. The memos also indicate that the administration had redefined, or that they were under way of redefining, presidential power to include the unitary executive principle of coordinate construction. The increase in presidential powers this redefinition caused are staggering as there did not seem to be any need for Congress or the judiciary in conducting foreign relations anymore. This expansion of presidential powers and additional redefinitions of prisoners and prisoner status would only increase as the next chapters of this thesis shows.

Notes to Chapter 2

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- ¹ Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, (November 13, 2001), <http://www.presidency.ucsb.edu/ws/index.php?pid=63124>. (Accessed April 16, 2009).
- ² Ibid.
- ³ A full overview of the internal communication between the White House, the DOD, and the DOJ regarding the treatment of prisoners can be found here: <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html> (Accessed March 3, 2009).
- ⁴ Memorandum for Chairman of the Joint Chiefs of Staff, from Donald Rumsfeld, Secretary of State, “Subject: Status of Taliban and Al Qaida,” January, 19, 2002, <http://news.findlaw.com/hdocs/docs/dod/11902mem.pdf>. (Accessed April 18, 2009).
- ⁵ Memorandum for the President from Alberto R. Gonzales, Counsel to the President, “Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban,” January 25, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>, 1. (Accessed April 16, 2009).
- ⁶ Irving L. Janis, *Groupthink* (Boston: Houghton Mifflin Company, 1982).
- ⁷ David Mitchell, *Making Foreign Policy: Presidential Management of the Decision-Making Process* (Aldershot: Ashgate, 2005), 198.
- ⁸ Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, from Jay S. Bybee, Deputy Attorney General, DOJ, OLC, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees,” January 22, 2002, <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>, (Accessed March 3, 2009).
- ⁹ Christopher S. Kelley, “Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency.” Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association, Chicago IL, USA, April 7-10, 2005. http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/5/9/4/pages85947/p85947-1.php. (Accessed April 16, 2009).
- ¹⁰ Ibid, 4.
- ¹¹ Memorandum for the President, from Gonzales, “Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban,” 1.
- ¹² Ibid, 1.
- ¹³ Memorandum for Gonzales and Haynes, from Bybee, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees,” 1.
- ¹⁴ Ibid, 1.
- ¹⁵ Ibid, 2.
- ¹⁶ Ibid, 5.
- ¹⁷ Ibid, 5.
- ¹⁸ Geneva Conventions of 12 August 1949, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Part I, Article 2. <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=375&t=art> (Accessed March 4, 2009).
- ¹⁹ Convention relative to the Treatment of Prisoners of War, Part I, Article 3.
- ²⁰ Memorandum for Gonzales and Haynes, from Bybee, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees,” 8.
- ²¹ Ibid, 8-9.
- ²² Ibid, 9.
- ²³ Convention relative to the Treatment of Prisoners of War, Part I, Article 4 (A)(2).
- ²⁴ Memorandum for Gonzales and Haynes, from Bybee, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees,” 10.
- ²⁵ Ibid, 10.
- ²⁶ Ibid, 10.
- ²⁷ Ibid, 11.
- ²⁸ Ibid, 11.
- ²⁹ Ibid, 11. Quoting Thomas Jefferson.
- ³⁰ Ibid, 23.
- ³¹ Ibid, 24, Quoting The Geneva Conventions Common Article 1.
- ³² Ibid, 24.
- ³³ Ibid, 25.
- ³⁴ Ibid, 25-28

³⁵ Ibid, 28.

³⁶ Ibid, 28. The quote is: "[N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."

³⁷ Ibid, 29.

³⁸ Ibid, 29.

³⁹ Ibid, 30-31.

⁴⁰ See note 111 on Ibid, 31.

⁴¹ Ibid, 31.

⁴² Ibid, 31.

⁴³ Ibid, 32.

⁴⁴ Memorandum for the President, from Gonzales, "Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 1.

⁴⁵ Ibid, 1.

⁴⁶ Mitchell, *Making Foreign Policy*, 45.

⁴⁷ Ibid, 26.

⁴⁸ Ibid, 26.

⁴⁹ Ibid, 45.

⁵⁰ Ibid, 45.

⁵¹ Memorandum for the President, from Gonzales, "Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 1.

⁵² Ibid, 1.

⁵³ Ibid, 1.

⁵⁴ Ibid, 1.

⁵⁵ Ibid, 2.

⁵⁶ Ibid, 2.

⁵⁷ Ibid, 2.

⁵⁸ Ibid, 2.

⁵⁹ Ibid, 2.

⁶⁰ Ibid, 2.

⁶¹ Kelley, "Rethinking Presidential Power," 11.

⁶² Memorandum for the President, from Gonzales, "Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 3.

⁶³ Ibid, 3.

⁶⁴ Ibid, 3 quoting George H. W. Bush.

⁶⁵ Ibid, 3.

⁶⁶ Ibid, 3.

⁶⁷ Janis, *Groupthink*, 174.

⁶⁸ Janis, *Groupthink*, 174.

⁶⁹ Memorandum for the President, from Gonzales, "Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 3.

⁷⁰ Ibid, 4.

⁷¹ Ibid, 4.

⁷² Janis, *Groupthink*, 175.

⁷³ Mitchell, *Making Foreign Policy*, 27.

⁷⁴ Ibid, 27.

⁷⁵ Janis, *Groupthink*, 176-177.

⁷⁶ Ibid, 176.

⁷⁷ Ibid, 177.

⁷⁸ Ibid, 194.

3.0 Banning Torture by Redefinition

This chapter analyzes part of the signing statement George W. Bush included when signing the 109th Congress' House Resolution 2863 (HR 2863) into law on December 30, 2005. The bill's full name is "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Public Law 109-148). Because HR 2863 is an emergency appropriations bill, it included several unrelated pieces of legislation, among them the Detainee Treatment Act 2005 (DTA), also known as the McCain Torture Ban, as Title X of the bill.

The inclusion of the DTA was spurred on when evidence that prisoners in U.S. custody were maltreated and even tortured emerged. The most significant evidence of maltreatment emerged in late April 2004 when pictures from the Abu Ghraib prison outside of Baghdad were publicized.¹ The pictures were graphic in their conveyance of the maltreatment that occurred, showing smiling American personnel beside dead prisoners, prisoners fitted with dog collars, naked prisoners stacked into human pyramids, or terrified prisoners being threatened with dogs. The Army's investigation into the maltreatment began in January 2004 and was conducted by Major General Antonio M. Taguba, who filed his report on the incidents to the Department of Defense in March. In the report he concluded that: "Numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees,"² and he even said that he had seen a video of "[an] American soldier in uniform sodomizing a female detainee."³ The horrors of what happened is not discussed in great detail in this chapter, but the facts of the scandal provide a very important context for why the DTA was included in HR 2863, and Bush's subsequent signing statement.

Before the signing statement is analyzed it is appropriate to provide some additional context to it. The first, and most important context apart from the Abu Ghraib scandal, is the administration's creation of a new term for defining prisoners of war, the "enemy combatant." Then the chapter provides a brief outline of what a presidential signing statement is, and how it has traditionally been used, before revisiting the Abu Ghraib scandal and the process of passing the DTA.

The signing statement provides several examples that the unitary executive continued to be the governing ideology within the administration in Bush's second term, and this chapter provides an extension to Christopher S. Kelley's findings from Bush's first term. In fact the signing statement itself serves as proof that belief in the unitary executive remained strong in the administration since Kelley points out that one of the most central tenets in the unitary

executive theory is that president's use signing statements to uphold the office's prerogatives.⁴ In this case George W. Bush used a signing statement in order to avoid enforcing a piece of legislation he was not happy with.

It also proves helpful to look at what happened after HR 2863 was signed into law in terms of how the judiciary responded to Bush's signing statement. In the majority opinion in *Hamdan v Rumsfeld* the Supreme Court directly addresses Bush's signing statement – referring to it as “[t]he government's argument”⁵ – the ruling forced Bush to get a firmer legal backing for his decisions in the signing statement; this came through the Military Commissions Act 2006 (MCA).

There is no evidence of groupthink in the signing statement itself, but if the findings of the last chapter and the process leading up to the torture ban and signing statement are included, one can argue that the symptoms found in Chapter 2 are present in the larger executive process. These symptoms are themselves not enough to conclude that groupthink occurred, but it is safe to argue that the symptoms present serve as proof that the administration had no intention of reconsidering its policies toward the prisoners. The symptoms also show that though it may be wrong to conclude that groupthink occurred, there was a degree of groupthink present in the process of deciding how to treat the prisoners.

3.1 Enemy Combatants

The creation of the term “enemy combatants,” proves to be one of the most central arguments for showing the consequences of the power of definition held by the Bush administration. The General Counsel to the Department of Defense (DOD), William J. Haynes II, sent a memorandum to the Council on Foreign Relations on December 12, 2002.⁶ In the memo Haynes explains what an enemy combatant is, who can be arrested as an enemy combatant, who has the authority to detain enemy combatants, and the rights the enemy combatants will be afforded.

Haynes begins by stating that the United States is at war and during wartime the President has the legal authority to detain enemy combatants until the conflict ends.⁷ He then defines exactly what constitutes an enemy combatant, “an individual who (...) may be detained for the duration of an armed conflict,”⁸ and that in the ongoing conflict an enemy combatant is “a member, agent, or associate of al Qaida or the Taliban.”⁹ Critics, among them Howard Ball a law professor at Vermont Law School, have argued that the term is legally meaningless, as the traditional definitions of prisoners taken during wartime is either lawful-

or unlawful combatant, or innocent civilian.¹⁰ Ball argues that before George W. Bush declared the War on Terror the term “enemy combatant” had been used once before in judicial history, in the Supreme Court case *Ex. Parte Quirin* (1942), to describe the behavior of an unlawful prisoner.¹¹

Haynes says that the term “enemy combatant” has two sub-categories, “unlawful enemy combatant,” and “lawful enemy combatant,” two terms which are almost identical to the traditional terms excepting the word “enemy.” The “lawful enemy combatants” will receive POW-status, while the “unlawful enemy combatants” will not.¹² Haynes continues by pointing out what Chapter 2 of this thesis showed, that all al Qaeda and Taliban prisoners would be barred from POW status, because the President could determine that they did not satisfy the criteria for receiving said status.¹³ As for who has the authority to detain and decide the status of the enemy combatants, that authority rests with the President, who may choose to delegate the authority to military commanders.¹⁴

Howard Ball argues that after the term “enemy combatant” was created the separation between “lawful-“ and “unlawful combatant” disappeared, in contradiction to what Haynes outlines, and that all the prisoners held by the U.S. military were “enemy combatants,” in Ball’s own words: “There were no innocents and no prisoners of war in the war on terror.”¹⁵ There are indications that the distinction between “lawful-,” and “unlawful enemy combatants” disappeared fairly quickly. In fact eight paragraphs below where Haynes mentioned the distinction, the distinction is gone as Haynes writes that:

[E]nemy combatants have no right to counsel to challenge their detention. Providing enemy combatants a right of access to counsel could thwart our ability to collect critical information and could imperil efforts to prevent further terrorist attacks.¹⁶

The DOD had also determined that enemy combatants who were not citizens of the United States would be barred from challenging their detention with a writ of habeas corpus.¹⁷ This right would not be withheld from U.S. citizen enemy combatants, but as long as the U.S. citizens were labeled as enemy combatants, they would presumably lose their right to an attorney. Haynes refers to a court case testing the removal of access to an attorney, in which the administration lost as the U.S. District Court for the Southern District of New York found, in *Padilla v. Bush*, that the President had the right to detain U.S. citizen Jose Padilla as an enemy combatant, but the court rejected that Padilla would not get access to an attorney. Haynes also notes that the administration was reviewing the court’s decision.¹⁸

Howard Ball describes the case of Jose Padilla in some detail, Padilla was arrested in 2002 on the suspicion of being a member of al-Qaeda, but the administration was unable to prove his connection to the terrorist organization. Padilla was eventually charged with a federal crime, and moved to a federal facility awaiting his trial in 2005, but Padilla's attorney was advised that Padilla could be detained again as an enemy combatant if he was acquitted in the federal court system.¹⁹ Padilla's case serves as chilling evidence of how the Bush administration viewed the enemy combatants as the administration clearly reserved the right to remove any right a person had, citizen or non-citizen alike, even if the person had been proven to be innocent of the crimes the administration accused him of having committed.

In summary what the Bush administration did was to use its defining powers to create a regime in which anyone, citizen and non-citizen alike, could be defined as an enemy combatant based on suspicion that they were connected to terrorism. If a person was detained as an enemy combatant he would immediately lose the protections provided by the United States Constitution and the Geneva Conventions, he could be held for the duration of the War on Terror without access to an attorney, and an enemy combatant's trial would be by military commission, and not in the federal court system or a regular court martial.

3.2 Signing Statements

A signing statement is often attached to the signature of the president when he signs a bill into law. Kelley argues that the signing statement has received very little attention by scholars, and that presidents have taken them much more seriously.²⁰ Philip J. Cooper says that the signing statement are announcements, often prepared by the Department of Justice, which have several uses, among them identifying provisions or statutes of the bill the president has concerns about, presidential interpretation of a law, and directing the executive branch in how to implement the law.²¹ Cooper also calls the signing statement a "different kind of line-item veto,"²² and argues that presidents often have gone beyond a line-item veto to become "substantive vetoes, (...) usually based on broad-based claims to constitutional authority,"²³ not unlike principle of coordinate construction enunciated by the unitary executive theory as Chapter 2 shows. The signing statement has been in use since the Monroe administration in the early 1800s, but served a largely ceremonial function until it was put to systematic use in order to preserve the prerogatives of the presidency under Ronald Reagan.²⁴ Kelley also argues that the increased use of signing statements is one of the most important characteristics of the unitary executive theory, as their use has skyrocketed since the Reagan

administration.²⁵ The signing statement analyzed in this chapter is a good example of how the unitary executive administration of George W. Bush used a signing statement as a veto.

3.3 The Abu Ghraib Scandal and Torture

If the two memos in the previous chapter are understood correctly, the decision regarding treatment, trial and applicability of Geneva III for the prisoners taken in the War on Terror was that the prisoners would not receive Geneva III protections, they would be tried by military commissions outside of regular courts martial, and they would be treated as humanely as possible in line with “standards universally recognized by the world,” as Gonzales’ memo said. Though the non-application of Geneva III and trial by military commissions may be controversial, the intention was to, at least, treat the prisoners humanely. However, what became apparent when the Abu Ghraib-scandal broke in late April 2004 was that the prisoners were not treated properly at all. Initially, military leaders were disgusted, but said that the maltreatment was done only “by a small number of soldiers who abused a small number of prisoners.”²⁶ Within the following three weeks new photos of the prisoner abuse at Abu Ghraib surfaced,²⁷ and information that abuse also took place in Afghanistan caused the administration and the military, to launch an investigation of the alleged abuse. The administration also promised to provide new guidelines to ensure that prisoners were treated with “dignity and respect.”²⁸ In spite of the new guidelines and good intentions of the administration and the military, the scandal continued to grow as more gruesome pictures emerged from Abu Ghraib,²⁹ and the situation was exacerbated by the surfacing of internal government memos regarding prisoner treatment, most prominently the Bybee Torture Memo.

The Bybee Torture Memo contained a very narrow definition of what actually constituted torture, and even went as far as to suggest that torture could be justified as long as military necessity dictated it, and that prohibiting torture could be unconstitutional.³⁰ Soon after the memos surfaced, critics voiced their concern and outrage over what the administration had done. The Bybee Torture Memo had been the operative directive used to define torture from August 2002, and remained so until it was reversed by the OLC’s new head, Daniel Levin in June 2004, after the scandal broke.³¹ One critic, Noah Leavitt a lawyer and former employee of the Department of Justice, argued that the definition of torture the administration used with regard to prisoners was not only extremely narrow, it contradicted torture definitions used when considering asylum seekers wanting to enter the United States based on the fear of being tortured, and that having separate definitions of torture was both

“unacceptable and wrong.”³² Leavitt also dismissed the administration’s suggestion that as long as torture was used with the purpose of extricating information and not to cause pain it could not be defined as torture, as “near-ridiculous,” and wondered if the administration would accept its own definition of torture if it was employed on American personnel.³³ The head of the Human Rights Watch, Kenneth Roth, also directed scathing criticism towards the administration and the CIA, claiming that the director of the CIA, Porter Goss, had made “misleading statements about the CIA’s use of torture,” and that “[m]any of the interrogation techniques (...) amount to torture.”³⁴ One of the interrogation techniques Roth claimed amounted to torture was waterboarding, or simulated drowning. Roth made the argument that there was “no doubt that waterboarding is torture, despite the administration’s reluctance to say so.”³⁵ The administration’s reluctance to admit, or rather its outright denial, that waterboarding is torture remained throughout the Bush Presidency, Vice-President Cheney for example maintained that viewpoint in December 2008, as Chapter 1 of this thesis shows.

In part the rejection of waterboarding being torture by both the CIA and the Vice-President over several years helps in illustrating one of the central arguments of this thesis, as well as its title, the Bush administration and other executive agencies, like the CIA, used their power to define, or redefine, the meaning of torture to suit their actions and goals. First the administration decided that prisoners taken in Afghanistan would not be protected by the Geneva Conventions, and continued by creating a new “label” for the prisoners, the “enemy combatant,” a label which had a dubious legal precedent at best and is not mentioned anywhere in the Geneva Conventions; coupled with the administration’s redefinition of what constituted torture left the detained prisoners scant protections. The interrogation techniques were initially only intended to be used on the enemy combatants held at Guantanamo Bay, but in *Bush, the Detainees, and the Constitution*, Howard Ball writes that by the summer of 2003 the administration had become frustrated by the lack of “actionable” evidence coming from interrogations in Iraq, so Secretary of Defense Donald Rumsfeld ordered military officials in Iraq to “‘Gitmo-ize’ the interrogation techniques,”³⁶ meaning that the administration would use the same methods for interrogating prisoners in Iraq as they did at GTMO. With this knowledge the pictures from Abu Ghraib become even more horrifying as there is reason to believe that the maltreatment in Abu Ghraib was a result of the “Gitmo-ization” of the interrogation techniques in Iraq, meaning that what happened in Abu Ghraib prison probably took place in the prison facilities at Guantanamo Bay at an earlier stage of the War on Terror.

The scandals of 2004 eventually led to the introduction of a “torture ban” in Congress, and on December 14, 2005 the torture ban, sponsored by among others Senator John McCain

(R-AZ), was voted into the defense appropriations bill by the House of Representatives. McCain was vocal in his criticism, and having endured torture as a prisoner of war of the Viet Cong during the Vietnam War he knew the horrors it entailed. McCain, a prominent member of the Senate, had also lost the bid to become the Republican nominee for President to George W. Bush in 2000, after Bush allegedly employed underhand tactics in the primary election in South Carolina. Bush agreed to the inclusion of the torture ban the next day after meeting with John McCain and the Senate Armed Services Committee Chairman John Warner (R-VA).³⁷ In spite of threats from the Armed Services Chairman in the House, Duncan Hunter, that he would block its inclusion,³⁸ the torture ban was included as Title X of HR 2863, it is also known as the Detainee Treatment Act of 2005 (DTA).³⁹ The DTA includes several different sections, perhaps the most important ones being Sections 1002 and 1003 which lay out uniform standards for interrogation techniques and a prohibition on “cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States government.”⁴⁰ The DTA also defines cruel, inhuman, or degrading treatment or punishment as what is “prohibited by the Fifth, Eighth, and Fourteenth Amendment to the Constitution.”⁴¹ There does not seem to have been any Congressional objections to the administration’s creation of the term “enemy combatant,” however as the DTA includes the term in several provisions.⁴² When George W. Bush signed the bill into law on December 30, 2005 he included an extensive statement to his signature, and paragraph 8 of the signing statement is Bush’s response to the DTA.

3.4 Signing Statement to the DTA

The first sentence of the paragraph in the signing statement relating to the DTA reads as follows:

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.⁴³ (Emphasis added).

This is the third time Bush refers to the unitary executive in the signing statement,⁴⁴ and it serves as proof that the unitary executive theory was very much alive in the second

administration of George W. Bush, just as Kelley argues for its presence in Bush's first term. Though the sentence itself does not seem to mean anything other than a general determination, or warning to the other branches to keep away from the unitary executive branch's prerogatives, the ramifications for the DTA are extensive. Section 1005 of the DTA lists several procedures for status review of the persons detained outside of the United States, among them is a requirement that the Secretary of Defense shall submit a report to the Committees on Armed Services and the Judiciary in both houses of Congress on the procedures of determining the status of detainees already held at Guantanamo Bay, and the prisoners taken in Afghanistan and Iraq. The DTA also requires the Secretary of Defense to submit an annual, unclassified, report outlining the number of detainees whose status were reviewed and the procedures used in such a review, and calls for the creation of a civilian office within the Department of Defense which shall be held by a civilian officer appointed by the President with the advice and consent of the Senate.⁴⁵ What President Bush's first sentence does is to nullify any requirement made on the executive branch by Congress in Section 1005. The requirements listed in Section 1005 would be infringements on presidential power since the President is the only person that has, and can have, control over the executive branch according to the adherents to the unitary executive. This means that if one reads Title X "in a manner consistent with the unitary executive," it is probable that all requirements made on executive branch officials, and the creation of new offices under the executive branch by Congress, are direct violations of Bush's understanding of the unitary executive branch, and the entire section of the DTA is made void. The final part of the quotation can be read as a somewhat veiled proclamation that the President is the Commander in Chief and that in order to protect America from further terrorist attacks he is justified in doing what he deems necessary without judicial or Congressional interference. By using a signing statement in this manner President Bush invokes the prerogatives of the unitary executive in a very direct manner, and it serves as a good example of what Kelley refers to as "venture constitutionalism," meaning that the President sees the environment as hostile and in order to protect the prerogatives of the presidency he aggressively pushes constitutional boundaries.⁴⁶

Having disposed of Congressional interference, Bush notes that since "the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action."⁴⁷ In other words, according to Bush's reading of the DTA, individuals who were intended to be protected by the DTA do not have the right to invoke the act, as the text of the act does not supply the individuals with the right to bring their case before a court. This is very similar to the

reasoning found in the Bybee Memo, where Bybee called for textual proof from Geneva III in order to accept that common article 3 of the Geneva Conventions was a “catch-all” for any conflict not covered by common article 2. Bush’s reading also makes the act unenforceable for private individuals an act which effectively renders the bill void and continues to withhold the rights from the detainees. Following Bush’s logic it seems that his intention is that the only function the DTA will serve is that only if someone is caught red-handed by the military, or law-enforcement in breaking the provisions of the act, they can be prosecuted under it, but the detainees themselves have no right to sue the military if the same provisions are broken during interrogations. This is a prime example of “coordinate construction” – that all branches of government have the power and duty to interpret both the laws and the Constitution independently – which the unitary executive rests upon according to Kelley.⁴⁸ As Chapter 2 shows this “executive judicial review” which comes as a result of coordinate construction, may remove the need for the judiciary and Congress in foreign relations. The unitary executive principles enunciated by the Bush administration have been criticized by Pulitzer Prize winning journalist Anthony Lewis who said that the OLC tried to substitute the “basic premise of the American constitutional system [with] something like the divine right of kings.”⁴⁹

The final part of Bush’s signing statement to the DTA removes any remaining function the act has:

Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.⁵⁰

The understanding Bush has of the DTA is somewhat in line with the text of the act, as the DTA actually restricts the possibility of detainees to submit writs of habeas corpus. The act explicitly mentions in Section 1005 (f) that: “Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.”⁵¹ The intention of the DTA is that prisoners detained abroad who have had their status reviewed correctly as an “enemy combatant” does not have any constitutional rights. This intention is easily side-stepped by Bush by the decisions made based on the findings of the internal memos in the last chapter; there was no need for status reviews since the president

could unilaterally determine that all al Qaeda and Taliban fighters were not entitled to prisoner of war status, thus making them enemy combatants. Therefore any person detained by the U.S. military, or bounty hunters, in Iraq or Afghanistan is an enemy combatant by default, removing any rights the detainee might have under the U.S. Constitution. This removal of, or complete lack of, rights was also valid for U.S citizens detained abroad or even within the United States if the president determined them to be enemy combatants according to an earlier decision by the 4th U.S. Circuit Court of Appeals.⁵² This raises some serious questions regarding the rights of citizens in a democracy. If the nation's leader can determine that any citizen, or in fact any person of any country, is a threat to the nation he can immediately remove all rights of that person, detain him wherever he wants, and treat him without respect to the Geneva Conventions. Though this may happen in countries ruled by dictators, it is highly dubious behavior from the leader of one of the world's oldest still-existing democracies.

Bush's final observation in the portion of the signing statement relating to the DTA is that no federal courts shall have jurisdiction to hear any action brought on behalf of, or by, the detainees. Section 1005 (e)(2)(A) gives the United States Court of Appeals for the District of Columbia exclusive jurisdiction over the validity of the decisions made by the Combat Status Review Tribunals. This means that, according to the DTA, a detainee can bring the decision of his status review to the Court of Appeals in D.C. if they contest it, or if they feel that procedural inconsistencies occurred when their status was determined. What the last part of Bush's signing statement does is to remove this option by stating that the executive branch understands that the federal courts have no jurisdiction under Section 1005. Since it has already been decided that no status reviews are necessary in any case, Bush's signing statement makes the entire DTA unenforceable. In three sentences he voids the entire DTA by nullifying the section describing how and under what circumstances the DTA is to be enforced, and removes any accountability the executive branch has towards Congress, the judiciary, or the detainees. Bush leaves the other sections of the DTA, including the torture ban and a section regarding the training of Iraqi forces, untouched, but by removing any possibility of enforcing and bringing to trial any potential breaches of the act, the torture ban ends up being idealistic thinking without any real impact on how detainees should be treated and tried. It also leaves the administration with the ability to continue torturing and trying all enemy combatants as it has been used to. This argument was brought up by *the Boston Globe* in January of 2006 and responded to by an unnamed "senior administration official," who said that the president "reserve[d] the right to use harsher methods," in order to protect the nation,

and that if following the DTA and protecting the nation came into conflict the President had to square the two off against each other.⁵³

The actions the administration took with regard to the enemy combatants seem shocking to a critical reader. By removing all rights the “enemy combatants” had under the United States Constitution and the Geneva Conventions, Bush then made the DTA, an act prohibiting torture, unenforceable. The possibility that Bush really believed that he only did what he absolutely had to in order to protect the United States, which some commentators seem to believe,⁵⁴ exists, but the accumulation of powers the administration’s use of its defining powers caused, effectively replaced the need for the judiciary, Congress, and the Constitution with a king as Lewis observed. Eventually the Supreme Court intervened, not in how the United States was treating its prisoners, but how they were put to trial.

3.5 Aftermath of the Abu Ghraib Scandal and the DTA

On June 29, 2006, six months after Bush had signed HR 2863 into law, and in doing so nullifying the DTA, the Supreme Court handed down its decision in *Hamdan v. Rumsfeld*.⁵⁵ Writing the majority opinion Justice John Paul Stevens concluded that the military commission used to try Yemeni national Salim Ahmed Hamdan – also known as Osama bin Laden’s driver – was unconstitutional as neither the DTA, or the Uniform Code of Military Justice gave the president the authority to convene the commission which tried Hamdan, “or any other [commission] at Guantanamo Bay”⁵⁶ (emphasis added). The court recognized that the DTA gave the president “a general authority” to convene military commissions to try prisoners, but only “in circumstances where justified under the Constitution and laws, including the laws of war.”⁵⁷ The court also rejected the opinion in Bush’s signing statement that the federal courts had no jurisdiction over actions brought to them, including writs of habeas corpus. What the *Hamdan* decision boiled down to was that in order to continue using military commission to try enemy combatants, President Bush had two options: ask Congress to proceed as he was doing, or begin to operate the commissions in line with the regulations for ordinary courts martial.⁵⁸

In a speech held on September 5, 2006 President Bush announced new legislation for setting up military commissions,⁵⁹ just as the Supreme Court had ordered him to in *Hamdan v. Rumsfeld*, this new legislation would be passed just over a month later as the Military Commissions Act 2006 (the MCA, Public Law 109-366).⁶⁰ The Human Rights Watch was critical of Bush’s proposal saying that the proposed legislation “would allow the use of

statements obtained under coercion, and would allow the accused to be convicted on the basis of secret evidence,” and concluding that “the proposed legislation lacks basic procedural protections necessary for a fair trial.”⁶¹ Quoting the Army’s Deputy Chief of Intelligence, Lieutenant General John F. Kimmons saying that “No good intelligence comes from abusive interrogation practices,” Human Rights Watch makes a vital point, agreed upon by several experts, and even the U.S. Army’s own Field Manual on Intelligence Interrogation: torture does not work. Howard Ball quotes the field manual’s section 3 titled *Prohibition against the Use of Force*:

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and *is neither authorized nor condoned by the U.S. Government*. (...) [It] is a poor technique, as it yields unreliable results (...) and can induce the source to say whatever he thinks the interrogator wants to hear.⁶² (Emphasis added).

The field manual Ball is quoting was replaced on the same day Bush gave his above mentioned speech, and in the new edition techniques such as waterboarding were prohibited, however the new Field Manual would not apply to the detainees held by the CIA.⁶³ Faced with evidence from the Army’s own field manual on interrogations, the advice of experts that torture does not work, and heavy criticism both from organizations like the Human Rights Watch, and members of Congress, the administration continued with the same beliefs, refusing to back down. Quoting Vice President Dick Cheney in a radio interview on October 24, 2006, the Human Rights Watch wrote that Cheney maintained the argument that waterboarding was, in his view, not torture, and a “no brainer” to use if it could save lives.⁶⁴

3.6 Groupthink and the Advisory Systems Framework

These sentiments above are in line with several of the symptoms of groupthink, primarily one of Janis’ symptoms of over-estimation: “An unquestioned belief in the group’s inherent morality, inclining the members to ignore the ethical or moral consequences of their decisions.”⁶⁵ This symptom seems to fit very well with regard to the Bush administration and its continued insistence on using “alternative procedures of interrogation,” while insisting that they work, and do not constitute torture. There seems to be a complete lack of moral or ethical considerations with respect to its own actions within the administration to the extent that when faced with information that more or less proves that torture does not work, the answer is simply that the administration does not condone or use torture. This is another symptom of

groupthink which Janis calls “Closed-mindedness”: “Collective efforts to rationalize in order to discount warnings or other information that might lead the members to reconsider their assumptions before the recommit themselves to their past policy decisions.”⁶⁶ Just as in the internal debate regarding Geneva III application in the last chapter, Bush and his administration display symptoms of groupthink, but again it is important to remember that even though some symptoms of groupthink are present, it is too hasty to conclude that groupthink occurred. In this case, as in the previous chapter, the antecedent conditions Janis lists like insulation of the policy-making group, or psychological stress or pressure⁶⁷ can not immediately be said to have been present in the choice to continue torturing the detainees who were in the hands of the CIA, nor were they likely present in the formulation and passing of the Military Commissions Act. A third symptom of groupthink which is present during this process is one of self censorship; that the group censors any deviations from the consensus. This was done by replacing the lone critical voice in the administration, Colin Powell, with someone who would be more on the same wavelength as the others. David Mitchell argues that the two most polarized figures in the Bush administration’s first term were Colin Powell and Donald Rumsfeld,⁶⁸ meaning that by appointing Condoleezza Rice as the new Secretary of State in his second term, George W. Bush effectively removed any critical voices from his innermost circle thus reinforcing the possibility of groupthink occurring.

By replacing Colin Powell with Condoleezza Rice, Bush conforms to Mitchell’s place for him in the Advisory Systems Framework (ASF) as well. When removing Powell’s critical voice Bush helps underline Mitchell’s assertion that differing views are excluded from a formal system with a high degree of centralization.⁶⁹ As for the other aspects of the formal high centralization system it is uncertain if Mitchell believes that the promotion of his old gatekeeper, Rice, to Secretary of State caused her to lose her role as gatekeeper. Since the gatekeeper is the one who filters all information before bringing one or more options to the president, it is likely that Rice no longer took on that role. Whether or not the gatekeeper-role was taken up Bush’s new National Security Advisor, Stephen Hadley, is not clear, but Hadley would at least conform to the low-conflict aspect of the formal high central in the ASF seeing as he had worked on Bush’s campaign in 2000, on the Bush-Cheney transition NSC and had held positions under both Reagan and George H. W. Bush’s administrations. It is unlikely that there would be much need, or possibility, to filter the criticism directed at Bush and his administration regarding the Abu Ghraib scandal and *Hamdan v Rumsfeld*, when considering the amount of controversy and media-attention the scandal got, but in spite of the criticism Bush was able to formulate, presumably, what he believed was the best option.

3.7 Responding to Hamdan

The administration's response to the *Hamdan* verdict was a new piece of legislation, the same mentioned and criticized by the Human Rights Watch above, the Military Commissions Act 2006 (MCA). The MCA was passed by Congress in October 2006,⁷⁰ and it achieved what Bush had set out to do in his signing statement, this time with the help of a Republican controlled Congress. The MCA removed the federal court's jurisdiction to hear habeas corpus writs from detainees at Guantanamo and other prison facilities, and actually barred the prisoners from submitting the writs at all as long as they were in the detention of the U.S. military.⁷¹ It also broadened the definition of enemy combatants and gave the President the power to "interpret the meaning and the application of the Geneva Conventions."⁷² What may be the most controversial provision of the MCA in its original text, however, was the fact that it rejected the notion that raping a detainee was torture.⁷³ This provision shows an almost horrifying view of human rights and the respect for other human beings. That the administration, with the help of Congress, was able to include this provision seems unbelievable at best and leaves one wondering at what point in a war it is necessary to rape a prisoner in order to obtain information that will save lives.

Having failed to succeed with the unitary executive approach, Bush was able to secure a victory in continuing his policies with the help of Congress, however he still was not satisfied with what the MCA allowed the CIA to do and what powers it afforded him. To deal with this he signed an executive order in July of 2007 which is dealt with in the next chapter.

Notes to Chapter 3

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- ¹ Rebecca Lung, "Abuse of Iraqi POWs By GIs Probed," *CBS News*, April 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (Accessed April 28, 2009).
- ² Seymour M. Hersh, "The General's Report," *The New Yorker*, paragraph 1, June 25, 2007, http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?printable=true (Accessed April 29, 2009).
- ³ *Ibid.*, paragraph 9.
- ⁴ Christopher S. Kelley, "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency," paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association April 7-10, 2005, Chicago, IL, 31. http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/5/9/4/pages85947/p85947-1.php (Accessed March 27, 2009).
- ⁵ John Paul Stevens, writing the majority opinion of the court in *Hamdan v. Rumsfeld* 548 U.S. 557 (2006) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=05-184> (Accessed March 27, 2009).
- ⁶ Memorandum for Members of the ASIL-CFR Roundtable, from William J. Haynes II, General Counsel to the Department of Defense "Subject: Enemy Combatants," December 12, 2002, <http://www.cfr.org/publication.html?id=5312> (Accessed April 29, 2009).
- ⁷ *Ibid.*, paragraphs 1-2.
- ⁸ *Ibid.*, paragraph 3.
- ⁹ *Ibid.*, paragraph 3.
- ¹⁰ Ball, *Bush, the Detainees, and the Constitution*, 233, in note #2.
- ¹¹ *Ibid.*, 42.
- ¹² Memorandum for ASIL-CFR, from Haynes, "Subject: Enemy Combatants," paragraph 4.
- ¹³ *Ibid.*, paragraph 5.
- ¹⁴ *Ibid.*, paragraph 6-9.
- ¹⁵ Ball, 42.
- ¹⁶ Memorandum for ASIL-CFR, from Haynes, "Subject: Enemy Combatants," paragraph 12.
- ¹⁷ *Ibid.*, paragraph 11.
- ¹⁸ *Ibid.*, paragraph 13.
- ¹⁹ Ball, *Bush, the Detainees, and the Constitution*, 27.
- ²⁰ Kelley, "Rethinking Presidential Power," 26.
- ²¹ Cooper, *By Order of the President*, 201.
- ²² *Ibid.*, 199.
- ²³ *Ibid.*, 204.
- ²⁴ Kelley, "Rethinking Presidential Power," 27.
- ²⁵ *Ibid.*, 30-31.
- ²⁶ CNN.com, "Iraq prison 'abuse' sparks outrage," April 30, 2004, <http://edition.cnn.com/2004/WORLD/meast/04/30/iraq.photos.reaction/index.html> (Accessed March 25, 2009).
- ²⁷ Ed Henry et. al., "GOP leaders oppose release of more abuse images," *CNN.com*, May 14, 2004, <http://edition.cnn.com/2004/ALLPOLITICS/05/12/congress.abuse/index.html> (Accessed March 25, 2009).
- ²⁸ CNN.com, "U.S. probes allegations of Afghan prison abuse," May 16, 2004, <http://edition.cnn.com/2004/WORLD/asiapcf/05/15/afghan.detainees/index.html> (Accessed March 25, 2009).
- ²⁹ Barbara Starr, "Shocking prison pictures emerge," *CNN.com*, May 20, 2004, <http://edition.cnn.com/2004/ALLPOLITICS/05/20/congress.abuse/index.html> (Accessed March 25, 2009).
- ³⁰ Ball, *Bush, the Detainees, and the Constitution*, 57.
- ³¹ *Ibid.*, 58.
- ³² Noah Leavitt, "Government redefining torture", *CNN.com*, August 26, 2004, <http://edition.cnn.com/2004/LAW/08/25/leavitt.torture/index.html> (Accessed March 25, 2009).
- ³³ *Ibid.*
- ³⁴ Human Rights Watch, "CIA Whitewashing Torture" *www.hrw.org*, November 20, 2005, <http://www.hrw.org/en/news/2005/11/20/cia-whitewashing-torture> (Accessed March 27, 2009).
- ³⁵ *Ibid.*
- ³⁶ Howard Ball, *Bush the Detainees, and the Constitution*, 62.
- ³⁷ Ed Henry, "McCain, Bush agree on torture ban," *CNN.com*, December 16, 2005, <http://edition.cnn.com/2005/POLITICS/12/15/torture.bill/> (Accessed March 25, 2009).
- ³⁸ *Ibid.*

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- ³⁹ The full text of the Detainee Treatment Act can be found here:
<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php> (Accessed March 25, 2009).
- ⁴⁰ Section 1003 of the Detainee Treatment Act 2005.
- ⁴¹ Section 1003(d) of the DTA.
- ⁴² See Section 1005 (a)(3).
- ⁴³ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and the Pandemic Influenza Act, 2006, paragraph 8,
<http://www.presidency.ucsb.edu/ws/index.php?pid=65259> (Accessed March 26, 2009).
- ⁴⁴ *Ibid*, Bush refers to the unitary executive in paragraphs 4 and 6.
- ⁴⁵ Section 1005 of the Detainee Treatment Act 2005.
- ⁴⁶ Kelley, "Rethinking Presidential Power," 12.
- ⁴⁷ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and the Pandemic Influenza Act, 2006, paragraph 8.
- ⁴⁸ Kelley, "Rethinking Presidential Power," 4.
- ⁴⁹ Quoted in *Ibid*, 26.
- ⁵⁰ *Ibid*.
- ⁵¹ The DTA Section 1005(f).
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<http://edition.cnn.com/2003/LAW/01/08/enemy.combatants/> (Accessed March 27, 2009).
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- ⁵⁴ Thomas Sowell, "Bush did what he had to do," *The Windsor Star*, January 31, 2009,
<http://www.windsorstar.com/sports/Bush+what/1237874/story.html> (Accessed March 27, 2009).
- ⁵⁵ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).
- ⁵⁶ *Ibid*, Section 3.
- ⁵⁷ *Ibid*,
- ⁵⁸ Michael Nelson, ed., *The Evolving Presidency; Landmark Documents 1787-2008* (Washington D.C.: CQ Press, 2008), 309.
- ⁵⁹ Human Rights Watch, "U.S.: Bush Justifies CIA Detainee Abuse" www.hrw.org, September 5, 2006,
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- ⁶⁰ Nelson, *The Evolving Presidency*, 308-309.
- ⁶¹ *Ibid*.
- ⁶² Ball, *Bush, the Detainees, and the Constitution*, 60-61
- ⁶³ Human Rights Watch, "U.S.: Bush Justifies CIA Detainee Abuse."
- ⁶⁴ Human Rights Watch, "U.S.: Vice President Endorses Torture," www.hrw.org, October 25, 2006,
<http://www.hrw.org/en/news/2006/10/25/us-vice-president-endorses-torture> (Accessed March 27, 2009).
- ⁶⁵ Irving L Janis, *Groupthink* (Boston: Houghton Mifflin Company, 1982), 174.
- ⁶⁶ *Ibid*, 174.
- ⁶⁷ *Ibid*, 176-177
- ⁶⁸ David Mitchell, *Making Foreign Policy: Presidential Management of the Decision-Making Process*, Aldershot: Ashgate, 2005, 179.
- ⁶⁹ *Ibid*, 26.
- ⁷⁰ Ball, *Bush, the Detainees, and the Constitution*, 184.
- ⁷¹ *Ibid*, 184. Referring the original text of the MCA. The MCA has later been revised, and the present version is found here: http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf (Accessed March 27, 2009).
- ⁷² *Ibid*, 184.
- ⁷³ *Ibid*, 184.

4.0 Interpretation by Executive Order

The Military Commissions Act was a controversial piece of legislation for several reasons, a few of which were mentioned in the previous chapter, including a stricter definition of what constituted torture. Additionally the MCA said that “any alien unlawful enemy combatant is subject to trial by military commission,”¹ meaning that as long as the administration determined that a non-U.S. citizen was an enemy combatant, he could be tried by military commission after being held for an indefinite period of time, and that the evidence brought against the enemy combatant in the military commission trial could have been obtained through coercion, or remain secret. With respect to the balance of power between the branches of government, the MCA completely removed the option of submitting writs of habeas corpus to a court. Section 7 of the MCA titled “Habeas Corpus Matters” states that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf on an alien detained by the United States.”² The restriction of habeas corpus privileges was one of the goals President Bush had tried to achieve by way of the signing statement to the Detainee Treatment Act discussed in the previous chapter. The constitutionality of that section of the MCA remained dubious until the Supreme Court eventually addressed it almost two years after the passing of the MCA, in June 2008.

This chapter begins with a look at how and why the MCA was passed as quickly as it was. From the date that the verdict was handed down in *Hamdan v. Rumsfeld* in June 2006, it only took the administration four months to negotiate and pass the MCA. The main reasons for this hurry was that the 2006 Midterm Elections were fast approaching, and as long as the administration had to go through Congress to get its way it made sense to pass the MCA while both houses of Congress were still in the Republicans’ hands. Some of the provisions included in the MCA gave President Bush powers which the unitary executive assumes the president has and by passing these provisions, Congress helped make principles found in the unitary executive theory into federal law. This inclusion also served to eclipse any further need for groupthink within the administration since the President at the point of passing was left with almost no obstacles and no checks on his power by the legislative branch.

The main focus of this chapter rests on an executive order President Bush issued in July of 2007. The executive order is a favored weapon for presidents, used to direct policy or avoid dealing with the other branches of government, in other words a weapon that suits the

unitary executive very well. Before Bush's executive order is analyzed there is a short explanation of how and why executive orders traditionally have been used.

As described in the previous chapter, Pentagon issued a new Field Manual which prohibited the use of waterboarding when interrogating prisoners, but the prohibition did not extend to the prison facilities operated by the Central Intelligence Agency. This separation indicated that the CIA would be able to continue using interrogation techniques which were deemed to constitute torture by many critics. The executive order analyzed in this chapter is the result of a sub-paragraph of section 6 of the MCA which says that the President shall issue an executive order interpreting the meaning and application of Geneva III.³ The order seems to be intended to address the issue of torture, but as the analysis shows, it does not succeed in its intentions. The title of the executive order analyzed is "Executive Order 13440 - Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency,"⁴ but the text of the order belies its content. More than anything else, the order confuses more than it interprets, and raises more questions than it answers. Whether this is an intentional effect of the order remains uncertain, but the analysis indicates as much and one is left with an understanding that the order only reaffirms the status quo without bringing any significant policy changes.

The last part of this chapter looks at how the Supreme Court, in *Boumediene v. Bush*, eventually addressed, and struck down the provision of the MCA which barred any court, judge or justice from having jurisdiction over writs of habeas corpus. The Supreme Court decision functions as the end point of the Bush administration's policy process and debate regarding enemy combatants, military commissions, torture, and the struggle between the different branches of U.S. Government addressed in this thesis.

4.1 Battle of the Branches

After a two year tug-of-war between Congress, the Supreme Court and the administration George W. Bush seemed to have gotten the final word with the passing of the Military Commissions Act in October 2006. Beginning with the Abu Ghraib scandal and the ensuing attempt by Congress to rein in the President with the Detainee Treatment Act and the Supreme Court's decision in *Hamdan v. Rumsfeld*, the MCA gave Bush exactly what he wanted. Having achieved the necessary legislation to continue with the intended regime of trying enemy combatants by military commissions, and obtaining acceptance for the administration's narrow definition of torture, and even if Bush's "unitary executive approach"

– through his signing statement – had failed, he was able to use a friendly Congress to achieve his goals.

The victory was not a decisive one in spite of the success of passing the MCA, because the passing showed that the act was very controversial even though it was passed with fairly large margins in both houses of Congress. In the House the bill passed with 253 to 168 votes in a very partisan vote where 219 Republicans and only 34 Democrats voted for the bill, while 160 Democrats and a meager 7 Republicans voted against it along with one Independent representative.⁵ Leading representatives in both parties defended or criticized the bill after the vote, with Republican Duncan Hunter saying that “[i]n times of war it is not practical to apply the same rules of evidence [as] in civil courts trial or courts martial,”⁶ while Democratic Senator Patrick J. Leahy called the bill not only contrary to American interests, but also un-American and unconstitutional.⁷ Duncan Hunter’s words reveal the same view as the administration held, that in order to conduct the War on Terror as effectively and “practically” as possible, it was necessary to cut a few corners, or ignore a few basic human rights. This may indicate that even members of Congress to some degree can be included as being members of the policy-making group, and thus be subjected to groupthink as well. That would mean stretching the terms and scope of groupthink, something David Mitchell warns about – what he calls “conceptual stretching”⁸ – meaning that one applies concepts to new cases whether they are comparable or not, in order to find evidence of, in this case, groupthink. It is important to remember that even though a member of one of the other branches, in this case Duncan Hunter, holds views supporting the policy-making group and the President, Hunter is less likely to be affected by groupthink as he normally is not as involved in the policy-making process as members of the executive branch and the administration, especially not in the Bush administration where the unitary executive reigned supreme.

The voting on the MCA in the Senate followed party lines in much the same way as it had in the House, with only one Republican Senator voting against the bill which passed 65 to 34.⁹ Leading Democrats continued their criticism of the bill. Hillary Rodham Clinton was quoted by *the New York Times* saying: “we must hold onto our values and set an example we can point to with pride, not shame.”¹⁰ The party divide showed that even though the bill was passed, it was mainly passed by Republicans, many of whom held the same views as the administration on how to treat and try enemy combatants, or who wanted to give the President what he asked. There were mixed feelings among the Republicans though, and even some Republicans who voted for the bill seemed less than enthusiastic about passing the MCA, as it

was expected that the Supreme Court would strike down the bill. The main concern was that the MCA included a provision which barred the courts from hearing challenges to the detainees' imprisonment,¹¹ the same objective Bush had attempted to achieve with his signing statement to the DTA.

The general opinion in Congress seemed to be that the bill was rushed and should have been subjected to more thorough debate before being put to the vote. This shared feeling of having rushed the passage of the bill was in all likelihood not coincidental, because the 2006 midterm elections were fast approaching and it seems likely that Bush wanted the bill passed through Congress while it was still controlled by the Republican Party. After all Congress had been controlled by Bush's party ever since his first inauguration in 2001, but the public mood was changing and it seemed that the Republican Party would lose its majority in Congress in 2006 for the first time in 10 years. Even if the unitary executive presumes that the presidency operates within a hostile environment, Bush had still had a "friendly" Congress and, what was deemed by many to be, a conservative Supreme Court as his main opponents for his entire presidency. The environment became more hostile just five weeks after the MCA was passed, however, when Democrats won control over both Houses in Congress in the midterm elections. Obtaining the narrowest possible margin in the Senate, with party affiliation counting 49 Democrats, 49 Republicans, and 2 Independents expected to caucus with the Democrats,¹² the Democratic Party had not received a convincing mandate for reform, however. The Democratic gains in the House were more impressive, but they still lacked the necessary majority to override presidential vetoes without turning to the Republican Party, something that seemed unlikely to succeed considering the strongly polarized situation evinced by the vote on the MCA. Some Democrats still tried in any case, among them Senator Chris Dodd who attempted to amend the MCA less than two weeks after the midterm elections on November 16, 2006.¹³ The proposed amendments called "the Effective Terrorist Prosecution Act," did not make it out of committee, however, and the MCA remained unchanged.

Even though the MCA had survived a polarized Congress, a midterm election, and early attempts to amend it, the signals that it probably would not survive for long seemed clear. The Democrats controlled Congress, and even Republicans believed that the Supreme Court would strike down the MCA eventually. The likelihood of Supreme Court action increased in June 2007 when a 4th U.S. Circuit Court of Appeals panel found that Ali al-Marri, a Qatari national living legally in the United States, could not be stripped of his constitutional right to challenge his detention, as the MCA opened for. Having been

captured in December 2001, al-Marri had been moved to a navy brig in June 2003 and spent the following four years in solitary confinement as an enemy combatant.¹⁴ In its verdict a divided panel said that “[t]o sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the president calls them ‘enemy combatants,’ would have disastrous consequences for the Constitution — and the country.”¹⁵ The administration responded by announcing that it intended to challenge the Appeals panel’s findings, but the verdict was a blow for the administration and the MCA nonetheless. Al-Marri’s case is still not resolved, but his status as an “enemy combatant” has been rescinded and at the time of writing he awaits a civil trial in Illinois, where he was first arrested in 2001.¹⁶

Just over a month after the June, 2007 verdict by the Appeals panel, a verdict Bush wished to render forceless, he employed another favored “weapon” for the executive, the executive order.

4.2 Executive Orders

The executive order is an example of executive direct action in the same way that a signing statement is. Presidents issue several executive orders each year for several different reasons. In *With the Stroke of a Pen*, Kenneth R. Mayer calls executive orders “presidential edicts, legal instruments that create or modify laws, procedure and policy,” and claims that they “often extend far beyond the government.”¹⁷ The University of California, Santa Barbara, has compiled a collection of all executive orders issued, dating back to John Quincy Adams in 1826,¹⁸ which provides an insight into how Presidents issue orders in different circumstances. Mayer writes that the issuance of executive orders rises and falls in response to significant events,¹⁹ and if one looks at how many executive orders George W. Bush issued in 2001, Mayer’s argument becomes clear. In the almost eight months between his inauguration and the terrorist attacks on September 11, 2001, Bush issued 25 executive orders, while in the remaining three months of 2001 after the terrorist attacks he issued 29.²⁰ These numbers are not necessarily dependable, as some executive orders may be classified, or not published at all according to Mayer.²¹

Philip J. Cooper provides an explanation of why presidents issue executive orders in *By Order of the President*, saying that sometimes the reasons for issuing an executive order are connected to the politics and relationship between the president and the other branches, while others are issued as responses to certain circumstances.²² Cooper uses a chapter in outlining the most common reasons for issuing executive orders. One reason is that executive

orders can be issued “to accomplish an end run around Capitol Hill,”²³ as Cooper puts it; in other words the President issues an executive order to avoid dealing with Congress. In relation to this thesis, an “end run around Capitol Hill,” does not apply as it was Congress who called for the issuance of the order by including a provision in the MCA ordering the president to do so. Another important reason Cooper mentions is that executive orders are used in the transition between two administrations to change the policy course from the previous administration.²⁴ This is exactly what President Barack Obama did only two days after his inauguration, a point that will be discussed in the next chapter. In the context of this chapter and the following analysis of Bush’s Executive Order 13440, another vital point Cooper brings up is that executive orders may have a symbolic value intended to send a message to a certain group of supporters or critics, in this case Bush’s critics, without having to commit political, legal or financial resources.²⁵ The analysis of the following order indicates that Executive Order 13440 may be such an order.

4.3 Moving Toward a Morally Acceptable Policy? – Executive Order 13440

The title of the executive order Bush issued on July 20, 2007 is in itself a controversial one, and in full compliance with the unitary executive principle of “coordinate construction,” but at the point of issuance the principle was included in federal legislation. The title also specifies that the executive order is only valid for CIA-operated detention facilities, meaning that prison and detention facilities operated by the military would not be covered by this executive order. This is in line with how the new Field Manual, described in Chapter 3, separated what the Pentagon and the CIA was allowed to do in interrogations.

The *New York Times* wrote about the executive order the day after Bush signed it, and in an article by *Times* journalist Mark Mazzetti, titled “Rules Lay Out C.I.A.’s Tactics in Questioning,” Mazzetti quoted former administration official and counsel to Condoleezza Rice, Philip D. Zelikow, as saying that the order showed that the government was moving towards a more moral and legally sustainable area of interrogations.²⁶ The article continues by saying that, at the time of writing, there was only one known prisoner held by the CIA, an Iraqi Kurd named Abd al-Hadi al-Iraqi, and that it was uncertain if the CIA held any other prisoners. It seems unlikely that Bush would issue an executive order that would only have ramifications for one prisoner, even if the MCA called for the issuance of the order, so it seems likely that the CIA held others, or at least was intending to detain others. The most remarkable fact to emerge in the *New York Times* article is in its final paragraph where CIA

officials admit that al-Iraqi had provided “valuable intelligence, despite the fact that C.I.A. [sic] interrogators at the time were only authorized to use the techniques approved for Pentagon interrogators.”²⁷ This would be a direct argument against the administration’s view that “enhanced interrogation methods” were necessary in order to produce “actionable evidence.” This may be an indication that the administration had realized that its policies had been wrong because it only had allowed “Pentagon approved” interrogation methods in al-Iraqi’s case. Along with the statement that the executive order moved towards a more moral and legal area of interrogations, one could almost assume that the administration was trying to modify its policies to accommodate its critics. The *New York Times* article indicates that there had been a lot of discussion within the administration regarding the language of the order being a legalization of torture, and that an earlier draft of the order had been rejected for that reason.²⁸ If the assumptions found in the *Times* article were the case then that would indicate that the process of drafting the executive order was not affected by groupthink, at least not in a similar way that the memos in Chapter 2 of this thesis indicates. Before it is possible to answer whether the order signified a break from earlier policies regarding the detention and interrogation of detainees, it is appropriate to take a look at what the text of the executive order says.

4.3.1 Executive Order 13440 – Executive Direct Confusion

The preamble, or first paragraph, of the executive order is a fairly standard one, outlining the sources of presidential powers employed in the order. In this case President Bush lists the Constitution and laws of the United States, the Authorization for Use of Military Force (AUMF), the MCA, and U.S. Code Title 3 Section 301.²⁹ These specifications are fairly standard, though knowing that Republicans in Congress expected that the MCA would be struck down by the Supreme Court, and the fact that a U.S. Circuit Court of Appeals panel had deemed provisions of the MCA unconstitutional just over a month earlier, this seems to serve as an attempt to underscore the validity of the MCA more than the president gaining any real powers from it, or rather to make the most use possible of the MCA while it still existed. Even though the MCA had not been addressed by the Supreme Court, lower federal courts had called the powers the MCA granted the President unconstitutional. Then again the issuance of the executive order is a direct result of the MCA, and the inclusion of the MCA in the first paragraph is also another hint of the unitary executive and “coordinate construction” at work, since the administration disagreed with the District Court Appeals panel’s decision

and probably intended to fight any action against the MCA. Bush understandably interpreted the MCA as valid, which it still was at the time Bush signed the executive order, and included it since it did give him expanded powers. The inclusion of Section 301 of title 3 of the U.S. Code is also understandable as the relevant section addresses the delegating powers the President has – his power to delegate executive responsibilities to department or agency officials who have been appointed with the advice and consent of the Senate.³⁰

Section 1(a) of the executive order begins with an affirmation that “the United States are engaged in an *armed conflict* with al Qaeda, the Taliban, and associated forces,”³¹ (emphasis added). This is not a surprising affirmation by any account, but it is important to remember that though the “War on Terror” was invoked after the terrorist attacks on September 11, 2001, no actual declaration of war has been made by Congress, and even though Bush had argued that any infringements on the executive would hamper his ability to conduct the War on Terror, and that the President as the Commander-in-Chief have a broad set of powers in wartime, the ongoing conflict is not legally a war. That does not make the conflict any less serious or potentially deadly for the participants, but the fact that the War on Terror was unilaterally invoked and overseen by the Bush administration is important to keep in mind. The fact that it is not legally a war may to a degree also explain how the administration was able to secure a policy of the non-application of Geneva III, because if Congress had actually declared war on either Afghanistan or Iraq, the War on Terror would have fallen under the Geneva Conventions Common Article 2 – a conflict between two or more High Contracting Parties – and the United States would in all likelihood have been bound by the Laws of War, something they are not if one is to believe the Bybee Memo analyzed in Chapter 2.

Continuing Section 1(a), Bush quickly dispels any belief that the administration intended to change its policies by stating that “On February 7, 2002, I determined (...) that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections [provided by Geneva III]. I hereby reaffirm that determination.”³² By choosing to continue a policy of non-application regarding the enemy combatants, Bush continued to ignore the attempts of the Democratic Congress and the Supreme Court to rein him in. The DTA, which Bush attempted, but failed to nullify, called for proper training of Iraqi officials, including teaching the Iraqis what protections prisoners were afforded by the Geneva Conventions.³³ Though the training of Iraqi personnel, and how the CIA should operate its detention facilities are not directly related, both are bound by the same Constitution and code of law, and Bush’s continued dedication to a policy of non-

application was a clear signal that neither he nor his administration would hear or accept any Congressional interference in their conduct of the ongoing conflict.

Section 1(b) of the executive order refers directly to the MCA and what it does. Most importantly for Bush in the context of the executive order is that “[the MCA] reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.”³⁴ Howard Ball has included several of the more controversial provisions of the MCA in an Appendix to *Bush, the Detainees, and the Constitution*, and if one looks at the original text of the MCA, one finds under Section 6 (3) (A) that the Constitution and the relevant section of the MCA grants the President the authority to interpret both what the Geneva Conventions mean and their application as long as the interpretation does not cause “grave breaches of the Geneva Conventions.”³⁵ This makes it obvious why President Bush included the MCA in the preamble of the executive order, and also astoundingly proves that Bush and his administration were able to include both the unitary executive principle of coordinate construction, and the unitary executive interpretation of Article 2, Section 2b of the U.S. Constitution regarding treaties into legislation passed by Congress. One could argue that the inclusion of these principles into federal law means that the unitary executive no longer was an ideology held by the administration, but rather had become an institutionalized part of the balance between the branches. Arthur M. Schlesinger published *The Imperial Presidency* in 1973 where he warned that the Presidency was becoming too powerful,³⁶ but by actually including principles of the unitary executive in the MCA, Congress effectively gave President Bush a helping hand in achieving exactly what Schlesinger warned against. If this is the case then there does not seem to be any validity in groupthink any longer since it is difficult to imagine any reason for groupthink to occur when the President no longer has to fear checks from the legislative branch. What the MCA does, combined with the tradition of largely leaving foreign policy up to the executive branch, is giving the president the power to do anything he pleases, thus negating the need for concurrence within the policy-making group, and between the executive and the legislative branches. Though this looks like a fairly dramatic shift in the balance of power between the branches, it is important to remember that at the time the executive order was written there had been no Supreme Court action regarding the MCA, and it is likely that it still was expected that the Court would strike the Act down.

Section 2 of Executive Order 13440 lists several definitions for terms used later in the order, the most interesting definition being the definition of “cruel, inhuman, or degrading treatment or punishment” in Section 2 (iv) (c). Bush defines this as the treatment or

punishment “prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution.”³⁷ It is understandable that this can be read as a move toward a more humane and legal interrogation practice since the Amendments Bush mentions give the right of due process and prohibits cruel and unusual treatment, but knowing that the MCA actually restricts enemy combatants from receiving their due process rights, and that cruel and unusual treatment does not include waterboarding or rape, the inclusion of this definition in the executive order rings hollow. If, on the other hand, the executive order is intended to move the CIA interrogation detention facilities toward a more humane and legal area of law, the inclusion of Bush’s definition again brings up the question of why this executive order exists at all. Even if the MCA required the order’s issuance, Bush could have used the order to interpret that the administration’s earlier policies had been wrong. If it had been shown that the CIA was able to obtain valuable information without “Gitmo-ized” interrogation techniques, and they from the effective date of Executive Order 13440 no longer were authorized to conduct interrogations which were prohibited by the new Field Manual and the US Constitution, there does not seem to be any reason why the Executive Order, or even the MCA’s provision allowing evidence obtained through coercion³⁸ to exist at all. By including a definition of cruel and unusual treatment that is identical to the U.S. Constitution Bush also indirectly says that because he has the power to interpret the Geneva Conventions, he also has the power to interpret the meaning of the Constitution. If the two documents are one and the same regarding the definition of cruel and unusual treatment, this implies that because Bush has the power to interpret one of the documents’ definition, he presumably has the power to interpret the other.

Beginning with Section 3(a), President Bush indirectly goes against every policy the administration had enacted up to the point of writing, stating that:

Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 [of the Geneva Conventions] with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.³⁹

Bush affirms yet again that he has the authority to interpret the Geneva Conventions, but continues by stating that the Conventions will in fact be applied to the CIA's detention program, while they at the same time shall not apply to al Qaeda, the Taliban and associated forces as determined in Section 1 of the order. It presumably means that the Geneva Conventions shall apply to non-enemy combatant detainees who are not associated with, or members of, the Taliban or al Qaeda, but if that is the case it is hard to imagine why these individuals are in CIA detention facilities, and not simply in military custody receiving the rights of prisoners of war and remain under the protection of the Geneva Conventions in the first place. Again the reader is left wondering why there is a need for the executive order.

Section 3(b) (i-iv) lists a set of thirteen points which define how the CIA detention program will be in compliance with U.S. obligations under Common Article 3 of the Geneva Conventions. Section 3(b)(i) lists prohibitions of torture "as defined in section 2340 of title 18 United States Code,"⁴⁰ prohibitions of murder, biological experiments, rape, intentionally causing serious bodily harm, cruel and inhuman treatment, other acts of violence, denigrating a detainees religion, and even demands that the detention program must be in compliance with the Detainee Treatment Act.⁴¹ Section 3(b) (ii-iv) requires the CIA director to determine that the alien detainee held is a member of the Taliban, al Qaeda or associates. The key word here is "alien," meaning that U.S. citizens no longer can be held by the CIA, but presumably they can still be held by the military as enemy combatants. The subsections also demand that the detainee has information that can prevent terrorist attacks or help in capturing senior Taliban or al Qaeda operatives, that the CIA director determines that the interrogation techniques and conditions of confinement used are safe, and that the detainees receive the basic necessities of life. Section 3(b) does exactly what the Bush critics had demanded since the Abu Ghraib scandal surfaced more than three years earlier, and strikes the reader as a complete reversal of any prior determination or policy choice up until the point of writing. Bush even demands that any CIA-operated detention facility is in line with the text of the DTA, a law he tried his best to nullify as seen in Chapter 3 of this thesis. The confusion of who will actually be detained by the CIA remains, as section 3(b) also outlines that the detention program only complies with Common Article 3 if the detainees are associated with the Taliban or al Qaeda – the same detainees to which Bush earlier in the same executive order reaffirms that the Geneva Conventions do not apply. It is baffling that the executive order demands that the CIA detention program should comply with legislation that does not apply to the persons who are to be detained under the program.

Having outlined how the detention program should be executed in order to comply with common article 3 President Bush directs the head of the CIA to issue written policies to the CIA personnel in Section 3(c) of the executive order. The written policies shall include directions to implement “paragraphs (i) (C), (E), and (F) of Subsection 3(b) of this order.”⁴² The written policies shall also include “the development of an approved plan of interrogations tailored for each detainee (...) consistent with subsection 3(b) (iv) of this order.”⁴³ Bush only mentions four of the thirteen points outlined in Section 3(b) specifically, which can make one wonder why they are singled out, or why the remaining nine are omitted when directing the policy for the CIA detention program. The points Bush specifically mentions to be part of CIA policy are points on “other acts of violence serious enough to be comparable to murder [or] torture,”⁴⁴ “willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual,”⁴⁵ and “acts intended to denigrate the religion (...) of the individual.”⁴⁶ The omitted points, which presumably are not to be included in any written policy issued by the CIA Director, include compliance with United States Code Title 18 Section 2340 on torture, compliance with the MCA and the DTA on torture, the demand that the detainee must be determined to be associated with the Taliban or al Qaeda, and that the detainee must sit on important information. By carefully listing which provisions should be implemented, it seems that Bush indirectly suggest to the CIA Director that the omitted points may not be necessary in order to comply with the Geneva Conventions, even though he specifically lists them as important for compliance in Section 3(b). By implying that there is no need to implement Section 3(b) (i) (A), (B), (D), and Section 3(b) (ii-iii), there is no reason to include them in the order at all, except as a diversionary tactic. The omissions of any point explicitly prohibiting torture⁴⁷ and the point demanding that the detainee must be associated with the Taliban or al Qaeda, the order loses all meaning barring a feeling that it is a roundabout way of reaffirming the status quo. Bush also wants the written policies to include proper training for interrogators, and an effective monitoring of the program to make sure it is safe,⁴⁸ which is a positive step, but at the same time the omissions leave the reader with the feeling that Bush implies that the interrogation and detention program can be safe even though torture is indirectly allowed. Remembering what policy choices, and attempts to nullify infringements on those policies, that already have been presented in this thesis, it does not seem likely that Bush intended to reverse all prior policy choices with this order, especially with the order’s preamble in mind.

The final two sections of the order are fairly standard, with Section 4 assigning the Director of National Intelligence with the functions of the president with respect to the CIA

detention program outlined in the order, and Section 5 says that the executive order “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States (...) or any other person,”⁴⁹ which is a normal statement at the end of any executive order.

In summary Executive Order 13440 does in fact seem to have been issued mainly to affirm the status quo and potentially confuse critics, and because the MCA said that it had to be issued. Initially it reaffirms that al Qaeda and Taliban members, or associates are not protected by the Geneva Conventions, then it states that the CIA detention program shall be in line with the Geneva Conventions and that only prisoners associated with al Qaeda and the Taliban are to be “enrolled” in the program thus providing Geneva protections to only those who are not eligible for it. The order then quickly scraps more or less any provision that demands that the detention program shall be in line with Geneva and only contain detainees with association to al Qaeda or the Taliban. Leaving a detention program that can detain anyone – except U.S. citizens – and presumably torture them as long as the interrogation techniques and the program is deemed safe and the detainees are afforded the basic necessities of life. This detention program is remarkably similar to the regime that already was in place before the executive order was issued. The only new provision provided by the order seems to be a demand that the interrogators receive appropriate training. If that truly is the intention of the executive order, which seems remarkable at best, then it could have been done a lot easier and straight forward. The quotation from Philip Zelikow in the *New York Times* article above, saying that the order represented a more moral and legal direction, does not make much sense when reading the executive order, because it would be hard to argue that the order represents a break with earlier policy. However reading the *New York Times* article and Philip Zelikow’s quote they serve as an indication that many of Bush’s critics actually believed that the order represented a break with policy. Provided this is the case one can argue that Philip J. Cooper’s example of “symbolic orders” discussed in Chapter 4.2 fits very well with the analyzed order. Some of Bush’s critics seemed pleased with the order, but it did not provide anything new in practice. Not everyone was pleased with the issuance of the executive order, however, as on July 26, 2007 – six days after the order was issued – then Democratic senator from Illinois, Barack Obama spoke out against it. Obama criticized the order for being “an effort to obfuscate and avoid accountability on issues of vital importance to this country’s well being.”⁵⁰ Obama continued:

I am deeply concerned that President Bush may now be trying to reopen the door to cruelty that Congress shut [with the DTA]. While the Executive order [sic] appears to rule out unlawful treatment, the administration has said that the order allows the CIA to resume at least some elements of its “enhanced interrogation” program, and to use methods beyond those that our military employs. The administration still refuses to rule out torture techniques such as waterboarding.⁵¹

Obama’s concerns are the same as this thesis argues; that the order seems to be an attempt to confuse critics and continue the controversial policies, rather than an attempt to change policies.

4.4 The Supreme Court Addresses the Military Commissions Act

The Supreme Court eventually addressed the MCA on June 12, 2008, when the Court delivered its opinion in *Boumediene v. Bush*. The case was brought to the Supreme Court on behalf of several plaintiffs, all enemy combatants held at Guantanamo Bay, Cuba. The petitioners contested the decision that they did not have the right to habeas corpus, as decided by the DTA and the MCA.⁵² In addressing the question Justice Kennedy wrote the majority opinion of the Court with Justices Stevens, Souter, Breyer and Ginsburg concurring. In the 5-4 decision the Supreme Court found that the suspension of any court’s jurisdiction to hear writs of habeas corpus, or any other action against the United States from enemy combatants as provided for in Section 7 of the MCA⁵³ was unconstitutional, and in turn that Section 7 of the MCA was unconstitutional, and that the section of the DTA setting up Combat Status Review Tribunals⁵⁴ was an inadequate substitute for the right to habeas corpus.⁵⁵ The Court also found that the Guantanamo Bay base, though not sovereign territory of the United States was under the direct control of the United States and that the territory was not exempt for the U.S. Constitution despite the fact that it was outside the United States, therefore the persons detained at the detention facilities could not be stripped of their rights under the U.S. Constitution.⁵⁶ The administration’s assertion that the base at Guantanamo was outside the “reach” of the U.S. Constitution was rejected by the majority opinion of the Court. In closing Justice Kennedy indirectly criticized President Bush and his continued insistence that any infringement on the executive branch’s powers in a time of war would weaken the President’s ability to conduct the war and keep the country safe:

Our opinion does not undermine the Executive's powers as Commander-in-Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers

structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ [of habeas corpus] is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.⁵⁷

Kennedy touches upon a vital point, not only in relation to the balance of power between the branches, but also on the fate of the enemy combatants being held at Guantanamo Bay and elsewhere. The MCA seemed to have institutionalized the principles of the unitary executive, but Kennedy's words above serve as a reminder of how important the separation of powers is within a democratic government. By reinstating the enemy combatants' right to seek habeas corpus relief from federal courts, the Supreme Court provided them with the Constitutional rights the Bush administration had withheld from them for several years. The quoted passage above also serves as a reminder that even though the enemy combatants were determined to have habeas rights, they might not succeed in their challenge. What the Kennedy quotation and the majority opinion in *Boumediene v. Bush* do is to remind the reader and the administration that no matter how "evil" or guilty a person is, a democracy does not remove that individual's rights of due process of the law, after all that right is included twice in the Amendments to the U.S. Constitution, in both the Fifth and the Fourteenth Amendments.

The *Boumediene* verdict put an end to the question of whether the enemy combatants had habeas corpus privileges under the U.S. Constitution. The verdict came at a time when George W. Bush was moving towards lame-duck status as well. The primary season of the 2008 election was over, and the Republican and Democratic nominees had taken over the political focus to a large degree. Having been struck down by the Supreme Court in both *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, the administration had lost on two vital fronts, both on trying enemy combatants by military commission and on withholding habeas protections from them. Even though the MCA had been passed, the controversies surrounding its passing and the eventual decision from the Supreme Court that the Act was unconstitutional ended the matter.

The verdict in *Boumediene* is the final stage of the policy process regarding the status, treatment, and trial of the enemy combatants, analyzed in this thesis. The tug-of-war which began with the DTA in December 2005 came to an initial end in June 2008 when the Supreme Court found the MCA unconstitutional. In January 2009, two days after Barack Obama had taken office the majority of Bush's policy choices, and definitions analyzed in this thesis was repealed by two executive orders, these are discussed in the next chapter.

Notes to Chapter 4

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- ¹ Howard Ball, *Bush, the Detainees, and the Constitution: The Battle over Presidential Power in the War on Terror*, (Lawrence: University Press of Kansas, 2007), 230.
- ² *Ibid.*, 231-232.
- ³ *Ibid.*, 231.
- ⁴ Executive Order 13440 – Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, (July 20, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=75569> (Accessed April 9, 2009).
- ⁵ Carl Hulse and Kate Zernike, “Legislation Advances on Terrorism Trials,” *New York Times*, September 28, 2006, <http://www.nytimes.com/2006/09/28/washington/28detain.html> (Accessed April 9, 2009).
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ David Mitchell, *Making Foreign Policy: Presidential Management of the Decision-Making Process*, (Aldershot: Ashgate, 2005), 42 in notes.
- ⁹ Kate Zernike, “Senate Approves Broad New Rules to Try Detainees,” *New York Times*, September 29, 2006, <http://www.nytimes.com/2006/09/29/washington/29detain.html> (Accessed May 3, 2009).
- ¹⁰ *Ibid.*
- ¹¹ *Ibid.*
- ¹² For the 2006 midterm election results see for instance CNN’s website at: <http://www.cnn.com/ELECTION/2006/> (Accessed April 9, 2009).
- ¹³ Chris Dodd, “Dodd Introduces Effective Terrorists Prosecution Act; Brings Terrorists to Justice, Honors America’s Good Name,” on *Chris Dodd’s Senate website*, November 16, 2006, <http://dodd.senate.gov/index.php?q=node/3661> (Accessed April 9, 2009).
- ¹⁴ Associated Press, “Court overrules Bush ‘enemy combatant’ policy,” *MSNBC.com*, June 11, 2007, <http://www.msnbc.msn.com/id/19172214/> (Accessed April 9, 2009).
- ¹⁵ *Ibid.*
- ¹⁶ Peoria Journal Star, “Our View: At long last, prisoner EC#2 will get his day in court,” *Peoria Journal Star*, March 5, 2009, <http://www.pjstar.com/opinions/x1714519737/Our-View-At-long-last-prisoner-EC-2-will-get-his-day-in-court> (Accessed May 1, 2009)
- ¹⁷ Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*, (Princeton: Princeton University Press, 2001), 4.
- ¹⁸ The collection of executive orders can be found here: http://www.presidency.ucsb.edu/executive_orders.php (Accessed April 12, 2009).
- ¹⁹ Mayer, *With the Stroke of a Pen*, 70.
- ²⁰ See the University of California’s collection for George W. Bush in 2001 at http://www.presidency.ucsb.edu/executive_orders.php?year=2001&Submit=DISPLAY (Accessed April 12, 2009).
- ²¹ Mayer, *With the Stroke of a Pen*, 70.
- ²² Philip J. Cooper, *By Order of the President: The Use & Abuse of Executive Direct Action*, (Lawrence: University Press of Kansas, 2002), 39.
- ²³ *Ibid.*, 55.
- ²⁴ *Ibid.*, 61.
- ²⁵ *Ibid.*, 69.
- ²⁶ Mark Mazzetti, “Rules Lay Out C.I.A.’s Tactics in Questioning,” *New York Times*, July 21, 2007, <http://www.nytimes.com/2007/07/21/washington/21intel.html> (Accessed April 9, 2009).
- ²⁷ *Ibid.*
- ²⁸ *Ibid.*
- ²⁹ Executive Order 13440, paragraph 1.
- ³⁰ United States Code Title 3, Chapter 4, § 301. http://www.law.cornell.edu/uscode/uscode03/usc_sec_03_00000301----000-.html (Accessed April 9, 2009).
- ³¹ Executive Order 13440, Section 1(a).
- ³² *Ibid.*, Section 1(a)
- ³³ See section 1006 (a)(1) of The Detainee Treatment Act <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php> (Accessed April 10, 2009).
- ³⁴ Executive Order 13440, Section 1(b).
- ³⁵ Ball, *Bush, the Detainees, and the Constitution*, 231.
- ³⁶ Arthur M. Schlesinger, *The Imperial Presidency*, (Boston: Houghton Mifflin, 1973).

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- ³⁷ Executive Order 13440, Section 2(c).
- ³⁸ Ball, *Bush, the Detainees, and the Constitution*, 230.
- ³⁹ Executive Order 13440. Section 3(a).
- ⁴⁰ *Ibid.*, Section 3(b)(i)(A).
- ⁴¹ *Ibid.*, Section 3(b)(i).
- ⁴² *Ibid.*, Section 3(c).
- ⁴³ *Ibid.*, Section 3(c)(ii).
- ⁴⁴ *Ibid.*, Section 3(b)(i)(C).
- ⁴⁵ *Ibid.*, Section 3(b)(i)(E).
- ⁴⁶ *Ibid.*, Section 3(b)(i)(F).
- ⁴⁷ The only point concerning torture explicitly mentioned by Bush is a point which only prohibits treatment comparable to torture.
- ⁴⁸ *Ibid.*, Section 3(c)(iii-iv).
- ⁴⁹ *Ibid.*, Section 5(a).
- ⁵⁰ Congressional Record - Senate, 2007, page S10142, http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10142&dbname=2007_record (Accessed April 30, 2009).
- ⁵¹ *Ibid.*, paragraph 5 of Obama's argument.
- ⁵² Justice Anthony M. Kennedy wrote the opinion of the Court in *Boumediene v. Bush*, 553 U.S. ____ (2008), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-1195#opinion1> (Accessed April 12, 2009)
- ⁵³ Ball, *Bush, the Detainees, and the Constitution*, 231-232.
- ⁵⁴ The Detainee Treatment Act 2005, Section 1005.
- ⁵⁵ *Boumediene v. Bush*, 553 U.S. ____ (2008).
- ⁵⁶ *Ibid.*
- ⁵⁷ *Ibid.*

5.0 Conclusion

The aim of this thesis has been to show how much power lies in the power to define, and how George W. Bush and his administration used their defining powers to increase executive power and shift the balance of power between the branches. The thesis also aimed to show how the administration used its defining powers to create a whole new category of prisoners of war, replacing all other categories, and redefine torture in order to avoid prosecution for using “enhanced interrogation methods.” By analyzing four central documents from the policy process regarding the status, treatment and trial of the prisoners taken in the War on Terror, and the context the documents were created in, the thesis has shown that the administrations made extensive use of its defining powers with significant consequences.

The thesis also intended to test three different theories regarding the presidency to the presented cases to see if any of the theories could provide further insight into the policy making process or explain why the policy outcomes turned out as they did. The most important theory turned out to be Christopher S. Kelley’s theory of “the unitary executive,” and how that has influenced the Bush presidency,¹ which proved central for understanding the policy choices Bush made. The two other theories are Irving L. Janis’ theory on groupthink in the policy-making process and David Mitchell’s theory on how the policy-making process is managed by the President. Both theories helped shed additional light on how some of the decisions were reached, but the two latter theories proved to serve more as supporting arguments to the investigation into the unitary executive for the purpose of this thesis.

This conclusion shows how the Bush administrations used its defining powers in three different policy areas, redefining presidential power, removing Geneva III protections and due process rights by creating enemy combatants, and what constituted torturing the enemy combatants. The three areas are discussed separately beginning with the expansion of presidential powers. The unitary executive theory proved to be intrinsically connected to the redefinition of presidential powers, and the theory is discussed in the first part of this conclusion. The conclusion then moves on to show how the administration removed Geneva III protections, and finally how the administration redefined torture. After the defining powers have been discussed, this conclusion applies the final test of the two theories on presidential policy making, before looking at some of the aftermath of the Bush administration’s policies, and what has happened after Barack Obama took office.

5.1 Redefining Presidential Power – the Unitary Executive

By institutionalizing the principles of “the unitary executive” in the executive branch the Bush administration succeeded in increasing presidential powers and prerogatives. The administration’s insistence on adhering to and making use of unitary executive principles was in itself a defining power which it turns out was used with great success from the administration, especially for shifting the balance of power in government.

The internal memos analyzed in Chapter 2, show how the Bush team redefined presidential power to include the power to interpret and even suspend treaties, such as Geneva III, on behalf of the nation and without Congressional consent. The opinion expressed in both memos serves as clear examples of “coordinate construction,” which is one of the most central foundations for “the unitary executive theory,” according to Kelley. The Bybee Memo opined that the president had the unilateral power to interpret and suspend treaties at his discretion, and cited Article II, Section 2b of the United States Constitution as the source of that power. The relevant article of the Constitution says: “He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur,” nowhere else in Article II of the U.S. Constitution are treaties mentioned, and Bybee’s reading of the Article seems dubious to a critical reader. It is possible that Bybee’s reading of Article II, Section 2b incorporates two other clauses of the U.S. Constitution, the Take Care Clause (Article II, Section 3), “he shall take care that the laws be faithfully executed,” and the Supremacy Clause (Article VI, b), “this Constitution, and the laws of the United States (...) and all treaties made, or which shall be made (...) shall be the supreme law of the land.” The traditional reading of the Supremacy Clause is that United States federal law supersedes any form of treaty or international law, meaning that if these two clauses are included in the reading of Article II, Section 2 b, along with the principle of coordinate construction, it is possible to argue that because the President shall “take care that the laws be faithfully executed,” and that federal law supersedes international law, the president has the right to interpret international treaties – in this case Geneva III – as being invalid for the United States if he finds that Geneva III would be in conflict with United States federal law. Whether Bybee’s reading and subsequent opinion that the President has unilateral suspension power of any treaty, includes the Take Care -, and Supremacy Clauses is not made clear in the memo, and Bybee does not express the opinion that Geneva III is in conflict with U.S. federal law, making Bybee’s opinion on behalf of the Office of Legal Counsel unconvincing. Even though the Take Care Clause may be vaguely worded, it does not provide

for a unilateral interpretation and suspension power of treaties without Senatorial consent. Article II, 2b, explicitly mentions, twice, that the conduction of treaties must be done with the advice and consent of the Senate and Bybee's reading is tailored to fit what the President wanted, while at the same time expanding presidential powers to such a degree as to make the Senate superfluous in foreign relations. The findings provided by this thesis indicate that Bybee's definition, or rather creation, of new presidential powers rests exclusively on a unitary executive reading of the U.S. Constitution.

Having acted relatively unchecked for two years – from the time the memos were written in January 2002 – the Bush administration faced strong criticism when the prisoner abuse in Abu Ghraib prison in Iraq became known in April 2004. When evidence that additional prisoner abuse had occurred in Afghanistan and at Guantanamo Bay emerged, Congress responded by passing the Detainee Treatment Act in December 2005 with the intention of increasing Congressional oversight, keeping a rein on the executive branch, and ensuring that no further prisoner abuse would occur. Using his interpretative and defining powers, President Bush, nullified the entire Act in three sentences by a signing statement to the bill, which is analyzed in Chapter 3. The signing statement decided that Congress would not have oversight over the detention and interrogation process, as the DTA says, or have the ability to serve as a check on the executive because it would be an infringement on the unitary executive branch. Though Bush did not say so directly, his signing statement says that he will read the DTA “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”² Without specifying where in the Constitution this authority is granted the President, Bush interprets the Constitution to grant him the power in the same way Bybee found that the Constitution granted the President unilateral “suspension powers.” Additionally the signing statement – which is another commonly used tool of the unitary executive according to Kelley – argued that the federal judiciary would not have jurisdiction to enforce the Act, nor hear writs of habeas corpus from enemy combatants. The signing statement serves as additional proof that the administration continued to redefine not only executive powers, but even those of the other branches. A unilateral definition of the federal courts' jurisdiction by another branch of Government creates a very disturbing precedent and a Constitutional problem regarding the system of checks and balances. If the executive branch, as Bush argues in his signing statement, has the power to define which cases the courts are allowed to hear, as well as the power to rebuff any Congressional “infringements” on the executive, there does not seem to be a need for checks and balances as the executive branch effectively relegates the other branches to vassals and creates a system in

which the “royal” unitary executive sits on top issuing decrees and defines what the others can and cannot do. Such an accretion of power within one branch is not only problematic in a constitutional democracy, but strongly warned against by one of the founding fathers, former president James Madison, in *Federalist No. 47*: “the accumulation of all powers, legislative, executive, and judiciary, in the same hands (...) may justly be pronounced the very definition of tyranny.”³ Labeling George W. Bush as a tyrant may be a bit too harsh, but by insisting on the principles of the unitary executive, the Bush administration expanded the executive power at the cost of the two other branches of government significantly, as the expanded powers included coordinate construction, or executive judicial review, the power to decide the courts’ jurisdiction, and the ability to ignore Congress. If not a tyrant in a traditional understanding of the word, it may be possible to argue – using James Madison’s words – that the Bush administration’s insistence upon defining the executive as unitary made President Bush into a “constitutional tyrant” ruling over the other branches of government. The Supreme Court did not agree to the definitions the administration insisted upon, however.

Having used his signing statement to the DTA to dispose of Congressional attempts to rein him in, President Bush’s intended regime of trying enemy combatants by military commissions was struck down by the Supreme Court in 2006 when, in *Hamdan v. Rumsfeld*, the Court found that the regime was unconstitutional as long as the administration did not get Congressional approval. The Supreme Court also addressed the administration’s opinion that the courts did not have jurisdiction to hear submissions of writs of habeas corpus from enemy combatants, rejecting the argument made by Bush’s signing statement as unpersuasive. The Supreme Court’s opinion in *Hamdan* was the first time the unitary executive approach had failed the Bush administration in the War on Terror, and he was forced to ask Congress to continue with his policy. This was achieved in a rushed passing of the controversial Military Commissions Act right before the Republican Party lost control over both houses of Congress in the 2006 Midterm Elections. Certain provisions of the MCA further institutionalized the principles of the unitary executive in the U.S. government as the President’s authority to interpret “the meaning and application of the Geneva Conventions,” was included in Section 6 of the MCA.⁴ Section 6 also included a provision saying that the President would issue an executive order interpreting the meaning and application of Geneva III, and that the forthcoming executive order would be “authoritative (...) as a matter of United States law.”⁵

The executive order was issued in July 2007 and seemed, to many of the administration’s critics, to reject the earlier regime of trying and treating the enemy combatants, and replace it with a more legal and morally acceptable one. The executive order

says that the detention program outlined in the memo would be in compliance with Geneva III. The appearance of rejection and reform seems to be just an appearance however, and as this thesis has shown the executive order appears to indicate that the administration had no intention of catering to its critics. The executive order, which was issued more than six years after Bush took office, showed that the administration had held onto its beliefs and refused to back down on several of its controversial policies, this is exemplified by the interview Dick Cheney gave to ABC News in December 2008 as mentioned in Chapter 1 of this thesis.

Having failed with his attempt to remove the courts' jurisdiction to hear writs of habeas corpus submitted by, or on behalf of, enemy combatants in his signing statement to the DTA, President Bush succeeded with the MCA, as the Act does exactly what he attempted to do with his signing statement in the Act's Section 7.⁶ This means that Bush's insistence on defining presidential powers during his first 6 years as President paid off when a Republican Congress accepted the unitary executive principles the administration had advocated, indicating how powerful Bush's defining powers had become at that stage with respect to the balance between the branches of government.

The controversies surrounding the MCA's passing, and the early attempt to amend it after the 2006 midterm elections indicated that the powers given the president by the MCA were not there to stay. Additionally, the judiciary would not accept the new presidential powers, and in June 2008 the 5-4 majority opinion of the Supreme Court struck down the MCA as unconstitutional in *Boumediene v. Bush*, finding both the executive's suspension of the federal courts' jurisdiction and Section 7 of the MCA unconstitutional.

The principles of the unitary executive guided George W. Bush and his administration throughout his presidency, but the increased presidential powers, which were a result of the Presidents interpretative and defining powers, were eventually struck down in Bush's last year as President. The June 2008 verdict in *Boumediene* signifies the beginning of the end for the unitary executive's influence over the U.S. government, at least for now. It is likely that George W. Bush continued to adhere to the principles for the rest of his second term, but by June 2008 his popularity was very low, and his status as a lame duck was confirmed as the nation looked forward to the 2008 presidential election between two of the Bush administration's most vocal critics, John McCain who sponsored the DTA, and Barack Obama who spoke out against Executive Order 13440 in the Senate. Even though George W. Bush ended his presidency without many of the powers he had obtained during his presidency, there is little doubt that his power to define presidential powers, guided by the

unitary executive theory, was of great significance for the United States government in the years between January 20, 2001 and January 20, 2009.

5.1.1 A New Imperial Presidency?

Bush's success in redefining presidential powers was largely due to his insistence on the principles of the unitary executive, and how he chose to run his administration, but there are additional factors which can help in explaining what happened. In *The New Imperial Presidency*, Andrew Rudalevige argues that the expansion of powers by the executive came as a result of the situation presented in the aftermath of the terrorist attacks on September 11, 2001, and that the other branches of government, especially Congress, failed to check the executive.⁷ Rudalevige's argument is that the balance of power shifted back to what it was during the Vietnam War and before Watergate, meaning that the Bush administration increased executive power significantly. The reason for this increase is a combination of the unilateral claims made by the Bush administration, the external event of 9/11, and an "invisible Congress."⁸ The invisible Congress is evinced in part by the lack of presidential vetoes in 2003 and 2004 according to Rudalevige,⁹ but it is important to remember that Bush's extensive use of presidential signing statements lessened the need for vetoes, as Bush could simply state that he would ignore the provisions he disagreed with. For a very considerable part of his presidency, however, Congress went along with these signing statements. There seems to be little doubt that Congress was uncharacteristically timid in the aftermath of the terrorist attacks, in part because disagreeing with the President might be perceived as "unpatriotic," a label which would not sit well with the electorate before the upcoming midterm election in 2002.

The situation which presented itself to the administration after the terrorist attacks was not the excuse the administration needed, however, as Rudalevige argues that: "even before the terrorist attacks of September 11, 2001, the Bush administration asserted a wide range of unilateral claims."¹⁰ The reason for these unilateral claims seems in part to be influenced by what Vice President Dick Cheney perceived as "a constant, steady erosion of the prerogatives and the powers of the president"¹¹ that had occurred during his 35 years in Washington D.C. Knowing that the unitary executive theory was popular in conservative circles, and that Bush had surrounded himself with "neo-cons" who believed that the presidency was "under attack" by the other branches of government, it seems likely that the terrorist attacks only eased the process of redefining presidential powers in line with the principles of the unitary executive,

and that the administration would have attempted to redefine presidential powers regardless of the terrorist attacks.

The erosion of “executive prerogatives” Cheney complained about, and the administration’s attempt to regain these prerogatives through the use of the unitary executive principles strengthens the image of a “royal executive,” or an imperial presidency. Rudalevige believes that we will continue to see aggressive claims to power made by future presidents,¹² but whether that is the case remains uncertain at the time of writing, as Obama’s presidency has just passed its first 100 days.

5.2 Redefining Prisoners of War and Torture

The defining powers employed by the administration not only had dramatic consequences for the balance of power within the United States government, but proved to have significant consequences for the prisoners taken by, or handed over to, the United States military and the CIA in the years after the terrorist attacks on September 11, 2001. The administration was quick to remove any protections provided the prisoners by the Geneva Conventions and shortly thereafter the administration created the term enemy combatant. Initially the administration intended a clear separation between lawful enemy combatants, and unlawful enemy combatants, but the distinction seemed to blur as time went by. The most immediate ramification for the enemy combatants were that the administration argued that they could be held as long as the War on Terror was ongoing, an argument critics interpreted as meaning the enemy combatants could be held indefinitely. Later the choice to “Gitmo-ize” interrogation procedures resulted in several of the enemy combatants being subjected to treatment that constituted torture, or at least treatment which was tantamount to torture, the administration, however, insisted that the treatment was not torture, merely “enhanced interrogation methods.”

5.2.1 Removing Due Process Rights and Geneva III Protections

The memos analyzed in Chapter 2 defined presidential powers to include a unilateral power to determine that any prisoner taken in a theater of armed conflict, or war, could be determined not to be prisoners of war without a status review, as common article 5 of the Geneva Conventions calls for, or input from the judicial branch. The ramifications this increase of presidential powers had for the soon to be enemy combatants were that they would not be

provided with the protections and rights provided by the Geneva Conventions, and the U.S. Constitution. Having ordered that the prisoners taken would be tried by military commissions in the military order of November 13, 2001, Bush removed the prisoners' due process rights they were entitled to in the Constitution. This turned out to have devastating results for several of the prisoners held in the prison facilities at Guantanamo Bay, Cuba, and in secret CIA prisons around the world, as some of the enemy combatants were held in solitary confinement for years without being presented with charges of any crime apart from their status as enemy combatants.

After the administration had created a new status definition for the detainees, having "dug out" a term which critics have labeled as legally meaningless and which had only been used once before in United States judicial history, the administration was able to replace the terms found in the Geneva Conventions – lawful combatant, unlawful combatant, and innocent or civilian – with their brand new definition, a definition which incidentally removed all due process rights and legal protections as long as president Bush used his unilateral power to define the prisoners as enemy combatants.

When Congress tried to set up a system of Status Review Tribunals in the Detainee Treatment Act in 2005, Bush's signing statement discarded the Act, and the Supreme Court had to intervene, in *Hamdan v. Rumsfeld*, in order to compel the administration to ask Congress if it could proceed with trying the enemy combatants by military commission. The result of the administration's cooperation with Congress was the MCA which left the unlawful enemy combatants who were not U.S. citizens in the same situation they had been prior to the *Hamdan* verdict. The MCA also allowed secret evidence, and evidence obtained through coercion – meaning that evidence obtained through "enhanced interrogation methods" would not be disallowed in the military commission trials.

The initial distinction between lawful enemy combatant and unlawful enemy combatant seems to have disappeared as in June, 2007, two separate military commissions on Guantanamo Bay, Cuba, refused to hear the cases of Salim Ahmed Hamdan, the enemy combatant lending his name to *Hamdan v. Rumsfeld*, and Canadian citizen Omar Khadr because the two prisoners had only been defined as "enemy combatants," not "unlawful enemy combatants" by a Combatant Status Review Tribunal.¹³ The military commissions refused to hear the cases because the MCA explicitly stated that "[a]ny alien unlawful enemy combatant is subject to trial by military commission,"¹⁴ and since Hamdan, and Khadr were only determined to be "enemy combatants" the military commissions decided they did have the jurisdiction to hear the cases.¹⁵ Hamdan was eventually convicted of material support for

terrorism and sentenced to an effective sentence of four months in August 2008. He was repatriated to his native Yemen in December 2008 where he would serve the final month of his sentence.¹⁶

The policy choice regarding the prisoners' status was begun in the two memos analyzed in Chapter 2, furthered by labeling the prisoners as enemy combatants, and remained throughout the Bush presidency despite attempts by Congress and the Supreme Court to better the legal standing of the detainees. The main reason for the continued policy was Bush's interpretative and defining powers working at full speed to avoid infringements on the decided upon policy.

5.2.2 Defining Torture

What may have been worst for the enemy combatants was how the administration defined "torture." The Gonzales Memo, analyzed in Chapter 2, opined that "inhumane treatment," as the War Crimes Act prohibits, was vague wording and that it would be hard to predict what treatment would violate this prohibition. At the same time Gonzales said that, if he understood correctly, Bush had decided that the prisoners would be treated humanely, which seems like somewhat of a contradiction to an outsider. What the Abu Ghraib scandal showed was that the prisoners were not treated humanely at all, and the horrifying treatment which emerged in the scandal was from a prison in Iraq, done to prisoners who, likely, were not members of al Qaeda or the Taliban. The treatment inflicted upon prisoners in Abu Ghraib was presumably the result of Donald Rumsfeld's calling for the "Gitmo-ization" of interrogation techniques, indicating that the treatment was going on in the facilities at Guantanamo Bay as well. The Abu Ghraib scandal initiated a debate of whether or not waterboarding constituted torture, but the administration insisted that it did not, nor was it presumably a violation of the U.S. Constitution, which prohibits cruel and unusual punishment. The administration's definition of torture was based on the opinion of the OLC as enunciated in the Bybee Torture Memo where Bybee concluded that

[F]or an act to constitute torture, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.¹⁷

How an interrogator can measure when the intensity of pain he causes reaches what accompanies organ failure or death is not apparent. The Bybee Torture Memo was scrapped by the OLC after the Abu Ghraib scandal, but it was the governing definition for over two years.

The debate of whether waterboarding constitutes torture is still not settled, and as the introduction to this thesis mentions, Dick Cheney does not believe waterboarding is torture while another former Bush official disagrees with Cheney. In an interview with Al Jazeera English, the former Deputy Secretary of State under Colin Powell, Richard Armitage, said that waterboarding was torture.¹⁸ Armitage's opinion is supported by humanitarian organizations like the Human Rights Watch as this thesis has shown. With regard to waterboarding, the Bush administration chose to define the act of pouring water onto a cloth covering a detainee's head to simulate drowning as not constituting torture, not even when used 183 times in one month on the same prisoner, as was done to Khalid Shaikh Mohammed in March 2003.¹⁹ Keeping in mind that not all enemy combatants were innocents, and that some of them, like Khalid Shaikh Mohammed, posed a very real danger to the United States, it still seems unfathomable that simulating drowning on a prisoner at an average of 6 times a day for a month is necessary regardless of the danger the prisoner and the knowledge he possesses, may turn out to pose. There also seem to be evidence that such harsh interrogation methods were unnecessary, as evinced by CIA officials admitting that the CIA detainee Abd al-Hadi al-Iraqi had provided valuable intelligence despite him not being exposed to harsh interrogation techniques, and by experts who argue that torture does not work as described in Chapter 4 of this thesis. There are also examples of torture occurring without the detainee being subjected to one specific treatment, like waterboarding, but rather a series of different treatments that in sum caused severe harm. One such example is the treatment Mohammed al-Qahtani was subjected to, and which a military judge reviewing practices at Guantanamo Bay, Susan Crawford, concluded constituted torture.²⁰ Qahtani was subjected to humiliating treatment and insults for 18-20 hours a day for the better part of two months causing him to be hospitalized two times. Crawford had no illusions about the danger Qahtani presented to the United States, as she was certain that he would have contributed to the September 11 terrorist attacks had he not been refused entry into the United States. Despite the danger Qahtani posed Crawford refused to refer Qahtani's case for prosecution because her conclusion was that he was tortured during interrogations.²¹

Seemingly unperturbed by the controversies caused by the Abu Ghraib scandal, President Bush discarded former prisoner of war and torture victim John McCain's attempt to

put an end to the maltreatment, when using his signing statement to the DTA to nullify the Act. The reports of maltreatment that surfaced during the Abu Ghraib scandal indicated that some prisoners were raped during interrogations,²² but the administration and Congress were still able to include a provision in the MCA rejecting that rape constituted torture. This signifies that the administration held an extremely narrow definition of torture, and was more concerned with “actionable evidence,” than the prisoner’s well being. President Bush’s Executive Order, analyzed in Chapter 4 of this thesis, seemed to cater to the administration’s critics with regard to the treatment the enemy combatants were subjected to, but this thesis has shown that not everyone was pleased with the order, nor does it seem that the order was intended to actually change policy in any significant way.

Whether or not Bush’s definition of torture was “correct” or not does not really matter in the end, as the consequences for the enemy combatants were the same. By using his defining powers the President of the United States decided that the prisoners taken in the War on Terror would lose all the protections the Geneva Conventions normally would have provided. The prisoners lost their due process rights, some were held without charges for several years – often in isolation with their only human contact being with their interrogators – some were subjected to humiliating and harmful treatments causing them to need hospitalization, and some were waterboarded on a daily basis over several weeks. There is no doubt that the power to define had extremely harmful consequences for many prisoners taken in the War on Terror whether they were dangerous or not.

5.3 Groupthink and the Advisory Systems Framework

In addition to testing the unitary executive theory this thesis tests two other theories on policy making to see if they can shed light on the policy-making process analyzed here. Irving L. Janis’ theory on groupthink provided a degree of understanding with regard to how the policy making group was influenced by its members in order to achieve concurrence regardless of the policy result. David Mitchell’s Advisory Systems Framework provided some insight as well, but to a much smaller degree than the unitary executive and groupthink. The main use for Mitchell’s theory proved to be as an addendum to explaining the degree of groupthink found in the analysis. The two theories are similar in how they both discuss the lack of conflict, and presence of a concurrence-seeking mentality within the policy making group, which causes the two theories to reinforce one another to a degree in spite of the fact that their intended conclusions are different.

Several of the symptoms of groupthink Janis' lists were found in the documents analyzed in this thesis. All of the different types of symptoms Janis lists, overestimations of the group, closed-mindedness, and pressures towards conformity were present. Chapter 2 indicates that there was a pressure to conform to the policy President Bush had decided upon, though there is not evidence that the pressure was applied directly to the dissenters in the State Department, but rather by Gonzales relegating the opposing views making the dissent less apparent. Gonzales relegation of Powell's dissent is also an example of Mitchell's argument for how a formal system in ASF works – that conflict is either discouraged, or takes place on a level below the president. The policy outcome produced by the Bybee and Gonzales memos conforms to what Mitchell calls a dominant-subset solution, meaning that the conflict takes place on a level below the President, in this case between the Department of Justice and the Department of State, before the conflicting opinions are presented for the president to make the final decision.²³ Gonzales presents both the DOJ's original opinion from the Bybee Memo, and Colin Powell's dissent, but he gears his own opinion towards the policy choice the President had already made, in an attempt to appeal to the President's preference.

The most obvious symptoms of groupthink in the Gonzales memo is the unquestioned belief that the policy Bush has chosen is the right thing to do, causing the administration to seemingly ignore the moral and ethical consequences of the choice. Even though Gonzales considers Powell's dissenting opinion, he concludes that the dissent is not correct, and what the President has chosen is unproblematic, because Bush has stated that the prisoners will be treated humanely. This belief seems to remain within the administration throughout the policy process as the administration continued its insistence on non-application of Geneva III, that the enemy combatants had no due process rights, and the indirect argument that the administration could treat the enemy combatants any way they pleased since what was done to the combatants was not torture. The different documents analyzed in this thesis do not indicate that there were no discussions within the administration regarding the morality of what they were doing, and it is likely that such discussions took place, but the final policy outcome was never changed in spite of attempts by Congress and the Supreme Court to halt the administration and criticism from human rights organizations. George W. Bush promoted himself as a moral leader with Christian values, and it seems unlikely that a leader who put so much emphasis on morals and whose favorite philosopher is Jesus Christ, would put his name to policies he saw as immoral. That makes it more likely that the administration believed what they did was necessary and moral, in order to protect the United States from the evil terrorists

held by the military and the CIA. If that is the case then another symptom of groupthink is present – the stereotyping of the enemy as too evil to warrant a negotiation of policy. The symptom is present in Gonzales' memo where Gonzales believes that al Qaeda and the Taliban will not adhere to their Geneva III obligations, and the policy outcome on enemy combatants indicate that the belief remained throughout the Bush presidency.

Another indication of groupthink is that President Bush replaced two of the most polarized figures in his administration during his second term. By replacing Colin Powell with Condoleezza Rice, and Donald Rumsfeld with Robert Gates he got an administration that would be more likely to agree, thus reinforcing group consensus. David Mitchell describes several early conflicts between Powell and Rumsfeld during Bush's first term²⁴ and by replacing them Bush conforms to Mitchell's assertion that conflict was discouraged within the Bush administration. One may argue that replacing Powell caused the policy process to conform to a final symptom of groupthink indirectly, as Janis includes a point in which the group may direct pressure on a member who does not conform to the group's stereotypes and illusions.²⁵ However this may also be an example of "conceptual stretching," as warned against by Mitchell, because it is hard to argue that directing pressure on a member of the group, and replacing said member amounts to the same thing.

Having found a number of the symptoms Janis lists as being needed to conclude that groupthink occurred, this thesis needs to test the findings against the numerous prerequisites Janis demands. When asking the four key questions needed to conclude that groupthink occurred, this thesis can not answer with an affirmation to all of them. First, one of the key questions is whether the antecedent conditions were present, and this thesis has shown that the antecedent conditions for groupthink can not readily be said to have been present in the policy process. Secondly, if Mitchell is to be believed, the final say in the policy process belonged to the President having been presented with the available options, so it is the President and not the group members who essentially made the decisions, this also conforms to the unitary executive as Kelley's theory states that it stems from the belief that the President must have complete control over the executive branch. Third it is not readily apparent whether the policy process was influenced by what Janis calls defective decision-making, though it may be argued that there was an incomplete survey of alternatives, or a failure to reappraise rejected alternatives, this thesis can not conclude that the policy-making procedures were defective. The group members and decisions made in the policy process may not have been perfect, as the results show, but to call the process defective, using Janis' list of symptoms for defective decision making would be incorrect in the context of this thesis. The final key question Janis

asks is whether one can find symptoms of groupthink, something that this thesis has done, but as this is the only key question that can be answered positively it is likely that Janis would argue that the policy making process regarding the enemy combatants was not a victim of groupthink. What can be argued however is that the unitary executive influenced the Bush administration to such a degree that the symptoms of groupthink, and the way Bush managed the decision making process may have been results of how much merit George W. Bush afforded the unitary executive. Whether one can say that the policy making process was influenced by a degree of groupthink, or that it was influenced to some degree by groupthink, can be argued. If one applies the strict standards Janis outlines, the answer would be that they were not, but there is no doubt that the policy making process was influenced by a concurrence-seeking mentality.

5.4 Aftermath: From Bush to Obama

On January 15, 2009 President George W. Bush held his last speech as president to the nation, and in his farewell address he spoke about how there had been debate about many of his decisions, but said there could be little debate about the results. "America has gone more than seven years without another terrorist attack on our soil,"²⁶ said Bush and continued "[a]round the world, America is promoting human liberty, human rights, and human dignity."²⁷ The analysis provided in this thesis shows that the promotion of human rights and dignity may not be as obvious as Bush says. The enemy combatants were not treated with respect to their rights or dignity, and the pronouncement may sound hollow to the critics of the Bush administration. Bush's argument that the results of his policies were successful since there have been no new terrorist attacks on the United States is a logical fallacy, as it is impossible to prove that something would or would not have occurred had he decided to avoid torturing enemy combatants and provided them with the rights many of them were entitled to. There have been no new terrorist attacks, but there have not been any proof that it was necessary to use waterboarding on Khalid Shaikh Mohammed 183 times to prevent a terrorist attack either. Dick Cheney intends to counter that argument however, as he called for the release of classified memos detailing the success of the interrogation process, to help the public understand how important the intelligence gathered was for the United States.²⁸ Until this is done the administration's critics is unlikely to judge the Bush legacy any differently than this thesis does.

Barack Obama ran an election campaign based on two central keywords, ‘hope’ and ‘change,’ and his landslide victory in the 2008 election provided him with the mandate for change he needed. In his inaugural address he directed a stab at his predecessor saying:

As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.²⁹

President Obama clearly believed that the policies the Bush administration had enacted were in direct conflict with the ideals of the United States, and that they were not necessary in order to keep the country safe. He followed up on his point only two days after his inauguration when he signed two executive orders which reversed every single policy choice, and legal interpretation the Bush administration had made after the terrorist attacks on September 11, 2001. The first executive order called, “Executive Order 13491 - Ensuring Lawful Interrogations,” revokes Executive Order 13440, which is analyzed in chapter 4 of this thesis, and every executive directive, order and regulation, inconsistent with Executive Order 13491, issued between September 11, 2001 and January 20, 2009.³⁰ The second order Obama issued was “Executive Order 13492 – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities.”³¹ The executive order calls for an immediate review of all the detainees in the facilities at Guantanamo Bay,³² and halts all trials by military commissions which are ongoing under the MCA until this status review is complete.³³ The order also affirms that all current detainees at GTMO have a constitutional right to submit a writ of habeas corpus,³⁴ calls for the closure of the detention facilities at GTMO within one year of the President signing the executive order,³⁵ that the detainees will be transferred to their home countries, a third country, another United States detention facility, or released depending on their review,³⁶ and that the detainees shall be afforded all the protections provided by the Geneva Conventions.³⁷ In addition to the two executive orders the Obama administration has scrapped the term “enemy combatant,” according to the Department of Justice.³⁸ It is staggering how easily President Obama overturns the policies of the Bush administration simply by issuing two executive orders. This is another indication that the power of definition may have far reaching consequences, by defining the old policies as wrong, and employing his own definition, Obama reversed almost everything Bush’s and his administration have done with respect to interrogation programs and the enemy combatants.

Knowing that Obama ran his campaign on a message of change, the reversals of Bush's policies are unsurprising as Obama needed to make a clear distinction between the old administration's policies and his own, but they are not the only changes which have occurred since Obama took office. Secretary of State Hillary Clinton has said that the term "War on Terror" is no longer used in Obama's administration,³⁹ and the CIA has announced that it will close down its secret prison facilities around the world.⁴⁰ In the months after Obama took office other former Bush officials have spoken out against the former regime. As described above, former Deputy Secretary of State Richard Armitage said that he believed waterboarding constituted torture, and in March 2009 Lawrence B. Wilkerson, the former Chief-of-staff to Secretary of State Colin Powell, revealed that many of the detainees held at Guantanamo Bay were innocent, but they were kept in detention in the hope that they knew something of importance, regardless of their innocence.⁴¹ If what Wilkerson says is true, the announcement Bush made in his farewell address that the United States was promoting human rights, liberty and dignity is an outright lie. It is interesting to note, however, that several of the ex-officials who now speak out against the administration were employed in the State Department under Colin Powell, who was the lone dissenter early in the policy process. Even if this thesis is unable to conclude that groupthink occurred, it can say with a fair amount of certainty that even if groupthink had occurred, the State Department was not involved in it.

The most recent development regarding the MCA came in March 2009, when a new bill was introduced in the House of Representatives, the "Terrorist Detainees Procedures Act of 2009" (H.R. 1315 of the 111th Congress), sponsored by Adam Schiff (D-CA) will if its passed repeal the MCA.⁴² At the time of writing the bill has only gotten as far as being referred to committee, but if the bill eventually succeeds another piece of Bush's controversial policy will be reversed.

5.5 Epilogue – Report by the Senate Select Committee on Intelligence

During the days the conclusion of this thesis was written the Senate Select Committee on Intelligence released a report titled "OLC opinions on the CIA Detention and Interrogation Program."⁴³ The report was begun in August 2008 by then Chairman of the Committee, John D. Rockefeller IV, in an attempt to provide an "unclassified narrative" of the different opinions the OLC issued between 2002 and 2007 with regard to the CIA's detention and interrogation program,⁴⁴ the report was not unclassified until April 17, 2009 by Attorney General Eric Holder.⁴⁵ The report provides an interesting overview of the different opinions

the OLC gave on different interrogation techniques and the legality of their use by the CIA, mentioning among other things how waterboarding was deemed as a lawful technique on July 26, 2002⁴⁶ because it did not inflict physical harm or pain, and therefore would not likely to cause “severe physical pain or suffering,” under Section 2340A of Title 18 of the United States code.⁴⁷ The OLC continued to review different statutes, but continued to conclude that the use of “enhanced interrogation methods,” including waterboarding, was not illegal under the abovementioned statute, the WCA, the Geneva Conventions or the Convention Against Torture. In spite of the OLC’s opinion the report reveals that the CIA only used waterboarding on three prisoners, and discontinued its use in 2004, despite reassurances that it was legal.⁴⁸ This means that waterboarding was discontinued as an interrogation technique by the CIA presumably as a response to the Abu Ghraib scandal, and revelations that waterboarding was used. This does not seem to have dissuaded the top officials in the Bush administration, like Dick Cheney, from continuing to insist that it was legal, and that waterboarding was not torture.

The end of the report gives an overview of the developments of the law on interrogation practices mentioning several of the pieces of legislation and Supreme Court cases analyzed and referred to in this thesis, the Detainee Treatment Act, *Hamdan v. Rumsfeld*, the Military Commissions Act and Executive Order 13440, are brought up when discussing the developments the Bush administration made on its interrogation policy.⁴⁹ Without going into great details regarding the different pieces of legislation, but rather concentrating on how the OLC interpreted different types of interrogation, and how the OLC helped in forming the legislation in response to *Hamdan*, the report serves as valuable insight into the policy process regarding the enemy combatants and how they were interrogated. The report may also serve as a starting point for further studies on the subject begun in this thesis, or as the starting point for a more in-depth analysis on how the OLC influenced policies during the Bush presidency.

5.5.1 Ali al-Marri

The final paragraph of Chapter 4.1 mentioned the case of Qatari national Ali al-Marri, and how he was facing a civil trial in Illinois after several years of being held as an enemy combatant. On Thursday April 30, 2009, al-Marri admitted that he was a terrorist and that he was working with al-Qaeda, in the U.S. District Court. He will be sentenced on July 30, 2009, and faces a potential 15 years in prison.⁵⁰

Notes to Chapter 5

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Appendix

Executive Order 13440

“Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”

July 20, 2007

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107-40), the Military Commissions Act of 2006 (Public Law 109-366), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. General Determinations. (a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

(b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Sec. 2. Definitions. As used in this order:

(a) "Common Article 3" means Article 3 of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(c) "Cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3. (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the

meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109-366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109-148 and section 1403 of Public Law 109-163);

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

(ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:

(A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and

(B) likely to be in possession of information that:

(1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or

(2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;

(iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and

(iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

(c) The Director of the Central Intelligence Agency shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:

- (i) safe and professional operation of the program;
- (ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b)(iv) of this order;
- (iii) appropriate training for interrogators and all personnel operating the program;
- (iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and
- (v) compliance with applicable law and this order.

Sec. 4. Assignment of Function. With respect to the program addressed in this order, the function of the President under section 6(c)(3) of the Military Commissions Act of 2006 is assigned to the Director of National Intelligence.

Sec. 5. General Provisions. (a) Subject to subsection (b) of this section, this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(b) Nothing in this order shall be construed to prevent or limit reliance upon this order in a civil, criminal, or administrative proceeding, or otherwise, by the Central Intelligence Agency or by any individual acting on behalf of the Central Intelligence Agency in connection with the program addressed in this order.

George W. Bush
The White House,
July 20, 2007.

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