

# LegalTimes

LAW AND LOBBYING IN THE NATION'S CAPITAL

FEBRUARY 12, 2007

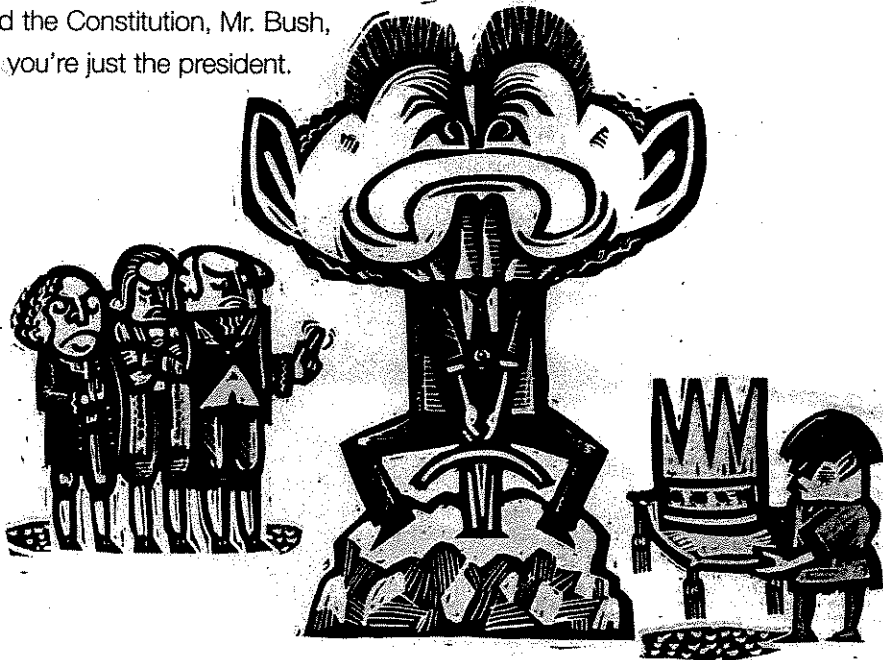
60

Legal Times • February 12, 2007

Points of  
View

## No King Please, We're Americans

If you read the Constitution, Mr. Bush,  
you'll see you're just the president.



BY FREDERICK A.Q. SCHWARZ JR.  
AND AZIZ HUQ

Before 9/11, who would have imagined that the vice president of the United States would publicly endorse the use of waterboarding in interrogating suspects as a "no-brainer"? Or that the administration would exploit the political opportunity of a tight election to run immunity for government torturers through Congress? Who would have imagined that America would be condemned around the world for "disappearing" suspects, sweeping them off into secret prisons for brutal interrogations? That only five years after 9/11 the sympathy expressed around the world for America's tragic losses would have faded? Or that Guantanamo and Abu Ghraib would become, for much of the world, more potent symbols of America than the Statue of Liberty?

It has not been terrorism alone that has changed the nation, but our response to it. A telltale sign: At one time, the *New York Daily News'* recent revelation that the pres-

ident asserts open-ended power to read our mail would have shocked us. Today, it's almost old hat. What once would have been dismissed as outlandish speculation is today the inevitable consequence of an executive branch that purports to stand above the checks and balances of the Constitution.

The president asserts the power once claimed by British kings to set aside the laws of the land. He uses that power to ignore laws banning torture and warrantless wiretapping. But this monarchical presidency makes the nation no safer and breaks faith with foundational constitutional traditions.

The theory of a monarchical presidency, decried by *The New York Times* last month as a return to the "imperial presidency" condemned by Arthur Schlesinger Jr. during the Nixon years, has been used to undergird precisely those policies that the American people would not countenance as open laws. The president thus claims unilateral power to use interrogation practices that amount to torture, to consign citizens to

indefinite detention, and to sift through Americans' mail and telephone calls unchecked by any judge.

Contrary to popular belief, though, the monarchical presidency is not a response to 9/11, but a long-nursed ideological project of a small clique. Vice President Dick Cheney drew from Watergate and its aftermath the lesson that checks on an imperial presidency should be cast aside. In the 1987 minority report on the Iran-Contra scandals, which he authored, Cheney made a remarkable call for "monarchical notions of prerogatives for the presidency." Nearly 15 years later, as the nation reeled from 9/11, Cheney and his allies seized their chance.

### BAD POLICY

Neither the original understanding of the Constitution nor present-day need, however, licenses the unprecedented concentration of power in one branch of government sought by the Bush administration. Leave aside for the moment the fact that a theory of unchecked presidential power breaks faith with our deepest constitutional tradi-

tions of limited government under law. It is also dangerously ill-suited to making counterterrorism policy.

Consider first the practical consequences of the policies justified by this theory of executive power, such as the use of coercive interrogation and "extraordinary rendition" to torturers in Syria or Egypt. These practices have yielded international opprobrium. "The world," former Secretary of State Colin Powell has warned, "is beginning to doubt the moral basis of our fight against terrorism."

This reputational hit has immense consequences for the nation's safety. As surveys conducted by the Pew Global Attitudes Project and others have shown, attitudes toward the United States in Muslim countries, the primary recruiting grounds for al Qaeda, have nose-dived. As then-Defense Secretary Donald Rumsfeld lucidly explained, it does us no good if our counterterrorism policies create more terrorists than they stop. Powerful symbols of American hypocrisy—including Guantanamo and Abu

See *Kawa*, Page 61

Points of View

KING, FROM PAGE 60

Ghraib, bitter fruit of the theory of a monarchical presidency—do precisely this.

Hypocrisy takes its toll among our allies, too. The British House of Lords, the highest court in the land of our closest ally, noted recently in relation to American counterterrorism policy that “the use of torture is dishonorable. It corrupts and degrades the state that uses it and the legal system which accepts it.” Such official condemnation not only signals a much deeper public disdain, but in practical terms makes it more difficult for Prime Minister Tony Blair and company to cooperate with their White House counterparts.

BAD ASSUMPTION

Executive-power mavens often argue that the president and his colleagues have better information than the rest of us, and they should therefore be trusted to make decisions. But policies that flow from presidential unilateralism too often lead to dramatically flawed decisions based on wildly wrong facts or flights of ideological fancy.

Drumming up support for the Iraq War, the president, the vice president, Powell, and Rumsfeld claimed that Iraq and al Qaeda were linked. The evidence, Rumsfeld told the nation, was “bulletproof.” But the evidence came from a senior al Qaeda operative who had been rendered to Egypt for torture. The Defense Intelligence Agency later advised the administration that the suspect’s statement was unreliable. Indeed, we know now that it was untrue.

Executive unilateralism thus allowed the administration to use tools such as coercive interrogation and rendition to generate the evidence it wanted. Then the executive branch used the same unilateralism to limit public and congressional scrutiny of its claims.

Unchecked executive power, in other words, is based on a false assumption that an unchecked executive will govern judiciously. It assumes that bureaucrats and politicians, freed from the need to account for their conduct, will be effective and just. History abundantly proves this wrong. Power without accountability lurches too easily into the loss of innocent lives.

BAD READING

The nation’s Founding Fathers were well aware of this aspect of human nature, that even the best-intentioned men and women can be seduced into error by the allure of being the “decider” in a moment of high tension. It should not be surprising, then, that the theory that the president can break the law flies in the face of America’s founding covenant to be a government of laws, not men. The Revolution was fought to rid America of monarchical powers of the sort the president and vice president have sought to resurrect.

The language and structure of the Constitution makes this clear. In contrast to the terse offices allotted the president, Congress is given the lion’s share of power, including power over military matters. The Constitution even authorizes Congress to “make Rules for Government and Regulation of the land and naval Forces.” The debates at the Constitutional Convention and in the state ratifying conventions that followed also undercut the current administration’s position. Perhaps most harmful to the administration’s claims is Alexander Hamilton’s *Federalist No. 69*, which sketches an executive with limited authority, neither omnipotent nor invulnerable to check by judiciary and legislature.

Professor John Yoo, formerly with the Bush Justice Department’s Office of Legal

Counsel, has argued that the Framers of the Constitution silently intended to adopt the “unwritten British Constitution’s allocation of powers between Parliament and Crown,” giving the president the British king’s powers to cast aside congressional laws. Set aside the small problem that the American Revolution repudiated the abusive structures of royal rule; the British monarchy had, in fact, been stripped of power to suspend parliamentary laws in the Glorious Revolution of 1688—almost exactly 100 years before the Constitutional Convention.

military and the State Department. And the legal analysis did not account for its inevitable consequence, the handicapping of America’s moral leadership in the world.

BAD LAW

The Constitution’s system of checks and balances, however, ought not to rest on the shoulders of executive-branch lawyers alone. It is up to all three branches to play their constitutionally assigned role.

The Supreme Court has risen to the task in decisions such as *Rasul v. Bush* (2004) and

may have the power and responsibility to rein in an overweening executive branch, but that doesn’t mean it will act wisely.

Throughout history, the task of keeping this republic has fallen not just to the three branches of government, but also to “We the People of the United States.”

The Framers knew that maintaining the Constitution’s system of checks and balances would not be easy. Stepping into Philadelphia sunlight in 1787, Benjamin Franklin was asked by an eager passerby what he and his fellow delegates had wrought—a

Throughout history, the task of keeping this republic has fallen also to ‘We the People.’



Nor has the U.S. Supreme Court, starting with Chief Justice John Marshall, been hospitable to the resurrection of monarchical power in America. From Marshall’s time through to Justice Robert Jackson’s canonical opinion on presidential power in the steel-seizure case (endorsed as “very important” by Chief Justice John Roberts Jr. in his Senate confirmation hearing), there has been no doubt, at least at the high court, that the Founders rejected the model of the British King.

The Bush administration lawyers who concluded that the Constitution gave us a king were relying on internal processes of deliberation and debate that failed. Pivotal memos did not mention key Supreme Court precedents. Political appointees did not seek insight from seasoned professionals in the

*Hamdi v. Rumsfeld* (2004). In June 2006, it delivered a clear rebuke to the administration in *Hamdan v. Rumsfeld*, which invalidated the military-commission system established by presidential fiat in 2001. But the response to *Hamdan* shows Congress’ performance still leaves much to be desired.

In September 2006, President George W. Bush and his allies on Capitol Hill stamped the Military Commissions Act into law. The legislation delegated to the executive unwarranted powers to detain and interrogate suspects outside the rule of law. Rather than acting on the basis of considered debate and a full understanding of the facts, legislators fell over themselves to sign off on a “tough on terror” agenda that broke with our nation’s historically enshrined liberties, most importantly habeas corpus. Congress

republic or a monarchy. “A republic,” replied Franklin, “if you can keep it.”

*Frederick A.O. Schwarz Jr. and Aziz Huq are co-authors of Unchecked and Unbalanced: Presidential Power in a Time of Terror, to be published by the New Press in March. Both work at the Brennan Center for Justice at New York University School of Law. Schwarz served as chief counsel for the Church Committee, a Senate panel that investigated intelligence-gathering operations in the mid-1970s. He was also chief lawyer for New York City and a partner at Cravath, Swaine & Moore. Huq is a 2006 Carnegie Scholars Fellow and clerked at the Supreme Court for Justice Ruth Bader Ginsburg. This article first appeared in The American Lawyer, an ALM publication.*

Covering the Washington Legal Community Since 1978

LegalTimes  
LAW AND LOBBYING IN THE NATION'S CAPITAL

PUBLISHER ANN FELHAM EDITOR IN CHIEF JAMES OLPHANT

EXECUTIVE EDITOR ALISON BETHEL MANAGING EDITOR TOM SCHOENBERG

NATIONAL OPINION EDITOR ELIZABETH ENGDALH

SPECIAL REPORTS EDITOR DEBRA BRUNO ASSOCIATE OPINION EDITOR ROBERT L. ROGERS

CONGRESSIONAL CORRESPONDENT T.R. GOLDMAN NEWS EDITOR BRENDAN SMITH BUSINESS EDITOR ANNA PALMER

REPORTERS NATHAN CARLILE, JOE CREA, ALEXA GARAFALY, COSTA ROEBGLI, JASON MCKLURE, EMMA SCHWARTZ

PHOTO EDITOR DIEGO M. RADZINSKI WEB EDITOR TONY ROSENBERGER

CHIEF COPY EDITOR SCOTT ACHELPOHL COPY EDITOR JENNIFER WYAND CONTRIBUTING LAW EDITORS LAUREN M. BLOOM, JULIE REYNOLDS

EDITORIAL ASSISTANT ATILIA BERRY PROOFREADER MURRAY WHITE INTERNS JONATHAN EMDEN, MICHAEL MARTIN, TIFANY WILLIAMS

ART DIRECTOR TEGIST LEGESSE PRODUCTION ASSOCIATE JENNIFER PARK PRODUCTION ASSISTANT CHRISTINA STRASSER

DIRECTOR OF ADVERTISING CARSON RAUGH HELSPER

LAW FIRM ACCOUNT MANAGER VICTORIA BARNES

DISPLAY ACCOUNT EXECUTIVES DON COOKSEY, ELLEN STERNBERG ACCOUNT EXECUTIVE KRISTIN SHREVER

SENIOR CLASSIFIED ACCOUNT EXECUTIVES BOB LUSKEY, GWEN ROSINSKY ADVERTISING COORDINATOR SHAMEEKA HARRIS

MARKETING MANAGER LAUREN RUBINSTEIN

DIRECTOR OF CIRCULATION GWENDOLYN ECHOLS-JONES

CIRCULATION ASSOCIATE ELAINE FORTE

DIRECTOR OF FINANCE DOUG WALLEN STAFF ACCOUNTANT SHARON JOHNSON-SIMPSON

AMERICAN LAWYER MEDIA WASHINGTON BUREAU

SUPREME COURT CORRESPONDENT TONY MAURO



CHAIRMAN BRUCE WASSERSTEIN PRESIDENT/CEO WILLIAM L. POLIAK SENIOR VICE PRESIDENT JACK BERKOWITZ

SENIOR VICE PRESIDENT GEORGE M. OLSHEAY SENIOR VICE PRESIDENT ALLISON C. NORFHAM SENIOR VICE PRESIDENT STUART M. WILLIAMS

VP/MARKETING PATRICIA CROCKER-FRANCE VP/FINANCE ROBERT KONDRACKI VP/OPERATIONS JOHN W. MASON VP/INFORMATION SYSTEMS IAN MURRAY

Legal Times editorial and business offices: 1730 M St., N.W., Suite 800, Washington, D.C. 20036. (202) 457-0464. E-mail address: roe@legaltimes.com/legaltimes.com. Legal Times is published by ALM Media, Inc. Copyright © 2007 by ALM Properties Inc. All rights reserved. No reproduction of any portion of this issue is allowed without written permission from the publisher. ALM Media Inc., 345 Park Avenue South, New York, N.Y. 10014, (212) 779-7200