erated as an 'unconstitutional suspension of the writ'.[109] The 5-4 judgment has done much to repair the reputation of the judicial branch in the USA and its vindication of the rule of law.

Conclusion

Despite its limitations *A(FC)* will doubtless be added to the lexicon of great statements of principle from the courts in protecting the individual against arbitrary action. It stands beside the *Public Committee against Torture in Israel* case[110] where interrogation techniques based on torture and inhumane treatment were outlawed and where the court noted:

> Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and allow it to overcome its difficulties.

Committee against Torture left open the necessity argument to justify torture which did not apply in that case. Despite its great constitutional resonance, *A(FC)* has left largely unchanged the reliance by 'civilized governments' on intelligence extracted by torture. Indeed, the government according to the judgment of some of the Law Lords would be in denial of a fundamental duty of preserving national security were it to ignore such intelligence. The chances of such evidence being admitted before judicial proceedings in the UK depends upon whether the stringent test of the Court of Appeal in *Othman* is upheld by the House of Lords and on whether the self denying ordinance of the Home Secretary not knowingly to use such material as *evidence* is maintained.[111] The eradication of the wider practice of using such intelligence to survey, investigate, detain and question is beyond the capability of judicial bodies.[112] Indeed the widespread blanket of secrecy which protects intelligence and security would prevent their effective challenge in any representative forum. Life-saving information may be obtained. Is torture a price worth paying in the war

109 *Boumediene* et al. v. *Bush* et al. 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008)

110 *Public Committee against Torture in Israel* v. *State of Israel* (1999) 7 BHRC 31 (Supreme Court, Israel) para. 39.

111 That, said Lord Hoffmann, is a policy, not a rule of law: *A(FC)* para. 90.

112 The use of intelligence obtained by torture puts the efforts by Mr Blair and Mr Brown's governments to extend pre-charge detention in the case of suspected terrorists beyond 28 days into perspective. In *R (Binyan Mohamed)* v. *Secretary of State for Foreign Affairs* [2008] EWHC 2048 and 2100 (Admin) the Divisional Court ruled that the claimant,who was a detainee in Guantanamo Bay and who had been subject to torture, was entitled, subject to any public interest immunity pleas, to documents in the possession of the Foreign Office which were relevant to his trial before the US Military Commission outlined above. This was despite the vehement protests of the US government.

against terrorism – a war that seeks to uphold civilized standards and the integrity of the individual?

7. Bush II's Constitutional and Legal Theory: The Constitution of Emergency between Law and Propaganda

Agustín José Menéndez

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

> The problem is not renegade actors; the problem, frankly, is renegade lawyers.
>
> Philippe Sands debating John Yoo

A. Introduction

This chapter analyses the positive and theoretical aspects of the doctrine of constitutional law put forward by the administration of Bush II since the terrorist attacks of September 11th 2001. The chapter is divided into four parts. First, I claim that Bush II's doctrine of constitutional law can be identified by reference to the four amendments to the positive constitutional law of the United States his lawyers have advocated and relied upon when offering legal advice.[1] It has been claimed that the President can establish in a definitive and final manner who poses a threat to national security and deny her some key constitutional rights; in particular her rights to liberty, privacy, life and physical integrity, as the President can order their indefinite arrest, warrantless surveillance, assassination or torture. Second, I maintain that all these amendments are to be understood as the rather consistent application of Bush II's theory of constitutional law, which affirms that there are two US constitutions (one applicable to 'ordinary' citizens and circumstances, the other to enemies and 'emergency' or 'exceptional' circumstances) and that international norms other than bilateral treaties are not real law. Third, I submit that changes in positive constitutional law and in constitutional theory are underpinned by an eclectic, minimalist and decisionistic theory of law, which denies any structural relationship between law and public reason. The minimalism of Bush II's legal theory accounts for the fact

1 By the phrases 'Bush II's lawyers' or the 'court lawyers of Bush II', I make reference to the main legal architects of the four constitutional amendments described in section I and in particular to David Addington, Alberto Gonzales, James Bybee, Jack Goldsmith, John Yoo and William Haynes II.

that it relies on an 'overlapping consensus' of three different mainstream legal theories (originalism à la Scalia, 'modern' natural law à la Finnis, and pragmatism à la Posner). Fourth, it seems to me that there are very good reasons to take very seriously the consequences of Bush II's constitutional doctrine and theory, but that should not entail considering them as serious legal and political theories. They have been intended as part and parcel of the propaganda effort to transform constitutional practice. This should make us reflect on the structural similarities between Bush II's constitutional and legal theories and the strategic legal advice characteristically provided by the attorneys of mafia dons and by the 'court lawyers' of Fascist states, all of whom area keen on instrumentalising the form of law at the service of raw power.

B. The four constitutional amendments of Bush II

Bush II has tried to alter key aspects of US constitutional law so as to expand executive power to the detriment of other institutions and decision-making process.[2] Such changes have resulted in a constitutional doctrine which seriously infringes the rights to freedom, privacy, physical integrity and life of both non-citizens and citizens, and openly infringes international legal standards.

The four constitutional amendments described below are said to temporary and narrow deviations from ordinary constitutional standards exclusively applicable to 'enemy combatants'. However, it would be wrong to take such characterization at its face value. On the one hand, the affirmation that the 'war on terror' is a 'long war' which will last for at least one generation[3] implies that the changes could be as permanent as formal amendments to the Constitution. On the other hand, the term 'enemy combatant' designates anybody deemed by the President to be a threat to US national security.[4] The vagueness of the standard and the lack of any review whatsoever render fully uncertain who would be fall under the description.

All four amendments are defended on three concurrent grounds, namely: (1) a 'dogmatic' interpretation of the legal texts, based on the search for the 'literal' and 'original' meaning of the provisions; (2) peculiar normative arguments which focus on the morality of acting unmorally under extreme circumstances; (3) prudential arguments, concerning the consequences of interpreting constitutional norms one way

2 The best overall description is to be found in C. Savage, *Takeover* (Boston, Little, Brown & Co., 2007).

3 By declaring 'war on global terror' and defining the scope as to stop and defeat 'every terrorist group of global reach', Bush II clearly indicated that the war on terror was bound to be a very long war. See Address to a Joint Session of Congress and the American People, 20 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

4 A comprehensive analysis of how the category has been defined by the Bush II Administration can be found in P. J. Honigsberg, 'Chasing 'Enemy Combatants' and Circumventing International Law: A Licence for Sanctioned Abuse' *UCLA Journal of International Law and Foreign Affairs* (2007): 1-74.

or the other in the 'post 9/11' world in which we are 'one bomb away' from disaster. While the specific dogmatic arguments employed vary from one amendment to the other, in all cases Bush II's lawyers rely on close readings of the literal tenor of legal provisions and make extensive (and exclusive) use legislative materials, while teleological arguments and systemic interpretation are formally discarded. This results in wider discretion for the interpreter. As regards normative arguments, two are frequently invoked. The first goes that the legality and morality of given acts cannot be determined during emergencies by reference to what positive law prescribes, but by the 'practical' judgment of leaders. In brief, not only *inter armas silent leges*, but *inter armas silent mores*. The second is that the existential threat to the political community posed by terrorism entitles the political community to deny all rights to those (generally, aliens) who make use of such rights to threaten the life of the republic. The typical prudential argument is that the nature of the 'new' terrorist threat requires replacing criminal procedure, with its simultaneous affirmation of liberty to do wrong and retroactive punishment, with 'preemptive' justice, aimed at rendering impossible the commission of the crime. This entails that constitutional rights should be redefined (and weakened) so as to render possible the efficient gathering of information from suspected terrorists.[5]

Before considering Bush II's constitutional amendments in detail, it is important to notice that the radical character of his constitutional agenda stems from the fact that it aims at changing the very content of constitutional law. We are not dealing with unconstitutional acts undertaken in the 'dark side'; what we face is the explicit promotion of the 'dark side' to constitutional normality.[6] There is a world of difference between the two projects.

I. No habeas corpus for enemy combatants

Bush II's first constitutional amendment affirms the inherent power of the President to order the detention of any person (including a US citizen), who has been previously certified as an enemy combatant. The decision of the President to either confine enemies within military facilities in the United States, or order their transfer to a location abroad is final and cannot be reviewed by any other institution or decision-making process.[7] This is the same as denying the privilege of habeas corpus to enemy combatants.

This first amendment is the result of three closely interrelated decisions.

5 Gonzales memorandum of 25 January 2002, available at <http://www.gwu.du/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>, p. 2.

6 Cheney interviewed in Russert's *Meet the Press*, 16 September 2001.

7 See B. Egelko, 'Gonzales says the Constitution doesn't guarantee habeas corpus', *San Francisco Chronicle*, 24 January 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/24/MNGDONO11O1.DTL>.

First, enemy combatants were denied the right of access to a US ordinary court or to a standard military court; instead, they were expected to be brought before a 'military commission', and denied basic legal guarantees.[8] Although the original text of the executive order excluded from its scope US citizens, two of them were later deemed to be enemy combatants and arrested on the sole authority of the President.[9]

Second, enemy combatants were denied the protection of the Geneva conventions, because they were found to be inapplicable to the 'war on terror' as 'quaint' and 'obsolete' norms.[10]

Third, the allegedly more 'valuable' enemy combatants were transferred to 'law-free zones' such as Guantanamo,[11] 'black sites' in Iraq, Poland, Romania, Diego García and Djibouti (among others)[12], or prisons in third countries (Morocco, Syria, Egypt and others, all characterized by their appalling treatment of detainees), in the latter case after being 'extraordinarily rendered'.[13]

All this was advocated on the grounds that the fight against Al Qaeda and other terrorist organizations was a war and thus enemy combatants could be indefinitely arrested until the war ended; and that this was such a radically novel type of war that fundamentally new legal norms should be devised for it, overcoming the quaint and obsolete norms contained in the Geneva Conventions and in the Code of Military Justice.[14] In concrete, Bush II's lawyers denied both that the Fourth Amendment

8 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', Executive Order of 13 November 2001, available at <http://www.presidency.ucsb.edu/ws/index. php?pid=63124>.

9 On Padilla and Hamdi, see B. Ackerman, *Before the Next Attack* (New Haven, Yale University Press, 2006), pp. 24ff.

10 On 18 January 2002 Bush issued an executive order accepting the legal advice put forward by Office of Legal Counsel which denied Geneva rights to enemy combatants (J. Yoo and R. J. Delahunty to W. J. Haynes II, 'Application of Treaties and Laws to al Qaeda and Taliban Detainees', 9 January 2002, available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09pdf>. This was followed by the Bybee memorandum of 22 January 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> and the Gonzales memorandum of 25 January 2002: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

11 See 'Memorandum for William J. Haynes, 'Re: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay' (signed by J. Yoo and P. Philbin), of 28 December 2001, available at <http://www. pegc. us/archive/DOJ/20011228_philbinmemo pdf>.

12 D. Priest, 'CIA Holds Terror Suspects in Secret Prisons', *The Washington Post*, 2 November 2005. Bush II openly admitted the existence of secret prisons on 6 September 2006 (http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html).

13 Legal memorandum by J. Yoo 'The President Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations', 13 March 2002, which remains classified. On the rendition program, see *CIA above the law? Secret detentions and unlawful inter-state transfers of detainees in Europe* (Strasbourg, Council of Europe, 2008); and the 'report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' from the Committee of the European Parliament, 26 January 2007 (A6-9999-2007) available at: http://www.statewatch.org/news/2007/jan/ep-cia-rendition-cttee-report.pdf. See also S. Gray, *Ghost Plane* (New York, St Martin Press, 2006).

14 J. Yoo, *War by Other Means* (New York, Atlantic Press, 2006), p. 36.

provided a universal right of judicial protection and that the Geneva Conventions (especially Common Article III) reflected a mandatory norm of international law. By means of an allegedly literal interpretation of these norms, they concluded that positive US law only granted protections to those who were part and parcel of the political community, from which those aiming at undermining it should be excluded.[15] The Geneva Conventions were only applicable to the community of, one guesses, civilized nations, from which Al Qaeda and the Taliban were excluded (the latter as rulers of a 'failed state', a legal concept used for the occassion).

Judges Advocates General and the State Department expressed their firm disagreement. This explains why it took so long to draft the actual rules governing military commissions. The long saga of decisions of the Supreme Court[16], and the reactions by Congress[17] seem to have resulted in the (at least temporary) reversal of Bush II's first amendment.

II. Warrantless surveillance of enemy combatants

Bush II's second constitutional amendment affirms that the President has the power to order the warrantless surveillance of enemy combatants, and incidentally, of US residents or even citizens. This entails a redefinition of the scope of the right to privacy, as enshrined in the Fourth Amendment as usually interpreted (in particular, on the basis of the rulings of the Supreme Court in *Katz*[18] and *Keith,*[19] and of the 1978 Foreign Intelligence and Security Act).[20]

Bush II's lawyers have argued that the Fourth Amendment only requires that surveillance is conducted in 'reasonable' ways. A court warrant is not the most reasonable way to protect the rights of citizens against state intrusion when it comes to intelligence gathering during a war; reasonableness is then better guaranteed by trusting the President or his Attorney General to take the right decisions.[21] Explicit statu-

15 Ibid., pp. 16, 23 and 33.

16 In particular, *Rasul*, 542 US 466 (2004), *Hamdi*, 542 US 507 (2004), *Hamdan*, 548 U. S. 557 (2006) and *Boumediene* 128 S. Ct. 2229 (2008)

17 The Detainee Treatment Act 2005, 119 Stat 2680, at 2739 (see also the signing statement of President Bush, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> and the Military Commissions Act 2006, 120 Stat 2600.

18 *Katz* v. *U. S.* 389 US 347 (1967).

19 *U. S.* v. *District Court for the Eastern District of Michigan, Southern Division, et al.* 407 US 297 (1972).

20 92 Stat 1783. FISA did not govern physical searches until 1994. See 108 Stat 3423, section 807, at 3443. For the practice before 2001 see A. R. Cinquegrana, 'The Walls (and Wires) have Ears: The Background and the First Ten Years of The Foreign Intelligence Surveillance Act of 1978', *University of Pennsylvania Law Review* 137 (1989): 793-828.

21 President Bush's Radio Address of 17 December 2005, available at: <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>. See also 'Legal Authorities supporting the activities of the National Security Agency described by the President,

tory limitations of the powers of the President (such as those contained in FISA) are to be deemed unconstitutional if they encroach upon his power to do so.

Bush II's second amendment resulted in the Terrorist Surveillance Program started in October 2001.[22] Although it remains a secret program, we know that it affected all communications in and out the United States in which there was 'reasonable basis' to conclude that one of the parties was a member of 'Al Qaeda'. There are good reasons to suspect that the said program was only one among several similar initiatives.[23] For example, there is a wealth of information indicating that the major switches of telecommunications companies were used for surveillance purposes.[24]

The tragicomic events surrounding the re-certification of the Terrorist Surveillance Program in March 2004[25] proved that there were doubts concerning the legality of the program within the administration, only increased after its existence was publicly revealed.[26] But against some odds, Bush II was rather successful in obtaining the endorsement of Congress in the Protect America Act of 2007.[27] In particular, the requirement of a judicial warrant for each specific surveillance operation was substituted by judicial review of the executive guidelines according to which surveillance of foreign intelligence targets 'reasonably believed' to be outside of the United States was to be conducted. This rendered legal surveillance within the United States and of US persons, even citizens.[28] At the time of writing, Congress had just passed a permanent reform of FISA confirming a good deal of such powers

published on 19 January 2006, available at <http://www.usdoj.gov/opa/ whitepaperonnsalegalauthorities.pdf.>

22 J. Risen and E. Lichtblau, 'Bush Lets U. S. Spy on Callers Without Courts', *The New York Times*, 16 December 2005.

23 The most spectacular of which was without doubt the so-called Total Information Awareness program, based on massive mining of major public and private databases. It is surprising how little effort has been made to elucidate the relationship between such plans and intelligence activities realized under the UKUSA Agreement, in particular the so-called Echelon network. See L. D. Sloan, 'Echelon and the Legal Restrains on Signal Intelligence: a Need for Reevaluation', *Duke Law Journal* 50 (2000): 1467-1510.

24 See also the USA today revelations about the government having access to list of phone calls. 'NSA has massive database of Americans' phone calls', USA Today, 5 October 2006. See also the information on the case brought by Electronic Frontier Foundation against AT&T at <http://www.eff.org/nsa/hepting>. The first official acknowledgment of the role played by telecommunications companies can be found in C. Roberts, 'Debate on foreign intelligence surveillance', *El Paso Times*, 22 August 2007.

25 See the definitive account in Savage, *Takeover*, pp. 185-88.

26 For a sample of the scholarly criticism, see C. Bradley, D. Cole, W. Dellinger, R. Dworkin, R. Epstein, P. B. Heymann *et al*, 'On NSA Spying: A Letter to Congress', (2006) 53 *The New York Review of Books*, 9 February 2006, available at: <http://www.nybooks.com/articles/18650#fn1>. It was formally withdrawn in early 2007. See Letter from Attorney General Gonzales to the Senate Judiciary Committee, 17 January 2007, available at <http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf>.

27 12 Stat 552.

28 'Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval', *Harvard Law Review* 121 (2008): 2200-21.

(and granting immunity to the companies which have cooperated in the conduct of domestic warrantless surveillance since 2001).

III. Assassination of enemy combatants

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

There was a rather world-wide consensus on the legal prohibition of targeted assassinations in the late XXth century,[29] Israel being the exception.[30] In particular, the blatantly illegal actions of the CIA during the Cold War exposed by the Church Committee[31] resulted in a further explicit reinforcement of the legal prohibition in the US legal order, through the Executive Orders of Presidents Ford, Carter and Reagan.[32]

Bush II signed a secret intelligence finding in which he authorized selective assassinations a few days after 9/11.[33] The scope of the order was expanded in 2002.[34] By the spring of 2003 the use of targeted assassinations had become fully normalized, as proved by the far from covert attempt to kill Saddam Hussein immediately before the open war in Iraq.[35] Manifold assassinations have been authorized and conducted since, including assassinations as part of covert operations in Iran.[36]

Although it seems that the decision was so quick as not have left time for previous written legal advice, the man who would have provided it, John Yoo, has claimed that the usual interpretation of the ban on assassinations does not apply to the 'war on terror',[37] a new type of conflict in which enemies will not only be killed

29 M. N. Schmitt, 'State Sponsored Assassination in International and Domestic Law' (1992) 17 *Yale Journal of International Law* 609-685.

30 See J. Nicholas N. Kendall, 'Israeli Counter-Terrorism: Targeted Killings under International Law', *North Carolina Law Review*, 80 (2002): 1069-88; K. Eichensehr, 'On target? Israeli Supreme Court and the Expansion of Targeted Killings', *Yale Law Journal* 116 (2007): 1873-82.

31 See Church Committee's report on selective assassinations at <http://www.aarclibrary.org/publib/contents/church/contents_church_reports_ir.htm.>

32 See Executive Order 11905, of 18 February 1976, section 5(9)available at <http://www. presidency.ucsb.edu/ws/print. php?pid=59348>; Executive Order 12036, of 24 January 1978, section 2-305, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=31100>; Executive Order 12333, of 4 December 1981, section 2. 11, available at <http://www. archives.gov/federal-register/codification/executive-order/12333.html>.

33 B. Woodward, 'CIA Told to Do 'Whatever Necessary' to Kill Bin Laden', *Washington Post*, 21 October 2001.

34 J. Risen and D. Johnston, 'CIA Expands Authority to Kill Qaeda Leaders', *New York Times*, 15 December 2002.

35 D. E. Sanger and J. F. Burns, 'Bush Orders Start of War on Iraq: Missiles Apparently miss Hussein', *New York Times*, 20 March 2003.

36 A. Cockburn, 'Secret Bush "Finding" Widens War on Iran', *Counterpunch*, 2 May 2008.

37 Ibid., p. 58 and especially pp. 60 and 63.

in traditional operations, but in 'surgical targeted killings'.[38] The latter are an application of the doctrine of 'collective self-preemption' which also underlies Bush II's first amendment.[39]

IV Torturing enemy combatants

Bush II's fourth constitutional amendment says that the President has the power to choose the techniques with which enemy combatants will be interrogated, even if they are tantamount to torture or cruel, inhuman or degrading treatment according to all other nations parties to relevant international treaties.

As a matter of positive constitutional law, both US statutes (the 1994 Anti-Torture Statute and the 1996 War Crimes Act)[40] and international treaties ratified by the US (more specifically the Convention Against Torture of 1984)[41] establish an absolute prohibition of torture and cruel, inhuman or degrading treatment.

A series of legal opinions from the Office of Legal Counsel reconsidered what was actually forbidden by those norms. Three of them have been rendered public until now.[42] In the three of them, the definition of torture is so narrow as to exclude any act short of the killing of the detainee (and not even that under certain circumstances). Questions concerning the legality of techniques of interrogation employed

38 Ibid., p. 54. The force of the argument carries Yoo to claim that the terrorist attacks of 11 September 2001 would have been legal had it not been for the fact that the method of the attack was 'the hijacking of civilian airliners' (Yoo, *War*, p. 64), a very intriguing and in my view ridiculous claim. A similar one is made regarding the eventual capture of Rumsfeld or Tenet on p. 166.

39 Ibid., p. 61.

40 Anti-Torture Statute, 108 Stat 382; War Crimes Act 1996, 110 Stat 2104.

41 See, among others, M. Nowak and E. MacArthur (eds.), *The United Nations Convention against Torture: A Commentary* (Oxford, Oxford University Press, 2008).

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

by military personnel were settled in a series of specific, but closely related (in chronological and substantive terms) opinions.[43]

The core of the defence of the right to torture was a peculiar interpretation of the literal tenor of the law. In particular, it was claimed that an act could only be qualified as torture if it complied simultaneously with two conditions: one objective, the other subjective.[44] The objective condition was the infliction of 'severe harm', either physical or mental. 'Physical harm' amounting to torture was 'death, organ failure or the permanent impairment of a significant body function'.[45] The critical standards for determining the accrual of mental pain or suffering were the lasting character of the harm (to be counted in months or years) and its resulting from the specific actions codified in the US Code.[46] The subjective condition was met when the interrogator 'acted with specific intent', or what is the same, 'he must expressly intend to achieve the forbidden act'.[47] Thus, it was not sufficient that interrogation results in a prolonged physical or mental pain or suffering; for a crime to be committed, the mental state of the interrogator must be that corresponding to the intentional of *severe and lasting* mental pain or suffering to the concrete detainee.[48]

There was considerable dissent expressed within the ranks of the administration on this definition.[49] During his brief stint as head of the Office of Legal Counsel in 2003-4, Jack Goldsmith (assistant to Haynes II until he was promoted to the OLC)

43 Diane Beaver to General James T. Hill, 'Legal Brief on Proposed Counter-Resistance Strategies', and 'Legal Review of Aggressive Interrogation Techniques', of 11 October 2002; Haynes II to Rumsfeld, 'Counter-Resistance Techniques', of 27 November 2002, and approved 2 December 2002 by Rumsfeld. The three documents are available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>. A compilation of opinions and decisions which helps understanding who and why took decisions has been posted by Senator Levin of the Armed Services Committee, and is available at <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>.

44 Bybee to Gonzalez, 'Standards of Conduct', p. 3.

45 Ibid., p. 6. This phrase derives from the definition of severe physical pain triggering compulsory health assistance of uninsured people. It was used to define torture, despite the lack of comparability of the two situations, because allegedly it was the only positive definition of 'severe physical pain' which could be found in the US Code.

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

47 Ibid., p. 3.

48 Ibid., p. 8.

49 See Alberto J. Mora's memo of 18 June 2004, 'Statement for the Record: Office of General Counsel Involvement in Interrogation Issues', available at <http://www.aclu. org/pdfs/ safefree/mora_memo_july_2004.pdf>.

withdrew Yoo's and Bybee's opinions.[50] Still, Bush II's fourth amendment has not been abandonded.[51] The President himself has opposed any attempt by Congress to reaffirm the prohibition of the use of torture (in particular, through his signing statement added to the 2005 Detainee Treatment Act and his recent veto of the bill reiterating the prohibition of any interrogation technique beyond those contained in the Army Field Manual).[52] Moreover, the director of the CIA has explicitly admitted that at least three detainees were waterboarded, while it is now accepted that the National Security Council explicitly discussed and approved specific techniques of interrogation before the interrogation of concrete detainees, and that was approved by Bush II himself.[53]

C. *The constitutional theory of Bush II*

The four amendments proposed and relied upon by Bush II's lawyers are to be constructed as specific concretizations of the constitutional theory to which Bush II's lawyers subscribe. This constitutional theory rests upon two key premises which reinterpret the legal meaning of the two main sources of limits to presidential action, namely, the US Constitution and international law. First, the US Constitution is said to contain two different sets of fundamental norms: the ordinary constitution *and* the emergency constitution. The latter is said to vest massive powers in the President which entitled him to override limits to his action set by other institutions. Second, international law, and very especially, multilateral treaties and international manda-

50 J. L. Goldsmith, *The Terror Presidency* (New York, Norton, 2007), pp. 144 ff (especially p. 155). Yoo, *War by Other Means*, pp. 185-6 seems to have resented that, although he (in my view, rightly) claims that changes have been more aesthetical than substantive.

51 J. Mayer, 'The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted', *The New Yorker*, 27 February 2006, reports that Mora was shown by late January a draft – one guesses, given the dates – of Yoo's legal opinion on specific interrogation techniques. The said opinion had been solicited by Haynes in what seems hard not to believe was an effort at influencing and perhaps rendering moot the Working Group itself. Mora kept on arguing that both Yoo's memo and the draft report of the Working Group were flawed. And so had done Judges Advocate General Romig, Bohr, Sandkhuler and Rives when proposing changes to the draft (their opinions are available at <http://www.dod.mil/pubs/foi/detainees/05-F-2083_JAGmemos. pdf>). Even if it was not rendered public, not even known within Army circles, the Working Group produced a final report by 4 April (available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>), which only became declassified after the Abu Grahib scandal broke out. Rumsfeld issued new guidelines concerning interrogation methods by 16 April; available at: <http://www.gwu. edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>.

52 The full text of the bill can be found at <http://www.opencongress.org/bill/110-h2082/text>.

53 S. Shane, 'C. I. A. Chief Doubts Tactic To Interrogate Is Still Legal', *New York Times*, 8 February 2008; J. C. Greenburg, H. L. Rosenberg and A. de Vogue,. 'Top Bush Advisors Approved 'Enhanced' Interrogation', *ABC News*, 9 April 2008; J. C. Greenburg, H. L. Rosenberg and A. de Vogue, 'Bush Aware of Advisers' Interrogation Talks', *ABC News*, 11 April 2008.

tory norms are said to lack legal bite and to be properly described as congeries of behavioural regularities.

I. The dual constitution

The theory of the dual constitution affirms that there is not but two US constitutions. Along with the ordinary constitution, applicable during the times in which the life of the republic proceeds normally, we find an emergency constitution, applicable during crisis situations. The 'ordinary' constitution is enshrined in the vast majority of the provisions of the 1787 Constitution, formal amendments, and constitutional conventions developed over time. The key provisions of the emergency constitution are contained in the written text of the US Constitution. The most important one is the first sentence of Article II. 2 of the Constitution, which establishes that

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

Additionally, we find bits and pieces of the emergency constitution in the express limits to constitutional applicable during emergencies.[54] The remaining content of the emergency constitution result from the constitutional practice during previous emergencies (in particular, the War of Independence, the Civil War and the three World Wars, including the Cold War). The core provisions of the emergency constitution are those concerning the allocation of power, not its substantive provisions. The vast variety of possible threats to the republic explain why the written constitution limits itself to determine in an unambiguous and definite manner *who* should be in charge of establishing how the core principles of the constitution are to be operationalized in emergency situations.

Emergency powers are said to be vested almost exclusively in the President as Commander in Chief. This is grounded on the claim that the President is the institutional actor best placed to take decisions during extraordinary constitutional times, for three reasons. He is the head of the most hierarchical branch of government, he is invested with direct democratic legitimacy, and he is used to exercising key powers on the decisive policies during emergencies (foreign policy, defence and intelligence).

The terrorist attacks of September 2001 were tantamount to a declaration of war against the government and the people of the United States, something which by itself activated the inherent emergency powers of the President; the actuality of his inherent emergency powers is said to have been further confirmed by Congress's Authorization to Use Military Force of September 18th, 2001.[55] Moreover, the radi-

54 Thus, the Second Amendment establishes that the privilege the writ of habeas corpus should not be suspended but 'in cases of rebellion or invasion' if moreover 'the public safety' may require it.

55 115 Stat 224. See Yoo's Memo of 25 September 2005, available at <http://www.justice.gov/olc/warpowers925.htm>.

cally new character of the threat posed by 'Al Qaeda' implied that this emergency was like no others. The nature of 'Al Qaeda' resulted in a global combat where cheap weapons of mass destruction might be used with unprecedented lethal consequences. Because this was a war like no others, the emergency constitution might have to be revised and most of the norms established in previous emergencies set aside as they had been rendered 'obsolete' and 'quaint'. The President could and should rewrite the constitution of emergency to adapt it to the new circumstances. This indeed amounts to claiming that the President has a power functionally akin to the *puovoir constituent* residing in the People, only the chief of the executive holds it as regards the emergency constitution, not the ordinary constitution.[56] In particular, the emergency version of the 'unitary doctrine of the executive' vests the President with the power to review the constitutionality of the statutes passed by Congress, and eventually to set them aside if unconstitutional; and also to ignore and left without application the rulings of the Supreme Court concerning the constitutionality of a given norm. This power is singularly exerted through a peculiar source of law, the signing statement.[57] Using them, Bush II has indeed contested the constitutionality of more than seven hundred legal provisions[58] by typically claiming that '[t]he executive branch shall construe [section, title and name of the act] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief'.[59]

II. International law as behavioural regularities

The second element of Bush II's theory of constitutional law is his theory of international law, according to which international norms other than bilateral treaties are merely behavioural regularities, and not a source of legal obligations.

The argument is three-pronged.[60] First, it is claimed that only a fraction of international norms can be characterized as legal norms proper. In particular, customary

56 Or does he? If the constitution of emergency is to remain activated for as long as the 'war on terror' lasts, and that could well be an awful long time, the difference between the two constitution-making powers becomes very diffuse indeed.

57 See American Bar Association, 'Recommendation of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine', available at <http://www.abanet.org/ leadership/2006/annual/dailyjournal/20060823144113.pdf>. On the literature, see P. J. Cooper, *By Order of the President* (Lawrence, University Press of Kansas, 2002), ch. 7; P. J. Cooper, 'George W. Bush, Edgar Allan Poe and the Use and Abuse of Presidential Signing Statements' *Presidential Studies Quarterly* 35 (2005): 515-32.

58 See American Bar Association, 'Recommendation of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine'; Cooper, 'Bush, Poe and Presidential Signing Statements'. See also Cooper, 'Bush, Poe and Presidential Statements'.

59 See for example the signing statement attached to the Detainee Treatment Act 2005.

60 Even more radical criticisms have been expressed by other Bushite lawyers. See for example J. R. Bolton, 'Is There "Really" Law in International Affairs?' *Transnational Law and Contemporary Problems* 10 (2000): 1-48.

norms and multilateral treaties are not law in a strict sense, because states comply with them only if the national interest or the threat of coercion of powerful states (and not any autonomous institution constituted by international law) coerce them into compliance.[61] Customary international law is thus better understood as a set of behavioural regularities stabilized by mutual interest, cooperation in a prisoner's dilemma situation, or coercion exerted by a hegemonic state;[62] while multilateral treaties are instruments through which states spread information about their mutual intentions.[63] Second, the only international customary norms with legal bite are those supported by the United States. This claim derives from a rather idiosyncratic understanding of how the *opinio juris* which underlies international customary norms is forged, in concrete, by transforming the *de facto* preminence of the United States in world affairs in a law-making power.[64] Third, the President as the *pouvoir constituent* of the constitution of emergency can decide in a final and unreviewable manner whether or not a given international standard should be followed by US authorities; so that even if customary norms or multilateral treaties have legal bite, they can be override by the President.

The utmost expression of Bush II's theory of international law is the neologism 'lawfare', intended to mean 'the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.'[65] Thus, international law is not only denied legal force, but stigmatized as one of the weapons of terrorists.

D. The minimalist and eclectic legal theory of Bush II

Bush II's legal theory is not the result of a systematic effort at answering the trade questions of legal theorists (what law is, in what relationship it stands with morality, what are the basis of validity of positive norms, etc.) but a minimal theory sufficient to provide support to the radical changes in positive law and constitutional theory advanced and relied upon the court attorneys of the President.

Bush II's legal theory is minimalist and eclectic. The key premise of this theory is that law is the ultimate source of validity of legal norms is the will of the sovereign.

61 E. Posner and J. Goldsmith, *The Limits of International Law* (Oxford, Oxford University Press, 2005), p. 10.
62 Ibid., p. 39.
63 Ibid., p. 105.
64 Yoo, *War*, pp. 33 and 37.
65 Charles J. Dunlad Jr, at present Deputy Judge Advocate, in 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts', a lecture delivered at the Kennedy School of Government on 29 November 2001, available at <http://www.duke.edu/~pfeaver/dunlap.pdf >.
66 Donald Rumsfeld and Jack Goldsmith expanded the concept and shifted its target, now 'European and South American allies and the human rights industry (sic) that supported their universal jurisdiction aspirations', see Goldsmith, *Terror Presidency,* pp. 59ff.

We the People acting through its representatives is the sovereign under the ordinary constitution, and We the People as represented by the President is the sovereign under the emergency constitution. Bush II's legal theory is thus a prescriptivist conception of law, which rejects the notion that legal reasoning should be viewed as a special case of critical practical reasoning (and thus, neither as a fully discretionary activity, in which moral and prudential arguments can be freely invoked to defeat positive legal norms; nor as a fully autonomous, technical activity; but one which in limited but decisive ways incorporates critical normative reasoning).[66] And consequently, the legal theory of the attorneys of the White House assumes that the interpretation of legal norms, and very especially constitutional norms, is a matter of *decision*, not a matter of *reasoning*.

The minimalist character of Bush II's legal theory is closely related to its eclecticism; as a 'thin' legal theory, it can rely on an 'overlapping consensus' of 'thick' legal theories to the extent that they subscribe, one way or the other, to the core prescriptivist assumption, even if they are antagonistic and contradictory when we consider them as 'thick' theories. This is indeed very convenient in strategic terms, as it seems to provide an expanded 'base' of support for the concrete constitutional changes being advocated.[67] And indeed, Bush II's lawyers have borrowed from three distinct theories of law, namely: (1) the peculiar bred of positivism that originalist theories endorse (exemplified by the originalism of Scalia); (2) the bred of 'modern' iusnaturalism concerned with the nature of positive law (exemplified by Finnis's legal theory); (3) pragmatist theories of law which characterize law as an instrument for other social ends (exemplified by Richard A. Posner's legal theory, applied and developed to emergencies by Eric Posner and Adrian Vermeule).

It may be necessary to underline that I am not claiming that all of these authors would fully agree with either the constitutional amendments or the constitutional theory of Bush II. Rather, I make three far more modest claims. First, the eclectic and incomplete theory of law put forward by Bush II's lawyers has been built with bits and pieces of the said three legal theories; whether it makes sense to take bits and pieces from the original complete legal theory or not is a different question, which is irrelevant to the court attorneys of the White House, but may be critical to the original authors of the bit or piece. Second, these borrowings reveal that

66 As Robert Alexy, Ronald Dworkin or Neil D. MacCormick, to name only three outstanding contemporary legal theories, conceptualize the law. This is not alien in any sense to the US constitutional tradition; just the contrary; see M. J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York, Hill and Wang, 1999).

67 This strategy has structural parallelisms with that underlying the pragmatic legal theory developed by Cass Sunstein over the years, and very especially on his 'Incompletely Theorized Agreements', *Harvard Law Review* 108 (1995): 1733-72; and now in his 'Incompletely Theorized Agreements on Constitutional Law', *University of Chicago Public Law Working Paper, no 147*, available at <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID957369_code249436.pdf?abstractid=957369&mirid=1>. Its political equivalent is 'government by fringes' as mastered by Karl Rove; see G. Wills, 'Fringe Govermment', *New York Review of Books*, 6 October 2005.

originalism à la Scalia, pragmatism à la Posner and (modern) natural law à la Finnis have a common prescriptivist foundation, even if the way in which law is reduced to power in each case is very different, and has different consequences. But even then, the ultimate endorsement of prescriptivism creates a potential affinity with theories such as Bush II's constitutional and legal theory. Third, the affinity between all these theories has occasionally led to a partial, even if qualified, endorsement of some of the most controversial aspects of the four constitutional amendments put forward by Bush II in all three cases.

I. Originalism à la Scalia.

Originalism is a breed of legal positivism that affirms that there is an objective meaning of legal norms, to be determined by reference to the authoritative constitutional will.[68] Although the term and the contours of the debate have been shaped in relation to the US Constitution,[69] it is obvious that similar debates concerning the canons of interpretation are endemic to all legal systems.

Originalism is an attractive theory of law and legal interpretation for Bush II's lawyers because it can be used to weaken the constraints that constitutional law imposes upon the executive. Although formally speaking it offers criteria to determine in an objective and fixed manner what the constitutional law says, in substantive terms not only the subjective or intersubjective will of the constitution-makers may be extremely difficult to ascertain in an objective manner (thus inviting discretionary interpretation), but also the identification of law with the will of a given authority (even if power has obtained in 'democratic' competition among elites) cracks the door open for the characterization of law as a congeries of norms, only tied together by their being willed by the sovereign; consequently, the ruling few have a larger discretion to determine what the law is.[70]

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

First, it allows the attorneys of the White House to present revolutionary judgments as conservative ones. By pretending to ground their claim on a 'lost' constitutional norm, they obtain a conservative wrapping for claims that advance an interpretation of positive constitutional law radically deviant from existing constitutional

68 The 'loci classici' are A. Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 57 (1989): 849-65 and A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997).

69 See for example S. G. Calabresi (ed), *Originalism, A Quarter-Century Debate* (New York, Regnery, 2007).

70 Cf. R. Dworkin, 'On Gaps in the Law' in P. Amselek and N. D. MacCormick (eds.), *Controversies on Law's Ontology* (Edinburgh, Edinburgh University Press, 1991), pp. 84-90; 'The Ardous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' *Fordham Law Review* 65 (1997): 1249-1268; and also R. A. Posner, *How Judges Think*, (Cambridge, MA, Harvard University Press, 2008), pp. 103-4.

practice (for example, if the President orders the warrantless surveillance of a US citizen within US territory in open breach of FISA, they claim that FISA was unconstitutional because it breached inherent executive powers; so true compliance with the Constitution requires allowing the President to order the warrantless surveillance) Indeed, the attorneys of the White House have frequently claimed that they were just rolling back the unconstitutional limits on executive action set by Congress in the seventies.

Second, originalism helps claiming that the four constitutional amendments are democratically legitimate. After all, it is generally assumed that the Constitution was authored by the people, and that it should not be changed but by the people. So to the extent that the President is faithfully restoring the true meaning of the constitution against meddling and elitist judges, and irresponsible notables in Congress, he is actually advancing the cause of democracy.

II. Legal Pragmatism à la Posner

Posnerian legal pragmatism claims that law is to be understood as a set of behavioural regularities concerning the use of state power. Denying any clear-cut distinction between what law is and what should be, Posner adds that officials should regard law as a means to achieve specific social ends, and thus are well-advised to take decisions in such a way that they maximize social welfare.[71] The alleged 'pragmatic' character of this theory derives from its antifoundational, even antitheoretical stand and its companion emphasis on practice.[72]

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

Still, the 'standard' view of Posner's theory comes hand in hand with an institutional theory which expands the role of courts, and dramatically constrains the legislators and the executive. This is because judges, contrary what is the case with the other two branches of government, proceed by means of incremental concrete decisions to settle particular and specific problems, and not by sweeping general decisions abstracted from any specific context. Judicial rulings are less prone to have massive unintended consequences, not only because of their narrower scope, but also because rectification is easier and speedier. How could it then be claimed that Posner's legal pragmatism serves the cause of aggrandisement of the executive

71 R. A. Posner, *The Problems of Jurisprudence* (Cambridge, Harvard University Press, 1990), p. 26; and *Economic Analysis of Law* (Boston, Little and Brown, 1972).

72 See 'The Problematics of Moral and Legal Theory' *Harvard Law Review* 111 (1998): 1637-1717.

power? The explanation lies in the fact that Posner in *Not a Suicide Pact* (and, as already said, Posner and Vermeule in *Terror in the Balance*) have assigned a key role to the distinction between ordinary and emergency politics, and have claimed that the benign role played by courts during ordinary times is actually to be played by Presidents during emergencies.[73] In concrete, they claim that the executive is the best-placed institution to preserve the republic during emergencies, on account of the speed, secrecy and decisiveness of its actions.[74] If this premise is true in general, is even truer if the emergency poses a radically new threat, as the present one does, because everything must be rethought from the scratch. Because new measures must have a chance to 'prove themselves',[75] monitoring or surveillance by other branches of government or by citizens themselves is unadvisable.[76]

Legal pragmatism offers support to Bush II's constitutional amendments because it justifies the four constitutional amendments in the name of the different weight to be given to the collective interest in national security under emergencies, thus requiring a new 'weighing and balancing' of subjective rights to freedom and the collective good of security.[77] In the book that ironically marked the launching of the Oxford series on inalienable rights (*sic*), Posner claims that because 'the law of necessity supersedes the Constitution',[78] the scope of fundamental rights should be made less extensive.[79] The reason is a simple calculus: the people at risk of being victims of a terrorist attack are far more numerous than those whose liberties may be curtailed; so the interest of the greatest number should prevail over that of the lesser. Posner adds that subjective rights to freedom should be only 'modestly' curtailed,[80] but then does endorse (with some qualifications, but also with some additions) Bush II's four constitutional amendments.[81]

73 R. A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford, Oxford University Press, 2007), p. 21

74 Ibid., p. 16 and 30.

75 R. A. Posner, *Not A Suicide Pact* (New York, Oxford University Press, 2006), p. 31.

76 Posner and Vermeule, *Terror in the Balance,* pp. 16 and 45.

77 Posner, *Not A Suicide Pact*, p. 31.

78 Ibid., p. 70

79 Ibid., p. 8.

80 Ibid., p. 41.

81 Ibid. In concrete: (1) all rights (not only habeas corpus, but *all* rights) could be denied to a foreigner enemy combatant seized abroad and brought into the United States (reservations should be held on whether foreign residents already present in the US could be treated similarly (pp. 41 and 58); (2) the right to judicial protection is to be redefined, increasing the length of time during which people could be arrested and held incommunicado on the sole authority of the executive (pp. 65 and 73; with reasonable remaining undetermined); even citizens could be detained indefinitely if they are deemed to be terrorists (pp. 67 and 73); (3) trial by military commission is fine even when there is no war (p. 73); (4)Individuals could be required to prove they are not terrorists, rendering unnecessary that prosecutors prove it (p. 58); (5) torture could be resorted to if there is a 'state of necessity' (pp. 12 and 81).

III: Natural Law à la Finnis

It may seem counterintuitive to claim that modern natural law theory is one of the house legal theories of Bush II's lawyers. Leaving aside the fact that the main exponents of modern natural law theories may share with the administration similar views on sexual morality and bioethics,[82] it is well-known that modern natural law offers a sophisticated account of the relationship between legal and practical reason.[83] One would then suppose that the structural and substantial connection between law and objective principles of morality defended by Finnis and other modern natural lawyers should provide a standpoint from which to criticize (and criticize heavily for that purpose) the practice and theory of constitutional law followed by Bush II's lawyers.

Still, modern natural law offers critical support to Bush II's constitutional and legal theory on one specific (and key) account: its rationalization of the dualistic understanding of the constitution and consequently of the need of unlimited executive power during emergencies, or what is the same, a moral grounded defence of the old principle that *inter armas silent leges*. In a neglected passage in *Natural Law and Natural Rights* reproduced at the beginning of this chapter, Finnis claims that when societies are 'threatened with military, economic or ecological disaster',[84] what the executive decides and pretends to embody into law should be regarded for the time being as a correct moral judgment; 'statesmen' *must* depart, 'temporarily but perhaps drastically' from the ordinary constitution, while presumably both citizens and scholars should simply be silent and comply, because 'one could say nothing that may appear to be a key to identifying the occasion or a guide to acting in it'. Thus, at the critical moments of truth, not only does law cease to be a guide to action, but legally constituted power ceases to be guided by practical reason and must be exercised by reference to individual political judgment.[85] Whatever 'statesmanship' applied to departing from law is, clearly it cannot be the same kind of public reason which underpins ordinary constitutional and statutory norms.

It could be argued that I am making too much out of a short passage in *Natural Law and Natural Rights*. Lack of space prevents me from attempting a deeper analysis of the relationship between Finnis' theory of emergencies and his overall theory, or for that matter, the complex genealogy of this idea, and the relationship in which it stands with Aristotles' and Aquinas' legal theory. I will only claim that Finnis himself seems to have proved that his theory of emergencies is far from being an abstract and marginal annotation in his *Natural Law and Natural Rights* to the extent that it grounds his criticism to the ruling of the House of Lords on the constitutional-

82 Including active and passive hostility towards stem cell research, same sex-marriage, abortion and any regulation of the right to die. See C. Tiefer, *Veering Right* (Berkeley, California University Press, 2004).

83 See N. D. MacCormick, 'Natural Law Reconsidered', *Oxford Journal of Legal Studies* 1 (1981): 99-109.

84 J. Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1979), p. 246.

85 Ibid., p. 275. The full quote is reproduced at the beginning of this chapter.

ity of the indefinite detention of certain foreign suspected of being terrorists.[86] By claiming that aliens do not have a right to be treated equally when it comes to the modalities of detention,[87] Finnis seems to confirm the central role played by his views on the morality and legality of unconstitutional action during emergencies. Quite obviously, the intriguing question is in which other respects the rights to be acknowledged to foreigners are different.

E. Conclusion: The constitution of emergency between law and propaganda

By holding to the narrative that the terrorist attacks of September 11th, 2001 plunged us into an unbrave new world, Bush II's lawyers have pretended to justify the exertion of the alleged inherent executive power to rewrite the emergency constitution that is said to lurk behind the ordinary US constitution. The recent judgment of the Supreme Court in *Boumediene*, the several investigatory committees set up in Congress, and above all, the progressive change of mind of the US public, seem to indicate that the revolution was close to success, but ultimately failed. But that cannot be taken for granted. *Boumediene* was decided by the narrowest of majorities, Congress lacks a clear goal in its investigations, and the public may get diverted if a new terrorist attack takes place. Moreover, as has been argued in this chapter, the challenge posed by Bush II was not merely one of unconstitutional action in the shadows, but is properly described as a frontal attack aimed at the constitutional doctrines, constitutional theory and legal theories of Bush II's lawyers. Even if the four constitutional amendments are about to be rejected, there are worrying signals that Bush II has been rather successful at transforming the very terms of the debate in constitutional and legal theory, and indeed in public debate in general. Ten years ago, arguments in favour of the juridification of torture would have been regarded as extravagant; today they are regularly taken to be serious propositions on which reasonable people can reasonably disagree. By revealing the interconnections between constitutional doctrine and theory, this chapter shows that the failure of Bush II's constitutional amendments may be temporary if his successes in theoretical terms are not also reversed. This is a very good reason to take very seriously Bush II's constitutional and legal theory, and not be contented to disregard it as fringe thought.

Moreover, evidence is coming to light that proves that there is a causal chain between the blatant violations of constitutional and international law and the legal advice provided by key General Counsels within the Administration, and decisively, from the Office of Legal Counsel in the Departament of Justice. The legal responsibility of Bush II's lawyers is not a partisan question, but a major issue which should be of concern to all jurists, and to all scholars in general. Although Bush II's lawyers have repeatedly claimed that they limited themselves to describing what the law

86 *A* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

87 J. Finnis, 'Nationality, Alienage and Constitutional Principle' *Law Quarterly Review* 127 (2007): 417-45, p. 438.

said, and consequently, they do not have any legal responsibility for what politicians decided to do *within the bounds of what they were advised was legally permissible*, the contrary is well established in law since the Nuremberg Trials. Specious legal advice leading to blatant violations of the law is part of the legal chain of causation, and thus, lawyers may be brought before criminal courts.[88] There are clear indications indeed that serious crimes have been committed by CIA operatives, military personnel and lawyers.[89]

Still, it would be wrong to analyse Bush II's constitutional and legal theories as if they were simply constitutional and legal theories. By doing that we will not only risk giving them too much undeserved credit, but we will miss the key role they have played in the propaganda effort to transform constitutional and political practice. In short, we have to be aware of the double role of Bush II's theories: as legal theories and as propaganda. The core decisions in the so-called 'war on terror' would not have been feasible if unsupported by well-formed constitutional arguments. They played a decisive role in convincing the restless many that the dissenting voices against the ruling few were not to be listened to. That what was being done was both legally and morally permissible. Because modern societies cannot be integrated by mere force, because most people believe the law is by and large a repository of moral principles, no matter how imperfect, the attempt to place the President above the law has to be legitimized by means other than force, with legal arguments playing a paramount role. But when the legal arguments put forward are merely specious arguments put forward for narrow strategic reasons, when the form of law is placed at the service of power, law is disconnected from public reason and turned into (cheap) propaganda.[90] The propagandistic subversion of law is far from new. It is in a way typical, as Scott Horton has reminded us,[91] of mob lawyers. And indeed the reduction of law to a mere technique cracks the door open to the propagandistic use of law.[92] But more worryingly, there are disturbing structural similari-

88 In particular, see the judgment in *US* v. *Alstoetter*, analysed in depth by Matthew Lippman, 'The Prosecution of Josef Alstoetter et al: Law, Lawyers and Justice in the Third Reich' *Dickinson Journal of International Law* 16 (1997): 343. On Alstoetter and the basis on which Bush II's lawyers could be prosecuted, see Milan Markovic, 'Can Lawyers Be War Criminals?' *Georgetown Journal of Legal Ethics* 20 (2007): 347-68.

89 'A Review of the FBI's involvement and observations of detained interrogations in Guantanamo Bay, Afghanistan and Iraq', available at <http://www.usdoj.gov/oig/ special/s0805/final.pdf>, p. xxii. Four recent books have articulated very cogent legal cases. See M. Ratner, *The Trial of Donald Rumfeld. A Trial by Book* (New York, The New Press, 2008); P. Sands, *Torture Team* (London, Allen Lane, 2008); E. de la Vega, *US* v. *Bush* (New York, Seven Stories, 2006) and V. Bugliosi, *The Prosecution of George W. Bush for Murder* (New York, Vanguard, 2008).

90 Indeed, it was only to be expected that the main advocates of Bush II's theory of law (including Justices Scalia and Thomas) would have been keen watchers of the TV show *24*. Sands, *Torture Team*; see also Clucas, Ch. 11 below.

91 S. Horton, 'The Green Light', 2 April 2008, available at <http://harpers.org/archive/ 2008/04/hbc-90002779>.

92 B. Z. Tamanaha, *Law as a Means to an End: A Threat to the Rule of Law* (Cambridge, Cambridge University Press, 2006).

ties between the constitutional and legal theory of Bush II's lawyers and the constitutional and legal theory of the court lawyers of Fascism and Nazism. The narrative on the radical new circumstances, and the consequent the need for radically new theories of law, as well as its infiltration of established and respected institutions and bodies of law by raw power leave the reader with a frustrating sense of *déjà-vu*.[93]

All this should make us reflect, and reflect seriously and deeply. Because we had been there already, they (and we) should have known better.

93 See S. Levinson, 'Torture in Iraq and the Rule of Law in America' (2004) 133 *DAEDALUS Journal of the American Academy of Arts and Sciences*. 5, available at <http://www. amacad. org/publications/summer2004/levinson.pdf>; and S. Horton, 'The Return of Carl Schmitt', published in *Balkinization*, 7 November 2005, available at <http://balkin.blogspot. com/2005/11/return-of-carl-schmitt.html>. It is not my intention to draw comparisons between the 'war on terror' and other conflicts; or between Bush II and other historical political leaders. My claim is a more modest one and considers the way in which Bush II's lawyers have argued in law. It is they and their arguments that I find pertinent to compare with, say, Carl Schmitt (as Sanford Levinson and Scott Horton have already suggested), Karl Larenz, Alfredo Rocco, Sergio Panunzio or Francisco Javier Conde. On the topic, see C. Joerges and N. Singh (ed.), *Darker Legacies of Law in Europe* (Oxford, Hart, 2003).