

washingtonpost.com

A Governing Philosophy Rebuffed

Ruling Emphasizes Constitutional Boundaries

By Peter Baker and Michael Abramowitz
Washington Post Staff Writers
Friday, June 30, 2006; A01

For five years, President Bush waged war as he saw fit. If intelligence officers needed to eavesdrop on overseas telephone calls without warrants, he authorized it. If the military wanted to hold terrorism suspects without trial, he let it.

Now the Supreme Court has struck at the core of his presidency and dismissed the notion that the president alone can determine how to defend the country. In rejecting Bush's military tribunals for terrorism suspects, the high court ruled that even a wartime commander in chief must govern within constitutional confines significantly tighter than this president has believed appropriate.

For many in Washington, the decision echoed not simply as a matter of law but as a rebuke of a governing philosophy of a leader who at repeated turns has operated on the principle that it is better to act than to ask permission. This ethos is why many supporters find Bush an inspiring leader, and why many critics in this country and abroad react so viscerally against him.

At a political level, the decision carries immediate ramifications. It provides fodder to critics who turned Guantanamo Bay into a metaphor for an administration run amok. Now lawmakers may have to figure out how much due process is enough for suspected terrorists, hardly the sort of issue many would be eager to engage in during the months before an election.

That sort of back-and-forth process is just what Bush has usually tried to avoid as he set about to prosecute an unconventional war against an elusive enemy after the attacks of Sept. 11, 2001. He asserted that in this new era, a president's inherent constitutional authority was all that was needed. Lawmakers and judges largely deferred to him, with occasional exceptions, such as the Supreme Court two years ago when it limited the administration's ability to detain suspects indefinitely.

"There is a strain of legal reasoning in this administration that believes in a time of war the other two branches have a diminished role or no role," [Sen. Lindsey O. Graham](#) (R-S.C.), who has resisted the administration's philosophy, said in an interview. "It's sincere, it's heartfelt, but after today, it's wrong."

Bruce Fein, an official in the Reagan administration, said the ruling restores balance in government. "What this decision says is, 'No, Mr. President, you can be bound by treaties and statutes,'" he said. "If you need to have these changed, you can go to Congress." This idea of a coronated president instead of an inaugurated president has been dealt a sharp rebuke.

The administration's allies, however, were disturbed that Bush's hands now may be tied by the ruling, written by Justice John Paul Stevens. "Stevens's opinion was quite shocking in its lack of discussion of the

Advertisement

president's independent authority," said Andrew McBride, a former Justice Department official who wrote a brief supporting the administration on behalf of former attorneys general and military lawyers.

Bush made no such protest himself yesterday, caught by surprise at the decision. He was meeting with visiting Japanese Prime Minister Junichiro Koizumi in the Oval Office and was about to head out for a news conference when counselor Dan Bartlett and press secretary Tony Snow informed him of the ruling. White House counsel Harriet Miers then arrived and gave Bush what he called a "drive-by briefing," but he gave little reaction when he met with reporters.

Snow later disagreed that the ruling undercut Bush's authority. "I don't think it weakens the president's hand, and it certainly doesn't change the way in which we move as aggressively as possible to try to cut off terrorists before they can strike again," he said.

Bush came to office intent on expanding executive power even before Sept. 11, 2001, encouraged in particular by Vice President Cheney, who has long been convinced that presidential authority was improperly diminished after Watergate.

The decision to create military commissions to try terrorism suspects, instead of using civilian courts or courts-martial, represented one of the first steps by the administration after the al-Qaeda attacks on New York and Washington to create a new legal architecture for handling terrorism cases.

As described by the New Yorker this week, the executive order establishing military commissions was issued without consultations with then-Secretary of State Colin L. Powell or then-national security adviser Condoleezza Rice after a concerted push by Cheney's legal adviser, David S. Addington, now his chief of staff.

"Rather than push so many extreme arguments about the president's commander-in-chief powers, the Bush administration would have been better served to work something out with Congress sooner rather than later -- I mean 2002, rather than 2006," said A. John Radsan, a former CIA lawyer who now teaches at William Mitchell College of Law.

The administration relied on the same expansive view of its power in detaining U.S. citizens indefinitely as enemy combatants, denying prisoners access to lawyers or courts, rejecting the applicability of the Geneva Conventions in some instances, employing harsh interrogation techniques and establishing secret CIA prisons for terrorism suspects in foreign countries. Only its telephone and e-mail surveillance program, which is operated by the National Security Agency, stirred much protest in Congress.

The administration often fended off criticism by arguing that the commander in chief should not be second-guessed. "The Bush administration has been very successful in defining the debate as one of patriotism or cowardice," said Andrew Rudalevige, author of "The New Imperial Presidency" and a Dickinson College professor. "And this is not about that. This is about whether in fighting the war we're true to our constitutional values."

In some ways, the ruling replicates a pattern in American history where presidents have acted aggressively in wartime, only to be reined in by courts or Congress. Even some Bush supporters said yesterday that it may be appropriate now to revisit decisions made ad hoc in a crisis atmosphere, when a president's natural instinct is to do whatever he thinks necessary to guard the nation against attack.

"That's what presidents do, and I say thank goodness for that," said George J. Terwilliger III, deputy attorney general under President George H.W. Bush. "But once you get past that point . . . both as a matter of law and a matter of culture, a more systemic approach to the use of authority is appropriate."

© 2006 The Washington Post Company

Ads by Google

[Frontline: The Dark Side](#)

Examines Cheney's Conflict With CIA Over Iraq War. Watch it online.

www.pbs.org/frontline/

[Mormon 72 Hr Survival Kit](#)

Buy 72 Hr Kits for Everyone 72 Hr Kits for Entire Family.

AlwaysBePrepared.com

[George W. Bush](#)

Should He Step Down As President? Vote Now To See Survey Results!

www.popularq.com