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EXECUTIVE SELF-CONTROLS: MADISON'S OTHER CHECK ON NATIONAL SECURITY INITIATIVES BY THE EXECUTIVE

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Thank you. I'm only on page 89 of Marty's two-part article, and that's just the introduction. Length aside, it is intimidating to come after him because his opus is brimming with new ideas, especially when, in stark contrast, I have none to offer you.

Instead, I offer an old idea. James Madison suggested it in *Federalist Papers No. 51* when he said, "If angels were to govern men, neither external nor internal controls on government would be necessary."¹ As he knew and we know, angels don't govern men (or women), so both controls are necessary. In a law school-trained preoccupation with the separation of powers, however, we usually focus on just the *external* controls supplied by one branch on the others (or by the media on all three). I'd like to pursue the other half of Madison's idea and talk instead, for the short time allocated me, about four very prosaic *internal* controls. I'll then close by responding to the objection that the internal controls on many Bush Administration national security initiatives have failed – an objection we might call the "Cheney objection."

The first internal control or check is the check of *inter-agency process*. By this, I mean nothing more than sending a proposed decision out of an agency to obtain approval or input from other agencies. Inter-agency process is common across the government, but particularly common in matters of national security that fall to an iron triangle of the Defense, State, and Justice Departments, all of which ordinarily would have to be consulted on many national security decisions. The details of this internal check vary, but typically the inter-agency consultation operates at a relatively unseen and unglamorous level of inter-agency working groups. Even more prosaically, it can take the highly informal form of circulating

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¹ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

drafts among agencies for comment. Occasionally, it will operate at a higher level in principals' committees involving Cabinet-level or sub-Cabinet people and their deputies.

The designation of U.S. citizen enemy combatants may seem an unlikely example of this check, given the seemingly haphazard way in which alien enemy combatants have been designated according to press accounts and the fitful Combatant Status Review Tribunal process. But the former designation process was described in detail by then-Attorney General Alberto Gonzales.² Judge Gonzales told a Bar Association meeting that the process begins with a written assessment of intelligence by the CIA and its recommendation to the Department of Defense about whether a U.S. citizen should be designated an enemy combatant for purposes of military detention. The Department of Defense then makes an independent written assessment, which it forwards with the CIA package to the Attorney General. The Attorney General solicits a formal legal opinion from the Office of Legal Counsel, based in part on the materials supplied by the CIA and Department of Defense. He also gets a factual recommendation from his Criminal Division. All of these materials are then sent back to the Secretary of Defense with a recommendation. The Secretary of Defense assembles this package and the CIA package and sends the whole thing over to the President with his final recommendation. The White House Counsel reviews the package, repackages it, and makes his own recommendation to the President. The President reviews the package (this is perhaps the least credible part of this account), gets briefed, and then makes his decision.

Even if, at this remove from 9/11, you are skeptical of Bush Administration assertions about national security processes, and therefore doubt the details of this one, I would wager that something like this must go on. No administration designates U.S. citizens as enemy combatants with a dartboard, given the dire consequences (military detention and possibly trial and even execution, without the protections of the ordinary criminal process).

So what? Exactly *how* does the inter-agency process serve as a check on the abuse of power? First, the overlap of interested agency jurisdictions brings different constituencies of lawyers and other experts into play. They supply some diversity of viewpoints, even if the involved agencies have no

² See Alberto R. Gonzales, Counsel to the President, Remarks at the American Bar Association Standing Committee on Law and National Security 11–17 (Feb. 24, 2004) (transcript available at <http://www.fas.org/irp/news/2004/02/gonzales.pdf>) (describing decision-making that led to enemy combatant determinations).

veto. Although the President calls the final shots, even Presidents desire consensus, which generates some pressure in the process to accommodate divergent views. A search for consensus or even more limited agreement, in turn, empowers dissidents within the agencies because it provides allies, influence, and cover. The net result is less group think and, in theory, better decisions.

A second internal check is afforded by *intra-agency process*, which presumably works in much the same way and with the same consequences as the inter-agency process. The circulation of proposed decisions within the agency also empowers dissidents and harnesses diversity of thinking. And, if nothing else, it catches errors, or at least increases the odds of avoiding them. Consider, for example, the reported process for preparing and submitting an application to the Foreign Intelligence Surveillance Court (FISC) for electronic surveillance under the Foreign Intelligence Surveillance Act (FISA). The statute actually doesn't specify any internal process, other than requiring the Attorney General to sign off on an application; but the FBI and the Department of Justice have necessarily created one anyway. Oversimplifying, I understand that an application or request is made at the field agent level. A supervisor has to sign off on it. It goes up to the next layer of command. They sign off on it, and they, in turn, send it over to the National Security Law Section of the FBI or its successor for approval and to package the application. Then it goes to independent lawyers at Justice. They sign off on it and then it goes to the Attorney General for approval, before it is finally submitted to the FISC. The result is another check on the government's use of FISA,³ indeed, one that may well be more effective, as a practical matter, in policing ill-founded or overbroad applications than the external check of judicial approval by the FISC itself.⁴

Agency culture is another internal check, perhaps the most important, but at the same time, the most nebulous. I am referring to an institutional self-

³ As I address below, it is, of course, no check on surveillance conducted outside of FISA, as the Terrorist Surveillance Program apparently originally was. Even in that program, however, concerns about the applicability of FISA arose within the Justice Department, ultimately prompting some as yet unreported modification of the program. See generally *U.S. Attorney Firings: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2007) [hereinafter *U.S. Attorney Firings*], available at http://gulcfac.typepad.com/georgetown_university_law/files/comey.transcript.pdf (testimony of Deputy Attorney General James Comey).

⁴ The government's won-lost record at the FISC would match up well with the 2007 New England Patriots' regular season record. See STEPHEN DYCUS, ARTHUR BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW* 548-49 (4th ed. 2007). But it does not prove the futility of the FISA authorization requirements, if the discipline of the intra-agency process (driven, no doubt, in large part by the prospect of FISC review) weeds out most problematical applications before they are submitted to the FISC.

awareness, almost an institutional ego about the quality of its products (decisions, opinions, etc.) and about how its professional personnel differ from (are better than) everybody else in the Executive Branch. A classic example with which most of us (lawyers) are familiar is the “officer-of-the-Court” culture of Solicitor General’s Office.⁵ The Office of the Legal Adviser to the State Department also has a distinctive culture.⁶ The Legal Adviser is the highest authority in international law. The Adviser is a representative of international law in the U.S. government – a voice not just for interpreting but, consistent with U.S. national interests, for advocating international law.⁷ The Office of Legal Counsel [hereinafter “OLC”] notoriously in the loop in the torture debate and other major national security initiatives by this Administration, historically had a distinctive culture, too, to which I will turn shortly.

The bedrock attributes of all these agency cultures is what I would call the *lawyer culture*. What is it? Well, we’ve all in this room been trained in it, so you can answer this for yourself. But as both a long-time trainer and long-past trainee, I can attest that the number one principle that we bring out without fail in every class in every law school in the United States is *competency*. It’s no accident that the first rule of the *ABA Model Rules of Professional Conduct* is that “[a] lawyer shall provide competent representation to a client.”⁸

A competent lawyer researches thoroughly. She anticipates contrary arguments. She deals carefully with precedent. She analyzes and advises objectively. Thus, OLC alumnae declared as first principle that the OLC provide “accurate and honest appraisals of applicable law.”⁹ The competent lawyer looks at the bad precedent, as well as the good, and tells the client about both. Business clients may hate their lawyers for being “nay-sayers,”

⁵ See generally PATRICK C. WOHLFARTH, *THE TENTH JUSTICE? THE CONSEQUENCES OF POLITICIZATION IN THE SOLICITOR GENERAL’S OFFICE* 2–3 (2006), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/3/9/3/4/pages139348/p1393481.php (remarking on the obligations of the solicitor general).

⁶ See Richard B. Bilder, *On Being an International Lawyer*, 3 *LOY. U. CHI. INT’L L. REV.* 135, 145 (2006) (commenting that government attorneys involved in international law issues “have special responsibilities that go beyond” their client extending to the U.S. government and American public); see also ABM Treaty Interpretation Resolution, S. REP. NO. 100-164, at 65 (1987) (describing the Legal Adviser’s duties and responsibilities).

⁷ See S. REP. NO. 100-164, at 65 (“The Legal Adviser stands alone among lawyers within our Federal Government. He is the first guardian, and often the last, of the United States Government’s commitment to the rule of law in two different legal systems—constitutional and international.”).

⁸ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2000).

⁹ Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004), reprinted in *Guidelines for the President’s Legal Advisors*, 81 *IND. L.J.* 1345, 1349 (2006).

but the opposite of nay-sayer is “yes-man.” Nay-saying objectivity is especially important in the small inner circle of presidential decision-making to counter the tendency towards groupthink and a vulnerability to sycophancy. Finally, a competent lawyer also respects precedent, at least so far as to explain it away when the client contemplates a departure. In national security law, where there are fewer relevant judicial precedents, prior OLC opinions may substitute, and respect for this “precedent” requires explaining away or distinguishing them. The drag of precedent may well make legal analysis inherently conservative, but that is just another way of saying that it serves as an internal check on government conduct informed by such analysis.

Fourth (and appropriately last because this is really an internal check that only comes into play when the rest have failed), is the check provided by threats to “go public” by leaking embarrassing information or publicly resigning. After 9/11, we have seen a series of leaks of OLC and Department of Defense legal analyses, and of details of legally controversial national security initiatives, such as the Terrorist Surveillance Program and coercive interrogation. While we have had almost no public protest resignations by senior government officers since the Saturday night massacre in the Watergate era, the press reported that then-Deputy Attorney General James Comey and thirty other Justice Department lawyers successfully threatened to resign in order to get the Terrorist Surveillance Program changed.¹⁰

But do these kinds of internal checks really work? The internal checks on Congress of bicameralism and majority voting are both rooted in the text of the Constitution. The internal checks on the courts of the case and controversy requirement, the requirement for public trials, and the right to jury trial are also rooted in the text of the Constitution. But the internal checks on the Executive of inter-agency and intra-agency processes, office and lawyer culture, and even “going public” are not rooted in constitutional text. They are imposed – or, in the case of leaks, regulated – by the President or his designates. In other words, they are in substantial part dependent on the very persons they are designed to check. If President Bush or Vice President Cheney, or their delegates, imposes these checks, can’t they just as easily remove or relax them?

Calling this the Dick Cheney objection is a shorthand for the assumption that the Vice President, in fact, did remove them or ignore them,

¹⁰ See *U.S. Attorney Firings*, *supra* note 3, at 4 (“The attorney general could almost wallpaper his office with the resignation letters of those who he was supposed to be supervising.”).

presumably acting with the President's approval. Key national security decisions were made in a small circle, centered on the Vice President's office. Jack Goldsmith, who was briefly in charge of Office of Legal Counsel during the Bush Administration, has asserted that a "War Council" of just five lawyers made some of the most controversial decisions, largely ignoring both the interagency process and any kind of thorough and effective intra-agency process as well.¹¹ For example, they excluded even the National Security Advisor and Secretary of State Collin Powell from the decision to issue a military order authorizing military detention and trial by military commission; Powell reportedly first read about the military order in the newspapers, like the rest of us.¹² Even when they were drafting that order and allegedly consulted some JAG experts, War Council lawyers reportedly showed the penultimate draft of the order only to the lead JAG lawyer, who was allowed to review it for only thirty minutes and was told "don't copy it or take it from the room." His recommendations were completely ignored in the final order.¹³ Similarly, Goldsmith reports that the senior lawyers in Justice were initially bypassed in the authorization of the Terrorist Surveillance Program.¹⁴ Indeed, Goldsmith reports that junior OLC lawyer and War Council member, John Yoo, sometimes even circumvented his own boss, the Attorney General.¹⁵

Moreover, such by-passing or short-circuiting of the internal check of inter-agency and intra-agency review was *intentional*. It reflected a theory of unitary executive power developed in response to what some would call an anachronistic view of a weakened and beleaguered presidency, tracing its roots to the post-Watergate era in which Vice President Cheney served as Chief of Staff to President Ford (after serving in the Nixon White House). The ruthless application of the unitary executive theory – in part by blowing through¹⁶ contrary laws and internal checks – resulted in what one scholar calls the "unitary-executive-on-steroids,"¹⁷ and what the Vice

¹¹ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 22–23 (2007) (describing the War Council's actions as approving the Bush "administration's aggressive antiterrorism efforts").

¹² See, e.g., Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A01 (noting Colin Powell's reaction).

¹³ See *id.* (remarking on the undermining of the State Department).

¹⁴ Information on the authorization of the Terrorist Surveillance Program on file with author.

¹⁵ See GOLDSMITH, *supra* note 11, at 24 (commenting on Yoo not "fully running matters by" Ashcroft).

¹⁶ See *id.* at 79, 181 ("These men felt the same imperatives of responsibility that led Roosevelt and many other presidents to blow through 'legalistic' restrictions on presidential authority during times of crisis.").

¹⁷ Neal Katyal, *Counsel, Legal and Illegal*, NEW REPUBLIC, Nov. 9, 2007, available at http://www.nr.com/story_print.html?id=fe4ec25a-8fb0-4fc2-8735-6fd05b4b4b05.

President's lawyer, Dick Addington, himself described as, "push and push and push until some larger force makes us stop."¹⁸

To rephrase the objection, then, if the President or Vice President can so easily blow through the internal checks on the Executive Branch that I've catalogued, how effective are they? Let me offer three brief answers.

First, neither the President nor the Vice President can systematically bypass such internal checks because *neither actually does anything*. They are only "Deciders." The President, after all, is *not* charged by the Constitution with executing the law, although we often say that in a sloppy paraphrase of the actual text. He's charged with "tak[ing] care that the laws be faithfully executed."¹⁹ The Decider is inevitably dependent on others to carry out his decision. He can issue a military order ordering trial by military commission for enemy combatants, but he must use the JAG lawyers ultimately to develop the procedures by which the commissions operate and to operate the commissions. He can order surveillance, but has to use career lawyers in the Justice Department to implement FISA, or even to circumvent it to operate the Terrorist Surveillance Program. The result is that he necessarily is going to run into some of the internal checks I have described, no matter how bent he is on blowing through them.

Secondly, while the President or Vice President, or their delegates, can try to change the *architecture* of decision making, (alter the inter-agency process), they cannot change the agency or lawyer *culture* nearly as quickly. The lawyer culture is implanted in law school and nurtured in practice, taking years and years to develop. As a result, it also takes years and years to root it out.

Take the torture memorandum²⁰ written by John Yoo as an example. It is now notorious for its alleged role in promoting or justifying coercive interrogation. But it is also independently problematical to good lawyers because it arguably violates the first rule of lawyer culture; it is not competent. It ignores applicable laws and regulations. It fails to cite, let alone distinguish, the *Steel Seizure Case*²¹ when discussing an exclusive Commander-in-Chief power and the power of Congress to legislate on certain subjects. It ignores substantive due process case law on torture and police brutality that would have been more pertinent than the Medicare

¹⁸ GOLDSMITH, *supra* note 11, at 126.

¹⁹ U.S. CONST. art. II, § 3.

²⁰ Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAE BB127/02.08.01.pdf>.

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

regulations on which it relies. Dean Koh called it “perhaps the most clearly erroneous legal opinion I have ever read,”²² and he’s read a lot, both as an OLC alumnus himself and as a law professor. Another OLC alumnus says it is “dangerously flawed advice,” “universally condemned,” and “an extreme example of poor lawyering.”²³

If you dismiss these criticisms as the views of cheese-eating, latte-sipping liberals, consider instead the opinion of a self-proclaimed legal conservative who served as head of the OLC for the Bush Administration. Jack Goldsmith looked at the torture memo and decided that he had to withdraw it. Not because he was uncomfortable exploring the contours of torture law. Not because torture is repugnant. Not because he rejected the necessity for enhanced interrogation. He had to withdraw it and a successor memo because they “were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.”²⁴ That is, they violated the bedrock rule of lawyer competency. They also violated the OLC culture. Goldsmith said, “they lacked the tenor of detachment and caution that usually characterizes OLC work”²⁵ They were “wildly broader than was necessary to support what was actually being done.”²⁶

Of course, you could still object that the lawyer culture did not stop their issuance, let alone any coercive interrogation that they could be read to authorize. You could say that their withdrawal came too late. You could say the memos that replaced them were not much better. You could say Jack Goldsmith is trying to have it both ways. But I think what you’d also have to say is that, if the damage was done despite the internal checks, it didn’t stay done, thanks, in part, to the same checks.

A final answer to the Cheney objection is that many of the internal checks are imposed by the Executive in its own self-interest – the interest of avoiding an external check. The intra-agency FISA procedures which I summarized are driven by the prospect of FISC disapproval. The Executive uses the process in part to earn deference from the court. Other inter-agency and intra-agency procedures are driven by the possibility of

²² Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of Int’l Law, Yale Law School, Testimony before the Senate Judiciary Committee regarding the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States (Jan. 6, 2005) (transcript available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1345&wit_id=3938).

²³ Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1565, 1578 (2007).

²⁴ GOLDSMITH, *supra* note 11, at 10.

²⁵ *Id.* at 149.

²⁶ *Id.* at 150.

due process review. They anticipate procedures that courts might impose. Internal checks are also put in place and enforced to forestall new legislation, should Congress eventually examine the initiatives that result. It gives the President the argument that, “We vetted this carefully and oversaw it closely, so there is no need for new legislation [that is, a statutory check].”

In conclusion, there is no gainsaying that the internal checks I have described may not block a President or Vice President and his inner circle bent on ordering a legally controversial national security initiative. Internal checks on the Executive rarely work as roadblocks. But they frequently do operate as speed bumps or simply as warning flags, slowing such initiatives until external checks – including, sometimes the power of the press – can come into play. They deserve the same attention as external checks, after 9/11 more than ever, to serve in place of Madison’s angels.

