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Bush's EO - Ruling By Executive Decree

From Joel Skousen
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The only major difference between the German experience with executive decree (Hitler's 1933 Enabling Act) and the Bush administration's continual use of executive orders to dictate policy is the speed of implementation. The German Bundestag gave Hitler all power in one bill. In the US, Congress is allowing Bush to take it one small step at a time. Both ways justify greater executive power on a continual state of national emergency. Both used deception and black operations to provoke fear of terror to keep the nation in a state of fear and war. The fact that these US emergency powers were enacted long ago and enhanced by both parties over time attests that this is not merely a Bush/Cheney phenomenon. We are simply seeing its long-intended implementation at a very accelerated pace. This week I'll analyze the two latest Bush Executive Orders.

Executive Order Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq

<http://www.whitehouse.gov/news/releases/2007/07/20070717-3.htm>

The President begins the EO by addressing his "constitutional" authority: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act, as amended (50 U.S.C. 1701 et seq.)(IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.)(NEA), and section 301 of title 3, United States Code... "

Interestingly, the National Emergencies Act of 1976 was passed to "stop open-ended states of national emergency and formalize Congressional checks and balances on Presidential emergency powers. The act sets a limit of two years on states of national emergency. It also

imposes certain 'procedural formalities' on the President when invoking such powers, and provides a means for Congress to countermand a Presidential declaration of emergency and associated use of emergency powers.[source:Wikipedia]" It is clear that the president is not abiding by these restrictions and/or that Congress is complicit by not challenging the president on his continued use of emergency powers. Naturally, the 1976 law is full of loopholes that make it easy to extend the two year limit.

If you go to the trouble of reading these acts, you will see how just how totalitarian these powers are that are granted to the president in an emergency. Worse, there are no limitations on his power to declare such an emergency for almost any reason. These powers are not necessarily constitutional even though passed by Congress. The Constitution limits legislative powers to its enumerated functions. No such emergency powers were ever enumerated in the Constitution.

This EO essentially directs federal agencies to confiscate or block access to funds or property of any person (including US Citizens) without due process and without warning [direct violations of the constitution] who the administration determines "commit or pose a significant risk of committing [dangerously broad language], an act or acts of violence that have the purpose or effect of threatening the peace or stability of Iraq or the Government of Iraq,.. undermining efforts to promote economic reconstruction and political reform in Iraq."

Then the President boldly asserts, " I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13303 [2003] and expanded in Executive Order 13315, [also 2003] there need be no prior notice of a listing or determination [meaning: no warning to the affected parties]."

At first glance, it appears as if these powers could be used directly against commentators and critics of US government policy. Certainly many of us could be viewed as "undermining efforts to promote economic reconstruction and political reform."

The singularly courageous Devvy Kidd recently criticized the Bush administration's lack of constitutional authority to spend billions of taxpayer dollars on behalf of Iraqi reconstruction. Is she guilty of "undermining Iraq reconstruction"? Your editor has criticized the phony puppet government of Iraq in all its various iterations. Am I guilty of "undermining efforts" for political reform? I'm sure some could construe it as such.

Steven Watson of Prisonplanet.com complained loudly, "President Bush's newest executive order states that any American citizen who threatens the peace and stability of Iraq and undermines efforts to promote reconstruction and reform there may have all their property and interests seized by the Treasury department without warning."

G. Edward Griffin and Aaron Russo agree when they claim, "President Bush signed an Executive order that authorized blocking the use of any property held by anyone he says is a threat to the 'stabilization' of Iraq. That means anyone who opposes his Middle East foreign policy now is subject to loss of home, automobiles, savings, investments, and anything else considered as property."

But as Devvy Kidd correctly notes: "I'm sorry, but this EO says no such thing." She's right, as usual. The specific language of the order limits its reach, "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States."

That said, there is another part of the order which is so broad that it can include innocent citizens who unknowingly are deemed in "support" of those whose property is blocked by the order: Under Sec B, the president also claims the power to include persons who "(ii) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of... any person whose property and interests in property are blocked pursuant to this order;" "Materially assisted" is a very broad legal phrase that can include almost any form of financial dealing-even innocent and unknowing. Clearly due process is necessary for these persons since the line of "support" needs careful adjudication.

Thus, using one's first amendment right to criticize government action in Iraq does NOT fit under giving "material support." So, you won't find Devvy Kidd or me arrested for having accused the government of improperly funding Iraqi reconstruction or the current puppet political regime in Baghdad.

Nevertheless, I do have to agree with the critic's long term view that all of these incremental uses of executive power point to an eventual take down of American civil liberties. It is unwise, however, to declare each new thrust of this out-of-control administration as the coup d'grace of our rights. That will only discredit our voice of warning.

We must continue to warn about the overall threat about in imprecise language used to prosecute these kinds of policies. Bruce Fein, Justice Department official during the Reagan Administration commented, "Certainly it is highly constitutionally questionable to empower the government to destroy someone economically without giving notice. This is so sweeping it's staggering. I've never seen anything so broad that it expands beyond terrorism, beyond seeking to use violence or the threat of violence to cower or intimidate a population..." So, even though the reach of this EO is limited, it's use of broad legal language to cast a wide net is very dangerous to all in the long-term.

Next, let's consider the legal basis of Executive Orders. This particular president has gone beyond the customary use of Executive Orders. Basically, an EO is merely an instruction from the President to his own

executive branch, directing them to do things that ultimately must find support in lawful statutes. In no case is it appropriate to create new laws or punishments applicable to citizens or other branches of government outside the Executive or where not specifically mentioned in the law.

Constitutional lawyer Larry Becraft pointed out to Devvy Kidd that we have examples in case law where the Supreme Court has overturned executive privilege. In *YOUNGSTOWN CO. v. SAWYER*, 343 U.S. 579 (1952) 343 U.S. 579, the Supreme Court wrote: "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand."

The issue was President Truman's attempt to nationalize a US steel company under the guise of a national war and economic emergency. The court wasn't buying it. Nevertheless, one or two cases doesn't make an impenetrable barrier to executive or judicial mischief. Such decisions only establish a partial precedent in law-which the courts are free to disregard as they will. They are not bound by precedent. With the current proclivity of the Supreme Court to back this administration's "war on terror", I would not bet on this particular case protecting us against dangerous Executive Orders.

THE CIA EXECUTIVE ORDER: This EO purports to regulate and limit the CIA's ability to hold persons in secret prisons and torture them. In fact, it is only a ruse--a propaganda stunt to give the appearance of controlling CIA secret prisons and torture. The specific language carefully carves out unspoken exceptions and permits them.

As Marty Lederman explains: "The only truly important section of the E.O. is section 3(b)(i)(C), which defines the category of violence that will be deemed to violate Common Article 3 for purposes of determining whether a CIA interrogation program comports with CA3. In addition to torture as defined by the federal criminal statute, and the forms of violence that remain prohibited under the new WCA [War Crimes Act], that subsection of the E.O. prohibits only 'other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in [the War Crimes Act].' In other words, if a form of violence is not already prohibited by federal criminal law, and is not 'comparable' to the forms of violence prohibited by the WCA, the CIA is not prohibited from using it."

I think it is obvious that this new EO does NOT prohibit "enhanced interrogation techniques" like water-boarding (near drowning by pouring water constantly over the head of an inclined prisoner), and the administration knows it. Every attempt to ask an administration official about water boarding was met with evasion.

As Joanne Mariner said in her aptly titled piece, "The Misinterpreter-in-Chief," ...The new order purports to determine that the CIA's secret prison program 'fully complies' with U.S. obligations under Common Article 3 of the Geneva Conventions, so long as the CIA follows a series of requirements in carrying out the program.

"But even without John Yoo to write his legal opinions, President Bush still gets it wrong. The Geneva Conventions do not permit secret, incommunicado detention, and U.S. law makes no provision for the CIA to hold detainees. 'Reaffirming' the President's February 2002 Determination, the new order opens with a misstatement. It says that, in February 2002, the President determined that al Qaeda detainees were not entitled to prisoner of war status under the Geneva Conventions, and that the President is reaffirming that determination with the present order.

"This short description rewrites history and leaves out a key intervening event: the Supreme Court's landmark 2006 ruling in the case of Hamdan v. Rumsfeld. Back in February 2002, the President did not simply determine that al Qaeda suspects captured in Afghanistan had no right to prisoner of war status; what he said was that they were not protected by the Geneva Conventions at all. Those detainees, he asserted, had absolutely no legal claim to humane treatment: If the U.S. decided not to abuse them, it did so as a matter of policy. Unsurprisingly, this initial determination set the stage for much of the abusive treatment that followed.

"President Bush hates to admit he could be wrong, but the fact is that the Supreme Court, in Hamdan, expressly rejected his position. Ruling that al Qaeda detainees could claim minimum Geneva Convention protections, the court struck down the president's jury-rigged system of military commissions."

EXECUTIVE ORDERS NOT THE ONLY WAY OF EXPANDING PRESIDENTIAL POWER: As Lynn Stuter of NWV relayed, "Last week, like so many before it, was highlighted by more incidents of egregious abuse and over extension of power by the executive branch under George W Bush, by unlawfully withholding information from Congress and the public:

1) "Representative Peter DeFazio (D-OR), member of the Homeland Security Committee, was denied access to classified documents concerning continuity of government (how government will be conducted) during a terrorist attack. Speaking of his ordeal, DeFazio had this comment to make, 'Maybe the people who think there's a conspiracy out there are right'

2) "Senator Hillary Clinton (D-NY), member of the Senate Armed Services Committee, was denied a requested briefing on how the Pentagon planned to safely withdraw American troops from Iraq. In

denying that request "Undersecretary of Defense for Policy Eric Edelman did not mince words. 'Premature and public discussion of the withdrawal of U.S. forces from Iraq reinforces enemy propaganda that the United States will abandon its allies'" Say what? That discussion has been all over the news media for weeks, making it obvious that in making said statement the Pentagon has made no accommodation for the safe withdrawal of American troops from Iraq.

3) "Bush Administration officials unveiled a bold assertion of executive privilege in the dispute over the firing of nine U.S. attorneys; seeking to block contempt charges being sought by Congress [for thumbing their nose at a Congressional subpoena] against current and former Bush Administration officials in the hopes of prying loose information concerning the firings."

Perhaps the most egregious presumption of power for the Bush/Cheney regime comes with the expansions of war powers based upon the president standing as "Commander in Chief." Adam Cohen blows apart this argument [My comments in brackets]:

"The nation is heading toward a constitutional showdown over the Iraq war [and the coming Iran war]. Congress is moving closer to passing a bill to limit or end the war [not really, just going through the motions], but President Bush insists Congress doesn't have the power to do it. 'I don't think Congress ought to be running the war,' he said at a recent press conference. [They may not have power to "run" the war, but if they have the power to declare war, they have the power to un-declare war and de-fund it-which they are unwilling to do.]

"The Constitution does make the president 'commander in chief,' a title President Bush often invokes. But it does not have the sweeping meaning he suggests. The framers took it from the British military, which used it to denote the highest-ranking official in a theater of battle. Alexander Hamilton emphasized in Federalist No. 69 that the president would be 'nothing more' than 'first general and admiral,' responsible for 'command and direction' of military forces...

"The founders would have been astonished by President Bush's assertion that Congress should simply write him blank checks for war. They gave Congress the power of the purse so it would have leverage to force the president to execute their laws properly... The framers expected Congress to keep the president on an especially short leash on military matters. The Constitution authorizes Congress to appropriate money for an army, but prohibits appropriations for longer than two years."

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