

“George, Charles, and George – the Good, the Bad, and the Ugly”

Kitsap Unitarian Universalist Fellowship

Bremerton, WA

January 21, 2007

By Bruce E.H. Johnson

Davis Wright Tremaine LLP, Seattle

In September 1787, as the Constitutional Convention ended in Philadelphia. Benjamin Franklin, one of the delegates, was approached by a group of citizens asking what sort of government the Convention had created.

His answer was: “A republic, if you can keep it.”

The Convention had rejected the option of a monarch – not surprisingly, since the Revolution had been caused by alleged abuses of power by King George III. The Framers gave us instead a republic, but with a powerful executive – a President – who also, interestingly, would be named George.

Not everyone was persuaded that this “President” proposal was a good idea for America. At the Virginia ratification debates, Gov. Patrick Henry attacked the scheme: “Away with your President!” In effect, he thundered: “We shall have a King: The army will salute him monarch.”

What did Franklin and these American citizens understand in 1787 when he said we would have a “republic”? And how do we keep it?

The Framers had a deep understanding of history and knew about republics, both ancient and modern, with a particular appreciation of English history, including the short-lived English Commonwealth.

But, first, we should ask: why is this ancient history relevant today?

To explain, I would like to briefly discuss the Bush Administration, and especially the driving force behind recent unprecedented assertions of presidential power on behalf of another George, who claims a right (and perhaps even a divine right, since he believes that God caused his election in December 2000) to rule

over us – George W. Bush. In the aftermath of September 11, 2001, Vice President Dick Cheney, and his chief deputy, lawyer David Addington, have invented a theory that President Bush possesses inherent military powers that cannot be restrained by the Constitution, the Congress, or the courts, and that he may ignore such laws as he wishes.

In fact, according to a November 2006 article in *The Boston Globe*, Cheney's "office has been the driving force behind the current administration's hoarding of secrets, its efforts to impose greater political control over career officials, and its defiance of a law requiring the government to obtain warrants when wiretapping Americans. Cheney's staff has also been behind President Bush's record number of signing statements asserting his right to disregard laws."

As the *Globe* article further notes: "In signing statements and legal memos, the administration, with Cheney and Addington as its driving force, has repeatedly used the war on terrorism to advance the idea that the president has vast 'inherent' authority to bypass laws enacted by Congress."

In 2002, noted *The Globe*, "the administration drew up secret legal opinions informing military and CIA interrogators that the president has the power to authorize them to violate laws banning torture." Bush's lawyers asserted that "the president's inherent constitutional authority" allows his agents to ignore the nation's laws and international treaties against torture during interrogations conducted "under his commander-in-chief authority."

We have seen this viewpoint before, and it is summarized in the immortal words of the unindicted co-conspirator President Nixon, when he sought to justify the Watergate burglary – the President can break the law, he said, because "when the president does it that means that it is not illegal." Former Secretary of State Colin Powell had a simpler analysis: "Addington," he observed, "doesn't care about the Constitution."

In a July 2006 *New Yorker* article, journalist Jane Mayer wrote about these efforts to extend the powers of the Presidency in times of "apparent war" by setting aside the existing American legal system as "too cumbersome." Known as the New Paradigm, she wrote, "this strategy rests on a reading of the Constitution that few legal scholars share—namely, that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it. Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside."

Mayer quoted Bruce Fein, a conservative scholar who was President Regan's Solicitor General:

David Addington is a satisfactory lawyer, . . . but a less than satisfactory student of American history, which for a public servant of his influence, matters more. "If you read the Federalist Papers, you can see how rich in history they are," he said. "The Founders really understood the history of what people did with power, going back to Greek and Roman and Biblical times. Our political heritage is to be skeptical of executive power, because, in particular, there was skepticism of King George III. But Cheney and Addington are not students of history. If they were they'd know that the Founding Fathers would be shocked by what they've done."

Let us take up Fein's suggestion to become, briefly, students of history – and I would like to offer a brief tour of two other chief executives, one English and one American, followed by a comparison with the current occupant of the White House. In doing so, I recognize that this analysis is based merely on facts, not on faith, and therefore may appeal only to what Bush's supporters have called the "reality-based community."

The Framers accepted a strong presidency, but trusted that the executive powers would likely not be abused, at least initially. This trust is explained in two words – George Washington.

George is the good one in my title.

George Washington believed, punctiliously, that a republican leader, even one commanding the armed forces was subordinate to the sovereign authority of the American people, as expressed in their legislature – the Congress.

Washington was a student of history. He knew that Rome had lost its freedom when the citizens of the Roman Republic – concerned about their security and about unchecked violence – allowed a general to assume an executive (in fact military, like commander-in-chief) title, *imperator* (or "emperor"), while they pretended they were not re-creating the monarchy that they had overthrown several centuries earlier, in 509 B.C. Washington therefore chose to defer to Congress, with Cincinnatus as his example – a Roman farmer who was twice asked by the Senate to serve the Republic as a military leader in face of an invasion, defeated the invaders, and then immediately retired to his farm.

According to biographer Joseph J. Ellis, Washington's "life was all about power: facing it, taming it, channeling it, projecting it" – and he insisted on limiting military power, always subjecting it to legislative authority. Thus, in 1776, as the new Army suffered repeated losses, and was on the verge of extinction, Washington decided he should burn New York City, to deny it to the advancing British. Congress ordered him not to. He called it "a capital error" but complied.

Soon, according to David Hackett Fisher's book *Washington's Crossing*, Washington reigned in his military powers even further. There were no Geneva Conventions then, and under existing military rules any victorious military commander could kill or torture prisoners by denying them quarter. Indeed, the British routinely collected American prisoners and dumped them into rotting prison ships in New York Harbor, under squalid conditions, where thousands died. But after the Battle of Princeton, Washington announced that the American army would not mistreat and torture prisoners of war. He said: "Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army in their Treatment of our unfortunate brethren. ... Provide everything necessary for them on the road."

As Fisher notes: "American leaders believed that it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause.... In Congress and the army, American leaders resolved that the War of Independence would be conducted with a respect for human rights, even of the enemy."

In March 1783, after the victory at Yorktown, the fate of American republicanism hung in the balance, as several leaders of the Continental Army, angry that Congress had not paid them their salaries, plotted a military takeover. Washington learned of this plot and single-handedly stopped this coup attempt, when he showed up uninvited at an officers' meeting in Newburgh, NY, and asked to speak to them. This was a signal moment in American history – Caesar had crossed the Rubicon in defiance of the Roman Senate, Cromwell had assumed military control over the English Commonwealth, and a few years later Napoleon would seize power during the French Revolution – and hundreds of caudillos and men on horseback would follow their examples. Instead, Washington asked his officers to place "full confidence in the purity of the intentions of Congress . . . to render ample justice to you, for your faithful and meritorious services."

When he noticed that his audience did not seem persuaded, Washington sighed, removed a letter from his pocket, and announced that it was from a member of Congress and that he wished to read it to them. He produced the letter, looked at it, fumbled with it, and then reached into his pocket again and produced a pair of new reading glasses. Then he spoke: “Gentlemen, you will permit me to put on my spectacles, for I have not only grown gray but almost blind in the service of my country.” His soldiers had never seen Washington’s spectacles before. As he read the letter and as they saw him struggle with his reading, his audience began to cry.

The idea of a military coup died. And, instead, a few months later, Washington rode to Annapolis, where the Continental Congress was sitting and, having asked permission, appeared before Congress and offered his resignation: “[B]idding an Affectionate farewell to this August body under whose orders I have so long acted, I here offer my Commission, and take my leave of all the employments of public life.” As Joseph J. Ellis notes in his recent biography *His Excellency*, Washington could easily have assumed an American throne, but at Annapolis in 1783, “he had sufficient control over his ambitions to recognize that his place in history would be enhanced, not by enlarging his power, but by surrendering it.”

These acts of renouncing power, and his tone of obedience as a public servant to the will of Congress, were repeated even when Washington became president. He was the model Chief Executive for the Framers’ generation.

Indeed, when he learned of Washington’s repeated efforts to resign authority rather than become a military dictator for life, King George III marveled that this was an unusual leader, who could give up power to preserve the liberties of his people. He told the painter Benjamin West that Washington’s actions had shown that he was “the greatest man in the world.”

So, what did Americans in the Revolutionary generation understand were the **vices** of Kings that they wanted to avoid? Their Declaration of Independence, while it named King George III, was actually aimed at assertions of arbitrary executive power that had reached its apogee 130 years earlier.

And so, we come to Charles.

Americans looked back to King Charles I, the last English King who asserted that he ruled by divine right. Charles was no George Washington.

In his book *The Tyrannicide Brief*, Geoffrey Robertson, a London barrister, has described the 1620s through the 1640s, when Charles repeatedly defied Parliament, and asserted that its laws could not bind him. He also imprisoned political opponents, tortured prisoners of war, and refused to allow courts to issue writs of habeas corpus against him, in defiance of Magna Carta (a charter initially signed by King John in 1215 agreeing to be bound by rules of justice and due process – one of the models for our own Constitution).

Charles insisted that, as King, he ruled England by divine right, and that no parliamentary law could intrude on his inherent powers. When he imprisoned his subjects indefinitely and lawyers sought their freedom, Charles ordered that his prison warden to answer the writ by asserting that the prisoners were held there “by His Majesty’s special command.” The King informed Parliament that “princes are not bound to give account of their actions but to God alone.” Parliament’s effort to rein him in with laws, he said, was “incompatible with monarchy.”

Charles – like many chief executives throughout history – had a problem in the 1620s. He had begun a foreign war (in France) and things had gone badly. Charles needed money. Parliament was opposed to his ventures. The King did not like to call Parliament into session.

Eventually, Charles decided he no longer needed Parliaments and ran the country himself, from 1629 to 1640. But Charles soon needed money again and imposed a special tax on the people without Parliament’s approval, claiming that funds were needed to deal with “pirates” and “thieves” and “robbers” and, yes, “Turks” – apparently, the Kingdom was menaced by Muslims. In 1638, in the *Ship-Money* case, Charles again imprisoned a political opponent who refused to pay, and his judges (who of course all owed their continuation in office to his will) rejected the writ of habeas corpus because “the King may dispense with any laws in case of necessity.”

In 1642 and again, in 1648, Charles declared war on Parliament and its supporters. He lost both wars. Later that year, as Charles was attempting to launch a third war against his people, he was arrested and put on trial.

He was convicted in Westminster Hall in January 1649, and was beheaded outside the Banqueting House in Whitehall. England then declared itself a republic, abolished the King’s special courts, the most famous one being Star Chamber, and eliminated Royal censorship of the press. (In 1660, the English

people handed authority to his son, Charles II, who promised to cooperate with Parliament. Unfortunately, when Charles II died, his younger brother, James II, was not as bright and was more arrogant, and forced Parliament to institute another revolution that finally enabled the English Crown to become a constitutional monarchy.)

Now we come to George Bush.

The issues raised by his (and Cheney's) seizure of power after 9-11 resemble many of the issues faced by Washington and by Charles I – the scope of habeas corpus, the propriety of torturing or mistreating prisoners of war, the right to trial with an independent judiciary, and whether “inherent” military or kingly powers of the Executive can trump the law, as enacted by the people's legislators. They boil down to a single over-arching constitutional question – to what extent is the chief executive subject to law or can he, unlike us mortals, defy the law?

A few weeks after 9-11, Vice President Cheney and President Bush set up a separate prison system to hold prisoners of their “war on terrorism” (and later detainees captured during the President's Iraq War) indefinitely, without criminal charges, and with military commissions staffed by judges appointed by, and subject to being fired by, Bush. They also announced that they would refuse to recognize any efforts to obtain writs of habeas corpus from regular courts on behalf of the prisoners that they were accumulating. Any appeal from Bush's military commissions would go to Bush, not to a judge, for final determination. As Cheney described the scheme in November 2001: “We think it *guarantees* that we'll have the kind of treatment of these individuals that we believe they deserve.”

Many legal and constitutional scholars contend that these provisions are in direct opposition to the Constitution (which protects the right of habeas corpus), and the Bill of Rights. So far, these efforts to extend Presidential powers, both overtly and covertly, have met with opposition by the courts, including several adverse decisions in the Supreme Court rejecting Bush's efforts to revoke habeas corpus rights for citizens and non-citizens who have been interned indefinitely in Guantánamo Bay and elsewhere (cases such as *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld*).

One recent case, *ACLU v. NSA*, challenged the warrantless spying program undertaken secretly by the President and his officials in direct defiance of a 1978 statute, which was enacted after Congress uncovered the abuses of J. Edgar Hoover (who, you may recall, secretly wiretapped Dr. Martin Luther King, Jr., and sought

to use the tapes in an attempt to blackmail King into committing suicide) and other government officials in the 1960s and 1970s. This 1978 law, the Foreign Intelligence Surveillance Act, by its terms was the “exclusive” procedure for warrantless spying by the President and his officials. FISA requires that the President go to a special court to obtain authority to do any “electronic surveillance” within the United States. The FISA court was not a major impediment to the White House – between 1979 and 2003, for example, the court denied only three of the Executive’s 16,450 applications for a warrant.

Even so, Bush decided to bypass the statutory court, but his secret program was uncovered by a *New York Times* investigation in December 2005. Lawsuits followed.

In August 2006, in *ACLU v. NSA*, a federal judge in Michigan, Anna Driggs Taylor, ruled that the Bush scheme was unconstitutional. Of special significance here, Judge Taylor reminded the White House that the Constitution had been designed to prevent the President from becoming a King, and quoted James Madison in *The Federalist* No. 47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

Judge Taylor also noted that these constitutional protections had been enacted by the Founders with “the actions of the star chamber in mind.” (This was a specific reference to King Charles I’s secret court system.)

Finally, Judge Taylor rejected Bush’s argument that he was commander-in-chief and therefore could ignore the Constitution and the Congressional statutes with impunity. She observed: “We must . . . note that the Office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all ‘inherent powers’ must derive from that Constitution.” Bush must exercise even his military powers in accordance with the Constitution, Judge Taylor ruled, because (in a comment that recalls the 1973 Saturday Night Massacre, when Nixon attempted to cover up his crimes by ordering the Justice Department prosecutors to stop investigating him), “the President [has] been created Commander in Chief of only the military, and not of all the people, even in time of war.”

Her conclusions are well-supported by the historical evidence. Indeed, Alexander Hamilton noted in *The Federalist* that the President, as commander-in-

chief, has authority that “would be nominally the same with that of the king of Great Britain, but in substance much inferior to it” because it amounts to “nothing more than the supreme command and direction of the military and naval forces, as first General and admiral” beholden to Congress, which retained the power to declare war and raise and regulate armies.

The *ACLU v. NSA* case is on appeal, and will be argued early next month. (My partner Randy Gainer is co-counsel for the ACLU.) Just last week, the Attorney General informed the Senate, without explanation, that the President would henceforth comply with FISA in undertaking his eavesdropping activities on Americans, and the Government has asserted that the Michigan lawsuit is therefore moot. Some commentators have suggested that this is merely a tactical retreat, as Democrats have now taken over Congress and a Court of Appeals argument date approaches, and so a few days ago the Senate Judiciary Committee has requested further information.

These are important issues, and go to heart of whether we have a republic. The President and his supporters take the view that (to quote the words of Alan Bennett in his recent hit play and film, *The History Boys*): “The loss of liberty is the price we pay for freedom.”

This view of inherent executive powers draws inspiration from Charles I, not from George Washington or our other Framers. Indeed, Thomas Paine asserted in 1776 in *Common Sense* that we owe no duty of obedience to any man, even a King, who has “discovered . . . a thirst for arbitrary power.” Rather, said Paine, “in America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.”

In 1866, in *Ex Parte Milligan* (1866), the United States Supreme Court granted a writ of habeas corpus and rejected a death sentence imposed by a military commission set up to try civilians in Indiana during the Civil War. In its opinion, the Court refused to accept the military authorities’ principal legal justification for imposing martial law – they had cited fear, of a possible Confederate invasion, as their basis for detaining civilians and imposing trial by military commissions. The Court held that the power to impose martial law when civilian courts remain open was inconsistent with a free republic. To permit such expansion of Executive authority invites future tyranny, as Justice Davis warned us, in his opinion for the Court: “Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and

Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.”

Yes, we have a republic – if we can keep it.