II. Supplemental Readings

Overviews

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Current Issues: Executive Power (reverse chronological order)

page 13 – 15 Savage, Charlie. "Washington Memo: Key to Power in Court Pick," *New York Times,* May 25, 2009.

page 16 – 20 Hastings, Max. "Americans regard him as something of a Messiah..." *The Daily Mail,* April 28, 2009.

page 21 – 22 Savage, Charlie. "Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus," *New York Times*, April 3, 2009.

page 23 – 24 Williams, Joseph. "Will Obama Be Like Bush on Executive Power?" *Boston Globe,* March 4, 2009.

page 25 – 26 Greenwald, Glenn. "Congress takes first step in impose limits on Obama's executive power," Salon.com, Feb. 12, 2009.

page 27 – 29 "Barack Obama's Inauguration and Now to Work." *The Economist*, Jan 22, 2009

page 30 – 31 Bowyer, Jerry. "Presidents and the Constitution." *Forbes,* Jan. 20, 2009.

page 32 – 33 Wilber, Del Quentin and r. Jeffrey Smith. "Intelligence Court Releases Ruling in Favor of Warrantless Wiretapping," *Washington Post*, Jan. 16, 2009.

page 34 – 38 Richey, William. "Bush pushed the limits of presidential power," *Christian Science Monitor*, Jan. 14, 2009.

page 39 Rusher, William. "The Limits of Presidential Power," Townhall.com. December 2, 2008.

page 40 – 42 Napolitano, Andrew. "Most Presidents Ignore the Constitution." *Wall Street Journal,* Oct. 29, 2008

page 43 – 44 Healy, Gene. "New President Won't Tame Executive Power," *Orange County Register,* Oct. 14, 2008.

page 45 – 52 Representative Bob Barr, "Testimony before the House Judiciary Committee," July 25, 2008 posted by the Tenth Amendment Center.

page 53 Savage, David. "Supreme Court rejects wiretap suit," *Los Angeles Times*, Feb. 20, 2008.

page 54 – 56 "State Secrets' Doctrine Draws Scrutiny; Congress, Corts Examine Bush Strategy to Protect Surveillance Program" MSNBC.com. Nov. 26, 2007.

page 57 Gellman, Barton and Jo Becker. "Pushing the Envelope on Presidential Power," *Washington Post*, June 25, 2007.

page 58 – 59 Nolan, Beth. "Executive Overreach; White House is Taking Privilege Too Far," *Washington Post*, March 23, 2007.

page 60 – 61 Cohen, Adam. "Congress, the Constitution and War: The Limits on Presidential Power," New York Times, Jan 29, 2007.

page 62 – 63 Kmiec, Douglas. "The Limits of Executive Power; the President's Best Defense is His Defense of the Nation," SanFrancisco Chronicle, Dec. 22, 2005.

page 63 – 67 Greenwald, Glenn. "Excerpt: How Would a Patriot Act?" Alternet, Independent Media Institute, May 11, 2006.

page 68 – 77 Yoo, John. "Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism," Heritage Foundation First Principles Series, April 2006.

page 78 – 80 Beeman, Richard R. "The Founding Fathers and Executive Power," *The Chronicle of Higher Education,* March 17, 2006.

page 81 – 82 Will, George. "No Checks, Many Imbalances," *Washington Post,* Feb. 16, 2006.

Historical Resources

page 83 – 85 Alexander Hamilton, Federalist 67 (Note all Federalist Papers are available from the Avalon Project, Yale University). -Classic Notes - Some / not all

page 86 – 89 "Statement on the Articles of Impeachment," Representative Barbara Jordan, July 25, 1974.

page 90 – 95 "Separation of Powers: When do the actions of one branch unconstitutionally intrude upon the powers of another branch?" University of Missouri-Kansas City.

page 96 – 98 Greenberg, David. "Lincoln's Crackdown: Suspects jailed. Not charges filed. Sound Familiar?" Slate.com, Nov. 30. 2001.

page 99– 100 "Exploring the Limits of Presidential Power after 9/11: Lessons from Lincoln. American Political Science Association.

page 101–109 Williams, Frank J. "Abraham Lincoln and Civil Liberties in Wartime," Heritage Foundation Lecture, May 5, 2004.

Selected Case Summaries in Chronological Order

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page 110 1886 Ex Parte Milligan
page 112 1895 In Re Debs
page 116 1936 United States v. Curtiss-Wright Export Corp.
page 119 1942 Ex Parte Quirin
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"The Presidential Puzzle"
Thomas E. Cronin
In The State of the Presidency

http://homepages.udayton.edu/~aherndaw/cronin.htm

"We give the President more work than a man can do, more responsibility than a man can take, more pressure than a man can bear. We abuse him often and rarely praise him. We wear him out, use him up, eat him up. And with all this Americans have a love for the President that goes beyond loyalty or party nationality (sic); he is ours, and we exercise the right to destroy him." -- John Steinbeck

According to Cronin, "The modern (post-Franklin Roosevelt) presidency is bounded and constrained by various expectations that are decidedly paradoxical. Presidents and presidential candidates must constantly balance themselves between conflicting demands. It has been suggested by more than one observer that it is a characteristic of the American mind to hold contradictory ideas simultaneously without bothering to resolve the potential conflicts between them. Perhaps some paradoxes are best left unresolved, especially as ours is an imperfect world and our political system is a yet to be perfected system held together by many compromises. But we should, at least, better appreciate what we expect of our Presidents and would-be presidents. For it could well be that our paradoxical expectations and the imperatives of the job make for schizophrenic presidential performances". (4)

The Twelve Paradoxes

1. **The Decent and Just but Decisive and Guileful Leader**
   - Opinion polls suggest that Americans want an honest and trustworthy yet tough and forceful leader with a touch of ruthlessness.
   - "...we demand a double-edged personality....the sinister as well as the sincere, President Mean and President Nice....The public in this case really seems to want a kindhearted son of a bitch".
2. **The Programmatic but Pragmatic Leader**
   - "We want both a programmatic (committed on the issues and with a detailed program) and pragmatic (flexible and open, adjustable) person in the White House".
3. **The Innovative and Inventive Yet Majoritarian and Responsive Leader**
   - "We want our presidents to provide bold, innovative leadership and at the same time respond faithfully to public-opinion majorities".
   - "To talk about high ideals is one thing...But the public resists being led to far in any one direction".

- "Most of our presidents have been conservatives or at best "pragmatic liberals" who have seldom ventured much beyond the crowd".

4. **The Inspirational but Don't Promise More than You Can Deliver Leader**
   - "We ask our presidents to raise hopes, to educate, to inspire. But too much inspiration will invariably lead to dashed hopes, disillusionment and cynicism".

   - "Do presidents overpromise because they are congenital optimists or because they are pushed into it by the demanding public? Surely the answer is a mixture of both".

5. **The Open and Sharing but Courageous and Independent Leader**
   - "Americans long for dynamic, aggressive presidents even if they do cut some corners....the country in fact yearns for a hero in the White House".

   - "Some scholars suggest that the less popular presidents were often our greatest leaders. We honor mediocre presidents during their incumbency".

6. **Taking the Presidency Out of Politics**
   - "A president is expected to be above politics in some respects and highly political in others. A president is never supposed to act with his eye on the next election; he's not supposed to favor any particular group or party. Nor is he supposed to wheel and deal or twist too many arms. That's politics and that's bad".

   - "A president separated from, or somehow above, politics might easily become a president who doesn't listen to the people, doesn't respond to majority sentiment or pay attention to views that may be diverse, intense, or at variance with his own. A president immunized to politics would be a president who would too easily become isolated from the processes of government and removed from the thoughts and aspirations of his people".

7. **The Common Man Who Gives an Uncommon Performance**
   - "It has been said that the American people crave to be governed by a president who is greater than anyone else but not better than anyone else. We are inconsistent; we want our president to be one of the folks but also something special".

8. **The National Unifier--National Divider**
   - "...our longing for a president to push us together again and yet to be a forceful priority setter, budget manager, and executive leader. The two tasks are near opposites".

   - "Our nation remains one of the few in the world that calls upon its chief executive to serve also as its symbolic, ceremonial head of state".

- "We have designed a presidential job description, however, that impels our contemporary presidents to act as national dividers. Presidents must necessarily divide when they act as the leaders of their political parties, when they set priorities that advantage certain goals and groups at the expense of others, when they forge and lead political coalitions, when they move out ahead of public opinion and assume the role of national educators, and when they choose one set of advisers over another".

9. The Longer He Is There, the Less We Like Him

- "Simply stated, the more we know of a president, or the more we observe his presidency, the less we approve of him. Familiarity breeds discontent. Research on public support of presidents indicates that approval peaks soon after a president takes office and then slides downward until it bottoms out in the latter half of the four year term".

- "Peace and prosperity can help stem the pleasant tide of ingratitude... For other presidents, however, their eventual downslide in popularity was due nearly as much to the public's inflated expectations as to the president's actions".

10. The Reassuring the Public While Accentuating a Sense of Crisis Leader

- "Presidents are simultaneously asked to build a lasting peace and at the same time maintain United States superiority as the number one superpower".

- "This paradox, in a sense, is the inevitable outgrowth of our belief system that is based on both laissez-faireism (fear of big government and the desire to be left alone) and interventionism (reliance on the strength and authority of the United States govern-ment to solve national and international problems".

- "We expect our president...to solve the entire scope of our problems by mustering all the powers and strengths to which his office entitles him--and then some--but we are unwilling to allow him to infringe upon our rights in any significant way. We don't especially like calls for sacrifice".

11. The Active in Some Areas and at Some Times but Passive in Other Areas or at Other Times Leader

- "There are times when we want our president to be engaged actively in doing certain things, and there are other occasions when we would like him to sit back and let things run their course. But different people will disagree on whether the times demand presidential passivity or activity".

- "...it is clear that the president is constrained by the dominant national mood or climate of expectations. Sometimes the coming of a new, colorful president can help recast or shift the national mood. More often, however, the national mood responds to major events, to challenges, to times of testing".

12. What It Takes to Become President May Not Be What Is Needed to Govern the Nation

- "To win a presidential election takes ambition, ambiguity, luck, and masterful public relations strategies. To govern the nation plainly requires all of these. However, it may well be that too much ambition, too much ambiguity, and too heavily a reliance on phony public-relations tricks actually undermine the integrity and legitimacy of the presidency".

- "To win the presidency many of our presidents (Lincoln, Kennedy, and Carter come to mind) had to talk as more progressive or even populist than they actually felt; to be effective in the job they felt compelled to act as more conservative than they wanted to".

- "The paradoxes of the presidency do not lie in the White House but in the emotions, feelings, and expectations of us all. There exists some element in the American mind, and perhaps in the minds of people everywhere, that it is possible to find a savior-hero who will deliver us to an era of greener grass and a land of milk and honey. When this pseudomessiah fails we inflict upon him the wrath of our vengeance. It is also a ritual destruction; we venerate the presidency, but destroy our presidents. Perhaps this is only logical when we elect a person expecting superhuman strength, character, and restraint, and invariably get a rather fragile, overworked, fallible, and mortal human.

Moral: Expect less of our presidents and more of ourselves?

The Cult of the Presidency

Who can we blame for the radical expansion of executive power? Look no further than you and me.

Gene Healy | June 2008 Print Edition
http://www.reason.com/news/show/126020.html

"I ain't running for preacher," Republican presidential candidate Phil Gramm snarled to religious right activists in 1995 when they urged him to run a campaign stressing moral themes. Several months later, despite Gramm's fund raising prowess, the Texas conservative finished a desultory fifth place in the Iowa caucuses and quickly dropped out of the race. Since then, few candidates have made Gramm's mistake. Serious contenders for the office recognize that the role and scope of the modern presidency cannot be so narrowly confined. Today's candidates are running enthusiastically for national preacher—and much else besides.

In the revival tent atmosphere of Barack Obama's campaign, the preferred hosanna of hope is "Yes we can!" We can, the Democratic front-runner promises, not only create "a new kind of politics" but "transform this country," "change the world," and even "create a Kingdom right here on earth." With the presidency, all things are possible.

Even though Republican nominee John McCain tends to eschew rainbows and uplift in favor of the grim satisfaction that comes from serving a "cause greater than self-interest," he too sees the presidency as a font of miracles and the wellspring of national redemption. A president who wants to achieve greatness, McCain suggests, should emulate Teddy Roosevelt, who "liberally interpreted the constitutional authority of the office" and "nourished the soul of a great nation." President George W. Bush, when passing the GOP torch to his former rival in March, declared that the Arizona senator "will bring determination to defeat an enemy and a heart big enough to love those who hurt." Hillary Clinton, meanwhile, suggests she is "ready on Day 1 to be commander in chief of our economy."

The chief executive of the United States is no longer a mere constitutional officer charged with faithful execution of the laws. He is a soul nourisher, a hope giver, a living American talisman against hurricanes, terrorism, economic downturns, and spiritual malaise. He—or she—is the one who answers the phone at 3 a.m. to keep our children safe from harm. The modern president is America's shrink, a social worker, our very own national talk show host. He's also the Supreme Warlord of the Earth.

This messianic campaign rhetoric merely reflects what the office has evolved into after decades of public clamoring. The vision of the president as national guardian and spiritual redeemer is so ubiquitous it goes virtually unnoticed. Americans, left, right, and other, think of the "commander in chief" as a superhero, responsible for swooping to the rescue when danger strikes. And with great responsibility comes great power.

It's difficult for 21st-century Americans to imagine things any other way. The United States appears stuck with an imperial presidency, an office that concentrates enormous power in the hands of whichever professional politician manages to claw his way to the top. Americans appear deeply ambivalent about the results, alternately cursing the king and pining for Camelot. But executive power will continue to grow, and threats to civil liberties increase, until citizens reconsider the incentives we have given to a post that started out so humble.

Minimum Leader

It wasn't supposed to be this way. The modern vision of the presidency couldn't be further from the Framers' view of the chief executive's role. In an age long before distrust of power was condemned as cynicism, the Founding Fathers designed a presidency of modest authority and limited responsibilities. The Constitution's architects never conceived of the president as the man in charge of national destiny. They worked amid the living memory of monarchy, and for them the very notion of "national leadership" raised the possibility of authoritarian rule by a demagogue ready to create an atmosphere of crisis in order to enhance his power.

The constitutional office they designed gave the president an important role, but he'd have "no particle of spiritual jurisdiction," the 69th essay of The Federalist Papers tells us. In Federalist No. 48, James Madison assured Americans that under the proposed Constitution the "executive magistracy is carefully limited, both in the extent and the duration of its powers." Indeed, the very pseudonym the Federalist's authors chose, "Publius," says something about how hostile Founding-generation Americans were to the idea of one-man rule. Publius Valerius Poplicola, a hero of the Roman revolution in the 5th century B.C., was famous in part for passing a law providing that anyone suspected of seeking kingship could be summarily executed.

Never were constitutional limitations more essential than when it came to using military power. Early Americans were no strangers to national security threats; in 1787 the U.S. was a small frontier republic on the edge of a continent occupied by periodically hostile great powers and Indian marauders. Yet the Constitution limited emergency powers and sharply rejected the idea that the president was above the law. "In no part of the Constitution," Madison wrote in 1793, "is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department." In any other arrangement, "the trust and the temptation would be too great for any one man." That sentiment crossed party lines. As Chief Justice John Marshall wrote in 1801, "the whole powers of war being by the Constitution of the United States vested in Congress, the acts of that body can alone be resorted to as our guides."

Today Americans expect their president to pound Teddy Roosevelt's "bully pulpit," whipping the electorate into a frenzy to harness power against perceived threats. But the Framers viewed that sort of behavior as fundamentally illegitimate. In fact, the president wasn't even supposed to be a popular leader. As presidential scholar Jeffrey K. Tulis has pointed out, in the Federalist the term leader is nearly always used pejoratively; the essays by Madison, Alexander Hamilton, and John Jay in defense of the Constitution begin and end with warnings about the perils of populist leadership. The first Federalist warns of "men who have overturned the liberties of republics" by "paying obsequious court to the people, commencing demagogues and ending tyrants," and the last Federalist raises the specter of a "military despotism" orchestrated by "a victorious demagogue."

Instead of stoking public demands for action, the chief magistrate was expected to resist "the transient impulses of the people" and use his veto to keep Congress within its constitutional bounds. That role didn't require much speechifying. Early presidents rarely spoke directly to the public; from George Washington through Andrew Jackson, they averaged little more than three speeches per year, with those mostly confined to ceremonial addresses. In his first year in office, by comparison, President Clinton delivered 600.

In the early State of the Union addresses to Congress, presidents knew better than to adopt an imperious tone. After his third SOTU, Washington wrote that "motives of delicacy" had deterred him from "introducing any topic which relates to legislative matters, lest it should be suspected

that [I] wished to influence the question" before Congress. Yet the deference shown by Washington and his successor John Adams didn't go quite far enough for our third president, Thomas Jefferson, who thought their practice of speaking before the legislature in person smacked of the British king's "Speech From the Throne." Jefferson instead inaugurated a new tradition of delivering the annual message in writing. For 112 years, that Jeffersonian tradition held sway, until the power-hungry Woodrow Wilson delivered his first State of the Union in person.

The 19th century did see presidents occasionally taking independent action of enormous consequences: Jefferson purchased Louisiana without congressional approval, Madison seized West Florida in 1810, Andrew Jackson governed as an irritable populist, and Abraham Lincoln expanded presidential power dramatically throughout the course of the cataclysmic Civil War. Yet taken as a whole, the 19th-century presidency was a pale shadow of the plebiscitary office we know today.

In a 2002 study tracking word usage through two centuries of SOTUs and inaugural addresses, political scientist Elvin T. Lim noted that in the first decades under the Constitution presidents rarely mentioned poverty, and the word help did not even appear until 1859. Nor did early presidents subscribe to the modern notion that it's all "about the children"; they rarely even mentioned the little buggers. But Lim found that "Presidents Carter, Reagan, Bush, and Clinton made 260 of the 508 references to children in the entire speech database, invoking the government's responsibility to and concern for children in practically every public policy area."

George Washington did mention kids in his seventh annual message, lamenting "the frequent destruction of innocent women and children" by Indian raiders. But that was a far cry from Bill Clinton in 1997, who declared in the State of the Union that "we must also protect our children by standing firm in our determination to ban the advertising and marketing of cigarettes that endanger their lives."

Wail to the Chief

A little-remembered vignette from the 1992 presidential race underscores how far we've traveled from the Framers' unassuming "chief magistrate"—and how infantile our politics have become along the way. The scene was the campaign's second televised debate, held in Richmond, Virginia; the format, a horrid Oprah-style arrangement in which a hand-picked audience of allegedly normal Americans got to lob questions at the candidates, who were perched on stools, trying to look warm and approachable. Up from the crowd popped a ponytailed social worker named Denton Walthall, who demanded to know what George H.W. Bush, Bill Clinton, and H. Ross Perot were going to do for us.

"The focus of my work as a domestic mediator is meeting the needs of the children that I work with...and not the wants of their parents," Walthall said. "And I ask the three of you, how can we, as symbolically the children of the future president, expect the three of you to meet our needs, the needs in housing and in crime and you name it."

One wonders how some of the more irascible presidents of old would have reacted at the sight of a grown man burbling about childish necessities to the prospective national father. Yet under the hot lights of the 1992 campaign, Ross Perot said he'd cross his heart and take Walthall's pledge to meet America's infantile needs, whatever those were. Bill Clinton, being Bill Clinton, pandered. And Bush 41 spluttered through his answer thusly:

"I mean I—I think, in general, let's talk about these—let's talk about these issues; let's talk about

the programs, but in the presidency a lot goes into it. Caring is...that's not particularly specific; strength goes into it, that's not specific; standing up against aggression, that's not specific in terms of a program. So I, in principle, I'll take your point and think we ought to discuss child care—or whatever else it is." That wasn't just an example of the Bush family's famous locution problems; it's hard not to stammer when faced with the limitless and bewildering demands the public places on the presidency.

How did we go from a reticent constitutional officer to the modern commander in chief, a figure who continually shifts back and forth between gushing empathy and military bluster, often within the same speech? As Tony Soprano might have put it, whatever happened to Calvin Coolidge, the strong, silent type?

There is no single explanation for the presidency's growth. New communication technologies such as radio and television played a role, as did growing material progress, which made Americans less willing to suffer inconveniences and more receptive to the belief that public problems could be solved with collective action. Yet in each key period of the presidency's growth, we see a familiar pattern: expansionist ideology meeting practical opportunity in the form of successive national crises.

The 100-Year Emergency

Much of what's wrong with American government today can be traced to the Progressive Era, that period of reformist backlash against the Industrial Revolution that dominated the decades surrounding the turn of the 20th century. As the Progressives saw it, if the Constitution stood in the way of necessary reforms, then too bad for the Constitution. "We are the first Americans," a young scholar named Woodrow Wilson wrote in 1885, "to hear our own countrymen ask whether the Constitution is still adapted to serve the purposes for which it was intended; the first to entertain any serious doubts about the superiority of our institutions as compared with the systems of Europe."

The Progressives were "the nearest to presidential absolutists of any theorists and practitioners of the presidency," wrote Raymond Tatalovich and Thomas S. Engeman in their 2003 book The Presidency and Political Science: Two Hundred Years of Intellectual Debate. For the new century's reformers, power wielded for national greatness was benign, checks on such power perverse. The Progressives had no use for the restrained oratorical traditions of the 19th century; it was the president's job to move the masses, unifying them behind calls for bold executive action.

Their model and embodiment was Teddy Roosevelt, whom the Progressive journalist and New Republic founder Herbert Croly described as a "sledgehammer in the cause of national righteousness." When T.R. took the stage at the 1912 Progressive Party convention, he foreshadowed Obama's quasi-religious fervor and McCain's bellicosity, barking, "To you who strive in a spirit of brotherhood for the betterment of our Nation, to you who gird yourselves for this great new fight in the never-ending warfare for the good of humankind, I say in closing.... We stand at Armageddon, and we battle for the Lord!"

The most astute among the Progressives recognized that, given the American public's congenital resistance to centralized rule, a sustained atmosphere of crisis would be necessary to sell the expansion of White House power. Two world wars and one Great Depression did the trick nicely. T.R.'s activist, celebrity presidency heralded the coming of a new sort of chief executive, one who would evermore be the center of national attention, the motive force behind American

government. With his expanded power, Roosevelt busted trusts, carried a big stick throughout the Americas with a newly imperial U.S. Navy, and issued nearly as many executive orders as all of his predecessors combined. Woodrow Wilson then proved what Progressives had long hypothesized: that soaring rhetoric combined with the panicked atmosphere of war could concentrate massive social power in the hands of one person. Over the course of his presidency he helped create the Federal Reserve, nationalized railroads, and used the Espionage and Sedition Acts (along with more than 150,000 vigilantes) to carry out the most brutal campaign against dissent in U.S. history.

But it took FDR to eliminate the last remaining vestiges of the modest presidency. Roosevelt used Wilson's Trading With the Enemy Act to shut down all U.S. banks in 1933, grabbed the power to approve or prescribe wages and prices for all trades and industries, and authorized the FBI to spy on suspected subversives. He changed the Supreme Court from a bulwark against presidential overreach to an enabler. By the end of his 12-year reign, FDR had firmly established the president as national protector and nurturer, one whose performance would be judged in terms of what political scientist Theodore Lowi has identified as the modern test of executive legitimacy: "service delivery." In his 11th State of the Union address, FDR conjured up a second Bill of Rights, one whose guarantees would include "a useful and renumerative job" and the "right of every farmer to...a decent living." Depression-era economic controls and war-driven centralization had turned the American system of government, in Lowi's words, into "an inverted pyramid, with everything coming to rest on a presidential pinpoint."

War was the health of the presidency during the long twilight struggle against the Soviet Union as well. "The worse matters get," Harry Truman's adviser Clark Clifford told him in 1948, "the more is there a sense of crisis. In times of crisis, the American citizen tends to back up his president." During the Cold War, presidents used the all-purpose rationale of national security to justify spying on their political enemies. Richard Nixon might have been the most notorious abuser, with a series of dirty tricks and flagrant offenses that led to his downfall, but his predecessors also wielded the presidential bludgeon with gusto. When American steel companies raised prices in 1962, John F. Kennedy declared privately that "they fucked us, and now we've got to fuck them," then (along with his attorney general, brother Bobby) ordered up wiretaps, Internal Revenue Service audits and early-morning raids on steel executives' homes. During the 1964 presidential race, Lyndon Johnson used the CIA to obtain advance copies of Barry Goldwater's campaign speeches, and the FBI to bug Goldwater's plane.

In the pre-Watergate age of the heroic presidency, public trust in government was at its height, and mainstream scholars lauded the presidency as an earthly manifestation of the living God. As political scientist Herman Finer put it in 1960, the office was "the incarnation of the American people in a sacrament resembling that in which the wafer and the wine are seen to be the body and blood of Christ." The president, Finer said, was "the offspring of a titan and Minerva husbanded by Mars."

I Hate You; Don't Leave Me

After Vietnam and Watergate, America's intoxication with the imperial presidency ended with a crushing hangover. A newly aggressive press and assertive Congress produced serial revelations of the executive abuses that blind trust had enabled. In the bicentennial year of 1976, Idaho Sen. Frank Church's Committee to Study Governmental Operations With Respect to Intelligence Activities summed up the damage:

"For decades Congress and the courts as well as the press and the public have accepted the notion that the control of intelligence activities was the exclusive prerogative of the Chief Executive and

his surrogates. The exercise of this power was not questioned or even inquired into by outsiders. Indeed, at times the power was seen as flowing not from the law, but as inherent, in the Presidency. Whatever the theory, the fact was that intelligence activities were essentially exempted from the normal system of checks and balances. Such executive power, not founded in law or checked by Congress or the courts, contained the seeds of abuse and its growth was to be expected."

During the Eisenhower 1950s and the JFK/LBJ 1960s, the newly ascendant conservative movement coalescing around Barry Goldwater and William F. Buckley's National Review was the most potent source of criticism of the imperial presidency. "Others hail the display of presidential strength...simply because they approve of the result reached by the use of power," Goldwater wrote in his 1964 campaign manifesto. "This is nothing less than the totalitarian philosophy that the end justifies the means."

But enticed by the long-awaited prospect of an "emerging Republican majority" and turned off by the journalistic and congressional attacks on Nixon, conservatives learned to stop worrying and love the executive branch. During the post-Watergate reform era, two senior Gerald Ford White House aides named Dick Cheney and Donald Rumsfeld fought tooth and nail against what they felt were dangerous shackles on the executive branch, supported by a conservative commentariat that refocused its ire on the Democratic Congress and the left-leaning press. "I didn't like Nixon until Watergate," National Review stalwart M. Stanton Evans once quipped.

Although Americans finally recovered their native skepticism toward power after Vietnam, Watergate, and the revelations of the Church committee, we never reduced our demands on the executive branch. The lesson we seemed to have learned from the legacy of abuses was to trust less, ask more. In 1998 the Pew Research Center noted that "public desire for government services and activism has remained nearly steady over the past 30 years." Two years later, a report on a survey by NPR, the Kaiser Family Foundation, and Harvard's John F. Kennedy School of Government put it pithily: "Americans distrust government, but want it to do more." The spirit of Denton Walthall lived on in the years leading up to the terrorist attacks of September 11, 2001.

Superman Returns

The Bush administration's extraconstitutional innovations in response to those attacks are by now all too familiar. John Yoo, David Addington, and other members of the president's legal team constructed an alternative version of the national charter, a "neoconstitution" in which the president has unlimited power to launch war, wiretap without judicial scrutiny, and even seize American citizens on American soil and hold them for the duration of the War on Terror—in other words, indefinitely—without ever having to answer to a judge.

Conventional accounts of the post-9/11 imperial presidency emphasize the role of dedicated ideologues within the administration, men and women who had long believed that post-Watergate America had swung the pendulum too far back, jeopardizing national security. There's good reason for that emphasis, but the "cabal of neocons" narrative risks obscuring the role that public demands have played in driving the centralization of power.

In his 2007 book *The Terror Presidency,* Jack Goldsmith, the former head of the president's Office of Legal Counsel, describes the prevailing atmosphere within the executive branch after 9/11, one where the president's men were acutely aware that all eyes were on the commander in chief. What is he doing to keep us safe? What more is he prepared to do?

Goldsmith, a dissenter from the Bush administration's absolutist theories of executive power, often clashed with Dick Cheney's deputy David Addington, the hardest-driving supporter of those theories. But Goldsmith understood why Addington was so unrelenting: "He believed presidential power was coextensive with presidential responsibility. Since the president would be blamed for the next homeland attack, he must have the power under the Constitution to do what he deemed necessary to stop it, regardless of what Congress said."

That dynamic can lead to enhanced presidential power even in areas far removed from the War on Terror, as was demonstrated in the aftermath of Hurricane Katrina. In business or in government, responsibility without authority is every executive's worst nightmare. That was the political reality facing the Bush administration in late summer 2005, when New Orleans was under water and desperate for assistance. As Colby Cosh of Canada's National Post put it at the time, "the 49 percent of Americans who have been complaining for five years about George W. Bush being a dictator are now vexed to the point of utter incoherence because for the last fortnight he has failed to do a sufficiently convincing impression of a dictator."

To be sure, the administration deserved plenty of blame for bungling the disaster relief tasks it had the power to carry out. But it soon became clear that the public held the Bush team responsible for performing feats above and beyond its legal authority. One almost had to feel sorry for Michael "Heckuva Job" Brown(ie), the disgraced former Federal Emergency Management Agency head, when he was obliged on Capitol Hill a month after the hurricane to inform an irate Rep. Chris Shays (R-Conn.) that in our federalist system, the FEMA chief has no power to order mandatory evacuations, or to become "this superhero that is going to step in there and suddenly take everybody out of New Orleans." "That is just talk," Shays responded. "Were you in contact with the military?"

For a president beleaguered by public demands, seizing new powers can be an adaptive response. Small wonder, then, that the Bush administration promptly sought enhanced authority for domestic use of the military. Although few in the media noted the historical moment, the president received that authority. On October 17, 2006, the same day he signed the Military Commissions Act denying centuries-old habeas corpus rights to "enemy combatants," the president also signed a defense authorization bill that contained gaping new exceptions to the Posse Comitatus Act of 1878, the federal law that restricts the president's power to use the standing army to enforce order at home.

The new exceptions to the act gave the president power to use U.S. armed forces to "restore public order and enforce the laws" when confronted with "natural disasters," "public health emergencies," and "other...incidents"—a catchall phrase that radically expands the president's ability to use troops against his own citizens. Under it, the president can, if he chooses, fight a federal War on Hurricanes, declaring himself supreme military commander in any state where he thinks conditions warrant it. That's the kind of executive power grab that happens when the public demands that the president protect Americans from the hazards of cyclical bad weather.

2009 and Beyond

To understand is not to excuse: No president should have the powers President Bush has sought and seized during the last seven years. But after 9/11 and Katrina, what rationally self-interested chief executive would hesitate to centralize power in anticipation of crisis? That pressure would be hard to resist, even for a president devoted to the Constitution and respectful of the limited role the office was supposed to play in our system of government.

In the current presidential race, none of the major-party candidates comes close to fitting that

description. Aside from the issue of torture, there's very little daylight between John McCain and George W. Bush on matters of executive power. For her part, Hillary Clinton claims she played a key role in her husband's undeclared war against Serbia in 1999. "I urged him to bomb," she told Talk magazine that year. In 2003 she told ABC's George Stephanopoulos: "I'm a strong believer in executive authority. I wish that, when my husband was president, people in Congress had been more willing to recognize presidential authority."

Barack Obama has done more than any candidate in memory to boost expectations for the office, which were extraordinarily high to begin with. Obama's stated positions on civil liberties may be preferable to McCain's, but would it matter? If and when a car bomb goes off somewhere in America, would a President Obama be able to resist resorting to warrantless wiretapping, undeclared wars, and the Bush theory of unrestrained executive power? As a Democrat without military experience, publicly perceived as weak on national security, he'd have much more to prove.

As Jack Goldsmith put it in his 2007 book, "For generations the Terror Presidency will be characterized by an unremitting fear of attack, an obsession with preventing the attack, and a proclivity to act aggressively and preemptively to do so....If anything, the next Democratic President—having digested a few threat matrices, and acutely aware that he or she alone will be wholly responsible when thousands of Americans are killed in the next attack—will be even more anxious than the current President to thwart the threat."

Law professors Jack Balkin of Yale and Sanford Levinson of the University of Texas at Austin are both Democrats and civil libertarians, so they take no pleasure in their prediction that "the next Democratic President will likely retain significant aspects of what the Bush administration has done." Indeed, they write in a 2006 Fordham Law Review article, future Democratic presidents "may find that they enjoy the discretion and lack of accountability created by Bush's unilateral gambits."

Throughout the 20th century more and more Americans looked to the central government to deal with highly visible public problems, from labor disputes to crime waves to natural disasters. And as responsibility flowed to the center, power accrued with it. If that trend continues, responses to matters of great public concern will be increasingly federal, increasingly executive, and increasingly military.

In the years to come, many Americans will find that the results of executive action are not to their liking. And if history is any guide, they'll respond by vilifying the officeholder and looking for another man on horseback to set things right again.

In *The Road to Serfdom*, economist and political philosopher F.A. Hayek chastised the "socialists of all parties" for their belief that "it is not the system we need fear, but the danger it might be run by bad men." Today's "presidentialists of all parties"—a phrase that describes the overwhelming majority of American voters—suffer from a similar delusion. Our system, with its unhealthy, unconstitutional concentration of power, feeds on the atavistic tendency to see the chief magistrate as our national father or mother, responsible for our economic well-being, our physical safety, and even our sense of belonging. Relimiting the presidency depends on freeing ourselves from a mind-set one century in the making. One hopes that it won't take another Watergate and Vietnam for us to break loose from the spellbinding cult of the presidency.

Gene Healy, a senior editor at the Cato Institute, is the author of *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Cato), from which this essay was adapted.

WASHINGTON MEMO; Key to Power In Court Pick

CHARLIE SAVAGE. New York Times, May 25, 2009
http://query.nytimes.com/gst/fullpage.html?res=9902EED6103EF936A15756C0A96F9C8B63

As President Obama prepares to replace Justice David H. Souter on the Supreme Court, conventional wisdom says his nominee will have little chance to change the court because all the contenders appear to share Justice Souter's approach on social issues, like abortion rights.

But the effect on presidential power could be pivotal. Important rulings on executive authority -- striking down military commissions and upholding habeas corpus rights for Guantánamo detainees -- have been decided by a five-vote majority, including Justice Souter, on the nine-member court.

"Given that the decisions have generally been 5-4 in this area, this could be terribly consequential," said David Golove, a New York University law professor. "We're losing one of the court's strongest leaders on the side of limiting executive power to reasonable bounds. If the person who replaces Souter is different than him, the balance of power may shift."

Most of the half-dozen or so candidates Mr. Obama is weighing have little by which to gauge whether their appointment might create a majority with greater sympathy for the White House. But one, Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, has expressed doubts about claims of sweeping executive powers in national security matters.

Another, Solicitor General Elena Kagan, has a history of advocating for presidential powers in domestic matters, along with a mixed record of statements on counterterrorism issues.

The scope of executive power has become the subject of a profound debate since the Sept. 11 attacks. Bush administration lawyers argued that the president's war powers could override laws and treaties, a theory at the heart of policies on harsh interrogations, surveillance without warrants and the detainees at the prison at the naval base in Guantánamo Bay, Cuba.

Some of former President George W. Bush's greatest setbacks came when the Supreme Court rejected such arguments. And while Mr. Obama has not embraced the Bush administration's most expansive theories, he appears to be on his own collision course with the court.

His administration is appealing a ruling that some detainees in Afghanistan have habeas corpus rights. And he has announced other policies, including revised military commissions and a system of prolonged preventive detention without trial, that are likely to be challenged.

Moreover, the broad powers Mr. Obama has employed in the economic crisis, like his virtual takeover of the American auto industry, could generate a new category of cases that would turn on how much deference the court gives to the executive branch.

"If Obama is really serious about national security, he ought to be looking for a justice who won't try to micromanage in this area," said Ed Whelan, a Bush administration lawyer. "He'll also want a strong proponent of executive power to review his aggressive domestic measures."

All three of Mr. Bush's Supreme Court nominees -- Samuel A. Alito Jr., Harriet E. Miers and John G. Roberts Jr. -- were current or former executive branch lawyers whose records suggested a

robust view of presidential power. Ms. Miers's nomination was withdrawn.

By contrast, one person near the top of Mr. Obama's short list -- Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit -- has never worked in the executive branch and sits on a court that hears few executive power cases.

Two other potential candidates, Janet Napolitano and Jennifer M. Granholm, have been governors, and Ms. Napolitano is now the homeland security secretary. Still, neither has worked extensively on legal issues about presidential power.

Judge Wood has served several stints in the executive branch, where her work focused on antitrust issues. But in a 2003 essay, she warned that steps proposed in the fight against terrorism, like diminishing privacy to facilitate executive surveillance, posed a threat to the rule of law.

"In a democracy, those responsible for national security (principally, of course, the executive branch) must do more than say 'trust us, we know best' when they are proposing significant intrusions on liberties protected by the Constitution," she wrote.

And in a lecture about legal issues related to natural disasters, published in 2008, Judge Wood suggested that she would view trying terrorism suspects in military commissions, as Mr. Obama has proposed, with suspicion.

"In the related area of military justice, the principle is well established that extraordinary tribunals, such as military commissions, are not authorized to operate if the normal courts are open for business," she wrote.

Ms. Kagan's history, by contrast, suggests a greater sympathy for executive interests. She worked in the White House under President Bill Clinton when he was at odds with a Republican Congress and seeking ways to achieve his agenda unilaterally.

As a Harvard law professor, she wrote an article defending steps Mr. Clinton had taken to centralize control over government agencies. She called it "ironic" that "self-professed conservatives" had been the loudest advocates of executive power in recent decades because a muscular presidency could change the status quo and achieve "progressive goals."

She also argued that the president had more power to command agency decisions than many scholars believed. Unless Congress has explicitly banned White House interference, she said, laws granting authority to an official -- like giving the Environmental Protection Agency administrator the responsibility to set allowable pollution levels -- should be interpreted as giving the president an unwritten power to override those decisions.

Later, in her solicitor general confirmation hearing, Ms. Kagan said the president had the authority to indefinitely detain, without a trial, someone suspected of helping to finance Al Qaeda.

She also said that she, like any solicitor general, would not defend a statute that "infringes directly on the powers of the president," because "there are occasional times where presidential power still exists, even if Congress says otherwise." But, she added, that category was "exceedingly narrow."

After her mid-March appointment, she joined a legal team that has battled to restrict detainee rights and has invoked the so-called state secrets privilege to block lawsuits involving

surveillance and torture.

Much of that litigation was in motion before she arrived, and it is not clear whether, if named to the bench, she would recuse herself from ruling on such cases.

But Ms. Kagan has also expressed skepticism about expansive presidential war powers. In 2007, she delivered a lecture at West Point praising Bush administration lawyers who threatened to resign over the program of surveillance without warrants, which they believed was illegal.

"The world is watching whether, under this provocation, we adhere to our self-declared principles," she said. "And the world will properly condemn us to the extent we become lawless."

Whoever replaces Justice Souter will join a court whose members hold strong opinions on both sides of the executive power issue.

In the decision striking down military commissions, for example, Justice Anthony M. Kennedy said trials controlled by the executive alone raised constitutional concerns "of the highest order" because "concentration of power puts personal liberty in peril of arbitrary action by officials."

In a dissent, Justice Clarence Thomas said the majority's opinion had "dangerous implications for the executive's ability to discharge his duties as commander in chief" and "openly flouts our well-established duty to respect the executive's judgment in matters of military operations and foreign affairs."

Americans regards him as something of a Messiah. But Obama's second 100 days are likely to be tougher than his first. So will fate overwhelm him?

The Daily Mail (London) Max Hastings, April 28, 2009
http://www.dailymail.co.uk/debate/article-1174042/MAX-HASTINGS-Americans-regards-Messiah-But-Obamas-second-100-days-likely-tougher-So-fate-overwhelm-him.html#

There is an old story of a school scripture teacher who asked a sixth-former how he would react if he answered the doorbell one night and found Jesus Christ on the step. The boy said: 'Ask him in, give him a drink and send for the vicar.'

Forget for a moment the Right-wing bitching about Barack Obama. Set aside criticism of his banquet of promises. The overwhelming reality of his first quarter as the most powerful man on Earth is that many Americans regard him as something close to the Messiah.

His poll approval ratings are no higher than were George Bush's eight years ago because a lemon-sour minority of hicks, bigots and Republican retros turns its back on him.

Challenge ahead: American President Barack Obama
But two in three Americans back their new President way beyond mere enthusiasm. They focus on him passionate hopes for a revival of their country's stature and selfbelief, brought low by George Bush and Wall Street's bankers.

Barack, Michelle, their gals and the new first dog dominate America's media like no First Family since the Kennedys. His grace, wit and dignity, together with his wife's feisty, sexy style, fulfil all the nation's yearnings for democratic royalty.

'Americans love this guy,' one of the most powerful - and instinctively cynical - New York editors said to me last week. 'If not him, then what?' A TV pundit asserted at primetime on Thursday that Obama is not merely the most trusted human being in America today, but 'the most trusted institution'.

At the weekend I heard a Texan doctor suggest that Bush was a 'dry drunk'. That is to say, while the former President never touched liquor in the White House, his sly, narrowly obsessional conduct of office was typical of the alcoholic he once was.

Whether or not this is true, one of the most striking characteristics of his successor is that Obama is so comfortable with himself. He seems secure in an emotional compact with his family and the world, which few people and incredibly few politicians achieve.

His serenity astonishes everybody who works with him. He has assumed the mantle of office as if the White House was his natural inheritance.

Tomorrow's 100-day 'landmark', about which everybody has become so excited, is of course unreal. Back in February 1945, when Winston Churchill heard that President Roosevelt would spare only five days to attend the Yalta conference with Stalin, the old Prime Minister observed in exasperation that even the Almighty allowed himself seven days to make the world.

Nowadays, however, summits like the G20 are shoe-horned into a single day. People allow themselves to talk as if a President could change not only anything but everything in three months.

For heaven's sake - the poor man has barely had time to find out where the spare loo rolls are kept in the Oval Office washroom. What we can sensibly say so far is that he has charisma that makes every Hollywood star look a punk. He has set an agenda for change, such as few national leaders attempt. He makes Gordon Brown seem a scowling pygmy.

His staff at the White House speak of the 'head-spinning' pace since Inauguration Day. They battle against chronic exhaustion. Since January 20, the President has ordered the Guantanamo Bay detention centre to be closed, recast Afghanistan strategy, visited nine countries, met 60 national leaders, legislated against job discrimination, extended health coverage, modified the ban on stem-cell research, sacked the boss of General Motors, launched a historic 'reach- out' to the Muslim world, produced a $3.6 trillion (£2.5 trillion) budget, forced a $787 trillion (£538 trillion) economic stimulus through Congress, and flagged his determination to drive ahead with the most radical healthcare proposals in U.S. history.

He wants everything he does to seem part of a single narrative, a bid to make this not just a good presidency, but a great one. Yet it is much too soon to know whether he will succeed, first in solving the economic crisis.

Almost no one I meet here shares the stock market's eagerness to believe the worst is over. 'Everybody is still very scared,' a veteran Wall Street banker told me. 'No big money is risking anything - what we're seeing in the market is a traders' rally.'

Critics accuse the President of failing to use his brilliance as a communicator to explain the crisis to bewildered Americans. It is also alleged that the administration has not yet solved the vital problem of ridding banks of their toxic assets.

I heard an economist suggest a gloomy explanation: 'What if Obama doesn't know what to say?

What if his Treasury Secretary, Tim Geithner, really can't think what to do next?' The world yearns to see those famous green shoots. Yet smart people on this side of the Atlantic scarcely see a break in the soil.

Obama's presidency is already being compared to Ronald Reagan's, in that the man is much more popular than his policies. The U.S. is instinctively conservative. It is striking to contrast the reaction of its people to the economic crisis with that of the British.

We look to our politicians, however inadequate, to solve problems. Most Americans, however, believe that citizens get things done. They fear and mistrust the state, which is why many are furious about tax money bailing out banks. Polls show 55 per cent popular support for Obama's healthcare plans. But a stubborn rump of Americans recoil from the notion of a national health service.

'What happens when they start rationing transplants when you need one?' demanded a sceptical Florida pensioner.

A slow, sore Georgian voter said to a senator on live TV last week: 'I want to be told you are doing absolutely everything in your power to stop this radical, socialist government we've got in the White House spending all our money.'

A Michigan blogger named Tal Simmons wrote: 'Obama's radical ideas, flip-flopping direction and socialist bad-mouthing of our great nation will undo him in 2012.' Another like-minded contributor added: 'He doesn't have the Reagan vision for America, he doesn't have the experience and HE DOESN'T LIKE AMERICA.'

To be sure, he does not like redneck Bush 'ole boy' America. One of the nastiest problems to hit Obama's desk is the torture story. There now seems overwhelming evidence that George Bush and his mad, bad associates led by Vice-President Dick Cheney instigated a policy of systematically mistreating Al Qaeda suspects. They breached U.S. law and have since lied through their teeth about it.

The media pack and Democrats on Capitol Hill are in full cry, demanding justice, vengeance or whatever you want to call it upon those responsible. Obama's body language makes it plain that he does not want to go there.

He dreads the prospect of the country succumbing to an orgy of recrimination and legal process such as was unleashed by Nixon's Watergate and Clinton's Monica Lewinsky scandal. Americans today need to focus on the present and future. It will be a tragedy if the nation overdoses on punishment for the past.

Yet there is passionate public anger about the 'stain of evil' with which the last administration besmirched the nation's flag and honour. Demands for legal process against the guilty are probably irresistible.

Prepare to see America launch itself into one of its paroxysms of moral indignation, which Barack Obama knows could damage his own presidency.

If Democrats insist on putting Bushies in the dock, cornered Republicans will fight back with everything they have got. Many Americans out there in the sticks still buy Cheney's defiant assertion that 'torture works', that any means were justifiable to save America from harm.

If, God help us, there is a terror attack on the U.S. while alleged Republican torturers are being whipped around a Washington circus ring, Obama's enemies will say that he is 'soft on terrorists'. His popularity could take a disastrous hit.

Yet the influential New York Times columnist Frank Rich wrote on Sunday: 'President Obama can talk all he wants about not looking back, but this grotesque past is bigger than even he is. It won't vanish into a memory hole.

'The White House, Congress and politicians of both parties should get out of the way... What we must have are fair trials that at long last uphold and reclaim our nation's commitment to the rule of law.'

The worst victim of such action could be Obama's campaign for consensus. Each day, his team drives home the message that he is 'the people's President', the 'listening chief executive'. All the world knows, because the White House tells it so, that Obama each day reads ten letters from ordinary voters, picked out by staff from a mailbag of 40,000.

Because I signed up to his website when reporting his campaign last year, I receive the same weekly

email messages as 13 million U.S. voters, each one personalised: 'Dear Max, Come to our listening tour meeting at your local town hall. You'll get the chance to help write plans for Organizing America in 2009 and beyond.

These meetings are not just for folks who were involved in the campaign, we're hopeful that every Missourian' - or Kansan, or Ohioan, or Californian - 'will get involved.'

And last week: 'Max - your representatives need to hear from you as they work for the change you mandated in November. Doing what's right can be thankless when the culture of Washington tries to make political games out of the issues that matter to everyday Americans.'

It is all brilliantly done, featuring national video links to the President, a sustained drive to keep every possible American inside Obama's big tent as he presents ever-more contentious legislation to Congress.

Yet already it is plain that bipartisanship cannot hold. Many Republicans hate Obama, just as their grandfathers hated Roosevelt. They want him to fail. For now, they thrash in impotence. But if some flagship administration policies come unstuck, they could gain ground. Obama's big green 'cap and trade' measure on carbon emissions (a system which penalises heavy polluters) is tipped to fall in Congress.

Abroad, with notable myopia, the French and German governments have rebuffed Obama's requests for more help in Afghanistan. Chances are that the U.S. will indeed fail to achieve its Afghan objectives. But that does not alter the fact that Europeans so far seem painfully unimaginative in their response to this remarkable President.

Likewise, Obama's attempts to achieve reconciliation with Iran will probably be frustrated by Iranian fanaticism. He will get no help from Putin's Russia. The U.S. relationship with China promises to stay spiky.

Americans are starting to realise that the world will not lie on its back to have its tummy tickled merely because a superman has moved into the White House.

Obama's second 100 days are likely to be even tougher than his first. Yet because he is such a fascinating man, it is almost as thrilling an experience for a visitor as for an American to watch his story unfold.

Notice that nobody any longer talks about 'this amazing black President'. Even enemies simply acknowledge him as one of the most remarkable personalities of any colour to occupy his office.

John F. Kennedy said on his Inauguration Day in 1961: 'All this will not be finished in the first 100 days, nor will it be finished in the first 1,000 days.'

Obama is likely to say something similar in his televised progress report to the American people tomorrow night. Washington is bathed in brilliant spring sunshine. The blossom is out. In many parts of America, supporters are holding 100-day parties. A host of people want to share in the thrill of the Obama experience.

The other night, I asked a veteran Democratic presidential adviser whether this President has the potential to achieve greatness. My friend answered: 'He can't determine that himself. Only fate can make a great President.'

So large are the challenges that Obama faces that we must acknowledge the danger that fate will overwhelm him. He is almost certainly trying to do too much.

But people are awed by the spectacle of a politician who tells the truth, a national leader bent upon achieving in office exactly what he promised on the campaign trail. If he knocks on your door, it is probably smart to ask him in, offer him a drink and send for the vicar.

The new tenant of the White House may not quite be the Messiah, but he is the sort of American leader the world has been waiting a long, long time for.

Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus

New York Times, April 3, 2009
Charlie Savage
http://www.nytimes.com/2009/04/03/washington/03bagram.html

WASHINGTON — A federal judge ruled on Thursday that some prisoners held by the United States military in Afghanistan have a right to challenge their imprisonment, dealing a blow to government efforts to detain terrorism suspects for extended periods without court oversight.

In a 53-page ruling that rejected a claim of unfettered executive power advanced by both the Bush and Obama administrations, United States District Judge John D. Bates said that three detainees at the United States' Bagram Air Base had the same legal rights that the Supreme Court last year granted to prisoners held at the American naval base in Guantánamo Bay, Cuba.

The three detainees — two Yemenis and a Tunisian — say that they were captured outside Afghanistan and taken to Bagram, and that they have been imprisoned for more than six years without trials. Arguing that they were not enemy combatants, the detainees want a civilian judge to review the evidence against them and order their release, under the constitutional right of habeas corpus.

The importance of Bagram as a holding site for terrorism suspects captured outside Afghanistan and Iraq has increased under the Obama administration, which prohibited the Central Intelligence Agency from using its secret prisons for long-term detention and ordered the military prison at Guantánamo closed within a year. The administration had sought to preserve Bagram as a haven where it could detain terrorism suspects beyond the reach of American courts, telling Judge Bates in February that it agreed with the Bush administration's view that courts had no jurisdiction over detainees there.

Judge Bates, who was appointed by President George W. Bush in 2001, was not persuaded. He said transferring captured terrorism suspects to the prison inside Afghanistan and claiming they were beyond the jurisdiction of American courts "resurrects the same specter of limitless executive power the Supreme Court sought to guard against" in its 2008 ruling that Guantánamo prisoners have a right to habeas corpus.

Dean Boyd, a Justice Department spokesman, said that the administration was reviewing the decision and that it had made no decision about whether to appeal.

Judge Bates emphasized that his ruling was "quite narrow." He said that it did not apply to prisoners captured on the battlefield in Afghanistan, and that a determination of whether prisoners might challenge their detention in court would depend on a case-by-case analysis of factors like their citizenship and location of capture.

"It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain is in a theater of war," the judge wrote. "It is quite another thing to apprehend people in foreign countries — far from any Afghan battlefield — and then bring them to a theater of war, where the Constitution arguably may not reach."

Moreover, the judge has put off ruling that a fourth prisoner — also captured outside Afghanistan, but holding Afghan citizenship — had a right to challenge his detention. He said any order to release the detainee could lead to frictions with the Afghan government, and asked for additional briefings on that case.

The United States is holding about 600 people at Bagram without charges and in spartan conditions. United States officials have never provided a full accounting of the prison population, but an American government official, speaking on condition of anonymity because it is against policy to discuss details of the Bagram prison, said that fewer than a dozen detainees fell into the category affected by the ruling — non-Afghans captured beyond Afghan borders.

Judge Bates has been involved in several high-profile executive power cases. In 2002, he sided with the Bush administration in a lawsuit over whether Vice President Dick Cheney's energy task force records were required to be disclosed. But in 2008, he sided with Congress in an executive-privilege dispute over whether top aides to Mr. Bush were immune from subpoenas related to the firing of federal prosecutors.

David Rivkin, an associate White House counsel in the administration of the first President Bush, predicted that Judge Bates's ruling would be overturned on appeal. He warned that the ruling "gravely undermined" the country's "ability to detain enemy combatants for the duration of hostilities worldwide."

But Tina Foster, the executive director of the International Justice Network, which is representing the four Bagram detainees, praised Judge Bates's decision as "a very good day for the Constitution and the rule of law."

Ms. Foster said that the Bagram ruling meant that changes to the Bush detention policies would go beyond merely closing Guantánamo and extend "to any place where the United States seeks to hold individuals in a legal black hole."

The power of federal judges to review decisions by the executive branch to imprison a terrorism suspect was among the most contentious legal issues that arose after the 2001 terrorist attacks. The Bush administration began a policy of holding prisoners indefinitely and without trials, arguing that federal judges had no authority to second-guess its decisions about whom to name an "enemy combatant."

But human-rights lawyers challenged those policies, winning Supreme Court decisions in 2004, 2006 and 2008 that gradually expanded the reach of the American legal system over detainees. After taking office, Mr. Obama ordered a review of the evidence against each of the roughly 240 prisoners at Guantánamo as a first step toward closing the prison within a year.

He did not extend the steps he was taking to resolve the fate of the Guantánamo prisoners to those held at Bagram, although a comprehensive review of detainee policies is due to be completed in July. Ms. Foster said that the Bagram case may force the administration to speed up its decisions.

Will Obama be like Bush on Executive Power?

By Joseph Williams, Boston Globe, March 4, 2009
http://www.boston.com/news/politics/politicalintelligence/2009/03/will_obama_be_l.html

WASHINGTON -- As a Senate committee debated today whether to create a "truth commission" to investigate alleged abuses of White House authority during the Bush era, President Obama has quietly adopted some of his predecessor's expansive views of the power as commander-in-chief -- especially concerning anti-terrorism policies.

Those moves could lead to a confrontation over the scope of presidential authority with the Democratic-led Congress, whose leaders say they intend to recalibrate the balance of power between Congress and the White House. Some top Democrats, Obama allies, and civil libertarians say they are closely watching how the new president uses his power, and intend to challenge him if he does not voluntarily roll it back to pre-Bush limits.

Senator Russ Feingold, a Wisconsin Democrat and member of both the Senate judiciary and intelligence committees, was one of several lawmakers who co-sponsored legislation to limit use of a "state secrets" exemption after Justice Department lawyers, under new Attorney General Eric Holder, invoked the provision in a federal lawsuit against Jeppesen, Inc., a subsidiary of Boeing. The attorneys argued that the White House believes the case should be dismissed because it could force the revelation of classified information which could jeopardize national security.

"I'm certainly on guard that it's not abused by the Obama administration," Feingold said, referring to the president's view of power. "I will be disagreeing with some of their conclusions."

Senator Patrick Leahy, a Vermont Democrat and judiciary committee chairman, is pushing for the "truth commission" to investigate the Bush administration's national security policies, including search and seizure powers. "Nothing has done more to damage America's place in the world than the revelation that this nation stretched the law and the bounds of executive power to authorize torture and cruel treatment," Leahy said in opening remarks at today's hearing.

Quoting a recent decision by Supreme Court Justice Anthony Kennedy, Leahy said the Constitution "is not something an administration is able 'to switch ... on and off at will,' " and that to prevent future abuses the nation "must not be afraid to look at what we have done" no matter how painful.

"We must understand that national security means protecting our country by advancing our laws and values, not discarding them," Leahy said.

However, Senator Arlen Specter of Pennsylvania, the top Republican on the committee, rejected the proposal, saying that the Justice Department is already investigating the Bush policies and releasing its secret memos justifying them. Democrats, he said, "can walk in the front door" of the Justice Department and "ask directions to the relevant filing cabinet."

The ongoing Justice Department investigation will be thorough, Specter said. "They're not going to pull any punches on the prior administration," he said.

The Senate debate comes as the American Civil Liberties Union and other watchdog groups say they are carefully monitoring the president and his staff, ready to sound the alarm if Obama follows in Bush's footsteps and more fully adopts the expanded view of presidential power.

The ACLU filed the lawsuit against Jeppesen on behalf of five terrorist suspects who sued the company, alleging it helped transport them overseas for harsh interrogations. When Justice Department lawyers cited the state secrets provision in the Jeppesen lawsuit, the ACLU expressed outrage.

"It was more than disappointing," said Caroline Frederickson, director of the ACLU's Washington office.

Given that Obama, on the campaign trail, derided Bush's views of executive power, Frederickson said it's unclear "whether the government's posture in the recent cases reflect the final judgment by the Holder Justice Department or whether it's a placeholder position as they evaluate" the national-security assertions of the Bush administration.

"It's really hard to say yet which it is," Frederickson said. "But it's worrisome."

Justice Department spokesman Matthew Miller declined to comment specifically about the case today because it is still in litigation. He said the department is reviewing the bills that would restrict the use of the state secrets provision.

In a written questionnaire during his Senate confirmation hearings, Holder pledged to use the state secrets provision only "when legally and factually appropriate" and promised to "consult with appropriate career personnel at the Department of Justice and perhaps in other agencies, before making a final judgment" on whether to support a bill restricting its use.

Congress takes first step to impose limits on Obama's executive power

Glenn Greenwald, FEB. 12, 2009
http://www.salon.com/opinion/greenwald/2009/02/12/state_secrets/index.html

Earlier this week, I wrote about the State Secrets Protection Act of 2008, which was co-sponsored by numerous key Senators [including Joe Biden and Hillary Clinton, as well as the Senate Judiciary Committee's Chair (Pat Leahy) and ranking member (Arlen Specter)], and which was approved by the Judiciary Committee last year with all Democrats voting in favor. That bill, in essence, sought to ban the exact abuse of the State Secrets privilege which the Bush administration repeatedly invoked and which, now, the Obama administration has embraced: namely, as a weapon to conceal and immunize government lawbreaking (by compelling the dismissal of entire lawsuits in advance) rather than a limited, document-by-document evidentiary privilege.

Yesterday -- as an obvious response to the Obama DOJ's support for the Bush view of the privilege -- Leahy and Specter, along with Russ Feingold, Claire McCaskill, Sheldon Whitehouse and Ted Kennedy, re-introduced that bill in the Senate. When doing so, Leahy made clear that the bill was more needed than ever in light of the actions of the Obama administration:

During the Bush administration, the state secrets privilege was used to avoid judicial review and skirt accountability by ending cases without consideration of the merits [ed: exactly what the Obama DOJ endorsed this week]. It was used to stymie litigation at its very inception in cases alleging egregious Government misconduct, such as extraordinary rendition and warrantless eavesdropping on the communications of Americans [ed: exactly what the Obama DOJ endorsed this week]. . . .

We held a Committee hearing on this issue last year, and the appropriate use of this privilege remains an area of concern for me and for the cosponsors of this bill. In light of the pending cases where this privilege has been invoked, involving issues including torture, rendition and warrantless wiretapping, we can ill-afford to delay consideration of this important legislation.

Sen. Feingold explicitly criticized the Obama administration earlier this week for its endorsement of exactly these abusive theories. Several hours before the Senate bill was introduced, several key House Democrats introduced a similar bill in the House. The ACLU promptly endorsed the bill.

A President who seeks to aggrandize his own power through wildly expansive claims of executive authority ought to be vigorously criticized. But the ultimate responsibility to put a stop to that lies with the Congress (and the courts). More than anything else, it was the failure of the Congress to rein in the abuses of the Bush presidency (when they weren't actively endorsing those abuses) that was the ultimate enabling force of the extremism and destruction of the last eight years.

What we need far more than a benevolent and magnanimous President is a re-assertion of Congressional authority as a check on executive power. Even if Obama decided unilaterally to refrain from exercising some of the powers which the Bush administration seized, that would be a woefully insufficient check against future abuse, since it would mean that these liberties would be preserved only when a benevolent ruler occupies the White House (and, then, only when the benevolent occupant decides not to use the power). Acts of Congress -- along with meaningful, enforced oversight of the President -- are indispensable for preventing these abuses. And that's

true whether or not one believes that the current occupant of the Oval Office is a good, kind and trustworthy ruler.

My time is limited this morning, but Chris in DC -- a Washington lawyer and regular commenter here -- elaborates on his own blog as to why it is a re-assertion of Congressional authority (not kind and good acts from Obama) that is the paramount priority:

What is often overlooked in all these discussions about the specific abuses of the Bush administration, amid all the resentment toward a particular president and his Republican party, is how much severe damage these excesses are doing to the very structure of our constitutional system. That corrosion of all sources of institutional (and popular) power other than the federal executive branch is, to me, far more egregious, more significant, and more difficult to reverse than the control and individual acts of a certain president or party in power at any given time.

As Marcy Wheeler notes, the co-sponsors of this bill are among the most influential in the Senate. The bill is endowed with the two most precious Beltway commodities -- bipartisanship (with Specter on board) and the blessing of a saintly "centrist" (McCaskill). It's a bill that is co-sponsored by the two leading Senators on the Senate Judiciary Committee as well as the Chairman of the House Judiciary Committee (Conyers). If they are serious about imposing meaningful limits on the Obama DOJ's attempt to shield the executive branch from judicial scrutiny, they will be able to move this bill quickly. I hope to have more shortly on ways to push that process along, but more vital even than limits on this privilege is having a Congress that once again acts as a meaningful check on executive transgressions. Restoration of that system is of far more enduring value than Obama's issuance of magnanimous and irrevocable-on-a-whim decrees.

Barack Obama's inauguration
And now to work

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The Economist
http://www.economist.com/world/unitedstates/PrinterFriendly.cfm?story_id=12991523

So much joy, such high expectations. Welcome to the White House, Mr Obama

EVERY inauguration has its quirks. George Washington, in his first inaugural speech, said he was not up to the job but would do his best, adding that there was no need to pay him a salary. William Henry Harrison gave the longest speech of any American president, forcing his audience to endure an hour and 45 minutes of snow-chilled tedium. He died a month later. Abraham Lincoln was sworn in by the chief justice who wrote the worst Supreme Court decision of all time, which upheld slavery and deemed black people eternally inferior.

Barack Obama's inauguration was marked by global jubilation and stratospheric expectations. (It was also slightly marred by a bumbled oath-taking, which Mr Obama corrected—though he did not need to—in the White House the next day.) More people probably packed the Mall than at any previous event in Washington—nearly 2m, by one estimate. More people probably watched his speech on television than any previous president's, partly because the world's population has grown, but partly because Mr Obama has charmed people from Kenya to Karachi.

His supporters rose before dawn and waited hours in icy weather to catch a glimpse of the new president. They wept, cheered and sang "This Land is Your Land" and "Hit the Road, George". They clapped furiously, though the sound was muffled by thick gloves. Headline-writers struggled to find synonyms for "historic". Adulation spilled over onto Mr Obama's wife, Michelle. "All Hail the Leader of the Fashionable World", trumpeted the *Washington Post*, commenting on her outfit.

The message of Mr Obama's speech on January 20th was sombre. America is in crisis, he said. The nation is at war. The economy is badly weakened. Health care is too costly, American schools fail too many, and "each day brings further evidence that the ways we use energy strengthen our adversaries and threaten our planet." As if that were not grim enough, there is "a sapping of confidence across our land—a nagging fear that America's decline is inevitable, and that the next generation must lower its sights."

Without directly insulting the man sitting behind him, Mr Obama alluded early and often to his predecessor's faults. The woeful state of the economy, he said, is "a consequence of greed and irresponsibility on the part of some". In other words, the suits on Wall Street gambled the country into penury and George Bush failed to stop them. American ideals, such as the rule of law, "still light the world, and we will not give them up for expedience's sake". Unlike some former presidents he could mention. "Our power alone cannot protect us, nor does it entitle us to do as we please." And, of course: "We will restore science to its rightful place."

Half-borrowing a theme from Shakespeare, he spoke of "this winter of our hardship". But whereas Shakespeare's winter was swiftly turned into "glorious summer" by a new king, Mr Obama gave warning that the immediate future for Americans will be tough. Life will be all

about braving icy currents and enduring raging storms, fortified only "with hope and virtue". He promised "bold and swift" action to revive the economy: building roads and bridges, electric grids and digital lines. "We will...wield technology's wonders to raise health care's quality and lower its cost. We will harness the sun and the winds and the soil to fuel our cars and run our factories."

None of this, he said, would happen quickly or easily. The road ahead was not for the faint-hearted, or "for those who prefer leisure over work". Quoting St Paul, he declared that: "The time has come to set aside childish things." Some observers guessed this might refer to Americans' habit of living beyond their means and demanding that their government do likewise. He vowed not to postpone unpleasant decisions. When government programmes failed, he said, he would end them. But he postponed the unpleasant decision of which specific programmes he had in mind.

Can he deliver? Mr Obama ran on a platform of having cake and eating it. Those who attended his rallies came away convinced that he was offering them lower taxes, better health care and cheaper, cleaner energy, all paid for by somebody else. That was not exactly what he promised, but that was what people heard. His inauguration speech was a veiled warning not to take his campaign hype at face value.

Few people minded. Short of sacking Joe Biden and making the temporarily wheelchair-bound Dick Cheney his vice-president, Mr Obama could have said nearly anything and still made his audience faint with ecstasy. For many, the thrill of the moment lay not in what he said, but in who he was.

No other majority-white country has elected a black leader. Roughly two-thirds of African-Americans now believe that Martin Luther King's dream has been fulfilled—a proportion that has doubled in less than a year, a CNN poll says. In his speech, Mr Obama did not mention his colour. He did not need to. The whole world could see his face. He alluded to it only in passing: "[A] man whose father less than 60 years ago might not have been served at a local restaurant can now stand before you to take a most sacred oath."

The two preachers who spoke at the inauguration put it more forcefully. Rick Warren, a young white conservative megapastor, declared, "Dr King and a great cloud of witnesses are shouting in heaven." Eighty-seven-year-old Joseph Lowery, who worked arm-in-arm with King while he was still on earth, gave a folksier benediction. "Lord," he said, "we ask you to help us work for that day when black will not be asked to get in [the] back, when brown can stick around, when yellow will be mellow, when the red man can get ahead, man—and when white will embrace what is right." The crowd laughed tenderly.

The mood in Washington was unshakably jolly. Grumpy Republicans left town, stayed indoors or decided to give the new president the benefit of the doubt. Democrats, who are a huge majority in the capital and were reinforced by countless busloads of like-minded political pilgrims, whooped it up without cease. Most could not see their hero in the flesh, but were content to watch him on enormous screens. Some got stuck in overcrowded side streets and could not even see the screens, but managed with oral accounts. Some perched on portable lavatories to get a better view. Hardly anyone shoved; hardly anyone grew impatient.

Some booed the outgoing president, but their anger was blunted by the knowledge that they

would not have to put up with him any more. After the ceremony, Mr Bush flew off in a helicopter. The crowds did not know which helicopter he was in, so they waved and shouted "Bye-bye, George" at any chopper that passed over them. On Monday, not far from the Mall, someone erected a big blow-up Bush with a Pinocchio nose. Revellers threw shoes at it.

The work begins

Mr Bush relinquished power without drama. Whereas Bill Clinton pardoned 140 people in his last few days in office, including a dodgy financier whose ex-wife donated to the Democrats, Mr Bush granted no last-minute pardons at all. His only late act of clemency, announced on January 19th, was to commute the jail sentences of two former Border-Patrol agents convicted of shooting a drug-smuggler on the Mexican border.

Whether or not Americans heed Mr Obama's call for "a new era of responsibility", he himself has suddenly assumed responsibilities unlike anything he has shouldered before. Even before the inauguration parties ended, he threw himself into his new job. One of his first acts was to put on hold all regulations issued by Mr Bush that have not yet gone into effect.

On January 20th he requested that legal proceedings against inmates at Guantánamo Bay be suspended, pending a review of the system for trying suspected terrorists there. Judges in individual cases are not obliged to grant his request, but probably will. Other executive orders expected soon include lifting Mr Bush's curb on federal funding for stem-cell research, revoking the ban on aid to foreign family-planning groups that offer abortions, and tightening the ban on torture.

On January 21st Mr Obama saw his economic advisers. Congressional leaders hope within days to send him a stimulus package to sign, probably totalling more than $800 billion. Meanwhile, the new president announced a pay freeze for senior White House staff and stricter lobbying rules. On the same day he telephoned the leaders of Israel, Egypt, Jordan and the Palestinian Authority. He promised to work with them to prolong the Israeli-Palestinian ceasefire, rebuild Gaza and block the smuggling of weapons to Hamas. He is likely to name a Middle East peace envoy soon.

Mr Obama must tackle two wars, a calamitous recession and the unexpected. Yet by a three-to-one majority, Americans are more optimistic with him in charge, according to a poll by the Associated Press. True believers put it more colourfully. At the Hawaii State Society ball on inauguration night, the consensus was that if Mr Obama can bodysurf at Sandy Beach, Oahu, where broken bones are common—and he can—he should be able to handle the presidency.

Presidents And The Constitution

Jerry Bowyer
January 20, 2009
http://www.forbes.com/2009/01/19/obama-roosevelt-constitution-oped-cx_jb_0120bowyer_print.html

John McIntyre of RealClearPolitics and I were both on Larry Kudlow's radio program on Saturday afternoon. Larry asked us both the same question: "Is there anything that Obama could say on Tuesday that will make you feel good about where he is taking the country?"

I answered that it's not what he *might* say; it's about what he definitely *will* say. Obama will swear an oath to "preserve, protect and defend the Constitution of the United States of America, so help me God." The question isn't whether he'll say it; the question is whether he'll mean it. You see, Barack Obama is, to my knowledge, the first American president to take this oath having in recent memory openly and publicly criticized the Constitution.

In 2001, he said the following on National Public Radio:

"But, the Supreme Court never ventured into the issues of redistribution of wealth ... didn't break free from the essential constraints that were placed by the founding fathers in the Constitution ... that generally the Constitution is a charter of negative liberties ... that says what the federal government can't do to you, but doesn't say what the federal government or state government must do on your behalf. ... One of the, I think, tragedies of the civil rights movement was ... a tendency to lose track of the ... activities on the ground that are able to put together the actual coalition of powers through which you bring about redistributive change."

Obama sees the constitutional limits placed on the power of government set by the founders as creating a tragedy in which the civil rights movement was unable to move from negative liberties to positive entitlement--that is, redistribution of wealth from propertied classes to the dispossessed peoples. No one else who has ever taken the office has so openly stated his disagreement with the document whose protection is his chief responsibility.

I say no one has done it--openly. Franklin Delano Roosevelt did it covertly. My friend Marvin Olasky, editor of *World Magazine*, found this remarkable statement from Roosevelt four years *after* he had taken the oath:

"When the chief justice read me the oath and came to the words 'support the Constitution of the United States,' I felt like saying: 'Yes, but it's the Constitution as I understand it, flexible enough to meet any new problem of democracy--not the kind of Constitution your court has raised up as a barrier to progress and democracy.' "

So, FDR took the oath with his fingers crossed, and it didn't take long before it showed. In the Inauguration speech he gave, he promised that he would use all the powers given to him under the Constitution to end the depression, and he then went on to say explicitly that if those powers were not enough, he would take additional powers for himself. FDR indeed did give himself powers "flexible enough to meet any new problem of democracy," so many, in fact, that the courts cast quite a few of them down. He responded by trying to intimidate the Supreme Court justices into compliance with a combination of harsh personal attacks and legislative attempts at court packing. FDR clearly went far beyond his constitutional responsibilities; 100,000 interned

Japanese-Americans can't be wrong.

Regarding Inaugurations: The speech is not the main point; neither are the masses gathered in the District of Columbia (something the founders actually feared). The fireworks, the whistle-stops, the ostentatious humility of walking down Pennsylvania Avenue are not the point either. Contra Shakespeare, the play is not the thing. The oath is the thing. The oath is the only element of all of this that is actually prescribed by the Constitution. (Article two, section one, for those keeping score at home.) Originally, the oath was only regarding the execution of the duties of the presidency, but the notes of the proceedings reveal that James Madison, considered the father of the Constitution, moved that an oath to protect the Constitution be added. Good man. Madison saw the tendency of presidents to become kings and of kings to become tyrants. He wanted something with teeth in it: a solemn oath to someone bigger even than the tyrant.

George Washington added the "so help me God" part voluntarily, but it was no shock. It's implied in the word oath. Affirmations were also given as an alternative to oaths, but at the time, that was a concession to highly religious Quakers and other dissenters who thought that oaths were dishonoring to God.

The Wall Street Journal said this week that Washington took his oath on a Bible opened at random that fell upon an obscure passage in the minor prophets. I don't think so. First of all, Washington did nothing at random. Second of all, there's at least one account that says that he opened his Bible to Deuteronomy chapter 28, Moses' farewell address, which is composed of a long list of national blessings and curses which would fall alternatively on just and unjust nations. Than, he gave an inaugural address that said that private virtue was the foundation of public prosperity.

He kept his promise, and the U.S. prospered beyond all expectations.

FDR broke his promise, and the U.S. suffered beyond all expectations.

Will Obama keep his promise?

So help him, God.

Jerry Bowyer is chairman of Bowyer Media and a CNBC contributor.

Intelligence Court Releases Ruling in Favor of Warrantless Wiretapping

Del Quentin Wilber and R. Jeffrey Smith Washington Post, January 16, 2009
http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011502311_pf.html

A special federal appeals court yesterday released a rare declassified opinion that backed the government's authority to intercept international phone conversations and e-mails from U.S. soil without a judicial warrant, even those involving Americans, if a significant purpose is to collect foreign intelligence.

The ruling, which was issued in August but not made public until now, responded to an unnamed telecommunications firm's complaint that the Bush administration in 2007 improperly demanded information on its clients, violating constitutional protections against unreasonable searches and seizures. The company complied with the demand while the case was pending.

In its opinion, a three-judge panel of the U.S. Foreign Intelligence Surveillance Court of Review ruled that national security interests outweighed the privacy rights of those targeted, affirming what amounts to a constitutional exception for matters involving government interests "of the highest order of magnitude."

The opinion, written by the court's chief judge, Bruce M. Selya, was extraordinary in several respects: It was partly redacted, and it referred to court pleadings that remain sealed. The ruling also hinged partly on a detailed, secret account by the government to the court of its surveillance procedures in 2007.

The judges, who are assigned to the court by the chief justice of the United States, concluded that the government's protections and restrictions included in the 2007 procedures were appropriate. "Our decision recognizes that where the government has instituted several layers of serviceable safeguards to protect individuals against unwarranted harms and to minimize incidental intrusions, its efforts to protect national security should not be frustrated by the courts," Selya wrote in the 29-page opinion.

He added that requiring a warrant in such cases would probably "hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake."

A Justice Department statement about the ruling called it "important" because it upheld the legality of Bush administration surveillance directives in 2007.

But independent experts said it is unclear whether the ruling would have a broader effect. The case involved the Protect America Act, a surveillance law that Congress has since altered. The court also declared that its review addressed only how the law was applied in 2007, not its underlying constitutionality.

Since then, Congress has approved new foreign intelligence surveillance legislation. It does not require, for example, that agencies have "probable cause" to believe that the person being targeted is a foreign agent, but instead allows more wide-ranging surveillance. It also does not limit the intelligence-gathering to a 90-day period, as previously required.

Jameel Jaffer, head of the American Civil Liberties Union's national security project, said the appellate court was "wrong to hold that the warrant requirement does not apply to foreign intelligence investigations." But he said its relevance to controversial Bush administration domestic surveillance between 2001 and 2005 is unclear, because so little is known about the nature of those efforts or the Justice Department's underlying legal justifications for them.

"We still don't know what those actions were" and whether they would also have met the court's approval, said Jaffer, who is challenging the constitutionality of the new surveillance law before a New York federal district court.

In this case, the company protested the government's demand for information and initially refused to comply. The Bush administration took the case to the Foreign Intelligence Surveillance Court, where U.S. District Judge Reggie B. Walton upheld the government's position in a secret ruling. The firm began to comply "under threat of civil contempt," the ruling released yesterday said.

In its appeal, the firm disputed the existence of an exemption to the Fourth Amendment's protection against unreasonable search for foreign intelligence surveillance. The company said that even if an exemption did exist, the government's demands were "unreasonable" because collecting such information for foreign intelligence may merely be a "significant" purpose under the law, rather than its "primary" purpose.

The appeals court struck down both arguments. The Supreme Court has recognized other exemptions, the ruling said, citing drug testing without warrants of high school athletes and railroad workers and frisking without warrants of those stopped by police for investigations. Selya also cited as precedent for the panel's conclusion a 1926 ruling by the Supreme Court that government officers should be regarded by the courts as acting properly in the absence of clear evidence to the contrary.

The ruling by the appellate court was only the second to be published. The panel was created in 1978 but did not meet to consider any case until 2002. In that decision, it rebuffed demands by the lower surveillance court to impose restrictions on some FBI wiretaps, ruling that the constraints were not required by the Constitution.

Yesterday's ruling can be appealed only to the Supreme Court.

Bush pushed the limits of presidential power
With Cheney's urging, he insisted that he had that right under the US Constitution, especially during wartime.

January 14, 2009, The Christian Science Monitor Online
http://www.csmonitor.com/2009/0114/p11s01-usgn.html
Warren Richey | Staff writer of The Christian Science Monitor

The presidential legacy of George W. Bush is perhaps best expressed in four words: He kept America safe.

Many legal scholars question President Bush's claim to unilateral power as commander in chief in the war on terror. And experts will long debate his aggressive approach to the fight against Al Qaeda – authorizing warrantless wiretaps within the US, secret kidnappings of terror suspects, coercive interrogation tactics, and military commissions with stripped-down legal protections.

But even Mr. Bush's harshest critics must concede that on his watch the country remained free of further terrorist atrocities following the 9/11 attacks.

The deeper question is at what price?

At the heart of the debate over Bush's legacy is a fundamental difference in outlook over what it means to remain faithful to the constitutional protections laid down by America's founding generation.

Critics say the Bush administration's expansive vision of executive power eclipsed the Constitution's mandated system of checks and balances. Some see the Bush years as lurching toward an imperial presidency, posing a direct threat to the essence of American liberty.

"The breadth of the theory that they were articulating is as broad as any theory of presidential power offered by any administration in history," says Gene Healy, a vice president at the Cato Institute in Washington and author of "The Cult of the Presidency: America's Dangerous Devotion to Executive Power."

Others disagree. "President Bush clearly had constitutional authority to make the military and counterterrorism decisions that he did," says Michael Paulsen, a constitutional scholar at the University of St. Thomas in Minneapolis. "I can think of none of President Bush's actions that fall outside those categories of relatively clear commander-in-chief clause power."

Bush, Vice President Dick Cheney, and administration advisers insist that their actions have been fully consistent with the Constitution.

Historical precedent for Bush actions

Every president since George Washington has sworn an oath to "preserve, protect and defend the Constitution of the United States." But presidents have interpreted that sacred pledge in different ways.

Some read it narrowly, that the president must always act within the strict letter and spirit of the law and Constitution. Others viewed it more broadly, embracing a duty to protect the nation itself, even when specific actions might temporarily violate the Constitution or laws.

Abraham Lincoln interpreted his presidential oath as a pledge to preserve the Union and the government itself. In 1861 amid a mounting crisis over the possible secession of Maryland, he suspended the writ of habeas corpus, a protection reserved under the Constitution to Congress.

Had Lincoln called Congress into special session in Washington, just as Maryland pulled out of the Union, the entire government would have been located within the Confederacy and in grave danger.

Instead, Lincoln acted quickly and alone. Then, within months, once the crisis in Maryland subsided, he presented the issue to Congress and obtained its approval.

Bush administration members invoked the example of Lincoln as justification for their own assertions of executive authority in the war on terror. But some analysts say the Bush administration wrongly sought to act alone in controversial areas, rather than obtaining the guidance and support of Congress.

"Given the kind of conflict we're faced with today, we find ourselves in a situation where I believe you need strong executive leadership," Mr. Cheney said in a FOX News interview in December. "There are bound to be debates and arguments ... about what kind of authority is appropriate in any specific circumstance. But I think that what we've done has been totally consistent with what the Constitution provides for."

Cheney noted that the president has 24-hour access to a briefcase containing all the codes necessary to launch a nuclear counterattack. "He could launch a kind of a devastating attack the world has never seen," the vice president said. "He doesn't have to check with anybody. He doesn't have to call Congress. He doesn't have to check with the courts. He has that authority because of the nature of the world we live in."

Many scholars take issue with Cheney's view. They say he and others in the Bush administration have used the war on terror as an opportunity to try to establish more robust powers within the executive.

"The basic strategy was to assert that the president could do various things like [authorizing domestic] wiretaps, detaining enemy combatants, and setting up military commissions solely on his own, he didn't need congressional authorization," says Steven Calabresi, a constitutional scholar at the Northwestern University School of Law in Chicago and author of "The Unitary Executive: Presidential Power from Washington to Bush."

"The hope was that by President Bush doing those things on his own it would vindicate presidential power in those areas," Professor Calabresi says. "I think that strategy was a mistake both legally and politically."

Cheney's strong hand seen

Others agree.

"Cheney is an executivist in the sense that he really thinks the president needs all that power and control to defend the country," says James Pfiffner, a political scientist at George Mason University in Fairfax, Va, and author of "Power Play: The Bush Presidency and the Constitution."

"There is a difference between power and authority," Professor Pfiffner says. "The president has the power to push the [nuclear] buttons, but he doesn't have the constitutional authority to do that. That rests with Congress."

Congress can delegate the power to the president to be prepared to respond immediately to a sudden attack. But the president does not possess the constitutional authority to launch and fight a war without congressional approval.

"Immediately repelling attacks is constitutionally entirely appropriate," Pfiffner says. "But Cheney wants to extend that and say that things are different now that we are under big threats, so you have to give all this power to the executive."

The effort did not fail, experts say. But it did not succeed either.

"I think probably the hopes of the president and vice president for creating a much stronger executive branch have been largely frustrated," says Bradford Berenson, a former associate White House counsel under Bush.

"In the Bush years the hope for revivifying presidential power ended up foundering on some of the war on terror-related policies that Congress and the public ultimately perceived as too pro-executive or too unilateral," Mr. Berenson says.

Some analysts say it is only a matter of time before the Bush and Cheney position is vindicated.

"Over the long term the view will come to be that President Bush was largely successful in restoring the full constitutional powers of the president as commander in chief during time of war and crisis," says Professor Paulsen.

He says President Bush's terror policies were supported by Congress, including via legislation specially written to overturn Supreme Court decisions and amend domestic surveillance laws.

"Ironically, President Bush's use of war powers was much more fully supported by Congress than were President Clinton's," Paulsen says. President Clinton ordered offensive US military operations in Kosovo, he says, without any authorization from Congress.

Paulsen acknowledges that the administration lost several important cases in the US Supreme Court. But he says over time those decisions will be viewed as "far more questionable on legal grounds than President Bush's decisions."

Historians like activist presidents

Cato's Healy agrees that history may be kind to Bush, but for a different reason. "Historians tend to overvalue presidents who provide a lot of drama and explosions," he says. "This is more a reflection of the perverse fascination with activist presidents who provide a lot of drama than it is on President Bush's actual performance, which I think has been quite awful."

Bush isn't the only president who sought to greatly expand his executive powers. Lincoln did it while trying to hold the union together and win a civil war. Franklin Roosevelt did it when he ordered the open-ended internment of American citizens of Japanese heritage during World War II. Harry Truman did it when he tried to use his commander in chief powers to take over the steel mills in 1952.

The Supreme Court precedent from the Truman debacle established the principle that presidents are at the zenith of their power when they act with Congress. It also established that presidential power is at its lowest ebb when the president acts alone in defiance of Congress.

Although the Supreme Court dealt the Bush administration setbacks in cases involving detainees and military commissions at the Guantánamo Bay prison camp, the high court has never directly ruled on the constitutionality of the administration's claims of unilateral commander in chief power. The terror cases were all decided on lesser legal arguments.

That means Bush's arguments are still available for future presidents. But the Bush experience could cut either way, analysts say. "If you think about lawyers in a future administration arguing about whether a similar claim [of executive power] is right or wrong, those who argue that it is wrong or at least unwise will be strengthened in their arguments [by Bush's record,]" Berenson says.

"I wouldn't say the Bush administration has done more harm than good to executive authority, but they have done less good then they hoped to," he says.

Will other presidents expand power?

Pfiffner sees a looming threat from the Bush example. "In general, executive power tends to ratchet up; it is less like a pendulum and more like a ratchet," he says. "Bush created precedents of constitutional claims to executive power that other presidents have not. So in that sense he has made the institution more powerful and future presidents can point to that and say Bush did it."

Ironically, future terror attacks may play the most decisive role in shaping how history views the Bush presidency.

"If we are attacked again and there is major loss of life, I think Bush's stock will soar and people will conclude that a lot of what he was doing was absolutely essential," says Professor Calabresi.

But he adds: "If there are no additional attacks and the whole terrorism threat seems to have fizzled out then I think people will be skeptical of what Bush did in fighting the war on terror and think it was unnecessary."

Several analysts echo an assessment made by former Bush legal adviser Jack Goldsmith in his book "The Terror Presidency." Mr. Goldsmith, now a law professor at Harvard, has said the administration could have gotten most of what it wanted had it reached out to Congress instead of trying to act unilaterally.

In his book, he writes: "When an administration makes little attempt to work with the other institutions of our government and makes it a public priority to emphasize that its aim is to expand its power, Congress, the courts, and the public listen carefully, and worry."

Professor Goldsmith says Bush failed to follow the lessons of Lincoln and Roosevelt, that greatness resides not in the ability to command but in the responsibility to persuade and inspire.

"[Bush] has been almost entirely inattentive to the soft factors of legitimation – consultation, deliberation, the appearance of deference, and credible expressions of public concern for constitutional and international values – in his dealings with Congress, the courts, and allies," Goldsmith writes.

In these failings are important lessons.

"I think the enduring legacy of the Bush administration in the separation of powers realm will be a renewed appreciation of the fact that whatever the limits of unilateral executive authority may be, the executive is strongest when it is acting in partnership with the legislative branch," former White House associate counsel Berenson says. "That is the deepest, ultimate lesson from the administration."

The Limits of Presidential Power

William Rusher, Townhall.com, December 02, 2008
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Whenever a new president is inaugurated, there is always a tremendous amount of speculation over what he (or she) is going to "do." And there's no denying that the new chief executive does have a great deal of discretionary power. But it swiftly becomes apparent that there are strict limits on that power.

In the first place, there are the limits that the new president imposes on himself. He may have pledged to do all sorts of things "on Day One" in the Oval Office, but a lot of them end up being postponed or severely modified, and some, for one reason or another, never get done at all. This is often all to the good: They were promised on the basis of information that turns out to have been inaccurate or incomplete, and on further consideration they may seem downright inadvisable.

Far larger are the restrictions imposed on the president by the Constitution, and by the statutes under which he is compelled to act. The Constitution is famously designed to limit the powers of the president (and, for that matter, of the Congress as well). A president cannot even appoint an ambassador to Nepal, let alone a Cabinet member or a justice of the Supreme Court, without the consent of two-thirds of the Senate. All sorts of presidential actions require the consent of the Senate, and a good many require the approval of both Houses of Congress.

Finally, there are the limitations imposed on presidential power by the political process itself. Even if a president possesses the indisputable power to take a particular step, it may be simply too unpopular with the public at large for him to take it. Franklin D. Roosevelt was, without much question, the most popular president of the 20th century. But when the Supreme Court blocked some of his efforts, and he tried to change its mind by proposing to enlarge it with justices sympathetic to his proposals, the public outcry forced Congress (which had previously been almost slavishly obedient to Roosevelt) to reject the "reform." Even if the consent of Congress had not been required, Roosevelt would have had to abandon his effort.

So we ought not to be surprised if President Obama fails to implement some of the pledges he made in the heat of the campaign. There are plenty of ways he can do this without seeming to betray his promises. Probably the easiest is to insist that he wants to keep a particular promise, but quietly let the Democratic leaders in Congress know that it won't break his heart if they manage to prevent him from having his way.

Meanwhile, I owe it to my readers to acknowledge that I was simply wrong recently, when I ventured that President-elect Obama would not name Hillary Clinton as his secretary of state. My estimate was that to do so would just give her a superb platform from which to pursue her own ambitions for the presidency in 2012 or 2016, while creating the potential for all sorts of public disagreements between the two during the Obama administration.

Obama's decision makes it clear that he's not all that upset by the prospect of Hillary running to succeed him (even if his own choice might be Vice President Biden), and that he doesn't anticipate -- or calculates that he can win -- any public disagreements between the two of them in the meantime.

These are legitimate political calculations, though either or both of them may prove to have been unwise.

Most Presidents Ignore the Constitution
The government we have today is something the Founders could never have imagined.

By ANDREW P. NAPOLITANO
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In a radio interview in 2001, then-Illinois State Sen. Barack Obama noted -- somewhat ruefully -- that the same Supreme Court that ordered political and educational equality in the 1960s and 1970s did not bring about economic equality as well. Although Mr. Obama said he could come up with arguments for the constitutionality of such action, the plain meaning of the Constitution quite obviously prohibits it.

Mr. Obama is hardly alone in his expansive view of legitimate government. During the past month, Sen. John McCain (who, like Sen. Obama, voted in favor of the $700 billion bank bailout) has been advocating that $300 billion be spent to pay the monthly mortgage payments of those in danger of foreclosure. The federal government is legally powerless to do that, as well.

When Franklin Delano Roosevelt first proposed legislation that authorized the secretary of agriculture to engage in Soviet-style central planning -- a program so rigid that it regulated how much wheat a homeowner could grow for his own family's consumption -- he rejected arguments of unconstitutionality. He proclaimed that the Constitution was "quaint" and written in the "horse and buggy era," and predicted the public and the courts would agree with him.

Remember that FDR had taken -- and either Mr. Obama or Mr. McCain will soon take -- the oath to uphold that old-fashioned document, the one from which all presidential powers come.

Unfortunately, these presidential attitudes about the Constitution are par for the course. Beginning with John Adams, and proceeding to Abraham Lincoln, Woodrow Wilson and George W. Bush, Congress has enacted and the president has signed laws that criminalized political speech, suspended habeas corpus, compelled support for war, forbade freedom of contract, allowed the government to spy on Americans without a search warrant, and used taxpayer dollars to shore up failing private banks.
All of this legislation -- merely tips of an unconstitutional Big Government iceberg -- is so obviously in conflict with the plain words of the Constitution that one wonders how Congress gets away with it.

In virtually every generation and during virtually every presidency (Jefferson, Jackson and Cleveland are exceptions that come to mind) the popular branches of government have expanded their power. The air you breathe, the water you drink, the size of your toilet tank, the water pressure in your shower, the words you can speak under oath and in private, how your physician treats your illness, what your children study in grade school, how fast you can drive your car, and what you can drink before you drive it are all regulated by federal law. Congress has enacted over 4,000 federal crimes and written or authorized over one million pages of laws and regulations. Worse, we are expected by law to understand all of it.

The truth is that the Constitution grants Congress 17 specific (or "delegated") powers. And it commands in the Ninth and 10th Amendments that the powers not articulated and thus not delegated by the Constitution to Congress be reserved to the states and the people.

What's more, Congress can only use its delegated powers to legislate for the general welfare, meaning it cannot spend tax dollars on individuals or selected entities, but only for all of us. That is, it must spend in such a manner -- a post office, a military installation, a courthouse, for example -- that directly enhances everyone's welfare within the 17 delegated areas of congressional authority.

And Congress cannot deny the equal protection of the laws. Thus, it must treat similarly situated persons or entities in a similar manner. It cannot write laws that favor its political friends and burden its political enemies.

There is no power in the Constitution for the federal government to enter the marketplace since, when it does, it will favor itself over its competition. The Contracts Clause (the states cannot interfere with private contracts, like mortgages), the Takings Clause (no government can take away property, like real estate or shares of stock, without paying a fair market value for it and putting it to a public use), and the Due Process Clause (no government can take away a right or obligation, like collecting or paying a debt, or

enforcing a contract, without a fair trial) together mandate a free market, regulated only to keep it fair and competitive.

It is clear that the Framers wrote a Constitution as a result of which contracts would be enforced, risk would be real, choices would be free and have consequences, and private property would be sacrosanct.

The $700 billion bailout of large banks that Congress recently enacted runs afoul of virtually all these constitutional principles. It directly benefits a few, not everyone. We already know that the favored banks that received cash from taxpayers have used it to retire their own debt. It is private welfare. It violates the principle of equal protection: Why help Bank of America and not Lehman Brothers? It permits federal ownership of assets or debt that puts the government at odds with others in the free market. It permits the government to tilt the playing field to favor its patrons (like J.P. Morgan Chase, in which it has invested taxpayer dollars) and to disfavor those who compete with its patrons (like the perfectly lawful hedge funds which will not have the taxpayers relieve their debts).

Perhaps the only public agreement that Jefferson and Hamilton had about the Constitution was that the federal Treasury would be raided and the free market would expire if the Treasury became a public trough. If it does, the voters will send to Congress those whom they expect will fleece the Treasury for them. That's why the Founders wrote such strict legislating and spending limitations into the Constitution.

Everyone in government takes an oath to uphold the Constitution. But few do so. Do the people we send to the federal government recognize any limits today on Congress's power to legislate? The answer is: Yes, their own perception of whatever they can get away with.

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New President Won't Tame Executive Power

Gene Healy, Orange County Register on October 14, 2008.
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Joe Biden hardly brings the glamour and excitement to his ticket that Sarah Palin does to hers, but he surely warmed civil libertarian hearts at the vice-presidential debate when he forcefully denounced "dangerous" theories designed to "aggrandize the power of a unitary executive." After seven years of an administration that has recognized few, if any, limits on executive power, it's only natural that many people look to the Obama-Biden ticket to put the presidency back in its proper constitutional place.

But there are good reasons to doubt that an Obama administration would meaningfully de-imperialize the presidency.

From Truman and Johnson's undeclared wars to the warrantless wiretapping carried out by FDR, JFK, LBJ and Nixon, the Imperial Presidency has long been a bipartisan phenomenon. In fact, our most recent Democratic president, Bill Clinton went even further than his predecessors in his exercise of extraconstitutional war powers. Prior presidents had unilaterally launched wars in the face of congressional silence. But Clinton's war over Kosovo in 1999 made him the first president to launch a war in the face of several congressional votes denying him the authority to wage it.

Recently, Barack Obama has found his own convenient rationales for endorsing broad presidential powers in the area of surveillance. When he signed on to the surveillance bill Congress passed this summer, Sen. Obama broke an explicit campaign promise to filibuster any legislation that would grant immunity to FISA-flouting telecom companies. By voting for the bill, Obama helped legalize large swaths of a dragnet surveillance program he'd long claimed to oppose. Perhaps some were comforted by Obama's "firm pledge that as president, I will carefully monitor the program." But our constitutional structure envisions stronger checks than the supposed benevolence of our leaders.

What motivated Obama's flip-flop? Was it a desire to look "tough" on national security-or was it that, as he seems ever closer to winning the office, broad presidential powers seem increasingly appealing? Either way, it's clear that the post-9/11 political environment will provide enormous incentives for the next president to embrace Bush-like theories of executive power. Can we really expect a Democratic president, publicly suspected of being "soft on terror," to spend much political capital making himself less powerful?

Not likely, say analysts on both sides of the political spectrum. Law professors Jack Balkin and Sanford Levinson, both left-leaning civil libertarians, predict that "the next Democratic president will likely retain significant aspects of what the Bush administration has done"; in fact, "future presidents may find that they enjoy the discretion and lack of accountability created by Bush's unilateral gambits." Jack Goldsmith, head of the Bush administration's OLC from 2003-04, argues that "if anything, the next Democratic president - having digested a few threat matrices ... will be even more anxious than the current president to thwart the threat."

There was always something difficult to swallow in the notion that a man running as the reincarnation of JFK could be relied upon to end the Imperial Presidency. Barack Obama has done more than any candidate in recent memory to raise expectations for the office, expectations that were extraordinarily high to begin with. Over the course of the 20th century, more and more Americans looked to the president to perform miracles, from "managing the economy," to

warding off hurricanes and providing seamless protection from foreign threats. As responsibility flowed to the center, the presidency grew far more powerful than the framers of our Constitution had ever intended it to be. We shouldn't be surprised then, if, during an Obama administration the Audacity of Hope gives rise to the Arrogance of Power.

None of this, of course, is to suggest that a President McCain would be any more respectful of constitutional limits. The Arizona senator worships at the altar of Teddy Roosevelt, maintaining that the bellicose TR was a great president because he "liberally interpreted the constitutional authority of the office." Like George W. Bush, McCain imagines that the president has a Magic Scepter of Inherent Authority that allows him to ignore statutes like FISA that restrain his discretion in national security matters.

Those who hope to put an end to the abuses of the Bush years are right to distrust McCain. Even so, when it comes to executive power, perhaps the best argument for an Obama presidency is found on a sardonic bumper sticker currently sold at Cafepress.com: "Obama '08: Get Disappointed by Someone New."

Civil libertarians, of all people, should know better than to hold out hope that a man on horseback will ride in to rescue the Constitution. Eternal vigilance - without regard for person or party - has ever been the price of liberty. That vigilance will be even more necessary in the years to come.

The Constitution as a Limit on Executive Power

25 July 2008
by Bob Barr
http://www.tenthamendmentcenter.com/2008/07/25/the-constitution-as-a-limit-on-executive-power/

Testimony before the House Judiciary Committee, July 25, 2008

Mr. Chairman and distinguished Members of this Committee, on which I was privileged to serve throughout my eight years as a Member of the House of Representatives, it is an honor to appear today to speak on the importance of the separation of powers in the federal government as a tool for protecting the people's liberties. Many vital issues confront our nation, but few are more important than repairing and maintaining the constitutional bulwarks that guarantee individual liberty and limit government power.

Mr. Chairman, today I appear as a private citizen, and also as a former Member of this Committee and as a once-again practicing attorney. I am also honored to be serving as the presidential nominee of the Libertarian Party.

It is axiomatic that no matter how much power government has, it always wants more. While the executive branch under George W. Bush has taken this truism to new heights, it is not unique in its quest for power. Unfortunately, the other branches of government have failed to do enough to maintain the constitutional balance. Particularly disturbing has been Congress' recent reluctance, in the face of aggressive executive branch claims, to make the laws and ensure that the laws are properly applied. This failure has inhibited the operation of the separation of powers, necessary to provide the checks and balances which undergird our system of constitutional liberty.

CHECKS AND BALANCES

The Constitution employs several techniques to preserve our liberties and privacy. One is to limit federal authority to enumerated powers. Another is to explicitly restrict government power, most notably through the Bill of Rights. The Founders also used the basic structure of government to protect the people from abuse, relying upon federalism, dividing power between state and national governments, as well as the separation of powers within the federal government itself. The latter concept goes back to ancient Greece and was explicated by such political philosophers as John Locke and most famously by Baron de Montesquieu, who was much studied by America's Founders. Many countries have implemented the same principle, though with different government structures, ranging up to six branches in Germany. In the U.S. the Founders established the executive, legislative, and judicial branches. The result is intentional inefficiency: the three branches are expected to constantly check and balance each other.

For instance, James Madison declared in Federalist No. 51: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." He went on to explain that, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This means "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other."

Despite the inevitable problems which will afflict any political system, the original constitutional scheme has worked extremely well. Although the relative power of the different branches has varied over time, checks and balances have always operated.

More than two centuries have passed, and the constitutional limits on both the legislative and judicial branches remain robust – at least in theory. The president appoints and the Senate confirms judges, for instance. Presidents veto legislation and administer the laws, while the judiciary assesses the constitutionality of and interprets statutes.

In contrast, however, the constitutional constraints on the executive branch have eroded, with some breaking down substantially or entirely. The process has been underway for many years, but has greatly accelerated since 2001. In particular, President Bush and his appointees have used his power as commander in chief—of the military, not American society, it should be noted—to disregard congressional authority and override explicit constitutional provisions. Indeed, since 9/11, the president has let few opportunities slip by without reminding us that he is not only commander in chief but also a "wartime president," and to argue that this status justifies whatever new power he claims to possess and wishes to utilize.

The president's authority is substantial, but limited by law. The Constitution directs him or her to "take care that the laws be faithfully executed." However, Congress is vested with the sole power to legislate, thereby determining the laws to be executed. Moreover, the president's administration of the law is constrained by the Bill of Rights, including the Fourth Amendment, which bars searches and seizures absent a warrant based on probable cause. Further, though the president by the nature of his office has a lead role in shaping foreign and military policy, the Constitution shares powers in these areas between the legislative and executive branches.

Since the nation's founding, Congress and the executive have struggled for supremacy. The 20th Century witnessed a steady if irregular expansion of presidential authority, which has carried over into this first decade of the 21st Century. The role of the president as the military's commander in chief has taken on increasing importance as it has been used to justify the aggrandizement of the executive's authority at the expense of that of both Congress and the judiciary. The issue is not just an abstract struggle between different government officials. Rather, this expansion of presidential power has increasingly put the people's liberties and privacy at risk.

WAR-MAKING POWERS

One of the most important expansions of executive authority has been transforming the president's power to conduct a war into that of starting a war. Congress is vested with the sole power to declare, meaning to start, war; the Constitution's framers explicitly intended to diverge from the British system and vest the authority to initiate war with the many in the legislature rather than the one in the executive. The Constitution also empowers Congress to create the military and enact rules governing both the military and the conduct of war. Although the constitutional convention changed the term from "make" to "declare" to allow the president to respond to a surprise attack, and the president's authority to conduct war as commander in chief suggests that Congress cannot second guess his tactical judgments, he is to exercise all his powers within the larger framework created by the legislative branch.

Yet modern presidents increasingly assert their unilateral authority to bomb and invade other nations, without legislative approval, and to conduct military operations for years even after the original circumstances giving rise to a congressional authorization to use force have changed. This trend did not originate with the Bush administration, but has continued and grown under it. For instance, in 2002 President George W. Bush insisted that Congress not tie his hands, and refused to acknowledge the constitutional necessity of winning legislative approval to invade

Iraq. Rather than make the decision for or against war, Congress transferred discretion to initiate war against Iraq to the president.

After launching the Iraq invasion in 2003 based on a 2002 congressionally-passed resolution to do so, the current administration has rejected the argument that a multi-year occupation violates Congress' authorization of force, which legally controls the executive's war objectives. The president also has resisted congressional oversight of its objectives and policies, which is an essential aspect of Congress' authority. Although acknowledging that Congress controls the budgetary purse strings, the president and his aides have fought any attempt to condition appropriations—conveniently bundled in "emergency" supplementals in order to reduce the opportunity for legislative review.

EROSION OF LIBERTY

The administration has attempted to use the same commander in chief power, as well as Congress' Authorization for Use of Military Force (AUMF), approved after 9/11, to trump constitutional protections for civil liberties and privacy. Yet the Constitution does not create a national security exception to the Bill of Rights or separation of powers, and no member of Congress imagined that voting to authorize the use of force abroad simultaneously authorized the president to engage in unspecified and otherwise unconstitutional conduct at home. There is no basis for the argument the president's authority as commander in chief in effect swallows and trumps the rest of the Constitution.

For instance, the administration undertook warrantless surveillance of Americans without court order or supervision. Conducted by the National Security Agency, the program was inaugurated shortly after the terrorist attacks of 9/11 and was inaccurately dubbed the Terrorist Surveillance Program, since in fact it targeted American citizens with no reason to believe they were engaged in any actions involving terrorism. The eavesdropping directly violated even the relaxed warrant requirements of the 1978 Foreign Intelligence Surveillance Act.

Under Republican control, Congress unashamedly refused to conduct serious inquiry into the obviously improper NSA surveillance program. Unfortunately, the GOP majority put partisan comity ahead of fidelity to the law and Constitution. Although more members of the Democratic majority, which took over in January 2007, indicated concern about administration lawlessness, this Congress recently caved in to administration demands and amended FISA to grant the government unprecedented power to surreptitiously spy on the phone calls and emails of American citizens in our own country, based on nothing more then a belief they are communicating with someone not in the U.S. The measure also granted immunity – retro-active and prospective — to telephone companies which aided government law-breaking.

Thus did a genuine need to modernize certain of FISA's technical provisions—for example, to reverse the court interpretation that monitoring calls sent by modern routing mechanisms through the U.S., even though both parties were located abroad, required a court order—became an opportunity to greatly expand the law's reach. The result is to make virtually every international call or email subject to monitoring without court oversight. Thereby carving out an entire class of communication from constitutional protection is a breathtaking decision with the potential to do enormous damage to the very meaning of the Fourth Amendment and to the essential foundation of limited government. This law also has effectively neutered the oversight role the Congress or the Foreign Intelligence Surveillance Court should play in this area.

Similarly extravagant has been the administration's claimed right, as an adjunct of both the president's constitutional warpowers and the AUMF, to designate American citizens arrested in

America as well as alleged terrorists captured overseas as "enemy combatants" beyond the reach of the U.S. Constitution and courts. The detention of combatants captured in battle is a natural adjunct to war, but not the suspension of all constitutional and legislative oversight of the executive's power to imprison anyone it claims to be a combatant for as long as it desires. The argument that the president has the unique power to suspend basic constitutional guarantees, including the "Great Writ" of habeas corpus, whereby a person has a fundamental right to be brought before a court to determine the lawfulness of his or her detention or deprivation, is particularly dangerous in the midst of a potentially endless "war" where the American homeland is considered to be a — and perhaps the chief — battlefield.

There is nothing in Article II of the Constitution which provides that the president is the military's commander in chief, to suggest that he thereby gains the power to suspend any law and any constitutional provision at his discretion. Indeed, the very next section reminds the president that at all times he has a responsibility to "take Care that the Laws be faithfully executed," with no hint of an exception whenever he decides he is acting as commander in chief. In Youngstown Sheet & Tube Co. v. Sawyer (1952), the Supreme Court rejected a similar claim by the Truman administration — that the president's powers as commander in chief allowed him to seize steel mills despite Congress' refusal to authorize such an act.

Nor is it plausible that Congress believed that by authorizing military action in response to 9/11 it was empowering the president to deny American citizens their constitutional rights at home. Authorizing military action overseas does not logically mean authorizing every conceivable use of surveillance, arrest, and imprisonment by the federal government at home. Indeed, if the administration had believed this theory at the time, there would have been no reason for it to have proposed the Patriot Act, since all those powers, too, should have been included in the AUMF. Equally important, Congress itself only has the authority to suspend—and only if our country is invaded or faced with overt "Rebellion"—not eliminate, habeas corpus. Congress cannot authorize the president to limit that right in additional circumstances.

SIGNING STATEMENTS

Another example of a direct presidential assault on the separation of powers, and thus the constitutional structure undergirding our free society, are presidential signing statements. Throughout history, signing statements have been used to thank supporters, provide reasons for signing a bill or express satisfaction or displeasure with legislation passed by Congress. Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton all used signing statements to express constitutional and other objections to legislation, influence judicial interpretation, and otherwise advance policy goals.

President George W. Bush has more aggressively – to an historically unprecedented degree — employed the presidential signing statement to challenge or deny effect to legislation that he considers unconstitutional, but nonetheless signs. As the Congressional Research Service reported last year, a much higher share of President Bush's signing statements have contained a constitutional challenge, and they "are typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of the law." This tactic, adds CRS, is "an integral part of the administration's efforts to further its broad view of presidential prerogatives and to assert functional and determinative control over all elements of the executive decision making process."

In scores of cases President Bush has claimed that legislation has improperly interfered with presidential authority. In a democracy, such assertions of power—most fundamentally the underlying failure to comply rather than the explanatory signing statement—do not happen in a

vacuum. They affect the careful balance of power in our system of government. The executive branch is not free to unilaterally change that balance; our Constitution requires legislative and judicial involvement in lawmaking to ensure public debate and oversight and to guard against centralization of power. Article I of the Constitution gives Congress the power to make the laws. Under Article II, the president has the duty to ensure that the laws are faithfully executed. The Constitution also provides that if the president objects to a proposed law, he can veto it. This gives Congress the chance to override his veto, enacting the law despite his opposition, or to sustain his veto, and then work to address the president's objections. A president may also challenge a law he believes to be unconstitutional in court.

Instead, the current president, especially, has used signing statements, and a refusal to enforce the law, as a sub rosa form of unreviewable veto, usurping the power of Congress and aggrandizing the power of the executive.

EXECUTIVE PRIVILEGE

Another tool of executive aggrandizement has been the doctrine of executive privilege. No where spelled out in the Constitution itself, the claim has been advanced by presidents starting with George Washington. The doctrine is most persuasively rooted in national security, but presidents often have more generally contended that confidentiality is necessary for the operation of the executive branch. Although the argument at its core is not without force, executive privilege has become an all-purpose shield and boilerplate excuse to hide embarrassing and potentially incriminating information from Congress and the public. That a claim for executive privilege had to be balanced with other interests was evident in 1807 when Aaron Burr, on trial for treason, sued President Thomas Jefferson to produce a supposedly exculpatory letter. Chief Justice John Marshall rejected Jefferson's argument that disclosure risked public safety and ordered the president to comply. In 1974 the climactic case of United States v. Nixon confronted President Richard M. Nixon's attempt to use the claim of executive privilege to avoid having to turn over evidence of criminal misbehavior to Watergate special prosecutor Leon Jaworski. The Supreme Court unanimously acknowledged a generalized right of confidentiality, but ruled that this privilege must yield to other government interests, most notably the criminal process. The order that he yield up the tapes recording his Oval Office conversations led to his resignation.

Other presidents have relied on the doctrine to shield their operations from scrutiny. The Clinton administration avoided disclosure of the deliberations of the president's health care reform task force because First Lady Hillary Clinton was considered to be a government employee under the relevant legislation. This admittedly strained interpretation allowed the courts to avoid ruling on the question of whether executive privilege applied to conversations between government officials and people outside of government.

As in other areas, the Bush administration has even more energetically sought to keep information about many of its activities, even those with no sensitive national security implications, from public view. For instance, the administration resisted a request for disclosure, based on legislation covering "advisory committees," of the names of participants and results of discussions by members of the Vice President's National Energy Policy Development Group. The administration lost in the lower courts, but was partially upheld by the U.S. Supreme Court, which sent the case back to the District Court for reconsideration. The D.C. Circuit Court of Appeals ultimately refused to order disclosure based on its interpretation of the relevant statute, based on the fact that several government officials served on the Group.

Elsewhere the administration's case for secrecy has been more frivolous and less well received. For instance, the administration attempted to keep secret visitor logs detailing Christian leaders

who visited the White House and vice president's residence. Earlier this month the D.C. Circuit distinguished this case from the energy group decision and ruled that the logs were not the property of the White House—which took custody from the Secret Service (part of the Treasury Department) in order to thwart a request under the Freedom of Information Act—and ordered their release.

These cases centered on statutory interpretation. The Bush administration also has more directly used the doctrine of executive privilege to resist disclosures to Congress, even as part of investigations of potential executive wrong-doing. For instance, at a recent hearing of this Committee, Karl Rove refused to appear, based on advice of the White House Counsel, to discuss his role in possible meddling in Justice Department prosecutions. Last year White House Chief of Staff Josh Bolten and former White House Counsel Harriet Miers similarly refused to obey committee subpoenas to appear to discuss the firing of U.S. attorneys; the House voted to hold them in contempt.

The House Committee on Oversight and Government Reform has been investigating the White House's involvement in the disclosure of Valerie Plame's employment by the CIA. In June Chairman Henry Waxman pointed out to Attorney General Michael B. Mukasey that "In his interview with the FBI, Mr. Libby stated that it was 'possible' that Vice President Cheney instructed him to disseminate information about Ambassador Wilson's wife to the press. This is a significant revelation and, if true, a serious matter. It cannot be responsibly investigated without access to the Vice President's FBI interview." However, in an echo of the Watergate controversies, Mukasey refused to comply, citing fear of "the chilling effect that compliance with the committee's subpoena would have on future White House deliberations." The White House cited executive privilege in refusing to turn over the FBI interview, even though the vice president's chief of staff had been convicted of perjury.

In an extraordinary twist on the doctrine of executive privilege, the Bush administration announced last year that it would not allow any U.S. Attorney to pursue a contempt citation on behalf of Congress. By attempting to control federal employees who also are officers of the courts, the administration attempted to place itself beyond effective accountability by any person or institution. Mark Rozell of George Mason University termed this position "astonishing" and "a breathtakingly broad view of the president's role in this system of separation of powers. What this statement is saying is the president's claim of executive privilege trumps all." Indeed, if sustained, Rozell added, this position will allow "the executive to define the scope and limits of its own powers." As a result, the House has filed suit to enforce its subpoena, the first such lawsuit in history.

"STATE SECRETS" DOCTRINE

Another doctrine used by the executive branch to the detriment of the constitutional separation of powers is the so-called "state secrets privilege." According to this doctrine, the executive branch refuses to release information in court cases on the grounds that disclosure would harm "national security." First recognized by the U.S. Supreme Court in 1953, the doctrine has been treated as well-nigh absolute by some judges.

In this case, like many others, there is an obvious basis for shielding sensitive information in extraordinary instances from public view, even to the detriment of a valid lawsuit. However, again, a legitimate doctrine has been twisted to frustrate cases that might expose government wrong-doing and executive misconduct. As a result, government accountability, and redress of wrongs suffered by individuals as the result of government action, have suffered greatly.

For instance, Khalid El-Masri filed a civil case against the U.S. government in a case involving "extraordinary rendition," in which the government illegally detained Mr. El-Masri in a case of mistaken identity. The trial court judge accepted the government's claimed "state secrets privilege," which thwarted disclosures necessary to prosecute the case. A similar result was reached in a similar case by Canadian Maher Arar, who was deported, based on false information, by the U.S. to Syria (he was a dual citizen), where he was apparently tortured. The Bush administration also invoked the state secrets privilege to defeat lawsuits challenging the government's unlawful FISA surveillance program.

Although judges can order, and have ordered, disclosure of disputed documents and other information to them for in camera screening, too often courts have given inordinate deference to executive branch claims. But the privilege should be treated as qualified, not absolute. A government refusal to allow judicial inspection could be met with forfeiture of the case. Congress could assist the judiciary by holding hearings and drafting legislation clarifying the authority of judges, procedures to be used to adjudicate executive claims of state secrecy, and sanctions to be imposed for the executive branch's refusal to comply.

CONGRESSIONAL OVERSIGHT

Unfortunately, Congress has been at least impartially complicit in this and other presidential "power grabs." It repeatedly has acquiesced to President Bush's unilateral actions. It has failed in its constitutional obligation to make the laws and to oversee the executive branch to ensure that the latter properly implements the laws passed by Congress.

Enforcing presidential compliance with the law is not easy, especially since a pattern of executive law-breaking has been established. However, the people—the citizens in whose name this House and the rest of the government act—can and should insist that those elected president, this coming November and in the future, respect the separation of powers and other constitutional limits on their authority.

Taking an oath to "preserve, protect and defend the Constitution of the United States" requires no less. Moreover, the legislature has many tools at its disposal to promote respect for the nation's fundamental law. It can enlist the courts, of course. It can use its power to hold oversight hearings, backed by the power to subpoena and hold executive officers in contempt. It can refuse to confirm presidential appointments.

Most fundamental is its power to control appropriations. Congress can shape funding in the relevant area to encourage compliance with the law. Moreover, broader retaliation, though less desirable, is another possibility. For instance, the Reagan administration's attempt to thwart explicit congressional guidelines over federal contracting led to a vote by this Committee to defund the Office of the Attorney General. A compromise was reached: Congress funded the Attorney General's Office while the administration complied with the law.

The most important requirement is that Congress treat seriously its responsibility to uphold the Constitution. Neither the Bill of Rights nor the separation of powers are self-enforcing documents or principles. The legislative branch has a critical role to play.

The Constitution creates explicit guarantees for individual liberty and limits on government power out of the recognition that even the best-intentioned public officials working to achieve the most public-spirited aims make mistakes. That surely has been evident during the so-called "Global War on Terror," in which more than a few innocent people have been not just detained,

but also imprisoned and tortured. The Bill of Rights and the separation of powers are not mere technicalities, but essentials of our government and our entire system of ordered liberty.

I know this Committee understands that the president's quest for intelligence and desire for flexibility, legitimate as they are, should not be allowed to serve as a subterfuge for circumventing constitutional protections for liberty and restrictions on presidential power. U.S. District Court Judge Royce Lamberth, appointed by President Ronald Reagan, has reminded us that, "[w]e have to understand you can fight the war [on terrorism] and lose everything if you have no civil liberties left when you get through fighting the war."

The temptation to cut constitutional corners is not the province of any one party. Rather, it grows when one party controls both the executive and legislature. Then party comity sometimes overrides institutional differences, as it did most recently between 2001 and 2006.

But our constitutional system, and its commitment to limited government and individual liberty, is based both on a series of explicit guarantees that constrain the use of government authority, and a structure that divides government authority. As such, the separation of powers, with the checks and balances expected to naturally follow, is the bedrock foundation of American constitutional government. It is a foundation clearly in danger of crumbling.

Bob Barr is the Libertarian Party candidate for President and a former member of Congress from Georgia.

Supreme Court rejects wiretap suit
The domestic spying case ends quietly as the justices issue a one-line order dismissing the ACLU challenge of the Bush program.

David G. Savage, Los Angeles Times, February 20, 2008
http://articles.latimes.com/2008/feb/20/nation/na-scotus20

WASHINGTON -- The Supreme Court today dismissed the first legal challenge to President Bush's warrantless wiretapping order, but without ruling on any of the key issues.

Since Congress is now fighting with the White House over new rules for wiretapping, the court may have chosen to stand aside from the controversy.

Lawyers for the American Civil Liberties Union had argued that this dispute went beyond whether the nation's spy agency could intercept international phone calls and e-mails. It raised the question of whether the president must abide by the law, they said.

The Foreign Intelligence Surveillance Act of 1978, a Cold War-era compromise, said the president could order secret wiretapping within the United States, but only with the specific approval of a special court.

But after the terrorist attacks of Sept. 11, 2001, President Bush issued a secret order to the National Security Agency that authorized it to intercept phone calls or e-mails coming into or going out of this country if there was a "reasonable basis" to believe there was a link to Al Qaeda. More significantly, the NSA did not need the approval of the FISA court to conduct this spying, according to the order.

When Bush's order was revealed in 2005, the president defended his decision as necessary for protecting against another attack within the United States. He also argued that the president, as commander in chief of the armed services, had the constitutional authority to act in the national interest, even if a law stood in the way.

The ACLU's lawyer urged the courts to take up the issue and rule that the law must be followed. "The president is bound by the laws that Congress enacts. He may disagree with those laws, but he may not disobey them," the ACLU said in the appeal to the Supreme Court.

But their lawsuit faced several hurdles before it could yield a ruling. They did not have proof that anyone in the United States had had calls or e-mails intercepted. They sued on behalf of several lawyers and journalists who had regular contact with people who were being investigated in terrorism-related cases. The lawyers said they did not feel free to contact their clients.

Last July, however, the U.S. appeals court in Cincinnati threw out the lawsuit and ruled that these people did not have standing to sue. This 2-1 decision reversed a strongly worded ruling by a judge in Detroit who declared Bush's order unconstitutional.

The argument over standing is especially frustrating for the civil libertarians. They say secret spying is illegal without a judge's order, but they cannot challenge the policy in court because they cannot prove one of their clients has been spied on.

In October, the ACLU asked the Supreme Court to take up their appeal and to rule that the Constitution does not give the president the power to ignore the laws. Administration lawyers said the disputed program is being revised in Congress, and they urged the justices to defer any decision on how it works.

The case ended quietly today when the justices issued a one-line order turning down the case of ACLU vs. NSA.

State secrets' doctrine draws scrutiny
Congress, courts examine Bush strategy to protect surveillance program

Nov. 26, 2007, http://www.msnbc.msn.com/id/21971705/

WASHINGTON - In federal courts and on Capitol Hill, challenges are brewing to a key legal strategy President Bush is using to protect a secret surveillance program that monitors phone calls and e-mails inside the United States.

Under grilling from lawmakers and attack by lawsuits alleging Bush authorized the illegal wiretapping of Americans, the White House has invoked a legal defense known as the "state secrets" doctrine - a claim that the president has inherent and unchecked power to shield national security information from disclosure, either to plaintiffs in court or to congressional overseers.

The principle was established a half-century ago when, ruling in a wrongful-death case brought by the widows of civilians killed in a military plane crash, the Supreme Court upheld the Air Force's refusal to provide an accident report to the plaintiffs. The government contended releasing the document would compromise information about a secret mission and intelligence equipment.

Judicial review proposed
Sen. Arlen Specter of Pennsylvania, the senior Republican on the Judiciary Committee, believes the White House has gone too far in invoking state secrets to halt civil lawsuits.

"We have the authority to define the state secrets doctrine," Specter says. "I don't think that the simple assertion of state secrets ought to be the end of the matter."

Specter, Sen. Edward Kennedy, D-Mass., and others are working on legislation that would direct federal judges to review the president's state secrets claims and allow cases with merit to go forward.

Practices among judges vary. Some accept state secrets claims outright, dismissing cases on the government's word. Others read the privileged information and decide for themselves, but almost invariably side with the government, according to legal scholars.

The draft legislation is modeled on procedures used in criminal cases that involve classified information. The Classified Information Protection Act lets judges review classified information a criminal defendant wants to use in his defense, but which could compromise national security if it were released publicly. The law allows the court to delete classified passages, substitute summaries of the information, or substitute a statement of facts that the classified information would prove.

The measure could become part of the Senate's new eavesdropping law, expected to be voted on in early December, the aides said.

State decisions
In another challenge to Bush's position on classified material, a federal judge in Virginia last week ordered the government to give trial prosecutors, defense lawyers and her clerk security clearances to review classified material in a terrorism case. Defense lawyers say the material will show the government failed to turn over evidence obtained by illegally monitoring their client's

communications, and they want a new trial. The government says the information is protected by the state secrets privilege.

And in a case in Oregon, a U.S. district court judge is set to decide whether the 1978 Foreign Intelligence Surveillance Act trumps presidential claims of secrecy.

Adopted after the Watergate scandal, FISA dictates when the government must get permission from a secret court to monitor electronic communications inside the United States. It also allows people who believe they were spied on illegally to sue the government for damages and to request materials that would prove the surveillance. If the attorney general says disclosure would harm national security, a district court may review the classified materials privately to determine if the surveillance was illegal.

Politics of terror

That civil liability provision of FISA, however, comes up hard against the National Security Agency's Terrorist Surveillance Program.

Shortly after the Sept. 11, 2001, attacks, Bush secretly authorized the spy agency to intercept international communications coming in and out of the United States that were believed to involve foreign terrorist organizations. It did so without going through the FISA court, claiming the Constitution and Congress' authorization for the use of military force after the terrorist attacks were all the authority the president needed to undertake the program.

Privacy and civil liberties groups say the warrantless surveillance violates FISA's prohibition on domestic surveillance without court orders. But for someone to sue the government for FISA violations, they must prove they were directly injured by the government's action. That is nearly impossible because the government will not disclose its targets or methods.

Terrorist Surveillance Program

One organization, however, believes it can demonstrate it has standing to sue because of an accidental document release in 2004. That February, the Bush administration froze the assets of the Al-Haramain Islamic Foundation, a Muslim charity the United Nations Security Council alleges is associated with al-Qaida. In preparation for a legal proceeding on the terrorist designation in August, the Treasury Department inadvertently gave the foundation's lawyers and directors a top secret document dated May 24, 2004.

The document appeared to be a government summary of phone conversations it monitored between foundation lawyers and directors, according to a Washington Post reporter who received a copy from the foundation.

The FBI took the document from the Washington Post and Al Haramain in October 2004.

Fourteen months later, The New York Times revealed the existence of the Terrorist Surveillance Program. That is when the foundation's lawyers realized what the top secret document was: proof the organization had been targeted for warrantless electronic surveillance under TSP. They believe that proves standing, unique among plaintiffs in dozens of surveillance cases filed across the country.

The government asserts the states secrets privilege and refuses to release the document or confirm its contents. In its first crack at the case in 2006, the federal court in Oregon partially agreed. It

said the document was rightfully protected by state secrets, but the foundation's lawyers could describe what they remembered about it to establish standing in their lawsuit.

The government appealed that decision to the 9th Circuit Court in San Francisco, which last week upheld its state secrets claim. But it did not dismiss the case. Instead, it directed the Oregon court to tackle one question it had sidestepped: whether FISA overrides the common law state secrets privilege.

Whatever the lower court decides, its decision will almost certainly be appealed to the Supreme Court, legal experts and attorneys on the case say. The high court is unlikely to be friendly to a challenge to the state secrets doctrine. In October it unanimously declined to hear a CIA torture allegation case that the Bush administration wanted dismissed on secrecy grounds. And in 2005, the Supreme Court unanimously upheld the state secrets doctrine in an espionage contract case.

Pushing the Envelope on Presidential Power

Barton Gellman and Jo Becker
Washington Post, June 25, 2007
http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/

Shortly after the first accused terrorists reached the U.S. naval prison at Guantanamo Bay, Cuba, on Jan. 11, 2002, a delegation from CIA headquarters arrived in the Situation Room. The agency presented a delicate problem to White House counsel Alberto R. Gonzales, a man with next to no experience on the subject. Vice President Cheney's lawyer, who had a great deal of experience, sat nearby.

The meeting marked "the first time that the issue of interrogations comes up" among top-ranking White House officials, recalled John C. Yoo, who represented the Justice Department. "The CIA guys said, 'We're going to have some real difficulties getting actionable intelligence from detainees'" if interrogators confined themselves to treatment allowed by the Geneva Conventions.

From that moment, well before previous accounts have suggested, Cheney turned his attention to the practical business of crushing a captive's will to resist. The vice president's office played a central role in shattering limits on coercion of prisoners in U.S. custody, commissioning and defending legal opinions that the Bush administration has since portrayed as the initiatives, months later, of lower-ranking officials.

Cheney and his allies, according to more than two dozen current and former officials, pioneered a novel distinction between forbidden "torture" and permitted use of "cruel, inhuman or degrading" methods of questioning. They did not originate every idea to rewrite or reinterpret the law, but fresh accounts from participants show that they translated muscular theories, from Yoo and others, into the operational language of government.

A backlash beginning in 2004, after reports of abuse leaked out of Iraq's Abu Ghraib prison and Guantanamo Bay, brought what appeared to be sharp reversals in courts and Congress -- for Cheney's claims of executive supremacy and for his unyielding defense of what he called "robust interrogation."

But a more careful look at the results suggests that Cheney won far more than he lost. Many of the harsh measures he championed, and some of the broadest principles undergirding them, have survived intact but out of public view.

The vice president's unseen victories attest to traits that are often ascribed to him but are hard to demonstrate from the public record: thoroughgoing secrecy, persistence of focus, tactical flexibility in service of fixed aims and close knowledge of the power map of government. On critical decisions for more than six years, Cheney has often controlled the pivot points – tipping the outcome when he could, engineering stalemate when he could not and reopening debates that rivals thought were resolved.

"Once he's taken a position, I think that's it," said James A. Baker III, who has shared a hunting tent with Cheney more than once and worked with him under three presidents. "He has been pretty damn good at accumulating power, extraordinarily effective and adept at exercising power."

Executive Overreach
The White House Is Taking Privilege Too Far

Beth Nolan
The Washington Post, March 23, 2007
http://www.washingtonpost.com/wp-dyn/content/article/2007/03/22/AR2007032201768_pf.html

The Framers of our Constitution envisioned that in the exercise of their authorities, the two political branches would assert their prerogatives against each other. A process of negotiation and accommodation between the branches is what one would expect. That process isn't elegant, but a push-pull between the branches doesn't necessarily mean that anything is wrong.

What is going wrong today, however, is the take-it-or-leave-it position of the White House.

The struggle between Congress and the executive branch over the requested testimony of White House officials regarding the removal of eight U.S. attorneys is playing out in the political arena. In fact, the political arena is where the contours of these prerogatives are largely shaped, rather than in our courts. While executive privilege is based in constitutional principles of the separation of powers and the authority of the president over the executive branch, and the privilege has been recognized by the Supreme Court, its scope has been largely determined outside the judicial process.

President Bush's counsel not inappropriately started by seeking to shield high-level White House advisers from compelled testimony before Congress. The White House offered the officials for private interviews by lawmakers and their staffs, so long as there are no oaths, transcripts, follow-up interviews or queries delving into White House discussions. Lawmakers have rejected that offer as insufficient to permit Congress to exercise fully its oversight and legislative roles, and congressional committees have authorized the issuance of subpoenas.

Out of respect for the separation of powers, Congress should not ordinarily call on such officials for testimony but should leave such officials to devote their attention to their duties for the president. This rationale no longer has force for those who have left the White House, such as Harriet Miers, but even then, communications with the president or internal White House communications about the president's decision to dismiss his appointees should usually be shielded from disclosure. Presidents need candid advice from their counselors, and respecting the privilege enhances the likelihood of such candor.

But Congress has duties and responsibilities in our constitutional system as well, and the president has an equal responsibility to respect Congress's important and legitimate interests in this matter. Serious questions have been raised about whether illegitimate considerations played into those dismissal decisions. These are questions Congress should be exploring. While any president has the authority to fire his or her appointees, including U.S. attorneys, the independence of our prosecutors from improper political (not policy) influence is a bedrock principle of our criminal justice system.

We don't know exactly what happened, but enough questions have been raised by the e-mails that have been disclosed and officials' changing stories to establish that Congress -- and the American people -- are entitled to know more. When Congress has already received information and testimony that raises serious questions about possible wrongdoing, the White House counsel's

offer -- a closed-door session that may not be recorded, even by a transcript, and on the condition that Congress has only one bite at the apple, no matter what it may subsequently learn -- is simply inadequate. Executive privilege is an important and essential constitutional principle, but it is not the only important principle at issue here.

Congress can be too aggressive in intruding on executive prerogatives. When I was counsel to the president, we were deluged with subpoenas, many of which were issued unilaterally by a committee chair and served on us without even the courtesy of a phone call first. So much for respecting a co-equal branch or engaging in a process of accommodation. I testified before Congress twice, under oath and pursuant to subpoena, on White House e-mail reconstruction. Even after the change in administrations, I testified under oath when Congress sought information about presidential pardons. (Once, the president asserted a privilege when my testimony was sought regarding earlier pardons.) Too often during that period, Congress failed to show proper restraint in seeking information from the White House.

But the executive can also be too aggressive in asserting its prerogatives in the face of a legitimate need of Congress. Each branch should vigorously seek to protect its legitimate powers, and each branch should recognize the legitimacy of the others' concerns. The White House's current insistence that its restrictive offer is nonnegotiable prevents the process from working as it should.

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Congress, the Constitution and War: The Limits on Presidential Power

January 29, 2007, The New York Times
By ADAM COHEN
http://www.nytimes.com/2007/01/29/opinion/29mon4.html

President Bush doesn't seem to care that Congress wants a bigger role in guiding the Iraq war. Talking about his plan to send in 20,000 additional troops, he said on "60 Minutes" that he knows Congress can vote against it, "but I've made my decision and we're going forward."

It is hardly the first time this president has insisted that he is "the decider," or even the first time he's used the Constitution to justify it, as Vice President Dick Cheney did when he told Fox News: "The Constitution is very clear that the president is, in fact, under Article 2, the commander in chief."

But Mr. Cheney told only half the story. Congress has war powers, too, and with 70 percent of Americans now opposed to President Bush's handling of the war, according to an ABC News/Washington Post poll, it is becoming more assertive about them. Congress is poised to pass a resolution denouncing the troop increase. Down the line, Congress may well consider mandatory caps on the number of troops in Iraq, or setting a date for withdrawal.

If it does, we may be headed toward a constitutional clash, with the administration trying to read powers into the Constitution — as it has with its "enemy combatant" doctrine and presidential "signing statements" — that the Founders did not put there. The Constitution's drafters were intent on balancing power so no one branch could drift toward despotism. The system of checks and balances that runs through the document divides the war power between the president and Congress.

The Constitution's provision that the president is the commander in chief clearly puts him at the top of the military chain of command. Congress would be overstepping if, for example, it passed a law requiring generals in the field to report directly to the speaker of the House.

But the Constitution also gives Congress an array of war powers, including the power to "declare war," "raise and support armies" and "make rules concerning captures on land and water." By "declare war," the Constitution's framers did not mean merely firing off a starting gun. In the 18th century, war declarations were often limited in scope — European powers might fight a naval battle in the Americas, for example, but not battle on their own continent. In giving Congress the power to declare war, the Constitution gives it authority to make decisions about a war's scope and duration.

The Founders, including James Madison, who is often called "the father of the Constitution," fully expected Congress to use these powers to rein in the commander in chief. "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it," Madison cautioned. "It has accordingly with studied care, vested the question of war in the Legislature."

In the early days of the republic, the Supreme Court made clear that Congress could limit the president's war powers — notably in the Flying Fish case. In 1799, during the "Quasi War," the undeclared sea war between the United States and France, Congress authorized President John

Adams to clamp down on trade between the two nations by stopping ships headed to French ports. But Adams went further, ordering commanders to stop ships that were sailing to or from a French port.

When the Flying Fish was seized while sailing from a French port — something Congress had not authorized — the ship's owner sued. The Supreme Court decided in his favor, ruling that the president had no right to issue the order he did. John Marshall, the nation's greatest chief justice, declared that even in a time of hostilities, a president's decision to act militarily beyond what Congress had authorized was "unlawful."

The court has repeatedly reinforced this principle. In 1952, in the steel seizure case, it ruled that President Harry Truman could not seize steel mills to avert a strike — even though steel was needed for the Korean War — because Congress had set out a different way of handling the labor unrest. More recently, in Hamdan v. Rumsfeld, it held that President Bush must follow Congressional guidelines when he sets up military tribunals for detainees.

Past Congresses have enacted just the sort of restrictions the Bush administration is trying to foreclose today. During the Vietnam War, the Foreign Assistance Act of 1974 capped the number of American military personnel in South Vietnam at 4,000 within six months. The Lebanon Emergency Assistance Act of 1983 required the president to get Congress's approval for any substantial increase in the number or role of armed forces in Lebanon.

There is little question that Congress could use its power of the purse to end a war. But cutting off financing is a drastic step, and one that members of Congress are understandably reluctant to take, because it can look like a refusal to support the troops. The Constitution's text, Supreme Court cases and history show, however, that Congress can instead pass laws that set the terms of military engagement. Whether it would be wise for Congress to adopt such limits is debatable; whether it has the authority to do so should not be.

The Bush administration insists that if Congress tries to manage the Iraq war, it will leave the commander in chief with too little authority. But the greater danger is the one Madison recognized at the nation's founding — that all the power will be left with the person "most interested in war, and most prone to it."

The Limits of Executive Power
The president's best defense is his defense of the nation

Douglas W. Kmiec
December 22, 2005
http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/22/EDGU6GB4FH1.DTL&type=printable

The president is commander in chief. The Congress declares war. John Marshall, who would later become "the great Chief Justice," declared the president to be "the sole organ of the nation in its external relations," a statement the U.S. Supreme Court has since relied on to confirm that the president has some "plenary and exclusive power [that] ... does not require as a basis for its exercise an act of Congress." Of course, under the Constitution, only Congress can "raise and support armies"; an army that is wholly dependent upon legislative appropriations.

The framers divided power and made it overlapping. In Madison's phrasing, "ambition would counteract ambition." These founding calibrations have served freedom well, but it should be obvious that they invite an expected constitutional tension between the president and Congress.

That tension has surfaced anew over whether President Bush properly authorized the National Security Agency to intercept communications without first seeking a judicial warrant. U.S. Attorney General Alberto Gonzales has made an expansive argument in support of the president, to which Democrat detractors have scoffed. They are wrong to do so.

The president has a plausible case that nothing he has done contradicts the Fourth Amendment guarantee against unreasonable searches. Unrefuted U.S. Supreme Court comment in two cases acknowledges that: "Wiretapping to protect the security of the Nation has been authorized by successive Presidents," and it is something that has not required "the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."

So, too, the Foreign Intelligence Surveillance Act does not categorically deny warrantless searches of the type undertaken by the president -- in this instance, those specifically targeted at communications where one end is outside the United States and reasonably believed to be linked to al Qaeda. Not surprisingly, the attorney general has also given emphasis to both the president's inherent power to repel attack and Congress' sweeping confirmation of that power to take all "necessary and appropriate" steps in its post-Sept. 11 Authorization for Use of Military Force. FISA is a product of the late 1970s, largely intended to regularize the gathering of intelligence from known foreign agents over an extended period for law enforcement or diplomatic purpose. By contrast, the president's classified program, as Gen. Michael Hayden, the deputy director of national intelligence, explained this week, is aimed exclusively at international calls (even as the New York Times reports that some purely domestic calls were also captured) and for a shorter period than it would usually take to get a court order. Moreover, the eavesdropping is to prevent an attack upon the homeland. FISA does not define the universe of foreign intelligence gathering; by its own terms, it anticipates that Congress can authorize more, and the president points out that is exactly what Congress has done by empowering him to fight the war.

In its recent Hamdi vs. Rumsfeld decision, the Supreme Court upheld the president's ability to detain enemy combatants, including American citizens, as an incident of Congress' military force authorization. It is the attorney general's proposition that the same congressional law that explicitly calls upon the president "to prevent any future acts of terrorism," when coupled with the president's own constitutional power as anchored in Article II, is ample authority for the current program. That is an intelligent, assertive interpretation of the law on behalf of the president's responsibility to secure the safety of the nation. Nevertheless, recent press disclosures have prompted -- appropriately, but also sometimes hyperbolically -- inquiries over whether this measure of safety comes at too high a cost to civil liberty.

This questioning ought not be cause for overstated assertions by either side. Broad claims of authority or illegality sit uneasily upon constitutional provisions that, as noted, have a design of deliberate overlap and ambiguity. As Justice Robert Jackson once posited: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."

If there has been an exaggeration of executive prerogative, the remedy is in congressional oversight that is respectful of the sensitive, classified nature of the wiretapping program. Whether such a review concludes that the president has slighted privacy or merely taken prudent steps to secure our well-being remains to be evaluated. The president, however, ought not to be taken to task for acting exactly as Hamilton anticipated in Federalist Paper 70 -- as an "energetic executive," one characterized by "decision, activity, secrecy and dispatch" in fighting all enemies, foreign and domestic.

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Excerpt: How Would a Patriot Act?

Glenn Greenwald, AlterNet Posted on May 11, 2006
http://www.alternet.org/story/36070/

In one sense, it is difficult to understand how the Bush administration has been able to embrace such radical theories of executive power, and to engage in such recognizably un-American conduct -- first in the shadows and now quite openly -- without prompting a far more intense backlash from the country than we have seen

That is because the Bush administration has in its arsenal one very potent weapon -- and one weapon only -- which it has repeatedly used: fear. Ever since September 11, 2001, Americans have been bombarded with warnings, with color-coded "alerts," with talk of mushroom clouds and nefarious plots to blow up bridges and tall buildings, with villains assigned cartoon names such as "dirty bomber," "Dr. Germ," and so on

We have to invade and occupy Iraq because the terrorists will kill us all if we do not. We must allow the president to incarcerate American citizens without due process, employ torture as a state-sanctioned weapon, eavesdrop on our private conversations and even violate the law, because the terrorists are so evil and so dangerous that we cannot have any limits on the power of the president if we want him to protect us from the dangers in the world.

Here is Dick Cheney in early January 2006, proudly defending the administration's illegal eavesdropping program:

"As we get farther away from September 11th, some in Washington are yielding to the temptation to downplay the ongoing threat to our country, and to back away from the business at hand The enemy that struck on 9/11 is weakened and fractured, yet it is still lethal and trying to hit us again
"

Cheney never once addresses the fact that the administration had full leeway to eavesdrop on terrorists without breaking the law. He ignores that fact because he is not making a rational argument. He is attempting to play on the fears of Americans to justify their violations of law. President Bush has also been fueling the fires of fear in almost every speech he has given since September 11, 2001. Here he is on October 6, 2005, attempting to whip up as much fear as possible in order to try to prop up Americans' diminishing support for the country's ongoing occupation of Iraq:

"The militants believe that controlling one country will rally the Muslim masses, enabling them to overthrow all moderate governments in the region, and establish a radical Islamic empire that spans from Spain to Indonesia. With greater economic and military and political power, the terrorists would be able to advance their stated agenda: to develop weapons of mass destruction, to destroy Israel, to intimidate Europe, to assault the American people, and to blackmail our government into isolation.

Our enemy is utterly committed. As Zarqawi has vowed, "We will either achieve victory over the human race, or we will pass to the eternal life." And the civilized world knows very well that other fanatics in history, from Hitler to Stalin to Pol Pot, consumed whole nations in war and genocide before leaving the stage of history

With the rise of a deadly enemy and the unfolding of a global ideological struggle, our time in history will be remembered for new challenges and unprecedented dangers."

Islamic terrorists are depicted as omnipotent villains with quite attainable dreams of world domination, genocide, and the obliteration of the United StatesFor four years, this is what Americans have heard over and over and over from our government All of our plans for the future, dreams for our children, career aspirations, life goals -- these are all subordinate unless we stand loyally behind George Bush as he takes the extreme and unprecedented measures necessary to protect us from these extreme and unprecedented threats.

It is that deeply irrational, fear-driven view of the world that has been used to convince Americans to acquiesce to the administration's excesses and abuses of power. And it is not difficult to understand why it works.

After all, if it really were the case that terrorism constituted the sort of imminent, civilization-ending threat the administration has spent the last four years drumming into everyone's head, then it might be extremely difficult to gin up much outrage over an eavesdropping program -- warrants or not -- or over a few American citizens being rounded up and put in military prisons without any charges

In fact, it has become unacceptable in polite company to even raise the prospect that the threat of terrorism may be exaggerated. During the 2004 election, John Kerry stumbled in his clumsy way towards challenging this fear-mongering when he was quoted in The New York Times Magazine as saying, "We have to get back to the place we were, where terrorists are not the focus of our lives, but they're a nuisance." This provoked predictable outrage from the Bush camp that Kerry, along with Bush's other opponents, was not serious about fighting terrorists and was too weak to protect our children from this unparalleled menace.

Despite the dire warnings of the Bush administration, people in rural Kansas and Georgia are beginning to realize that on the list of problems and threats that endanger their children, the potential of a terrorist attack does not predominate.

In a rational world, risk is equal to impact multiplied by probability. As the Linguasphere Dictionary puts it: "In professional risk assessment, risk combines the probability of a negative event occurring with how harmful that event would be." But the administration has spent four years urging Americans to ignore that way of thinking.

But one can protect against the threat of terrorism with courage, calm and resolve -- the attributes that have always defined our nation as it has confronted other threats. Hysteria and fear-mongering are the opposite of strength.

Most people know individuals in their lives who live in this type of irrational, all-consuming fear -- people who are scared, pathologically risk-averse, always hiding and exerting excess caution lest something go wrong. In its more extreme version, that sort of fear manifests as a life-destroying mental disorder.

The Bush administration has been trying to reduce this country to a collective version of that affliction. And it is hard to imagine what a nation fueled by such fear can accomplish.
The administration has managed to get away with the Orwellian idea that fear is the hallmark of courage, and a rational and calm approach is a mark of cowardice. They have been aided in this

effort by a frightened national media and political elite that lives in Washington and New York -- two "target-rich" cities -- and that has been so petrified of further attacks that they were easily pushed into a state of passive, uncritical compliance in exchange for promises of protection.

Freedom fighters

For a different vision of our nation, we need only look to the founders, who embodied courage and resolve. Most of them were wealthy and educated, and enjoyed the privileges of a gentrified upbringing in the British Empire.

But mere comfort and safety were not enough for them. What they lacked were the basic liberties that have now come to define America and that we now take for granted. Under the Bush administration, we have traveled as a nation from the towering heights defined by the courage of Patrick Henry (and other founding fathers) to a fearful basement where we are ready to give up our liberties and grant the government power without limits.

Senator John Cornyn is a Texas Republican and, as such, one of the most loyal defenders of George Bush. On December 20, 2005 -- five days after the New York Times first revealed the president's lawless eavesdropping -- the Capitol Hill newspaper The Hill reported on the debates that had arisen in Congress over these issues:

"Senators launched new salvos in the battle over national security and civil liberties yesterday as recent revelations of domestic spying continued to color the chamber's stalemate on an extension of the antiterrorism law known as the PATRIOT Act.

"None of your civil liberties matter much after you're dead," said Sen. John Cornyn (R-Texas), a former judge and close ally of the president who sits on the Judiciary Committee."

Contrast the American ethos as embodied by Patrick Henry and the other founders -- an insistence that our system of government adhere to the rule of law and preserve individual liberty -- with the fear-driven mentality peddled by the president's defenders in order to justify his conduct.

We are told that we must give up our liberties and allow the president the power to break the law, because none of that really matters. Where would America be if, throughout our history, we had succumbed to the paralyzed, weak-willed fear being hawked by the likes of Cornyn and Roberts? We would not have risked our lives to win our freedom from the British monarchy. We would have acquiesced to the evils of slavery and the division of our country rather than risk our lives in the Civil War. After Pearl Harbor, we would have gone to war against Japan but not Nazi Germany.

On January 28, 2006, history professor and best-selling author Joseph J. Ellis published an op-ed in the New York Times in which he pointed out one of the most important and under-recognized truths about the way in which we view the threat of terrorism:

"My first question: Where does Sept. 11 rank in the grand sweep of American history as a threat to national security? By my calculations it does not make the top tier of the list, which requires the threat to pose a serious challenge to the survival of the American republic.

Sept. 11 does not rise to that level of threat because, while it places lives and lifestyles at risk, it does not threaten the survival of the American republic, even though the terrorists would like us to believe so."(Emphasis added.)

And the terrorists appear to be joined in that desire by President Bush. His administration continuously -- and irrationally -- depicts terrorism as the overarching threat around which we are constructing our entire foreign policy, changing the basic principles of our government, and fundamentally altering both our behavior in the world and the way we are perceived.

As a result, one rarely hears anyone arguing that the terrorism threat, like any other threat, should be viewed in perspective and subjected to rational risk-benefit assessments.

In his op-ed, Professor Ellis makes another critically important point: Even with regard to the genuinely existential threats in our nation's history, we have at times allowed our fears to be exploited. But when we have done so, we have adopted excessive measures which have led to some of the most shameful episodes in our past. Among the examples he cites are the Alien and Sedition Acts in 1798, "which allowed the federal government to close newspapers and deport foreigners during the 'quasi-war' with France," and the internment of Japanese Americans during World War II," which was justified on the grounds that their ancestry made them potential threats to national security."

Life during wartime

Supporters of the president often defend his lawless expansion of executive power by equating it to Abraham Lincoln's suspension of habeas corpus and other emergency measures taken to save the Union during the Civil War. [But] during Lincoln's presidency, the entire nation was engulfed in an internal, all-out war. Half of the country was fully devoted to the destruction of the other half. The existence of the nation was very much in doubt. Americans were dying violent deaths every day at a staggering rate. One million Americans were wounded and a half million others -- a full 5 percent of the population -- died, making it the deadliest war America has ever faced. ... ... The word "war" has become an all-purpose political tool, to the point where it is virtually impoverished of meaning. War is something we wage on cancer, on poverty, on drugs, and now on "terror ".

But whatever else one can say about our conflict with terrorists, it is nothing even remotely like the Civil War.

More safe, less free

In March 2006, researchers in the social psychology program at Rutgers University-New Brunswick offered some empirical evidence to demonstrate the critical role fear plays in driving people to support George Bush. Their study (more than 130 registered voters) sought to measure the impact fear had on voting choices in the 2004 election. As the summary issued by Rutgers recounted:

"Their findings demonstrated that registered voters in a psychologically benign state of mind preferred Senator Kerry to President Bush, but Bush was more popular than Kerry after voters received a subtle reminder of death. Citing an Osama bin Laden tape that surfaced a few days before the election, among other factors, the authors state, "The present study adds convergent support to the idea that George W. Bush's victory in the 2004 presidential election was facilitated by Americans' nonconscious concerns about death " The authors believe that people were scared into voting for Bush.

The Bush administration did not, of course, invent the use of fear as a weapon to justify its wrongful conduct and enhance its own power Nor is Al Qaeda the first enemy the United States has had. ...

On April 24, 1950, President Harry S. Truman gave a speech to the nation regarding the threat posed by domestic communism -- a threat at least as real as Islamic terrorism. Part of what he said:

"Now I am going to tell you how we are not going to fight communism. We are not going to transform our fine FBI into a Gestapo secret police. That is what some people would like to do. We are not going to try to control what our people read and say and think. We are not going to turn the United States into a right-wing totalitarian country in order to deal with a left-wing totalitarian threat."

And the founders repeatedly warned of the danger, and the likelihood, that governments would attempt to exploit fear of external threats in order to justify abridgments of core liberties. ... The apex of fear-wallowing came during the exceptionally well-staged Republican National Convention of 2004 ... Here is Zell Miller, the former Democratic senator from Georgia, explaining how his fears drove him to support George Bush:

"And like you, I ask which leader is it today that has the vision, the willpower, and, yes, the backbone to best protect my family? There is but one man to whom I am willing to entrust their future and that man's name is George W. Bush

We do not have a government where the president can break the law in secret and then tell us not to worry about it because it is being done to "protect" us. We have never had a system of government operate on such paternalistic and blindly loyal sentiments. And we have never before been a nation living in such fear that, in exchange for promises of protection and safety, we are told that we must allow the president to seize those very powers which the Constitution prohibits. Glenn Greenwald is a constitutional law attorney and chief blogger at Unclaimed Territory.