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Comment

## Commanding Heights

Has presidential power reached its zenith under Bush? Don't bet on it.

by Charlie Savage

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In January 2001, the members of the Bush-Cheney administration's new legal team gathered in the wood-paneled office of their boss, White House Counsel Alberto Gonzales, whose freshly unpacked family pictures and Texas mementos lined the bookshelves. After a genial introduction, Gonzales got down to business. The new president, he said, had given them two mandates. First, they were to push conservative judicial nominees quickly into the confirmation pipeline. And second, they were to seize opportunities, wherever they lay, to protect and expand presidential power. The institution had been weakened by George W. Bush's predecessors, Gonzales said, and the new president wanted them "to make sure that he left the presidency in better shape than he found it."

To at least one of the assembled lawyers, this second priority seemed at the time to be an injunction to help repair the damage Bill Clinton's scandals had done to the White House. But it now seems clear that something far more sweeping was being set in motion: the realization of Vice President Dick Cheney's dream of restoring what the historian Arthur Schlesinger Jr. had called the "imperial presidency"—the era of unchecked executive power that peaked during the Nixon administration, when Cheney began his political career.

Taken one by one, the Bush administration's efforts to expand presidential power seem familiar. Piled together, they are startling. The administration has asserted a power to imprison Americans without charges, to bypass laws such as those governing wiretapping and torture, to set aside the Geneva Conventions and scrap other major treaties without consulting the Senate, and more. It has rebuffed oversight and has expanded secrecy. And it has tightened White House control over federal agencies through an explosion of "signing statements" appended to new legislation, instructing the executive branch that it can ignore vast swaths of laws that restrict the president's authority.

It may seem that this presidency's most aggressive expansions of executive power have been curbed. The new Democratic Congress has launched many oversight hearings. Five of nine Supreme Court justices have held that presidents must obey the Geneva

Conventions and need congressional permission to set up military commissions.

But the aftermath of the Nixon presidency suggests that any ebbing of presidential power from its new high-water mark may be only temporary. Richard Nixon had sought unchecked power on many fronts—he expanded secrecy, spied on his political enemies, fired the special prosecutor who was investigating him, and kept the Vietnam War going for two years after Congress revoked its authorization. Vietnam and Watergate eventually prompted Congress to impose new controls on executive power. Among other things, the new rules required presidents to consult lawmakers before sending the armed forces into combat, and to bring troops home after 60 days if Congress did not explicitly authorize a longer fight. Congress also created an independent counsel who could investigate the White House without being fired by the president.

The erosion of these and other checks began even before the post-Watergate furor had fully subsided. As early as 1975, Gerald Ford, without consulting Congress, was sending marines on a bloody rescue mission to Cambodia; by 1999, Bill Clinton felt free to order the Air Force to bomb Kosovo and Serbia, which it did for 78 days—all without any explicit congressional authorization. After the Iran-Contra and Whitewater investigations, lawmakers let the independent-counsel law expire.

Administrations from both parties also continued to develop new powers. Jimmy Carter set the precedent for unilaterally scrapping a ratified treaty when he pulled the United States out of a mutual-defense pact with Taiwan. Ronald Reagan's legal team invented the "Unitary Executive Theory," which undercuts the authority of Congress to regulate the executive branch. The imperial presidency was largely restored before Bush took office. While Cheney claimed that he and Bush were filling in a valley of executive power, they were actually building atop a mountain.

Indeed, presidential power has been mostly growing—in fits and starts—since World War II. An early-20th-century president, such as Calvin Coolidge, had no large standing army to command, nor a CIA to use for covert operations. He would not have dreamed of launching a major overseas war without permission from Congress—as Harry Truman did in Korea. He could not utter the magic words *state secrets* or *executive privilege* to nullify lawsuits and evade congressional oversight—both of these precedents were set during Dwight Eisenhower's administration. By exploiting the sense of permanent crisis that surrounded the early Cold War, presidents of both parties cowed both Congress and the Supreme Court. Today, the war on terrorism has provided a similar rationale.

Most legal scholars believe that these changes to the structure of American democracy deviate from the vision of the Founders, who hated monarchies and had a pessimistic view of human nature. To reduce the damage that a bad leader could inflict, the Founders divided control over the government among three coequal powers so that each could check the others. Focused in particular on keeping the president from becoming an elected king, they gave Congress the power to make the big decisions about going to war and broad authority to regulate how the executive branch carried out its work.

Of course, since then the government has grown in ways that necessarily increased the authority of presidents, because newly created bureaucracies fall under their day-to-day management. But it was not inevitable that checks and balances would simultaneously shrink. The erosion of controls on the presidency is the achievement of several generations of "presidentialists." Convinced that the modern world is too dangerous and complex for the president's hands to be tied, they have taken advantage of the fact that even the most vigilant Congress has only limited and politically difficult options for resisting executive overreach.

And, of course, lawmakers are not always vigilant. During Bush's first six years, a friendly Congress largely abandoned oversight while passing laws that broadened the president's power over detainees and strengthened his ability to impose martial law. Today, Congress has changed, but those laws remain on the books. And the administration's departures from traditional restraints and its novel assertions of power are now historical precedents.

In 1944, Supreme Court Justice Robert Jackson warned that each new assertion of executive power, once validated into precedent, lies about "like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."

In the six decades since, presidents of both parties have seldom hesitated to use all the powers available to them. So what will future presidents do with the arsenal they will inherit from Bush and Cheney? So far, the 2008 candidates have volunteered little about what limits, if any, they would respect if entrusted with the presidency. It's time to start asking.

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