Most people who cast ballots on Super Tuesday believed they were voting not just for a new face in the White House but also for sweeping new policies. Few believe a President McCain, Obama or Clinton would hew to all of the policies of Bush and Cheney--and even fewer believe they should.

Yet that certainty may be misplaced. When the next President is sworn in, the clammy fingers of the Bush Administration may still be wrapped around vital national policies. Even in the past few weeks, the Administration began entrenching strategic policies that are core to its ideological commitments in national security.

Acting largely in secret, the Administration is moving to tie down the next White House--Republican or Democratic--in ways that will prove hard to unravel. Whether or not it succeeds depends on the vigilance of Congress and the public.

The idea of turning over a new leaf in the Oval Office goes back to the Republic's early days. But George Washington's decision to return to Mount Vernon in 1796, eloquently explained in his famous farewell address, began a long tradition of limited tenure in the White House. Thanks to the Twenty-Second Amendment, which limits a President to two terms, we find it now profoundly obvious that an office as capacious, and potentially capricious, as the presidency should not be held by one man for too long.

Indeed, even the inkling of hereditary politics is considered by many a step too far.

But Presidents have long sought ways to embed their policies beyond their terms. In January 2006, Justice Sandra Day O'Connor's retirement gave Bush a chance to shove the Court to the right. On his way out the White House door in 2000, President Clinton fired off regulations on energy-efficiency standards for washing machines and workplace ergonomics. Supreme Court appointments are hard to undo, but regulations are far more easily wound back: in January 2001 White House Chief of Staff Andrew Card moved quickly to freeze all regulatory actions without Bush's signature.

So what can a President and Vice President seeking ideological immortality do? If they're Bush and Cheney, they can turn to secrecy, inertia and dubious constitutional theories.

Inertia and ambiguity seem to be serving Bush and Cheney quite well in their effort to extend the practice of coercive interrogation. One of the Administration's enduring legacies will be the fact that the United States is now globally known to sanction and use torture. And the specific techniques that have been authorized, including waterboarding, environmental manipulation and physical blows, are relatively well-known.

Despite two pieces of legislation purporting to tighten or clarify rules against coercive interrogation, the next President will inherit a situation of tremendous ambiguity, with the CIA's much-vaulted interrogation practices not a smooth-running program but a train wreck.
There is a remarkable ambiguity at the heart of the McCain Amendment and the Military Commissions Act, both of which addressed coercive interrogations. President Bush declared in September 2006 that Congress needed to "clarify the rules" for the CIA, yet the Administration has worked overtime to ensure that the rules stay murky.

In secret legal opinions, the Justice Department has parsed recent legislation so that tactics like waterboarding can be "defined" below the level of torture, as something other than cruel, inhuman or degrading. And the Administration seems to have wriggled out of actual compliance with Common Article 3 of the Geneva Conventions, which limits "cruel" acts.

Only through these dubious legal moves can Attorney General Michael Mukasey still claim that the law about waterboarding is unclear. Responding to senators' inquiries last week, Mukasey explained that waterboarding "is not, and may not be," licitly used by the CIA. He refused to rule it out because "any answer I give could have the effect of articulating publicly--and to our adversaries--the limits and contours of generally worded laws that define the limits of a highly classified interrogation program."

Mukasey refused to discuss such "limits," even in closed session with members of the Judiciary Committee. Instead, he warned that the legality of waterboarding remained an open question that might be lawful "under the particular conditions and circumstances."

Mukasey's position, in short, is that the Administration declines to give up its claim that waterboarding might be "lawful" in some scenarios or--as important--to disclose its legal analysis, even to members of Congress.

The next Administration will thus inherit a perverse and bewildering situation: there are multiple anti-torture laws on the books. Read normally, any one of these laws would bar waterboarding and its ilk. But the law within the executive branch on January 19, 2009, will be far from normal. Everything, as Mukasey said, will depend on the "circumstances."

Of course, there will likely be tremendous pressure on the next President to resolve this studied lack of clarity and to prohibit waterboarding clearly. But the first days and months of a new presidency will make that very hard.

The next Administration--especially a Democratic one--will be acutely aware that any early pro-civil liberties move will be leveraged against it in the event of another terrorist attack. Indeed, the candidates should already know that the Bush Administration has left national security, from the ports to our national monuments, in a terrible state. Iraq and Guantánamo have also stoked anti-US propaganda while diminishing our moral and military resources for a response. The risk of another attack is not insubstantial.

A risk-averse President--is there any other kind?--would be loath to do anything that could be labeled a cause of a later attack. And even a chief executive who wants to do the right thing might decide to leave the train wreck of anti-torture laws alone on the flawed theory that no harm is being done.

And in any event, if a new President publicly repudiates the idea of torture, even if he or she deliberately does nothing about current ambiguity, the relief will be so great that the issue will soon ebb away--leaving the law shot through with tattered holes. Leaving the law unclear will be a victory for the Bush Administration. It would leave in the legal framework what Justice Robert Jackson once compared to a "loaded weapon," just waiting for the next crisis to happen.
More flagrant than the torture disaster, however, is the impending stitch-up of the Bush Iraq strategy. While the problem of undoing torture arises from the predictable pressures on a new President, the lock-up of Iraq policy is simply another example of Bush’s tendency to snub Congress in favor of a unilateralist form of government alien to the American Constitution.

In November Bush and Iraqi Prime Minister Nuri al-Maliki signed a joint declaration, which contains nothing beyond predictable pities. The Administration has since begun negotiations with Maliki’s lackeys on a permanent agreement, called a "Status of Forces agreement" (SOFA), to provide for a long-term US troop presence in Iraq.

Speaking at Camp Arifjan in Kuwait on January 9, Bush explained that this further agreement would cement America’s "enduring relationship" with Iraq, ensuring "active U.S. engagement that outlasts my presidency." Put starkly, it would enable permanent bases, embedding the United States as an enduring military presence in Iraq and the Middle East. Further, it would close off withdrawal options for a new President.

Like term limits for Presidents, treaties are addressed by the US Constitution. And they are not a presidential preserve. The framers, after careful debate at the Philadelphia convention, concluded that treaties could not be concluded without Senate ratification. The idea of unilateral international agreements seems inconsistent with this rule.

But according to Lieut. Gen. Douglas Lute, the Administration point person for Iraq policy, the Iraq SOFA would be different. Despite the fact that it involves decades of military commitment of tremendous national security significance, Congress does not get to play a role in either the negotiations or the final treaty.

The next President will thus inherit a done deal of dubious constitutionality, crafted in the backrooms of the Bush White House, that ensures Iraq is ours for the foreseeable future. (The proposed Iraqi agreement is strikingly different from other executive agreements that do not involve Congress in that it commits American tax dollars, steel and blood for the long haul to a policy many or most Americans are dead-set against.)

The Supreme Court is unlikely to hinder the new agreement, given its recent swing to the right. So Congress alone stands in the way. Senators Clinton and Obama have introduced the Congressional Oversight of Iraq Agreements Act, which would retard the agreement. But expect a veto threat and a signing statement. Even on this issue, the fight will be long and difficult.

In his farewell address, Washington humbly explained his reasons for declining to serve once more. He reminded his compatriots that "honesty is always the best policy," and he warned against international agreements that would "entangle our peace and prosperity." In a different register, all of Washington’s lessons remain relevant today.

About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of Unchecked and Unbalanced: Presidential Power in a Time of Terror (New Press, 2007) He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the Columbia Law Review, the Yearbook of Islamic and Middle Eastern Law, and the New School's Constellations Journal. He has also written for Himal Southasian, Legal Times and the American Prospect, and appeared as a commentator on Democracy Now! and