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Dismantling the Imperial Presidency

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President-elect Obama's first appointments to the Justice, State and Defense Departments mark no radical change. Rather, they return to a centrist consensus familiar from the Clinton years. But pragmatic incrementalism and studied bipartisanship will do little to undo the centerpiece of the Bush/Cheney era's legacy. At its heart, that regime was intent on forcing the Constitution into a new mold of executive dominance.

Obama enters the White House in a slipstream of forces that will hinder attempts to abandon this constitutional vision. He may be a careful constitutional scholar, but we can't rely on Obama alone to reorient the constitutional order. It will be up to progressives to insist on fundamental repudiation of the Bush/Cheney era.

At first blush, Obama's victory is cause for optimism. As a senator he roundly rejected the signature Bush/Cheney national security policies: torture, "extraordinary rendition," Guantánamo and--until July--warrantless surveillance. Obama appointees like Eric Holder as attorney general speak unequivocally against these violations of constitutional and human rights (to be sure, in Holder's case it was after early equivocation).

The most significant Bush/Cheney innovation was planted at the taproot of our Constitution. It was the insistence that the president can exercise what Cheney in 1987 called "monarchical notions of prerogative." That he can, in other words, override validly enacted statutes and treaties simply by invoking national security. This monarchical claim underwrote not only the expansion of torture, extraordinary rendition and warrantless surveillance but also the stonewalling of Congressional and judicial inquiries in the name of "executive privilege" and "state secrets."

The Bush/Cheney White House leveraged pervasive post-9/11 fears to reverse what Cheney called "the erosion of presidential power" since Watergate. Relying on pliant Justice Department lawyers for legal cover, it put into practice a vision of executive power unconstrained by Congress or the courts. It achieved what James Madison once called the "accumulation of all powers, legislative, executive and judiciary, in the same hands," which he condemned as "the very definition of tyranny."

Radical change is needed to re-establish legitimate bounds to executive power. We must again place beyond the pale Nixon's famous aphorism that "when the president does it, that means it's not illegal." But radical change--as early appointments and policy signals from the Obama transition team suggest--comes easier as campaign slogan than governing practice. And there are many reasons to fear a go-slow approach from Obama when it comes to restoring the constitutional equilibrium.

No matter how decent, any new president is tempted by the tools and trappings of executive authority. However tainted the Oval Office is now, Obama's perspective will change dramatically on entering the White House. He is already reading more daily security briefs than Bush and beginning each day with a barrage of fearful intelligence, hinting at dangers that largely never materialize. Submersion in that flow of intelligence will wrenchingly change his sense of the world's risks.

So Obama will be tempted to maintain Bush's innovations in executive power. While the terror threat remains substantial, as the Mumbai attack shows, the Bush administration has left counterterrorism

policy in tatters. We have no rational strategy for terrorist interdiction and prevention. Obama's nominations of Robert Gates as defense secretary and Gen. James Jones as national security adviser suggest he is acutely aware of these deficits and of the Democrats' perceived vulnerability on national security. Nor are terrorists the only threat that might lead Obama to reach for emergency powers: credit crunches and fiscal meltdowns can also prompt unilateral executive action, with consequences as sweeping as any national security initiative.

Internal pressure for changing the White House position on executive power will thus wane as the new administration settles in. And pressure from the other two branches is unlikely to swell. The Obama White House will at first face a friendly Congress eager to show results on the economy and healthcare. Unlike the recently oppositional Congress, legislators in the majority have little incentive to make constitutional waves (expect some stalwarts, such as Senator Russ Feingold, to buck this trend). Matters are not helped by the turn from the feckless to the competent. Legislators and the public care most about the constitutional restraints on executive power when the occupant of the White House raises concerns about abuses of power. A more capable leader's entrance saps immediate pressure for reform, even when openings for such limits can be glimpsed.

Nor will the judiciary, listing rightward with President Bush's 324 appointments, provide much constraint. In his appointments to the Supreme Court and the District of Columbia Circuit Court of Appeals (which hears many key constitutional cases), Bush seems to have selected executive-power mavens, including Chief Justice John Roberts, Justice Samuel Alito and Judge Janice Rogers Brown. Their opinions already evince strong deference to executive claims of secrecy and expediency. Paradoxically, then, one of Bush's key legacies will be a judiciary that instinctually hews to an executive controlled by a Democratic president.

I am thus not optimistic that the Obama administration will of its own volition restore the constitutional balance, even if it gives up some of Bush/Cheney's most extravagant and offensive policies. With formidable forces arrayed against them, advocates for the Constitution's original equilibrium of powers must choose their battles carefully.

Three areas are particularly important in the administration's early days: torture, the law that the executive follows and accountability. In each case, measures can be taken that would correct a policy the Obama administration clearly disagrees with and simultaneously help dismantle the Bush/Cheney constitutional revolution. (The other pressing issue to face the incoming administration--detention policy--is so complex and difficult, largely thanks to the outgoing administration's compounded mistakes, that it needs to be looked at separately.)

Begin with torture. President Bush's repeated disavowals of government-sanctioned torture have created cognitive dissonance: White House protestations that "we don't torture" are no longer believed. An Obama administration dedicated to restoring America's tarnished international reputation must do more than talk. The best way to begin is for Congress to enact and President Obama to sign already introduced legislation that would limit the intelligence community to the specific interrogation tactics listed in the recently revised Army Field Manual. This law would make it clear that the CIA in particular cannot use what it euphemistically calls "enhanced interrogation techniques." In signing the law, Obama should eschew the weaseling signing provisos favored by Bush and instead forthrightly recognize that there is no presidential override when it comes to torture. This bill is a golden opportunity to restore international credibility *and* repudiate the monarchical presidency. So it is unfortunate that Democratic Senators Dianne Feinstein and Ron Wyden have already begun backsliding on it.

Also on the torture front, the Obama administration should candidly acknowledge past wrongs, thereby abandoning the Bush/Cheney demand for absolute secrecy. In legal cases filed by torture victims such as Maher Arar, Khaled el-Masri and Shafiq Rasul, the Bush administration has parried demands for acknowledgment or restitution with a sweeping constitutional theory of "state secrets." Rejecting this

theory would be a significant step in dismantling the Bush/Cheney view of executive unilateralism. It would be the smallest measure of justice to abandon this theory as ill founded and also to offer profound apologies and restitution to victims. It would be a public acknowledgment that our fears are never an excuse for anyone's suffering.

Torture is only one aspect of a larger distortion of the Constitution. Changing the executive's operating definitions of the law will be critical to rolling back the Bush/Cheney vision. Now this vision is largely memorialized in Justice Department opinions, many still secret. Some of them directly address presidential prerogatives to override laws. Others deal with specific constitutional rights, such as Fourth Amendment privacy rights and the freedom from indefinite detention without trial.

While there is not much general public pressure to change these positions, many constitutional scholars and advocacy groups have protested these opinions. Consistent pressure is required to ensure that the Obama Justice Department cleans house. All department opinions on executive power should be revealed, and troubling ones should be red-flagged so officials will know they can no longer rely on them. The Justice Department should then develop opinions that systematically repudiate the most offensive positions, in particular the idea of monarchical prerogatives to override the law.

Traditionally, opinions have been prepared by the Office of Legal Counsel in secret and then closely held within the administration. Given executive-branch lawyers' habitual pro-presidential tilt, this process should be refashioned. Not only should opinions be made public after publication; the OLC should invite comment and criticism from the public and scholars during drafting, much as other federal regulations are subject to pre-publication "notice and comment."

Finally, there is the thorny matter of accountability. Absent accountability, the lesson of the Bush/Cheney era would be that those who violate the law can, if brazen enough, get away with it. Yet the Obama transition team has signaled no appetite for criminal proceedings. And in any case, indictments might be pre-empted by a blanket pardon before January 20.

Many others have made a compelling case for prosecutions. But what if they don't happen? Paradoxically, blanket presidential pardons may be the least bad alternative. If prosecutions proceed, they may not be edifying. Admissible evidence will be sparse, given secrecy rules. Officials will protest at being sandbagged after having relied on (flawed) OLC opinions. And there is the danger of a repeat of the Iran/Contra trials, where Oliver North used the dock as a soapbox. Given these risks, a blanket pardon perversely might send the clearest signal that the malaise of the Bush/Cheney era was endemic.

Yet this is no reason to renounce accountability. Several commentators have urged a commission to establish full documentation of what was done and its legal justifications. An investigative commission could be less amenable to manipulation than trials. If it could carry out its work in a bipartisan spirit, while insisting on the investigative tools needed to cut through secrecy, such as subpoena power, it could establish a definitive historical record of Bush/Cheney's extraordinary power grab. Bringing to public scrutiny the imperial presidency's infractions will, I suspect, be as good a way as any of thoroughly discrediting that constitutional vision.

No one should assume that the end of the Bush presidency marks the end of the imperial presidency. The Obama administration faces a geostrategic environment of growing uncertainty, with treasury, reputation and military depleted by eight feckless years. It would be foolhardy simply to assume that the worst will be swept away. Yet the opportunities exist for progressives to insist that Obama stay true to his message of hope and his promise of restoring America's tarnished Constitution.

About Aziz Huq

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