Bush’s imperial presidency is Obama’s toughest challenge

Barack Obama campaigned for the presidency on a theme of change, and critics of the Bush administration are hoping for nothing less than a paradigm shift in American government. On George Bush’s watch, the United States government tortured prisoners, blocked their access to the courts, defied the separation of powers by sidestepping Congress and attempting to circumscribe the role of the judiciary, illegally spied on American citizens, and generally claimed an inherent executive power equal to that of absolute monarchs. Obama’s criticism of this shameful record and his nomination of high-profile critics of the Bush administration’s policies to important posts in the Justice Department are hopeful signs that change really is coming to Washington.

THE DOCTRINE OF THE “UNITARY EXECUTIVE” AND THE EXPANSION OF PRESIDENTIAL POWER

In December 2005, the United States House of Representatives passed a special amendment to a routine appropriations bill. The amendment, sponsored by Republican Senator John McCain of Arizona, barred cruel, degrading, and inhumane treatment of prisoners held by the United States at the Guantanamo Bay Naval Base in Cuba and elsewhere. President Bush had opposed the McCain amendment but acceded to its inclusion when it became clear that the measure had overwhelming congressional support.

Nonetheless, in his signing statement Bush announced that “[t]he executive branch shall construe [the amendment relating to detainees] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . . of protecting the American people from further terrorist attacks.”

Similarly worded signing statements were attached to more than 800 laws over the course of the Bush presidency, quietly asserting an unheard of constitutional authority and vastly magnifying the power of the executive branch.

The doctrine of a unitary executive supposedly derives from The Federalist Papers, where Alexander Hamilton praised the “unity” of the American presidency. But what Hamilton had in mind was the advantage he saw in having one person as head of the executive branch rather than a plural presidency consisting of two or more persons who would function as a committee, which had been rejected by the Founding Fathers.

Initially formulated by President Ronald Reagan’s Office of Legal Counsel in the 1980s (which included on its staff future Supreme Court justice Samuel Alito) and subsequently burnished by Bush, Cheney, and company, the doctrine of the unitary executive holds first that presidential authority over the executive branch is absolute and that presidents are not bound by laws or treaties that in their view place limits on that authority.

Second, the doctrine claims that the other branches of government may not interfere with the president’s actions arising under his executive authority. In addition, Bush administration lawyers have repeatedly argued that the courts may not adjudicate in areas that the president deems to be within his executive power. Consider, for example, the administration’s strained denial of habeas corpus to both foreign nationals and United States citizens declared to be “enemy combatants” in the war on terror.

ALL POWER TO THE COMMANDER IN CHIEF

While the doctrine of a unitary executive appears to have been created out of whole cloth, the Commander in Chief clause provides more fertile ground for claims of executive power. The United States Constitution makes the president commander-in-chief of the army and
It is to be hoped that Obama, as a former professor of constitutional law, will respect the people’s civil liberties and the legitimate role played by Congress and the courts in America’s system of checks and balances.

**THE WAR PRESIDENCY AND EXECUTIVE AGGRANDIZEMENT**

In a recent issue of *Vanity Fair* the Bush administration’s Jack Goldsmith, one-time legal adviser at the Department of Defense and later head of the Justice Department’s Office of Legal Counsel, tries to put the administration’s conduct in perspective. He observes that in times of war and crisis past presidents also claimed extraordinary powers. Abraham Lincoln, Franklin Roosevelt, and John F. Kennedy “stretched the law and bent the law, and many people think they broke the law.” The views on executive power espoused by Vice-President Cheney and his aide David Addington seem to Goldsmith “not unlike some of the most extreme assertions of Lincoln and Roosevelt.” But he notes that unlike Cheney and Addington, Lincoln and Roosevelt recognized the need to seek congressional approval, if only after the fact, and to respect what he calls the “soft values” of constitutionalism. A second difference that distinguishes Cheney and Addington, according to Goldsmith, is that “it was almost as if they were interested in expanding executive power for its own sake.”

Goldsmith gets it almost right: expanding executive power for its own sake was the whole point.

**REINING IN THE EXECUTIVE**

In a series of important cases concerning the power of the president to deny enemy combatants access to the courts, *Rasul v. Bush* and *Hamdi v. Rumsfeld* (both from 2004), *Hamdan v. Rumsfeld* (2006), and most recently *Boumediene v. Bush* (2007), the Supreme Court dealt the Bush administration a serious reversal, showing that despite its increasingly conservative cast, the judicial branch is not prepared to indulge the executive’s every constitutional whim.

By and large, however, despite some grumbling by Democrats and the odd Republican, Congress shamefully acquiesced in Bush’s power grab by giving retroactive legislative cover to some of his actions and by failing to shine a bright light on the misconduct of executive branch officials or hold them accountable. It is arguable that high officials of the Bush administration responsible for “extraordinary renditions” and the torture of detainees in the war on terror are guilty of war crimes, but the critics generally concede that none of them will ever be formally charged, much less brought to trial.

President Obama has announced that he will close the prison at Guantanamo and it is widely expected that he will end the constitutionally dubious military commissions set up by President Bush to try detainees. Moreover, his picks for the Justice Department, notably Eric Holder as Attorney General, Elena Kagan (dean of Harvard Law School) as Solicitor General, and Dawn Johnsen (professor of law at Indiana University) as head of the Office of Legal Counsel, signal a clear repudiation of the Bush power grab. Johnsen, it deserves to be noted, published a scathing critique of recent counterterrorism initiatives in a law review article last year titled “What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses.”
Whatever Obama decides to do, it is unclear at this moment whether he will marginalize the people of inner-city America who danced in the streets on the night of his election.

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It is to be hoped that Obama, as a former professor of constitutional law, will respect the people’s civil liberties and the legitimate role played by Congress and the courts in America’s system of checks and balances. In the days preceding his inauguration all the protagonists are favourable. But it remains to be seen whether the ugly precedents set by the Bush administration will be extinguished or simply allowed to lay dormant, possibly to be revived in the event of another 9/11.