Bush's imperial presidency is Obama's toughest challenge

BY STEPHEN L. NEWMAN

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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."

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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. Although previous presidents had issued signing statements addressing their concerns that elements of legislation being signed into law encroached on executive privilege, none went so far as to claim an inherent constitutional authority to ignore provisions of laws with which they disagreed.

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

navy "when called into the actual Service of the United States." Most constitutional scholars agree, however, that the sparsely worded Commander in Chief clause does not make the president the end point in the military chain of command. That honour goes to Congress, which is vested not only with the power to declare war but also with the responsibility for regulating the military, punishing crimes committed on the high seas, and settling "offenses against the law of nations."

Up until the wars of the 20th century, Congress was foremost in the conduct of the nation's military affairs and foreign policy, though not without the occasional protest from presidents who would have preferred greater autonomy. The emergence of the United States as a world power in the last century enhanced the role of the executive in foreign affairs. Increasingly, presidents claimed a greater constitutional authority with regard to military matters, claims that were by and large ceded by Congress and endorsed by the courts.

The curious feature of the Bush administration's reading of the Commander in Chief clause is its insistence that an "originalist" reading of the Constitution—that is, a reading faithful to the intentions of the Founding Fathers—reveals presidents to have vast military powers far in excess of those actually exercised in the past.

The Bush Commander in Chief doctrine was first articulated by then deputy assistant attorney general John Yoo in 2001. Yoo claimed that the other branches of government may impose no limits whatsoever on actions taken by the president as commander-in-chief in defence of the nation. This utterly groundless claim, repeated countless times in subsequent memoranda and legal briefs, was used to justify imprisoning "enemy combatants" indefinitely and to deny them the protections of the Geneva Conventions. It subjected detainees to torture in violation of the laws of the United States and international law and executed warrantless surveillance of domestic telephone calls contrary to existing American law.

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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 officers 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."

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the expedient rhetorical cover to pursue a new strategy. Florida's privileging of middle-class and upper-middle-class people and institutions as the engine of city solvency and growth has widespread support in the planning, policy, and government realms. Obama, who in the words of columnist Josh Leon represents "modernity and tolerance"—important markers in Florida's world—may well follow this strategy. The new "creative" middle classes have emerged as decisive voters in current American society as they swell in numbers and increasingly occupy the public and political spaces that matter. They do so, in particular, in the newly gentrified central cities.

The alternative is to focus on the core issues that plague the majority population (disproportionately racialized poor people) in these cities: scant decent-paying jobs, underfunded public schools, a dwindling ability to secure affordable housing, and racism and exploitation in the new low-wage service and day labour economies. In the Bush years, as programs and policies aided the goals and ideals of the real estate and business communities, this majority population suffered.

Yet, many mayors across America, still aligned with real-estate capital and growth machines as city revenues continue to plunge, now also aggressively call for help in alleviating deepening poverty, hunger, and hopelessness. But the incentive to pursue this strategy may not be sufficient. The disincentives are profound. The pendulum is now swinging back to inner city politics but perversely to the new liberal elites of the gentrified inner cities (Neil Smith's inner city "revanchists") at the expense of the poor who have been or are being displaced through catastrophic events like Hurricane Katrina and the subprime mortgage crisis, and through gentrification.

DOING THE RIGHT THING: THE RIGHT TO THE CITY

Are there alternative forces that seek to put Obama on the other path? At the expense of singling out one over possibly hundreds of similar critical initiatives that have recently shaped the US urban scene, let's mention the Right to the City Alliance of longstanding radical urban community and labour groups, which have now created a nationwide coalition to coordinate urban struggles for progressive policies. These are critical core constituencies of Obama's urban popular support. They claim: "The hollowing out of the cities, the destruction of public participation, privatization, job loss, structural racism, and the loss of the very soul of the city has affected many sectors and constituencies. The Right to the City isn't a set of policies for one or another group of people: it is a fundamental approach to reorganizing our cities, to the leadership of the city, and to the future of the city."

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Infrastructure investment is key to Obama's urban policy program. Yet, as David Harvey reminded us recently, such economic stimulus can be treacherous. Although it is likely that the disaster capitalists of Halliburton and company, who filled their coffers under Bush and Cheney with massive civic and military infrastructure investments at home and abroad, will lose their spot in the sun, Obama still has basically two options: Will he tread in the footsteps of Baron Haussmann, who rebuilt 19th-century Paris, and New York technocrat Robert Moses and build roads for a "splintered city"? Or will his infrastructure package create transit lines leading toward a more democratic and redistributive metropolis?

A VISION IN THE MAKING?

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. Obama here faces a choice of political expediency versus apparently heartfelt personal conviction, a decision that he believes will affect his political standing, base of support, pool of capital donations, and political legacy. On "the city question," then, Obama's choice of planning and policy tools to revitalize cities suggests a preliminary commitment to bolstering the needs and desires of real-estate, finance, and business capital as the key. But, it is not too late to modify this: decades of festering unemployment, underemployment, class and race segregation, and hopelessness among many deepen and need to be directly addressed. In this time of political change in America, with Republican politics discredited, the time to strike has never been better.

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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 portents 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.