

Will You Love Every Future President?

Presidential power has been expanding beyond what the Constitution outlined

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Presidential power has been on a [pathway](#) of expansion beyond what the Constitution outlined, and what a government of, by, and for the people requires, since George Washington was president. That expansion, which hit the highway after World War II, got a [turbo boost](#) during the co-presidency of [George W. Bush](#) and [Dick Cheney](#).

Some of the new powers that those two stole from Congress, the courts, the states, and us the people are being abused less severely in this new age of Obama; others, more so; but far more crucially, in a pattern followed by recent presidencies, *all* are being maintained, if not expanded, and thus more firmly cemented into place for future presidents to use. Wherever you fall on the political spectrum, you are likely to strongly oppose some major decisions of some future presidents. So it shouldn't be hard to envision some pretty undesirable consequences that might flow from presidential power that increasingly approaches the absolute.

Our television news and newspapers don't seem terribly interested in this story, despite scraping its surface with reports on the many "czars" Obama has appointed or lectures on the importance of renewing, or only marginally amending, the PATRIOT Act. And Congress seems, if possible, even less interested. That's not so surprising, given that we've replaced the three branches of government with the two parties, so that at any given time roughly half the members of Congress take as their leader a president who is theoretically supposed to execute the will of Congress. And the other half usually obey their party's "leaders" in Congress, whose primary interest is in electing one of their own as the next president. Both parties continue to value presidential power itself either for its uses in the present, or for when their candidate is elected. Everyone wants to inherit the imperial presidency, not constrain it.

Under these circumstances, [bills](#) to [create](#) commissions investigating presidential abuses, to [place](#) a judicial check on claims of "state secrets," [limit](#) the use of presidential signing statements, or to [allow](#) more than eight members of Congress to be given "security" briefings by the executive branch prove not to be priorities for either party.

These days, the old-fashioned idea of checking executive abuses of existing laws through the [issuance](#) of [subpoenas](#) or by [impeachment](#) is, in Washington, widely considered a scandalous proposition. Congress impeached [a judge](#) this year who had groped his employees, but [Jay Bybee](#), who signed secret memos purporting to legalize [aggressive war](#) and [torture](#), and who now holds a lifetime seat on the Ninth Circuit Court of Appeals, is protected from such a step by his recent membership in the executive branch (and the displeasure Fox News would express toward his impeachment).

In April, Senator Patrick Leahy, chairman of the Senate Judiciary Committee, [asked](#) Bybee to testify, and the judge refused, just as many of his former colleagues in the Bush administration [had](#) in 2007 and 2008. Leahy may be unwilling to follow up by issuing a subpoena that even the new Department of Justice might refuse to enforce. The current department, for instance, allowed the White House Counsel to [negotiate](#) partial compliance with a House Judiciary Committee subpoena by former presidential advisor Karl Rove. And if Leahy is like most members of Congress, he will not even consider [the option](#) of using the Capitol Police to enforce a subpoena himself — something that no committee has done in 75 years.

All Power to the President

Any quick survey of the powers the presidency now claims would have to include the power to make laws, the power to make wars, the power to spend money, the power to make treaties, the power to grant immunity for crimes, the power to operate in secrecy, the power to spy without warrants, the power to detain without charge, and the power to torture.

Laws are still made by Congress, but they can be rewritten via [signing statements](#); that is, statements announcing a president's intention to violate particular sections of the very bill he is signing into law. Neither Congress nor President Obama has thrown out all of Bush's extensive signing statements that did indeed alter laws. In fact, Obama [has announced](#) that his subordinates will review his predecessor's signing statements only as the need arises.

This policy might please those imagining that the Obama administration will always make the right decision about whether to maintain or reject a Bush-made amendment to a law, but it does nothing to strip the presidency of the power to use the mechanism of the signing statement to re-make or amend or alter new laws. As it happens, Obama has already published [his own](#) law-making signing statements.

Presidents now also routinely [determine](#) national policy through executive orders and, in doing so, run the country out of the White House rather than through departments headed by officials approved by Congress. They also increasingly [dictate](#) a legislative agenda to Congress — and both members of Congress and members of the public generally accept without comment or opposition that inversion of our constitutional system. And then there are the [secret memos](#).

In those secret memos, Bush's lawyers in the Department of Justice dutifully "legalized" numerous illegal acts, including [aggressive war](#) and [torture](#). Despite years of public back-and-forth between the White House and the Congress over the question of whether to ban torture, any act of complicity in torture was already a felony in the U.S. code under the [Anti-Torture Act](#), which enforced the [Convention Against Torture](#) signed by President Ronald Reagan. However, the secret Justice Department memos were taken as the final word in legality, no matter what the law said.

Obama has directed the Justice Department not to prosecute those at the highest levels responsible for producing those memos, though he has [permitted](#) consideration — whether seriously intended or not — of the possibility of prosecuting a handful of low-ranking staffers who strayed beyond the illegal policies outlined in the memos. Not only does this bestow immunity on the most prominent criminals, reversing the approach — starting at the top — that the U.S. took at the Nuremburg war crimes trials after World War II, but it has the

potential to create a terrifying precedent for the future. If a president can use his justice department to legalize a crime simply by asking a lawyer to write a memo, then who can doubt that a president has something approaching absolute power?

Presidents, not Congress, do indeed make wars now, whether or not they consult Jay Bybee's memo on the subject. They make wars without congressional declarations of war, using instead vague bills to maintain a pretense of congressional involvement — and then they don't even comply with the terms outlined in those authorizations. Illegal (as well as unconstitutional) as they may be, these wars can be expanded into [apparently permanent](#) occupations that include the construction of gigantic military bases from which additional wars may be launched. In the process, mercenaries often take the place of soldiers, and as "private contractors" they then [operate](#) even further from congressional oversight or the law.

To invade Iraq, President Bush [spent](#) money not appropriated for that purpose. He also gave himself the power to transfer money into "black budgets" beyond the purview of all but a few members of Congress, and so use it for secret tasks signed off on by his officials. Of course, massive secret budgets under the control of the president are nothing new, though they've grown through the years. Neither are they constitutional or sustainable.

On October 6th, the leaders of the two parties met with President Obama and, by Senate Majority Leader Harry Reid's account, [let him know](#) that he could end, decrease, maintain, or escalate the war in Afghanistan and Pakistan as he saw fit. The Senate had voted the previous week not to call on war commander Stanley McChrystal for public testimony about that ongoing war until *after* the president determines his war policy, which of course means a war policy for all of us. Two days later, in a surprising flicker of dissent, House Appropriations Committee Chairman David Obey [released](#) a statement suggesting that, contrary to everything he'd said for years, he recognizes that Congress has the power to choose not to fund those wars and thereby to end them.

As his presidency was winding down, George W. Bush [concluded](#) an unofficial treaty (though it was called a Status of Forces Agreement) with the government of U.S.-occupied Iraq for three more years of war there without feeling the slightest need for it to be ratified by the Senate. Ever since, the U.S. military has actually violated the terms of that document, while its key commanders continued to [publicly state](#) their intention to remain in Iraq beyond the end of 2011, a clear violation of the agreement. In the meantime, this White House has used the treaty as cover for an ongoing illegal occupation of Iraq with, at this point, 120,000 U.S. troops and tens of thousands of private contractors.

Is Congress Broken?

When many [feared](#) that Bush might pardon his subordinates for [crimes](#) he had himself authorized, the consensus among members of Congress and scholars was that he could, in fact, do such a thing. In some ways what both Bush and Obama have actually done is worse. With a big assist from Congress in the form of bills like the [Military Commissions Act](#) and the [FISA Amendments Act](#), they have worked to grant immunity for crimes without even naming the criminals or revealing what they have done. Obama's Department of Justice is now [arguing](#), appealing, or re-appealing in [various court cases](#) to keep [secret](#) the abuses of government officials and [corporations](#) involved in torture and warrantless spying. Recently, the Justice Department even [argued](#) that, when it comes to denying information to a court or the public, telecommunication corporations must be considered a part of the executive

branch of the federal government, and earlier this year the administration [threatened](#) the British government with an end to intelligence sharing if it revealed evidence of torture.

President Obama [announced](#) that he will only claim the right to hide information from a court on the grounds that important “state secrets” are involved after careful review by lawyers at the Department of Justice. This may be an improvement over the Bush years — not exactly a hard standard to reach — but notably this decision still cedes not an ounce of power to any branch other than the executive, even as Obama’s lawyers make radical “state secrets” claims in attempts to block entire court cases, rather than over particular pieces of information.

While this president is ceding modest amounts of territory claimed by the previous one, he is ceding nothing when it comes to presidential power itself. For example, the president said he would release White House visitor logs (as the Bush administration had not), just not those already recorded, including the ones that held records of the visits of deal-making health insurance executives, nor any future logs that *he* thinks would endanger “national security.” That offers change of a sort, however modest, but leaves it entirely in the president’s hands to decide which logs to release.

This administration has indeed [released](#) some of the secret memos that Bush’s Department of Justice used to justify torture and never shared with the public, but only when compelled by courts. The Justice Department has, in fact, fought fiercely against their release and has redacted significant sections of them before making them public.

Bush claimed for the presidency the power to detain people without charge or legal process — and then used it. Obama stood in front of the U.S. Constitution in the National Archives in Washington and [asserted](#) the same power, in violation of the right of *habeas corpus* found in that torn and tattered document. Director of Central Intelligence Leon Panetta and presidential advisor David Axelrod have similarly [made clear](#) that the president still claims the power to engage in “harsh interrogation techniques” but chooses not to use it. Torture in this way has been transformed from a crime into a policy choice, with the intended message apparently being that we can stop torture temporarily by choosing to elect Democrats. This is perilous territory.

Perhaps presidents simply cannot be expected to give back powers gained by the executive branch, but shouldn’t we expect Congress to work to take them back on our behalf? When Alberto Gonzales resigned as attorney general, he did so because a rapidly growing list of members of Congress signed onto a one-sentence bill directing the House Judiciary Committee to investigate possible grounds for his impeachment. Such an approach toward Judge Jay Bybee could begin to [restore the power](#) of Congress to assert itself in other areas as well, while pressuring the Justice Department to enforce the law, and potentially making public a great deal of information through the subpoenas involved in any impeachment hearing, which does not permit claims of “executive privilege.” Information subpoenaed in an impeachment hearing *must* be produced, or the failure to produce it can become another impeachable offense.

Many of us probably consider our current president a much nicer guy than our local congressional representative. That doesn’t change the fact that influencing a president, or even a senator, via grassroots pressure is infinitely more difficult than influencing a member of the House of Representatives.

This is not a new discovery. After all, isn't this, in part, why the House was given the power of the purse and the power of impeachment? Being closer to the ground, that body is, by its nature, going to be more amenable to democratic pressure and direction. If we want once again to have a real hand in making our nation's policies, our best shot — admittedly still a distinctly uphill course — is to focus on the person who represents us in the House.

Unfortunately, we have to compel each of them to do something they have come to collectively fear: taking back the power originally bestowed on them and not on behalf of their party, but of their branch of government, of the Constitution to which they've sworn an oath, and of the proper sovereigns of this nation: we the people. Otherwise the chief legacy of the Obama years will, like those of his immediate predecessors, be the slide from republic into empire and the continuing growth of an imperial presidency.

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