THE CONSERVATIVE EMBRACE OF PRESIDENTIAL POWER

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The power of the presidency has become a contentious issue for the conservative movement. In recent years, many conservatives have been furious with their colleagues for accepting the growth of presidential power.[1] However, this criticism ignores how deeply ingrained presidential power has become in the conservative movement since the 1970s.

During the past three and a half decades, a growing number of conservatives have embraced the presidency and have come to privilege this branch of government.[2] While conservatives have traditionally justified their position by arguing that the presidency is often the best agent for achieving smaller and more accountable government, they have also recently relied on an aggressive and centralized presidency to advance their agenda.[3] For many conservatives, the congressional reforms that passed in response to Watergate dangerously eroded the power of the executive branch.[4] Moreover, many conservatives view the reforms as symbols of what went wrong as a result of the 1960s. Furthermore, conservatives add that the gradual delegation of authority to independent agencies has resulted in unaccountable bureaucrats making big decisions that are beyond the control of elected officials.[5]

Richard Nixon demonstrated how the executive could use presidential power as a force against liberalism when he relied on that power to implement budget cuts and achieve his military objectives.[6] Conservative interest in presidential power accelerated between 1973 and 1978 as Congress passed reforms to curtail the executive branch's power. During Gerald Ford's and Jimmy Carter's presidencies, congressional reforms to constrain the extra-

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[1] *See, e.g.*, Bruce Fein, *Vital Monitors . . . Unlimited?*, WASH. TIMES, Dec. 20, 2005, at A17; George F. Will, *Why Didn't He Ask Congress?*, WASH. POST, Dec. 20, 2005, at A31.

[2] The best existing history of this issue can be found in CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

[3] *See generally* JULIAN E. ZELIZER, WASHINGTON WARFARE: THE POLITICS OF NATIONAL SECURITY SINCE WORLD WAR II (forthcoming Oct. 2009).

[4] *Id.* chs. 8-9, 11.

[5] SAVAGE, *supra* note 2, at 281-82.

[6] *See, e.g.*, GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 79 (2007).

constitutional powers and common abuses of presidents angered many conservatives. In 1978, for example, Congress passed the Foreign Intelligence Surveillance Act ("FISA"), subjecting domestic surveillance to court supervision.[7] Given the battles of the era, conservatives saw the congressional reforms of the executive branch as a liberal objective.

Like Nixon, President Ronald Reagan believed in the usefulness of the presidency for conservative objectives. Reagan learned that Congress would present major obstacles to his conservative agenda, even when Republicans controlled the Senate between 1980 and 1986.[8] In response, Reagan and his Cabinet aggressively relied on executive power as a way to achieve conservative objectives that otherwise would have fallen to defeat.[9]

Conservatives attempted to balance their acceptance of muscular presidential power with anti-government arguments. They claimed that stronger presidents were needed because twentieth-century liberals had abandoned the non-delegation doctrine in favor of agencies that could make regulatory decisions without accountability.[10] At the same time, they also claimed that enhancing presidential authority would diminish the influence of institutions such as Congress, or other bureaucracies that were more prone to intrusive federal initiatives.[11]

In addition to conservative acceptance of more expansive executive power to achieve conservative ends, there was also an influential cohort of young attorneys in the Department of Justice.[12] These attorneys promoted the theory of the unitary executive.[13] They argued that whatever the scope of executive power, all of that power should be vested in the President rather than dispersed among independent agencies.[14] These attorneys also argued that each branch of government had a *limited* right to intervene in the affairs of the other.[15]

Republicans in Congress also defended executive power. One of the most important moments for them took place during the Iran-Contra scandal in 1986 and 1987. The scandal began when media reports and congressional hearings revealed that top National Security Council officials had sold arms to Iran and used the money to provide assistance to the Nicaraguan Contras, assistance which Congress had explicitly prohibited. In response to the Iran-Contra

[7] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (1982)).

[8] *See* Richard M. Pious, *Why Do Presidents Fail*, 32 PRESIDENTIAL STUD. Q. 724, 739-40 (2002).

[9] ZELIZER, *supra* note 3, ch. 9.

[10] SAVAGE, *supra* note 2, at 281-82.

[11] *Id.* at 44 ("[S]upporters of Reagan sought to rehabilitate the early Cold War faith in a strong centralized authority inside the White House, and a subordinate role for Congress.").

[12] ZELIZER, *supra* note 3, ch. 9.

[13] SAVAGE, *supra* note 2, at 44-45.

[14] *Id.* at 48; *see also id.* at 46.

[15] *Id.* at 48.

committees' bipartisan rebuke of the Reagan administration, eight Republicans signed on to a minority report that provided a proverbial Magna Carta for the conservative defense of presidential power.[16]

George H.W. Bush was a moderate Republican who maintained a more tenuous relationship than Reagan with the conservative movement. However, he also continued to champion executive power.[17] In December 1990, Bush and his advisors debated whether or not to seek congressional consent for sending American troops into the Persian Gulf region to expel Iraqi soldiers from Kuwait. Privately, the President insisted that he did not need congressional authorization to send troops because the United Nations had passed a resolution allowing for military action. The administration decided to approach Congress for a resolution of support, but only as a pragmatic calculation that was aimed at winning domestic and international approval.[18] Ultimately, the administration obtained a congressional resolution of support but never sought a declaration of war.

As Democrats secured their hold on the White House during the Clinton years, the Republicans took control of Congress in the 1994 elections. Clinton continued the aggressive assertion of executive power that past Republican administrations promoted.[19] Certainly, conservatives had pragmatic reasons for becoming more hostile toward presidential power now that they did not control the White House. For instance, they attempted to pass legislation and introduce amendments limiting presidential discretion when sending troops under U.N. command and for specific "nation-building" efforts.[20]

Despite congressional efforts, however, the 1990s did not witness a complete philosophical reversal of conservative support for presidential power.[21] Indeed, the "Republican Contract with America" included proposals for term limits for members of the House and line-item veto power for the President.[22] Moreover, Speaker Newt Gingrich and the 1994 Republican majority attempted to repeal the 1973 War Powers Resolution,[23] which requires the President to obtain congressional authorization for troop

[16] REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 431, 457-78 (1987) (minority report) (setting forth legal and historical arguments in favor of broad and exclusive presidential power in the realm of foreign affairs).

[17] SAVAGE, *supra* note 2, at 57-58.

[18] *Id.* at 62.

[19] *See id.* at 64 ("Especially after 1994, Clinton also made aggressive use of executive orders to advance his agenda without going to Congress . . . .").

[20] *Id.*

[21] ZELIZER, *supra* note 3, ch. 10.

[22] Republican Contract with America, http://www.house.gov/house/Contract/CONTRACT.html (last visited Feb. 18, 2008).

[23] Katharine Q. Seelye, *House Defeats Bid to Repeal 'War Powers,'* N.Y. TIMES, June 7, 1995, at A11.

deployments lasting longer than sixty days.[24] Furthermore, when the Independent Prosecutor Law[25] – one of the greatest symbols of congressional resurgence from the 1970s – expired on June 30, 1999 following the effort to impeach Clinton, few members of either party were eager to extend it; Congress allowed it to expire.

When George W. Bush became President in 2001, he continued conservative efforts to strengthen presidential power.[26] Thus, the conservative embrace of presidential power was not a sharp break with tradition but rather a continuation of a trend beginning in the 1960s. Vice President Dick Cheney staffed the White House with conservative veterans of the 1970s and 1980s who believed that the executive branch remained the best base from which conservatives could advocate their agenda without having to compromise.[27] White House Counsel Alberto Gonzales, as well as the Justice Department staff, and the Office of the Vice President, believed the congressional reforms of the 1970s had emasculated the presidency.[28]

In response to the 9/11 attacks, Alberto Gonzales, John Yoo from the Justice Department, and David Addington and Lewis Libby from the Office of the Vice President, claimed that vibrant executive power would be essential to fighting the war against terrorism.[29] Convinced that congressional restraints on executive power were responsible for the government's failure to stop al Qaeda, the President's advisors sought authority to overcome FISA barriers, which they claimed hampered domestic intelligence operations.[30] Gonzales argued there was strong precedent for granting the Commander-in-Chief virtually unlimited power during wartime, and that the President could not be bound by congressional law or international treaties.[31] Congress passed the Authorization for the Use of Military Force on September 18, 2001, which gave the President power to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts

[24] War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2000)).

[25] Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73.

[26] SAVAGE, *supra* note 2, at 69.

[27] ZELIZER, *supra* note 3, ch. 11.

[28] SAVAGE, *supra* note 2, at 73.

[29] *See id.* at 79 ("[Yoo] wrote the first confidential memos about the extent of the president's war powers in the weeks after 9/11, establishing a framework from which everything else would follow.").

[30] *Id.* at 131.

[31] *Id.*

> of international terrorism against the United States by such nations, organizations or persons.[32]

Based on the memos of John Yoo and David Addington, Gonzales insisted the United States needed to abandon its "cops and robbers" approach to terrorism, which relied on normal judicial channels and due process protections for captured terrorists, and instead shift toward a "war powers" model. By strengthening the President's hand, Gonzales argued the government could achieve speedier and more efficient results.[33] To that end, President Bush signed a directive on November 13, 2001, calling for the use of military tribunals to prosecute alleged terrorists.[34]

Recent events confirm how conservatism and presidential power have become intertwined since the 1970s. Since the 1960s, the Right has been a vociferous champion of an all-powerful White House. This realization contributes to an expanding historical narrative that attempts to revise our understanding of the conservative movement. The narrative demonstrates both how the shift to the right was not inevitable, and how conservatives have had a more complex relationship with the modern state than commentators previously have assumed.[35]

Despite the conservatives' argument that centralized presidential power is a necessary tool for limiting other forms of government intervention, they must acknowledge that their movement has also helped build bigger government in America. Centralized presidential authority is a significant form of government power – regardless of the reasons behind its expansion – and the impact has been clear during the war on terrorism. Conservatives must reassess their own anti-government rhetoric and re-examine the impact of the enormous expansion in executive power they have promoted over the decades.

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[32] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

[33] SAVAGE, *supra* note 2, at 134-35.

[34] Exec. Order. No. 57,833, 32 C.F.R. 17 (2001).

[35] *See generally* DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY (2007) (analyzing the various ideological contradictions regarding state-citizen relations with which the conservative movement struggled as it sought political victory following World War II); DAVIES, *supra* note 6 (discussing the "persistence and even growth of big government during a supposedly conservative era"); BRUCE SCHULMAN & JULIAN E. ZELIZER, RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S (2008) (discussing the factors which contributed to the political rise of the conservative movement in the 1970s).