GlobalResearch
Center for Research on Globalization

One Step Forward, Two Steps Toward Monarchy

By David Swanson
Global Research, March 10, 2009
afterdowningstreet.org 10 March 2009

Region: USA
Theme: Law and Justice

It has become almost commonplace, since the release last week of seven “legal” opinions written in 2001 and 2002 by the Justice Department, to remark that unbeknownst to us we came within an inch of dictatorship. And with President Obama announcing an end to torture and a new policy on signing statements, it is extremely common to speak as if we are moving quickly and deliberately in the opposite direction. But this picture is far too simplistic.

We knew a great deal about what was happening when Bush and Cheney were president. In fact, the reason we find the latest handful of memos so “shocking” is that we are already familiar with many of the actual crimes and abuses they were used to justify. While the transfer of unconstitutional powers to the president began when George Washington held that office and has advanced over the centuries, it did take a dramatic leap forward during the reign of Bush-Cheney. We were indeed within a foot, if not an inch, of outright dictatorship, but we were well aware of it. Many chose to avert their gaze for a variety of reasons. Chief among them were approval of presidential power, loyalty to Republicans, and loyalty to Democrats who chose not to rock the boat.

The picture is also too simplistic because there is far more smoke than fire in President Obama’s retreat from imperial power, and there is a fundamental defect in our assumption that limiting presidential power can and should be done by a president, rather than by Congress, courts, and the American people. Obama has announced policy changes, some of them very much for the better, but to choose a policy of not torturing, or a policy of not altering laws with signing statements unless absolutely necessary, is to make choices in areas we previously supposed to allow no room for choice at all. In other areas, including the launching of missiles into foreign nations, rendition, unlawful detention, outrageous claims of “state secrets” and “executive privilege”, claiming the right to deny courts access to any classified information, the continuation and even escalation of aggressive wars, the refusal to prosecute known crimes of the previous administration, and the creation of gargantuan powers to spend and lend without accountability for the purposes of bailing out bankers, stimulating the economy, and potentially even providing healthcare in a manner acceptable to health insurance companies, Obama has not only made policy choices but made the wrong ones, made the ones that the Constitution does not allow him.

It strikes me as very unlikely that Obama and Biden will abuse their offices to an extent equal to Bush and Cheney. But it is equally unlikely that the presidency in 2013 will possess only the powers it possessed in 2000, if we leave the job of restricting those powers to the president. Most of us are pleased that Obama has just legalized stem-cell research. Others of us are furious. But we should all be terrified of the state of affairs in which a single person can make such fundamental decisions. The problem is not just that the next president can reverse such decisions, but also that he or she can make decisions completely contrary to

the will of the majority of Americans or the rights of individuals. If Obama can choose to stop torturing, but not prosecute any of the torturers, a number of horrible consequences follow. First, the torturers have nothing to fear and torture continues even within a government opposed to it. Second, the levels of secrecy permitted the president allow no one to be sure how much torture is happening. Third, we stand in violation of our laws and international treaties, encouraging lawlessness around the world, allowing the foreign minister of Algeria when accused of human rights abuses by our State Department last month to reply, in effect, "Look who's talking!" Fourth, no matter how much truth we get or how reconciled we become, there is nothing to deter the next president from secretly or openly establishing a policy of torture, and nothing to stop any president from violating any other law. Fifth, we no longer elect executives to execute the will of Congress, but elected despots, kings for four years.

History shows that powers claimed by one president are almost always claimed by future ones, even if not abused to the same extent by the immediate successor. A statement from a president, no matter how good and righteous, is not the way to end a pattern of unconstitutional statements from presidents. Congress should pass a bill banning the use of signing statements to alter laws. Of course, this bill could be signing-statemented or ignored, but it wouldn't be if the threat of impeachment were reestablished. One way of doing that would be by impeaching Bush and Cheney despite their being out of office, an action for which there is precedent. Another step in the right direction would be to impeach Jay Bybee, former torture memo author, now appellate court judge.

We could also consider a Constitutional amendment, but there is good reason to be reluctant about proceeding with that. No reasonable interpreter of the current Constitution could ever have imagined that the president had the right to rewrite laws with signing statements. If we amend the Constitution to clarify that point, we could be seen as suggesting that any bizarre outrage against the basic principles of a government of laws is permissible until explicitly forbidden in detail by Constitutional amendment. And the Constitution already includes the power of impeachment. If, however, we ever significantly revise the Constitution in convention, banning signing statements should be a part of that revision.

As a candidate for the presidency, Obama committed to not using signing statements to reverse laws. In a questionnaire published by the Boston Globe on December 20, 2007, Obama said:

"Signing statements have been used by presidents of both parties, dating back to Andrew Jackson. While it is legitimate for a president to issue a signing statement to clarify his understanding of ambiguous provisions of statutes and to explain his view of how he intends to faithfully execute the law, it is a clear abuse of power to use such statements as a license to evade laws that the president does not like or as an end-run around provisions designed to foster accountability. I will not use signing statements to nullify or undermine congressional instructions as enacted into law. The fact that President Bush has issued signing statements to challenge over 1100 laws — more than any president in history — is a clear abuse of this prerogative."

On February 17, 2009, President Obama published his first signing statement in the Federal Register, commenting on H.R. 1, the "American Recovery and Reinvestment Act of 2009." He wrote the statement in plain English and did not declare the right to violate the law. His

statement appears to be exactly what Bush's lawyers claimed his were, a press release. But, unlike Bush, Obama did not post his first signing statement on his website, and — as far as I know — he didn't send it to any press. So what was the point? One point may have been to simply establish that there would still be signing statements. Another may have been to make part of the formal law these seemingly innocuous and admirable phrases:

"My Administration will initiate new, far-reaching measures to help ensure that every dollar spent in this historic legislation is spent wisely and for its intended purpose. The Federal Government will be held to new standards of transparency and accountability. The legislation includes no earmarks. An oversight board will be charged with monitoring our progress as part of an unprecedented effort to root out waste and inefficiency. This board will be advised by experts—not just Government experts, not just politicians, but also citizens with years of expertise in management, economics, and accounting."

While nothing is said here that Obama did not also say publicly, he has hereby (if we allow this interpretation of signing statements to stand) made part of the law his right to use the hundreds of billions of dollars appropriated in this bill in "new" and "far-reaching" ways that he "initiates," as well as the understanding that an "oversight board" created by the executive branch will — rather than Congress — oversee the activities of the executive branch, or as Obama calls it "the Federal Government."

On March 9, 2009, Obama published a memo on the topic of signing statements in which he defended the practice but promised not to abuse it. The memo read, in part:

"executive branch departments and agencies are directed to seek the advice of the Attorney General before relying on signing statements issued prior to the date of this memorandum as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute,"

suggesting that Bush's signing statements permitting the violation of laws would be reviewed on a case-by-case basis as needed. There was no indication of how the public would learn of such reviews. But, of course, unless we learn of such reviews we will have yet another form of secret law, and even if we do learn of such reviews, we will have legislating done by the executive branch.

Some commentators have exclaimed that by so reviewing Bush's signing statements, Obama has finally agreed to "look backwards." I disagree. Obama's "look only forward" idea is all about undoing bad policies and creating new ones. What it is not about is holding anyone accountable for their crimes.

As president-elect, in November, Obama said that he was preparing a list of about 200 executive orders issued by Bush that he, Obama, would simply reverse. I haven't seen that list yet, and this latest memo regarding signing statements suggests that they will not be included. The most Constitutional move that President Obama could make would be to toss out every signing statement that authorized violating laws and every executive order, memo, determination, finding, directive, proclamation, or other royal decree that his predecessor did not have the Constitutional right to issue. Instead, Obama has reversed a handful of Bush's orders because of "policy differences." Some of these are wonderful and lifesaving reversals, such as that regarding torture. But they involve a life-threatening maintenance of dangerous monarchical power. Congress should give the president explicit and limited rule-making powers. All rules should be publicly available. And Congress should

be understood to have the power to overrule them. Outside of those restrictions, a president should not be permitted to make decrees carrying the force of law.

In the same pre-election questionnaire quoted above, Obama made an encouraging comment regarding secrecy:

"I believe the Administration's use of executive authority to over-classify information is a bad idea. We need to restore the balance between the necessarily secret and the necessity of openness in our democracy–which is why I have called for a National Declassification Center."

But Obama has, at least thus far, chosen to release only a small fraction of the Bush-Cheney crime documents known to exist. We have not seen most of the memos and not seen the Emails. Eric Holder's Justice Department has opposed releasing the Emails and urged a federal appeals court to dismiss a lawsuit against Boeing subsidiary Jeppesen DataPlan for its role in the extraordinary rendition program. Mohamed et al. v. Jeppesen had been brought on behalf of five men who were kidnapped and secretly transferred to U.S.-run prisons or foreign intelligence agencies overseas where they were tortured. The Bush administration had asserted the "state secrets" privilege, claiming the case would somehow undermine national security, and Holder's department agrees.

Holder's Justice Department has also used a "state secrets" claim to try to block a lawsuit over Bush's warrantless spying, and claimed in a brief filed in that case that only a president can decide on the use of any classified information in court (even in a closed court), a power that would allow presidents to give themselves immunity by simply classifying evidence of their crimes.

Britain's High Court of Justice ruled that evidence in the U.K. civil case of Binyam Mohamed, one of the plaintiffs in the Jeppesen case, had to remain secret because of U.S. threats to cut off intelligence sharing. Britain's Telegraph newspaper reported that "Mohamed's genitals were sliced with a scalpel and other torture methods so extreme that waterboarding, the controversial technique of simulated drowning, 'is very far down the list of things they did'." Britain's Daily Mail reported that Mohamed "was identified as a terrorist after confessing he had visited a 'joke' website on how to build a nuclear weapon. … [He] admitted to having read the 'instructions' after allegedly being beaten, hung up by his wrists for a week and having a gun held to his head in a Pakistani jail."

In a remarkable show of their continuing desire for Congress to exist as a functioning part of our government, and willingness to challenge a president of the same political party, leading Democrats in the House and Senate have introduced the State Secrets Protection Act, which would require court review of any "state secrets" claims. Senator Russ Feingold (D., Wisc.) also requested a classified briefing to have this particular "state secrets" claim explained to him. Of course, if he's given an explanation he'll be forbidden from sharing it with us. And, of course, Congress does not propose Congressional review, only court review, of "state secrets" claims.

However, in what I consider a remarkable rush to give presidents more power, Feingold joined with Republican Senators John McCain and Paul Ryan last week to reintroduce legislation that would effectively give presidents an unconstitutional line-item veto for spending bills. Unwilling to ban or simply stop including wasteful earmarks, senators and Congress members would like to give presidents the power to undo congressional decisions.

Rather than rejecting an item with a signing statement, a president could legally "rescind" it, requiring both houses to vote again on that item alone. The same result could be achieved by requiring each house to vote on such items individually to begin with, but that wouldn't transfer power to the president and therefore doesn't look to Washington insiders like as much of a reform.

Barack Obama as a candidate for the presidency had advocated for Congressional "approval" of the treaty President Bush made with Iraq. As President-Elect, Obama favored Congressional "review." As President he went silent. President Obama immediately upon taking office began launching military strikes into Pakistan and has now escalated the occupation of Afghanistan, without anyone even suggesting that Congress be consulted in these matters. President Obama and his top officials, in their first weeks in office, supported claims of "executive privilege" allowing members of the former Bush administration to refuse to comply with Congressional subpoenas, and explicitly doing so in order to protect the "power of the presidency." Obama's lawyer conducted a negotiation of terms between the first branch of our government and a common criminal, Karl Rove, rather than hauling Rove in by force, something that Congress itself of course refuses to do as well. The result will be Rove testifying, at least in private and at least on some topics, but also the maintenance of the idea that the president can choose whether or not to allow Congress to subpoena witnesses.

I hate to sound ungrateful here. I'm delighted that Obama released seven more memos. I'm aware that those memos exhibit a reckless, lawless lunacy that outstrips anything previously seen in this country or likely to be seen in the next four years. But the powers claimed by those memos do not go away just because some other memos are written and the powers are not used. The powers go away only if something is done to deter their reappearance. One option, which really ought not to be an option, would be for the Justice Department to enforce the law.

#yiv1404933991 p.p1 {margin:0.0px 0.0px 12.0px 0.0px;font:12.0px Times;}
#yiv1404933991 p.p2 {margin:0.0px 0.0px 12.0px 0.0px;font:12.0px Times;min-height:14.0px;}

David Swanson is the author of the upcoming book "Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union" by Seven Stories Press and of the introduction to "The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush" published by Feral House and available at Amazon.com. Swanson is Co-Founder of AfterDowningStreet.org, creator of ConvictBushCheney.org and Washington Director of Democrats.com, a board member of Progressive Democrats of America, the Backbone Campaign, and Voters for Peace, a convenor of the legislative working group of United for Peace and Justice, and chair of the accountability and prosecution working group of United for Peace and Justice.

Become a Member of Global Research

Articles by: David Swanson