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## **The Call for Executive Action**

The Bush administration says it knows best how to keep the nation safe from terrorism;  
SPELLING IT OUT; UNDOING THE DAMAGE; WARTIME FOOTING

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In a recent speech to the Federalist Society, outgoing Attorney General John Ashcroft warned the audience of conservative lawyers about a "profoundly disturbing trend" in American politics.

In a parting shot before leaving the administration, Ashcroft blasted federal court rulings that constrain the president's conduct in the war on terror. "These days it seems that some [federal judges] are unwilling to accept an idea fundamental to our Constitution -- the idea that there are certain decisions the framers reserved to our elected and accountable president," Ashcroft said.

While Ashcroft's rebuke of the judicial branch paid lip service to the checks and balances built into the Constitution to prevent any one branch from becoming too powerful, his message was clear: The president should be left alone to fight the war on terror.

The tenor of Ashcroft's remarks was no surprise. Since the terrorist attacks of Sept. 11, 2001, the Bush administration has laid claim to sweeping powers, while making every effort to sidestep judicial review and congressional oversight.

In doing so, the White House has asserted that the president's authority as commander in chief allows him to imprison anyone in the world, even U.S. citizens, and hold them indefinitely without judicial supervision in the name of national security. A wartime president, administration lawyers argue, should not be bound by domestic laws and international treaty obligations that hinder efforts to protect American lives.

The administration's position has been rooted in its core belief that the executive branch is uniquely suited to protect the country and should do so without interference. The White House has stood its ground even in the face of Supreme Court decisions this year that rejected aspects of its approach.

In June, the Court ruled that military prisoners jailed at the U.S. navy base at Guantánamo Bay, Cuba, may challenge the legitimacy of their detention there in federal court. In a separate case, the Court also held that a U.S. citizen challenging his detention as an enemy combatant must be given the opportunity to contest his status before an impartial authority.

While the full impact of the rulings is not yet clear, what is evident is that the Bush administration has no plans to back down. Its legal posture has remained essentially the same in the six months since the decisions were delivered. Earlier this month, one Justice Department lawyer told a federal judge in a Guantánamo Bay case that the deference owed to the president in his prosecution of the war on terror is "almost absolute."

The scope of the Bush administration's vision of executive branch power was laid out in a confidential memo from the Justice Department's Office of Legal Counsel to White House Counsel Alberto Gonzales.

The August 2002 memo, which analyzed domestic and international prohibitions on the use of torture, concluded that the president can legally order the use of torture under his authority as

commander in chief. The memo, which became public in early June, left critics and supporters alike wondering whether administration lawyers consider the president above the law.

Gonzales -- who has been nominated to replace Ashcroft as attorney general -- insisted that the president had not condoned torture, but he stopped short of disavowing the underlying legal analysis.

At a June 22 press briefing to discuss the memo, Gonzales called the analysis "irrelevant" and "unnecessary" because the White House did not rely upon it. But he never said that the memo's conclusions were wrong.

Georgetown University Law Center professor Neal Katyal, who served in the Justice Department under President Bill Clinton, calls the Bush administration's view of presidential power "radical."

"The defining contribution of the Bush administration is to create an unrooted presidency in which the Constitution's commander-in-chief clause has been elevated into license to do what ever he wants," says Katyal, who represents a Yemeni national held at Guantánamo Bay in litigation against the Pentagon.

The Bush administration's aggressive assertions of executive power have Republican critics, as well.

Some complain that by refusing to recruit support from Congress, the administration has weakened its legal footing and may set precedents that will hogtie future presidents.

Meanwhile, advocates of a limited federal government fear that the Bush gambit may instead succeed and secure powers that will one day be passed to a Democratic president.

D.C. lawyer Bruce Fein, a Republican who spent 11 years in the Justice Department during the Richard Nixon, Gerald Ford, and Ronald Reagan administrations, calls the administration's posture in the war on terror "shortsighted."

"These vast unlimited powers are not limited to a Republican president. When the Democrats get into office, they'll be able to claim heir to these same vast oceans of powers," says Fein. "I guess if you only care what happens in your own tenure, than so be it. If you're concerned about conservatism and restraint, you have to pay attention to how your successor might use the same power."

Even Bush loyalists such as former DOJ Criminal Division chief Michael Chertoff have expressed reservations about the administration's current approach to detaining terror suspects, calling it "unsustainable."

Chertoff, now a judge on the U.S. Court of Appeals for the 3rd Circuit, raised questions in an article in *The Weekly Standard* last year. "We need to debate a long-term and sustainable architecture for the process of determining when, why and for how long someone may be detained as an enemy combatant and what judicial review should be available," he wrote.

Chertoff's comments generated substantial interest for a brief moment in time, but did nothing to sway the administration.

Every presidential administration has pushed for more power and resisted incursions by the other branches.

Officials in the Reagan administration defied Congress by secretly selling arms to Iran and diverting the proceeds to the Contra rebels in Nicaragua.

President Clinton invoked executive privilege several times in connection with the independent counsel investigation into his relationship with Monica Lewinsky. His claims, including a novel argument aimed at preventing Secret Service agents from testifying before then-Independent Counsel Kenneth Starr's grand jury, were rejected by the courts. Conservatives criticized Clinton for weakening the power of the presidency by using it as a shield in a personal scandal.

President George W. Bush's victory in 2000 ushered in a legal team staunchly committed to reversing the perceived erosion caused by past presidents. Even before the Sept. 11 attacks, administration lawyers deliberately sought opportunities to assert executive branch prerogatives, most notably by successfully resisting congressional requests for documents related to Vice President Dick Cheney's energy task force.

Unlike most previous presidents, Bush has been unwilling to compromise for political expediency -- even this year under the pressure of a close presidential campaign. It helped, too, that Republicans controlled Congress and that episodes such as the Abu Ghraib scandal never gained traction as a campaign issue.

"I don't think this administration necessarily has a different vision of what executive power is," says Paul Rosenzweig, a legal fellow at the conservative Heritage Foundation. "It's just that this administration has been much more disciplined, principled, and vigorous in asserting that power."

The war on terror has given the administration a dramatic opportunity to advance its agenda of a stronger presidency.

Unlike past wars, the fight against al Qaeda has no geographic boundaries and is unlikely to have a definitive end. To the Bush administration, the unprecedented nature of the conflict presents challenges that can be entrusted only to the executive branch.

"The latitude and discretion reserved for the president under our Constitution must, of course, be greatest in the areas of national security and foreign relations, especially during times of war and national crisis," Ashcroft said in his November address to the Federalist Society.

He added, "The danger I see is that intrusive judicial oversight and second-guessing of presidential determinations in these critical areas can put at risk the very security of our nation in a time of war."

To be sure, the Constitution does charge the president with protecting national security and many of the administration's aggressive tactics have been fueled by the grave need to detect and prevent terrorist attacks before they occur.

But key policies -- the decision to transport military prisoners to Guantánamo Bay for extensive interrogation outside the parameters of the Geneva Conventions; the detention of U.S. citizen Jose Padilla as an enemy combatant on the basis of a presidential determination; the order establishing World War II-era military commissions for the trial of suspected terrorists -- have also been shaped by the administration's ideological commitment to enhance the power of the executive branch and an inherent distrust of the other branches of government.

That distrust was heightened last month when when a D.C. federal trial judge brought military commission proceedings at Guantánamo Bay to a screeching halt.

Critics of the commissions applauded the ruling by Judge James Robertson of the U.S. District Court for the District of Columbia, who found the process violated international and military law. But to the administration, the decision represented everything it has been trying to avoid: A single judge, in a single court, interfering with the machinery of war. The administration has appealed.

"The Constitution entrusts to the president the responsibility to safeguard the nation's security," Justice Department spokesman Mark Corallo said in a statement at the time. "The Department of Justice will continue to defend the president's ability and authority under the Constitution to fulfill that duty."

The irony is that with Republicans in control of Congress, the Bush administration would likely have little trouble securing specific legislative authorization to carry out its objectives. Such action would go a long way to shoring up the administration's legal arguments in the eyes of judges such as Robertson. It might even end much of the ongoing litigation against the government, including the 60 pending habeas corpus claims brought by prisoners held at Guantánamo.

But Congress has not put forward such legislation. Nor has the administration asked it to. To the White House, going to Congress for approval would be a tacit concession of executive branch authority.

"If Congress passed a law today defining the rights due to detainees held at Guantánamo, that would insulate the government altogether," says Rosenzweig of the Heritage Foundation.

He adds, "I don't know why the administration hasn't asked lawmakers to do that."