
Book Review

A Patriot's Guide to Cheney's Power-Grab

by Edward Spannaus

Takeover, The Return of the Imperial Presidency and the Subversion of American Democracy

by Charlie Savage

New York; Little, Brown and Company, 2007

400 pages, hardcover, \$25.99

The Terror Presidency, Law and Judgment Inside the Bush Administration

by Jack Goldsmith

New York, W.W. Norton & Company, 2007

256 pages, hardcover, \$25.95

Unchecked and Unbalanced, Presidential Power in a Time of Terror

by Frederick A.O. Schwarz, Jr. and Aziz Z. Huq

New York, The New Press, 2007

276 pages, hardcover, \$25.95

With our nation and the world plunging, at this very moment, into an economic-financial crisis of unprecedented dimensions, these three books perform a valuable service. Each makes it clear, from differing vantage points, that the unconstitutional seizure of dictatorial powers by the Bush-Cheney gang was not a spontaneous response to the terrorist attacks of Sept. 11, 2001, but a planned move toward dramatically undermining our Constitution.

The lesson must be drawn: Unless this Administration is removed, its claims of unbridled, unilateral authority for the Executive Branch represent an appropriation of power that can pave the way for a fascist dictatorship.

The first of these three books to be published was *Unchecked and Unbalanced*, in April of this year; it presents the most in-depth historical analysis of the argument for unchecked executive power, and reveals its British pedigree. Its authors are both associated with the Brennan Center for Justice at New York University: Aziz Z. Huq directs the Liberty

and National Security Project there; F.A.O. Schwartz, Jr. was the chief counsel for the Church Committee, the special Senate committee, created in 1975 to investigate intelligence abuses.

The other two books were published in early September. Savage's *Takeover* is the most comprehensive account of the Cheney-Addington power grab.* Savage is a *Boston Globe* reporter who did pioneering work on this Administration's unprecedented use of "signing statements" to declare its intention to ignore and override legislative enactments with which it (more precisely, David Addington, Cheney's legal counsel) disagreed.

Shortly after the disclosure of the Administration's warrantless wiretapping program, Dick Cheney told reporters that the President had all the authority he need to override the Foreign Intelligence Surveillance Act or any other law, based on his inherent powers as Commander-in-Chief in time of war. Cheney directed reporters to the minority views appended to the 1987 report of the Joint Congressional Committee investigating the Iran-Contra affair. Savage took Cheney's advice, and dove into not just the Iran-Contra investigation, but into Cheney's role during the Nixon and Ford Administrations—the heyday of what historian Arthur Schlesinger, Jr. called the Imperial Presidency. Digging into the Cheney files at the Ford Presidential Library, Savage found material that sheds light on the formation of Cheney's views toward Executive power, but it doesn't explain the why, or who is pulling Cheney's strings, although it's obvious that the Vice President is not exactly an original thinker.

Completing the trilogy is *The Terror President*, by Jack Goldsmith, who headed the pivotal Office of Legal Counsel (OLC) in the Justice Department from October 2003 until June 2004, at which point he resigned over his disagreements with the Administration's policies. The OLC is charged with providing advice to the Executive Branch on the legality and constitutionality of proposed actions. Goldsmith was selected for that position due to his apparent agreement with the Administration's anti-terror policies, but when he actually reviewed the secret memoranda prepared by his predecessors in OLC, he was appalled by their shoddy and unsupportable legal reasoning—which quickly pitted him in bitter confrontation with David Addington.

* To this reviewer's knowledge, he was the first to disclose, in December 2001, that aides to Cheney were involved in drafting the Military Order which created military commissions, and since then, *EIR* has highlighted the role of David Addington, who was initially unknown to the public and even to reporters covering these matters. (I was alerted to Addington's and Cheney's role by military and military-linked lawyers who were furious at the civilian-concocted military commission scheme, which they saw as a stain on the long and honorable tradition of military justice in the United States.) It is, in one sense, gratifying to see, five or six years later, that Cheney's evil legal genius Addington is getting the attention he deserves. However, it is pathetic that Addington and his boss are still in positions of power, long after they should have been driven out by patriots determined to save the Republic—were more than a handful of any such persons to be found in the U.S. Congress.

A Monarchy or a Republic?

As important as is Schwartz's and Huq's recounting of the Church Committee's findings about the FBI's Cointelpro, the CIA's Operation CHAOS, and the NSA's surveillance of Americans, far more valuable is the book's leitmotiv: that the powers claimed by Cheney and his allies in this Administration are the powers of a European monarchy, completely unsuitable for our republic, as established by the 1787 Constitution. The book opens with Nixon's infamous statement that "when the President does it, that means it's not illegal," and then proceeds to the damning follow-up statement in the Minority dissent to the 1987 Iran-Contra report—which Cheney suggests was written by Addington—that, "the Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the laws."

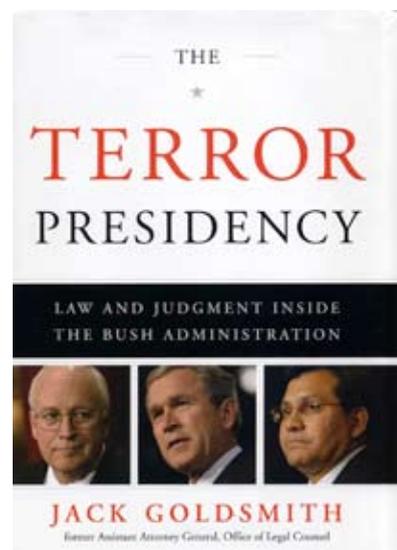
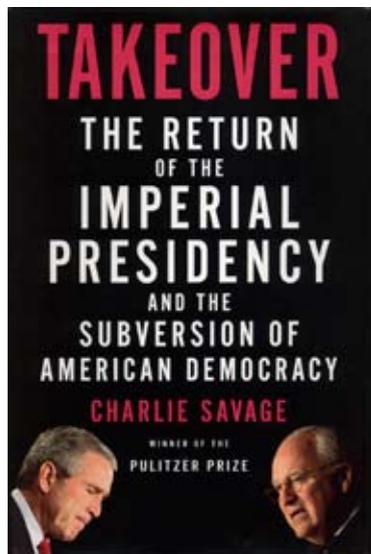
The authors show that this idea, that the Executive can set aside legitimately enacted laws in times of war or national emergency, is nowhere to be found in our Constitution, but rather, "This claim finds precedent in the seventeenth-century British kings' royal 'prerogative' power to 'suspend' or 'dispense' with laws enacted by Parliament."

Within the Bush-Cheney Administration, the argument that the President inherited the plenary powers of the King was explicitly argued by John Yoo, the deputy head of the OLC. This was not new for Yoo; in academic articles written in 1996-97, Yoo praised the British model of government, and argued that British history ought to guide the interpretation of the war-time powers of a U.S. President. Schwartz and Huq take note that Yoo cited John Locke to the effect that cumbersome legislatures "should not interfere in the executive branch's war decisions."

"It was Locke who furnished the closest model for the power the Administration seeks today," Schwartz and Huq write, and it was Locke in particular who argued for a prerogative power by which the prince could act in contradiction to the law. But, they write, quoting one historian, "by the time of the American Revolution, the Founders viewed Locke's prerogative as 'so odious in its very name ... but nobody ever thought but to hate it, and to thank God it was utterly exterminated.'"

In a 2004 article (after he left the Justice Department), in which Yoo defended the practice of extraordinary renditions, he was still basing his arguments on British practice, and writing that that understanding of the Constitution's allocation of powers between Congress and the President is informed by the unwritten British Constitution's allocation of powers between Parliament and the Crown.

"For Yoo, the 'original understanding' of the Constitution is not Madison's. It is King James I's," Schwartz and Huq write. And not surprisingly, they point out, this view of pre-



Independence practices associated with European monarchies, was incorporated into the most infamous of what became known as the torture memos, the Aug. 1, 2002 "Bybee Memo," which contended that Congress has no power to legislate anything which would interfere in the Commander-in-Chief's power to control methods of interrogation.

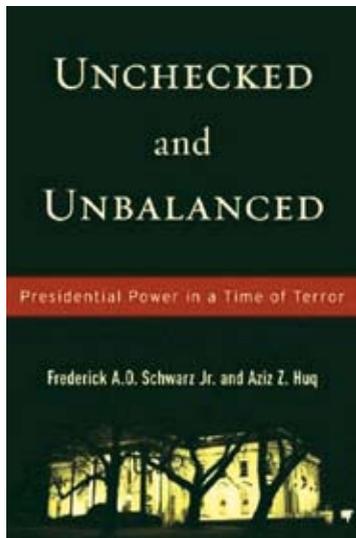
Lincoln and FDR: Not a Precedent

This takes us into the theme of the "Imperial Presidency"—but before taking that up, we should dispense with the simple-minded notion that the necessity for strong Presidential powers in times of crisis, means conceding the argument to Addington and Yoo, or to the advocates of the "unitary executive."

To their credit, all three books make a sharp distinction between the manner in which emergency powers were exercised by Presidents Abraham Lincoln and Franklin Delano Roosevelt, and what the "presidentialists" of today promote. Even Jack Goldsmith, a conservative who accepts the notion of prerogative power, notes that although Lincoln, after the attack on Fort Sumter, took a number of actions which are reserved to the Congress under the Constitution—raising an army, borrowing money on the credit of the United States, suspending the writ of habeas corpus, imposing a blockade on the South—but, in contrast to the secrecy and unilateralism of the Bush Administration, Lincoln informed Congress (which was not in session at the time of Fort Sumter), publicly defended his actions, and asked Congress to ratify them.

Likewise, FDR took emergency actions outside of his formal authority as President, but always openly, explaining what he was doing, and challenging Congress to use its Constitutional powers to take action to avoid disaster.

Addington, whom he observed first-hand, "had no such instincts," Goldsmith writes. "To the contrary, long before 9/11 he and his boss had set out to reverse what they saw as



Congress's illegitimate decades-long intrusions on 'unitary' executive power." Addington's notion of the "unitary executive," Goldsmith contends, was far different even than the version propounded in the 1980s Reagan Administration, which was that the President should have complete control over Executive Branch agencies. To Addington, it meant that the President could rule *without* Congress, and that Congress could not in any way infringe

on the President's powers as Commander-in-Chief. Lincoln and Roosevelt were not "executive power ideologues," says Goldsmith; neither was concerned with expanding executive power as an end in itself, as are Cheney and Addington.

Savage, in *Takeover*, makes the case that this is not a partisan issue, and that it has been Democratic Presidents, as much as Republican, who were responsible for establishing the "Imperial Presidency."

The seeds of this were laid down by Teddy Roosevelt, Savage demonstrates, who declared that the President had a broad "residuum of powers," to do anything he was not specifically forbidden to do. "Without seeking prior Congressional approval, [Teddy] Roosevelt launched the project to build a canal in Panama, sent the U.S. fleet around the world, and dispatched U.S. troops to intervene in the Dominican Republic and Cuba."

To the contrary, Franklin D. Roosevelt vastly expanded the scope and powers of the Federal government, but always by working with Congress. When the Supreme Court balked, Roosevelt called on Congress to take perfectly legal and constitutional measures to expand the Court. (Although Savage and the others don't mention it, FDR's March 9, 1937 Fireside Chat, in which he explained his so-called "court-packing" scheme to the American people, in terms of the Constitution's commitment to the General Welfare, and sought the population's support, is exemplary of how a morally strong President approaches such matters in times of national emergency.)

Likewise, when FDR sent supplies to Britain in 1940, in apparent violation of the Neutrality Act, he did not claim that he had an "inherent" right to violate a law passed by Congress. And as Goldsmith also points out, in stark contrast to the current occupants of the White House, FDR consulted with Congress, and educated the public, every step of the way, also doing the same with the Lend-Lease program in 1941.

There was another model of a "strong executive" during the 1930s Great Depression. As we have previously shown (*EIR*, Jan. 6, 2006), the *Führerprinzip* doctrine, authored by Carl Schmitt, the "Crown Jurist" of the Third Reich, is another way of saying that in times of emergency, the leader *is* the law. Schmitt's doctrine, that in war-time, when the state confronts a mortal enemy, all law flows from the leader for the sake of the preservation of the nation, is the real precedent for the "unitary executive" doctrine as promulgated by Addington and Yoo.

This is not taken up in any of the three books under review, but it must be kept in mind to understand the true significance of the evil policies put into practice by Cheney's cabal of lawyers.

Truman, Nixon, and the 'Imperial Presidency'

We return now to Savage's account, which pinpoints the post-war Administration of Harry Truman as crucial in the rise of the "Imperial Presidency." Whereas previously, Congress had normally reclaimed the powers it had ceded in war-time, Truman used the emergency climate of the onset of the Cold War to expand his powers as Commander-in-Chief, claiming for the first time in U.S. history that he could take the country into a major war on his say-so alone. In 1950, he sent U.S. troops to fight North Korea without Congressional authorization, asserting his "inherent" powers as Commander-in-Chief. Similarly to today, Congress, not wanting to appear soft on Communism, did not block Truman's action.

Two years later, again citing his inherent powers, Truman took over the nation's steel industry to block a strike which he claimed would endanger the war effort. This was invalidated by the U.S. Supreme Court, in a landmark ruling which Addington, Yoo & Co. utterly ignored in the early years of this Administration.

By the time Nixon became President, the powers of the Presidency to act without Congress were inflated beyond anything in U.S. history. Nixon, with Cheney at his side, pushed matters to their breaking point.

Savage points out that Cheney's first job in the Nixon Administration was as Donald Rumsfeld's assistant at the Office of Economic Opportunity, which had been established by Congress as part of Lyndon Johnson's War on Poverty. Rumsfeld's charge was to bring OEO to heel, and to dismantle Congressionally mandated anti-poverty programs he didn't like, such as the Office of Legal Services. Cheney threw himself eagerly into the task.

After Nixon's forced resignation, Rumsfeld was made President Gerald Ford's Chief of Staff, with Cheney again as his deputy. When Rumsfeld was appointed Secretary of Defense, Cheney, 34, became White House Chief of Staff. One of his principal functions there, was to stonewall the Senate investigation of intelligence abuses being headed by Sen. Frank Church, a former Army Intelligence officer.

Even during his sojourn in Congress, beginning in 1979,

Cheney was a leading proponent of unfettered Executive power, strongly backing aid to the Contras in violation of Congressional prohibitions, and loudly supporting the U.S. invasion of Grenada, the bombing of Libya, and other military deployments abroad.

The outlines of the rest of Cheney's career are fairly well known. Suffice it to say that by the time Cheney selected himself as George W. Bush's Vice President, his agenda was fully formed. What Savage fleshes out, is the scope of Cheney's setting and controlling the agenda for the Bush White House. Apart from the well-known stories of how Cheney and Addington rammed through their detention and interrogation policies over the opposition of the uniformed military and the State Department, the almost air-tight secrecy surrounding Cheney's energy task force, and the blugeoning of Congress around the Patriot Act and its renewal, Savage details Cheney's control in lesser-known situations, such as in selecting Supreme Court nominees, his long-time fight to place the Judge Advocates General in the military services under the thumb of civilian appointees, and his demand that *all* legislation be routed through the Vice President's office before going to the President for signing. This was, of course, to enable Addington to go over bills with a fine-tooth comb, looking for provisions that should be the subject of Presidential semi-secret "signing statements," asserting the President's right to ignore any laws Addington deemed inconsistent with his doctrine of the "unitary executive."

One element Savage does not take up, is Cheney's putting himself in charge of all emergency and counter-terrorist planning in May 2001. Between that time and Sept. 11, while counter-terrorism coordinator Richard Clarke was begging for action, Cheney's task force never met, and the Administration, for reasons yet to be explained, made no preparations for the type of attack which hit on 9/11. The previously well-functioning Federal Emergency Management Agency (FEMA) was virtually dismantled, with the consequences evident in the Hurricane Katrina disaster.

What is particularly valuable in Goldsmith's book, are his first-hand descriptions of the inner workings of the White House. He shows how the ever-present Addington controlled discussions in the White House Counsel's office, noting that there is no reason that the Vice President's lawyer should even be in the room when the head of the OLC is advising the counsel to the President. He attributes this to former White House Counsel Alberto Gonzales's utter lack of experience in dealing with military and national security matters, contrasted with Addington's 20 years of maneuvering through the Federal bureaucracy on the minutiae of national security law, combined with the fact that Addington wielded enormous clout because it was understood that he spoke for Cheney, who exercised a powerful influence over President Bush.

Upon taking charge of the OLC, Goldsmith began reviewing the office's key policy memos, mostly drafted by his friend John Yoo, and found them to be fundamentally flawed. This

threw him almost immediately into increasingly bitter conflict with Addington, who did not take well to hearing disagreements from anyone in the inner circles of power.

The first point of confrontation was over the application of the Geneva Conventions, and detention and interrogation policies. This was followed by Goldsmith's review of the warrantless wiretap program, which he concluded was unlawful. He took his concerns to Attorney General John Ashcroft and Deputy Attorney General James Comey, who agreed with him; this led directly into the now-famous confrontation in Ashcroft's hospital room, and the unprecedented threat by as many as 30 top Justice Department officials to resign, if the program was not changed.

The substance of what was at issue in the wiretap program is still not known, although there is abundant reason to believe that it involved massive scooping-up of telephone call and e-mail information on Americans, and then subjecting this information to data-mining programs similar to the Poindexter "Total Information Awareness" program which Congress tried to shut down in 2003. For Congress to now even be considering legislation on electronic surveillance, without knowing what was done previously and what triggered the threat of mass resignations, is the height of irresponsibility, and a gross violation of its Constitutional duties.

A Permanent Threat

After the publication of the Goldsmith and Savage books, a friendly debate broke out between the two. Savage pointed out the contrast between his view of the permanence of expansions of Executive power at the expense of the other two branches, with that of Goldsmith, who argues that Cheney & Co. overreached, triggering a backlash which resulted in a net weakening of Executive power.

Speaking at a Sept. 17 Constitution Day event sponsored by the Law Library of Congress and the Constitution Project, Savage stated that the vast expansion of Executive power promoted by Cheney and Addington is likely to result in permanent damage to the Constitutional system of checks and balances.

During the question period, this reviewer asked Savage about the implications of the Cheney-Addington drive toward dictatorial powers, under conditions of economic crisis and social unrest. Savage said he had not considered it in those terms, but he did elaborate on his view that these changes in the constitutional structure will tend to be permanent. Another panelist, former Congressman Mickey Edwards (R-Okla.), who is quoted a number of times in Savage's book, pointed out that under conditions of economic distress, people tend to look to a strongman, and he recommended *It Can't Happen Here*, Sinclair Lewis's 1935 novel about an anti-FDR fascist coup d'état in the United States. Edwards concluded by saying that he agreed that the precedents set by Cheney are very dangerous, "if what you're suggesting [about the economic crisis] is true."