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Promises Broken: Obama's Attack on the Constitution

President Obama began his presidency with great promise, publicly pledging to end many of the Bush administration attacks against the U.S. Constitution. Obama had pledged during his initial election campaign to end signing statements as a back-door method of legislating (usurping the legislative branch's powers under Article I of the Constitution), warrantless surveillance (violating the Fourth Amendment), detention without *habeas corpus* (Fifth Amendment) or trial (Sixth Amendment), torture (Eighth Amendment), and excessive executive branch secrecy under the "executive privilege" and "state secrets" claims, and pledged that he would not engage in offensive wars without the approval of Congress (Congress' power under Article I, Section 8).

During his first week as President, Obama appeared to be making great progress toward fulfilling those promises to return the executive branch of government to the limits of the U.S. Constitution and Bill of Rights. Obama signed three executive orders to ban torture and limit interrogations to the Army Field Manual, to close Guantanamo prison within one year and grant detainees in the war on terror prisoner-of-war status, and to limit the use of executive privilege and executive branch secrecy.

Since that first week, however, Obama has beaten a fast-track retreat on nearly all of these promises related to the U.S. Constitution and, in some instances, even committed worse offenses against the Constitution than the Bush administration. Following is a survey of those campaign promises and how Obama has fulfilled or — in nearly every case — reneged on them.

Signing Statements: Total Backtrack

Candidate Obama told the *Boston Globe* on November 20, 2007 that he would never use signing statements — a public announcement by the President attached to a bill Congress has enacted into law — to undo the will of Congress. He correctly noted that the Bush administration had unconstitutionally done precisely this on a regular basis:

> I will not use signing statements to nullify or undermine congressional instructions as enacted into law. The problem with this administration is that it has attached signing statements to legislation in an effort to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation. The fact that President Bush has issued signing statements to challenge over 1,100 laws — more than any president in history — is a clear abuse of this prerogative.

Yet within months of taking office, Obama had already used signing statements to put Congress on

notice he would ignore provisions of laws he had signed on foreign relations, as well as on domestic spending bills. Even Congressmen in his own party complained to Obama in a letter that he had unconstitutionally usurped the exclusively legislative power to make rules for the spending of federal monies.

"We were surprised to read your signing statement in which you expressed the view that you are constitutionally free to ignore the conditions duly adopted in the legislative process regarding funding for the international financial institutions," Congressmen Barney Frank (D-Mass.) and David Obey (D-Wis.) wrote in a letter to Obama July 21, 2009. "During the previous administration, all of us were critical of the President's [i.e., Bush's] assertion that he could pick and choose which aspects of congressional statutes he was required to enforce. We were therefore chagrined to see you appear to express a similar attitude."

Obama upped the executive-branch-arrogance ante with a signing statement on four of his "czars" in April 2011. In a bill he helped to broker to stop the government from shutting down, Obama brazenly declared he would ignore the law's provisions to defund the "czar" positions. Obama's signing statement noted that the bill would "prohibit the use of funds for several positions that involve providing advice directly to the President," but that "Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers." In short, Obama said he would ignore the clear law about federal funding for his "czars," themselves created without any explicit congressional authority. Of course, this is a clear violation of the Constitution. Article I, Section 9 of the U.S. Constitution stipulates, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," and Section 8 stipulates that all laws must be passed by Congress.

Obama turned the U.S. Constitution on its head in that signing statement, taking for himself and the imperial presidency a power that is exclusively reserved to Congress. James Madison noted that this was a vital power of the legislative branch in *The Federalist No. 58*:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

Indefinite Detention Without Trial, Habeas Corpus: Total Backtrack

Obama's campaign website pledged that "as president, Barack Obama will close the detention facility at Guantanamo." Obama has broken this promise, issuing an executive order in March 2011 keeping the prison open.

While there's nothing about the Guantanamo prison itself that is unconstitutional, the chief objection to Guantanamo has been that it has been a symbol of keeping detainees outside the reach of the law. And Obama's campaign in 2008 noted this:

> The right of habeas corpus allows prisoners to ask a court to determine whether they are being

> lawfully imprisoned. Recently, this right has been denied to those deemed enemy combatants. Barack Obama strongly supports bipartisan efforts to restore habeas rights.

Indeed, Article I, Section 9 of the U.S. Constitution bans the President from denying habeas corpus, and the Fifth and Sixth Amendments guarantee "due process of law" and a "trial by jury" without any exceptions. The United States even gave the very worst perpetrators of the holocaust during World War II a trial by jury, despite the risk of a German backlash and Nazi resurgence. Yet within a month of taking office, Obama administration officials had taken exactly the same view as the Bush administration with regard to detainees challenging their imprisonment in court. The *New York Times* reported on February 21, 2009, "The Obama administration has told a federal judge that military detainees in Afghanistan have no legal right to challenge their imprisonment there, embracing a key argument of former President Bush's legal team."

Since that time, Obama has ruled that about 50 of those detained at Guantanamo would remain imprisoned forever without a trial by jury, including even trial by a military commission jury. Even today, at Bagram Air Force Base in Afghanistan — which has 10 times the number of detainees as Guantanamo — none of the 1,700 detainees can challenge their detention in a court.

Abolish Torture: Progress, but Not Completed

President Obama issued an executive order January 22, 2009 designed to end torture. The executive order purported to restrict interrogations to methods in the Army Field Manual, comply with Geneva accords on treatment of prisoners of war, and restrict extraordinary rendition to states engaging in torture. Obama's executive order required of U.S. government officials that detainees "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment)."

And Obama has appeared to have made some progress in minimizing some of the worst torture excesses during the Bush administration. "Waterboarding" has apparently been discontinued.

But news reports of torture of detainees continue to reach the news media, especially from secret "black site" prisons in Afghanistan. The *Washington Post* reported black site torture continued into 2009, which included punching, slapping, and prolonged 24-hour-a-day darkness and isolation, sleep deprivation, and forced nudity. This torture and secret prison network has apparently continued to this day. "The most secretive of roughly 20 temporary sites is run by the military's elite counterterrorism unit, the Joint Special Operations Command, at Bagram Air Base," Associated Press writer Kimberly Dozier wrote on April 8, 2011. Dozier reported much of the same torture tactics being employed, including forced nudity and sensory deprivation in 24-hour dark cells. *Wired* magazine observed that all Obama did was transfer the government body responsible for torture. "Under President Obama, the CIA is barred from holding terrorism detainees in secret prisons. That's the Joint Special Operations Command's job now."

Warrantless Surveillance: Total Backtrack

Asked by the *Boston Globe's* Charlie Savage on November 20, 2007, "Does the president have inherent powers under the Constitution to conduct surveillance for national security purposes without judicial warrants, regardless of federal statutes?" Obama responded:

> The Supreme Court has never held that the president has such powers. As president, I will follow existing law, and when it comes to U.S. citizens and residents, I will only authorize surveillance

for national security purposes consistent with FISA and other federal statutes.

Obama also added: "Warrantless surveillance of American citizens, in defiance of FISA, is unlawful and unconstitutional." On a campaign flyer, "The War We Need To Win," Obama categorically pledged to "Eliminate warrantless wiretaps."

But Obama's record on unconstitutional warrantless surveillance is no different from that of the Bush administration. By April 2009, the Obama administration had pledged to keep intact the Bush-era NSA surveillance program, and to fight for it in court. "In a dangerous world," Obama said in a statement released April 16, 2009, "the United States must sometimes carry out intelligence operations and protect information that is classified for purposes of national security. I have already fought for that principle in court and will do so again in the future."

Obama also sought renewal of the Patriot Act without amendment (despite a campaign pledge to the contrary) and even expanded FBI warrantless access to Americans' Internet traffic.

"State Secrets" and Executive Privilege: Total Backtrack

Candidate Obama pledged to curb the excessive Bush administration use of executive privilege and the "state secrets" privilege. Asked by the *Boston Globe*, "Does executive privilege cover testimony or documents about decision-making within the executive branch not involving confidential advice communicated to the president himself?" candidate Obama stressed in 2007 that he would use executive privilege as a means to keep advice from his close staff advisers confidential and candid. But he added, "I believe the Administration's use of executive authority to over-classify information is a bad idea."

But Obama has utilized the same pseudo-legalistic argumentation as the Bush administration in court to justify ignoring the Fourth Amendment to the U.S. Constitution and Congress' ability to know the facts.

The American Civil Liberties Union noted in testimony before the House Judiciary Committee on December 9, 2010 that both Obama and Bush had "invoked the privilege to block a challenge to the government's authority to use lethal force against a U.S. citizen without due process. This once-rare tool is being used not to protect the nation from harm, but to cover up the government's illegal actions and prevent further embarrassment."

In fact, according to the Electronic Frontier Foundation, Obama has used the so-called "state secrets privilege" even more broadly than the Bush administration. Moreover, the Obama administration has even argued in court that the new reason it needs to have warrantless surveillance powers is itself a state secret; i.e., they can't even tell the courts why they want to keep warrantless surveillance secret.

How secretive is the Obama government? Ironically, Obama even classified the ceremony of an "openness in government" award it had received.

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What's no longer a secret is that the Obama administration has continued the attack on the U.S. Constitution. Obama has even expanded that attack. Only Congress can restore the Constitution by reining in the runaway executive branch's attack on the Constitution and Bill of Rights. Extreme measures — such as impeachment — may be the only remedy that will restore the U.S. Constitution.

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