October 26, 2007

The Path to Power

BILL MOYERS: Welcome to the JOURNAL.

For our friends in California, we begin with condolences for the miseries of fire, fear, and evacuations. And to those of you living in the Southeast, where suddenly people are talking about an epic shortage of water, we'll be watching and hoping you show the rest of us how to meet one of the century's looming challenges. Where I grew up in Texas farmers would look up at the scorching skies and say: "You never miss the water until the well runs dry."

Now on to our report this week. Some of you will remember that back in July the conservative scholar Bruce Fein was here on the JOURNAL expressing outrage over expansion of presidential powers under Bush and Cheney.

BRUCE FEIN: Take for instance the assertion that he's made that when he's out to collect foreign intelligence, no other branch can tell him what to do. That means he can intercept your emails, your phone calls, open your regular mail, he can break and enter your home, he can even kidnap you, claiming I'm seeking foreign intelligence there is no other branch - Congress can't make it illegal, judges can't say this is illegal. I can do anything I want.

BILL MOYERS: Many others have joined Bruce Fein's chorus of concern. This week it's the muckraking populist Jim Hightower. Writing in his newsletter the Hightower Lowdown, shown here on the Web site Alternet, he asks the question: "Is a presidential coup under way?"

He goes on to say, "The Constitution is being trampled, the very form of our government is being perverted, and nothing less than American democracy itself is endangered."

We've posted Jim Hightower's Lowdown on our web page at pbs.org so that you can read the whole of his argument about it.

But here's some background as to why so many people of different political stripes are alarmed. President Bush and Vice President Cheney espouse the theory of the unitary executive. That means the President's orders can't be reviewed, questioned, or altered by the other two branches of government. He alone can say what the law means, or whether or not it will be enforced or ignored. In effect, George W. Bush says his powers must be unilateral and unchecked.

Critics claim the President has used the war on terror to put himself above the law and that he has created a secret presidency of classified decisions and orders, that approve extraordinary renditions, torture, illegal detentions, and wiretapping without warrants with the collaboration of big telecom companies. This boundless secrecy and surveillance evokes images counter to American values.
Remember "The Lives of Others" - the movie that won this year's Academy Award for best foreign language film....a story of life under East Germany's secret police. The critic Roger Ebert said: "The movie is relevant today, as our government ignores habeas corpus, practices secret torture, and asks for the right to wiretap and eavesdrop on its citizens. Such tactics, he said, did not save East Germany; they destroyed it, by making it a country its most loyal citizens could no longer believe in." You want to say it couldn't happen here but we've been close before. During the cold war with the Soviet Union and then the hot war in Vietnam, a secret government mushroomed in this country.

SENATOR FRANK CHURCH (1976): The attitude in the White House seemed to be, "If in the wake of Vietnam I can no longer send in the marines, then I will send in the CIA.

BILL MOYERS: Thirty two years ago, at the end of the Vietnam War, Congress turned over the rock and found all kinds of things squirming under it — lethal activities from electric pistols and poison pellets to Mafia connections and drug experiments. As well as illicit acts by the executive branch ranging from secret attempts by the CIA to subvert foreign democracies to unlawful domestic spying under such code names as Chaos, Cable Splicer, Garden Plot and Leprechaun. The Select Senate Committee headed by Frank Church found, no mailbox, no college campus, no television had been safe. The Church Committee led Congress to reject presidential claims of 'inherent authority' and restore some checks and balances, including putting an end to electronic surveillance without warrants.

WALTER MONDALE: This kind of unrestrained, illegal, secret intimidation and harassment of the essential ability of Americans to participate freely in American political life shall never happen again.

BILL MOYERS: But advocates of presidential prerogatives chafed at the restrictions and began then to try to reverse them. One of the people who argued most vociferously that a president could exceed the laws was a former White House Chief of Staff who had been elected to Congress. His name. Dick Cheney. Look at this excerpt from the documentary 'Cheney's Law' that was broadcast on FRONTLINE last week:

NARRATOR: Cheney had learned some hard lessons early in his political career.

NEWSCASTER: They are now boarding the helicopter, walking through the honor guard-

NARRATOR: He has been watching presidents for three decades.

NEWSCASTER: the president now at the door, a final wave-

NARRATOR: It began at the end of the Nixon administration.

NARRATOR: Thirty-three-year-old Dick Cheney saw it firsthand.

RON SUSKIND, AUTHOR, THE ONE PERCENT DOCTRINE: He viewed the searing moments of the Nixon administration, which he was there in the front seats for, as a diminution of what the president ought to be.

NARRATOR: Then in 1975, he became President Ford’s Chief of Staff.

DAVID GERGEN: Dick Cheney was in about his mid-30s, for the first time in his life really having a substantial amount of power and responsibility.

SEN. SAM ERVIN (D-NC), WATERGATE COMMITTEE CHAIRMAN: The subcommittee will come to order-

NARRATOR: Cheney watched Congress assert its authority over the president.

JAMES MANN, AUTHOR, RISE OF THE VULCANS: You have a wave of Congressional investigations-

SEN. FRANK CHURCH (D - IDAHO): The program certainly appears to violate the 4th Amendment to the Constitution.
RICHARD PERRIE: -and Cheney is trying to fight off these investigations.

PROF. JACK GOLDSMITH, UNIV. CHICAGO LAW SCHOOL, 1997-'02: He’s talked about how Congress unduly burdened the president and in a way that he believed was unconstitutional.

DAVID GERGEN: And Dick came out of that absolutely committed to the idea of restoring the powers of the presidency.

BILL MOYERS: When the terrorists struck on 9/11, Dick Cheney was Vice President, with the opportunity to claim extraordinary power in the name of national security. The FRONTLINE documentary showed how he did it.

JAMES RISEN, THE NEW YORK TIMES: They began to spy on Americans in an unprecedented way, in a way that they never had done before, by creating a special program to eavesdrop on Americans without warrants on their international phone calls and also by mounting a massive data mining operation.

NARRATOR: The data from billions of telephone calls and emails were being captured by The National Security Agency. But in the 1970s, Congress had prohibited such activities without the approval of a special court.

BARTON GELLMAN: The initial justification, legally, comes from yet another memo by John Yoo, in which he says that Congress may no more regulate the president’s gathering of intelligence against enemies than it can decide where he deploys troops on the battlefield.

JOHN YOO: If it’s part of the president’s power as a constitutional matter to gather intelligence, including intercepting communications, then that’s a power that’s included and Congress can’t seize it just because it wants to.

NARRATOR: The program was top secret when Jack Goldsmith decided to review it.

JACK GOLDSMITH: It’s the most important thing during my time in government, and it is central to the government’s counterterrorism policy. So the stakes were enormous.

BILL MOYERS: The stakes are still enormous and the argument over presidential power has grown more contentious because Democrats in control of Congress keep calling administration officials to testify only to be rebuffed by claims of executive privilege.

(SENATE JUDICIARY TESTIMONY, JULY 11, 2007)

SARA TAYLOR: ... asked me to follow the president’s assertion of executive privilege ...I was a deputy assistant to the president. I was a commissioned officer. I took and oath and I take that oath to the president very seriously.

SEN. LEAHY: No the oath says that you take an oath to uphold and protect the Constitution of the United States. That is your paramount duty. I know the president refers to the government as being his-it’s not. It’s the government of the people of the America.

BILL MOYERS: At recent Senate hearings over the president’s nominee for attorney general, Michael Mukasey. The battle over presidential power flared again.

(MICHAEL MUKASEY ATTORNEY GENERAL CONFIRMATION HEARING 10/18/2007)

SEN. LEAHY: Can a president authorize illegal conduct? Can a president put somebody above the law by authorizing illegal conduct?

MR. MUKASEY: The only way for me to respond to that in the abstract is to say that if by illegal, you mean contrary to a statute -- but within the authority of the president to defend the country, the president is not putting somebody above the law, the president is putting somebody within the law. Can the president put somebody above the law? No. The president doesn’t stand above the law. But the law emphatically includes the Constitution. It starts with the Constitution.
SEN. LEAHY: We'll go back to -- we'll go back to this. I'm troubled by your answer. I see a loophole big enough to drive a truck through...

BILL MOYERS: The question now: who defines torture?

(MICHAEL MUKASEY ATTORNEY GENERAL CONFIRMATION HEARING 10/18/2007)

SEN. SHELDON WHITEHOUSE (D-R.I.): So is waterboarding constitutional?

MR. MUKASEY: I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional.

SEN. SHELDON WHITEHOUSE (D-R.I.): If water-boarding is constitutional is a massive hedge.

MR. MUKASEY: No, I said, if it's torture. I'm sorry. I said, if it's torture.

SEN. SHELDON WHITEHOUSE (D-R.I.): If it's torture? That's a massive hedge. I mean, it either is or it isn't. Do you have an opinion on whether waterboarding, which is the practice of putting somebody in a reclining position, strapping them down, putting cloth over their faces and pouring water over the cloth to simulate the feeling of drowning -- is that constitutional?

MR. MUKASEY: If it amounts to torture, it is not constitutional.

SEN. SHELDON WHITEHOUSE (D-R.I.): I'm very disappointed in that answer. I think it is purely semantic.

MR. MUKASEY: I am sorry.

BILL MOYERS: But listen to this voice from the past. From 1974. The Watergate scandals had revealed astonishing crimes and secret abuses of power by President Nixon and the men around him. The House Judiciary Committee was deliberating Nixon's impeachment. Congresswoman Barbara Jordan of Texas went straight to the heart of the matter:

BARBARA JORDAN: My faith in the constitution is whole it is complete it is total and I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.