Augustus, Tiberius, Caligula and Claudius – Rome’s first emperors, and all members of the Julio-Claudian family – all wrestled with how to establish the power of the executive within the context of the authority of the Republican Senate. This article in Sunday’s NY Times Magazine speaks directly to this issue in a contemporary context.

“After the Imperial Presidency,” by Jonathan Mahler


Ask a long-serving member of the United States Senate — like, say, Patrick Leahy of Vermont — to reflect on the Senate’s role in our constitutional government, and he will almost invariably tell you a story from our nation’s founding that may or may not be apocryphal. It concerns an exchange that supposedly took place between Thomas Jefferson and George Washington in 1787, the year of the constitutional convention in Philadelphia. Jefferson, who had been serving as America’s ambassador to France during the convention, asked Washington over breakfast upon his return why he and the other framers created a Senate — in addition to the previously planned House of Representatives and presidency — in his absence.

“Why did you pour that coffee into your saucer?” Washington reportedly replied.

“To cool it,” Jefferson answered.

“Even so,” Washington said, “we pour our legislation into the senatorial saucer to cool it.”

The United States Senate has been called the world’s greatest deliberative body. By serving six-year terms — as opposed to the two-year terms in the more populist and considerably larger House of Representatives — senators are supposed to be able to stand above the ideological fray and engage in thoughtful and serious debate. What’s more, the filibuster rule allows a single senator to halt the creep of political passions into the decision-making process by blocking a given vote.

Perhaps nowhere is the ethos of the Senate, this commitment to principle over politics, more memorably captured than in the classic 1939 film “Mr. Smith Goes to Washington,” when Jimmy Stewart, who plays an idealistic freshman senator wrongfully accused of graft, refuses to yield the floor until he has cleared his name. (After almost 24 hours, he winds up passing out from exhaustion but is ultimately exonerated.)

“We’re supposed to be the conscience of the nation,” Senator Leahy told me recently in his Washington office, which is decorated with New England folk art, including a print of a dog and cat cuddling on a throw rug that looks as if it could be on loan from a bed-and-breakfast in his home state.

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1 Jonathan Mahler is a contributing writer. His most recent book is “The Challenge: Hamdan v. Rumsfeld and the Fight Over Presidential Power.”
Leahy is one of Congress’s so-called Watergate babies. He was elected to the Senate following Nixon’s resignation in 1974, and his arrival on Capitol Hill coincided with the sweeping bipartisan effort to investigate the Nixon administration’s abuses of executive power. “There was a sense inside the Senate among both Republicans and Democrats that the government had gotten off course and that we had a responsibility to find out what happened,” Leahy recalled.

Weeks after the 34-year-old Leahy was sworn into the Senate, his Democratic colleague from Idaho, Frank Church, began his legendary probe into domestic spying during the cold war. Church’s bipartisan Senate committee interviewed more than 800 officials and held 21 public hearings, uncovering widespread abuses by the C.I.A. and the F.B.I. “I had just come from eight years as a federal prosecutor,” Leahy told me, “so I knew a little something about convening grand juries and issuing subpoenas. But this was on a scale magnified a thousand times anything I had ever seen.”

If Leahy speaks about that era with a certain nostalgia, it’s because he recognizes that the power of the Senate, which blossomed during his early years in Congress, has now withered. The story of the United States is in many ways the story of the push and pull between the executive and legislative branches. Consider just the last half-century or so. In the late 1940s, Congress moved aggressively to recoup some of the power it had lost to Franklin Delano Roosevelt, who took full advantage of his presidential prerogative during a 12-year tenure that spanned both the Depression and World War II. (Among other things, Congress passed the 22nd Amendment, which limited future presidents to two terms in office.) President Harry Truman and other cold warriors pushed back; the ’50s and ’60s were dominated by the high-stakes diplomacy and covert overseas operations of the Soviet Union-United States conflict, shifting the balance of power back to the executive — until the aforementioned Nixon reaction. Yet much of the authority that Congress recaptured during the post-Watergate and post-Vietnam administrations of Carter and Ford it gave back when Ronald Reagan assumed the presidency and flexed his presidential muscle to push through an ambitious agenda that included massive tax cuts and an escalation of America’s global struggle against Communism.

During Bill Clinton’s tenure, what was shaping up as a strong presidency was brought to heel by an independent counsel and impeachment hearings. By the time Clinton finished his second term, it looked to many experts as if the White House would be working with diminished authority for years to come: the presidential historian Michael Beschloss called George W. Bush “the first truly postimperial president.”

As it turned out, the power of the president soared to new heights under Bush. Many of the administration’s most aggressive moves came in the realm of national security and the war on terror in particular. The Bush administration claimed the authority to deny captured combatants — U.S. citizens and aliens alike — such basic due-process rights as access to a lawyer. It created a detention facility on Guantánamo
Bay that it declared was outside the jurisdiction of the federal courts and built a new legal system — without any input from Congress — to try enemy combatants. And it argued that the president’s commander-in-chief powers gave him the authority to violate America’s laws and treaties, including the Geneva Conventions.

The assertion and expansion of presidential power is arguably the defining feature of the Bush years. Come January, the current administration will pass on to its successor a vast infrastructure for electronic surveillance, secret sites for detention and interrogation and a sheaf of legal opinions empowering the executive to do whatever he feels necessary to protect the country. The new administration will also be the beneficiary of Congress’s recent history of complacency, which amounts to a tacit acceptance of the Bush administration’s expansive views of executive authority. For that matter, thanks to the recent economic bailout, Bush’s successor will inherit control over much of the banking industry. “The next president will enter office as the most powerful president who has ever sat in the White House,” Jack Balkin, a constitutional law professor at Yale and an influential legal blogger, told me a few weeks ago.

And yet the issue of executive authority scarcely reared its head in the presidential campaign. It wasn’t addressed directly in any of the debates, and aside from a Boston Globe questionnaire on executive authority given to all of the primary candidates in December of last year, neither Obama nor McCain had much to say on the stump or in interviews about the power of the office he aspired to occupy.

“Ambition must be made to counteract ambition,” James Madison wrote, meaning that America’s divided system of government would depend on both the president and Congress forcefully pursuing their respective roles — and in so doing, acting as a natural check on each other. Why did that fail to happen during the Bush years, and will a new president and newly elected Congress act to undo the excesses of presidential power over the past eight years?

Senator Lindsey Graham, the baby-faced South Carolina Republican who first stepped onto the national stage as a House manager of Clinton’s impeachment trial, has not been an easy figure to pin down in the struggle over presidential power. At times, he was one of the Bush administration’s most reliable allies in the Senate, notably when it came to the executive branch’s assertion that it could block enemy combatants from challenging their detentions in federal court. In the fall of 2005, days after the Supreme Court agreed to hear a Guantánamo detainee’s lawsuit against President Bush, Graham came to the administration’s rescue with a bill devised to kick the case off the court’s docket and to make all pending and future detainee challenges illegal. (The bill passed, but the justices nevertheless refused to dismiss the case, Hamdan v. Rumsfeld.)

But Graham, a former Air Force lawyer, was also one of a handful of Republican senators who resisted the executive branch’s claim that the president could authorize coercive interrogations of detainees. He memorably accused Alberto Gonzales, then the nominee for attorney general, of “playing cute with the law” in order to justify that claim and was a member of the triumvirate of so-called Republican mavericks — along
with Senators John McCain and John Warner — who drafted a bill aimed at preventing the torture of enemy combatants.

“The Bush administration came up with a pretty aggressive, bordering on bizarre, theory of inherent authority that had no boundaries,” Graham told me one day last summer in his Senate office. “As they saw it, the other two branches of government were basically neutered in the time of war.”

As has now been widely noted, the chief architect of the Bush administration’s expansive view of executive power was Vice President Dick Cheney, whose interest in pumping up the presidency dates to the mid-1970s, when, as President Ford’s chief of staff, he had a front-row seat for Congress’s post-Watergate crusade against the executive branch. Ten years later, as a member of the House of Representatives, Cheney dissented from the majority of his colleagues in the Iran-contra affair, arguing that President Reagan possessed the power to provide arms to the contras — even though Congress had expressly prohibited him from doing so.

Yet even absent a Cheney, it’s very likely that any president, Republican or Democrat, would have accrued more authority in the aftermath of 9/11. The president needs the flexibility to move quickly and forcefully to protect the country during wartime, even if this entails concealing information from the public and encroaching on civil liberties. “It is of the nature of war,” Alexander Hamilton wrote, “to increase the executive at the expense of the legislative authority.” And Hamilton was speaking about conventional warfare — not the war on terror with all its novel challenges.

In a sense, it’s hard to fault Congress for the historic surrender of its authority during the Bush years. Like the Iran-contras arms deals, many of the actions that the administration undertook after 9/11 — like the rendition of suspected terrorists to “ghost prisons” in foreign countries and the warrantless wiretapping of American citizens — were kept secret, even from lawmakers, which made oversight impossible. The administration also did everything it could to block unwanted disclosures about its policies, routinely invoking the formerly obscure “state-secrets privilege” to avoid revealing details of its treatment of enemy combatants.

When the administration did choose to pass on information to Congress, it did so selectively, not always reliably, and with a very clear political goal in mind. In “Angler: The Cheney Vice Presidency,” Barton Gellman, a reporter at The Washington Post, wrote that when Cheney was lining up support for the invasion of Iraq, he met with Representative Dick Armey, the Republican majority leader. Behind closed doors, he told Armey, who had been skeptical, that Saddam Hussein had made “substantial progress” toward building a miniature nuclear weapon. Armey duly voted for the invasion.

Still, Congress was hardly unaware of what was going on. Many of the most aggressive positions that the Bush administration staked out after 9/11 — from the creation of Guantánamo to what amounted to the suspension of America’s Geneva Conventions obligations governing the treatment of captured combatants — were a
matter of public record. Not only did Congress not flinch at such unilateral actions, but it also helped enable the expansion of presidential authority by passing the USA Patriot Act, which gavethe executive sweeping new law-enforcement powers.

It wasn’t until the fall of 2005, a year and a half after the detainee-abuse scandal at Abu Ghraib became public, that Congress passed a piece of legislation intended to limit, rather than expand, the president’s wartime authority — the torture bill. I asked Graham why he and his fellow senators waited so long to try to reclaim their place in the constitutional order. “The Congress was intimidated after 9/11,” he answered. “People were afraid to get in the way of a strong executive who was talking about suppressing a vicious enemy, and we were AWOL for a while, and I’ll take the blame for that. We should have been more aggressive after 9/11 in working with the executive to find a collaboration, and I think the fact that we weren’t probably hurt the country. I wish I had spoken out sooner and louder.”

Graham’s explanation — that the 9/11 attacks threw Congress off its game — tells only part of the story. Congress, like the White House, was in Republican hands from 2003 to 2006; it’s impossible to ignore the role politics played in the institution’s passivity.

Single-party rule in Washington has not always translated into a timid Congress. In 1941, Harry Truman, then a largely unknown Democratic senator from Missouri, drove his Dodge across the country to expose profiteering by private military contractors under F.D.R., who was supplying weaponry to the Allied powers. During the Carter administration, the Democratic Congress aggressively investigated among other things the shady financial dealings of the president’s brother, Billy.

The Senate is a different place now, though. Consider this telling bit of institutional history, as related by Robert Caro in his continuing biography of Lyndon Johnson. When Johnson was elevated to the vice presidency in 1961, he suggested to Senator Mike Mansfield, his successor as Senate majority leader, that he be permitted to continue presiding over the Democratic caucus. Mansfield initially agreed — but the rest of the caucus revolted. The vice president might be the ceremonial president of the Senate, they argued, but to empower him to attend their caucuses, let alone run them, would create a dangerous precedent.

By contrast, in recent years, you could set your watch by the arrival of Vice President Cheney’s motorcade on Capitol Hill for the Republican caucus’s weekly strategy sessions. He was at times known to bring Karl Rove with him as well. “You can imagine the amount of dissent that goes on with the two of them sitting there,” Leahy told me.

As Leahy sees it, these weekly trips to Capitol Hill were part of the administration’s strategy to marginalize Congress by encouraging Republican senators to put party loyalty ahead of institutional loyalty. He draws a sharp contrast between Cheney and vice presidents like George H.W. Bush and Walter Mondale, who made an effort to get to know members of both parties and ensure that their voices were heard
inside the Oval Office. “I think in a way this administration set out to make the Republican Party on the Hill an arm of the White House,” Leahy told me.

But the politicization of the Senate didn’t begin with Bush. Norman Ornstein, a resident fellow at the American Enterprise Institute, traces the roots of the trend to the Congressional elections of 1994, when the Republicans took back the House after 40 years in the minority. Led by Newt Gingrich, a new group of fire-breathing freshman lawmakers arrived on Capitol Hill with an ambitious, highly partisan agenda. Finally in the majority, the House Republicans gleefully wielded their newfound subpoena power to harass the Democratic president, Bill Clinton, by, for example, taking dozens of hours of testimony on whether he abused the White House Christmas-card list for the purposes of fund-raising.

According to Ornstein, the Senate, and in particular its leader through 1996, Bob Dole, was at first skeptical of Gingrich and his ideological minions in the House. But Dole’s successor, Trent Lott, was more partisan and thus more willing to engage in the politicization of Senate actions like the confirmation of Clinton’s judicial appointments.

It was the Clinton impeachment trial in 1999, though, that finally pushed the Senate into the trenches of political warfare and polarized the institution once and for all. Senators now saw themselves as members of their respective political parties first — and representatives of their constituencies second. After George W. Bush’s election in 2000, many Republicans on Capitol Hill saw it as their duty to protect him from their Democratic colleagues. “The Republican leaders in both houses of Congress made the decision that they were going to be field soldiers in the president’s army, rather than members of an independent branch of government,” Ornstein says.

Next year, the Senate will lose one of its most beloved and respected figures, the 81-year-old Virginian John Warner, who decided not to seek re-election to a sixth term. The son of a World War I field surgeon, Warner served in both the Navy and the Marines and then did a tour as President Nixon’s secretary of the Navy before joining the Senate in 1979. He has been on the powerful Senate Armed Services Committee for decades and has served as its chairman on three occasions.

Scanning the framed photographs in Warner’s office in the Senate’s Russell Building — on horseback with Ronald Reagan; in the Persian Gulf with John Glenn; conferring, pipe in mouth, with Barry Goldwater — you can’t help feeling that an era is passing with his retirement. A tall, courtly and dapper man with a thick mane of white hair, Warner is the model of the senator as elder statesman, a man who isn’t swayed by the mercurial moods of the nation or the ideological passions of his party. Over the years, this has produced some memorable acts of apostasy. In the 1994 Virginia Senate election, for instance, Warner refused to support the conservative hero Oliver North in his run against the incumbent Democrat, Senator Charles Robb.

Warner’s Senate career began improbably, after Virginia’s Republican nominee, Richard Obenshain, died in a plane crash weeks before the general election. When he got the phone call inquiring if he’d be willing to run for Senate, Warner and his wife at
the time, Elizabeth Taylor, were getting ready to leave for Ireland, where Taylor was to serve as grand marshal at the Dublin Horse Show. “There were about 10 big bags of her luggage sitting in the front hall,” Warner told me recently. Instead, he stayed behind and kicked off his Senate campaign — “Liz Taylor’s Next Role: Senator’s Wife?” asked a headline on the cover of The Saturday Evening Post — and wound up winning.

The popular perception of Warner when he first arrived on Capitol Hill in 1979 was hardly generous: a Doonesbury cartoon portrayed him as a “dim dilettante who managed to buy, marry and luck his way into the Senate.” But Warner soon established himself as a shrewd politician and a powerful defender of the importance of the Senate’s role in our constitutional government, a role that he now worries the Senate is in the process of ceding. “The tripod has got to stand on these three legs,” he told me, referring to America’s three coequal branches of government, “and if one leg gets weak, the tripod begins to not supply the support this country needs. I see this institution getting weak.”

I met with Warner on a Friday in late September, the day after Treasury Secretary Henry Paulson first announced that the government was working on a massive financial bailout plan. Warner was annoyed that the executive branch hadn’t given the Senate a heads-up about its intentions. “Until about 8 o’clock last night I didn’t know a damn thing about what these guys were doing,” he told me. “I had to pull over to the side of the road so I wouldn’t have an accident listening to the secretary of the Treasury’s press conference on the radio.” What bothered him even more, though, was the fact that the Russell building was largely deserted: “Where is everybody? We’ve got a major crisis facing America.”

The central problem, as Warner sees it, is the soaring cost of Senate elections. By political necessity, senators spend as much time as possible back in their home states building up their treasuries for their next race. To accommodate this need, most Senate votes are scheduled between Tuesday and Thursday. “When I came here, the Senate would work Mondays through Fridays,” Warner recalls. “Old Bob Byrd was the majority leader, and if he was not happy, you stayed here all weekend, without a lot of notice.”

The fact that many senators have to spend so much time away from Capitol Hill means less time for Senate work. It has also eroded the fabric of the institution. It’s now common for senators to leave their families back home and basically commute to Washington. “In my days here the Senate was kind of a family,” Warner recalls. “It was a lot easier to cross the aisle because you just had dinner the night before with the senator and his wife or your kids were in school together. Now the relationships between senators just don’t develop.”

Even the most independent-minded senators are still members of a political party. When that party also happens to be in control of the White House, senators often find themselves trying to balance their party loyalty with their duty to keep a close eye on the executive branch. This can be especially tricky for those in leadership positions,
as Warner was during his last term as chairman of the Armed Services Committee from 2003 to 2006.

As a veteran of the Senate, Warner was hardly a stranger to dealing with presidential administrations eager to impose their will on Congress. But he was nevertheless surprised by Defense Secretary Donald Rumsfeld’s highhanded approach to the Legislature. “Warner was bewildered by Rumsfeld’s way of doing his business, his attitude that the Senate should just confirm his people, validate his programs and shut up,” one former senior staff member of the Armed Services Committee told me. (The senator himself declined to discuss the specifics of his relationship with the former defense secretary.)

Still, apart from the occasional sternly worded letter, Warner tried assiduously to prevent his relationship with Rumsfeld from becoming openly hostile. When the defense secretary publicly snubbed one of Warner’s longtime staff members, Les Brownlee, leaving him as acting Army secretary for months on end, another one of Brownlee’s Senate mentors, the chairman of the Appropriations Committee, Ted Stevens, directed his staff to find one of Rumsfeld’s pet Pentagon projects so that he could withhold financing for it. (Rumsfeld still refused to relent.)

Warner, too, had a powerful lever to use against the defense secretary: the Armed Services Committee has to confirm all high-level appointments to the Pentagon. Warner could have held up any number of Rumsfeld’s nominees, yet he declined to do so. “Look, I’ve got to work with this guy,” the senator would say, according to the former staff member, whenever one of his aides urged him to move more aggressively against Rumsfeld.

Warner was also a captive of his own background. As a former secretary of the Navy, Warner had a powerful reverence for the institution of the defense secretary and the Pentagon in general. This, combined with his loyalty to the Republican Party, made him at times deferential. When Warner requested a full committee briefing with a press conference to follow on the activities of the Lincoln Group, a public-relations firm under contract with the United States military that was paying to have stories placed in Iraqi newspapers, Rumsfeld instead asked him to come to the Pentagon for a private briefing to prevent one of the committee’s Democrats, Edward Kennedy, from exploiting the issue. Warner acceded.

When Warner was determined to challenge the Republican administration, he had to contend with his right flank inside the Senate. After the Abu Ghraib scandal broke in April 2004, Warner was taken aback to learn that the Pentagon had known about the detainee abuse for months but had never so much as informally briefed him on it. Many of Warner’s Republican colleagues urged him to let the administration deal with the scandal on its own, but Warner insisted on convening public hearings and summoned Rumsfeld to testify as the first witness. He even ordered that Rumsfeld be sworn in, a breach of common practice that infuriated the defense secretary.
To Warner, if anything cried out for aggressive Congressional oversight — not simply a hearing room filled with news cameras but an independent bipartisan probe — Abu Ghraib was it. But opening a special investigation would have required the approval of the majority of the Senate. In the days of Iran-contra, this was not a problem; the creation of the special Senate subcommittee that investigated the illegal transfer of arms to the contras passed overwhelmingly. Warner knew he wouldn’t be able to get enough support from his fellow Republicans for a similar probe into Abu Ghraib. So he instead resigned himself to conducting oversight on the Pentagon’s own internal investigations into the scandal.

Yet even this was too much oversight for many of Warner’s fellow Republicans. As the hearings moved forward, several conservative senators turned up the heat on Warner, both publicly and privately. Ted Stevens, a longtime friend and colleague, angrily confronted Warner one afternoon in the Senate cloakroom. “No more hearings,” he said. “Their attitude was that these hearings were just going to provide propaganda for the insurgents and be politically embarrassing for the Republican president during an election year,” says the former Armed Services staff member.

Things reached a head in late May 2004, when a handful of Republican senators on the Armed Services Committee came to Warner’s office with an ultimatum: if he continued with the hearings, they warned, they were no longer going to be able to support his chairmanship. To underscore their seriousness, they presented him with a letter signed by all of the committee’s Republicans save for Senators McCain, Graham and Susan Collins of Maine. It was unprecedented for a group of junior senators to take such a confrontational posture toward a senior figure like Warner, effectively threatening to strip him of his chairmanship; Warner was convinced they had been put up to it by Rumsfeld himself.

Warner refused to stop the hearings, but the focus of his inquiries subtly shifted. He was less confrontational and more concerned with trying to prevent future abuses than with assigning blame for those that had already occurred. He and his colleagues eventually passed the torture bill, which was devised to address what they considered to be the root cause of Abu Ghraib — the murky interrogation standards promulgated by the administration. But Warner never urged the president to fire or even censure the official ultimately responsible for those standards, the secretary of defense.

Warner told me that Rumsfeld’s successor, Robert Gates, has been much more cooperative with Congress. Nevertheless, he says that today’s Senate is still no match for an executive branch that works 24 hours a day, seven days a week — and for a president who, from the day he is sworn into office, has a vested interest in increasing his authority at the expense of Congress. “Every president, as he leaves the Capitol steps and gets into his limo proceeding to the inaugural, is calculating, How soon can I put that place behind me?” Warner says.
You need not look any further than Senator John McCain’s efforts to give Congress a voice in the treatment of detainees to grasp the difficulty that the legislative branch faces trying to push back against a determined president.

McCain first got involved in the torture fight in early 2005, when it was by no means a popular cause, particularly inside his own party. “At a time when there was not a single person in the United States who had any influence who was willing to take this issue on, he took it on,” says the executive director of Human Rights First, Elisa Massimino, who worked with McCain on the torture bill.

The White House did everything it could to stop McCain, Warner and Graham from going forward with their torture bill. Bush repeatedly threatened to veto the legislation, and Cheney met behind closed doors with the three senators on three separate occasions to persuade them that limiting the president’s power to authorize coercive interrogations would hurt the war against terror.

McCain dug in his heels, though. When Stephen Hadley, the president’s national security adviser, called Warner to urge the senators to at least soften the language of the legislation, a Warner aide alerted a McCain staff member. In a matter of minutes, McCain was bounding down the hall toward Warner’s office. He emerged triumphantly a few minutes later, joking to Warner’s staff, “I had to go in there and waterboard him.”

After months of work, the senators succeeded in getting the torture bill passed with a vetoproof majority, 90-9. But the president subsequently undid all of their efforts with a stroke of the pen. The language of the bill required that all military interrogations be conducted according to the United States Army Field Manual, which defines what methods can and can’t be used and outlaws “cruel, inhumane or degrading” treatment of prisoners. When Bush signed the bill into law at the end of 2005, he issued a presidential signing statement asserting the right, as commander in chief, to determine what constitutes “cruel, inhumane or degrading” treatment. For good measure, he reserved the power to violate the torture bill itself if he thought it necessary for the purposes of national security.

McCain’s experience with the Military Commissions Act, another bill governing the treatment and trial of detainees, followed a similar arc. Once again, he took the lead in drafting the legislation. Once again, the White House leaned on him. And once again, the president had the last word.

The stickiest issue was how to deal with the Geneva Conventions. The Supreme Court ruled in June 2006 in Hamdan v. Rumsfeld that the Geneva Conventions were applicable to America’s conflict with Al Qaeda. But the White House argued that the treaty’s prohibition against “outrages upon personal dignity” was too sweeping, placing too many restrictions on the C.I.A.’s methods of interrogation. The president wanted Congress to define, narrowly, what would constitute such outrages.

To an extent, McCain, Warner and Graham were legislating in the dark. They were trying to place limits on how far interrogators could go, but to do that, they
needed to know what techniques had been used in the past and with how much success, and the White House wouldn’t tell them.

In late September 2006, after a weekend-long negotiating session, the two parties reached a compromise. The bill came under fire from many Democrats but passed. For their part, the three senators were happy with the deal they struck. They had made a lot of sacrifices but had stood their ground on the all-important question of the Geneva Conventions. The bill did not restate America’s obligations under the international treaty. Rather, it put the onus on the administration to issue an executive order listing the interrogation techniques it considered legal under the existing language of the Geneva Conventions. This, the senators believed, would force the administration’s hand by requiring it to publish its interrogation techniques while also allowing Congress to hold the administration accountable going forward.

Nine months after signing the bill into law, the president issued his executive order. Not only did it fail to address specific interrogation techniques, but it also created more wiggle room for C.I.A. interrogators by barring only “willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual.” (In other words, outrageous acts of personal abuse done for the purpose of gathering intelligence were permissible.) No sooner had the order been issued than the C.I.A. revived its program of coercive interrogations, which had been dormant since the Supreme Court’s ruling that all detainees must be treated in accordance with the Geneva Conventions.

“It was frustrating,” one of McCain’s aides told me. “We were expecting the administration to lay things out there in a good-faith way.” Still, the three senators did not publicly press the president to rescind the order.

In as much as McCain spoke to the issue of presidential power during the campaign, his attitude appeared to shift. In the Boston Globe’s 2007 questionnaire, he articulated a less expansive view of the White House’s authority than Bush. McCain said he would never issue a signing statement if elected president and that he didn’t believe the president had the authority to violate any laws. He also said that he would “do his utmost to accommodate Congressional requests for information.”

Yet as the campaign progressed, McCain seemed to tack toward a more robust view of the president’s authority. Last spring, he voted against a bill that would have restricted the C.I.A.’s interrogation techniques — explicitly outlawing waterboarding, among other things — and in so doing siphon power away from the president. And in June, one of his top aides wrote in National Review magazine that the senator believed that Bush’s warrantless-wiretapping program, which bypassed the special court established by Congress in 1978, was both constitutional and appropriate.

Senator Arlen Specter plays squash almost every day, usually before dawn in the basement of the Federal Reserve building, one of the few remaining courts in Washington designed for hardball, the largely outdated form of the game that he prefers. He keeps a record of the scores of all of his matches against a rotating group of
opponents, including a 27-year-old staff member whom the senator has been known to call at 5:30 a.m. with directions to get dressed and meet him on the court in half an hour. Even now, at the age of 78 and having recently survived Hodgkin’s disease, Specter is enormously competitive. During a recent match, when he suspected that I might be easing up a bit, he barked at me to play harder.

After our match, over breakfast in the Senate dining room, I asked Specter, who was chairman of the Judiciary Committee from 2005 to January 2007, how he thought Congress had fared vis-à-vis the executive branch during the Bush administration. “Decades from now,” he answered, “historians will look back on the period from 9/11 to the present as an era of unbridled executive power and Congressional ineffectiveness.”

Having risen to the Senate from the courtrooms of Philadelphia, Specter is a stickler for process. Even now, he becomes visibly angry when he recalls reading in the newspaper that the National Security Agency was illegally wiretapping United States citizens. “I was madder than hell,” he told me. “It was a flat violation of the Foreign Intelligence Surveillance Act, and it violated the well-established custom of briefing the chairman and ranking member of the Judiciary Committee on matters like this.”

When I asked Specter whether he thought he had done everything he could to prevent the executive branch from expanding its authority, he became a little indignant: “I fought it every step of the way — I’m still fighting it.”

There is truth to this, though the story is more complicated. During the Bush years, Specter did write numerous pieces of legislation intended to bolster Congress’s role in the war on terror. In February 2002, he introduced a bill that would have established a system of trials for suspected Al Qaeda detainees. It never made it out of the Senate Armed Services Committee, leaving the administration to devise the trial system itself. In 2006, Specter proposed the Presidential Signing Statements Act, which would have empowered Congress to file suit to have a signing statement declared illegal by a federal court. This, too, never went anywhere.

As Specter sees it, the very same rules that are intended to ensure thoughtful deliberation inside the Senate put it at a disadvantage with respect to the White House. “The executive branch requires the decision of one person, as opposed to the legislative branch, which requires 10 votes just to get my bill out of committee,” he says.

But Specter also missed his share of opportunities to stand up for Congress in the battle over the president’s wartime powers. When Attorney General Alberto Gonzales testified before the Judiciary Committee in early 2006 about the illegal wiretapping, Specter didn’t require that he be sworn in, nor did he ask for any of the Justice Department’s internal legal memorandums on the secret surveillance program. What’s more, Specter’s own legislative response to the warrantless-wiretapping scandal, which he proposed in 2006, was widely seen as a capitulation to the White House.

Like Warner, Specter was no doubt torn between his obligations to the Senate and his duties to the Republican Party. And Specter’s hold on the chairmanship of the
Judiciary Committee, a job he had coveted since being elected, was more precarious than Warner’s. Because of Specter’s support for Roe v. Wade, the Republican leadership had agreed to give him the job only if he agreed not to block the president’s judicial nominees. He was basically on probation from the moment he took over the chairmanship.

Specter’s most noteworthy concession to the executive branch came when he voted for the Military Commissions Act of 2006. Despite McCain’s and Warner’s enthusiasm for the bill, Specter strenuously opposed it because it empowered the White House to strip detainees of their ability to challenge their imprisonments in federal court. He argued that the Constitution permitted the president to suspend this particular right — the right to habeas corpus — only in times of rebellion or invasion. Specter drafted an amendment to the act to preserve the habeas rights of detainees and delivered an impassioned speech on the Senate floor in defense of habeas corpus, tracing its roots back to Magna Carta of 1215. After his amendment was narrowly defeated, he vowed to vote against the legislation. Yet when the Military Commissions Act came up for a vote less than 24 hours later, Specter supported it.

One former Judiciary Committee staff member told me that his change of heart was animated partly by his loyalty to Rick Santorum, the conservative Republican who held Pennsylvania’s other Senate seat at the time. To the displeasure of the right wing of the party, Santorum helped rescue Specter during a tough primary fight against a more conservative opponent in 2004. At the time of the Military Commissions Act vote in the fall of 2006, Santorum was engaged in a difficult re-election battle of his own. Fearing that Specter’s opposition to the bill would hurt his own cause among conservatives — who still blamed Santorum for Specter’s re-election — Santorum made a personal plea to Specter to vote for it.

Specter told me that he wasanguished over the Military Commissions Act vote. “I’ve voted about 9,000 to 10,000 times in the Senate, and that was the most agonizing vote I’ve ever had,” he said. “Bork and Thomas were nothing compared to that one,” he added, referring to the confirmation battles of the two Supreme Court nominees, “and Bork and Thomas were toughies.”

Specter said he would not have voted for the bill if he hadn’t thought that the Supreme Court would strike down the section that dealt with habeas corpus. His instincts there were correct. Last June, the Supreme Court concluded in Boumediene v. Bush that the Military Commissions Act did indeed represent an unconstitutional suspension of habeas corpus.

In the long history of the court before Bush, it ruled against a sitting president only a handful of times during a period of armed conflict; the Boumediene decision represented the fourth time that the court rebuked President Bush in the war on terror. Perhaps nothing better sums up both the ambitions of the administration and the passivity of Congress, which left its duty to oversee the prosecution of the war largely
in the hands of a judiciary that has historically been loath to interfere with the president’s war-making power.

Several weeks ago, I met with Warner’s Democratic successor as Armed Services chairman, Senator Carl Levin of Michigan. A rumpled-looking man with gold-rimmed glasses and a gray comb-over, Levin pulled a document out of a beat-up briefcase to illustrate, as he put it, “what happens when you have a majority of Congress protecting the president.”

Levin explained that in early 2003, before the war in Iraq began, he asked George Tenet, the director of the C.I.A., at a public hearing if the C.I.A. had given the United Nations its list of so-called high-level suspect sites where United States intelligence officers thought it most likely that inspectors would find weapons of mass destruction. Tenet answered yes. Levin told Tenet he thought he was wrong.

In a private setting later that day, Levin brought up the subject again. “I said: ‘George, I’ll tell you, I’ve looked at your report, and there is a significant number of sites that haven’t been shared. This is a pretty important issue in terms of whether or not we should be going into Iraq.’ ” Tenet agreed to double-check. Soon after, at another public hearing, Levin again asked Tenet about the high-level suspect sites. Tenet said that he had double-checked and that the C.I.A. had indeed shared its complete list with the U.N.

Levin told me he urged the Armed Services Committee, then in Republican hands, to press the issue, but he didn’t get anywhere, and as a member of the minority party, he lacked the power to convene hearings or issue subpoenas. Levin then showed me the document, a Senate Intelligence Committee report dated almost two years later, pointing at one of the few lines that wasn’t redacted: “Public pronouncements by administration officials that the Central Intelligence Agency had shared information on all high- and moderate-priority suspect sites with United Nations inspectors were factually incorrect.”

To Levin’s way of thinking, the Democrats have made great strides toward restoring the balance of power since retaking Congress in 2006. There’s no question that they have engaged in more vigorous oversight. Levin has been behind one of the Senate’s most significant probes, investigating how tactics from the C.I.A.’s SERE (Survival, Evasion, Resistance, Escape) program, which was established to train American troops in surviving capture and resisting torture by enemies who don’t abide by the Geneva Conventions, were adopted by United States military interrogators in the war on terror.

Not all of the Democratic Congress’s oversight efforts have been as successful, though. A number of administration officials have invoked executive privilege rather than answer questions at hearings; others have simply refused to show up altogether, often ignoring subpoenas in the process. While hardly pleased, the Democrats have yet to issue a single contempt-of-Congress citation.
Nor has the Democratic Congress made much use of the rest of its tools against the executive branch. Take, for instance, the Senate’s power to confirm appointments. When President Bush nominated Michael Mukasey to serve as attorney general in the fall of 2007, the Senate could have easily insisted on any number of conditions before confirming him, even something as simple as a public statement that the president is bound by the laws passed by Congress. There was a clear precedent for such deal making. In 1973, the Senate refused to confirm President Nixon’s attorney general nominee, Elliot Richardson, until Richardson agreed to name a special prosecutor to investigate Watergate. The Senate even insisted that it be allowed to sign off on the name of the special prosecutor before moving ahead with Richardson’s confirmation. The Senate made no such preconditions with respect to Mukasey. In fact, he was confirmed even after stating during his confirmation hearing that the administration’s secret surveillance program was not illegal because the president has the right to ignore statutory law if he thinks it’s necessary to defend the country.

When I asked Levin what needs to happen for Congress to take back the rest of the ground that it ceded to the executive branch during the Bush years, he replied predictably, “We need a Democrat in the White House.”

For those concerned about the expansion of presidential power, Barack Obama’s answers to the Boston Globe’s 2007 questionnaire were encouraging. Among other things, he said the president can’t conduct surveillance without warrants or detain United States citizens indefinitely as unlawful enemy combatants. He also said that it’s illegal for the president to ignore international treaties like the Geneva Conventions and that if Congress prohibits a specific interrogation technique by law, the president cannot employ it. “The president is not above the law,” Obama said.

It would be a mistake, though, to view presidential power as a left-right issue. Historically, Democratic presidents have been no less eager than their Republican counterparts to leverage the authority of their office. Recall that the last Democrat to occupy the White House, Bill Clinton, launched airstrikes on Kosovo in a war against Yugoslavia without Congressional authorization and liberally invoked executive privilege during the various investigations into his private life and financial dealings.

History has shown that where you stand on executive authority is largely a matter of where you sit. Before his election, Abraham Lincoln criticized President James Polk for provoking the Mexican War; as president, Lincoln unilaterally suspended habeas corpus and ordered a blockade of the ports of rebel states. As a senator, Richard Nixon — of all people — criticized President Truman’s frequent invocations of executive privilege.

Bruce Fein, a Justice Department lawyer in the Reagan administration who is now a critic of presidential power, told me a few weeks ago that he expects the next president to “take everything Bush has given him and wield it with even greater confidence because Congress has given him a safe harbor to do so with impunity.” This may be overstating the point, but it’s worth keeping in mind that in the final year of
Bush’s presidency — while facing a Democratic Congress and historically low approval ratings — he was able to push through a federal bailout bill that vested almost complete control over the economy in the Treasury secretary (who reports to the president), not to mention a major rewriting of the 1978 Foreign Intelligence Surveillance Act that will make it easier for the White House to spy on American citizens.

At the president’s urging, the new FISA bill, which Obama and McCain supported, also went a step further, granting immunity to telecom companies that cooperated with the government’s secret surveillance program. As a result, we will probably never know how many people were spied on, what criteria were used to select them and what was done with the information gleaned from the wiretaps.

These are just a few of the many unanswered questions raised by the White House’s policies in the war on terror. Presumably, as more detainee lawsuits make their way through the federal courts, we will learn additional details about the mistreatment of enemy combatants, particularly because the new administration’s lawyers won’t have the same incentive to suppress such information. But there has been no talk of the newly elected Congress undertaking a sweeping investigation of the Bush administration’s activities along the lines of the Church Committee.

During my conversations with the senators, I sometimes had the impression that their irritation with the White House’s arrogance toward Congress had overshadowed their concerns about the administration’s policies themselves. I wondered if along the way they had lost sight of their duty to represent the interests of their constituents.

For all of the legislature’s complaints about being excluded from the political process during the Bush years, it seems fair to question whether Congress really wants to be a full partner in America’s government. Senators may not like being kept in the dark, but they seem to prefer to leave the big decisions — especially those concerning national security — to the executive. “There’s a psychology of vassalage to the president,” Fein says. “They don’t want to be out there on a limb.”

Given these diminished ambitions, even if the legislative branch does reassert itself in the next administration, what exactly will that mean? Will Congress simply insist on being asked for its blessing before empowering the president to do whatever he sees fit? And if so, what will it take for what the historian Arthur Schlesinger Jr. identified as democracy’s greatest virtue — “its capacity for self-correction” — to kick in and restore the constitutional balance?