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Imperial presidency has long history

Paul Starobin | *National Journal* | February 22, 2006

In the beginning was King Harry -- a modest sort who surely never expected to mount a throne. That can't be said of King Lyndon or King Richard -- both of whom became intoxicated by their lofty perch and, in the end, paid dearly for this character flaw. King Ronald seemed to combine regal purpose with a rare ability to wear the crown lightly, and King Bill proved, in his aw-shucks way, to be as casually high-handed as any of his predecessors.

And then arrived King George II, not to be confused with his relatively cautious father, King George I. Midway through the son's reign, either of two verdicts seem possible. Will he go down in history as The Protector, who responded with laudable dispatch at a time of grave national peril? Or will he be The Presumer, who exploited the dangers threatening his realm to grab powers that exceeded his charter?

The Imperial Presidency. It is often viewed as an abuse or even a subversion of the Constitution, but it can also be seen as a product of history and national ambition -- and even as its own political institution, with entrenched precedents and traditions that tend to survive the transient occupants of the Oval Office.

The Imperial Presidency can be defined, succinctly, as a structure in which enormous discretionary power to respond to national security crises and perceived dangers is concentrated in the office of the president. In this scheme, Congress, willingly or not, is only a bit player. Although the term has a pejorative connotation, it is not so much the existence of an Imperial Presidency that has spurred public backlashes as it is the abuses of power that have sometimes come with it. Richard Nixon comes to mind.

The birth and sustained growth of the Imperial Presidency are inseparable from America's self-adopted "world responsibilities," in the apt phrase of Harry Truman. "In one generation, we've come from an isolated republic, to the position of the leadership of the world," Truman declared a few months into



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the Korean War, which began without congressional authorization in June 1950. The American Age ushered in a new kind of presidency, designed to anticipate and, if need be, respond to threats from virtually anywhere on the globe.

Like all institutions created by the human hand, the Imperial Presidency is a work in progress. It is foremost the combined creation of the men who have held the presidential reins over the last six decades. The construction is despised by pro-Congress legal scholars and historians as well as by civil-liberties activists. But it is not, as critics sometimes suggest, an un-American creation. The modern architects have been working off a blueprint, or at least notes, supplied by no less a Founder than Alexander Hamilton, who clashed with Thomas Jefferson and (later) James Madison in his determination to establish a strong central government led by a robust executive.

In any case, Congress and the public have tended to be enablers of the Imperial Presidency, and the courts have mostly stayed out of the debate. Congress's greasing role can be seen in the fate of the most significant attempt by that body to limit the executive's national security powers: the 1973 War Powers Resolution, which required the president to gain Congress's express approval to keep troops in combat. The resolution was a failure.

"Frankly, if I were president, I would thumb my nose at this legislation," the majority leader of the Senate said in May 1988, at the tail end of the Reagan presidency. That judgment came from a veteran Democrat, still serving, who has never been a slouch in upholding the prerogatives adhering to his end of Pennsylvania Avenue: Robert Byrd of West Virginia.

Nor is the Imperial Presidency the province of any single ideological faction. In the post-Cold War era, advocacy for aggressive White House-led military intervention in conflicts around the globe has come not only from neoconservatives but also from so-called liberal war hawks, aiming to stop genocide in the Balkans and in Rwanda.

Such history is worth recalling at the outset of what looms as the most searching debate on presidential powers since the post-Watergate, post-Vietnam reforms of the 1970s. Critics of George W. Bush have long viewed him as abuser of executive powers -- and these critics believe that the president has been smoked out by the recent revelation that he authorized the National Security Agency to eavesdrop on terrorism suspects inside the United States without first obtaining warrants.

Congress is holding hearings, federal judges are demanding explanations, and the NSA's inspector general has launched an internal investigation. In certain quarters of Washington, there are even whispers of the "I" word: Impeachment.

Whatever Bush's fate, an obituary for the Imperial Presidency is premature. It has, after all, already survived Nixon's forced departure and Clinton's impeachment. After Bush, a new king -- or queen -- will undoubtedly wear the crown. Indeed, with the precedents that Bush is establishing for the president's "inherent authority" in such matters as using torture, the scope of executive powers may expand even more, political scientist Andrew Rudalevige, author of the recently published *The New Imperial Presidency*, noted in an interview.

America long ago ceased to be, if it ever was, the kind of grassroots Jeffersonian democracy that we often promote to the rest of the world. That said, the modern Imperial Presidency exceeds even Alexander Hamilton's ambitions for the office. Some 65 years into the Age of Hyper-Hamiltonianism -- and with the controversy over Bush's maneuvers intensifying -- let's try to understand how we arrived at this juncture.

Prince Alexander: The Worldly Philosopher

What was it that led Hamilton to think in such bold terms about executive powers? His views were, after all, at odds with the general spirit of the Yankee revolt against Britain's King George III. The answer begins with Hamilton's experience as a brash 20-year-old aide to Gen. George Washington in the Revolutionary War. Hamilton was the equal of Madison and Jefferson in his bookish attraction to political philosophy, but unlike them, he fought in the war and saw firsthand how easily it could have

been lost.

The young Hamilton frequently battled stubborn old generals in his efforts to make Washington's orders stick. Such encounters "strengthened his preference for strict hierarchy and centralized command as the only way to accomplish things," a biographer, Ron Chernow, observed in *Alexander Hamilton*.

Even more than that, Hamilton saw "centralized command" as the only way to save America from extinction. He became an implacable critic of the Articles of Confederation, a kind of national government by committee that presided during and after the Revolutionary War and gave the states near-sovereign powers.

Hamilton was the first to call for a gathering to write a new constitution -- in 1780, seven years before he and other Founders met in Philadelphia to write that document. Executive leadership was top on his mind. "We should blend the advantages of a monarchy and of a republic in a happy and beneficial union," Hamilton wrote in a letter to his friend James Duane.

Hamilton was both an American nationalist and a fan of the British system of government. That's not as contradictory as it sounds. At that time, the British Crown did not exercise absolute powers -- the Crown had wide powers in foreign affairs, but Parliament had the power of the purse.

At the Philadelphia convention, Hamilton proposed a president who would be elected for life, "on good behavior." That idea went nowhere. Nevertheless, some critics viewed the final result, a president with powers including those of commander-in-chief, as close to an elective monarchy. In debate over ratification of the Constitution, Hamilton vigorously defended the strong-executive plan in the essays that became known as *The Federalist Papers*.

"Energy in the executive is a leading character in the definition of good government," Hamilton wrote in *Federalist 70*, adding, "It is essential to the protection of the community against foreign attacks." With that premise set forth, he went on to explain why "the executive" should be represented not by a committee but by one person. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."

For modern defenders of the Imperial Presidency, Hamilton's musings are secular scripture. The controversial notion that a president has "inherent powers" or "inviolable powers" is routinely cited as a Hamiltonian interpretation of that first, pregnant sentence of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America." Step aside, Madison and Jefferson. Scratch an advocate of a strong executive and you'll invariably find a neo-Hamiltonian.

King Harry and Prince Dean: The Assumers

On June 25, 1950, the massive armies of the Communist regime of North Korea invaded the Republic of South Korea. The territory of the United States was not under attack, and America had no troops on the Korean Peninsula at the time.

So, why did alarm bells ring in Washington? Because, with the Soviet Union reasonably presumed to be the power behind the North Koreans, "it was an open, undisguised challenge to our internationally accepted position as the protector of South Korea, an area of great importance to the security of American-occupied Japan," Dean Acheson, Harry Truman's secretary of State, explained in his memoir, *Present at the Creation*.

"To back away from this challenge," Acheson continued, "would be highly destructive of the power and prestige of the United States."

Without a vote from Congress, for or against, Truman dispatched troops to repel the Korean invasion. This can be seen as the first defining precedent of the modern Imperial Presidency. True, Truman's predecessor, Franklin Delano Roosevelt, was certainly capable of acting imperiously, as in his failed

effort to pack the Supreme Court.

But FDR, in his first two terms, displayed great deference to Congress and in particular to the dominant isolationist sentiment there. And when America entered World War II, it was on the strength of Congress's power under Article I of the Constitution to "declare war."

But in the case of Truman's Korea precedent, Congress, in effect, willingly ceded its war powers responsibilities to the executive. Contrary to accusations leveled against him when the Korean War bogged down, Truman had not flouted the legislative branch.

"He personally consulted repeatedly with the joint leadership of Congress, asked repeatedly to address a joint session of Congress on the crisis, and even provided a draft resolution of approval for Congress to consider," Robert F. Turner, a war powers scholar at the Center for National Security Law at the University of Virginia, wrote in a 1996 paper based on a review of newly declassified records.

"And at every turn," Turner continued, "he was advised by congressional leaders of both parties to 'stay away' from Congress and assured that he had adequate powers to do what he was doing in Korea under the Constitution and the U.N. Charter." (The United Nations Security Council had approved a resolution holding that North Korea had breached the peace.)

Among those whom Truman consulted on the question of whether to seek a congressional declaration of war was the chairman of the Senate Foreign Relations Committee, Tom Connally, a Texas Democrat. "If a burglar breaks into your house," Connally told the president, "you can shoot at him without going down to the police station and getting permission."

Why was Congress so accepting of a diminished war powers role? The primary reason was an institutional self-abasement that was not entirely unearned. Pearl Harbor, the surprise attack on an unprepared country, destroyed isolationism as a credible national security strategy -- and it was Congress that had been the seat of that policy and had impeded FDR's push for a more interventionist tack to combat threats from Europe and the Far East.

Doubts about the wisdom of Congress playing a major role in foreign affairs now infected the institution itself. Senate Majority Leader Scott Lucas was among those who opposed calling Congress back from a recess to debate a response to North Korea's invasion.

On top of Congress's sense of its own inadequacy, the advisers who hovered around Truman had a high disregard for Congress's role. "We are in a position in the world today," Secretary of State Acheson said during the Korean crisis, "where the argument as to who has the power to do this, that, or the other thing is not exactly what is called for from America in this very critical hour."

It has often been the case that the princes of the Imperial Presidency, whose influence depends, after all, on the prestige of the presidential office, are the first to disparage Congress.

The courts were less acquiescent to the White House. The Supreme Court, for example, refused to permit Truman to use his wartime powers to seize control of steel mills shut down by a labor strike. But even that ruling is something less than a bright-line limitation on the Imperial Presidency.

In an oft-quoted decision, Justice Robert Jackson wrote, "There is a zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain.... In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."

Jackson's ruling proved prescient. In the era of the Imperial Presidency, the separation of powers has generally been less a matter of court decree than the outcome of "tests of power" between the congressional and executive branches. If Congress wants to check a president's power, it must first muster the political will to do so.

King Richard: The Abuser

The postwar Imperial Presidency attracted fawning members of the intellectual elite who were just about as dazzled by the specter of the new American global goliath as were the commanders-in-chief. The presidency, in the hands of its approving image-shapers, became a glamorous institution; Congress was, by comparison, fusty and passe.

"It must be said that historians and political scientists, this writer among them, contributed to the rise of the presidential mystique," Arthur M. Schlesinger Jr. wrote at the outset of his 1973 best-selling book, *The Imperial Presidency*, which made the term a staple of the political lexicon.

An acclaimed historian and a political liberal, Schlesinger had been an adviser to President Kennedy. In an earlier book, *A Thousand Days*, Schlesinger had all but deified JFK's truncated reign, which Jacqueline Kennedy had likened to Camelot. This book, and others during the Cold War era, gave the public a selective portrayal of the president, representing him as a Mount Olympus figure, ever occupied with fate-of-the-world problems.

An anxious citizenry, under instructions to repair to the bomb shelters in case of nuclear attack, was an easy sell for this sort of rendering. Under these circumstances, who wouldn't wish for a powerful protector?

The truth, of course, was that Imperial Presidents could sometimes make terrible mistakes, as did JFK when he secretly authorized the CIA-conceived plot to overthrow Fidel Castro in what went down as the disastrous Bay of Pigs operation. Presidents could be deceitful, too, as Lyndon Johnson arguably was in his twisted public presentation of the 1964 Gulf of Tonkin incident, which he used to justify a fateful escalation of the Vietnam War.

In the dark days of the Nixon era, Schlesinger was at long last beginning to sound an alarm. "The pivotal institution of the American government, the presidency, has got out of control," he declared in *The Imperial Presidency*.

In an intellectually honest rethinking of his own past perspective on the institution, Schlesinger argued that Nixon's presidency was "not an aberration but a culmination" of long-standing trends favoring greater executive powers. (He got nearly halfway through the book before launching into a detailed discussion of Nixon.) Having established the trend, Schlesinger indicted Nixon for an unprecedented misuse of presidential authority.

Nixon's presidency offered two core lessons about the Imperial Presidency. First, his reign demonstrated that the key post-World War II organs of national security, the National Security Agency and the Central Intelligence Agency, could also be used to threaten Americans. Nixon directed these agencies to spy on his domestic political critics so that he could undermine their opposition. The NSA specifically targeted Vietnam War protesters.

The other lesson was a positive one. The public would tolerate, even in some cases revere, an Imperial President, but it would not abide a flagrantly abusive one. Nixon's presidency collapsed because the public turned on him. The great check on the Imperial Presidency had been established: not Congress, not the courts, but the public.

Chasing public opinion, Congress passed the War Powers Resolution (over Nixon's veto) and imposed other constraints on executive power. But a new label that came into vogue -- the Imperiled Presidency -- proved a myth.

Although the Nixon scandals had stripped the presidency of its mystique, what Schlesinger in 1973 called the "decisive impetus" for the Imperial Presidency remained: "foreign policy," and in particular, as he put it, "belief in permanent and universal [global] crisis, fear of communism, [and] faith in the duty and the right of the United States to intervene swiftly in every part of the world."

Proof of the Imperial Presidency's survival did not have to wait for the election of Ronald Reagan. Jimmy Carter offered it in his final State of the Union Address on January 23, 1980, a month after Soviet forces had invaded Afghanistan. "An attempt by any outside force to gain control of the Persian

Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force," Carter declared.

His congressional audience whose members had played no role in the formulation of what *The Washington Post's* editorial page called a "historic and structural" enlargement of the security commitments of the U.S., responded to the announcement of the "Carter Doctrine" with bipartisan applause.

King George and Prince Richard: The Presumers?

Five years into his reign, George W. Bush has made a historic contribution to the Imperial Presidency. The original rationale for this institution -- the concentration of discretionary power over foreign affairs in the office of the president -- was the global war against communism. In the post-Cold War age, Bush has come up with a new rationale: the "global war against terrorism," as he calls it.

Bush is not the first post-Cold War president -- Bill Clinton was. But Clinton failed to develop a comprehensive justification for an imperial exercise of power. He did not, though, have a modest idea of the role of the executive.

In March 1999, without authorization from Congress (and without even approval of the U.N. Security Council), Clinton ordered U.S. forces to participate in NATO's massive bombing campaign against Serb forces in the former republic of Yugoslavia. A leading pro-Congress legal scholar, David Gray Adler, called this "one of the most flagrant acts of usurpation of the war power in the history of the Republic."

But despite the determined efforts of liberal war hawks to remold the American presidency into a tool for applying discretionary force to stop human-rights crimes -- *The New York Times* editorial page applauded Clinton for stressing "the moral imperative" of his action in the Balkans -- Clinton never fully subscribed to that agenda.

A notable case where the Imperial Presidency might have been used for humanitarian good -- but was not -- was in Rwanda, where in 1994, the majority Hutu tribe slaughtered more than 800,000 Tutsis. "The failure to try to stop Rwanda's tragedies became one of the greatest regrets of my presidency," Clinton wrote in his memoir, *My Life*.

But a focus on humanitarian crises tangentially connected to U.S. national interests might not have been broad enough to sustain the Imperial Presidency. Yesterday's anti-communism and today's anti-terrorism rationales share a crucial premise.

Both are designed to respond to a perceived existential threat to America -- to the very existence of the realm. They play directly to the fears -- the understandable, if sometimes exaggerated, fears -- of the public in a way that human-rights (and pro-democracy) campaigns do not.

Although anti-terrorism is at the core of the Bush Imperial Presidency, the making of "King George," at least in a philosophical sense, predates the 9/11 attacks. The Bush team entered office with highly developed views on executive powers. In particular, Vice President Cheney, the neo-Hamiltonian in the Bush White House, had devoted his Washington career to resisting what he viewed as improper and disabling congressional encroachment in the national security arena.

The conventional view is that Cheney was transformed by 9/11. But at least with respect to his perspective on presidential authority, that is plainly not the case. Michael Malbin, a political scientist formerly associated with the American Enterprise Institute, met Cheney back in 1979, when Cheney was a freshman House member from Wyoming.

Jimmy Carter was in the White House, having three years earlier knocked off Gerald Ford, for whom Cheney had served as chief of staff. "I can assure you," Malbin said in a recent interview, "his views on executive power were quite strong and nonpartisan. He would defend the president," Malbin added, "sometimes against members of his own party," who were seeking to "shackle" the Carter White

House.

Malbin attributed Cheney's attitude to the experience in Ford's White House, when the backlash against Nixon's abuses of the office was at a high point. But Cheney's time on Capitol Hill only solidified his views. In 1987, a band of Cheney-led congressional Republicans offered an impassioned inherent-powers defense of the constitutionality of President Reagan's actions to trade arms for hostages with Iran and use proceeds to fund the Nicaraguan Contras.

Their views, laid out in the "minority views" section of a report by Congress's Iran-Contra committee, are replete with references to Hamilton's *Federalist 70*. Malbin, whom Cheney had appointed to the committee staff, wrote the report at Cheney's request and under his close review. (Cheney recently encouraged reporters asking about his views on executive powers to read this "obscure text ... actually authored by a guy working for me." Malbin confirmed for *National Journal* that he was the author.)

Shortly before leaving Congress in 1989 to become George H.W. Bush's secretary of Defense, Cheney wrote an essay, "Congressional Overreaching in Foreign Policy," for an American Enterprise Institute conference. (Malbin assisted in the writing.)

Much as the current Bush team defends its NSA surveillance program as a matter of inherent presidential authority, Cheney in this paper wrote, "I believe the president has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve certain other important foreign-policy objectives."

At the time, Cheney was exercised, not least, by the efforts of House Speaker Jim Wright, a Texas Democrat, to conduct what critics viewed as an independent line of diplomacy with the president of Nicaragua, Daniel Ortega. But Cheney also criticized the foreign-policy incursions of conservative Republican Sen. Jesse Helms of North Carolina. "I don't think [Cheney] thought that presidential power was what it ought to be at the end of the Reagan administration," Malbin recalled recently.

Third Generation

Cheney was hardly the only member of the George W. Bush administration to arrive with well-thought-out views on executive powers. A grand philosophy for a reconstituted Imperial Presidency came from John Yoo, a constitutional scholar specializing in foreign affairs who was a deputy assistant attorney general in the Justice Department's Office of Legal Counsel from 2001 to 2003.

That may not sound like a lofty station, but after the 9/11 attacks, the 34-year-old Yoo became the key drafter of administration legal opinions, including the argument that the Geneva Conventions did not apply to captured terrorists. He has declined to comment on reports that he drafted an opinion justifying the NSA's warrantless surveillance program.

If Acheson represented the first generation, in modern times, of Imperial Presidency advocates, and Cheney represents the second, then Yoo can be seen as an exemplar of the third. The child of Korean immigrants, he grew up in an anti-communist household; was a teenage fan of Ronald Reagan; studied American history at Harvard University and law at Yale Law School; and clerked for Judge Laurence Silberman on the U.S. Court of Appeals and then for Justice Clarence Thomas on the Supreme Court. (Silberman, a prominent supporter of "inherent" executive powers and a former deputy attorney general in the Nixon Justice Department, is, for liberals, nearly as much of a *bete noire* as is Justice Thomas.)

Yoo, now a law professor at the University of California (Berkeley), recently published *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*. It is a radical work, returning to the original intentions of the Founders and arguing that not just Hamilton but most of the Framers held a highly expansive view of executive powers.

The power that Article I gives to Congress to declare war, Yoo says, is meant not as authority to

permit a president to take the country to war, but as more of a legal certification or announcement of a state of war between America and a foreign enemy. Therefore "the practice of unilateral presidential war-making," Yoo asserts, "falls within the permissible bounds of discretion granted to the political branches."

The crucial question for today's political system, Yoo said in a recent telephone interview, is a philosophical and legal one: whether the 9/11 attacks represent a war or a crime. "Generally, Congress has not tried to interfere in the way that the executive branch chooses to wage war against a foreign attacker," he noted. "If it is a crime," he said, "you would expect to see more participation" from Congress and the courts in America's response to the assault.

In Yoo's opinion, the fight against terrorism is clearly a matter of war, the conduct of which is "just functionally better suited to the executive branch." But he also said, "War would not be possible to wage without Congress's appropriating funds."

Is the expected long duration -- decades -- of the global war against terrorism an argument for, in this particular war, a more constricted executive? "I don't think so," Yoo replied. "There have been lots of long wars in [world] history.... Vietnam itself was quite long."

Yoo is concerned that courts have begun to stray toward a wrong treatment of the anti-terrorism struggle as a criminal matter. But that's not a big gripe. "I think the system works pretty well, actually," Yoo said. "There hasn't been another 9/11," and "we had elections in the middle of this war. American constitutional democracy is working."

The Future of the Imperial Presidency

On balance, the Imperial Presidency appears to have a bright future, notwithstanding a couple of short-term threats to the Bush-Cheney regnum. One possible threat is a public backlash against what might be called the imperial style of this White House as seen in Cheney's evasiveness, for several days, following his shooting of a lawyer friend during his recent quail-hunting expedition in Texas.

And should the Democrats capture the House or the Senate in the midterm elections, Bush is guaranteed investigations into every alleged abuse of his presidential powers. An impeachment proceeding could conceivably emerge, depending on the findings.

But critics of Bush's use of powers, unless they can prove that, Nixon-like, he has authorized surveillance of domestic political enemies, are wading into treacherous political currents. Bush's conduct of the "war on terrorism" remains one of the most popular features of his presidency.

And on the surveillance matter in particular, there is no public consensus that he has gone over a line. A *New York Times*/CBS News poll, conducted in late January, found that 53 percent of respondents approved of Bush's authorization of warrantless surveillance on some phone calls in the U.S. in order "to reduce the threat of terrorism." Thus, even some folks who don't like Bush -- his public-approval ratings hover in the low 40s -- are willing to allot his regime king-like powers.

It is possible the courts will reverse Bush on his most questionable use of presidential powers. But don't bet on it. The Bush White House vetted both Chief Justice John Roberts and Justice Samuel Alito, the Supreme Court's two newest members, with careful attention to their judicial track records of sympathy for strong executive authority.

Another reason to predict a bright future for the Imperial Presidency is Bush's establishment of the principle of pre-emptive warfare as a central strategy to protect against terrorist attack. Even more than the Cold War policy of containment did, this strategy tends to concentrate power in the executive.

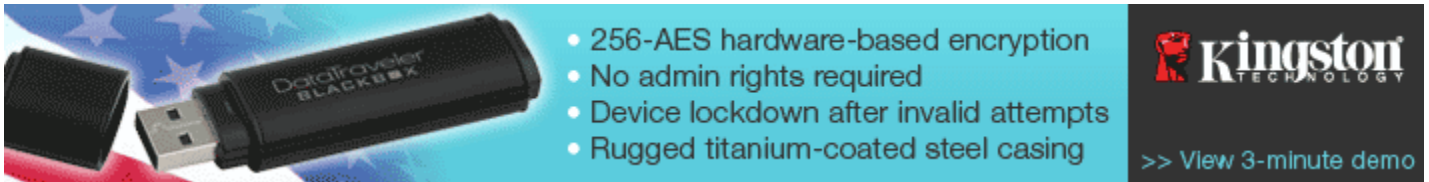
"Pre-emptive or preventive warfare, by its nature, enhances the executive," the political scientist Andrew Rudalevige observes in *The New Imperial Presidency*. "Its successful prosecution," he explains, "requires extensive intelligence-gathering, the discretionary ability to adjust troops and resources,

and, for pre-emption, the element of surprise."

And, finally, no one should underestimate the ability of presidents to set, unilaterally, by fiat, precedents that broaden the sweep of America's national security commitments. In the wake of recent menacing statements from Iran against Israel, Bush appeared to do just that. "You bet we'll defend Israel," he said on being asked by *Reuters* whether America would militarily assist the Jewish state in case of attack. No president has ever been that explicit about a pledge to protect Israel; Congress has never been asked to approve a treaty commitment of that sort.

Debate over the Imperial Presidency tends to get diverted by complex questions of constitutional law on which the experts, who are themselves not devoid of political ideologies, disagree and probably always will. Both critics and advocates of the institution should have to set forth and defend their vision of America's position in the world.

After all, the core, underlying reason that America has come to have an Imperial Presidency is not because of the essays of Alexander Hamilton and not because of a modern tendency to have strong-willed presidents, acquiescent Congresses, and deferential courts. It is because America has an Imperium.



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