

The Return of the Imperial Presidency?

One lesson of American politics since September 11 is that some tensions between presidents and Congress spring from a deeper source than the partisan passions of the moment.

by Donald R. Wolfensberger

Moments after President George W. Bush finished his stirring antiterrorism speech before Congress last September, presidential historian Michael Beschloss enthusiastically declared on national television that “the imperial presidency is back. We just saw it.”

As someone who began his career as a Republican congressional staff aide during the turbulence of Vietnam and Watergate in the late 1960s and early 1970s, I was startled by the buoyant tone of Beschloss’s pronouncement. To me, “imperial presidency” carries a pejorative connotation closely tied to those twin nightmares. Indeed, *Webster’s Unabridged Dictionary* bluntly defines *imperial presidency* as “a U.S. presidency that is characterized by greater power than the Constitution allows.”

Was Beschloss suggesting that President Bush was already operating outside the Constitution in prosecuting the war against terrorism, or did he have a more benign definition in mind? Apparently it was the latter. As Beschloss went on to explain, during World War II and the Cold War, Congress deferred to presidents, not just on questions of foreign policy and defense, but on domestic issues as well. Whether it was President Dwight D. Eisenhower asking for an interstate highway system or President John F. Kennedy pledging to land a man on the moon, Congress said, “If you ask us, we will.” Without such a galvanizing crisis, the president would not be able to define the national interest so completely. “Now,” continued Beschloss, “George Bush is at the center of the American solar system; that was not true 10 days ago.” In fact, just

nine months earlier Beschloss had described Bush as “the first post-imperial president” because, for the first time since the Great Depression, “we were not electing a president under the shadow of an international emergency like the Cold War or World War II or an economic crisis.” Then came September 11.

Still, it’s hard to join in such a warm welcome for the return of an idea that was heavily burdened just a generation ago with negative associations and cautionary experiences. Presidential scholars understandably become admirers of strong presidents and their presidencies. But a focus on executive power can become so narrow as to cause one to lose sight of the larger governmental system, with its checks and balances. To invest the idea of the imperial presidency with an aura of legitimacy and approbation would be a serious blow to America’s constitutional design and the intent of the Framers.

It was historian Arthur M. Schlesinger, Jr., who popularized the term *imperial presidency* in his 1973 book by that title. Schlesinger, who had earlier chronicled the strong presidencies of Andrew Jackson and Franklin D. Roosevelt in admiring terms, admits in *The Imperial Presidency* his own culpability in perpetuating over the years “an exalted conception of presidential power”:

American historians and political scientists, this writer among them, labored to give the expansive theory of the Presidency historical sanction. Overgeneralizing from the [pre-



“A Senator Fulbright to see you Sire. Seems he can’t reconcile himself to your infallibility,” reads the caption of this Vietnam War-era cartoon.

World War II] contrast between a President who was right and a Congress which was wrong, scholars developed an uncritical cult of the activist Presidency.

The view of the presidency as “the great engine of democracy” and the “American people’s one authentic trumpet,” writes Schlesinger, passed into the textbooks and helped shape the national outlook after 1945. This faith of the American people in the presidency, coupled with their doubts about the ability of democracy to respond adequately to the totalitarian challenge abroad, are what gave the post-war presidency its pretensions and powers.

“By the early 1970s,” Schlesinger writes, “the American President had become on issues of war and peace the most absolute monarch (with the possible exception of Mao Tse Tung of China) among the great powers of the world.” Moreover, “the claims of unilateral authority in

foreign policy soon began to pervade and embolden the domestic presidency.”

The growth of the imperial presidency was gradual, and occurred “usually under the demand or pretext of an emergency,” Schlesinger observes. Further, “it was as much a matter of congressional abdication as of presidential usurpation.” The seeds of the imperial presidency were sown early. Schlesinger cites as examples Abraham Lincoln’s 1861 imposition of martial law and his suspension of habeas corpus, and William McKinley’s decision to send 5,000 American troops to China to help suppress the Boxer Rebellion of 1900. It is a measure of how much things have changed that Theodore Roosevelt’s 1907 decision to dispatch America’s Great White Fleet on a tour around the world was controversial because he failed to seek congressional approval. Then came Woodrow Wilson’s forays into revolutionary Mexico, FDR’s unilateral declaration of an “unlimited

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national emergency” six months before Pearl Harbor, and Harry Truman’s commitment of U.S. troops to the Korean War in 1950, without congressional authorization, and his 1952 seizure of strike-threatened steel mills.

In 1973, the year *The Imperial Presidency* was published, Congress moved to reassert its war-making prerogatives during non-declared wars by enacting the War Powers Resolution over President Nixon’s veto. The following year, prior to Nixon’s resignation under the imminent threat of impeachment, Congress enacted two more laws aimed at clipping the wings of the imperial presidency and restoring the balance of power between the two branches. The Congressional Budget and Impoundment Control Act of 1974 was designed to enable Congress to set its own spending priorities and prohibit the president from impounding funds it had appropriated. The Federal Election Campaign Act of 1974 was supposed to eliminate the taint of big money from presidential politics. Subsequent years witnessed a spate of other statutes designed to right the balance between the branches. The National Emergencies Act (1976) abolished scores of existing presidential emergency powers. The Ethics in Government Act (1978) authorized, among other things, the appointment of special prosecutors to investigate high-ranking executive branch officials. The Senate, in 1976, and the House, in 1977, established intelligence committees in the wake of hearings in 1975 revealing widespread abuses; and in 1980 the Intelligence Oversight Act increased Congress’s monitoring demands on intelligence agencies and their covert operations.

Since those Watergate-era enactments, presidential scholars have decried the way Congress has emasculated the presidency. As recently as January of last year, political scientist Richard E. Neustadt, author of the classic *Presidential Power* (1964), lamented that “the U.S. presidency has been progressively weakened over the past three decades to the point where it is probably weaker today than at almost any time in the preceding century.” Neustadt cited congressional

actions as one of several causes of the decline.

As one who worked in the House of Representatives from 1969 to 1997, I have long been puzzled by such complaints. They have never rung true. What I witnessed during those years was the continuing decline of the legislative branch, not its ascendancy. Even Congress’s post-Watergate efforts to reassert its authority look rather feeble in the harsh light of reality. The War Powers Resolution has been all but ignored by every president since Nixon as unconstitutional. They have abided by its reporting requirements, but presidential military forays abroad without explicit congressional authority continue unabated. Bosnia, Kosovo, Haiti, Somalia, and Serbia come readily to mind.

The congressional budget act has been used by every president since Ronald Reagan to leverage the administration’s priorities by using budget summits with Congress to negotiate the terms of massive reconciliation bills on taxes and entitlements. The independent counsel act has been allowed to expire twice—though, in light of the unbridled power it gives counsels and the potential for abuse, this may have been wise. Federal funding of presidential campaigns has not stopped campaign finance abuses. And congressional oversight of perceived executive abuses has met with mixed results at best.

In the meantime, presidents have been relying more heavily than before on executive agreements to avoid the treaty ratification process, and on executive orders (or memorandums) of dubious statutory grounding in other areas. Administrations have defied Congress’s requests for information with increasing frequency, dismissing the requests as politically motivated. And they have often invoked executive privilege in areas not previously sanctioned by judicial judgments.

The most recent example is Vice President Richard Cheney’s refusal, on grounds of executive privilege, to turn over to the General Accounting Office (GAO), an arm of Congress, information about meetings between the president’s energy task force and energy executives. The controversy took on added interest with

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Uniforms redolent of imperial pomp briefly appeared on White House guards in the Nixon administration, only to vanish after a public outcry.

the collapse of Enron, one of the energy companies that provided advice to the task force. Vice President Cheney, who served as President Gerald R. Ford's White House chief of staff, said his action was aimed at reversing "an erosion of the powers" of the presidency over the last 30 to 35 years resulting from "unwise compromises" made by past Administrations. President Bush backed Cheney's claim of executive privilege, citing the need to maintain confidentiality in the advice given to a president.

It is revealing in this case that the congressional requests for information came not through formal committee action or subpoenas but more indirectly from the GAO, at the prompting of two ranking minority committee Democrats in the House, even though their Senate party counterparts are committee chairmen with authority to force a vote on subpoenas. The committee system, which should be the bulwark of congressional policymaking and oversight of the executive branch, has been in steady decline since the mid-1970s. Not the least of the causes is the weakening of committee prerogatives and powers by Congress itself, as a response to members' demands for a more participatory policy process than the traditional committee system allowed. Party leaders eventually replaced committee leaders as the locus of power in the House, a shift that was not altered by the change in party control of Congress in 1995.

Another contributing factor has been the shift in the Republican Party's base of power to

the South and West, which has given a more populist and propresidential cast to the GOP membership on Capitol Hill.

Even with recent promises by Speaker of the House Dennis Hastert (R-Ill.) and Senate Majority Leader Tom Daschle (D-S.D.) to "return to the regular order" by giving committees greater flexibility and discretion in agenda setting and bill drafting, Congress is hamstrung by self-inflicted staff cuts and three-day legislative workweeks that make deliberative lawmaking and careful oversight nearly impossible. The "permanent campaign" has spilled over into governing, diminishing the value members see in committee work and encouraging partisan position taking and posturing. (It also makes members eager to get back to their districts for the serious work of campaigning, which explains the three-day work week in Washington.) It is easier to take a popular campaign stand on an unresolved issue than make a painful policy choice and explain it to the voters.

Is it any wonder that even before the current emergency the executive was in a stronger position than Congress? Such power alone is not necessarily a sign of an imperial presidency. But testing the limits of power seems to be an inborn trait of political man, and presidents are no exception. Even presidential power proponent Richard Neustadt, who sees the presidency at the beginning of this 21st century as the weakest it's been in three decades, concedes that none of the formal limits on presidential powers by Congress

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or the courts have managed to eliminate those powers of greatest consequence, including the “plentitude of prerogative power” (a Lockean concept of acting outside the constitutional box to save the nation) that Lincoln assumed during the Civil War.

Both presidents George H. W. Bush and George W. Bush, to their credit, sought authorization from Congress for the use of force against Iraq and international terrorists, respectively, before committing troops to combat. Yet both also claimed they had inherent powers as president to do so to protect the national interest. (The younger Bush was on firmer ground since even the Framers explicitly agreed that the president has authority to repel foreign invasions and respond to direct attacks on the United States.)

The presidency is at its strongest at the outset of a national crisis or war. Just as President Franklin D. Roosevelt was encountering public and congressional wariness over his depression-era policies in the late 1930s, along came World War II and a whole new lease on the throne. Presidential power tends to increase at the expense of Congress. Alexander Hamilton put it succinctly in *The Federalist* 8: “It is of the nature of war to increase the executive at the expense of the legislative authority.”

One way to gauge this balance of power is to look at the extent to which Congress deliberates over policy matters and the extent to which it gives the president most of what he requests with minimal resistance. Two weeks after Congress passed a \$40 billion emergency spending bill and a resolution authorizing the president to use force against those behind the World Trade Center attacks, Senator Robert S. Byrd (D-W.Va.) rose in a nearly empty Senate chamber to remind his colleagues of their deliberative responsibilities. “In the heat of the moment, in the crush of recent events,” Byrd observed, “I fear we may be losing sight of the larger obligations of the Senate.”

Our responsibility as Senators is to carefully consider and fully debate major policy matters, to air all sides of a given issue, and to act after full deliberation. Yes, we want to respond quickly to urgent needs, but a speedy response should not be used as an excuse to trample full and free debate.

Byrd was concerned in part about the way in which language relating to the controversy over adhering to the 1972 antiballistic missile treaty had been jettisoned from a pending defense authorization bill in the interest of “unity” after the terrorist attacks. But he was also disturbed by the haste with which the Senate had approved the use-of-force resolution “to avoid the specter of acrimonious debate at a time of national crisis.” Byrd added that he was not advocating unlimited debate, but why, he asked, “do we have to put a zipper on our lips and have no debate at all?” Because of the “paucity of debate” in both houses, Byrd added, there was no discussion laying a foundation for the resolution, and in the future “it would be difficult to glean from the record the specific intent of Congress.”

A review of the *Congressional Record* supports Byrd’s complaint. Only Majority Leader Daschle and Minority Leader Trent Lott (R-Miss.) spoke briefly before the Senate passed the emergency spending bill and the use-of-force resolution. The discussion was truncated chiefly because buses were waiting to take senators and House members to a memorial service at the National Cathedral.

The House, to its credit, did return after the service for five hours of debate on the resolution, which it passed 420 to 1. Some 200 members spoke for about a minute each—hardly the stuff of a great debate. At no time did any member raise a question about the breadth, scope, or duration of the authority granted by the resolution. The closest some came were passing references to the way in which President Lyndon B. Johnson had used the language of the 1964 Gulf of Tonkin Resolution as authority to broaden U.S. involvement in Vietnam.

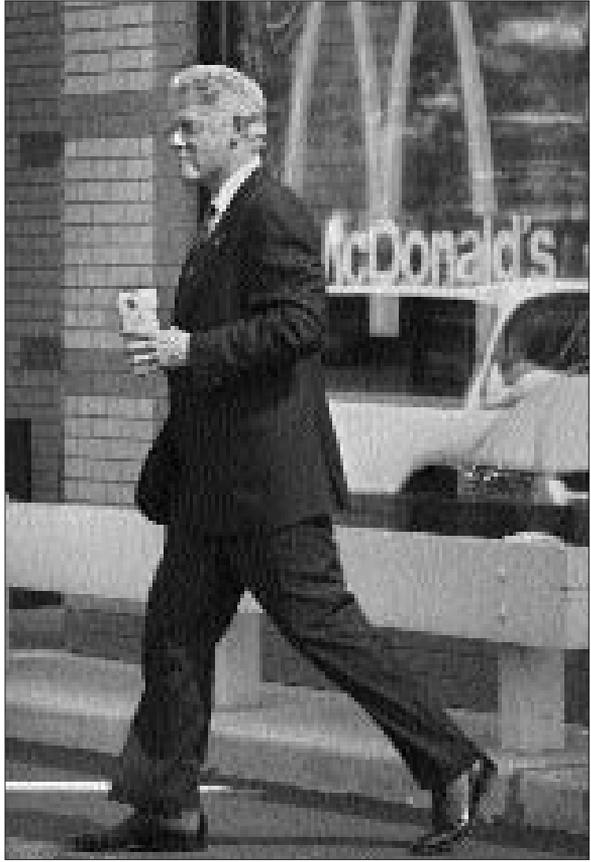
To the credit of Congress, a small, bipartisan leadership group had earlier negotiated a compromise with the White House to confine the resolution’s scope to “those nations, organizations or persons” implicated in the September 11 attacks. The original White House proposal was much broader, extending the president’s authority “to deter and pre-empt any future acts of terrorism or aggression against the United States.” The language change is significant. If President Bush cannot demonstrate that Iraq was somehow involved in the September 11 attacks but decides to take military action against it, he will have to decide whether to seek additional authority from Congress or act without it, as

President Bill Clinton did before him.

In times of war or national emergency, presidents have always acted in what they thought to be the national interest. That is not to say that Congress simply becomes a presidential lap dog. While it tends to defer to the commander in chief on military matters once troops have been committed to combat, it continues to exercise oversight and independence on matters not directly affecting the war's outcome. For example, President Bush was forced to make drastic alterations in his economic stimulus package by Senate Democrats who disagreed with his tax relief and spending priorities. And even in the midst of the war on terrorism, the House and Senate intelligence committees launched a joint inquiry into why our intelligence services were not able to detect or thwart the September 11 terrorist plot. In the coming months, moreover, Congress is sure to have its own ideas on how the federal budget can best be allocated to meet the competing demands for defense, homeland security, and domestic social-welfare programs.

Is the imperial presidency back? While at this writing the White House has not overtly exercised any extraconstitutional powers, the imperial presidency has been with us since World War II, and it is most likely to be re-energized during times of national crisis. Every president tends to test the limits of his power during such periods in order to do what he deems necessary to protect national security. To the extent that Congress does not push back and the public does not protest, the armor of the imperial presidency is further fortified by precedent and popular support against future attacks.

What is the danger in a set of powers that have, after all, evolved over several decades into a widely recognized reality without calamitous consequences for the Republic? As James Madison put in *The Federalist* 51, “The separate and distinct exercise of the different powers of government . . . is admitted on all hands to be



He had the common touch—and an imperial taste for sending U.S. troops abroad without congressional approval.

essential to the preservation of liberty.” The “great security against a gradual concentration of power in the same department,” he went on, is to provide each department with the “necessary constitutional means and personal motives to resist. . . . Ambition must be made to counteract ambition.”

The Constitution's system of separated powers and checks and balances is not a self-regulating machine. Arthur M. Schlesinger, Jr., observed in *The Imperial Presidency*, that what kept a strong presidency constitutional, in addition to the president's own appreciation of the Framers' wisdom, was the vigilance of the nation. “If the people had come to an unconscious acceptance of the imperial presidency,” he wrote, “the Constitution could not hold the nation to ideals it was determined to betray.” The only deterrent to the imperial presidency is for the great institutions of our society—Congress, the courts, the press, public opinion, the universities, “to reclaim their own dignity and meet their own responsibilities.” □