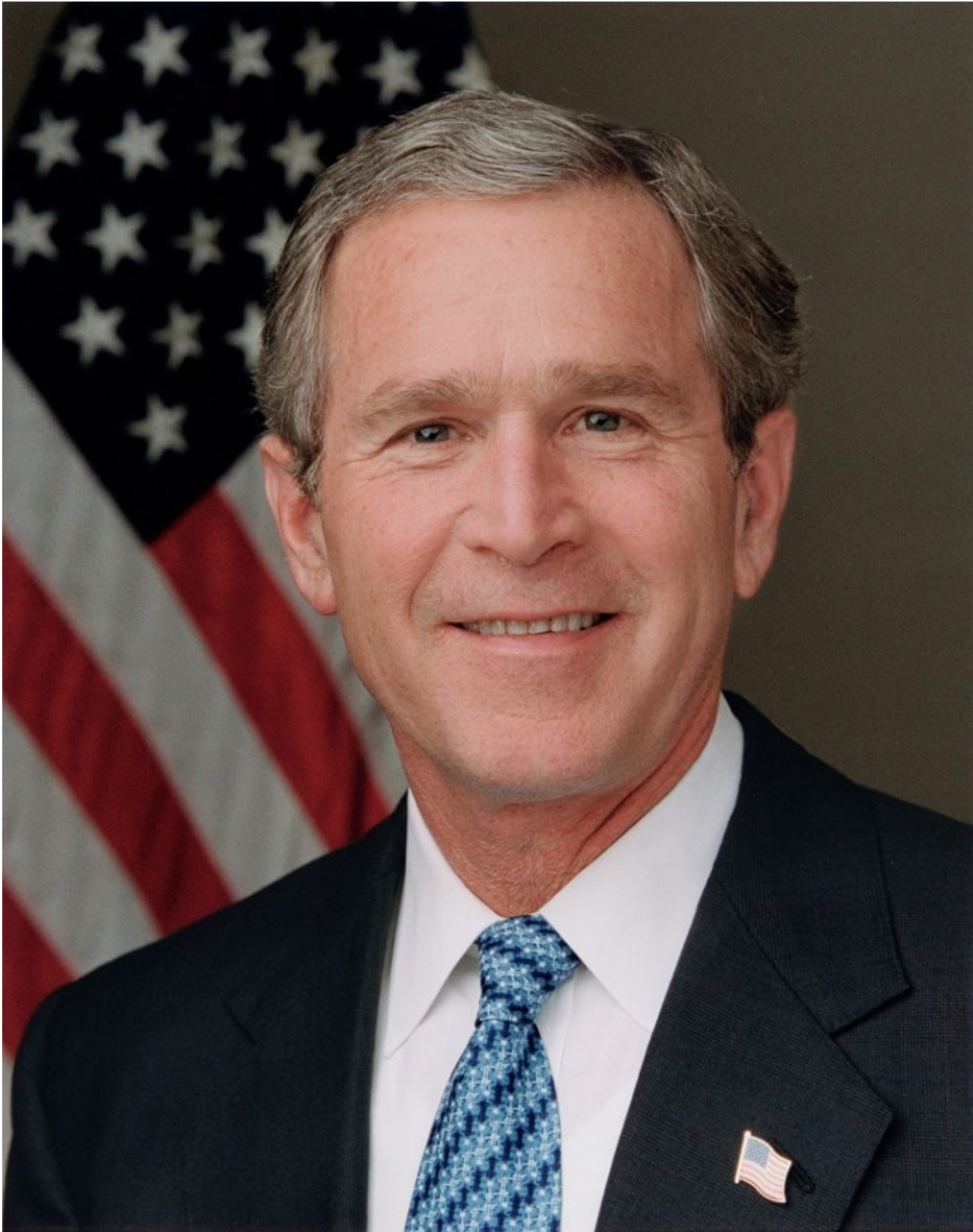


## The Kingness of Mad George



The roots of the current debate over presidential power

The recent conflict over President Bush's domestic surveillance program reflects one of the oldest recurring divisions in American politics, dating all the way to the 1790s. Bush's Democratic critics have taken a stance that traces back to the Jeffersonian (or Democratic) Republicans, arguing that the U.S. government is rather flexibly bound, but still bound, by the values and rules embedded in our founding documents and, as such, is a government whose power is essentially limited. The Bush administration and its modern (anti-Democratic) Republican defenders have staked out a position that traces back to Alexander Hamilton and the Federalists, reasoning from the inherent nature of government and the overwhelming fearsomeness of the challenges the United States faces that the powers of its government must be essentially *unlimited*. The GOP-Federalist position applies especially to times of foreign crisis, a state that Federalists saw as virtually perpetual in the early Republic and the Republicans have likewise been warning about ever since the outbreak of the cold war in 1946.

This recurring argument has often turned on the question of whether the norms and procedures of democracy and republicanism are adequate to national survival in a dangerous world of terrorists, Commies, and Frenchmen. Federalists and modern Republicans alike have often indicated their belief, expressed with varying degrees of regret, that the methods of democratic, accountable, transparent government are not strong enough to meet these challenges. Jeffersonian Republicans and modern Democrats, in turn, have tended to respond that they are. The essence of the frequently heard rightist refrain that America cannot fight the evildoers of the moment with democracy tying its hands or with one arm tied behind its back (fill in your Goldwaterish/Cheneyesque metaphor) can be found in [a recent Wall Street Journal op-ed column](#) about the Pentagon paying Iraqi journalists for favorable coverage. If the U.S. military had elected to "play by Marquess of Queensberry rules," argued the *WSJ*, we would have had to "wait decades" for some good Arab press, and we would have created "a heady propaganda win for the terrorist/insurgents, a prolonged conflict, and more unnecessary violence and death"—as opposed to the speedy triumph the writer apparently believes we are experiencing in Iraq right now.

The key difference in the recurring party debate is not so much the government's or military's mere use of extraconstitutional powers and undemocratic methods. Those things have happened under many presidents of most of the major U.S. parties, especially during the cold war. The key is the further act of justifying such powers and methods *in principle*. George W. Bush and Dick Cheney have repeatedly gone out of their way to do this, asserting and exercising an alleged independent presidential authority to do things (like eavesdropping on suspected terrorists) the government was able to do just as swiftly and effectively under existing legal procedures. (A secret court was created in the 1970s with no other purpose than legally authorizing government eavesdropping when national security requires it.) In other cases, they have ordered up briefs to self-legalize obviously unconstitutional powers to have people tortured and to hold American citizens without charge or trial.

A similar tactic was recently used against Senator John McCain's anti-torture resolution, a measure that Bush vehemently opposed but finally signed just before New Year's Day. With the president's signature, the administration included a "[signing statement](#)" explaining that it reserved the right to torture whoever it pleased no matter what the resolution said.

*The executive branch shall construe [the provision], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.*

The recipe for this little writ of mandamus is two parts pure executive prerogative and one part the ends justify the means. The statement invokes the president's "constitutional authority" but employs a concept not found in the Constitution: the idea that the president has the apparently sole and absolute power to supervise a "unitary executive branch." Advise and consent this, Congress. The only constitutional limitation mentioned is on the judicial branch and any effort it might make to hold the "unitary executive" to any procedural standards when it decides to detain people. Capping things off we have a statement implying that any action the administration deems handy in the "shared objective" of "protecting the American people" is automatically legal and constitutional.

In the same vein, [President Bush's December radio address](#) assured listeners that the National Security Agency's warrantless domestic-spying program was "fully consistent with my constitutional responsibilities and authorities." Not legally authorized by Congress, but "consistent" with the general ends of the president's duties. Bush could not even cite which constitutional duties he might mean because those would actually be quite hard to find in the Constitution. Commander in chief of the armed forces is one thing, but Bush and Cheney clearly have some broader and frankly more king-like role in mind, something along the lines of the monarchical title that John Adams thought presidents should bear: "His Highness the President of the United States and Protector of the Rights of the Same." Karl Rove might want to add the British monarchs' tag, "Defender of the Faith," for the religious Right's benefit. Even closer to what Bush and Cheney seem to intend would be the title that Richard III used before he finally dealt with those pesky little congressmen, I mean princes, in the Tower: "Lord Protector of the Realm."

## **Hamilton, Lincoln, and the Inherent-Powers Tradition**

President Bush's admirers will doubtless be heartened by the knowledge that he shares some aspects of this governing philosophy with the newly re-burnished

[“Business Class Hero”](#) of the founding era, Alexander Hamilton. Confronted by Thomas Jefferson and James Madison with the fairly credible argument that the brand-new Constitution did not provide the government with the power to create his proposed national bank, [Hamilton appealed](#) by referring, not simply to the text of the Constitution itself, but more importantly to the “*general principle . . . . inherent in the very definition of government.*” The principle was “That every power vested in a government is in its nature *sovereign*, and includes, by *force of the term*, a right to employ all the *means* requisite and fairly applicable to the *ends* of such power.” While Hamilton recognized (unlike Bush) that a constitutional government could not legally engage in actions that its constitution specifically prohibited, his “definition of government” was in fact far older than the United States and its founding documents, and in truth it was not terribly respectful to those documents. Hamilton derided [Jefferson and Madison’s arguments](#) that the text of the Constitution might truly limit the government’s “sovereign power, as to its declared purposes and trusts,” writing that they presented “the singular spectacle of a political society without sovereignty, or of a people governed without government.” It barely dawned on Hamilton that such a spectacle, of a people governed without a traditional European form of government, was exactly what many Americans thought their revolution had sought.



Fig.1

Abraham Lincoln fell back on a similarly ante-constitutional notion of the inherent powers of government in justifying his decision to restore the Union by force. As explained in [his first inaugural address](#), Lincoln held “in contemplation of universal law” that “the Union of these States is perpetual.” Like Bush and Hamilton, Lincoln invoked the Constitution but based his position largely on concepts not mentioned in it. “Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for

its own termination.” It may not have been as safe to assert this as Lincoln hoped because for many Americans, and not only the defenders of slavery, the U.S. experiment in liberal government had relatively little in common with the fundamental law of all other national governments. They did not see the United States as a “government proper” if that meant it existed in unconditional perpetuity, with the people losing forever the Lockean right of revolution described in the Declaration of Independence.

The Hamilton/Lincoln idea of the “definition of government” or “government proper” amounts, in the final exigency, to the very old and widely embraced idea of government as rulership, the repository of sovereign authority that has no superior within its ambit and cannot be lawfully overruled. Though not necessarily absolute or completely insulated from popular influence, this sort of government derives its authority from some transcendent and irresistible source, a divine source for most of the monarchs who practiced it and a natural source—the nature of government and the practical requirements of nation-building—for Hamilton and other American advocates of inherent powers.

The logic behind this view can seem beguilingly simple and practical. Government is coterminous with the community and the guarantor of its structure, values, and very existence—matters too basic to be left to the whims of political give-and-take. Government is charged with the fundamental tasks of preserving the community from internal disorder, external conquest, and other forces that threaten to destroy it. Burdened with such awesome responsibilities, it needs powers to match, powers that were limited only by what its subjects would accept as legitimate by their mere acquiescence.

Defenders of the inherent-powers position frequently and significantly direct attention to the necessity or desirability of the ends they seek to achieve: fighting the terrorists or Communists or (in Hamilton’s case) achieving national greatness and economic growth. While such goals were worthy enough on their own, the move of loudly proclaiming their transcendent worthiness is a political tactic rather than a constitutional or substantive argument; its real function is to embarrass and silence critics by calling their patriotism or morals into question. At the same time, the tactic expresses a basic tenet of old-school governance, which is that law, procedure, and constitutionalism are minor matters as long as what Hamilton called “the essential ends of political society”—security and prosperity and whatever other states of being a community wants for itself—are being met. State this as a folksy modern politician might, say as “getting the job done,” and it sounds like practical good sense. State it a bit more clearly, and it makes a mockery of the very idea of limited, transparent, and democratic government by dismissing it as so much “red tape.”

## **Angels in the Form of George W. Bush?**

As Reinhard Bendix points out in *Kings or People* (1978), one of the very first scholarly books I can remember buying, the old-school view of government as a



mandate to rule, constrained only by such compromises as were necessary to allow the mandate's continued existence, is one that any medieval king, pope, god-emperor, or caliph would have found perfectly familiar. A ruler had to do what a ruler had to do. And you knew his actions were legitimate if he got away with them and succeeded in his goals.

While it has monarchical origins, the reliance on inherent powers does not by itself render a government monarchical. Early American nationalists like Hamilton, Lincoln, and Daniel Webster had made the modernizing transition that Bendix describes from God to "the people" or "the nation" as the inviolate source of governmental authority. By contrast, Bush and Cheney clearly hearken back to the older monarchical model in which everything rests with the supreme ruler and his supreme duties. The key difference lies in their approach toward law. While different societies tend to have very different legal traditions, in the crudest sense we may say that kings got to be kings by establishing themselves as the sole legitimate source of secular law within their realms. American government has long been celebrated as one of "laws, not men," where law is created by following certain publicly known and set procedures and, in the process, obtains some form of popular consent.

This is where Bush and Cheney's views and actions seem quite breathtakingly dangerous. There have likely been absolute monarchs whose lawmaking was more procedurally constrained than that of the present administration. "We have a system of law," [Senator Russ Feingold said of the NSA spying program](#). "He just can't make up the law . . . It would turn George Bush not into President George Bush, but King George Bush." While I hope and believe that George W. Bush has no intention of crowning himself, his mentor Cheney has been seeking "unimpaired" presidential power ever since his days as a junior aide in the Ford White House. Why should his president/boy-prince be forced to endure the insolent effrontery of pesky reporters and congressional investigating committees? For Cheney, the Imperial Presidency is a matter of personal and ideological conviction.

Despite my obvious preferences in present politics, the underlying philosophical question here is still an open one for me. All governments probably do have inherent powers they will have to exercise in times of crisis. Lincoln certainly faced one and probably made the most courageous and far-sighted choice. Yet we should be clear that we are doing just that—making a choice—when we endorse government action based on such thinking. Governing on the basis of inherent powers rather than clear legal-constitutional authority is a distinctly undemocratic, illiberal, and un-American approach to governance. As Lincoln recognized, it should be used sparingly and only when absolutely and indispensably necessary.

The problem comes when leaders manipulate the public sense of crisis to make extraconstitutional powers and presidential monarchy thinkable. The modern American Right has a long record of promoting phony or highly exaggerated crises for political effect, often as a way to attack aspects of democracy,

especially the economic, cultural, and intellectual expressions of it that conservatives so dislike. Extensive freedom of expression, strict protections for the rights of the accused, and other civil liberties have never been popular with the dominant elements of the American Right, and strangely enough, the present crisis—whatever it is—always seems to demand that civil liberties be curtailed in some way. The 9/11 terrorist attacks only provided a more easily salable version of the ongoing crisis that the Right has been ringing alarm bells over for the past sixty years or more. The sudden salience of Islamic terrorism as an issue allowed Republicans to revive many of their old cold war themes and policies and provided the opportunity to apply them in Iraq.

There is pretty overwhelming evidence that the intelligence failures regarding al Qaeda and Iraq had more to do with incompetence and ideologically driven inattention and misperception—[useful information had been gathered but was not acted on or reported correctly](#)—than a lack of “tools” such as legalized torture and illegal mass eavesdropping. Given that situation, I will let [Thomas Jefferson’s first inaugural address](#) give the last word, for now, on my behalf.

*I know, indeed, that some honest men fear that a republican government can not be strong, that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world’s best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question.*

## Further Reading:

The sources for all the quotations above are linked at the point where a particular document or news item is first introduced.

The Bush administration’s working theory of the executive’s nearly absolute powers in matters relating to national security and foreign policy has been given its most developed form by University of California, Berkeley, law professor John Yoo (a former Department of Justice official) in his book *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago, 2005). Simply put, the Constitution does not seem to have much to do with it, except through the most, er, tortured constructions imaginable. Yoo can be heard defending the presidential power to do just about anything [here](#). (Link via [Information Clearinghouse](#).)

For my money, the most incisive recent commentary on the president's role in our current system is a chapter in Jon Stewart's [\*America \(the Book\)\*](#): "The President: King of Democracy."

I don't claim great expertise on the history of kingship or its theoretical basis, but the remarks above are influenced by Martin Van Creveld, *The Rise and Decline of the State* (Cambridge, 1999); Richard L. Bushman, *King and People in Provincial Massachusetts* (Chapel Hill, 1992); Robert Filmer, *Patriarcha and Other Writings*, ed. Johann P. Somerville (Cambridge, 1991); the first part of Gordon S. Wood, *The Radicalism of the American Revolution* (New York, 1992); and especially Reinhard Bendix, *Kings or People: Power and the Mandate to Rule* (Berkeley, 1978). History Book Club dealt in some weighty tomes back in those days. Van Creveld, a military historian based in Israel, recently had [some choice words on the Bush administration and the Iraq War in the Forward](#).

In expectation of the hate mail I will soon be receiving from Alexander Hamilton's many fans, let me urge any present-day liberals tempted to imagine Hamilton and the Federalists as their guys in the 1790s—I know a lot of historians who incline this way—to first read Mike Wallace's review essay "[Business-Class Hero](#)," about the New-York Historical Society's Hamilton exhibit. That said, Max Edling's recent book, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York, 2003), convinced me that Hamilton was a more measured statist than I once believed. A somewhat overdrawn reminder that the early presidents were no strangers to the perennial presidential yen for secrecy and covert action is Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* (New York, 1996).

While Hamilton and the Federalists strike me as far more respectful of the law than the present administration, one thing that Bush and Cheney still seem to have in common with the Federalists is a largely imaginary sense of social superiority to the rabble engaged in democratic politics. [This week's Time magazine](#) contains a remarkable quotation in which the White House uses frank social prejudice as a way of distancing themselves from disgraced House Majority Leader Tom Delay: "Of the former exterminator, a Republican close to the President's inner circle says, 'They have always seen him as beneath them, more blue collar. He's seen as a useful servant, not someone you would want to vacation with.'"

I imagine this piece will have many detractors, and I hope they and any supporters will take advantage of the *Common-place Coffeeshop* in making their views known. Future plans call for a blog-like discussion space that will be more directly linked to this column.

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