Separation of Powers

Separating the powers of the federal government and dividing them among the House and Senate, President, and the Judiciary were decisions fundamental to the Constitution's design. With fresh memories of the Crown's exercise of autocratic authority over the colonies, the Founding generation was determined to prohibit the concentration of government power in the hands of one person or one body. As an "essential precaution in favor of liberty,"[1] the Framers created a government that separates the power to make law from the power to execute the law and further separates those powers from the power to try individuals for violating the law. While departing from the Articles of Confederation to create the office of the President, our Constitution conspicuously omits any analog to the dispensing power invoked by British monarchs to disregard acts of Parliament and instead directs the President to "take Care that the Laws be faithfully executed."[2]

In the aftermath of September 11, 2001, President Bush repeatedly claimed that the Constitution gave him authority to act contrary to duly enacted federal statutes. He asserted the right to engage in domestic electronic surveillance despite restrictions in the Foreign Intelligence Surveillance Act.[3] He claimed the power to apply so-called enhanced interrogation techniques to persons in U.S. custody despite statutes prohibiting torture.[4] He argued that Congress cannot extend the habeas corpus jurisdiction of federal courts to alien detainees held abroad because it would interfere with the President's authority to conduct the military campaign against al Qaeda.[5] And upon passage of the McCain amendment in 2005 banning cruel, inhuman, or degrading treatment of any person under U.S. custody or control anywhere in the world, President Bush issued a signing statement declaring that he would construe

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the prohibition subject to his authority as Commander in Chief to protect the nation from further terrorist attacks.[6]

The purported basis for these claims was stated by the Office of Legal Counsel in an August 2002 memorandum examining laws against torture—a memorandum that President Bush's Justice Department subsequently withdrew but whose constitutional reasoning it did not repudiate. "In wartime," the memo stated, "it is for the President alone to decide what methods to use to best prevail against the enemy."[7] The enemy identified by the memo was neither the Taliban in Afghanistan nor the armies of Saddam Hussein in Iraq, but rather "international terrorist organization[s]."[8] Moreover, the Bush administration had previously said the war against terrorism is one that will not end in our lifetimes.[9] Thus, the upshot of reserving to the President alone the authority to decide what methods to use against the enemy would be to grant unfettered discretion to the President, notwithstanding statutory constraints, to pursue any action he believes conducive to interdicting, retaliating against, or gaining intelligence about terrorist activities.

Throughout the world, there are examples of governments led by a strongman with such unchecked powers. But our nation's Founders made a different choice. A key premise of our Constitution, as James Madison explained, is that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[10] Our system disperses power among three branches of government—not by making them "wholly unconnected with each other" but by "giv[ing] to each a constitutional control over the others."[11] In other words, ours is a system of checks and balances.

This fundamental principle applies even in times of war. The Founders recognized that the executive must act with dispatch and strength in times of war, but they were deeply concerned about the risk of concentrating too much power in executive hands. The text of the Constitution reflects that concern. It contains seven clauses assigning significant war powers to Congress—the powers to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules governing land and naval forces; to call forth the militia; to provide for the organizing, arming, and disciplining of the militia; and to define and punish piracies and felonies committed on the

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high seas and offenses against the law of nations.[12] By contrast, the war powers committed to the President derive solely from his designation as Commander in Chief of the armed forces and the militia.[13]

In times of emergency, the President is naturally inclined toward robust action in the nation's defense, and the Commander in Chief authority ensures unified control of our armed forces. While reserving to Congress the power to declare war, the Founders certainly expected the President to have the power to repel sudden attacks without prior congressional authorization.[14] Such power is meant to authorize the President not to create a state of war but to use force to defend the nation when conditions of exigency make prior approval by Congress impractical and when the President reasonably anticipates that Congress will support the action after the fact. But nothing in the Constitution's text or framing history suggests that the President's power to repel sudden attacks displaces Congress's authority under its war powers (or other powers) to make law that is binding on the Executive after the emergency has passed.

In recent years, the most aggressive claims of executive authority have relied not on the well-established power to respond to exigencies but instead on the President's prerogative as Commander in Chief to make strategic and tactical decisions in wartime. As the August 2002 memorandum by the Office of Legal Counsel put it, "Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war."[15] Under this theory, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."[16] And so, "[j]ust as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States."[17]

These assertions go beyond the claim that the President has inherent power to conduct military operations in the nation's defense absent congressional authorization. The latter claim is an interpretation of presidential power within what Justice Jackson called the "zone of twilight," where the "absence of either a congressional grant or denial of authority" invites the President to "rely upon his own independent powers" even as "he and Congress may have

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concurrent authority, or . . . its distribution is uncertain."[18] Justice Jackson recognized that presidential claims of inherent power in this zone of twilight (Category Two in his tripartite analytical framework) are often controversial, with "any actual test of power . . . likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[19] Even more controversial, then, are Category Three cases—such as the recent examples above—where the President claims "preclusive" power to "take[] measures incompatible with the expressed or implied will of Congress."[20] Here the President's power "is at its lowest ebb."[21] Such claims of executive authority "must be scrutinized with caution" lest they undermine "the equilibrium established by our constitutional system."[22]

Throughout our nation's history, the equilibrium to which Justice Jackson referred is one that has eschewed any broad assignment of preclusive power to the President in his role as Commander in Chief. Textually, the Constitution's designation of the President as Commander in Chief does suggest some limits on congressional control. For example, Congress may not alter the military hierarchy by assigning ultimate command of the armed forces to a military officer or to anyone other than the President. Nor may Congress delegate responsibility for the conduct of a military campaign to an officer insulated from presidential direction or removal.[23] These limitations marked a significant change from the power that the Articles of Confederation had given to Congress to appoint officers of the armed forces.[24]

It is far less clear, however, that the President's authority as Commander in Chief precludes congressional enactments that substantively direct the conduct of military campaigns. In an exhaustive survey of evidence from Founding-era practices, the constitutional convention, and the state ratification process, David Barron and Martin Lederman conclude that historically "the legislature possessed the power to subject the Executive to control over all matters pertaining to warmaking," including "such clearly tactical matters as the movement of troops."[25] "[N]otwithstanding recent attempts to yoke the defense of executive defiance in wartime to original understandings," they explain, "there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it."[26]

During the Revolutionary War, for example, the Continental Congress exercised extensive authority over the strategies and tactics, including troop

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deployments, ordered by George Washington as commander in chief of the colonial army. Scrupulously deferential to congressional dictates, Washington never assumed that he had authority to disobey a legislative command, even when he believed Congress's judgment to be clearly wrong.[27] Similarly, there is no indication in early state constitutions that the commander in chief of the militia could act contrary to statutes governing military affairs. The constitutions of several states, including Massachusetts and New Hampshire, made clear that the war powers of the commander in chief were subject to legislative control.[28]

If we look beyond original understandings, we find little evidence in our constitutional practice of any widely shared understanding that the President's authority as Commander in Chief precludes congressional regulation of military operations. Even during the Civil War, a reference point often invoked by contemporary defenders of robust executive power, "Lincoln himself never once asserted a broad power to disregard statutory limits, not even during his well-known exercise of expansive executive war powers at the onset of hostilities or when confronted with statutes that challenged his own tactical choices later in the war."[29] In particular, when President Lincoln in April 1861 authorized his generals to suspend habeas corpus in response to rioting in various states, he defended his action on two grounds: first, that the suspension was a necessary response to a genuine emergency at a time when Congress was not in session, and second, that the Article I Suspension Clause empowers the President, in Congress's absence, to suspend habeas corpus when the nation faces rebellion. Whatever the merits of these arguments, they were "a far cry from a claim of general power pursuant to the Commander in Chief Clause to defy statutes regulating the conduct of war."[30] Indeed, President Lincoln conceded that the suspension was subject to congressional override, and when Congress passed the Habeas Corpus Act of 1863 limiting the President's suspension power, neither he nor his administration argued that the statute would be unconstitutional if it constrained the President's detention policies during war.[31]

Equally relevant is President Lincoln's acquiescence to the confiscation act that Congress passed in 1862. Despite his concern that seizing rebel property and emancipating certain slaves as tactics for ending the war risked alienating the border states, "no executive branch official—including the President and his Attorney General—contended at any point in the extensive debate that the

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Act unconstitutionally interfered with the President's constitutional war authority" even though that argument had been thoroughly aired in Congress.[32]

The history of our constitutional practice reveals no longstanding tradition of preclusive executive power to control the conduct of war, although the claim has surfaced more often since the mid-twentieth century. President Truman invoked preclusive as well as inherent power as Commander in Chief in deploying forces to Europe in 1951 to counter the Soviet threat,[33] but it does not appear that the deployment actually violated any federal statutes. And while many believe Truman exceeded his inherent powers when he committed troops to the Korean War without prior congressional authorization,[34] his action did not rely on preclusive power to disregard a statutory prohibition. Over the next fifty years, Congress passed numerous laws restricting the President's power to conduct military operations, including legislation in 1971 prohibiting U.S. deployment of ground troops in Cambodia, the War Powers Resolution in 1973, the Foreign Intelligence Surveillance Act in 1978, and the Boland Amendments in the 1980s restricting military aid to the Contras in Nicaragua.[35] Although nearly all of President Truman's successors claimed preclusive power in one or more circumstances, the practice was not consistent and often left unclear whether the claim was made in anticipation of future circumstances or in response to an applicable law on the books. "Certainly there was no sustained practice of actually disregarding statutes similar to that we have seen since September 11, 2001."[36] Further, it is worth noting that, from the Founding to the present day, the Supreme Court has never invalidated a federal statute on the ground that it improperly interfered with the President's constitutional prerogative to conduct a military campaign.

Faced with this history, recent defenders of preclusive presidential power have argued that new constitutional understandings are required in order to meet new threats to national security. The principal author of the Office of Legal Counsel's August 2002 memorandum on torture has explained that traditional checks and balances "might have been more appropriate at the end of the Cold War, when conventional warfare between nation-states remained the chief focus of concern and few threats seemed to challenge American national security."[37] Today, however, "it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force" given the emergence of rogue nations, the easy availability of weapons of

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mass destruction, and the rise of international terrorism.[38] Instead of maintaining "a warmaking system that place[s] a premium on consensus, time for deliberation, and the approval of multiple institutions," the argument goes, now "[t]he United States must have the option to use force earlier and more quickly than in the past."[39]

Although arguments for preclusive power based on societal change can hold no sway among those who believe in an originalism of expected applications, they nonetheless merit careful consideration because our Constitution's text and principles were meant to be adapted to new challenges and not frozen in time. In the war on terrorism, we face an asymmetrical conflict where the enemy is not a nation-state but a diffuse and hidden network, where enemy tactics include the targeting of civilian populations, where armed struggle is not confined to a traditional battlefield, and where the enemy's sources of financing and support are largely secret and not rooted in a territorial homeland. These conditions differ in many ways from past conflicts with nation-states that have agreed to abide by laws of war, and the unconventional nature of the enemy and its tactics may call for novel responses. The question is whether effective responses to terrorist threats require an allocation of decision-making authority that departs from original understandings of separation of powers and its actual practice throughout our history—in particular, the longstanding power of Congress to regulate the President's conduct of military campaigns.

It may be too soon to answer the question definitively, given the recency of the war on terrorism. But the argument for unchecked presidential power based on changed conditions should be viewed with great skepticism. As an initial matter, we ought not assume too quickly that the threat of terrorism is entirely different from security threats that our nation has confronted in the past. "The United States has long been troubled by sub-state actors engaged in non-traditional tactics to undermine U.S. interests," beginning with the Barbary pirates during the Founding era.[40] But even acknowledging the important differences between today's threats and those of the past, it is not obvious that effective responses require an enlargement of presidential power up to and including the power to disregard federal statutes constraining the exercise of executive war powers.

As a functional matter, our nation's "history undermines assertions about the inherent or inevitable unmanageability or dangers of recognizing

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legislative control over the conduct of war."[41] In the war on terrorism, there is little evidence so far to suggest that complying with existing laws or engaging Congress in passing new legislation has hampered the President's prosecution of the war. Where the President has asked Congress for greater authority, Congress has generally been willing to provide it.[42]

For example, after the National Security Agency's secret warrantless surveillance program came to light in 2005, the Attorney General argued that the program was a proper exercise of the President's power as Commander in Chief because existing statutory authority for government wiretapping was inadequate to meet national security needs. The secret program was justified, the Attorney General claimed, despite procedures in the Foreign Intelligence Surveillance Act that comprised "the exclusive means" for conducting domestic electronic surveillance.[43] The President, however, had never asked Congress for additional authority. Once the national security needs were made clear to Congress, legislators enacted the authorizations necessary to put the surveillance within a legal framework that balances effective intelligence-gathering with important privacy concerns.[44]

As this example and others suggest, there are good reasons to believe that the development of sound anti-terrorism policies requires more, not less, inter-branch consultation and cooperation.[45] By contrast, the Bush administration's torture and interrogation policies show how a claim of preclusive power—lacking the public deliberation, scrutiny, and consensus-building that the lawmaking process affords—can be self-defeating by compromising the effective prosecution of terrorist suspects, by undermining the collection of reliable intelligence, and by alienating potential allies throughout the world.

Notably, the Supreme Court has shown no inclination to endorse claims of preclusive power in the war on terrorism. Every major decision by the Court in this area has invoked traditional understandings of checks and balances. In *Rasul v. Bush,* for example, the Court held that federal courts have jurisdiction under the federal habeas statute to hear suits by Guantánamo detainees challenging the legality of their detention, effectively rejecting the President's argument that reading the habeas statute this way would unconstitutionally interfere with his Commander in Chief power.[46]

Similarly, in *Hamdi v. Rumsfeld,* the President claimed "plenary authority" to detain indefinitely an American citizen captured as an enemy combatant in Afghanistan despite a federal statute prohibiting the detention of citizens.[47]

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In a plurality opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, Justice O'Connor declined to reach the President's broad claim, instead upholding the detention on the ground that the Authorization of the Use of Military Force enacted by Congress after September 11, 2001, provided sufficient authorization for the detention. Rather than endorse a broad construction of the Commander in Chief power, the plurality situated the President's action within the confines of a duly enacted statute. Further, the plurality elaborated the due process requirements applicable to the detention. In doing so, Justice O'Connor reaffirmed our settled understanding of separation of powers:

> [The President's argument] serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[48]

Subsequently, the Court in *Hamdan v. Rumsfeld* held that military tribunals created by President Bush purportedly through his inherent power as Commander in Chief were not authorized by statute and violated the Uniform Code of Military Justice and the Geneva Conventions.[49] In reaching its holding, the Court rejected the notion of preclusive presidential power by saying: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[50] As Justice Breyer observed, "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[51] After *Hamdan,* the President did precisely that, and Congress responded by enacting legislation authorizing military commissions for aliens detained as enemy combatants.[52]

Although it is fair to say that the statutes examined in *Rasul, Hamdi,* and *Hamdan* are not models of legislative clarity or foresight, the decisions in those cases ultimately reflect the Court's adherence to Justice Jackson's dictum that "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be

under the law, and that the law be made by parliamentary deliberations."[53] Neither original understandings nor the lessons of constitutional practice, including our most recent experiences in the war on terrorism, provide reason to question that wisdom. In sum, fidelity to the Constitution requires that we preserve, not abandon, the core principle of checks and balances by working within our system of divided power to meet new challenges through democratic means.