

Introduction

Congress and the President

After September 11

In the years following the terrorist attacks of September 11 and the American-led invasion of Iraq, much attention was paid to the legality of many of the efforts by the administration of President George W. Bush to prevent future terrorist attacks in the United States, including the use of torture on terrorism suspects, widespread electronic surveillance of domestic telephone and Internet traffic, and the handling of detainees at Guantánamo Bay. By the Winter of 2008, Lincoln Caplan could write without exaggeration that

the view of presidential power asserted by the administration of George W. Bush stands out for the farness of its far-reaching scope: the Bush position is that the decisions of the president related to a war or national crisis are beyond the reach of statutory or court-made law, even if what he does is prohibited by Congress, the Supreme Court, or an international treaty signed and ratified by the United States.¹

As against this view stands the popular notion—repeated in political speeches, op-ed pages, and the blogosphere—that the events of September 11 “changed everything.” A version of this notion was used to justify the United States invasion of Iraq, the detention and interrogation of enemy combatants, and, on our shores, the Bush administration’s domestic electronic surveillance activities.² In the context of discussions about the wisdom and legality of these and other actions, the belief that the United States should approach national security issues differently in the wake of September 11 was invoked along with United States Supreme Court Justice Robert Jackson’s oft-repeated admonition that we temper the logic of constitutional decision-making with practical wisdom, ignoring legal niceties in the face of danger lest we convert “the constitutional Bill of Rights into a suicide pact.”³

1 Lincoln Caplan, *Who Cares About Executive Supremacy?*, THE AMERICAN SCHOLAR, Winter 2008, at 20, 22.

2 See E.L. Gaston, *Taking the Gloves Off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies*, 1 HARV. LAW & POL’Y REV. 519, 520-22 (2007) (cataloging counterterrorism actions taken by the Bush administration after September 11).

3 *Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

We assert, to the contrary, that September 11 did not necessarily change how the United States should approach issues of national security vis-à-vis terrorism, and that, even after September 11, the Constitution is no more likely than before to become a suicide pact. While there is something reassuring in the thought that the terrorist threat to national security requires a new approach—namely, the consolidation of defensive authority in the executive branch—and, further, that this new paradigm is legally justified by the exigent circumstances created by the September 11 attacks,⁴ the better argument is that the constitutional allocations of authority and traditional checks and balances continue to provide sufficient means to combat the threat of terrorism consistent with the rule of law.

Before turning to the basic issues of authority and accountability, in this Introduction we take a look at two other issues raised by the war on terror and the Iraq invasion: the regulation of the American military under the Constitution, and preemptive action against potential enemy states. We use these issues to highlight the constitutional concerns raised by the actions of the Bush administration and, more importantly, to highlight the Congressional response in each instance and whether Congress was playing its constitutionally assigned role of ensuring that, as our constitutional system of checks and balances promises, the executive is acting within legal limits.

Regulating the Armed Forces

Let's begin in 2006, with the release of a Pentagon-commissioned report from Andrew Krepinevich. The report indicated that, as a result of the wars in Iraq and Afghanistan, the U.S. Army was stretched too thin. The essence of the report was that the troop deployments in Iraq could not be sustained at then-current levels and the Army was in danger of reaching a breaking point. The civilian leaders in the Bush administration did not heed the report's recommendations, a situation made worse during the President's term by the increasing unpopularity of the war in Iraq.

But productive action could have been taken—by the Congress. For the issue was not just a matter of logistics; it was also one of constitutional dimension, concerning specific allocations of authority between the Congress and the President. While the President's authority as Commander-in-Chief includes the discretion to control military forces in the field and like matters relating to national

4 See, e.g., Norman J. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times*, 12 PSYCHOL. PUB. POL'Y, & L. 242, 243 (2006) (suggesting that, “[i]n the wake of horrific and heinous acts, there are powerful sentiments, psychological and political, to act”). See also FREDERICK A.O. SCHWARTZ, JR., AND AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 182 (2007) (discussing arguments of Bush administration lawyers that “their vision [of presidential power] was simply necessary constitutional change impelled by the present necessities of a post-9/11 era”).

defense, he does not have the exclusive authority to regulate the armed forces or to determine the appropriate troop levels and force composition. The Constitution expressly authorizes the Congress, among other things, “to provide for the common Defense,”⁵ “to raise and support Armies,”⁶ and to “make Rules for the Government and Regulation of the land and naval forces.”⁷ Given these textual commitments of authority and responsibility, in no sense can it be maintained that the President has exclusive authority over matters related to foreign affairs and national security, and in particular maintenance of the nation’s armed forces.

Indeed, Congressional authority does not end at the decision to raise an army; it embraces as well the discretionary authority to “support” the army—to regulate its size and composition. There is little historical evidence for the view that, once Congress calls an armed force into existence, the issue of its maintenance falls solely within the President’s authority. Congress, in short, has the constitutional authority to do more than appropriate funding for a military—it has the power to ensure that the armed forces are well-maintained under the watch of any President. As Professor Louis Henkin put it in his seminal essay on the Constitution and foreign affairs, “[t]he evidence is that in the framers’ contemplation, the armed forces would be under the command of the President but at the disposition of Congress.”⁸

It follows that Congress had the constitutional responsibility to take President Bush to task when his unreasonable assessments of the Army’s long-term needs and sustainability threatened the structure and integrity of American military capacities as the world’s most powerful fighting force. Congress abdicated that responsibility when it did not fully inquire into the status and condition of that force—when it did not take into consideration evidence like the Krepinevich report. Congress is not obligated to accept the Department of Defense’s or the administration’s views as to the appropriate levels of troop strength and composition; it can and should conduct its own inquiry, through hearings and investigation, to determine what the state of the armed forces is and what appropriate force levels should be.

Preemptive Action and the Congress

Perhaps the most foundational questions about the relationship between the President and the Congress regarding matters of national security arising during the Presidency of George W. Bush came from initiatives sponsored by Vice President Dick Cheney, in accord with his well-documented belief in a strong executive with near-exclusive power over foreign affairs and national security. Vice President Cheney stated time and again his view that prior occupants of the Oval Office

5 U.S. CONST. art. I, § 8, cl. 1.

6 U.S. CONST. art. I, § 8, cl. 12.

7 U.S. CONST. art. I, § 8, cl. 14.

8 LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 25 (1990).

had allowed too much interference with executive decisionmaking in these areas. Indeed, it was reported that the Vice President “would find a way to work around” any Congressional limitation on the President’s preemptive authority.⁹

If this kind of thinking about executive and Congressional authority sounds familiar, it’s because representatives of the Reagan administration put forward precisely the same argument for executive power in 1984, in connection with the passage of a piece of legislation called the Boland Amendment. The amendment essentially forbade the U.S. government from providing military support to the Contra rebels in Nicaragua with funding appropriated to the Central Intelligence Agency (CIA), the Department of Defense, or any other intelligence agency.¹⁰ The Reagan administration skirted the prohibition by relying upon funding derived from several sources, including the sale of weapons to the government of Iran. A scandal erupted when that action became known to the public.

In all the attention given the issue of executive power in the wake of the Iran-Contra scandal, the question whether, consistent with the U.S. Constitution, Congress could limit the President’s decisionmaking in respect to foreign policy went without a definitive response. The question became relevant again after September 11, as the Congress in 2006 reportedly considered limiting the President’s discretion to launch any preemptive military action against Iran—just as Vice President Cheney had predicted.

Would a prohibition on preemptive action have been within the Congress’s constitutional authority to enact? Some guidance on the subject comes from a 1989 analysis by Louis Fisher. In a short article that appeared in the *American Journal of International Law*, Fisher maintained that Congress has the authority to limit the scope of the President’s foreign affairs and national security actions.¹¹ Fisher argued that the beginning and end of the discussion lies in the appropriations of power: Congress has the exclusive power of the purse. Article I, section 9, provides that “No money shall be drawn from the Treasury, but in Consequence of Appropriations Made by Law.” The President enjoys no similar authority. Though it would be possible for the President to conduct federal operations with funds gathered from non-Congressional sources, such action would still have to be approved by Congress; otherwise it could only be regarded as *ultra vires*. As Fisher concluded, the constitutional design suggests that neither the executive nor the legislative branch of the federal government could involve the nation in military operations, and fund those operations, absent reliance upon the other.

Fisher’s argument has special relevance to the relationship between the President and Congress after September 11. The Constitution simply does not

9 Seymour M. Hersh, *Is a Damaged Administration Less Likely to Attack Iran, or More?*, THE NEW YORKER, Nov. 27, 2006.

10 The Boland Amendment to the War Powers Act of 1973, Pub. L. No. 98-215, (1983), available at <http://www.milnet.com/boland.htm>.

11 Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758 (1989).

allow decisions regarding the initiation of military operations (except in exigent circumstances, of course, as we discuss in Chapter 2) outside the system of checks and balances upon which our democracy depends. That system ensures that decision-makers remain accountable, and it prevents the accretion of too much power in any one branch of the federal government.

So, while representatives of the Bush administration following September 11 may well have believed that preemptive military operations in Iran were necessary to protect the American citizenry, the executive would have lacked the authority to act on that belief if the people's representatives in Congress, in their collective wisdom, did not happen to agree. Importantly, the constitutional design does not leave a President without options in the face of congressional opposition. He can always attempt to make a stronger case for military action and demonstrate why any limitations on his discretion to pursue preemptive military operations ought to be lifted. That may be a difficult task given the known exaggerations in which the Bush administration engaged in the run-up to the Iraq war. Indeed, in light of the case the Bush administration made for the Iraq war, present and future members of Congress could be forgiven for viewing any President's arguments with some skepticism, and for asking probing questions of administration officials, carefully reviewing all available intelligence, and exercising their own judgment with regard to potential threats to the United States. Such inquiries represent a critical structural check on executive power and the ability of Congress to act on them is a constitutional prerogative.

The Legislative-Executive Dynamic Under the Constitution

As each of these examples illustrates, national security issues raise a complicated series of questions regarding constitutional authority—whether and where it exists, in the executive branch or the legislative branch; and when Congress does enjoy authority in this area, whether it should use its power so as to provide a check on the executive branch. In the case of the long-term needs of the armed forces, Congress effectively failed to honor its constitutional obligation; in the case of preemptive war, Congress seemed ready to exercise its power to rein in the President. As this Chapter's very brief survey suggests, in many areas related to national security, the executive is not the sole decision-maker, and the Constitution's structural arrangements—the system of separation of powers and of checks and balances—serve to ensure that the people are able to hold their elected decisionmakers properly accountable, even in national security matters—perhaps especially in matters involving plans and policies designed to keep the citizenry safe in an increasingly dangerous world.

What we obviously have not provided in this Chapter is a complete explanation of the limitations on the President under our constitutional framework, and we proceed in the next Chapter to do that, and then in subsequent Chapters to apply that framework to some of the most controversial issues implicated by the war on

terror. These issues include the scope of the President's power to address exigent circumstances, the Congressional reaction to the practices at the Abu Ghraib prison, the use of secret evidence in military tribunals, the President's use of the state secrets privilege in court, and President Bush's attempts to politicize and marginalize the influence of military lawyers on issues related to the law of war. We conclude by suggesting a way forward, examining issues in which the Congress has begun the task of exercising its constitutional authority to influence executive decisionmaking, and whether there are other ways in which the Congress can work to keep the executive's excesses in check while allowing him the power to act appropriately to defend the nation.