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Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism

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Conduct of the war on terrorism raises novel, complex, and unprecedented legal and policy issues. This should be expected from a conflict that knows no borders and involves enemy combatants who do not fight on behalf of any nation. But critics go beyond claiming that President George W. Bush has made poor policy decisions to alleging that he has acted unconstitutionally by seizing Congress's authority to wage war.

For instance, in December, *The New York Times* reported that President Bush had authorized the National Security Agency (NSA) to engage in the warrantless interception of international phone calls and e-mails linked to terrorist activity. The Bush Administration claimed that both the President's constitutional powers as commander in chief and chief executive and Congress's authorization for the use of military force passed a week after the September 11, 2001, attacks allow the surveillance to take place outside the warrant process required by the Foreign Intelligence Surveillance Act (FISA) of 1978.

Claims that the surveillance is illegal are not just limited to the usual suspects of liberal newspaper columnists, Democratic Congressmen, and law professors. George Will, for example, claims that the Bush Administration has created a new danger by arguing that:

> because the president is commander in chief, he is the "sole organ for the nation in foreign affairs." That non sequitur is refuted by the Constitution's plain language, which empowers Congress to ratify treaties, declare war, fund and regulate military forces, *and make laws "necessary and proper" for the execution of all presidential powers*. Those powers do not include deciding that a law—FISA, for example—is somehow exempted from the presidential duty to "take care that the laws be faithfully executed."[1]

Will's statement that the President is the "sole organ for the nation in foreign affairs," however, was not manufactured by the Bush Administration, but in fact represents the view of the Supreme Court, first articulated in the case of *Curtiss-Wright Export Corp*. Congress does not ratify treaties; the Senate does. The Constitution's Necessary and Proper Clause may give Congress the power to implement the other powers of the government, but it also does not allow Congress to change the separation of powers in its favor by reducing the powers of the President.

Finally, the President has the duty to take care that the laws are faithfully executed, but because the Constitution is the highest form of federal law, the President cannot enforce acts of Congress which are themselves unconstitutional. Will seems to imagine the Commander-in-Chief Clause as being substantively empty—the President's sole function is to execute the war policies of Congress.

[1] George F. Will, "No Checks, Many Imbalances," *The Washington Post*, February 16, 2006, p. A27.

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Richard Epstein, perhaps the nation's leading libertarian legal scholar, similarly believes that Congress has the upper hand in setting war policy, primarily through its powers to declare war, to make rules for the regulation of the armed forces, and to fund the military. Epstein does have a broader view of the Commander-in-Chief Clause, which he suggests guarantees civilian control over the military and prevents Congress from issuing orders or evading the chain of command. But it is nowhere near the powers held by Congress. "The precise detailed enumeration of powers and responsibilities in Article II just do not confer on the president a roving commission over foreign and military affairs. He is a coordinate player, not a dominant one."[2] According to Epstein, Congress's power goes so far as to allow it to prohibit the military from using live ammunition in combat.

These critics misread the Constitution's allocation of war-making powers between the executive and legislative branches. This is nowhere more true than where their case should be its strongest: who gets to decide whether to start a war. For much of the history of the nation, Presidents and Congresses have understood that the executive's constitutional authority includes the power to begin military hostilities abroad.

As I argue in *The Powers of War and Peace*,[3] the Constitution does not create a legalistic process of making war, but rather gives to the President and Congress different powers that they can use in the political process to either cooperate or compete for primacy in policy.

During the last two centuries, neither Presidents nor Congress have ever acted under the belief that the Constitution requires a declaration of war before the U.S. can engage in military hostilities abroad. Although this nation has used force abroad more than 100 times, it has declared war only five times: the War of 1812, the Mexican–American and Spanish–American Wars, and World Wars I and II. Without declarations of war or any other congressional authorization, Presidents have sent troops to oppose the Russian Revolution, intervene in Mexico, fight Chinese Communists in Korea and remove Manuel Noriega from power in Panama, and prevent human rights disasters in the Balkans. Other conflicts, such as both Persian Gulf Wars, received "authorization" from Congress but not declarations of war.

Critics of these conflicts want to upend long practice by appeals to an "original understanding" of the Constitution. But the text and structure of the Constitution, as well as its application over the last two centuries, confirm that the President can begin military hostilities without the approval of Congress. The Constitution does not establish a strict war-making process because the Framers understood that war would require the speed, decisiveness, and secrecy that only the presidency could bring. "Energy in the Executive," Alexander Hamilton argued in the *Federalist Papers*, "is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."[4] And, he continued, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[5]

Rather than imposing a fixed, step-by-step method for going to war, the Constitution allows the executive and legislative branches substantial flexibility to shape the decision-making process for engaging in military hostilities. Indeed, given rogue states' increasing ability to procure weapons of mass destruction (WMD), and the rise of al-Qaeda and international terrorism, maintaining this flexibility is critical to preserving American national security.

CONSTITUTIONAL TEXT AND STRUCTURE

Many prominent scholars have criticized the wars of the post-war period by appealing to the intentions

[2] Richard A. Epstein, "Executive Power on Steroids," *The Wall Street Journal*, February 13, 2006, p. A16.

[3] John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005).

[4] Alexander Hamilton, *Federalist* No. 70, "The Executive Department Further Considered" (Jacob E. Cooke ed., 1980), at 423.

[5] Alexander Hamilton, *Federalist* No. 74 (Jacob E. Cooke ed.), at 447.

of the Framers. But interpretation of the Declare War Clause, like any other constitutional provision, should begin with analysis of the constitutional text and structure.

Critics of the President's war powers appeal to an understanding of declaring war that is probably taught in most high school civics classes. Professor Michael Glennon, for instance, has written that the Declare War Clause not only "empowers Congress to declare war," but also "serves as a limitation on executive war-making power, placing certain acts off limits for the President."[6] It is perhaps a commonsense notion to equate the power to "declare" war with the power to "begin" or "commence" war.

This view comports with a popular imagery of declarations of war as marking American entry into the most significant conflicts of the 20th century—namely, the two World Wars. The constitutional text, however, does not support such an expansive reading.

First, note that the Constitution uses the word "declare" war rather than "make," "begin," "authorize," or "wage" war. At the time of the ratification, "declare" carried a distinct and separate meaning from "levy," "engage," "make," or "commence." Samuel Johnson's English dictionary, perhaps the definitive dictionary of the time, defined "declare" as "to clear, to free from obscurity," "to make known, to tell evidently and openly," or to "publish or to proclaim."[7] This suggests that declaring war recognized a state of affairs—that is, it clarified the legal status of the nation's relationship with another country—rather than authorized the commencement of hostilities. As I will soon discuss, constitutional history provides further convincing evidence of this conclusion.

Second, the Declare War Clause should not be considered in isolation. In fact, the Constitution does not consistently use the word "declare" to mean "begin" or "initiate." Rather, when discussing war in other contexts, the Constitution's phrasing indicates that declaring war referred to something less than the sole power to send the nation into hostilities.

For instance, Article I, Section 10 withdraws from states the power to "engage" in war. If "declare" meant "begin" or "make," the provision should have prohibited states from "declaring" war. Certainly, granting Congress the sole authority to "engage" the nation in war would have been a much clearer, much more direct method for vesting in Congress the power to control the actual conduct of war.

Similarly, Article II defines treason as "levying War" against the United States. Again, if "declare" had the clear meaning of "begin" or "wage," the Constitution should have made treason the crime of "declaring war" against the United States. The evidence suggests that 18th century English speakers used "engage" and "levy" broadly to include beginning or waging warfare, but not "declare," which carried the connotation of recognition of a legal status rather than of an authorization.

Aside from the constitutional text itself, the structure of several constitutional provisions suggests that declaring war does not mean the same thing as beginning, conducting, or waging war. As just mentioned, Article I, Section 10 generally prohibits the states from engaging in war. It allows states to conduct hostilities, however, if Congress approves. The provision reads: "No States shall, without the Consent of Congress…engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

This provision is significant because it creates the exact war powers process between Congress and the states which critics want to create between Congress and the President. It makes resort to force conditional on the "Consent of Congress," and it even includes an exception for defending against sudden attacks.

Pro-Congress scholars believe that this exception must be read into the Declare War Clause to allow the executive to use force in response to an attack without having to seek a declaration of war from Congress. Otherwise, their strict interpretation would prevent

[6] Michael J. Glennon, *Constitutional Diplomacy* 17 (1990).

[7] Samuel Johnson, *A Dictionary of the English Language* (W. Strahan ed., 1755).

the President from engaging in even defensive uses of force without legislative pre-approval—a *modus operandi* utterly unworkable in the real world. Article I, Section 10 shows the faults of this approach because it requires us to believe that the Framers did not know how to express themselves in one part of the Constitution but did in another part of the Constitution on exactly the same subject.

Therefore, if one believes that the Framers were consistent throughout the Constitution, they should have written that "the President may not, without the Consent of Congress, engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Instead, the Constitution only allocates to Congress the declare-war power and to the President the commander-in-chief power without specifically stating—as it does in Article I, Section 10 with regard to the states—how those powers are to interact. The Constitution's creation of a specific, detailed war powers process at the state level but silence at the federal level shows that the Constitution does not establish any specific procedure for going to war.

The absence of a defined process for going to war is telling because the Constitution usually makes very clear when it requires a specific process before the government can act. This is particularly the case when the Constitution imposes shared power on the executive and legislative branches. Article I of the Constitution, for example, establishes a finely tuned system of bicameralism and presentment necessary to enact federal laws, and Article II, Section 2 declares that the President can make treaties subject to the advice and consent of two-thirds of the Senate, while appointments can be made subject to consent of a bare majority of the Senate. Both provisions establish a process, the order in which each institution acts, and the minimum votes required.

In contrast, the Constitution does not define a process for war-making. This suggests that the absence of a defined war-making process is an intentional element of constitutional design.

The Constitution is not merely a list of unassociated ideas; articles, sections, and even clauses often have specific functions or themes. The Declare War Clause is housed in Article I, Section 8, Clause 11. In addition to the power to declare war, that provision also vests in Congress the now-obscure powers to grant letters of marque and reprisal and to make rules concerning captures. Significantly, both of these powers relate to the recognition or declaration of a legal status rather than the authorization to carry out a specific activity. Rules on capture, for instance, do not authorize captures in wartime, but only determine their ownership, while letters of marque and reprisal extend the benefits of combat immunity to private forces. Reading the clauses to share a common nature because of their grouping suggests that the Declare War Clause similarly vested Congress with a power devoted to declarations of the international legal status of certain actions.

Indeed, when the Framers employed "declare" in a constitutional context, they usually used it in a juridical manner in the sense that courts "declare" the state of the law or the legal status of a certain event or situation. An example from early American political history—no less than the Declaration of Independence—illustrates this meaning. The Declaration did not "authorize" military resistance to Great Britain, as hostilities had existed for more than a year. Instead, it announced the new legal relationship between the mother country and its former colonies.

This begs the question: Are declarations of war merely useless window dressing devoid of substance? Absolutely not. Declarations of war serve a purpose, albeit one that does not amount to the sole authority to initiate hostilities: They place the nation in a state of total war, which triggers enhanced powers on the part of the federal government.

And we should not forget the commander-in-chief power. It is not empty of substance, nor is it simply a command to the President to carry out Congress's wishes. Several of the state constitutions drafted during the post-Revolutionary period, for example, contained quite extensive definitions of the commander in chief. Massachusetts, which adopted its constitution in 1780, and New Hampshire, which ratified a similar

document in 1784, both provided for strong executive power in war:

> The president of this state for the time being, shall be commander in chief of the army and navy, and all the military forces of the state, by sea and land; and shall have full power by himself…to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist… and in fine, the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral….[8]

These war powers provisions not only gave the governor the commander-in-chief power, but also assumed that the governor had authority to make war. These provisions do not just limit executive war-making authority to defensive responses to attack; they also explicitly provide for offensive operations under the direct authority of the executive, who may use any means he sees fit ("kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means") to achieve his war aims. Given the governor's duty to secure the safety of the state, these military provisions placed in the executive's hands the responsibility and incentive to act first.

Massachusetts and New Hampshire's provisions also indicate the role of a declaration of war as a judicial announcement rather than a legislative authorization for executive action. The power to declare war is vested in the legislature, but only acts as a triggering device for the governor's authority to declare martial law.

The Framers also had practice as a guide. New York's constitution, much admired by the Framers,[9] simply vested the commander-in-chief power in a governor. George Clinton, New York's first governor, sent the militia on his sole authority to reinforce General Gates's campaign against British forces during the Revolution. He later notified the legislature of the move in his first inaugural address.[10]

Throughout the war, Clinton (himself a military officer) worked closely with General Washington and his subordinates to coordinate operations against the British. Although it expressed its views when appropriating funds for the war effort, the legislature generally obeyed Clinton's wishes. He encountered such success in running the war and the state that the voters returned him to office for 18 consecutive years even though for most of the war New York City remained in the hands of the enemy. But it is important to note that New York's example was significant not because it granted the executive broader substantive war powers than other states. Rather, New York's allocation of powers remained fairly unexceptional. It was only when these substantive powers were combined with a structurally independent and unitary executive that vigorous government emerged. These lessons did not go unnoticed by the Framers. New

[8] N. H. Const. (1784), reprinted in 4 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 2463–64 (1909).

[9] See Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* 34–35 (1922).

[10] See E. Wilder Spaulding, *His Excellency George Clinton: Critic of the Constitution* 95–98, 114–18 (1938).

York's experience influenced not only the later constitution-writing efforts of Massachusetts and New Hampshire, but also the work of the Philadelphia Convention.[11]

The Framers were also heavily influenced by the understanding that the first President would be America's greatest commander in chief, George Washington, who had operated with significant independence and initiative in war policy, especially as the Continental Congress often was under flight and could not even raise funds and supplies to pay the Continental Army.

CONSTITUTIONAL HISTORY

Historical context further supports the understanding that the President retains broad war powers under the Constitution. The Framers would have understood the distribution of war powers between the executive and legislative branches in the context of the British Constitution, the source of many of the legal concepts found in the American Constitution.

Under the formal British system, as articulated by the influential and widely read Blackstone, the King exercised all of the war power, including the power to declare war.[12] A declaration of war was not needed either to begin or to wage a war, however, but rather served as a courtesy to the enemy and as a definition of the status of their relations under international law. It notified the enemy that a state of war existed so as to formally invoke the protections of international law.[13] It also played a domestic legal role by informing citizens of an alteration in their legal rights and status: During periods of formal war, citizens of the contending nations could "annoy" the persons or property of the enemy and lawfully keep captured vessels.

British governmental practice in the 18th century indicates that Parliament's control over funding, rather than the role of declaring war, provided a sufficient check over executive war-making. Indeed, in the 100 years before enactment of the Constitution, Britain engaged in eight significant military conflicts but only once "declared" war at the start of a conflict. The usual British course toward war involved months, if not years, of direct armed conflict without a declaration of war. Many of these wars remained vivid in the minds of the Framers, whose fathers fought in them as subjects of the British Empire.

If any of these conflicts impressed on the Framers the idea that declarations of war were unnecessary to the conduct of hostilities, it was the Seven Years War. George Washington saw his first significant military action in the conflict, and it was also the first war between the great powers that began in America. American and British troops had engaged in direct conflict with French troops since July 3, 1754, but Britain did not declare war until May 1756.[14]

Thus, by the time of the framing, the British constitutional system had reached an accommodation concerning the royal prerogative over war. The legislature was not powerless, however. Parliament's true check on executive power came through control over the raising of armies and the power of the purse. Parliament's consent was necessary to wage war; otherwise, soldiers would not be paid, armies would not be properly equipped, and the King's war power would be rendered largely illusory.

This allocation of war powers was not the result of mere happenstance. Rather, the distinction between the war power and the powers to fund and legislate

[11] See Clinton Rossiter, *1787: The Grand Convention* 59, 65 (1966). Afterwards, during the struggle for ratification, Publius expressed the thoughts of many when he declared that the New York constitution "has been justly celebrated both in Europe and America as one of the best of the forms of government established in this country." Federalist No. 26, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[12] I William Blackstone, *Commentaries on the Laws of England* 252.

[13] See *id*. at 249–50.

[14] Even in the early decades of the 19th century, American legal scholars such as Chancellor Kent still remembered that the Seven Years' War had broken out in America several years before England formally declared war. See I James Kent, *Commentaries on American Law* 54 (2d ed. 1832).

was a core element of the separation of powers and the rise of parliamentary democracy.

After independence, the revolutionaries did indeed turn against executive authority, in part due to overbearing colonial executives and perceived abuses by the Crown. The new state constitutions sought to weaken the executive by placing explicit restrictions on its power and by diluting its independence and structural unity. For instance, in all but one state, governors were elected by the legislature, and many states eliminated the structural unity of the executive branch by providing for powerful advisory councils. Pennsylvania even took the radical step of replacing the single governor with a 12-person executive council. Critics of the presidency today forget that the Constitution rejected these innovations.

Details from the framing debates themselves also provide evidence that some of the Constitution's supporters believed that it replicated the British system. It is true that the Constitutional Convention transferred the power to declare war from the British King to the Congress, but an earlier draft of the Constitution had given Congress the power to "make" war, and the delegates subsequently changed the power to the lesser power to "declare" it. Charles Pinckney had opened the debate by arguing that the power to make war should rest only in the Senate rather than in Congress as a whole because the full legislature's "proceedings were too slow."[15] Others went further than Pinckney in their skepticism of Congress, proposing an expansion of the executive role in war-making. Pierce Butler, for instance, argued for "vesting the power [to make war] in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."[16] Immediately after Butler's comment, Madison and Elbridge Gerry of Massachusetts moved "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Though subsequent debate shows that the Framers did not possess a clear consensus on the Declare War Clause, changing the phrase from "make" to "declare" certainly reflected an intention to prohibit Congress from encroaching on the executive power to conduct war.

When, in the all-important state ratifying conventions, opponents of the Constitution criticized the presidency as a potential monarch, its defenders never trumpeted—although they had every incentive to do so—Congress's power to declare war. Rather, pressed during the Virginia ratifying convention with the charge that the President's powers could lead to a military dictatorship, James Madison argued that Congress's control over funding would provide enough check to control the executive.[17]

CONSTITUTIONAL DESIGN

But suppose we conceded that the constitutional text and history did not provide a clear answer to the question of which branch controls the decision for war. We should then ask whether requiring congressional approval for war would provide significant functional benefits to American national security.

Proponents of congressional war power often argue that the executive branch is unduly prone to war. In this view, if the President and the Congress have to agree on war-making, then the nation will enter fewer wars and those wars that do occur will arise only after sufficient reason and deliberation. It is far from clear, however, that outcomes would be better if Congress alone had the power to begin wars.

First, congressional deliberation does not necessarily ensure consensus. And even if it does represent consensus, it is no guarantee of consensus after combat begins. Thus, the Vietnam War, which was initially approved by Congress, did not meet with a consensus

[15] I *The Records of the Federal Convention of 1787,* at 292 (Max Farrand ed., 1911).

[16] *Id*. at 293.

[17] Madison declared: "The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America as far as any analogy can exist." See 10 *The Documentary History of the Ratification of the Constitution* 1282 (John P. Kaminski and Gaspare J. Saladino eds., 1986) (Madison speech of June 14, 1788).

over the long term but instead provoked some of the most divisive politics in American history. It is also difficult to claim that the congressional authorizations to use force in Iraq, either in 1991 or in 2002, reflected a deep consensus over the merits of the wars there. Indeed, the 1991 authorization barely survived the Senate, and the 2002 authorization received significant negative votes and has become a deeply divisive issue in national politics.

It is also not clear that the absence of congressional approval has led the nation into wars that it should not have waged. The experience of the Cold War does not clearly come down on the side of a link between institutional deliberation and better conflict selection. War was fought throughout the world by the two superpowers and their proxies during this period. Yet the only war arguably authorized by Congress was the Vietnam War. The United States fought against Soviet proxies in Korea and Vietnam, the Soviet Union fought against American-backed forces in Afghanistan, and the two very nearly came into direct conflict during the Cuban missile crisis.

Aside from bitter controversy over Vietnam, there appeared to be significant bipartisan consensus on the overall strategy of containment, as well as the overarching goal of defeating the Soviet Union. We did not win the four-decade Cold War by declarations of war. Rather, we prevailed through the steady presidential application of the strategy of containment, supported by congressional funding of the necessary military forces.

On the other hand, congressional action has led to undesirable outcomes. Congress led us into two "bad" wars, the 1798 quasi-war with France and the War of 1812. Excessive congressional control can also prevent the U.S. from entering conflicts that are in the national interest. Most would agree that congressional isolationism before World War II harmed U.S. interests and that the United States and the world would have been far better off if President Franklin Roosevelt could have brought us into the conflict much earlier.

Congressional participation does not automatically, or even consistently, produce desirable results in war decision-making. Critics of presidential war powers exaggerate the benefits of declarations or authorizations of war. What also often goes unexamined are the potential costs of congressional participation: delay, inflexibility, and lack of secrecy. Legislative deliberation may breed consensus in the best of cases, but it also may inhibit speed and decisiveness. In the post–Cold War era, the United States is confronting several major new threats to national security: the proliferation of WMD, the emergence of rogue nations, and the rise of international terrorism. Each of these threats may require pre-emptive action best undertaken by the President and approved by Congress only afterwards.

Take the threat posed by the al-Qaeda terrorist organization. Terrorist attacks are more difficult to detect and prevent than those posed by conventional armed forces. Terrorists blend into civilian populations and use the channels of open societies to transport personnel, material, and money. Despite the fact that terrorists generally have no territory or regular armed forces from which to detect signs of an impending attack, weapons of mass destruction allow them to inflict devastation that once could have been achievable only by a nation-state. To defend itself from this threat, the United States may have to use force earlier and more often than was the norm during the time when nation-states generated the primary threats to American national security.

In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the executive branch needs flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence. By acting earlier, perhaps before WMD components have been fully assembled or before an al-Qaeda operative has left for the United States, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force.

Similarly, the least dangerous way to prevent rogue nations from acquiring weapons of mass destruction may depend on secret intelligence gathering and covert action rather than open military intervention. De-

lay for a congressional debate could render useless any time-critical intelligence or windows of opportunity.

LEGALITY OF NSA WIRETAPPING PROGRAM

That brings us back to the NSA program. The legality of the NSA wiretapping program rests on several pillars, most of which bear directly on the nature of the executive war power.

First, the United States is in fact at war. Both the President and Congress agree that the September 11 attacks created "an unusual and extraordinary threat" to the national security of the United States. Suppose, for example, that a hijacked airliner headed for Washington refused to respond to air traffic control. Under the civil libertarian approach, the government could not monitor the suspected hijackers' phone or radio calls unless they received a judicial warrant first. What civil libertarians forget, however, is that because we are in a state of war, our military can intercept the communications of the plane to determine whether it poses a threat and to target, if necessary, the enemy. A judicial warrant is not necessary, especially since the purpose of the interceptions is not to arrest someone for trial for a crime committed, but to prevent an attack.

Second, the President as commander in chief has the constitutional power and responsibility to wage war in response to a direct attack against the United States. During World War II, for instance, the Supreme Court recognized that once war has begun, the President's authority as commander in chief and chief executive gave him access to the tools necessary to wage war effectively. The President has the power "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war" and to issue military commands using the powers to conduct war "to repel and defeat the enemy."[18] In the wake of the September 11 attacks, even Congress agreed that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States…."[19] This statement recognizes the President's authority to use force, and any powers necessary and proper to that end, to respond to al-Qaeda.

Third, the Constitution's grant to the President of the power to wage war successfully, once begun, carries with it the authority to gather intelligence, through secret means if necessary. This has been recognized by the Supreme Court in several cases, most notably *United States v. Curtiss-Wright Export Corporation*, in which the Justices found that the power to set foreign policy ought to rest with the presidency because its structure allowed it to act with unity, secrecy, and speed.[20]

Fourth, a practice has long existed of Presidents, under their power to conduct intelligence activities to protect the country, ordering electronic surveillance without any judicial or congressional participation. Every President, until FISA's passage, conducted national security surveillance without a warrant, and even the Carter Administration made clear during FISA's passage that it could not infringe on the President's constitutional rights in the area—a view later shared by the Clinton Administration.[21] This is not to say that such surveillance was conducted willy-nilly, although in the case of President Nixon it was certainly abused. Such wiretaps were placed only on the approval of the Attorney General or his designate and underwent reviews by lawyers within the Justice Department. Furthermore, this record of surveillance occurred primarily during peacetime and did not involve a period of

[18] *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).

[19] Authorization for Use of Military Force, Pub. L. 107–40 (Sept. 18, 2001).

[20] 299 U.S. 304 (1936). As recently as last year, the Court upheld the longstanding doctrine that courts should not exercise review when the success of secret espionage is at stake. See *Tenet v. Doe*, 544 U.S. 1 (2005).

[21] See Foreign Intelligence Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (Statement of Attorney General Griffin Bell); Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence, 103d Cong., 2d Sess. 61 (1994) (Statement of Deputy Attorney General Jamie Gorelick).

heightened presidential power during wartime after a direct attack on the United States, when the need for intelligence would be even greater. If Presidents could order the interception of the communications of foreign spies and terrorists in the absence of war, the September 11 attacks and the state of war they ushered in would only strengthen executive authority.

Fifth, courts have never opposed the President's exercise of the authority to engage in electronic surveillance without a warrant to protect national security. When the Supreme Court first considered this question, in the 1972 *Keith* case, it held that the Fourth Amendment required a judicial warrant if a President wanted to conduct surveillance of a purely domestic group that posed a threat to the government.[22] Obviously, the Court was concerned that warrantless surveillance of domestic groups could turn into the suppression of political dissent, but it also made clear that its ruling did not reach surveillance of foreign threats to national security and left the question open. In the years since, as a federal appeals court specially created to hear challenges to the surveillance laws noted in late 2002, every lower federal court to have addressed the question has agreed that the executive branch possesses such power.[23]

Sixth, it is arguable that Congress implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States. On September 18, 2001, Congress enacted a law authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[24] This authorization is sweepingly broad; it has no limitation on time or place—only that the President pursue al-Qaeda wherever it may be, even inside the United States. Although the President did not need, as a constitutional matter, Congress's permission to pursue and attack al-Qaeda after the attacks on New York City and the Pentagon, its passage shows that the President and Congress fully agreed that military action would be appropriate. Congress's support for the President cannot be limited only to the right to use force, but to all the necessary subcomponents that permit effective military action.[25] If Congress approved the capture rather than killing of al-Qaeda members, then it must also include the ability to locate the operatives in the first place.

The Constitution thus creates a presidency that is uniquely structured to act forcefully and independently to repel serious threats to the nation. Instead of specifying a legalistic process to begin war, the Framers wisely created a fluid political process in which legislators would use their funding power to control war. As we confront terrorism, rogue nations, and the proliferation of weapons of mass destruction, we should look skeptically at claims that radical changes in the way we make war would solve our problems, even those stemming from poor judgment, unforeseen circumstances, and bad luck.

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[22] *United States v. United States District Court*, 407 U.S. 297 (1972).

[23] *In re Sealed Case*, 310 F.3d 717, 742 (For. Intell. Surv. Ct. Rev. 2002).

[24] Authorization for Use of Military Force, Pub. L. 107–40, § 2 (Sept. 18, 2001).

[25] See Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," 118 Harv. L. Rev. 2048, 2092 (2005).