

MEET THE NEW BOSS: CONTINUITY IN PRESIDENTIAL WAR POWERS?

MICHAEL D. RAMSEY*

This panel discussion asks us to consider continuities in the exercise of presidential war powers from the administration of George W. Bush to the administration of Barack Obama. I agree to a large extent with what has become conventional wisdom—that despite candidate Obama’s criticism of President Bush, once candidate Obama became President Obama, large areas of continuity arose. Particularly in the war on terror, examples spring readily to mind: detaining terrorism suspects without trial at Guantanamo and elsewhere; conducting trials of terrorism suspects by military commission; and energetically using military force abroad against terrorist groups, not only in Afghanistan but also in Pakistan, Somalia, and Yemen.

I want to dissent, however, from the panel’s implicit premise that continuity should be the principal theme in examining the exercise of presidential war powers between the Bush and Obama administrations. Despite persistent and at times shrill complaints that President Bush exceeded his constitutional authority, in several fundamental respects we have experienced wider assertions of unconstitutional executive authority under President Obama, to much more muted criticism. I want to focus on that contrast.

This expansion of presidential war powers should be a concern at a conference focused on a Constitution of limited government. I do not think the Framers envisioned a national secu-

* Professor of Law, University of San Diego School of Law. This essay was adapted from remarks given during a panel discussion titled “Meet the New Boss: Continuity in Presidential War Powers” at the 2011 Federalist Society National Lawyers Convention. For an audio and video recording of the complete panel, visit the Federalist Society’s website. *Meet the New Boss: Continuity in Presidential War Powers—Event Audio/Video*, FEDERALIST SOC’Y (Nov. 10, 2011), <http://www.fed-soc.org/publications/detail/meet-the-new-boss-continuity-in-presidential-war-powers-event-audiovideo>.

rity exception to the idea of constitutionally restrained power. Many of the constitutional provisions that the Framers wrote were specifically directed at national security issues and, moreover, were specifically directed at effecting a separation of powers and a checking function in those areas.¹

The constitutional checks in national security law have come under more stress in recent times, and the Obama Administration has been especially aggressive in ways the Bush Administration was not. Consider two examples.

The first is the recent intervention in Libya. I think it is clear that the Constitution's original meaning does not allow the President to initiate war, at least in the absence of an immediate threat of attack on the United States. This restriction comes from the Declare War Clause,² which the Framers understood as shorthand for initiation of war. The phrase "declare war" was used in two ways during the eighteenth century: A nation could declare war by a formal declaration or it could declare war by initiating the use of armed force.³ The Framers disagreed on many things in their comments about their handiwork, but Madison, Hamilton, Washington, Jefferson, Marshall, and others agreed that the President could not begin war on his own authority.⁴

In Libya, there is no doubt, despite what the administration might say,⁵ that the President initiated war on his own author-

1. See, e.g., U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cl. 1; MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 347–48 (2001) (discussing the extent of and limits on executive foreign affairs power).

2. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . to declare War . . .").

3. RAMSEY, *supra* note 1, at 218–26; Michael D. Ramsey, *Textualism and War Powers*, 69 *U. CHI. L. REV.* 1543, 1596–97 (2002); see also Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 *CORNELL L. REV.* 45 (2007). But see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CALIF. L. REV.* 167, 242 (1996) (arguing that the Declare War Clause simply empowers Congress to make a statement about the existence of a war).

4. See Ramsey, *supra* note 3, at 1549–51.

5. See Office of Legal Counsel, Authority to Use Military Force in Libya, Memorandum Opinion for the Attorney General, April 1, 2011, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> [hereinafter OLC Libya Opinion].

ity.⁶ The Libya intervention is clearly a war in the eighteenth-century sense—“the exercise of violence under sovereign command.”⁷ A sustained military attack on a foreign sovereign government to force it to do our will must surely qualify as war.⁸ Therefore, we have in Libya a manifest violation of the Constitution’s original meaning regarding war powers.

6. Cf. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all>.

7. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Arno reprint 1979) (definition of “war”); see also Ramsey, *supra* note 3, at 1610–12 (collecting additional eighteenth-century definitions of war).

8. The Obama administration argued that war in the constitutional sense, requiring congressional approval, exists only in the case of “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” OLC Libya Opinion, *supra* note 5, at 8; see *id.* at 13 (concluding that “the limited military operations the President anticipated directing were not a ‘war’ for constitutional purposes”). Specifically, the administration argued with respect to Libya that the “limited mission” and the fact that the United States would not deploy ground troops demonstrated that congressional approval was unnecessary. *Id.*

To the contrary, however, the founding generation understood Congress’s approval under the Declare War Clause to be required even for limited missions that did not involve ground troops if the missions involved the use of military force against a foreign sovereign. For example, no one in Congress or President Adams’s administration doubted that Congress’s approval was required to undertake limited naval operations against France in 1797. See DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 241–44 (1997); ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 139–161 (1976). Indeed, the principal constitutional debate arising from the conflict was whether the President had independent power to authorize *defensive* arming of merchant vessels against possible French attack. SOFAER, *supra*, at 142–43. The Supreme Court subsequently held that the 1797 conflict was a “war” falling under Congress’s war powers. *Bas v. Tingy*, 4 U.S. 37, 40–45 (1800); *Talbott v. Seeman*, 5 U.S. 1, 26–28 (1801).

Similarly, in 1801 there was debate over President Jefferson’s unilateral military operations against Tripoli. The early stages of this conflict involved only limited naval operations. Yet the principal actors, including Jefferson, Alexander Hamilton, and Jefferson’s Treasury Secretary Albert Gallatin, assumed that it was a “war” of the type for which Congress’s approval ordinarily would be required. Gallatin and Hamilton argued, however, that no congressional approval was required because Tripoli had first declared war on the United States; Attorney General Levi Lincoln disagreed, contending that Congress’s approval was needed for anything beyond purely defensive measures. See SOFAER, *supra*, at 209–16; DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 123–30 (2001). No one suggested that, because the conflict was limited and did not involve ground troops, the declare-war power simply was not implicated. The OLC Libya Opinion is manifestly inconsistent with the thinking reflected in both episodes, neither of which it discusses.

In contrast, this behavior is not something we saw in the Bush Administration. President Bush honored the constitutional limit on initiation of war. He sought and received approval from Congress to use military force in the war on terror,⁹ even though it was not entirely clear that the President needed approval to respond to an attack on the United States. The President, in my view, has significant independent authority to respond to such an attack.¹⁰ But by seeking congressional approval, rather than relying on a contested version of the Executive's independent powers, President Bush assured that his military responses to the attacks of September 11, 2001, in particular the subsequent intervention in Afghanistan, did not transgress the separation of powers. In addition, although some advisers suggested that congressional authority to invade Iraq was unnecessary, President Bush sought and obtained congressional approval for that operation as well.¹¹ Conversely, President Bush did not attack Iran in 2007 or 2008 in response to Iran's potential development of a nuclear weapons program, despite some urging that he do so.¹² At that time Congress clearly would not have authorized an attack on Iran.¹³ No doubt other considerations went into the decision to refrain from attacking Iran as well, but it is nonetheless notable that President Bush obtained congressional approval for major military actions in Iraq and Afghanistan and refrained from acting in Iran when approval was not forthcoming, in sharp contrast to President Obama's approach in Libya.

9. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

10. See Michael D. Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007). But see Prakash, *supra* note 3, at 94-112.

11. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498 (Oct. 16, 2002); see also Elisabeth Bumiller & Carl Hulse, *Bush Administration Will Use Congress Vote to Press U.N.*, N.Y. TIMES, Oct. 12, 2002, at A1.

12. See, e.g., Ian Black & Simon Tisdall, *Saudi Arabia urges U.S. Attack on Iran to stop nuclear Programme*, THE GUARDIAN, Nov. 28, 2010, <http://www.guardian.co.uk/world/2010/nov/28/us-embassy-cables-saudis-iran>; Helene Cooper, *Rice Plays Down Hawkish Talk About Iran*, N.Y. TIMES, June 2, 2007, <http://www.nytimes.com/2007/06/02/world/middleeast/02diplo.html>.

13. See, e.g., *Pace: No Operations Inside Iran*, UNITED PRESS INTERNATIONAL, Jan. 11, 2007, http://www.upi.com/Business_News/Security-Industry/2007/01/11/Pace-No-operations-inside-Iran/UPI-17551168541023/.

My second example of an unconstitutional use of executive power is the drone attack that killed U.S. citizen Anwar al-Awlaki in Yemen in 2011.¹⁴ Arguably, Congress approved this action in the 2001 Authorization for Use of Military Force (AUMF), but even with congressional authorization it likely violated the original meaning of the Constitution's Due Process Clause.¹⁵ As an initial matter, U.S. citizens are protected by the Bill of Rights even when they are overseas.¹⁶ The eighteenth-century idea of sovereign jurisdiction depended on territory and citizenship.¹⁷ A sovereign's laws extended to its citizens abroad, and, for that reason, it follows that constitutional protections extend to citizens abroad. There is substantial evidence that the founding generation agreed with this view.¹⁸

It is important to note that the eighteenth-century view did not extend constitutional protections to aliens abroad.¹⁹ Aliens abroad

14. See, e.g., Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>.

15. U.S. CONST. amend. V.

16. See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (“[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”).

17. See, e.g., Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1843–44 (2009).

18. See *id.*; Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens* (Mar. 7, 2011) (on file with the Utah Law Review), available at <http://ssrn.com/abstract=1780584>. Although the Supreme Court later suggested otherwise, see *Ross v. McIntyre*, 140 U.S. 453, 464 (1891), that decision was not grounded in the text's original meaning and has since been abandoned. See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2011).

19. See, e.g., Hamburger, *supra* note 17, at 1881–82; J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 486 (2007).

Extending constitutional rights to citizens abroad makes sense in an eighteenth-century context. U.S. citizens, especially political and economic elites, commonly traveled overseas at the time. And executive agents could surely reach overseas as well. It would be odd if the founding generation thought that citizens would be exposed to the whims of executive discretion respecting their life and liberty simply by crossing the border. Further, the Constitution's text itself does not have a territorial limitation, and though a limitation might well be implied for non-citizens—who were understood to be outside both the allegiance and protection of the United States, as Professors Kent and Hamburger describe—the reasons for this implication would not apply to citizens. Relatedly, the understanding was that non-citizens were protected by international law rather than constitutional law; U.S. citizens in contrast would not have been protected by eighteenth-century ideas of international law against actions by their own government.

were protected by international law and by diplomatic relations but not by the Constitution.

One of the central constraints on executive power found in the Bill of Rights is the Due Process Clause, which says we cannot deprive persons of “life”—as in al-Awlaki’s case—without due process of law.²⁰ It is often called the Due Process Clause, but it should really be called the Due Process of Law Clause. There was some process within the Executive Branch in determining whether al-Awlaki would be a target or not, but that was not due process of *law*. It was due process of executive discretion at best. Due process of law in the eighteenth-century understanding meant, in general, a court pronouncement. The Executive was not ordinarily permitted to kill people without a court pronouncement of their guilt.²¹

Of course, there were exceptions to this general rule. In particular, the rule did not apply to activities on the battlefield or similar exigent circumstances. It was never understood in the eighteenth century that battlefield combatants had any sort of

20. U.S. CONST. amend. V; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *132–133 (1765) (“To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (“The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.”).

21. Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005406. As Chapman and McConnell summarize:

By the time the Fifth Amendment was enacted, everyone agreed that due process applied to executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate a deprivation of rights must be preceded by certain procedural protections characteristic of judicial process: generally presentment, indictment, and trial by jury. . . . [D]ue process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property between independent political institutions. In modern parlance, due process has always been the insistence that the executive—the branch of government that wields force against the people—deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate.

Id. at 7–9; *see also id.* at 11 (describing the English understanding of due process as a “guarantee of judgment by an independent institution according to procedures designed to take the case out of the hands of the king”).

protection against being killed, even if they were citizens fighting against their own country. The al-Awlaki episode, however, did not take place on a battlefield in any sense that would have been understood by the Framers. It only could be understood as a battlefield if one considers the entire world to be a battlefield, a conception wholly divorced from the eighteenth-century idea of the battlefield. Moreover, it was not clear that al-Awlaki was a combatant, as opposed to someone who was simply giving aid to America's enemies.²² And it was not clear that there were any exigent circumstances, in the sense that he was planning an immediate attack on the United States that could be thwarted only by immediate lethal force.²³

Absent exigent circumstances, the Constitution provides a specific way for acting against U.S. citizens who are alleged to be aiding and supporting the enemy: the Treason Clause.²⁴ The Treason Clause requires that they be brought to trial under specific conditions including, for example, conviction only on the testimony of two witnesses or confession in open court.²⁵ If the President could simply kill anyone the President believed was supporting hostilities against the United States, this clause would be easily circumvented.²⁶

In the eighteenth century, moreover, it was understood that the King of England could not simply kill alleged traitors, even if they were overseas giving aid and comfort to the King's enemies. The King could kill them on the battlefield through the use of military force, but dissidents who simply had taken

22. Cf. *Killing of Awlaki is Latest in Campaign Against Qaeda Leaders*, N.Y. TIMES, Sept. 30, 2011, www.nytimes.com/interactive/2011/09/30/world/middleeast/the-killing-of-anwar-al-awlaki.html.

23. See David Cole, *Killing our Citizens Without Trial*, N.Y. REV. OF BOOKS, Nov. 24, 2011, <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/?pagination=false>.

24. U.S. CONST. art. III, § 3.

25. *Id.* ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."). This text illustrates the extent to which the founding generation was concerned about trumped-up charges of treason: it contains both a substantive definition of the crime and a procedural protection for its proof.

26. Thus, the Treason Clause confirms that there is no "treason" exception (or, as we would say in modern discourse, "national security" exception) to the Due Process Clause.

refuge in France were not at the mercy of royal assassination squads.²⁷ Thus, the killing of al-Awlaki is a claim of executive power that goes not only beyond anything the Bush Administration claimed but also beyond anything claimed by the King of England in the eighteenth century.

Again, the contrast with the Bush Administration is striking. President Bush did not face the same issue, but his treatment of captured U.S. citizens believed to be aiding al Qaeda was somewhat more attentive to constitutional concerns.²⁸ In any event, Bush did not assert the power to kill American citizens abroad.

Thus there has been an escalation in the use of unconstitutional executive war power under President Obama, yet there has not been an outcry against him resembling the outcry against the Bush Administration, which was routinely attacked for exceeding the limits of executive power.²⁹ Although some voices have been raised against President Obama's claims of executive power,³⁰ they have been marginalized. They have not

27. See Alford, *supra* note 18 (discussing eighteenth century views). See also D. ALAN ORR, TREASON AND THE STATE: LAW, POLITICS, AND IDEOLOGY IN THE ENGLISH CIVIL WAR 11, 14–15 (2002) (illustrating importance of the trial process in treason cases).

28. In the case of Yassir Hamdi, for example, the President claimed power to detain Hamdi without judicial process because Hamdi had been captured on the battlefield. But, upon learning that Hamdi was a U.S. citizen, the President directed that Hamdi be brought to the United States for detention, a move that assured he would have access to courts via habeas corpus. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a divided Supreme Court did not provide a clear answer to Hamdi's due process claims, although a majority appeared to believe some process beyond mere executive declaration was needed. See *id.* at 509 (plurality opinion); see also *id.* at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). In a strongly worded dissent, Justice Scalia, relying on eighteenth-century sources, concluded that the Treason Clause barred executive detention of citizens. See *id.* at 554 (Scalia, J., dissenting); see also Chapman & McConnell, *supra* note 21, at 102–03 (describing *Hamdi* as a difficult case as a result of Hamdi's detention on the battlefield).

29. See, e.g., *Media Criticism: Bush and Obama comparison*, THE CONSTITUTION, INC. (Aug. 11, 2011), <http://theconstitutioninc.wordpress.com/2011/08/11/media-criticism-bush-and-obama-comparison/>.

30. E.g., Noam Chomsky, *The Grim Picture of Obama's Middle East*, COMMONDREAMS.ORG, June 4, 2009, <http://www.commondreams.org/view/2009/06/04-16>; Kara Rowland, *ACLU slams Obama's security policies*, WASH. TIMES, July 29, 2010, <http://www.washingtontimes.com/news/2010/jul/29/aclu-slams-obamas-security-policies/>; see also Cole, *supra* note 23 (“[A]s long as the Obama administration insists on the power to kill the people it was elected to represent—and to do so in

been taken up by the mainstream in the manner of similar criticisms of President Bush. My speculation is that there is an identification by legal and media elites with the establishment Democratic Party that makes it difficult for these criticisms to gain traction in the way they did in the Bush Administration.

I think this makes it easier for Democratic presidents than for Republican presidents to unconstitutionally extend executive power. Thus Obama's policies, which are much more deserving of constitutional criticism, do not generate the popular pushback that we saw, perhaps unjustifiably, against President Bush. In any event, what is most striking about executive war power under President Obama is not the commonly recognized continuity as compared to the prior administration, but rather the increased disregard of constitutional limits.

secret, on the basis of secret legal memos—can we really claim that we live in a democracy ruled by law?”).