

EXECUTIVE POWER: THE LAST THIRTY YEARS

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1. INTRODUCTION

The last thirty years have witnessed a continued growth in executive power—with virtually no check by the legislative branch. Regardless of which political party controls the Congress, the institution of the executive continues to grow and increase in power—particularly in the foreign affairs arena. While to many, the end of the Bush administration signaled the end of a perceived “power grab” by the executive branch, nothing could be further from the truth. This short Article will assert that since the founding of this journal thirty years ago, the United States has witnessed several changes that have inevitably led to this rapid expansion of executive power. Section 2 will discuss the Founders’ intention that the executive be supreme in the arena of foreign affairs. Section 3 will explore executive power in the twenty-first century, particularly since 9/11 when the vast increases in technology and the ability to inflict massive harm in an instant (often by non-state actors) has necessitated a more aggressive, centralized decisionmaking process within the power of the executive. Additionally, the bureaucratic inefficiencies of the Congress have crippled its ability to actually “check” the executive, for fear of being perceived as “soft on terror” or “weak on defense.” With these considerations, this Article recommends that President Barack Obama continue to protect his executive prerogatives as the best means of promoting national security in the twenty-first century.

Unfortunately, the real danger is not necessarily the understandable growth in executive power—it is that foreign affairs and wartime decisionmaking is going unchecked by the Congress and is increasingly in the hands of the federal courts and

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unelected, life tenured judges and justices—something the Founding Fathers would have not, and could have not, ever anticipated.

2. THE EXECUTIVE IN FOREIGN AFFAIRS AT THE FOUNDING

The history of the power of the executive in the area of foreign affairs, and military operations in particular, is abundant with examples of the Founders' intent. Their intent, partially in response to the failures of the Articles of Confederation, placed the Commander-in-Chief powers clearly in the Constitution—within Article II.

One way to discern the Founders' intent on foreign affairs is through the lens of the meaning of executive power at the time of the creation of the Constitution. In the eighteenth century meaning of the term, executive power clearly included the foreign affairs power as well as the power to execute the laws within the domestic United States. Thus, the Founders, aware of the failures of the Articles of Confederation in foreign affairs, military affairs, and the execution of laws, sought to remedy these problems by vesting such power in the Presidency.

Some scholars and policy makers today, when reviewing the pre-revolutionary period and the revolutionary period itself, argue the Founders were rejecting the crown and intended the legislature to be the strongest branch. In some areas this is true—particularly with regard to domestic affairs. However, these critics, such as my friend Lou Fisher, rely upon the strength of the legislatures during this period as indicia the Founders wanted the legislature to be co-equal—or in many ways, superior to the executive in the foreign affairs realm.¹ However, I would suggest my learned colleagues misinterpret the actual intent of the Founders. The legislatures, the Continental Congress, and the state legislatures for the most part were functioning as the “executive branch.” Prior to the Constitution, there was no real executive branch in existence, and thus, the “executive powers” in foreign affairs were vested in the legislatures. Even the great Chief Justice John Marshall later described it: “[t]he confederation was, essentially, a league; and congress was a corps of ambassadors, to be recalled at the will of

¹ Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 19–21 (2006) (describing the relatively expansive powers of Congress over military and foreign affairs during the pre-revolutionary period).

their masters.”² Jack Rakove, a leading scholar today on the Founders, notes that many Americans during this period actually referred to the legislature as the “Supreme Executive” and the “Supreme Executive Council.”³ Rakove has further noted “the idea that Congress was essentially an executive body persisted because its principal functions, war and diplomacy, were traditionally associated with the Crown, whose executive, political prerogatives, bear a very striking resemblance to the powers of Congress.”⁴ The failures of this framework, however, led the leading thinkers of the day to reject this notion, and to create an executive branch to be the Commander-in-Chief and the sole person to conduct the nation’s foreign affairs. The Constitution once enacted, rejected the theories that the United States could function efficiently without an executive.

Most scholars look to Alexander Hamilton, the most ardent supporter of a strong executive, for guidance when researching the original intent of executive power within the U.S. Constitution.⁵ He is well known to have sought an aggressive executive branch to meet the needs of foreign affairs and warfare. However, as Professor Michael Ramsey has written, even the era’s leading legislative champion, Thomas Jefferson, saw the need to have an energetic executive.⁶ Jefferson said, “The Constitution has declared the Executive powers shall be vested in the President. The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate.”⁷ Although not a Framers, per se, one clearly would not rely on him exclusively for discerning intent of the period. It is, however, important to note the leading anti-federalists of this nascent period of the United States also agreed with this notion of the dominance of the executive in foreign affairs, thus, helping better argue and articulate the original meaning and intent of the Framers during

² JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 73-74 (2005).

³ JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 383 (1979).

⁴ *Id.* (internal citations omitted).

⁵ THE FEDERALIST No. 74 (Alexander Hamilton).

⁶ See, Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 Harv. J.L. & Pub. Pol’y 141, 141 (2006) (noting that Thomas Jefferson advocated for an executive that had the power to execute laws and manage foreign relations).

⁷ *Id.*

this period. It is reasonable to assert that, if Hamilton and Jefferson agreed on this issue (possibly the only question upon which they truly agreed in the early 1800s)—strong executive power may be reasonably understood to be the intent of the Framers.

The Framers also looked long and hard at certain state governments during the Revolutionary period to determine how best to create an effective executive. Hamilton particularly relied upon the state of New York in drafting the Constitution. In fact, Governor George Clinton maintained a strong executive throughout the 1770s and 1780s. The Framers considered New York to be the most stable colony during this era. Of importance, the New York Constitution, adopted in 1777, vested the Governor with the position of “general and commander-in-chief of all the militia and admiral of the navy of the State.”⁸ Clinton exercised his unilateral and unitary power by sending troops to reinforce General Gates’ efforts against the British. He only let the state legislature know of his actions several months later. The strength of the New York Constitution and government strongly influenced New Hampshire, Connecticut, and Massachusetts when they created their own state Constitutions as well.

The Framers took the New York example to heart when drafting the federal Constitution in Philadelphia. They created an independent, energetic executive empowered with the robust authority to engage in foreign affairs, and conduct war. Additionally, they were strongly influenced by the enlightened thinkers of the day. Although popular culture often refers to John Locke as the most influential, in reality William Blackstone was by far the most widely read and influential political writer in America during the founding period. James Madison described Blackstone’s *Commentaries* as “a book which is in every man’s hand”⁹ and described Montesquieu as “the oracle who is always consulted and cited on the separation of powers.”¹⁰ Both Blackstone and Montesquieu defined the executive powers to include foreign affairs. This area of foreign affairs, and most importantly carrying out warfare operations, was vested in the executive to ensure speed, flexibility, and dispatch.

⁸ N.Y. CONSTITUTION of 1777, art. XVIII (1777).

⁹ Virginia Ratifying Convention: June 18, 1788, http://www.constitution.org/rc/rat_va_15.htm (last visited Mar. 1, 2009).

¹⁰ THE FEDERALIST No. 47 (James Madison).

For example, Montesquieu wrote, the executive “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”¹¹ In military affairs, Montesquieu argued that the executive should possess exclusive control over the army. He wrote, “[o]nce an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing, its business consisting more of action than in deliberation.”¹² Again, the legislature retained the power of the purse as it does today and the ability to terminate the authorization of the army. In the days of the standing army this power was significant and could be analogized today to authorizations to conduct military operations.

Similarly, Blackstone in his *Commentaries on the Laws of England* declared the conduct of foreign affairs to be a quintessentially executive function. He defended the Crown’s authority in this area by declaring, “[t]he King has the sole prerogative in making war and peace. . . it would indeed be improper that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.”¹³ Certainly, this can be analogized to the various issues confronting our nation today as our armed forces are committed to fighting two wars. He further declared the King to be the “generalissimo, or the first in military command, within the kingdom.”¹⁴ These statements offer glimpses into the most influential thinkers of the era and give us a real concept of the thinking of our founding fathers as they debated how to create the executive branch.

Beyond this understanding, we need to look at this power from a functional perspective. President George Washington understood his role; having overseen the entire Convention, and upon taking office, he immediately assumed the duties of Commander-in-Chief and the leader in foreign affairs. Without any statutory authority, he exercised the foreign affairs functions that were not specifically mentioned in the Constitution, operations such as control and removal of diplomats, foreign

¹¹ Yoo, *supra* note 2, at 39 (internal citations omitted).

¹² *Id.* at 41 (quoting 2 CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans. 1949) (1748)).

¹³ *Id.* at 41 (quoting WILLIAM BLACKSTONE, *COMMENTARY ON THE LAWS OF ENGLAND* 249 (1830)).

¹⁴ *Id.* at 41.

communications, and formation of foreign policy. These powers were previously exercised by the Congress during the period of the Articles of Confederation and the new Congress certainly appeared to understand these powers had now shifted to the Presidency. There is no evidence that anyone in Congress protested these actions, formally or informally. Thus, *de facto*, it appears to have been understood by the new government that the authority for foreign affairs and warfare became the sole province of the executive.

Also, Hamilton, in the *Pacificus* essays, dealing with Washington's proclamation of neutrality, noted this authority was simply part of the traditional executive power over foreign affairs; this power was vested in Article II of the Constitution, and not granted to any other branch of government. His arguments are now well known to have carried the day. But it should be made clear these were not isolated proclamations by the genius Hamilton. Other prominent leaders of the 1790s, including Madison, John Jay, Oliver Ellsworth, John Marshall, and President Washington, similarly described foreign affairs powers as executive in nature.

The extreme of foreign affairs—armed conflict—was clearly intended to be embodied within the executive branch. Blackstone, Montesquieu, the Federalist Papers, affirmations by the leaders of the day, as well as the conduct of the first president himself leaves little room to doubt the Founders' intentions in this arena. Again, this is not to say Congress has no role whatsoever. That is simply not the case. Congress has the power to declare war, and during combat operations the right to refuse to fund the war. Once warfare begins, however, it appears the need for rapid action necessitates a shift in the careful balancing act between executive and legislative power to the executive branch. The War on al Qaeda, however—with an enemy that does not wear a uniform, provides no institution with which to negotiate, flouts the laws of war, and whose membership is spread across over fifty nation states makes the need for dispatch more important than in prior conflicts.

Of note, the development and intellectual strength invested in creating a strong executive in foreign affairs and during periods of armed conflict was well-established before the Constitution limited the term of a President to a maximum of eight years.¹⁵ Since that

¹⁵ U. S. CONST. amend XXII.

amendment, regardless of the power exercised as President, no matter what happens, in four to eight years, an executive will be removed. As a result, the electorate can have reduced concerns (since 1951, when the Twenty-Second Amendment was ratified) about excessive executive power by a President who might otherwise run for multiple terms. As a result, an "imperial presidency" is now firmly out of the realm of possibility. Thus, again, any accusations of an imperial presidency, or executive power grabs, or other references to tyrannical government asserted by some critics (particularly critics of President George W. Bush), appear hyperbolic within our existing Republic.

3. EXECUTIVE POWER IN THE TWENTY-FIRST CENTURY

The latter half of the twentieth century witnessed increasing concern about the power of the executive to engage in combat operations without any input from Congress. The Vietnam War prompted Congress to enact the War Powers Resolution requiring the President to notify Congress if employing troops for longer than sixty to ninety days in any zone of combat.¹⁶ Unfortunately, however, Congress has never fully asserted its constitutional, statutorily-empowered role in "checking" the executive with this power.

Since the attacks of 9/11, the original concerns noted by Hamilton, Jay, and Madison have been heightened. Never before in the young history of the United States has the need for an energetic executive been more vital to its national security. The need for quick action in this arena requires an executive response—particularly when fighting a shadowy enemy like al Qaeda—not the deliberative bodies opining on what and how to conduct warfare or determining how and when to respond. The threats from non-state actors, such as al Qaeda, make the need for dispatch and rapid response even greater. Jefferson's concerns about the slow and deliberative institution of Congress being prone to informational leaks are even more relevant in the twenty-first century. The advent of the twenty-four hour media only leads to an increased need for retaining enhanced levels of executive

¹⁶ War Powers Resolution of 1973, Pub. L. No. 93-148, § 5, 87 Stat. 555, 557. The Congress has truly only asserted its authority under this law once regarding troops being assigned in Beirut. See *Multinational Force in Lebanon*, Pub. L. No. 98-119, 97 Stat. 805 (1983) (authorizing the use of force in Lebanon under the authority of the War Powers Resolution Act).

control of foreign policy. This is particularly true in modern warfare. In the war on international terror, intelligence is vital to ongoing operations and successful prevention of attacks. Al Qaeda now has both the will and the ability to strike with the equivalent force and might of a nation's armed forces. The need to identify these individuals before they can operationalize an attack is vital. Often international terror cells consist of only a small number of individuals—making intelligence that much more difficult to obtain and even more vital than in previous conflicts. The normal movements of tanks, ships, and aircrafts that, in traditional armed conflict are indicia of a pending attack are not the case in the current “fourth generation” war. Thus, the need for intelligence becomes an even greater concern for the commanders in the field as well as the Commander-in-Chief.

Supporting a strong executive in foreign affairs does not necessarily mean the legislature has no role at all. In fact, their dominance in domestic affairs remains strong. Additionally, besides the traditional roles identified in the Constitution for the legislature in foreign affairs—declaring war, ratifying treaties, overseeing appointments of ambassadors, etc.—this growth of executive power now, more than ever, necessitates an enhanced, professional, and apolitical oversight of the executive. An active, aggressive oversight of foreign affairs, and warfare in particular, by the legislature is now critical. Unfortunately, the United States—particularly over the past decade—has witnessed a legislature unable to muster the political will necessary to adequately oversee, let alone check, the executive branch's growing power. Examples are abundant: lack of enforcement of the War Powers Resolution around the executive's unchecked invasions of Grenada, Panama, and Kosovo, and such assertions as the Authorization for the Use of Military Force, the USA Patriot Act, military commissions, and the updated Foreign Intelligence Surveillance Act (“FISA”). There have been numerous grand-standing complaints registered in the media and hearings over most, if not all, of these issues. However, in each case, the legislature has all but abdicated their constitutionally mandated role and allowed the judicial branch to serve as the only real check on alleged excesses of the executive branch. This deference is particularly dangerous and, in the current environment of foreign affairs and warfare, tends to unintentionally politicize the Court.

The Founders clearly intended the political branches to best serve the citizenry by functioning as the dominant forces in

guiding the nation's foreign affairs. They had anticipated the political branches to struggle over who has primacy in this arena. In doing so, they had hoped neither branch would become too strong. The common theme articulated by Madison, ambition counters ambition,¹⁷ intended foreign affairs to be a "give and take" between the executive and legislative branches. However, inaction by the legislative branch on myriad policy and legal issues surrounding the "war on terror" has forced the judiciary to fulfill the function of questioning, disagreeing, and "checking" the executive in areas such as wartime policy, detentions at Guantanamo Bay, and tactics and strategy of intelligence collection. The unique nature of the conflict against international terror creates many areas where law and policy are mixed. The actions by the Bush administration, in particular, led to outcries from many on the left about his intentions and desire to unconstitutionally increase the power of the Presidency. Yet, the Congress never firmly exercised the "check" on the executive in any formal manner whatsoever.

For example, many policymakers disagreed with the power given to the President within the Authorization to Use Military Force ("AUMF").¹⁸ Arguably, this legislation was broad in scope, and potentially granted sweeping powers to the President to wage the "war on terror." However, Congress could have amended or withdrawn significant portions of the powers it gave to the executive branch. This lack of withdrawal or amendment may have been understandable when Republicans controlled Congress, but as of November 2006, the Democrats gained control of both houses of the Congress. Still, other than arguing strongly against the President, the legislature did not necessarily or aggressively act on its concerns. Presumably this inaction was out of concern for being labeled "soft on terror" or "weak on national security" and thereby potentially suffering at the ballot box. This virtual paralysis is understandable but again, the political branches were, and remain, the truest voice of the people and provide the means to best represent the country's beliefs, interests, and national will in the arena of foreign affairs. It has been this way in the past but the more recent (certainly over the past thirty years and even more so in the past decade) intrusions of the judicial branch into what

¹⁷ THE FEDERALIST NO. 51 (James Madison).

¹⁸ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

was intended to be a “tug and pull” between the political branches can properly be labeled as an unintended consequence of the lack of any real legislative oversight of the executive branch.

Unfortunately, now nine unelected, life-tenured justices are deeply involved in wartime policy decision making. Examples of judicial policy involvement in foreign affairs are abundant including *Rasul v. Bush*;¹⁹ *Hamdi v. Rumsfeld*;²⁰ *Hamdan v. Rumsfeld*;²¹ as well as last June’s *Boumediene v. Bush*²² decision by the Supreme Court, all impacting war policy and interpretation of U. S. treaty obligations. Simply, judges should not presumptively impact warfare operations or policies nor should this become acceptable practice. Without question, over the past thirty years, this is the most dramatic change in executive power. It is not necessarily the strength of the Presidency that is the change we should be concerned about—the institutional search for enhanced power was anticipated by the Founders—but they intended for Congress to check this executive tendency whenever appropriate. Unfortunately, this simply is not occurring in twenty-first century politics. Thus, the danger does not necessarily lie with the natural desire for Presidents to increase their power. The real danger is the judicial branch being forced, or compelled, to fulfill the constitutionally mandated role of the Congress in checking the executive.

4. PRESIDENT OBAMA AND EXECUTIVE POWER

The Bush presidency was, and continues to be, criticized for having a standing agenda of increasing the power of the executive branch during its eight-year tenure. Numerous articles and books have been dedicated to discussing these allegations.²³ However, as argued earlier, the reality is that it is a natural bureaucratic tendency, and one of the Founders presciently anticipated, that each branch would seek greater powers whenever and wherever possible. As the world becomes increasingly interdependent, technology and armament become more sophisticated, and with

¹⁹ *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²² *Boumediene v. Bush*, 553 U.S. ____ (2008).

²³ See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007) (outlining some of the more current criticism).

the rise of twenty-first century non-state actors, the need for strong executive power is not only preferred, but also necessary. Executive power in the current world dynamic is something, regardless of policy preference or political persuasions, that the new President must maintain in order to best fulfill his constitutional role of providing for the nation's security. This is simply part of the reality of executive power in the twenty-first century.²⁴

In his first months in office, President Obama has surprised some by embracing several aspects of what many viewed as efforts by President Bush to unconstitutionally broaden executive power. Specifically, the Obama Justice Department and White House lawyers have sided with Bush on preventing disclosure of White House records; they have invoked the much maligned State Secrets Doctrine on at least three different occasions (in a suit over the extraordinary rendition program; in a suit on wiretapping issues; and also in a suit brought by the citizens asserting their constitutional rights were violated by the telecommunications companies); supported the Bush policies regarding detainees when the Obama Justice Department filed a legal brief maintaining the detainees in Afghanistan do not have constitutional rights even though held at an air base in Bagram; as well as on immigration where the new administration also supported doing workplace raids targeting illegal immigrants.²⁵

Unlike the critics of these policies, I believe it is natural for an executive to assert its power in these arenas. The Obama administration, as its predecessors—both Democrat and Republican—have all done they can and should continue to maintain—or even further expand Presidential power within the arena of foreign affairs. The international situation demands an expansive executive power and the Congress is permitting it. Perhaps an area where the new administration would be pragmatic and help better attain an appropriate constitutional balance is by ensuring Congress is more fully briefed (if even with the Select

²⁴ See Nancy Benac, *Amid Obama's Change, There's Also More of the Same*, USA TODAY, Mar. 1, 2009, available at http://www.usatoday.com/news/washington/2009-03-01-obama_sameN.htm ("Glenn Sulmasy . . . said Obama is simply shifting from campaigning to governing. 'It's just the realities of executive power in the 21st century,' Sulmasy said, 'When you sit down and see the threat of al-Qaida and the threats to national security and homeland security, this would be natural and normal for him to take such steps and measures.'").

²⁵ *Id.*

Intelligence committees) of actions that could be perceived by citizens—or even the courts—as unconstitutional usurpations of power.

Thirty years ago, there were great concerns about excessive expansion of executive power by the Nixon administration. In 2009, many of these concerns remain. Just as the end of the Nixon era did not bring an end of such support of executive power, transfer of power from President Bush to President Obama did not significantly change the role or power of the executive. Indeed, in his first month as the Commander-in-Chief, and as most students of history would agree, President Obama not unsurprisingly has furthered many of the policies the Bush team asserted regarding executive power.

As a result of the rise of non-state actors such as al Qaeda, the ubiquity of media coverage, and the increased likelihood of leaks, the need for rapid, coherent, and unified action by the executive is even more critical today than it was in the 1970s. However, Congress's role should be reestablished as the real, anticipated, and constitutionally required check on the executive. If Congress continues to play politics and never asserts itself, either through legislation, declarations of war, modifications of existing laws, or authorizations for force, the Judicial branch will continue the solitary check on executive power. This trend is cause for concern and it should be resisted. The new administration can change this course by fostering an improved relationship with Congress, where the legislature can be comfortable once again in asserting its constitutionally mandated role.