RETHINKING EXECUTIVE POWER AND COUNTERTERRORISM

ROBERT F. TURNER†

I want to begin by commending Elizabeth Kruman and her colleagues on *The Wayne Law Review* for assembling an outstanding symposium on "9/11 and the Legal Landscape: A Decade Later." The chapters assembled in this volume represent some of the best thinking in the nation on these important issues.

Regrettably, I was forced to withdraw from the program on very short notice because of a medical problem. I had intended to deliver oral remarks using PowerPoint slides, and in my absence, my dear friend Spike Bowman did an outstanding job of presenting those slides. I had hoped to find time to turn the ideas in those slides into a written presentation, but with the permission of the *Law Review* leadership I have decided instead to provide some edited excerpts on the same basic topic from a presentation I prepared for a subcommittee of the House Foreign Affairs Committee in 2008.

THE ORIGINAL UNDERSTANDING OF SEPARATION OF POWERS REGARDING WAR, INTELLIGENCE, AND DIPLOMACY

The first thing that must be understood is that the authors of our Constitution were greatly influenced by the writings of Locke, Montesquieu, and Blackstone—sometimes described as the "political Bibles of the constitutional fathers."[1] And each of these great writers argued that, for what might be called reasons of "institutional competency," the business of what Locke described as "war, peace, leagues and alliances" of necessity had to be vested in the king or magistrate and was a key component of "executive power." As Locke explained in his *Second Treatise on Civil Government*:

---

† Professor, co-founder (1981), and Associate Director, Center for National Security Law, University of Virginia School of Law. B.A., 1968, Indiana University; J.D., 1981, University of Virginia; S.J.D., 1996, University of Virginia. Former National Security Adviser to Hon. Robert P. Griffin, U.S. Senate (1974-1975); Special Assistant to the Undersecretary for Policy (1981), U.S. Department of Defense; Counsel, President's Intelligence Oversight Board (1981-1984); Acting Assistant Secretary for Legislative Affairs, U.S. Department of State (1984-1985); President, U.S. Institute of Peace (1986-87).

1. *See, e.g.*, QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 363 (1922).

> These two Powers, Executive and Federative, though they be really distinct in themselves, yet one comprehending the Execution of the Municipal Laws of the Society within its self, upon all that are parts of it; the other the management of the security and interest of the publick without, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative Power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good . . . .
>
> [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.[2]

Unlike Montesquieu and Blackstone, who described the power over foreign affairs as part of the "executive power," Locke coined the term "federative" power, but it is clear from the above excerpt that he shared the conventional wisdom of the era that this was a power that belonged in the hands of the executive magistrate.

The great Professor Quincy Wright—who served as President of the American Society of International Law and both the American and the International Political Science Associations (and who wrote the first major treatise on *The Control of American Foreign Relations* in 1922)—explained: "Thus when the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto."[3] Similarly, my late friend Professor Louis Henkin, of Columbia Law School, added in his 1972 classic, *Foreign Affairs and the Constitution*: "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[4]

That the Constitution vested exclusively in the President all powers "executive" in character that were not expressly placed elsewhere was established in the 1789 congressional debates over the placement of the

2. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 147 (1690).
3. WRIGHT, *supra* note 1, at 147.
4. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

power to remove the Secretary of Foreign Affairs. The Constitution had not specifically addressed this issue, and some speculated it was therefore either a life-tenured appointment or that, as in the case of appointment, the President would need the advice and consent of the Senate to remove the incumbent officer. But Madison carried the day in both the House and Senate with this argument:

> The constitution affirms, that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority.[5]

Now Congress has the power to pretty quickly end a major war simply by refusing to raise new forces or appropriate the necessary funds—major wars are expensive enterprises—but there may be a parallel here in terms of whether Congress has the power while the President has funds and other resources available to simply legislate an end to a war. The Framers viewed war as an executive function, and Congress was given a constitutional negative only over the decision to "declare War."[6] I suspect it is largely an academic question given the other weapons of Congress to successfully undermine a war, but Madison's logic may nevertheless be of relevance.

In a letter to Edmund Pendleton explaining the debate over the power to remove an executive branch cabinet officer, Madison wrote:

> [T]he Executive power being in general terms vested in the President, all power of an Executive nature not particularly taken away must belong to that department . . . .
>
> In truth, the Legislative power is of such a nature that it scarcely can be restrained, either by the Constitution or by itself; and if the federal Government should lose its proper equilibrium within

5. 1 ANNALS OF CONG. 481 (Joseph Gales ed., 1834) (1789).
6. U.S. CONST. art. 1, § 8, cl. 11.

> itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department.[7]

Thus, when the Constitution in Article II, Section 1, provided that "[t]he executive Power shall be vested in a President of the United States of America,"[8] it was vesting in the President exclusive control over decisions involving diplomacy, intelligence,[9] and the conduct of military operations, subject only to the narrowly construed exceptions clearly vested in the Senate or Congress.

As Thomas Jefferson explained in an April 1790 memorandum to President Washington (who had asked where the Constitution placed all of the powers related to diplomacy that were not specifically mentioned in the instrument):

> The Constitution . . . has declared that "the Executive power shall be vested in the President," submitting only special articles of it to a negative by the Senate . . . . 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. *Exceptions* are to be construed strictly.[10]

Just three days later, Washington recorded in his diary that he had discussed Jefferson's memo with Representative James Madison and Chief Justice John Jay, and they agreed with Jefferson that the Senate had "no [c]onstitutional right to interfere" with matters of diplomacy save for their expressed power of "an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution."[11]

Three years later, Jefferson's political rival (and, along with Madison and Jay, the third author of the *Federalist Papers)* Alexander Hamilton made precisely the same argument, this time with a specific reference to the power of Congress to "declare War":

---

7. Letter from Madison to Edmund Pendleton, (June 21, 1789), *in* 5 WRITINGS OF JAMES MADISON, 1751-1836, at 405-06.

8. U.S. CONST. art. II, § 1.

9. In FEDERALIST No. 64, John Jay explained that because Congress could not be trusted to keep secrets, the Constitution had left the President "able to manage the business of intelligence in such manner as prudence may suggest."

10. *Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments*, in 16 PAPERS OF THOMAS JEFFERSON, at 378-80 (Julian P. Boyd ed., 1961).

11. 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' ed. 1925).

> The general doctrine then of our constitution, is that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument . . . .
>
> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly[,] and ought to be extended no further than is essential to their execution.
>
> While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War, it belongs to the "Executive Power," to do whatever else the law of Nations . . . enjoin, in the intercourse of the United States with foreign Powers.[12]

In an 1804 letter to Treasury Secretary Albert Gallatin, President Jefferson explained the original understanding of the role of Congress in appropriating funds for foreign intercourse:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations . . . .
>
> From the origin of the present government to this day, . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[13]

The truth of this is easily confirmed by examining the legislation in this area enacted by Congress. While the bill creating the Department of the Treasury required the Secretary to appear before Congress on demand and to make his annual reports to the Congress, the bill introduced by Madison to establish the Department of Foreign Affairs (later re-designated "Department of State") was short and to the point:

---

12. 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969).
13. 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

> Be it enacted . . . [t]hat there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to time be enjoined on or intrusted [sic] to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.[14]

Dr. Charles Thach, in one of the classic academic studies on the origins of presidential power, observed:

> The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the "presidential" departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done . . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.[15]

Consider also the first appropriations bill for foreign intercourse. In language that would be repeated for many years thereafter, Congress in 1790 appropriated $40,000 (soon raised to $50,000, at which time it was 14 percent of the federal budget) for foreign intercourse, with these instructions:

> [T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .[16]

As a Federalist Member of Congress in 1800, John Marshall played a key role in the debate over whether President Adams had acted wrongfully in surrendering a British deserter found in Charleston, South

---

14. 1 STAT. 28 (1789).

15. CHARLES C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789, at 160 (Herbert J. Storing ed., 1963) (1923).

16. 1 STAT. 129 (1790).

Carolina to British military authorities pursuant to the extradition provision of the Jay Treaty without involving the judiciary. Showing the typical deference to the President's "executive" power over foreign affairs, Marshall reasoned:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.
>
> . . .
>
> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
>
> . . .
>
> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed.
>
> . . .
>
> The department which is entrusted with the whole foreign intercourse of the nation, . . . seems the proper department to be entrusted with the execution of a national contract like that under consideration.
>
> . . .
>
> It is then demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department.
>
> . . .
>
> In this respect the President expresses constitutionally the will of the nation . . . . This is no interference with judicial decisions,

> nor any invasion of the province of a court. It is the exercise of an indubitable and a Constitutional power.[17]

Marshall's speech persuaded even Gallatin and many of the other House Republicans, and the resolution to censure Adams was quickly defeated. In 1936, the Supreme Court praised Marshall's reasoning while embracing the language that the President is "the sole organ of the nation in its external relations[.]"[18]

Three years after his defense of Adams while a Representative, Marshall was America's fourth Chief Justice.[19] And in the most famous of all Supreme Court cases, *Marbury v. Madison*, he was called upon to examine the discretionary constitutional powers of his bitter political rival, President Thomas Jefferson.[20] Those who believe that there can be no "unchecked" executive powers in a republican form of government presumably studied constitutional law using one of the several casebooks that omits this language from that landmark case:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.
>
> . . .
>
> [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President . . . . The acts of such an officer, as an officer, can never be examinable by the courts.[21]

---

17. 10 ANNALS OF CONG. 613-15 (1800).

18. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

19. *Biographies Of The Robes: John Marshall*, PBS.ORG, http://www.pbs.org/wnet/supremecourt/democracy/robes_marshall.html (last visited Oct. 25, 2011).

20. *See* Marbury v. Madison, 5 U.S. 137 (1803).

21. *Id.* at 165-66.

This last sentence is important, and it explains why the judiciary often invokes the political question doctrine to sidestep cases that question the President's conduct of war or foreign affairs. To the extent these decisions are constitutionally entrusted to the discretion of the President, the courts can no more properly address them than it can sit in judgment of a member of Congress for an allegedly defamatory remark made during a speech or debate on the House floor. That issue, too, is confided by the Constitution to the exclusive discretion of another branch.[22]

That presidential powers in the foreign affairs realm are plenary and exclusive—save for the expressed exceptions vested in the Senate and Congress—has been repeatedly affirmed by the Supreme Court. By far the most frequently cited Supreme Court case in this area is *United States v. Curtiss-Wright Export Corp.*, in which the Court declared:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.[23]

It was not merely the executive and judicial branches that recognized presidential primacy in these areas, but Congress as well. Consider this excerpt from an 1897 Senate Report:

> It is to be remembered that effective intervention in foreign affairs sometimes requires the cooperation of other nations, while on the other hand, the expectancy of future intervention sometimes stirs up foreign governments to take preventive measures. Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these

22. Under the Speech or Debate Clause of Article I, Section 6, "The Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

23. *Curtiss-Wright*, 299 U.S. at 319.

> facts that the superintendence of foreign affairs was intrusted [*sic*] to the executive and not to the legislative branch of the Government.
>
> . . .
>
> [O]ur Constitution gave the President power to send and receive ministers . . . [etc.]. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the President, which the Federal Government itself was to possess—the general control of foreign relations . . . . That this is a great power is true; but it is a power which all great governments should have; and, being executive in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.[24]

In 1906, a debate occurred in the Senate over the power of that body to compel the President to provide documents about the negotiation of a treaty. One of the great figures of that body, Senator John Coit Spooner, delivered a detailed exposition on constitutional treaty powers in which he explained:

> The Senate has nothing whatever to do with the *negotiation* of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty.
>
> . . .
>
> From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.

---

24. U.S. Senate, Memorandum Upon the Power to Recognize the Independence of a New Foreign State, S. Doc. No. 54-56, at 6-7 (1897).

. . .

> I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses, it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President.
>
> . . .
>
> [S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority.[25]

When Senator Spooner took his seat, another legendary figure in the Senate, Henry Cabott Lodge, arose and declared: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . [that] we have heard from the Senator from Wisconsin [Sen. Spooner]." Senator Augustus Bacon, whose request for treaty negotiating documents had led to Senator Spooner's lengthy address, responded that the Senate's claim to the information was based not upon "legal right" but upon "courtesy" between the President and the Senate.[26]

Following the end of World War I, the President kept a considerable number of American military personnel in Germany—much to the dismay of their parents back in this country. In 1922, a junior Senator proposed that the Senate pass a law directing the President to bring the boys home. This exchange occurred on the Senate floor between Senator Reed and his much senior colleague, Senator William Borah, a famous isolationist who had served numerous terms in the Senate and included among his accomplishments service as Chairman of the Senate Committee on Foreign Relations:

---

25. 40 CONG. REC. 1417 (1906), *available at* http://books.google.com/ebooks/reader?id=4GYdAAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.PA84.

26. EDWIN CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 182 (4th ed. 1957).

> Mr. Reed. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?
> Mr. Borah. I do . . . . [But] [y]ou can not bring them home, nor can I.
> Mr. Reed. We could make the President do it.
>
> . . .
>
> Mr. Borah. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.
>
> . . .
>
> Mr. Reed. I wish to change my statement. We can not make him bring them home.[27]

In my doctoral (SJD) dissertation, I document that this was the common understanding of all three branches of our government until well into the Vietnam War, when Congress began seizing control over a variety of executive business long accepted to be the exclusive province of the President. Since one of the leaders of that assault on presidential power was the late Senator J. William Fulbright, it might be instructive to remember what Senator Fulbright said as Chairman of the Senate Foreign Relations Committee in a 1959 lecture at Cornell Law School: "The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs 'which the Constitution does not vest elsewhere in clear terms.'"[28] Note that Senator Fulbright refers not only to the President's role in communicating with foreign leaders, but also his responsibility for the "formulation" of the nation's foreign policy. Obviously, through its negative over treaties, the Senate has considerable influence over some areas of foreign policy; but the general rule is that this is "executive"

---

27. CONG. REC. (December 27, 1922).

28. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 3 (1961).

business and thus confided by the Constitution to the discretion of the President.

On August 17, 1787, Madison and Gerry moved in the Philadelphia Convention to replace that the grant to Congress (taken from the Articles of Confederation) "to make war" with the much more limited power to "declare war," which was a term of art from the Law of Nations. When the Constitution was written, it was considered necessary to "declare war" only when a country was about to wage all-out, "total," or "perfect" war in which all citizens of one state would be at war with all of the citizens of another. None of the prominent scholars whose works were regularly cited by the Founding Fathers believed that a formal "declaration of war" was necessary when force was being used defensively. It was only considered necessary when two nations were at peace and one elected to initiate an all-out war that could not be justified by the doctrine of self-defense. Thus, Hugo Grotius—often described as the father of modern international law—wrote in 1620: "[N]o declaration [of war] is required when one is repelling an invasion, or seeking to punish the actual author of some crime."[29] Similarly, Alberico Gentili explained: "[W]hen war is undertaken for the purpose of necessary defence, the declaration is not at all required."[30]

THE POWER OF CONGRESS TO DECLARE WAR IS AN ANACHRONISM

In my view, the power granted to Congress by the Constitution "to declare war" is today as much an anachronism as the power given in the same sentence to "grant letters of Marque and Reprisal . . ." Letters of marque and reprisal were commissions from the government to private ship owners authorizing them to seize the ships of a foreign enemy on the high seas—either in major war or in settings of "quasi-war" like the conflict between the United States and France during the presidency of John Adams.

The world community outlawed letters of marque and reprisal in 1856, and no country has employed one since then. Should the President decide to authorize privateers to fight in a future war, Congress would clearly have a negative over the decision. But that is highly unlikely to ever happen, and if it did it would be a violation of international law.

Similarly, in 1928 the world community outlawed the kind of use of force associated with formal declarations of war. The 1928 Kellogg-Briand Treaty proved ineffective because it had no teeth, but the

29. HUGO GROTIUS, DE JURE BELLI AC PACIS bk. III, ch. 3 (1620).

30. 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 140 (1933).

principles it embodied are reaffirmed in Article 2(4) of the UN Charter, and no country has clearly issued a formal declaration of war since the 1945 founding of the United Nations.

Virtually the only kinds of force it is lawful for individual states to use in the modern world are in self-defense and collective self-defense under Article 51 of the Charter.[31] Under international law, those types of force have never required a formal declaration of war. Like the power to grant letters of marque and reprisal given in the same sentence, the power of Congress to declare war has largely been destroyed by the progressive development of international law. Nations no longer have the legal right to use the kind of aggressive force that was associated with formal declarations of war—and in my view that is a very good thing. But, once again, if the President ever decided it was desirable to launch a major aggressive war, Congress would still retain its constitutional negative to prevent it. Which is to say, neither the UN Charter, nor any other treaty, could modify the U.S. Constitution under American law.

As I have already mentioned, a letter of marque and reprisal was a well-established legal instrument by which states would authorize private ship owners to engage in armed hostilities against the ships of a country with which the issuing state was unhappy. These legal documents would authorize "privateers" to capture commercial vessels (and sometimes even warships) of the other State, and once seized the matter would be taken before a prize court where the judge would examine the documentation and ascertain whether the seizure was in accord with law.[32] If the seizure was upheld as lawful, the captured ship and its cargo would be sold at auction with the proceeds divided pursuant to an established formula between the capturing ship's owner, the captain, first mate, and so forth.

The *Records of the Federal Convention* are essentially unhelpful in trying to interpret this clause, as the language on this issue was inserted into our Constitution on August 18, 1787—apparently without discussion or debate.[33] This was almost certainly because there was no real controversy in vesting this power in Congress. Even in countries like

---

31. This is an oversimplification, as I believe it is lawful to use force under certain circumstances in anticipatory self-defense and humanitarian intervention. The point I am making is that formal declarations of war were associated only with offensive war (in a *jus ad bellum* sense)–what we today would characterize as "aggressive" war–which are today clearly illegal under international law.

32. For example, the court would determine whether the seized vessel was in fact owned by a citizen of the state in question and that the letter of marque was in proper order.

33. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 326 (Max Farrand ed., 1966).

France and Great Britain, where the power to declare war was vested exclusively in the King, the issuing of letters of marque and reprisal was regulated by statute. It was a power very closely related to the property rights of individual citizens, and a practice heavily regulated under both international and domestic laws—virtually always involving judicial process. As "laws" were needed to establish the "rules," to confirm under what circumstances title to private property would pass to new owners, and to provide punishment for offenders, it was a power for which the Executive alone was not institutionally competent. It was also a process that did not require for its success the institutional competencies of the executive, such as a need for unity of plan, secrecy, or speed and dispatch. The United States government has not issued a letter of marque since the War of 1812, and the practice was outlawed on April 16, 1856 by the Declaration of Paris, which provided that "[p]rivateering is, and remains, abolished."[34]

PRESIDENTIAL WAR POWERS

The business of "war" was viewed by Locke, Blackstone, Montesquieu, and the Founding Fathers as by its nature a part of the "executive" power of government. As Hamilton noted, the power of Congress to declare war was an "exception" to this general grant of power to the President and thus was to be construed narrowly.[35]

Similarly, in a September 6, 1789, letter to Madison from Paris, Jefferson praised the wisdom of the new Constitution, noting:

> We have already given in example one effectual check to the Dog of war by *transferring* the power of letting him loose[[36]]

---

34. *Reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed. 1972). The United States participated in the negotiations but in the end refused to agree to outlawing privateering–arguing that the entire right of capturing private property on the high seas should also be abolished–however, it thereafter abided by the terms of the agreement, abstaining from issuing letters of marque during the Spanish-American War. F. E. SMITH, INTERNATIONAL LAW 124-25 (1911).

35. *See* 16 PAPERS OF THOMAS JEFFERSON, *supra* note 10 and accompanying text.

36. Before he purchased his first "polygraph" machine that made duplicate copies of his correspondence with a second quill pen, Jefferson would routinely copy his letters for his own files (and often again to send to others), and in doing so he would frequently improve upon the original in some ways. The above language is from the copy of this letter found in Madison's papers. Jefferson's own copy said instead that we had transferred the power "of declaring war"–making it clear that was to what he was referring. Presumably he decided that he had mixed his metaphor and changed the final version to reference "letting loose the dogs of war" to correct that problem.

> from the Executive to the Legislative body, from those who are to spend to those who are to pay.[37]

Since the power to "make war" had been vested under the Articles of Confederation in the Continental Congress, Jefferson clearly was not saying the Constitution had "transferred" that power from where it had been under the Articles of Confederation—he was likely referring to where this power existed "in nature" as affirmed by the leading publicists like Montesquieu and Blackstone. And as an inherently "executive" power, as we have seen, Jefferson argued that the "negatives" vested in the Senate (or Congress) should be "construed strictly."[38]

The President clearly has very important "war" powers that are beyond the direct[39] control of Congress. In language just as clear as the Article I, Section 8, grant to Congress of the power "to declare War," Article II, Section 2, made the President the "Commander in Chief." That, too, was an important component of "the power of war"—and it was *denied* to Congress, inter alia, because of the importance the Framers placed upon separation of the *purse* from the *sword.* A major argument in both the Philadelphia Convention and state ratification conventions was that the mingling of the power of the purse and the power of the sword would inevitably lead to tyranny.

Indeed, in several of the state ratification conventions, opponents of the proposed Constitution argued that the vesting in the new federal government of both the "power of the purse" and the "power of the sword" was a dangerous breach of Montesquieu's famous maxim. Madison answered this challenge in Virginia,[40] as did Hamilton in New York.[41] Hamilton's analysis was typical:

---

37. 15 PAPERS OF THOMAS JEFFERSON 397.

38. *See* 16 PAPERS OF THOMAS JEFFERSON, *supra* note 10 and accompanying text.

39. In a non-defensive setting, if Congress refuses to authorize war—or in any setting if it refuses to raise and support an army or other military forces or to provide the necessary fund—the President may not usurp legislative authority in order to fight or continue a war.

40. *See, e.g.*, Madison's comment in the Virginia Convention on June 14, 1788:

> Mr. Chairman, the honorable gentleman has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. But it is totally inapplicable to this question. What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot be the meaning . . . . The only rational meaning, is, that the sword and purse are not to be given to the same member. Apply it to the British government, which has been mentioned. 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

> We have heard a great deal of the sword and the purse. It is said our liberties are in danger, if both are possessed by Congress. Let us see what is the true meaning of this maxim, which has been so much used, and so little understood. It is, that you shall not place these powers either in the legislative or executive, singly; neither one nor the other shall have both, because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger. All governments have possessed these powers; they would be monsters without them, and incapable of exertion.[42]

A sharp distinction was made by the Founding Fathers between the common aspiration to avoid offensive (aggressive)[43] wars, and the need to remain strong to deter or defeat the offensive adventures of foreign governments. In *Federalist* No. 34, for example, Hamilton spoke of "tying up the hands of Government from offensive war, founded upon reasons of state"; but argued "certainly we ought not to disable it from guarding the community against the ambition or enmity of other Nations."[44]

This offensive-defensive distinction was also apparent from Madison's notes on the debates in the Philadelphia Convention on this issue. Basically, the role of Congress with respect to the initiation of armed conflict is a veto or "negative" over a presidential decision to launch a major aggressive "War" against another sovereign state in a non-defensive setting. For example, when Henry Clay and other congressional leaders were told by President Jackson that he had decided to use military force to compel the French government to pay a debt the

---

> analogy can exist . . . . I can see no danger in submitting to practice an experiment which seems to be founded on the best theoretical principles.

5 THE WRITINGS OF JAMES MADISON 195-97 (Gaillard Hunt ed., 1904).

41. 5 THE PAPERS OF ALEXANDER HAMILTON 20 (Harold C. Syrett ed., 1961-87).

42. 2 ELLIOT'S DEBATES 348-49.

43. The term "aggressive" has different meanings in *jus ad bellum* (the law governing the initiation of hostilities) and *jus in bello* (the law governing the conduct of military operations), and for purposes of this discussion we are talking about the former. Thus, when General Douglas MacArthur during the Korean War responded to North Korean aggression by the Inchon Landing rather than a more "defensive" strategy, that did not turn the U.S.-led United Nations peacekeeping force into "aggressors" in a *jus ad bellum* sense.

44. THE FEDERALIST No. 34 at 211-12 (Alexander Hamilton).

French executive had acknowledged was legitimate (based upon damage done to American shipping during the reign of Napoleon), but for which the French National Assembly had not yet found it expedient to appropriate money, Clay and his colleagues told Jackson essentially to forget about it and the matter quickly came to an end. Without the support of Congress, Jackson acknowledged he could not initiate such a war. [45]

A useful description of the Commander in Chief power was provided by Alexander Hamilton in *Federalist* No. 69:

> The President is to be the "Commander in Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons . . . ; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene on extraordinary occasions both houses of the Legislature . . . ; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars the power of the President will resemble equally that of the King of Great Britain and of the Governor of New-York. The most material points of difference are these—First; the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great-Britain and the Governor of New-York have at all times the entire command of all the militia within their several jurisdictions. In this article therefore the power of the President would be inferior to that of either the Monarch or the Governor. Secondly; the President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and

45. *See* 1 WILLIAM GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 489-513 (1974).

> *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.[46]

I submit that "the supreme command and direction of the military and naval forces" is in fact a very great power, giving the President complete control over the actual conduct of military operations (whether authorized by Congress or initiated by another State). Congress may not lawfully interfere with the discretion of the Commander in Chief. It may refuse to create and fund an army, but—as Senator Borah recognized—once it is created, the President is the sole commander.

In 2006, the Supreme Court reaffirmed this important principle in the *Hamdan* case, when Justice Stevens, writing for the Court, quoted classic language from Chief Justice Chase in the 1866 case of *Ex Parte Milligan*:

> The Constitution makes the President the "Commander in Chief" of the Armed Forces, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," to "raise and support Armies," to "define and punish . . . Offences against the Law of Nations," and "To make Rules for the Government and Regulation of the land and naval Forces"[.] The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan*:
>
> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns . . . ."[47]

Too many in Congress fail to understand this point today.

CONCLUSIONS

Our topic is "rethinking executive power and counterterrorism." The destructive nature of the 9/11 attacks, and the potential of even more destructive attacks should our terrorist adversaries ever acquire nuclear

---

46. THE FEDERALIST No. 69 at 464-65 (Alexander Hamilton).

47. Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006) (citations omitted) (quoting *Ex parte* Milligan, 71 U.S. 2, 139 (1866)).

weapons or other Weapons of Mass Destruction, has led many to wonder if we need to make adjustments in our system of government. I have no objections to reorganization—such as the creation of the Director of National Intelligence and the Department of Homeland Security (although I believe the jury is still out on the utility of both changes)—and certainly some of the upgrading of infrastructure and legal authorities has been long overdue. The FBI computer system at the time of 9/11 was an embarrassment, as was the fact that permission for roving wiretaps and other technologies long upheld by the courts for use against drug dealers and organized crime suspects was denied to those whose mission was to protect the nation from terrorist attacks.

But as we work to make our counterterrorism capabilities more effective, we must not lose sight of the core values of our Country. Just as frightened government officials in 1942 authorized the internment of American citizens for the sole "crime" of having Japanese ancestors, we have in my view made some unfortunate decisions in the conflict with al Qaeda. Shortly after the 9/11 attacks I observed that if America sacrificed the Bill of Rights on the altar of the war against terrorism, Osama bin Laden will have won a far greater victory than was apparent as we dug through the rubble in the days following the 9/11 attacks. My view on that issue, if anything, has strengthened over the past nine years.

The problem with "executive power" in my view is not to "rethink" or alter it in any way, but rather to understand it. And the starting point in that inquiry is to try to understand the term as it was understood by the constitutional framers, and to realize that in the post-Vietnam era we have drifted well off course and largely lost track of the meaning and great importance of this power.

In my view, while both administrations made mistakes, neither George W. Bush nor Barrack Obama are evil men intent on undermining our constitutional system and respect for the rule of law. But both have been widely denounced as such, in no small part because their critics were ignorant of our constitutional history and the original understanding of the grant of "executive power" to the president in Article II, Section 1. If this short presentation has helped shed some light on that problem, I have accomplished my purpose.