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Philip Heymann

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## THE ON/OFF SWITCH

Philip Heymann\*

The only point I want to make is very simple, but its implications are immensely important. The writers of a Constitution that carefully separated powers out of fear of executive authority and who, even then, saw that it could only be ratified after a Bill of Rights was added, could not have intended that the President be given unilateral control of an on/off switch for both of these sets of protections against executive power. I could stop there.

### I. ARTICLE II

I am persuaded that a presidential signing statement, an interpretation of a new law, is just one of a number of forms by which the President can direct executive branch activity, with certain advantages and disadvantages to each. I take seriously the argument that the President, under an extension of the principles of *Marbury v. Madison*,<sup>1</sup> has a responsibility to direct subordinates not to enforce at least some statutes on the grounds that they are plainly unconstitutional. I wonder whether this logic would not take us, as well, to the obligation of executive subordinates not to enforce any presidential directives or statutes they regard as unconstitutional—a consequence that nobody recommends. I am not at all sure that a distinction can be drawn between his protection of Article II powers, such as the appointment power,<sup>2</sup> and his protection of the Bill of Rights. I recognize that the precedents have drawn no such distinction, although the former seems to pose more of a conflict of interest.

Still, no chain of reasoning in terms of premises that start with the normal priority of the Constitution over statutes<sup>3</sup> can convince me that the President was given independent control of an on/off switch labeled “war” or “no war” against individuals or groups—a switch that empowers him to set aside vast portions of the Constitution and, in particular, those portions that were intended to control his powers. That simply cannot be. If, as history and policy both dictate, the executive enjoys highly exceptional powers and independence in times of “war,” Congress and the courts have to control that switch.

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> See *id.* art. VI, cl. 2.

My argument thus does not require concluding that, in times of armed conflict between the United States and another state, the President lacks extraordinary powers. My argument does not even require me to insist that any such conflict be something recognizable as very similar to a past war before Congress can agree, in a way that is likely to bind the courts, that the President has the extraordinary powers that Lincoln and Roosevelt exercised. My argument is simply that, except for a short period of time after a dangerous emergency arises and before Congress can act, the President cannot exercise war powers except with the consent of Congress.

The reason is very simple. In the Constitution, the Framers allocated to Congress powers which were very carefully withheld from the President<sup>4</sup> and the Framers gave the people liberties which were very carefully protected from the President.<sup>5</sup> There may be rare situations of war or other emergency where some of those fundamental understandings do not apply, but it would have been absurd for the Framers to allow a discretionary decision of the President that we were at war with some group of non-state actors to overturn the most basic framework of the Constitution.

Unlike many other constitutions, our Constitution does not contain emergency powers, other than the power of Congress to suspend habeas corpus in times of invasion or rebellion.<sup>6</sup> Modern nations that do have emergency powers generally require legislative authorization of a state of emergency.<sup>7</sup> They do not allow the chief executive to decide for himself when he is to have extraordinary powers.<sup>8</sup> Perhaps very dangerous situations can create something like emergency powers, although the Framers did not find it necessary to do this explicitly. But if there are such extraordinary national security powers in the executive, the most rudimentary common sense—something the Framers excelled at—would require these powers to be triggered by another branch. The Framers may well have believed they accomplished this by vesting in Congress the powers to suspend habeas corpus<sup>9</sup> and to declare war.<sup>10</sup>

## II. THE AUTHORIZATION FOR USE OF MILITARY FORCE

Even if the reader agrees with me about the President's claim of Article II powers to set aside normal understandings about the role of Congress and the Bill of Rights,

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<sup>4</sup> *See id.* art. I, § 8.

<sup>5</sup> *See id.* amends. I–X.

<sup>6</sup> *Id.* art. I, § 9, cl. 2.

<sup>7</sup> *See, e.g.,* La Constitution 1958 CONST. art. 35 (Fr.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2005); GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [Constitution] art. 25 (Neth.), *translated in* 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2007); REGERINGSFORMEN [RF] [Constitution] 10:9 (Swed.), *translated in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2007).

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>10</sup> *Id.* § 8, cl. 11.

the reader may still accept the President's argument that the Authorization for Use of Military Force,<sup>11</sup> passed by Congress soon after September 11, 2001, provides the President with all the powers that he needs.<sup>12</sup>

The major premise of such an argument is that we no longer require a "declaration of war" to activate highly exceptional powers in the case of armed conflict with another state.<sup>13</sup> More recently we have relied on congressional resolutions authorizing the use of military force.<sup>14</sup> Thus, the argument goes, the fact that the President obtained such an authorization to use military force to pursue al Qaeda and its supporters and that the authorization was in the language we had used in the past to authorize armed conflict with hostile foreign nations, means that the President was granted the powers to detain indefinitely, to interrogate cruelly, and to kill or punish without a fair trial those Americans he thinks are supporters of al Qaeda.

But an interpretation of words of Congress that are wholly inexplicit as to the reach and powers they grant the President may mean one thing against the background of an armed conflict with another state and something less when the background against which the words were used is very different. The same broad words, which have in the past granted extensive powers in wars against the forces of nation states, may be intended to have far more limited meanings as broadly applied to American citizens accused of supporting a very dangerous but relatively small group of terrorists without the powers of a state.

Lawyers will disagree as to whether Congress meant to grant such extreme powers. But there is, at a minimum, obvious uncertainty as to congressional intent to authorize extraordinary forms of detention, interrogation, or killing of U.S. persons.<sup>15</sup> That uncertainty is at the heart of my rejection of the argument that the President can rely on what Congress has done even if he lacks exclusive Article II powers.

Before explaining, let me again begin by making clear what is *not* part of my argument here. I do not intend to pass judgment now on the legal effect of an unambiguous authorization by Congress to use particular, but generally forbidden, forms of military force against citizens of the United States who had no ties to a hostile state during an armed conflict with that state. Resolving whether Congress could itself,

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<sup>11</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>12</sup> See, e.g., President George W. Bush, President's Radio Address (Dec. 17, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html>.

<sup>13</sup> See U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (2006), *available at* <http://www.fas.org/irp/nsa/doj011906.pdf>.

<sup>14</sup> See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>15</sup> See Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 168 (2006).

free of judicial review, declare a “real” war on, for example, non-state actors who are purveyors of weapons of mass destruction, or on powerful organized crime groups, or on dangerous terrorists—thus empowering the President to exercise powers greater than the wartime powers of a Roosevelt or a Lincoln—is not necessary to my argument. I doubt that Congress could but I need not reach that issue.

My argument is simply that to the extent that the President relies on a congressional authorization to claim powers that are highly unusual and a dangerous departure from the normal constitutional structure, the authorization by Congress must be very clear and unambiguous. And, of course, different background conditions—including whether what is involved is or is not a familiar armed conflict with another nation—can mean that similar words may well grant different powers or may be more or less ambiguous as to the scope of their authorization. Whether Congress intended to authorize the powers President Bush has claimed in dealing with Americans and aliens within the United States is, at best, a very uncertain matter.

So how should such uncertainty be resolved? The unilateral power to interpret such an authorization without review of the interpretation by either the judiciary or the legislature is itself a great power. Has this power to interpret what Congress approves, unlike the constitutional power to decide unilaterally whether we are at “war” with substate groups,<sup>16</sup> been left to the President alone? For the many situations where there can be no judicial review, isn’t it inevitable that we must trust the President’s lawyers to interpret a statute or resolution by Congress? The answer is “yes,” but we can and should demand certain canons of interpretation in this setting.

In particular, there should be a strong presumption that any action that involves a dramatic departure from provisions of the Constitution, treaties, or statutes that have long been thought to apply when there is no war against a foreign nation and that have been considered basic to our freedoms, must at the very least be clearly intended by the Congress. If Congress is to be said to have made lawful the discretionary exercise of powers that our founders took great pains to generally deny our chief executive, Congress must be assumed to have wanted clear, broadly agreed upon interpretations of its intent—not creative or highly disputable interpretative constructions. Otherwise, the President can call upon lawyers he selects to throw the very switch that the Constitution has denied him, subject only to reversal at the hands of two-thirds of each house of Congress.<sup>17</sup> If Congress intends to give the extraordinary wartime powers exercised by Roosevelt and Lincoln in times of dire danger, short of familiar armed conflicts with another state, it must and will make itself clear.

There is one major difference between the President’s assertion of Article II powers and his assertion that his interpretation of a congressional authorization to use military force gives him the powers he demands. As to Article II powers, my argument is that the Framers would not have allowed the President to control such an

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<sup>16</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>17</sup> *Id.* art. I, § 7 (requiring a two-thirds vote to override a presidential veto).

on/off switch in radically reducing the rights of citizens and the powers of Congress, and the Constitution in fact required the President to seek the authorization of Congress to exercise war powers even against a state. When the President purports to rely on an interpretation of a congressional statute or resolution, he claims that he already has the needed congressional authorization, making irrelevant both any dispute about who has the power to declare war and the analogy to emergency powers in other countries. What is more, there is no obvious alternative to the President interpreting his statutory authority.

These differences are less consequential than the similarities. If the congressional authorization clearly includes the extraordinary powers the President claims, then the President does not have his hand on the on/off switch. Congress has thrown the switch. If, at the other extreme, the President's interpretation is far-fetched, and if he is therefore relying on the fact that the courts cannot review his legal claim, then the only individuals sharing control of the on/off switch are the lawyers he has hired and put in place—far too unreliable a check on nearly absolute power.

A President's claim of powers based on a plausible but readily contestable interpretation of congressional action should not be adequate. The fact that the President needs to seek only a simple majority of each House<sup>18</sup> to clarify what powers Congress has given him—while Congress would need two-thirds of each House to make its equally plausible point since the President can veto any congressional effort at clarification<sup>19</sup>—strongly suggests that any congressional grants of power must be clear. There should be a presumption against the President interpreting ambiguity in a way that makes major structural changes in our constitutional framework.

Thus, the Founders' allocation to Congress of the on/off switch for presidential war powers also means that Congress bears a burden of clear statement and that absent that clarity, there shall be a presumption of normal constitutional protections.<sup>20</sup> It is not enough that the President's lawyers have embraced an interpretation of the powers Congress granted, particularly with regard to American citizens, that would authorize extraordinary measures. Those lawyers, at their most independent, understand that they are obligated to go or stretch as far as they decently can to find support for the President's position. At their least independent, they authorize whatever he wants.

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<sup>18</sup> *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 269–70 (2003) (statement of Michael J. Gerhardt, Professor, William & Mary School of Law) (explaining that, outside of the seven instances in the Constitution explicitly requiring a two-thirds vote, the Framers may have intended all other votes to be by a simple majority).

<sup>19</sup> U.S. CONST. art. I, § 7.

<sup>20</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460–61, 464 (1991) (recognizing a “plain statement rule” requiring the Court to be “absolutely certain that Congress intended such an exercise” when interpreting legislation).

And the President is empowered, as he has dramatically shown in the case of fired U.S. attorneys, to replace the independent with the loyal.<sup>21</sup>

### III. AN APPLICATION OF THESE PRINCIPLES

Lest my arguments about interpretation of an authorization seem too abstract, let me close with the example of the President's power to detain a citizen, Jose Padilla, in a military prison for years without access to a lawyer or court.<sup>22</sup> The power to suspend the writ of habeas corpus is found among those granted to Congress in Article I.<sup>23</sup> Even then, it is limited to "Cases of Rebellion or Invasion."<sup>24</sup> The Fifth Amendment to the Constitution forbids the denial of "liberty" to any person by the federal government "without due process of law."<sup>25</sup> A federal statute passed in response to the detention of Japanese-Americans during World War II forbids the detention of any American except pursuant to a congressional statute.<sup>26</sup> Even the President's claim of powers to detain, published soon after September 11, 2001, was limited to aliens.<sup>27</sup>

Yet the President ordered the Secretary of Defense to detain Padilla on unreviewed military findings that he was an illegal "enemy combatant" and to deny him access to judicial process.<sup>28</sup> The contention was simply (1) that we were at war, triggering all historically exercised presidential war powers, and these could not be controlled by Congress; and (2) that in any event the very general wording of Congress's Authorization for Use of Military Force would cover the secret detention of an American citizen, although there was not the remotest suggestion that Congress had any such thing in mind or would have agreed to any such power.<sup>29</sup>

I assume that the President's lawyers told him that he could do whatever Lincoln had done during the Civil War<sup>30</sup> and assert whatever powers Roosevelt had claimed in the *Quirin* case<sup>31</sup> during the second world war. But if President Bush were to have

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<sup>21</sup> See *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?* Hearing Before the S. Comm. on the Judiciary, 110th Cong. 2 (2007) (statement of Sen. Charles E. Schumer, Member, S. Comm. on the Judiciary).

<sup>22</sup> See *Rumsfeld v. Padilla*, 542 U.S. 426, 430-32 (2004).

<sup>23</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* amend. V.

<sup>26</sup> 18 U.S.C. § 4001 (2000).

<sup>27</sup> Directive on Combating Terrorism Through Immigration Policies, 37 WEEKLY COMP. PRES. DOC. 1570 (Oct. 29, 2001).

<sup>28</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004).

<sup>29</sup> *Id.* at 431; see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>30</sup> See Proclamation No. 7, 13 Stat. 734 (Sept. 15, 1863) (suspending habeas corpus during the Civil War).

<sup>31</sup> *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding the jurisdiction of a military tribunal created by President Roosevelt).



the power to detain Americans free of judicial review, it would have to be because Congress had agreed unmistakably that he should have such powers on the ground that we were in a war like that facing Lincoln and Roosevelt in all relevant respects. His lawyers cannot, by highly disputable interpretations of an inexplicit authorization, limit the power of Congress in so many ways or the rights of citizens in such fundamental ways. Whether the President purports to act by a directive, as in this case, or by a signing statement, our freedoms cannot depend on the President deciding that the conditions are right or not right for throwing a self-empowering switch.