

Keeping Faith: Chapter 5 – Separation of Powers

The Framers and Constitutional Design

- Separating the powers of the federal government and dividing them among the House and Senate, President, and the Judiciary were decisions fundamental to the Constitution's design. The Founding generation was determined to prohibit the concentration of government power in the hands of one person or one body.

Executive Power in a Time of War

- In the aftermath of September 11, 2001, President Bush repeatedly claimed that the Constitution gave him authority to act contrary to duly enacted federal statutes. The purported basis for these claims was stated by the Office of Legal Counsel in an August 2002 memorandum examining laws against torture. "In wartime," the memo stated, "it is for the President alone to decide what methods to use to best prevail against the enemy," with the enemy being broadly identified as "international terrorist organization[s]."
- A key premise of our Constitution is checks and balances, and this premise applies even in times of war. The text of the Constitution contains seven clauses assigning significant war powers to Congress—the powers to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules governing land and naval forces; to call forth the militia; to provide for the organizing, arming, and disciplining of the militia; and to define and punish piracies and felonies committed on the high seas and offenses against the law of nations. By contrast, the war powers committed to the President derive solely from his designation as Commander in Chief of the armed forces and the militia.
- While reserving to Congress the power to declare war, the Founders certainly expected the President to have the power to repel sudden attacks without prior congressional authorization. Such power is meant to authorize the President not to create a state of war but to use force to defend the nation when conditions of exigency make prior approval by Congress impractical and when the President reasonably anticipates that Congress will support the action after the fact. But nothing in the Constitution's text or framing history suggests that the President's power to repel sudden attacks displaces Congress's authority under its war powers (or other powers) to make law that is binding on the Executive after the emergency has passed.

Preclusive Power, Terrorism, and Arguments about Changed Conditions Requiring New Understandings

- In recent years, the most aggressive assertions of executive authority have relied not on the well-established power to respond to exigencies but instead on the President's prerogative as Commander in Chief to make strategic and tactical decisions in wartime; they theoretically include claims of "preclusive" power to "take measures incompatible with the expressed or implied will of Congress."
- The history of our constitutional practice reveals no longstanding tradition of preclusive executive power to control the conduct of war, although the claim has surfaced more often since the mid-twentieth century. Faced with this history, recent defenders of preclusive presidential power have argued that new constitutional understandings are required in order to meet new threats to national security. Although arguments for preclusive power based on societal change can hold no sway among those who believe in an originalism of expected applications, they nonetheless merit careful consideration because our Constitution's text and principles were meant to be adapted to new challenges and not frozen in time. In the war on terrorism, we face conditions that differ in many ways from past conflicts. The question is whether effective responses to terrorist threats require an allocation of decision-making authority that departs from original understandings of separation of powers and its actual practice throughout our history—in particular, the longstanding power of Congress to regulate the President's conduct of military campaigns.
- It may be too soon to settle the issue definitively, given the recency of the war on terrorism, but the argument for unchecked presidential power based on changed conditions should be viewed with great skepticism. As an initial matter, we ought not assume too quickly that the threat of terrorism is entirely different from security threats that our nation has confronted in the past. As a functional matter, our nation's "history undermines assertions about the inherent or inevitable unmanageability or dangers of recognizing legislative control over the conduct of war." In the war on terrorism, there is little evidence so far to suggest that complying with existing laws or engaging Congress in passing new legislation has hampered the President's prosecution of the war. Where the President has asked Congress for greater authority, Congress has generally been willing to provide it. In addition, the Supreme Court has shown no inclination to endorse claims of preclusive power in the war on terrorism. Every major decision by the Court in this area, including *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld*, has invoked traditional understandings of checks and balances.