



## Constitutionalism

# Drone Controversy Reveals Crumbling of Constitutionalism

By Joseph Baldacchino

Senator Rand Paul's recent filibuster in opposition to the use of drones to spy on or kill American citizens provides an occasion to review the constitutional restraints that the Framers placed on the employment of force by the federal government. The Framers were very careful to place restrictions on the use of force against American citizens in what is today somewhat awkwardly known as the "homeland." History also demonstrates that such constitutional checks have been frequently ignored and have little power to deter tyranny except when the public remains mindful of them. It was James Madison who warned that even the best governments are composed not of angels but of flawed men and women and that they are in as much need of restraints as those over whom they govern.

Senator Paul said that the purpose of his talkathon was to assure that "the alarm is sounded from coast to coast that our Constitution is important, that your rights to trial by jury are precious, that no American should be killed by a drone on American soil without first being charged with a crime, without first being found to be guilty by

a court." Giving rise to the senator's concern—shared by many across the political spectrum—was a March 4 letter from Attorney General Eric H. Holder, Jr., responding to a question Paul had posed concerning the Administration's views about whether "the President has the power to authorize lethal support, such as a drone strike, against a U.S. citizen on U.S. soil, and without a trial."

In the letter to Senator Paul, Holder refused to rule out the possibility that the President might order a drone strike against a U.S. citizen on American soil, saying: "It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States." As examples, he cited attacks "like the ones suffered on December 7, 1941, and September 11, 2001."<sup>1</sup>

In a subsequent letter to Paul, dated March 7, the attorney general wrote: "It has come to my attention that you have asked an additional question: 'Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?' The answer to that question is no." Paul said he was satis-

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fied with that answer, but administration officials later admitted that Holder had been deliberately ambiguous. While the senator had repeatedly asked whether the President believed he had the authority to kill an American, on U.S. soil, who was not “actively attacking” America, Holder, in his response, avoided using that phrase. Would an editorial writer who opposed the Administration’s anti-terror policy be defined as “engaged in combat” and be subject to targeted killing? Administration officials would not be specific.<sup>2</sup>

Others, not associated with the current Administration, have asserted a sweeping view of the President’s power, attributing to him almost *carte blanche* authority to employ military force against Americans or foreign nationals solely at his own discretion. In a September 25, 2001, memorandum that for a time represented official Bush Administration policy, then-Deputy Assistant Attorney General John C. Yoo declared, “the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, *whether at home or overseas.*”<sup>3</sup>

Yoo famously advocates what he calls a “unitary executive,” according to which the President is vested with all powers that are executive in nature unless explicitly denied in the Constitution, whereas Congress has only those powers explicitly enumerated. “[T]he constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature—such as the power to conduct military hostilities—must be resolved in favor of the executive branch. Article II, section 1 provides that ‘[t]he executive Power shall be vested in a President of the United States.’ By contrast, Article I’s Vesting Clause gives Congress only the powers ‘herein granted.’” This difference in language, Yoo argues, indicates that Congress’s legislative powers are limited to those enumerated in Article I, section 8, while the President’s powers include inherent executive powers that are unenumerated in the Constitution. It follows, according to Yoo, that, “In the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.”<sup>4</sup>

Contrary to views such as the foregoing, the constitutional Framers went to great lengths to

*restrict* the use of force against American citizens, not only by the President acting alone but by the federal government as a whole. A key example is Article IV, section 4. This article gives to Congress the authority to determine when a foreign invasion has occurred, which is one of the conditions under which Congress may call forth the militia and suspend the writ of habeas corpus. However, the power to determine whether the other condition authorizing Congress to take such extraordinary measures has occurred—that is, an internal rebellion or insurrection—is explicitly reserved to the *states*. Thus, Article IV, section 4 provides that only *on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)* is the federal government authorized to use force in a state to protect it “against domestic Violence.”<sup>5</sup>

At the Philadelphia convention, virtually all delegates who addressed the subject agreed that, as an early formulation of July 18 had it, “each State shall be protected [by the general government] against foreign & domestic violence.” But delegates were divided on whether the general government should have the power to decide on its own to put down a rebellion in the states or whether the power to involve the general government should be reserved to the states. On August 17 and again on August 30 delegates proposed granting this power to the general government. John Dickinson of Delaware even pointed to the possibility that an insurrection “may proceed from the State Legislature itself.” However, the majority of state delegations agreed with Luther Martin of Maryland, at least so far as domestic violence rather than foreign invasion is concerned, that, “The consent of the State ought to precede the introduction of any extraneous force whatever” (August 17).

Each time this issue arose the majority of state delegations insisted by their votes that the several states should retain this power, making it unconstitutional for the general government to use force to put down a rebellion in any state unless *requested* by that state’s designated authorities. On August 17, for example, James Madison and John Dickinson jointly moved to insert after “State” the words “against the Government thereof.” This motion would have lodged the power to intervene with the general government if in its judgment the violence threatened not merely the government of

one state but the Union as a whole. As Madison explained in his *Notes of Debates in the Federal Convention*, "There might be a rebellion agst. the U. States [i.e., the federal union]." This limited effort to expand the federal power was temporarily approved. But only temporarily, for in its amended form, which many delegates saw as a clear threat to state power, the entire clause was voted down.

Thenceforth, delegates who might have preferred to lodge this great power with the general government were forced to reserve the power of decision to the states as a price for retaining the clause in any form at all. The Constitution approved by the convention gave the general government no power to put down a rebellion or domestic violence unless the states in which the insurrection occurred explicitly requested it.<sup>6</sup>

This outcome represented one of the most significant victories for those who feared the employment of federal military force against Americans living at home. Another such victory was Article 1, section 8, clause 17 of the Constitution, which gives to the states, not the general government, ultimate control over all land within their jurisdiction. The mentioned clause gives the federal government exclusive jurisdiction over what would become the District of Columbia and allows it "to exercise like Authority over all Places [and here are the significant words] *purchased by the Consent of the Legislature of the State in which the Same shall be*, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Why this was done is spelled out explicitly in a few brief paragraphs of Madison's *Notes of Debates in the Federal Convention*. The relevant passage is as follows: On the clause

"to exercise like authority over all places purchased for forts &c.

Mr. Gerry contended that this power might be made use of to enslave any particular State by *buying up its territory*, and that the strongholds proposed would be a means of *awing the State into an undue obedience to the Genl. Government*—

Mr. King . . . would [and here are the key words] move to insert after the word "purchased" the words "by the consent of the Legislature of the State[.]" *This would certainly make the power safe.*

Mr. Govr Morris 2ded. the motion, which was agreed to nem: con: . . .<sup>7</sup>

That is the entire record of the origins of this provision. So that the states would not be intimi-

dated "into an undue obedience to the general government," the latter was made dependent on the states for the acquisition of property in their territory.

That the two constitutional provisions here cited give to the states powers to limit or restrain the use of force by the federal government (including the President) upon their soil is incontrovertible. Yet few Americans today are aware of either of these constitutional powers that were so explicitly and deliberately granted to the states by the Framers. They have been ignored and fallen into disuse.

For more than eighty years, when the general government wanted to build a fort or a lighthouse or a post office, Congress would pass a statute requesting that the appropriate state legislature cede land to the general government for the purpose. The state legislature, at its discretion, would approve, and, if suitable property was not available on the open market, the legislature would use its reserved power of eminent domain on behalf of Congress, the latter having no such power.<sup>8</sup>

But then in 1875 the Supreme Court's decision in *Kohl v. United States* literally inverted the previously existing relation of the two levels of government concerning land use. For the Court, Justice William Strong wrote:

The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses[, etc.] . . . If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State . . . This cannot be.<sup>9</sup>

The Court simply ignored that this dependence of the general government on the states was precisely what the Framers had intended, not to render the federal military power nugatory but to make it less than plenary.

Strong went on to argue that, as the states derive the power of eminent domain from their sovereignty, the general government should have the power as well, since it "is as sovereign within its sphere as the States are within theirs." This last inference is particularly disingenuous, for it was

a part of the states' retained sphere of sovereignty that they had the ultimate control of all land within their borders except for any that had been ceded. It is impossible to give *ultimate* control over state territory to the *federal* government and still to leave ultimate control with the *states*.

Recognizing that this power could not reside in two places and believing that to put it in the general government would undermine the states' reserved powers, the Constitution, upon discussion and a conscious decision at the convention, left eminent domain where it had been—with the states. In its ruling in *Kohl*, the Supreme Court brazenly flouted the clear and explicit intention of the Framers.

Soon the Framers' worst fears were realized. Over the next twenty-one years, the previous sovereignty of the states over their own territory was obliterated root and branch. The following summary of the Supreme Court's 1896 ruling in *Chappell v. United States*, taken from FindLaw, says all we need to know:

The fact that *land included in a federal reservoir project is owned by a state*, or that its taking may impair the state's *tax revenue*, or that the reservoir will obliterate part of the state's *boundary* and interfere with the state's *own* project for water development and conservation, constitutes *no barrier* to the *condemnation* of the land by the United States.<sup>10</sup>

From the foregoing recitation of historical facts, at least two lessons can be drawn. First, the Framers plainly did not intend to vest the discretion to use lethal force against U.S. citizens in the President alone or even in the federal government alone. Second, the checks and balances enshrined in the Constitution are not self-enforcing. They must be constantly championed by an alert citizenry and its representatives. When asked at the conclusion of the constitutional convention what kind of government the Framers had crafted, Benjamin Franklin is said to have responded: "A republic, if you can keep it."

To maintain or restore free government, it is not sufficient merely to point to this or that constitutional provision or this or that quotation from the Framers or the *Federalist* papers. It is necessary to keep alive or revive the spirit that animates the Constitution and without which the Constitution becomes an empty shell or the plaything of people looking to expand their power.

The drone controversy and the evidence of the Framers' intent here presented are mere examples of the apparent precariousness of American constitutionalism and traditional liberties. That Americans should be willing to consider the use of drones to kill Americans on American soil without due process of law may indicate a sea change in how Americans and their leaders view government.

To restore American constitutionalism would require, first of all, a reinvigoration of the traditional culture of humility and vigilance against the lower potentialities of human nature. These are its necessary prerequisites.

We must recognize that the Framers did not invent the Constitution out of whole cloth or create it in a cultural vacuum. Rather, the checks and balances codified in our federal and state constitutions were the product of customary law and constitutional arrangements that had developed over the centuries in England, beginning in the Middle Ages.

Constitutional restraints were valued because the dominant ethos of the time, heavily influenced by Christianity, recognized that a good society results not from giving free vent to human impulses but rather from putting checks on man's natural tendency toward arbitrariness, misuse of power, and general self-indulgence. According to this view, men and women are torn between higher and lower inclinations, and goodness, including community, results when merely selfish desires—or what Madison refers to in *Federalist* 10 as "partial considerations"—are blocked in favor of what he calls "justice" or society's "true interest."<sup>11</sup>

Though not viewed as in themselves substitutes for willing the good or following conscience, externally imposed restraints were seen by the Framers and by the Age of which they were a part as indispensable supports for man's higher nature. By posing obstacles to the all-too-human tendency to rush to self-serving judgments, frequently based on simplistic views of complex situations, constitutional checks provided invaluable opportunities for those of better character and more deliberative temperaments to be heard.

In short, the Constitution of the Framers was the product of a very specific culture or way of viewing the world that emphasized man's fallibility, and not least his penchant for rationalizing

behavior that is merely self-serving or even harmful. All of us—not only our political opponents but we ourselves and those who agree with us—are in need of restraints, and this is true of us both as individuals and in groups, including governing bodies. As Edmund Burke explained,

Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should frequently be thwarted, their will controlled, and their passions brought into subjection. This can only be done *by a power out of themselves* . . . . In this sense the restraints on men, as well as their liberties, are to be reckoned among their rights.<sup>12</sup>

These words of Burke’s—“the restraints on men, as well as their liberties, are to be reckoned among their rights”—provide a good summary of the constitutional morality that must be present in society if constitutionalism is to be effective. To have any hope of restoring genuine American constitutionalism, therefore, our first and necessary task will be to help restore to prominence in American culture and imagination the realistic assumptions concerning human moral strengths and weaknesses that made the Constitution meaningful at the time of its adoption.

In the meantime, Americans will have to adjust to living with drones and other violations of due process—and to Americans dying because of them.

Notes

1. *Congressional Record*, March 6, 2013, S1150-S1176.
2. Guy Benson, “WH Official: Holder’s Letter to Rand Paul was an Intentional Non-Answer,” *Townhall.com*, March 11, 2013, <http://townhall.com/tipsheet/guybenson/2013/03/11/wh-official-holders-letter-to-rand-paul-was-a-nonanswer-n1531213>
3. “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” Memorandum

Opinion for the Deputy Counsel to the President, September 25, 2001, by John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel. (Emphasis added.)

4. *Ibid.*(Citations omitted.)

5. The Constitution of the United States, Article IV, section 4 (emphasis added), [www.nhinet.org/ccs/docs/constitution.htm](http://www.nhinet.org/ccs/docs/constitution.htm).

6. James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: Norton, 1969), 474-75, 559-60.

7. *Ibid.*, 581 (emphases added).

8. In *United States v. Bevans*, 16 U.S. 3 Wheat. 336 (1818), Chief Justice John Marshall, though known as a supporter of a strong central government, nevertheless ruled that the states retain general legislative power or jurisdiction over all matters within their territorial boundaries except in geographical areas where exclusive jurisdiction has been explicitly ceded to the general government by the state legislature. “Congress has power to exercise exclusive jurisdiction over this district [of Columbia],” wrote Marshall, “and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.” The federal government’s “power of exclusive legislation (which is jurisdiction) is united with cession of territory” by the states, Marshall continued, and the cession of territory “is to be the free act of the states.”

9. *Kohl v. United States*, 91 U.S. 367 (1875) (emphasis added), <http://supreme.justia.com/cases/federal/us/91/367/case.html>.

10. “Annotation 14—Fifth Amendment, National Eminent Domain Power,” Footnote 167 (emphases added), <http://constitution.findlaw.com/amendment5/annotation14.html>.

11. Madison, *Federalist* 10.

12. Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin Books, 1969;1790), 151 (emphasis in the original).