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Executive Power in Wartime

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The following is adapted from a speech delivered in Washington, D.C., on September 15, 2011, at the Second Annual Constitution Day Celebration sponsored by Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship.

President Obama campaigned for office largely on the claim that his predecessor had shredded the Constitution. By the Constitution, he could not have meant the document signed on September 17, 1787. Article II of that document begins with a simple declaration: "The executive Power shall be vested in a President of the United States of America." Not "some" or "most" or even "all but a teeny-weeny bit" of the executive power. The President is vested with *all* of it. This is particularly noteworthy when compared with the enumerated legislative powers vested in Congress: "All legislative Powers herein granted." The Founders understood, based in part on their unfortunate experience under the Articles of Confederation, that the branch of government most likely to be in need of the ability to act quickly and decisively is the executive. The branch most likely to overreach is the legislature.

Perhaps, then, candidate Obama was thinking of the Bill of Rights in claiming that President Bush shredded the Constitution. But leaving that question aside for now, let us consider how President Obama has fared in undoing the Bush policies he opposed. He began dramatically in January 2009 by issuing a series of executive orders. According to one, Guantanamo was to be closed within a year. Even though the principal planner of September 11, Khalid Sheikh Mohammed, or KSM, had announced that he would plead guilty before a military tribunal at Guantanamo, the Justice Department announced in November 2009 that the military commission was cancelled. Instead, KSM would be brought to the mainland United States to stand trial. In response, Congress passed a statute, relying on its constitutionally-enumerated power

of the purse, directing that no federal funds be used to bring any detainee from Guantanamo to the U.S. As a result, the Guantanamo military commission trial for KSM and other detainees charged in connection with September 11 is back on.

Another executive order in January 2009 suspended the CIA interrogation program. Instead of these allegedly disgraceful and unconstitutional interrogation techniques, it was announced that anyone acting on behalf of the U.S. government, even a highly trained CIA operative seeking sensitive security-related information, is limited by the Army Field Manual. This manual—because it was drafted for general use—is pitched to the capabilities of the most junior recruit in the field interrogating someone he has just captured. In fact, it has been available on the Internet for years and has been used by terrorists as a training manual for resisting interrogation.

The abandoned CIA program involved—in what is probably the most disastrous marketing term since New Coke—“enhanced interrogation” techniques which were, in fact, completely lawful. When detainees were subjected to those techniques—detainees who self-selected as both knowledgeable of Al Qaeda and resistant to lesser techniques—we learned a great deal. Three of these detainees—Abu Zubaydah, Khalid Sheikh Mohammed, and Abdel Rahim al Nashiri—gave up a huge trove of valuable information. Not only did KSM disclose general information on how Al Qaeda moved money and people, but also specific information that helped disrupt other plots. One such plot involved airplanes attacking the Library Tower in Los Angeles. It was to be carried out by a South Asian group headed by a man named Hambali. Other information resulted in the capture of people involved in a plan to develop a biological weapons capability in the U.S. The list goes on.

Not only has this interrogation program been abandoned, but when people today are apprehended in connection with terrorist plots directed at this country—and there have been more than 20 since September 11—most are turned

over immediately to law enforcement authorities, informed of their Miranda rights, and treated as routine criminal suspects.

What do we lose in this process? With the would-be Christmas Day bomber Umar Farouk Abdulmutallab, we lost the chance at information about who had built his bomb. From bombs that have shown up in packages originating in Yemen, it appears that the same bomb maker is still in business, and he is believed to be responsible for a bomb that injured Prince Mohammed Bin Nayef, the man largely responsible for Saudi Arabia’s counter-terrorism efforts.

Although Guantanamo remains open, the President remains committed to closing it. For example, no new detainees are being brought to Guantanamo. We learned a month or two ago that a man named Warsame was apprehended and was thought to be in possession of valuable intelligence. He was placed aboard a naval vessel and debriefed for two months, after which he was advised of his Miranda rights and brought to the U.S. The administration disdains military tribunals, notwithstanding the fact that they have been used in our history from the Revolutionary War to World War II and are provided for specifically in a statute passed by Congress called the Military Commissions Act.

The administration also remains committed to figuring out a way to release those detained in Guantanamo, despite the fact that at least 20 percent of Guantanamo alumni have returned to the battlefield. We know that figure because 20 percent have been recaptured or killed. How many others are still in the fight is anyone’s guess.

So after all this, where do we stand? The intelligence gathering techniques adopted and followed during the preceding administration not only remain on the books but are actively pursued. And thanks to a vigorous and courageous exercise of the Article II Commander-in-Chief power, and the splendid performance of a team of Navy Seals, Osama bin Laden is dead. I certainly would not

minimize that achievement. He needed killing, and he and we needed it to be done at the hands of Americans. It was done in a way that allowed us to exploit the trove of intelligence that was found in his home—though one wishes that less had been said about it at the time, rendering it more effective. And his death has great symbolic significance, because of the status he had attained during the ten years since September 11. But it is impossible to gauge the significance of bin Laden's death unless and until we recognize the simple fact that our encounter with what he stood for began much earlier than September 11, 2001.

What bin Laden stood for was Islamism, which—insofar as it holds the U.S. in a weird combination of awe and contempt—has been incubating for about as long as we have known about the other two “isms” that we successfully conquered in the last century. As a movement distinct from the religion of Islam itself, Islamism traces back to Egypt in the 1920s, when the loosely organized Muslim Brotherhood was established by a man named Hassan al-Banna. Al-Banna founded the Muslim Brotherhood as a reaction to the modernizing influence of Kemal Ataturk, who dismantled the shell of what was left of the Muslim caliphate in Turkey, banned the fez and headscarves, and dragged his country into the 20th century.

Al-Banna's principal disciple was also an educator—a bureaucrat in the education department of the Egyptian government named Sayyid Qutb. Qutb caused enough trouble in Egypt to get himself awarded a traveling fellowship in 1948, the year al-Banna was killed. Regrettably for us, Qutb chose to travel to Greeley, Colorado. And although it would be hard to imagine a more inoffensive place than post-World War II Greeley, Colorado, for a man like Qutb it was Sodom and Gomorrah. He hated everything he saw: American haircuts, enthusiasm for sports, jazz, and what he called the “animal-like mixing of the sexes,” even in church. His conclusion was that Americans were “numb to faith in art, faith in religion, and faith in spiritual values altogether,” and that Muslims must regard “the white man,

whether European or American . . . [as] our first enemy.”

Qutb later returned to Egypt, quit the civil service, and joined the Muslim Brotherhood. He welcomed Gamal Abdel Nasser's coup against the corrupt monarchy of King Farouk in 1952, but then became disillusioned with Nasser for failing to institute Sharia law. He opposed Nasser, and was subsequently arrested and tortured. However, he continued to write and agitate for Islam and against Western civilization, particularly against Jews, whom he blamed for atheistic materialism and considered the worst enemies of Muslims. He was released for a time, but eventually was re-arrested, convicted of conspiracy against the government, and hanged in 1966.

Many members of the Brotherhood fled to Saudi Arabia, where they found refuge and ideological sustenance. Qutb's brother was among those who fled and taught the doctrine in Saudi Arabia. Among his students were Ayman al-Zawahiri, an Egyptian who would become a leading Al Qaeda ideologist, and a then-obscure Osama bin Laden, the pampered child of one of the richest construction families in the country. And the rest, as they say, is history.

That history did not come to these shores on September 11—or even on February 26, 1993, when a truck bomb detonated in the basement of the World Trade Center, killing six and wounding hundreds. It came at the latest in the 1980s, when a couple of FBI agents spotted a group of men taking what looked like particularly aggressive target practice in Calverton, Long Island. When they approached, they were accused of what we now call racial profiling, and they backed off. In November 1990, one of those men, El-Sayyid Nosair, assassinated a right-wing Israeli politician, Meir Kahane, in the ballroom of a Manhattan hotel. When the 1993 World Trade Center bombers demanded the freeing of Nosair from jail, it became apparent that the Kahane assassination had not been the lone act of a lone gunman. Authorities reviewed the amateur video of Kahane's speech the night he was killed and discovered that

one of those 1993 bombers had been in the hall when Kahane was shot. Further investigation disclosed that another was driving the intended getaway vehicle.

The man who served as the spiritual advisor to Nosair and the 1993 World Trade Center bombers, Omar Abdel Rahman, the so-called blind sheikh, along with Nosair and several others, were tried before me and convicted for participating in a conspiracy to conduct a war of urban terror against this country—a war that included the Kahane murder, the first World Trade Center bombing, and a plot to blow up other landmarks around New York and assassinate Egyptian leader Hosni Mubarak when he visited the United Nations. The list of unindicted co-conspirators in that case included Osama bin Laden.

At the time, all of this was treated as a series of crimes—unconventional crimes, to be sure, but crimes nevertheless. This despite the fact that in 1996, and again in 1998, Osama bin Laden declared that he and his cohorts were at war with the United States.

In 1998, the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed almost simultaneously. Again the criminal law was invoked, this time in an indictment that named Osama bin Laden as a defendant. Apparently he was unimpressed, or at least undeterred, because in 2000, Al Qaeda bombed the USS Cole in Aden, Yemen, killing 17 sailors. It would have carried out the bombing of another naval vessel, but for the fact that the barge carrying the explosives was overloaded and sank.

Then came September 11, and to the call “bring them to justice” was added the call “bring justice to them.” We were told that we were at war more than 50 years after Sayyid Qutb determined that Islamists would have to make war on us, about 15 years after Islamists had made it clear that they were training for war with us, and five years after Osama bin Laden made it official with a declaration of war.

In fighting Islamism, we are handicapped at the strategic level by the refusal of those in authority to acknowledge the goals of our adversaries. Those goals are

essentially political, and involve the recreation of an Islamic caliphate and the imposition of Sharia law over as broad a swath of the world as possible. This is a profoundly anti-democratic movement at its core, and it regards the whole idea of man-made law as anathema. Instead, we try to be inoffensive by using a term that originated in the administration in which I served, and we refer to a war on terror or terrorism. People who wish to quibble about what it is we are at war with take the discussion off into absurdity. One such person is the President’s Assistant for National Security, John Brennan, who, before an audience at the Center for Strategic Studies, ridiculed the idea of a war on terrorism or on terror, saying it is impossible to have a war on a means or a state of mind.

This lack of clarity also distorts the view of policy makers about what is happening in the Middle East, and so they daydream about democratic movements when the reality on the ground is more populist than democratic. The principal beneficiary of populism is more likely to be the Muslim Brotherhood than the local spokesman for Facebook. The credo of the Muslim Brotherhood is succinct and chilling: Allah is our goal, the Prophet Muhammad is our leader, the Qu’ran is our constitution, jihad is our way, and death in the way of Allah is our promised end.

If the death of Osama bin Laden is more than simply a spasm, or an opportunity to engage in self-congratulation—if it helps provide some insight into the nature of what it is we are fighting—then it will have been significant indeed. If not, its significance will be substantially diminished.

The signs do not seem promising. Even on September 11 itself, as was pointed out by Fouad Ajami, there was no discussion whatever of the 19 people who perpetrated the atrocity. Ajami pointed in particular to Ziad Jarrah, the most Westernized of the hijackers. Raised in Beirut, Lebanon, to be cosmopolitan in the spirit of that city, he then went to Hamburg, Germany, where he was radicalized, and he then wound up at the controls of Flight 93, the flight that

was supposed to hit the U.S. Capitol. It didn't because the passengers learned what had already happened at the World Trade Center and the Pentagon, figured out what was in store for them and their country, and chose to act.

There is much to be learned from those facts. Start with the last. We learn the importance of intelligence. The passengers on Flight 93 were able to act because of what they had learned about what was going on elsewhere. Intelligence gathering must be our number one priority. The people waging war on us are part of a movement that does not occupy any particular place or country that we can demolish and then pronounce ourselves the winners. They live in some cases among us, and the only way of opposing them successfully is to find out in advance what they intend to do and to thwart it.

Second, note that Jarrah was radicalized not in the Middle East, but in the West. We must be aware of those in our society who wish to create closed ethnic zones, where Muslims essentially run their own affairs and outsiders enter only at their peril. This has already happened in the suburbs of French cities, in parts of England, and in other places you would not expect it such as Malmö, Sweden, and it allows radicalization to go on undetected. Guidelines have been put in place to allow the FBI to function for the first time in its history as an intelligence gathering organization and not simply as a law enforcement agency. If the Bureau partners with state and local law enforcement, then the kind of insular activity that allowed Jarrah to be radicalized can be broken up. Those guidelines must remain in place, and must be defended.

Doing that will require an intelligent understanding of the part of the Constitution I didn't discuss at the outset, the part that animated so much criticism of the Bush administration by those now in charge—the Bill of Rights. This part of the Constitution provides robust protection to both public and private activity that we value, which is essential for the continuation of our civic life. But it does not

require that we close our eyes when there are people plainly setting the stage for activity that is in no way protected.

The First Amendment protects free speech and freedom of worship. It permits preaching even violence in the name of religion. But it does not guarantee that such speech will go undetected. Nor does it guarantee that evidence of it cannot be presented in a court when and if it is appropriate to charge that the speaker and those to whom he spoke understood this protected speech and took it as a call to unprotected action. This includes action that itself consists only of speech—such as an agreement to commit a crime, which is itself the crime of conspiracy.

The Fourth Amendment protects against unreasonable searches and seizures, and contains a separate warrant clause providing that warrants may issue only on a finding of probable cause. That does not mean that a search conducted for intelligence purposes requires a warrant, only that it be reasonable.

The Fifth and Sixth Amendments guarantee due process, counsel to those accused of crimes, and the right to confront witnesses, but their application is limited to trials occurring in Article III courts. How much process is due and what kind of evidence may be received and under what circumstances in other tribunals, such as military commissions, is an entirely different story.

The message lurking in the *structure* of the Constitution is that those acting lawfully under it deserve at least the benefit of the doubt when they act to protect the common good. That is not meant to be a statement or a suggestion of a jurisprudential standard, a standard of law; but it is meant as a prudential standard, a standard of civics and public discourse. This standard will help keep intact the system that we depend on to preserve the nation that Abraham Lincoln called the last, best hope of earth—words that are truer today than they were when he spoke them during another time of trouble. ■