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Constitution Kerfuffle

By Aziz Huq

Politics makes strange bedfellows. Last week saw an almost unheard of scrambling of allegiances after the FBI searched the congressional office of Rep. William Jefferson, D-La. While the Constitution's Separation of Powers figured prominently in news of the executive branch decisions to bypass laws against torture and domestic spying, this seemed a wholly unexpected front for the White House's push for executive power.

But in amongst the smoke, is there fire? The New York Times and others concluded that there wasn't even an ember. The Times labeled the Jefferson search a sideshow, a distraction from today's far more serious Separation of Power questions.

But this moves too quickly. The Jefferson search is a significant illustration of a pervasive, but largely unnoticed, dynamic of "constitutional hardball." As such, it presents a chance to open broad dialogue on how underlying constitutional values are being altered. To insist on ideological purity in defense of the Separation of Powers now would be a strategic mistake for those who believe the principle to be in clear and present jeopardy elsewhere.

The Jefferson search seems little more than an amusing spectacle of political leaders defending principles they typically deride or ignore. House Majority Leader Dennis Hastert joined hands with his minority counterpart Nancy Pelosi to issue a call for documents the FBI seized from Jefferson's office to be returned. Attorney General Alberto Gonzales—after more than four years of signing off on Justice Department memos that peel away legal restraints on torture—hinted he would resign if Hastert won. (FBI Director Robert Muller also apparently tendered a similar offer).

Perhaps most oddly of all, The Washington Post reported that some of the most strenuous complaints about the Jefferson search inside the executive branch came from Vice President Cheney's chief of staff David S. Addington. Addington has been at the front-lines of battling for increased executive power from his time working for Cheney on the Iran-Contra committee to his recent service defending the president's purported right to torture and spy on Americans.

As the Times and others rightly observe, the Jefferson search seems at first blush far removed from Addington's aggressive campaign to loosen executive power from legislative restraints. That doesn't mean, however, it's irrelevant to those same Separation of Powers concerns. On the contrary, the Jefferson search illustrates in sharp contrast the very tool used to dislodge legislative restraints and mechanisms of accountability elsewhere, a tool Harvard Law Professor Mark Tushnet calls "constitutional hardball."

According to Tushnet, constitutional hardball "consists of political claims and practices... that are

without question within the bounds of existing constitutional doctrine and practice but are nonetheless in some tension with existing pre-constitutional understandings.” In other words, constitutional hardball happens when someone tries to change the practices government actors use to put the Constitution into action. Tushnet cites the furor over judicial filibusters and the use of recess appointments as examples. He uses these to argue that politicians use constitutional hardball to shift the playing field of political and constitutional understandings to give one side an enduring advantage.

The present administration excels in constitutional hardball, especially when it comes to executive power. From the Cheney energy taskforce to Justice Department legal opinions authorizing the override of otherwise binding laws against torture and domestic spying, we can trace a pattern of concerted efforts to stake out new rules of the game. On some occasions (such the Justice Department’s memos on torture and spying) this meant sidelining fundamental Constitutional principles.

And a Republican-dominated Congress has largely acquiesced albeit with some noble exceptions, such as Sen. Arlen Specter. The senator from Pennsylvania valiantly voted against General Michael Hayden’s confirmation on the ground that Hayden had supervised the NSA’s illegal domestic spying activities.

Regardless of the final constitutional merits, the FBI’s move boldly essays a change in the social practices and understandings that largely make up the Separation of Powers between executive and legislative. The Jefferson search is the first such event in 219 years. This sort of thing, done for the first time, changes the balance of power between Congress and White House even if it turns out to be constitutional.

As this rather melodramatic example illustrates, constitutional hardball comes to the fore in times when a constitution’s basic understandings are under stress and thus changing. Since 9/11, the Separation of Powers has been on the anvil. As in any time of national crisis, the executive branch’s ability to act quickly with secret information comes to the fore (although Katrina shows it can be poorly used). In an age of multi-agency intelligence services scanning every American’s every electronic communication, what does the Separation of Powers mean? How do we best realize its values?

These are hard questions. But Congress to date has been warming the bench. Meanwhile, the executive seized the initiative in areas where Congress is under scant pressure to act, encroaching on non-citizens’ rights and setting up sweeping surveillance programs. No constituency of voters mobilizes on these issues. Most members of the public shrug off the executive’s decisions to override bars against torture and unlimited detention on the (flawed) assumption that these decisions will never effect them. Domestic spying has an incremental effect on a huge number of people—but may hit no one group especially hard. Collective action problems mean it is hard to turn this diffuse injury into an effective form of political protest.

The Jefferson search squarely puts into play Congress’s own interests. It’s now the House’s own ox being gored. Thus, while Addington’s alarm may reflect some pure commitment to constitutional theory, it may also reflect concern that the FBI’s search risks waking a slumbering Congress. A real dialogue might then begin on what the Separation of Powers means in an age of counter-terrorism. We might begin to see real efforts to rein in executive overreaching.

The FBI’s search may thus be a signal chance to draw broad attention to Separation of Powers problems elsewhere, and to begin the public debate needed on what that constitutional principle means today. It may be an opportunity to think imaginatively about new structures for maintaining a real balance between the branches, and a chance to condemn foolish executive initiatives policies that have us less safe and less free.

This would, indeed, be a debate long overdue and long needed.

ABOUT THE WRITER

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