

4. TERRORISM AND THE CONSTITUTION

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Former Senator Schmitt Ties Congressional and Presidential Dereliction in War on Terror to a Violation of Constitutional Mandates

The Constitution of the United States of America charges the President and Congress, to “provide for the common defence.” Neither entity lives up to this responsibility in spite of both the people and the Constitution being under attack by radical Islam.

Beginning with its Preamble, the Constitution gives clear mandates on the preservation of our liberty against foreign and internal threats. That Preamble declares that the Founders established the Constitution, among four basic objectives, to “provide for the common defence” as well as to “secure the Blessings of Liberty to ourselves and our Posterity.”

To meet these two clearly related objectives, Article II, Section 2 of the Constitution gives the President the power of “Commander in Chief of the Army and Navy.” In addition, Article I, Section 8 states that “The Congress shall have the Power to lay and collect Taxes...” to “provide for the common Defence,..” and “To declare War..., To raise and support Armies..., To provide and maintain a Navy...,” and “To make Rules for the Government and Regulation of the land and naval Forces.” What could be clearer? Both the President and Congress are required to defend the people and liberty and the Congress

has the power to provide the financial means to do so.

Designation of the President as “Commander in Chief” gives that Office explicit authority to determine how to perform the Government’s duty to defend the Constitution and the Nation. Congress, of course, can advise on the adequacy and nature of Presidential initiatives through required budgetary appropriations and Senate confirmation of Cabinet appointees. The Founders clearly intended, however, that there be only one final decision-maker in matters of national security, namely the Office of the President. The Founders’ also intended that Presidents, through the Article I, Section 7, Clause 2, veto power bear full responsibility for success or failure, thus preventing a multitude of “generals” from trying to manage actual military strategies. The Article I, Section 2, Clause 5 power of the House to impeach the President for unconstitutional neglect of the duties of the Office further focuses direct responsibility for national security in that Office.

Together, these provisions of the Constitution underlie nearly two and a quarter centuries of successful, if at times stumbling and mismanaged, efforts to preserve the nation and the liberty of its people from security threats. The Founders appear to have

wanted both tension and joint responsibility to exist between the Executive and Legislature. On the other hand, it defies logic, as well as the Founders' experiences in the Revolution, to conclude that the President, elected by all the voters of the nation, would not have primacy in determining, as Commander in Chief, the specific requirements and actions that would "provide for the common defence." Given this hierarchy of authority in the

Republic, the powers of the Congress that seemingly allow it to second-guess the Commander in Chief should be exercised sparingly.

Relative to our current situation, the Founders did not anticipate election of both a President and a Congress that did not share their constitutional emphasis on national security and the preservation of liberty. These otherwise extraordinarily clairvoyant men and women gave us no clear guidance on how to protect the people from a concentration of political power in like-minded officials – officials with greater concern about ideology and maintaining political power than about the indefinite and successful protection of American freedom and prosperity.

Nor did the Founders anticipate that a President and his Attorney General would not recognize that a long-term state of war exists between the United States and a non-national entity like radical Islam even though Congress had effectively and constitutionally declared such a war in Public Law 107-243. Instead of fighting radical Islam under the recognized rules of war and common sense, the Executive Branch treats terrorism events of that war as "criminal" acts by non-citizens to whom should be given constitutional protections. Also, the Founders did not anticipate that a President would

not recognize continued terrorist attacks on American soil as part of this war, such as the avoidable attacks that occurred at Fort Hood and elsewhere in 2009.

Yesterday, the President rhetorically admitted, "We are at war with Al Qaeda," but gave little indication that the Administration's actions will follow the rhetoric. The President's constitutional responsibilities will not be met until the Administration profiles radical Islamic terrorists rather than targeting all traveling Americans; actively interrogates captured enemy combatants and stops plans to close the state-of-the-art Guantanamo military prison facility; reverses plans to try foreign terrorists in American civilian courts; deals with Iran as a sponsor of Islamic terrorism as well as a nuclear threat; and generally takes the war on terror to the real enemy on a global scale.

The President's and the Congress' disregard for their constitutional mandate to "provide for the common defence" extends beyond their dereliction in the war with radical Islam. This malfeasance includes the (1) Attorney General's prosecution of American warriors acting under orders from the former Commander in Chief; (2) reduction and possible elimination of defenses against terrorist missile attack; (3) neglect of our nuclear deterrence of attacks or intimidation by other nuclear powers; (4) general reduction in the country's defensive capabilities and industrial base relative to current and potential threats; (5) lack of significant action against clandestine importation of weapons of mass destruction; (6) limitation of border efforts to intercept terrorists and illegal aliens entering the country; and (7) intentional weakening of the country's economy needed to support "the common defence" with increased financial dependence on a potential future adversary—China.

The current Congress refuses to force a change in attitude by the Executive through its Article I, Section 8 powers, much less through any thought of impeachment. Affected and threatened parties should explore constitutional challenges to this dangerous inattention to our “common defence.” Those directly killed or harmed by recent attacks or by overly restrictive “rules of engagement” during battlefield actions should have standing before the Courts. If not, we must depend on the American voter to soon awake

to the threats they and their liberty face from the potentially fatal lack of action in the “common defence” by their elected leaders.

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