

Reason

A Tale of Two Conservatives

Andrew C. McCarthy wants to give the government more power; Sen. Rand Paul doesn't.

Lucy Steigerwald | December 9, 2011

Before 93 percent of the U.S. Senate voted to approve the 2012 National Defense Authorization Act last week, Sen. Rand Paul (R-Ky.) tried to block a provision allowing for the indefinite detainment by the military of American citizens.

According to Paul's critics, his support for Sen. Mark Udall's (D-Colo.) amendment to the authorization bill makes him a dangerous extremist. That criticism reflects the Republican Party's long preference for powerful government and unchecked executive authority.

Paul failed to prevent the bill's sponsors, Sens. John McCain (R-Ariz.) and Carl Levin (D-Mich.), from passing this prima facie violation of the constitutional guarantee of due process. But he did help kill an amendment that would have allowed enemy combatants to be detained even after being found not guilty.

When Paul directly asked McCain in floor debates whether his provision might allow for Americans to be detained in Guantanamo Bay, McCain responded "I think that as long as that individual, no matter who they are, if they pose a threat to the security of the United States, I don't think they should be allowed to continue that threat." Sen. Lindsey Graham (R-S.C.) also clearly believes that the bill allows for the indefinite holding of Americans.

One of Paul's rewards for defending the liberties of American citizens was a piece by National Review Institute Senior Fellow Andrew C. McCarthy headlined "Rand Paul, Libertarian Extremist."

Paul and McCarthy, a former assistant U.S. attorney who resigned from the Justice Department in 2003, are twin opposing pillars of conservatism. Both are ostensibly Republicans, but one has a fundamental faith in government power, even with a Democrat in the White House. The other not only dislikes what he considers to be unconstitutional government overreach but often preaches the virtues of a fundamental distrust of government power.

(Article continues below video.)

Like his father, Texas congressman and GOP presidential candidate Ron Paul, Rand Paul simply advises people not to assume the American government is incapable of tyranny. McCarthy, meanwhile, tries to claim some limited-

government credibility with a token mention of how he too dislikes wasteful security measures and by writing that, "The Tea Party's limited government, constitutional heart is in the right place." But he also blames creeping libertarianism for 9/11, writing in *National Review Online*:

But terrorist plots do not succeed because government is too big and sprawling and inefficient; they succeed because libertarian extremists frustrate government's ability to perform even those few functions for which we actually need a central government.

Furthering that objection, McCarthy claims that Paul believes in giving equal constitutional protection to foreigners accused of terrorism, which Paul flatly denied in in his December 5 response, also published on *National Review Online*.

McCarthy believes that the powers Paul objects to already exist thanks to the Authorization for Use of Military Force (AUMF) which passed on September 18, 2001, back when Osama bin Laden was alive, Saddam Hussein was the president of Iraq, Khalid Sheikh Mohammed was still at large, and the Taliban were the official government of Afghanistan.

Cato Institute Defense and Homeland Security Studies Research Fellow Benjamin H. Friedman notes what should be obvious to McCarthy: Precedent matters. There is a reason, even if you are not a "libertarian extremist," to fight against the McCain/Levin amendment. "By explicitly endorsing constitutionally dubious powers that the president already claims, Congress makes those claims more likely to survive legal challenge," Friedman recently wrote at Cato's @Liberty blog.

McCarthy generously suggests that Paul work on removing that 2001 authorization if he truly objects to these powers, yet McCarthy himself isn't worried. He scorns Paul's concerns over an open-ended, global war on terror because "no war has come with an expiration date." He also writes:

To assert, as Senator Paul does, that the indefinite duration of the war equates to a diminution of fundamental due process is just absurd.

But the absurdity does not end there. Senator Paul contends that this purported loss of liberty is permanent. He reasons that once government rolls back due process rights the status quo ante is never restored. But history proves him wrong again and again—even in the examples he cites.

McCarthy's proof: Abraham Lincoln's suspension of habeas corpus during the Civil War was rolled back after the war. Detention of American citizens—including 100,000 Japanese Americans and resident aliens—during World War II did not establish a permanent presidential power of imprisonment. And the Supreme Court case of *Hamdi v. Rumsfeld* (2004), which affirmed the president's power to detain indefinitely people he deems to be enemy

combatants, also specified that American citizens have the right to challenge their detainment before a judge.

This ignores the central feature of wartime judicial precedent—what Robert Higgs, author of *Crisis and Leviathan: Critical Episodes in the Growth of Government*, dubs "the ratchet effect." Higgs writes that while government power may ebb a bit after wartime panic passes, it rarely returns to its original scope or size. This is what concerns Paul. And this is what McCarthy dismisses as extremism, paranoia, or at best well-meaning naivete.

The difference between Paul and McCarthy is that the latter interprets constitutional powers as broadly as possible in favor of government. He does so especially when government invokes the magic incantations of war and terrorism as its excuse for the security state. McCarthy doesn't trouble himself over the risk that innocent people will be caught under the heel of the state. The senator from Kentucky, on the other hand, has an attachment to constitutional rights and a broad skepticism of government power. Unfortunately for the current GOP—and for the country—Paul is the rebel in his party, and McCarthy is more of the same.