

Richard Epstein, "Give Me That Old Time Constitution," Wall Street Journal, March 1, 2006.

In their [Feb. 21 Letters to the Editor](#), Roger Pilon and John Eastman object on multiple grounds to my conclusion ([editorial page, Feb. 13](#)) that the president has exceeded his constitutional and statutory powers in ordering the NSA to conduct domestic surveillance. They misfire on both counts.

Start with the constitutional issues. Prof. Eastman is wrong to assert that the opening words of Article II, that "executive power shall be vested in a President," counts as a hidden fount of unenumerated presidential power. Rather, the vesting clause discharges two functions. First, it provides for one president, not a committee. Second, it blocks any congressional effort to lodge executive power elsewhere. It does nothing, however, to expand scope of executive power beyond what the rest of Article II provides.

Nor does Prof. Eastman draw blood by insisting that the word "commander" gives the president all the "power" he needs to disregard any rules that Congress lays down for "the government and regulation of the land and naval forces." Field commanders have to follow the general law, and the president, as top dog, is no exception. The Constitution does not, contradictorily, vest the same power in both Congress and the president. The president's power to command does not allow him to disregard valid congressional rules.

For his part, Mr. Pilon observes that *Troung* (1980) and *In re: Sealed Case* (2002) have accepted without question the "inherent" power of the executive to conduct warrantless searches to obtain foreign intelligence. So they did, but utterly without any analysis, as both cases were concerned chiefly with the reasonableness of searches under the Fourth Amendment. Neither case mentions any explicit constitutional provision, nor explains how the shadowy, nontextual notion of "inherent power" gobbles up explicit grants of congressional power.

Both decisions, moreover, take a far more absolutist view of the presidential position as commander-in-chief than the eight of nine justices (Justice Thomas excepted) in the fractured *Hamdi* decision. The plurality there wrote, more modestly, that "capturing and detaining enemy combatants is an inherent part of warfare," while ducking the inherent presidential power argument. I am confident that the Supreme Court will not hold that domestic wiretaps of ordinary citizens are part of an unbridled executive power. It will also decline to follow Mr. Pilon's lead in deciding that only political checks restrain presidential power.

Prof. Eastman and Mr. Pilon also mischaracterize the breadth of *Hamdi* on the statutory authorization question. *Hamdi* held that the Authorization of the Use of Military Force Act (AUMF) overrode the Nondetention Act only in "narrow circumstances" involving Hamdi's capture on the battlefield in Afghanistan. Domestic surveillance, however, implicates the rights of innocent third parties at home. Even those justices who sided with the now retired Justice O'Connor in reluctantly holding with that limited authorization are

likely to join Justice Scalia's dissent, by concluding that the AUMF lacked sufficient "clarity" to impliedly repeal FISA's elaborate statutory scheme.

Nor should we regret this probable outcome. Strong limitations on presidential power are inconsistent with our overall constitutional scheme. On one side, a unitary executive allows the president to carry out the laws with speed and dispatch. But the Founders also checked executive power because of their deep fear of the dangers that a standing army posed to the safety and security of the nation. Nothing in Article II gives the president an exclusive control over national security issues, nor reduces Congress to a mere spectator on the grand events of the day. The Congress makes the rules; the president carries them out. That was the formula of 1787. It is the formula of 2006.

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