

## Letters To The Editor

### “Be Very Wary of Restricting President’s Power”

On NSA surveillance, Richard Epstein concludes unlike others who have written for the editorial page ("[Executive Power on Steroids](#)," Feb. 13). No surprise there. The issues are complex, the Constitution imprecise. That said, his contention that "the president has exceeded his constitutional powers in disregarding FISA" (the Foreign Intelligence Surveillance Act) is hardly self-evident. But his claim that "the Constitution gives Congress the power to set policy; it gives to the president the right, and the duty, to execute it," much less that "Congress gets to set the general rules governing military efforts," is surely wrong. No court has ever read the president's foreign affairs power so narrowly.

Prof. Epstein cites "precise provisions" of the Constitution, yet the provisions he cites are neither precise nor dispositive. In particular, Congress's awesome power "to declare War," rarely used, was never meant to "authorize" military action. And the power of Congress "to make rules for the government and regulation of the land and naval forces," which Prof. Epstein finds "most critical for the spying dispute," was meant to enable Congress to establish a system of military justice outside the ordinary courts, not "to set the general rules governing military efforts."

But it's the idea of "inherent" executive power, which he likens to "plenary power over military affairs," that most concerns Prof. Epstein. Yet the FISA Court of Review, in an authoritative opinion on FISA post Patriot Act, spoke directly to that issue in a November 2002 decision known as *In re: Sealed Case*. Citing an earlier case called *Truong* that dealt with pre-FISA surveillance based on "the President's constitutional responsibility to conduct the foreign affairs of the United States," the court said: "The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. It was incumbent upon the court, therefore, to determine the boundaries of that constitutional authority in the case before it. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." The Supreme Court let the decision stand.

Note that the president's power is "inherent," but not "plenary." Its exercise must be "reasonable" under the Fourth Amendment, which Congress can weigh in on, but not to the point of encroaching on the president's inherent power -- say, by prohibiting "the use of live ammunition in combat," which Prof. Epstein would allow. Note, too, the absence of bright lines.

Congress's micromanagement of the executive, which FISA amounts to, leads only to judicial hermeneutics concerning what Congress "really" meant. *Sealed Case* makes that plain. It shows also how earlier courts doing the same led to the erroneous erection of a "wall" between counterintelligence and law enforcement, and that may have led, tragically, to September 11. When the Framers gave the unqualified "executive Power" to

the president, they did not leave it unchecked. But not every check must be by law. On this matter, politics is the better check.

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Richard Epstein is a friend and former teacher, but I have to take issue with his contention that the president cannot conduct warrantless surveillance of enemy communications. His position is based on a strained reading of the Commander in Chief clause and ignores other relevant constitutional text and existing Supreme Court precedent.

Prof. Epstein challenges the president's claim of inherent power by noting that the word "power" does not appear in the Commander in Chief clause, but the word "command," fairly implied in the noun "Commander," is a more-than-adequate substitute for "power." Was it really necessary for the drafters of the Constitution to say that the president shall have the power to command? Moreover, Prof. Epstein ignores completely the first clause of Article II -- the Vesting clause, which provides quite clearly that "The executive Power shall be vested in a President." The relevant inquiry is whether those who ratified the Constitution understood these powers to include interception of enemy communications in time of war without the permission of a judge, and on this there is really no doubt; they clearly did, which means that Congress cannot restrict the president's authority by mere statute.

Prof. Epstein's own description of the Commander in Chief clause recognizes this. One of the "critical functions" performed by the clause, he notes, is that "Congress cannot circumvent the president's position as commander in chief by assigning any of his responsibilities to anyone else." Yet FISA does precisely that, assigning to the FISA court a core command authority, namely, the ability to authorize interception of enemy communications. This authority has been exercised by every wartime president since George Washington.

Prof. Epstein also disputes the Justice Department's claim of congressional support via the Use-of-Force Authorization that was passed overwhelmingly in 2001, contending that "AUMF does not contain one word that dislodges FISA." Here, Prof. Epstein's position is at odds not only with Justice, but with the Supreme Court as well. A nearly identical argument was made unsuccessfully in the Hamdi case. Hamdi argued that federal law prohibited detention of citizens "except pursuant to an Act of Congress," and that the AUMF was not such an act because it did not contain a single word dislodging the anti-detention law. Justice O'Connor, writing for a court plurality, held that the AUMF was sufficient because detentions of enemy combatants had always been considered an incident of war. So, too, with the interception of enemy communications.

Finally, Prof. Epstein contends that Congress can restrict the president's constitutional power by virtue of its own constitutional power "to make rules for the government and regulation of the land and naval forces." This is a novel reading of that clause, which was designed to permit Congress to adopt things like the Code of Military Justice, not to determine operational tactics. It is Prof. Epstein's broad reading of congressional power, not the president's historically- and textually-grounded reading of his own power, that threatens to "upset a carefully wrought constitutional balance." Our nation's founders designed a chief executive, answerable directly to the people, that was strong enough to defend our national security, even acting "with secrecy and dispatch," if necessary. We should be very wary about restricting the president's constitutional powers at the very moment they are most critically needed.

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