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### Is There An Exclusive Commander-In-Chief Power?

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# THE YALE LAW JOURNAL POCKET PART

JULIAN G. KU

## Is There an Exclusive Commander-in-Chief Power?

Which President was advised by his lawyers that he had the constitutional authority to refuse to comply with federal statutes enacted by Congress? Which President also openly violated a federal statute in the exercise of his Commander-in-Chief power? The answer is not George W. Bush, but Bill Clinton. Like every modern President, Clinton defended his inherent and exclusive constitutional powers as Commander in Chief from congressional interference. Yet no legal argument has provoked more outrage today than the Bush Administration's identical claims pursuant to the same power.

Not only has Senator Russell Feingold of Wisconsin accused the administration of acting like rulers "who put themselves above the law,"<sup>1</sup> but *Slate* magazine asked recently whether Bush was "turning America into an elective dictatorship."<sup>2</sup> A group of prominent attorneys also charged Justice Department attorneys with failing "to meet their professional obligations" by advising that "the President's authority as Commander-in-Chief allows him to ignore laws, treaties, and the Constitution relevant to human rights."<sup>3</sup>

These critics are wrong. As President Clinton recognized, the President does possess an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power. The existence of this exclusive power is supported by the text of the Constitution as well as judicial precedent and the practice of past Presidents. Rather than deny its existence, the critics of the

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1. Transcript of U.S. Senate Judiciary Committee Hearing on Wartime Executive Power and the NSA's Surveillance Authority (Feb. 5, 2006) (statement of Sen. Feingold), [www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601001.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601001.html).
  2. Jacob Weisberg, *The Power-Madness of King George*, SLATE, Jan. 25, 2006, <http://www.slate.com/id/2134845/nav/tap1>.
  3. Bruce Ackerman et. al., *Lawyers' Statement on the Bush Administration's Torture Memos*, <http://www.phrusa.org/research/iraq/docs/o8o4statement.pdf>.

Administration should reframe their arguments to define reasonable limitations on the scope of this exclusive but important presidential power.

Article II of the Constitution designates the President as “Commander in Chief.” But even without the Commander-in-Chief clause, the President would still be the chief of the armed forces because the President is vested with a general “executive Power.” So what is the purpose of designating him as “Commander in Chief”? The most sensible textual inference is to read the Commander-in-Chief clause as a constitutional constraint on the other two federal branches, especially Congress, from interfering with the President’s command of U.S. military forces.

Courts have generally endorsed this understanding. In *Ex Parte Milligan*, a Civil War-era decision that limited the President’s power to use military commissions in peacetime, Chief Justice Chase nonetheless reiterated that Congress “cannot intrude . . . upon the proper authority of the President” in the exercise of his military authority. Congress could not, for instance, “interfere[] with the command of the forces and the conduct of campaigns.”<sup>4</sup>

This view is also completely consistent with Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>5</sup> the famous Supreme Court decision rejecting President Truman’s wartime seizure of steel mills. In his opinion, which has been widely invoked by critics of the Commander-in-Chief argument, Jackson clearly believed that the President holds some exclusive Commander-in-Chief powers that Congress cannot limit. After describing three categories of presidential power in foreign affairs, Jackson specifically left room in his analysis for the President to act against the will of Congress. Although the President’s powers are at their “lowest ebb” when Congress objects to his actions, he may still act in those cases pursuant to his inherent constitutional powers.

Presidential practice has uniformly recognized the existence of this exclusive power. Beginning in 1974, for instance, every U.S. President has rejected the constitutionality of the War Powers Act’s ninety-day limitation on the deployment of troops without congressional authorization.<sup>6</sup> Indeed, President Clinton openly flouted the law in 1999 when he kept U.S. troops deployed to Kosovo past the Act’s deadline.

The Clinton Administration actually endorsed a more radical defense of the exclusive Commander-in-Chief power. Walter Dellinger, who served as President Clinton’s chief of the Office of Legal Counsel, opined that Congress could not prohibit the deployment of U.S. soldiers under the command of

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4. 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

5. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

6. 50 U.S.C. §§ 1541-1548 (2000).

foreign commanders because of the Commander-in-Chief clause.<sup>7</sup> According to Dellinger, Congress could not even attach such restrictions to its defense spending appropriations. Dellinger further advised in a separate opinion that it was perfectly acceptable for a President to refuse to implement or execute a law that impermissibly restricted the President's inherent constitutional powers.<sup>8</sup>

Academic commentators have also agreed that there is an exclusive Commander-in-Chief power. Even though Congress also holds broad powers to declare war and make rules governing the regulation of military forces, commentators have universally agreed that some part of the President's Commander-in-Chief power must remain free from congressional regulation. As Professor Louis Henkin, the nation's leading foreign relations scholar, has written of the Commander-in-Chief power, "It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President's authority is effectively supreme."

Accepting the existence of an exclusive Commander-in-Chief power does not require critics to accept the legality of every one of the Bush Administration's policies. But it does require critics to consider seriously the dangers of excessive congressional regulation of the President's wartime powers as much as they highlight the dangers of presidential unilateralism. For instance, defenders of congressional restrictions on warrantless wiretapping should concede the necessity of an exclusively foreign surveillance power, and focus their arguments instead on justifying Congress's authority to regulate domestic surveillance operations.

Whenever the Commander-in-Chief argument is invoked, critics accuse the administration of lawlessness and even monarchical aspirations. This may be satisfying as a matter of political rhetoric, but it is poor and unpersuasive as a mode of legal argument. Widely accepted understandings of the constitutional text reflected in judicial precedent and executive practice confirm the existence of an exclusive Commander-in-Chief power. The question, therefore, is not whether the exclusive power exists, but how far this critically important and necessary power should extend.

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7. Memorandum on H.R. 3308 from Walter Dellinger, Assistant Attorney Gen., May 8, 1996, *reprinted in* 142 CONG. REC. H10061-62 (daily ed. Sept. 5, 1996).

8. Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994).

IS THERE AN EXCLUSIVE COMMANDER-IN-CHIEF POWER?

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9. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. (forthcoming Oct. 2006).