

2005

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Recommended Citation

Epstein, Richard A. (2005) "Executive Power, the Commander in Chief, and the Militia Clause," *Hofstra Law Review*: Vol. 34: Iss. 2, Article 1.

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HOFSTRA LAW REVIEW

Volume 34, No. 2

Winter 2005

EXECUTIVE POWER, THE COMMANDER IN CHIEF, AND THE MILITIA CLAUSE

*Richard A. Epstein**

I. INTRODUCTION: A REVERSAL OF ATTITUDES

One of the great constitutional struggles in the United States depends on our vision of government. In dealing with that question in connection with the issues of federalism, the prevailing modern wisdom since the 1937 term of the Supreme Court is that we should not trouble ourselves unduly with the concerns of excessive concentration of power that troubled James Madison, and should instead cede vast powers to the national government in the regulation of the economy. The current disputes over the role of the President on matters of national security do not raise issues of federalism, but it does raise questions about the concentration of power. On this question, many people who are content to give the federal government vast control over the economy have become rightly uneasy about affording similar deference to the President whose claims of executive power in connection with the National Security Agency (“NSA”) surveillance dispute make it appear as though he has well-nigh exclusive power in dealing with this issue. In some settings, the claim is the more modest one—if incorrect one—that the President has received all the congressional authorization he needs when

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Congress passed the Authorization for Use of Military Force Act¹ shortly after September 11, 2001. But in other cases it involves the more robust claim that Congress has no ability to restrict the President in these intelligence gathering activities because Article II of the Constitution vests exclusive authority on these matters in the President. It follows on this view that the Foreign Intelligence Surveillance Act (“FISA”),² which purports to limit presidential power, is unconstitutional.

In this Idea I seek to examine these claims, by looking at the relevant textual and historical materials from what some would call an originalist perspective. The ironies here are palpable, for this approach demonstrates, quite conclusively, that these inflated claims for executive power have no textual or historical justification. Some of the strongest evidence on this point rests on a proper appreciation of one element that both the President and his opponents have left out of the debate: the key role that the state militias (which have morphed into the National Guard) play in the original constitutional scheme. To set my argument in perspective, first note that many defenders of extensive executive power insist that the President, as head of the executive branch of government and as the commander in chief of the armed forces, is entitled on the strength of his “inherent power” to engage in these surveillance activities, with or without the authorization of Congress.³ For example, Professor Harvey Mansfield writing in the *Weekly Standard* says:

One can begin from the fact that the American Constitution made the first republic with a strong executive. A strong executive is one that is not confined to executing the laws but has extra-legal powers such as commanding the military, making treaties (and carrying on foreign policy), and pardoning the convicted, not to mention a veto of legislation. To confirm the extra-legal character of the presidency, the Constitution has him take an oath not to execute the laws but to execute the *office* of president, which is larger.⁴

David Rivkin echoes the same theme in a more explicit form in a debate that he and I had in *National Review Online's Opinion Duel*:

1. Pub. L. No. 107-40, 115 Stat. 224 (2001).

2. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (current version at 50 U.S.C.A. §§ 1801-1871 (West 2005)).

3. See, e.g., John C. Eastman, Letters to the Editor, WALL ST. J., Feb 21, 2006, at A19; Roger Pilon, Letters to the Editor, WALL ST. J., Feb. 21, 2006, at A19.

4. Harvey Mansfield, *The Law and the President: In a National Emergency, Who You Gonna Call?*, WKLY. STANDARD, Jan. 16, 2006, at 12. The appeal to national emergency should be given little weight. No one doubts the ability of any commander to use force in self-defense, or the ability of Congress to create rules in advance of emergencies that should govern during them.

While there are healthy debates and disagreements about the precise interplay between congressional and presidential powers, I do not know many scholars who seriously contend that the commander-in-chief clause of Article II does not vest the president with enormous substantive powers. For that matter, so does the Vesting Clause of Article II, which assigns all of the executive powers to the president. (I am not sure what Richard means by the commander-in-chief provision being a role, but to read it as amounting to no more than a ceremonial function is, to use a term so oft-misused in Senate judicial confirmation battles, quite out of the constitutional mainstream.) It is pretty well-settled that the transaction of foreign and defense policy is an executive function, that it was so at the time of the Founding, and that the Constitution assigns this power to the president, with a few exceptions, narrowly construed, granted to Congress.⁵

In dealing with these quotations, there is no doubt the defenders of the strong executive power are correct insofar as they insist that the President as the commander in chief possesses the power to defend the United States against a sudden attack. That conclusion, which answers in part Mansfield's query of "who you gonna call" was part of the original understanding of the point,⁶ and has been accepted and endorsed by modern Supreme Court decisions as well.⁷

In contrast to this robust reading of executive power, many traditional liberals who are quite happy with the concentration of government power on economic matters, have become keenly aware of the importance of separation of powers and divided government on the delicate question of presidential power, and they have indeed formed the "Coalition to Defend Checks and Balances,"⁸ (which I have also signed) which harkens back to the older theme of government abuse that looms so large in the *Federalist Papers*.

5. David Rivkin, *National Review Online*, Jan. 31, 2006, available at <http://www.opinionduel.com/archives/> (follow "Domestic Eavesdropping" hyperlink).

6. "Mr. M[adison] and Mr. Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1966) (James Madison's notes from Aug. 17, 1787).

7. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); see also *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J. concurring) ("I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization . . .").

8. See Press Release, The Constitution Project, Statement of the Coalition to Defend Checks and Balances (Feb. 28, 2006), available at http://www.constitutionproject.org/pdf/Separation_of_Powers_Statement_02_28_2006.pdf.

II. WHITHER EXECUTIVE POWER

The stakes on this issue are high. Behind the shadowy formulation of “inherent executive power” lies the claim that the President can in virtue of his powers decide to ignore treaty obligations of the United States, or explicit statutory rules about the proper governance of war efforts. The particular claims go so far as to say that Congress has overstepped its proper bounds just by passing FISA, and that the President may not be bound by the McCain Amendment,⁹ which prohibits cruel, inhuman, or degrading treatment of detainees.

As I have written elsewhere, this assertion of executive power does not sit well with many explicit provisions of the Constitution that seek to divide authority between Congress and the President over the conduct of military activities.¹⁰ In dealing with this issue the usual clauses that have been called into play include the power of Congress to declare war,¹¹ and more importantly its power “[t]o make Rules for the Government and Regulation of the land and naval Forces,”¹² to which may be added its power to “make Rules concerning Captures on Land and Water.”¹³ On the other side of the register lies the basic charge of Article II that “[t]he executive Power shall be vested in a President of the United States of America,”¹⁴ which is then backed up by the further statement that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”¹⁵

In dealing with the last provision, most analysis stops after the phrase “the Army and Navy” of the United States, and ignores the role and position of the militia. Even truncated in this fashion, I think that the commander in chief clause does not authorize the claim of inherent executive power that allows the President, within the domain of military and intelligence activities, to disregard general rules found in either treaties or statutes. The claim that the President has a commander in chief “power” (even though the term is not used in this connection) is inconsistent with the two dominant principles of constitutional interpretation: separation of powers and checks and balances. The former principle cannot survive if both the Congress and the President

9. Pub. L. No. 109-148, §§ 1001-1003, 119 Stat. 2680, 2739-40 (2005).

10. Richard A. Epstein, *Executive Power on Steroids*, WALL ST. J., Feb. 13, 2006, at A16.

11. U.S. CONST. art. I, § 8, cl. 11.

12. *Id.* at cl. 14.

13. *Id.* at cl. 11.

14. *Id.* at art. II, § 1, cl. 1.

15. *Id.* at § 2, cl. 1.

receive the identical power to make rules to govern and regulate the armed forces. That power is given explicitly to the Congress. It cannot be given implicitly to the President, except on pain of contradiction. Yet at the same time, the principle of checks and balances is at work here. The power to make general rules is checked in effect by the inability of Congress (given the vesting clause) to oust the President from office, or from his role of commander in chief.

III. ENTER THE MILITIA CLAUSE

These principles are sufficient to argue against the claim of inherent executive power, and the brief endorsements of that supposed principle in the decided cases does nothing to refute these textual and structural arguments.¹⁶ What has not been noticed thus far is that a closer examination of the constitutional treatment of the militia strengthens that inference. To begin, first notice the careful phrasing of the President's commander in chief role over the militia. The clause relies on the passive voice when it notes that the President becomes commander in chief of the Militia "when called into the actual Service of the United States."¹⁷ It does not anywhere say that the President has on his own the power to call them up into the actual service. That seems like an odd description of the President's role if the claims of his inherent authority were correct.

This apparent lacunae in the President's asserted power is not a simple oversight because key provisions contained in Article I, Section 8 dovetail neatly with the President's inability to call the militia into actual service of the United States. Thus Article I, Section 8, Clause 15 states that Congress shall have the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."¹⁸ In so doing, this Clause places important limitations on the states, which previously had exclusive control over the militia.

Once again details matter. The use of the indirect verb construction ("provide for the calling forth") makes it clear that Congress itself does not have the power to call forth the militia, but in fact must pass some statute which will decide how and when the militia shall be called into the United States. It would be odd if it could devolve that power onto

16. For example, "[t]he *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." *In re Sealed Case*, 310 F.3d 717, 742 (F.I.S.A. Ct. Rev. 2002) (citing *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980)).

17. U.S. CONST. art. II, § 2, cl. 1.

18. U.S. CONST. art. I, § 8, cl. 15.

itself, so the clear implication is that it can set by rules and regulations the conditions under which the President may, as commander in chief, call the militia into actual service. There is no reason to suppose that this provision counts as a limitation on the President's inherent power, for that he has none over state militias prior to the adoption of the Constitution. Rather, the provision seeks to rationalize the organization of federal power consistent with the general principles of separation of powers and checks and balances. The use of the distinction between rule and order is identical in structure and form to the ability of Congress to make rules for the government and regulation of the land and naval forces, which the President then leads. There is here, of course, no need to figure out how to call the standing army into service, because it is already there.

In addition, two other observations are relevant about this clause. First, its use of the term "execute" is inconsistent with any claim that the executive power of Article II contains some unspecified powers that go beyond those of carrying the laws into effect, which was the meaning that the term has in both John Locke's *Second Treatise*, as well as key essays in the *Federalist Papers*. Thus, for example, Locke's entire discussion reads as follows:

But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual execution*, or an attendance thereunto; therefore it is necessary there should be a *power always in being*, which should see to the *execution* of the laws that are made, and remain in force. And thus the *legislative* and *executive power* come often separated.¹⁹

A parallel account of the executive power also runs through the *Federalist Papers*. For example, *Federalist 48*, in speaking about the executive power, contrasts the limited power under a republic with "the overgrown and all-grasping prerogative of an hereditary magistrate."²⁰ It then notes that "in a representative republic, where the executive magistracy is carefully limited," the same dangers are effectively controlled.²¹ This hardly speaks to a huge reservoir of unenumerated executive powers.

Second, the ability to call the militia into actual service is also limited by the purposes for which this may be done, namely "to execute

19. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 144 (C.B Macpherson ed., Hackett Pub. Co. 1980) (1690) (emphasis added).

20. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

21. *Id.*

the Laws of the Union, suppress Insurrections and repel Invasion.”²² The entire point of these limited purposes is to insure that the President cannot use the militia to engage in overseas combat, which, whether wise or foolish, is wholly inconsistent with a grand notion of executive power. The current use of the National Guard in overseas action does not depend on the President’s control over the militia. Rather, it turns on the explicit modern creation of dual status for all National Guard members, who have by statute dual commissions in both the National Guard and the Army or Air Force precisely because the limitations on the purposes for which the militia may be called up have proved so engrained.²³

The basic case on this point is strengthened by looking at Article I, Section 8, Clause 16, which provides that Congress shall have the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.²⁴

It is critical to note here how well integrated this clause is with the other sections already noted. First, this Clause is the only one in Article I, Section 8 that contemplates an explicit division of power between the federal and state governments. On dealing with “provid[ing] for” the “organizing, arming, and disciplining” of the militia, the power goes to Congress. On this matter, “disciplining” meant setting the standards of operation for the militia. The actual training and staffing of the militia was left to the states, so long as it followed the regimen that Congress provided. The decentralization of actual control reduced the risks of a power grab by the standing army. The standardization of instruction allowed for the integration of the militia of several states when called into actual service. When in actual service, moreover, the militia was subject to the same degree of congressional oversight as the regular land

22. U.S. CONST. art. I, § 8, cl. 15.

23. See 10 U.S.C.A. § 10101 (West 2005) (stating that the Army National Guard and Air National Guard are reserve components of the United States Armed Forces.); 10 U.S.C.A. § 12301 (West 2005) (authorizing the transfer of National Guard members to active duty); 32 U.S.C.A. § 325(a)(1) (West 2005) (noting that guard members who are ordered to active duty in the Armed Forces are automatically relieved from their National Guard duties). For a fuller discussion, and relevant materials, see *Perpich v. Dep’t of Defense*, 496 U.S. 334 (1990) (sustaining the Montgomery Amendment, which limited the ability of governors to withhold their consent to overseas deployment of National Guard members).

24. U.S. CONST. art I, § 8, cl. 16.

and naval forces, for once called up into the service of the United States, Congress had the power to provide for “governing” its operations, obviously by general rules.

IV. THE FEDERALIST UNDERSTANDING

Set against this background, it seems evident that the President’s position as commander in chief was subject to a dense fabric of rules that lay in the hands of Congress. Fortunately, however, the question here does receive explicit treatment in *Federalist 69*, and what there is cuts against the strong claims for inherent powers of the executive. Here, I quote the relevant passages from *Federalist 69* in full:

The President is to be the “commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States” [In this regard], the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:

First. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor.

Second. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature. The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective

governors, than could be claimed by a President of the United States.²⁵

On this passage, again several comments are in order. First, the treatment of the commander in chief power starts with the militia clause, and it accurately tracks the language of Article I, Section 8, Clause 1. The stress is not on inherent power, but on how the President's power is inferior to that of "either the monarch or the governor," the two applicable points of comparison. Second, in dealing with the President's role as commander in chief of the land and naval services, it stresses not inherent powers but instead that his powers "would amount to nothing more" than the powers of the first general or admiral, with the clear implication that he is subject to the same rules on the conduct of military affairs, including intelligence, that govern any other general or admiral. Its natural use of the term "powers" in this connection in no way upsets the balance described above, because the limited powers that were so recognized here are consistent with—indeed were defined in reference to—the powers of Congress.

The footnoted material is also of interest. It reads in full:

A writer in a Pennsylvania paper, under the signature of TAMONY, has asserted that the king of Great Britain owes his prerogative as commander-in-chief to an annual mutiny bill. The truth is, on the contrary, that his prerogative, in this respect, is immemorial, and was only disputed, "contrary to all reason and precedent," as Blackstone vol. i., page 262, expresses it, by the Long Parliament of Charles I. but by the statute the 13th of Charles II., chap. 6, it was declared to be in the king alone, for that the sole supreme government and command of the militia within his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, EVER WAS AND IS the undoubted right of his Majesty and his royal predecessors, kings and queens of England, and that both or either house of Parliament cannot nor ought to pretend to the same.²⁶

It is tempting in these circumstances to assume that the claim that the King does not hold his prerogative as commander in chief to Parliament's passage of the annual mutiny bill is inconsistent with the limited account of the President's role as commander in chief. But the opposite is in fact true. What this footnote stresses is that the President does not serve as commander in chief at the pleasure of the Congress.

25. FEDERALIST NO. 69, at 417-18 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (footnote omitted).

26. *Id.* at 418.

Rather, his office is defined by and protected from nullification under the Constitution. But that key and important feature of the Constitution is perfectly consistent with the limited powers that go with the office of President. There is no contradiction between the broad oversight that Congress has over both the militia and the national armed forces and the role of the President as commander in chief. But it is wholly inconsistent with the inflated claims of inherent executive authority that have injected such a misguided element into the current political debates over domestic surveillance by the NSA.

The specific materials on the President as commander in chief all point in one direction. The question is what historical arguments can be raised on the other side. Here the defenders of a broad executive power will usually turn to *Federalist 70* to explain their position, as was the case with the United States Department of Justice (“DOJ”) in its legal defense of the President’s power.²⁷ That first move fails. To be sure, that *Federalist 70* does make clear what is already in the text, namely that we have a single executive, and not a pair of Roman consuls or some more elaborate committee structure. The reason for this decision is to make sure that we have an “energetic” executive that meets Lockean concern for the permanent enforcement of the laws. Yet at the same time, that essay contains not a single word about the President’s powers and responsibilities as commander in chief.

In addition, the DOJ makes reference to *Federalist 64*, written by John Jay, to support the proposition that the President “will be able to manage the business of intelligence in such manner as prudence shall direct.”²⁸ Right off the bat, this is an odd paper to look at to claim executive power since its title is “The Powers of the Senate.” The particular snippet in question does not deal with the issue of commander in chief, but with the matter of the Senate’s role in approving treaties. The full passage thus has a totally different feel:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the

27. U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT, Jan. 19, 2006, at 7, available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

28. *Id.* at 30 (citing FEDERALIST NO. 64 at 393 (John Jay) (Clinton Rossiter ed., 1961)).

secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.²⁹

The point here is not that the President gets carte blanche to engage in spying or otherwise. It is only that he need not reveal his confidential sources in order to gain the consent of the Senate—even if nothing is said of what the Senate can do if he fails to do so. Furthermore, the DOJ's argument rests on a verbal conceit: the use of intelligence (as in its first use in the second sentence) means only gathering advice from whatever source. It does not refer to intelligence in the modern sense of spying or surveillance.

Lastly, a similar argument might be made about two passages from *Federalist 74*. One of these passages actually does speak about the commander in chief but only in his noncontroversial role.

Even those of them which have in other respects coupled the Chief Magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.³⁰

Who could deny this? But at the same time, who could say that it has anything to do with the relationship of the President to Congress? Indeed the reference “placed by law at his command” has the opposite implication, if it has any at all. For the militia, it suggests that the Congress sets the rules by which the militia is called into actual service.

Next, *Federalist 74* (in a passage that the DOJ did not cite) notes that the President receives the unfettered power to pardon, which might prove to be of especial importance in time of war when it would be impossible to convene the legislature to act before letting slip some “golden opportunity,” to use the pardon power for political purposes.³¹ The pardon power, of course, covers these situations, as well as any other. But in this case we do not need to engage in any niceties of constitutional interpretation to reach that conclusion. Nor is it necessary to appeal to any notion of “inherent” executive power. The proposition is

29. FEDERALIST NO. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

30. FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *Id.* at 449.

evident from the text of the pardon power itself, which reads “he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”³² There is, impeachment aside, no check on this power, and the use of the term “Offenses against the United States” surely covers actions committed in war against this nation at the very least. There is no need for ingenuity here. The Constitution means what it says and says what it means. It contains no yawning structural gaps that call out for the creation of some unenumerated executive power.

V. CONCLUSION

There is an instructive lesson about the Constitution that comes from this little exercise in scoping out the power of the President as the commander in chief. The greatness of the Constitution on these structural issues lies in this simple proposition: the Constitution means what it says and says what it means. The congruence between word and design is made evident first in the way the particular provisions of the Constitution mesh together, especially in connection with the President, the Congress, and the militia. It is reinforced by the way in which the complete passages of the *Federalist Papers* confirm the conclusions that are derived from the text itself. The uneasy feature in this debate lies in the power of redaction whereby, as was evident in the DOJ’s memorandum, bits and pieces of text are used to create an impression that neither the Constitution nor its most learned commentators support. The President as commander in chief does not have the power to ignore the general rules set out by the Congress, whether in FISA or anywhere else.

32. U.S. CONST. art. II, § 2, cl. 1.