

OPINION

■ THE PRESIDENCY ■

What inherent power?

By Joseph D. Becker SPECIAL TO THE NATIONAL LAW JOURNAL

WE NOW KNOW that, in addition to eavesdropping on international phone calls of Americans, the National Security Agency (NSA) has collected records of millions of domestic phone calls. Some claim that the eavesdropping program, which ignores the warrant requirements of the Foreign Intelligence Surveillance Act (FISA), derives from “inherent” powers of the president under Article II of the U.S. Constitution that trump FISA. Similar claims may be made for the record-collection program.

“Inherent” presidential authority engages a very unstable principle. There are doubtless some such powers buried in Article II: For example, the express power granted by Article II to command the military and to make treaties would seem to carry with it, inherently, subordinate powers, especially in the realm of foreign affairs, where the president is the inevitable leader. But the inherency principle is unprincipled; it conduces to opportunism, attributing powers to the president when convenient, without roots in the text or history of Article II.

That is not surprising. In the great steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Robert H. Jackson searched the records of the constitutional convention of 1787 for the intention of the framers in adopting Article II. He found them “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”

The two provisions at issue

In the presence of an enigmatic text, two provisions are said to be the sources of the inherent powers of the president. First, Article II

begins with the words, “The executive Power shall be vested in a President.” Here, Alexander Hamilton, a firm supporter of presidential power, said in Federalist No. 69 that the “first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate.” That is, the simple intention of the phrase was to establish the presidency as unitary, as a one-person executive rather than (as some at Philadelphia advocated) a council. Hamilton went on in No. 70 to use the word “unity” in precisely this limited sense, not as a source of power but as a definition of structure. In our time, Chief Justice William H. Rehnquist noted in *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the independent counsel statute), that the argument from the first words of Article II “depends upon an extrapolation from general constitutional language which we think is more than the text will bear.” A theological, rather than judicial, cast of mind (surely present in this administration) may be necessary to divine executive power from that opening sentence.

The second supposed source of the president’s inherent power to disregard FISA is the declaration of Article II that the “President shall be Commander in Chief of the Army and Navy of the United States.” The face of the provision, of course, says nothing about domestic spying. Again, Hamilton in No. 69: “In this respect [as Commander in Chief] 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.”

“Nothing more” is dismissive of broader powers, suggesting that the president, like a field marshal, may give strategic and tactical military orders but could hardly use that power to eavesdrop at home. As Jackson added, the title “Commander in Chief of the Army and

Navy” did not constitute the president also as “Commander in Chief of the country, its industries and its inhabitants.”

It may be asked whether Hamilton’s understanding of presidential power, even if a true reflection of the intentions of the framers, should fix the boundaries of the office two centuries later, after 42 presidents have given practical demonstrations of what it takes to do the job. It cannot be the case, of course, that every act of a president (apart from powers expressly granted) may be justified as an expression of inherent power; that would favor self-levitation. Some external principle must operate to tell us when he is out of bounds: “[U]surpation creates no constitutional precedents” (said Arthur Schlesinger in a recent book).

Justice Felix Frankfurter, again in the steel seizure case, proposed such an external principle: The actual conduct of the chief executive might be accepted as a gloss on Article II, enlarging its grant of powers, if there were evidence in the particular case of “a systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned.” That sensible test is as fatal to the Bush program as is Hamilton’s: The enactment of FISA stopped any unbroken executive practice pursued without question by Congress.

In short, there is not express, implied, congressionally delegated or acquiescent power in the president for this conduct. He may be a George but he’s not George III. ■

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