

---

## WHAT LURKS BENEATH: NSA SURVEILLANCE AND EXECUTIVE POWER

GARY LAWSON\*

It is not surprising that, nearly two and a quarter centuries after ratification of the Federal Constitution, people are still actively arguing about the extent of the American President's powers.<sup>1</sup> The concept of executive power is notoriously murky,<sup>2</sup> so disputes about its scope and character are virtually unavoidable. It is, however, at least a tad surprising that, nearly two and a quarter centuries after ratification of the Federal Constitution, people are still arguing about the constitutional *sources* of presidential power.<sup>3</sup> It is one thing to disagree about how far the President's power extends, but it is quite another thing to disagree about which words of the Constitution are relevant to that inquiry. It is actually quite remarkable that the United States could function for more than 200 years without agreement on something as basic as the correct provisions of the Constitution to read in determining the extent of the powers of one of the federal government's great institutions. Nonetheless, the dispute about the proper grounding for presidential power is one of the most fundamental and long-lived disputes in American constitutional law.

Nor is this dispute purely academic. The real-world stakes of identifying the proper locus (or loci) of presidential power are staggering. To illustrate those stakes, to show just how deeply and profoundly opinion is divided on this issue, and to suggest the proper resolution to the conflict, I want to focus on a relatively recent set of events involving electronic surveillance of suspected terrorists as a case study in the causes and consequences of constitutional confusion.

---

\* Professor, Boston University School of Law. I am grateful to the Abraham and Lillian Benton Fund for support.

<sup>1</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 27-28 (1995).

<sup>2</sup> See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1283-84 (1996).

<sup>3</sup> Compare Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004), with Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1595 (2005).

My basic contention is that the President's constitutional power<sup>4</sup> stems entirely from two provisions in the Constitution: the provision in Article I, Section 7 which gives the President the presentment and veto power<sup>5</sup> and the first sentence of Article II, Section 1 which states that "[t]he executive Power shall be vested in a President of the United States of America."<sup>6</sup> The second half of this statement is the eye of the storm. No one doubts that the Presentment Clause is a grant of power to the President, but the idea that the President draws power from the "Vesting Clause" of Article II rather than from the specific enumerations of presidential functions in Sections 2 and 3 of Article II – an idea that will henceforth be called "the Article II Vesting Clause thesis"<sup>7</sup> – is one of the most hotly debated propositions in modern constitutional law.<sup>8</sup>

The debate turns out to be remarkably one-sided upon careful consideration: the Vesting Clause grants power to the President beyond a reasonable doubt. To be sure, there are plenty of reasonable doubts about the scope and character of the power granted to the President by the Article II Vesting Clause, but the proposition that the Constitution itself grants something called "[t]he executive Power"<sup>9</sup> to the President is a slam dunk as a matter of textual, linguistic, intratextual, and structural analysis.

Once the Article II Vesting Clause is seen as a grant of power, the proper framework for evaluating the legality of presidentially-ordered surveillance of foreign communications becomes clear. Without the Article II Vesting Clause thesis, the case for the legality of the current surveillance program is dicey at best. With the Article II Vesting Clause thesis, the case for the legality of the program, while not unanswerable, is very strong, at least as a matter of original constitutional meaning.<sup>10</sup> Accordingly, the Article II Vesting Clause thesis should be front and center in any discussion of the National Security Agency ("NSA") surveillance controversy for which the original meaning of the Constitution is deemed relevant.

---

<sup>4</sup> Statutes, of course, can also be an important source of presidential power. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006). My focus in this Essay, however, is on presidential powers that come directly from the Constitution itself.

<sup>5</sup> U.S. CONST. art. I, § 7.

<sup>6</sup> *Id.* art. II, § 1, cl. 1. This shall henceforth be referred to as the "Vesting Clause."

<sup>7</sup> A similar argument applies to the Vesting Clause at the beginning of Article III, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1.

<sup>8</sup> See *supra* note 3; see also *infra* text accompanying notes 59-66.

<sup>9</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>10</sup> Whether it is weak or strong as a matter of contemporary doctrine, which is at least five degrees of separation removed from any plausible account of original meaning, is another question for another time and another scholar.

## I

In the wake of the terrorist acts of war of September 11, 2001,<sup>11</sup> the Bush Administration, through the NSA, began a program of intercepting electronic communications between persons inside and outside of the United States when at least one party to the conversation was suspected of having terrorist connections.<sup>12</sup> On at least some occasions, the electronic eavesdropping was concededly performed without following the procedures specified on the face of the Foreign Intelligence Surveillance Act of 1978 (“FISA”),<sup>13</sup> which generally requires the Executive Department to obtain a warrant from a special Foreign Intelligence Surveillance Court before intercepting foreign electronic communications.<sup>14</sup> From where, if anywhere, did the President of the United States get the legal authority to authorize this program?

---

<sup>11</sup> Many people dispute that the current struggle against radical Islamists can properly be characterized as a war. See, e.g., Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 *FORDHAM L. REV.* 475, 477-81 (2006). To the best of my knowledge, that class of disputants does not include anyone who is a radical Islamist engaged in the struggle. While we cannot ask the 9/11 bombers whether they regarded their mission as an act of war, the conduct of individuals and organizations allied with them both before and after 9/11 gives every indication of the kind of coordinated and sustained assault on the United States to which the label “war” can appropriately be given. If the shoe-bomber fits . . . . See JOHN YOO, *WAR BY OTHER MEANS* 1-8 (2006). Nor is it relevant for domestic constitutional purposes that Congress has not formally declared war. See U.S. CONST. art. I, § 8, cl. 11 (giving Congress power “[t]o declare War”). A declaration, as the word suggests, recognizes a state of affairs that exists independently of the declaration. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 207-08 (1996). If a terrorist nation rained nuclear destruction on twenty American cities, a state of war would exist even if Congress had not gotten around to declaring it. Similarly, if a terrorist organization rained conventional destruction on two American cities (and, thanks to some heroic ordinary Americans, one empty field), a state of war would exist whether or not members of Congress, or of elite academic institutions, chose to recognize it.

<sup>12</sup> At least, that is the aspect of the monitoring program for which there has been public acknowledgment. See President George W. Bush, President’s Radio Address on Homeland Security (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (acknowledging that he “authorized the National Security Agency . . . to intercept the international communications of people with known links to al Qaeda and related terrorist organizations”). It is possible that actual NSA monitoring extends beyond the acknowledged limits. I doubt whether the international character of a communication matters very much to the ultimate legality of this activity, but in any event this Essay addresses only considerations that bear on the legality of warrantless electronic surveillance of transmissions into or out of the United States where at least one party to the communication is reasonably suspected to be an enemy of the United States.

<sup>13</sup> Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1871 (2000 & Supp. IV 2004)).

<sup>14</sup> 50 U.S.C. §§ 1803-1805 (2000 & Supp. IV 2004). There are exceptions to this requirement, but no one claims that those exceptions cover all, or even most, of the activities

It matters very much how one answers this question. According to FISA, it is a federal criminal offense to engage in foreign intelligence surveillance under color of law without statutory authorization or a judicial warrant.<sup>15</sup> Let us stipulate that at least some of the activities authorized by the Bush Administration fall outside of FISA's enumerated authorizations and exceptions. In that case, without some source of legal authorization beyond FISA itself, numerous officials in the Bush Administration, including the President, seem to have committed criminal and impeachable offenses. On the other hand, if the President in time of war *does* have authority to monitor the conversations of suspected enemies and fails to exercise it, that inaction would, in my humble judgment, constitute the impeachable offense of neglect or dereliction of duty.<sup>16</sup> As I said, finding the right answer matters. And there are at least five possible right answers.

One possibility is that the President has no such authority, in which case impeachment proceedings are probably an appropriate next step. That is a conclusion, however, that one ought to reach only after examining all possible sources of authority.

A second possibility is that the President has *statutory* authority to order wiretaps outside the scope of FISA in at least some circumstances. FISA specifically provides that its seemingly exclusive procedures do not govern electronic surveillance that is otherwise "authorized by statute."<sup>17</sup> On September 18, 2001, Congress authorized the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts

---

under the NSA surveillance program. *See id.* §§ 1802(a)(1), 1804(f); *see also* Press Briefing by Alberto Gonzales, Attorney General, and General Michael Hayden, Principal Deputy Director of National Intelligence (Dec. 19, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> ("We understand that [the NSA surveillance program] is a more – I'll use the word 'aggressive' program than would traditionally be available under FISA." (quoting General Hayden)); John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 *GEO. MASON L. REV.* 565, 565 (2007). For an overview of FISA, see Memorandum, Elizabeth B. Bazan & Jennifer K. Elsea, Presidential Auth. to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Cong. Research Serv. 17-27 (Jan. 5, 2006) [hereinafter CRS Memo].

<sup>15</sup> *See* 50 U.S.C. § 1809 (2000).

<sup>16</sup> This is a relatively broad (though far from unprecedented) view of the range of impeachable offenses, *see* Lawson & Moore, *supra* note 2, at 1307-09, but even if I am wrong that failure to pursue lawful measures to monitor terrorists is impeachable, it would certainly be grossly irresponsible.

<sup>17</sup> 50 U.S.C. § 1809(a).

of international terrorism against the United States by such nations, organizations or persons.<sup>18</sup>

Perhaps that Authorization for Use of Military Force (“AUMF”) is all the authorization required for the NSA surveillance program.<sup>19</sup>

Perhaps this is the case, but perhaps the words “all necessary and appropriate force” do not refer to all possible activities aimed at combating international terror networks but instead refer only to a narrower range of traditional military activities. The language of the AUMF can certainly be read to cover intelligence gathering, electronic or otherwise, on battlefields, on the reasonable assumption that “necessary and appropriate force” refers to the traditional incidents of war, including supplying troops with weapons, supplies, and information.<sup>20</sup> It does not inexorably follow, however, that it also includes the monitoring of non-battlefield communications, no more than it necessarily includes operating commercial radio or television stations in neutral foreign countries to win over hearts and minds, even if that would be an effective tool in the war.<sup>21</sup> It is true that the war against radical Islamists does not have well-defined geographical boundaries, so that “[a]ll the world’s a stage”<sup>22</sup> for the conflict. But that cannot possibly mean (can it?) that any action that could lawfully be taken in a location involving actual, active hostilities can be taken anywhere in the world under the AUMF. Nor does it logically follow from the geographically and temporally boundless language of the AUMF that it contemplates authorization for *all steps leading up to* the use of “necessary and appropriate force” in addition to the necessary and appropriate force itself. Once the President identifies “those nations, organizations, or persons . . . [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,”<sup>23</sup> the AUMF sweeps very broadly, but it does not necessarily authorize all possible mechanisms for making that initial identification. The argument that Congress authorized the NSA surveillance program seems like a bit (if only a bit) of a stretch. In any event, it makes for a more interesting conversation to assume that the AUMF does *not* – or at least does not without a very strong dose of the constitutional avoidance doctrine – constitute statutory authorization for the NSA wiretapping program.

---

<sup>18</sup> Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001) [hereinafter AUMF].

<sup>19</sup> Some very smart people so believe. See Yoo, *supra* note 11, at 115-18; U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 23-28 (Jan. 19, 2006) [hereinafter DOJ Memo].

<sup>20</sup> Yoo, *supra* note 14, at 587 n.159.

<sup>21</sup> Cf. Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. OF BOOKS, Feb. 9, 2006, at 42, 43, available at <http://www.nybooks.com/articles/18650>.

<sup>22</sup> WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7, l. 139.

<sup>23</sup> AUMF, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001).

A third possibility is that the President gets the power to authorize the NSA wiretaps from the evident enumerations of presidential power in Sections 2 and 3 of Article II. Those provisions read:

Section 2

The 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.<sup>24</sup>

Obviously, the power to commission officers, to request the opinion in writing from principal officers on matters related to their duties, or to pick the time for adjournment of Congress when the House and Senate cannot agree won't cut it, but what about the first sentence of Article II, Section 2, which says that the 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"?<sup>25</sup> Perhaps being Commander-in-Chief

<sup>24</sup> U.S. CONST. art. II, §§ 2-3.

<sup>25</sup> *Id.* art. II, §2, cl.1.

includes the power to order intelligence gathering both on and off the battlefield, so that even if the AUMF does not authorize such activities, the Constitution itself does so.

Perhaps, but the conclusion is a poor fit with the language of the Commander in Chief Clause. The evident import of the clause is to establish a chain of command rather than to define the scope of the Commander-in-Chief's power.<sup>26</sup> To be "Commander in Chief" is to be the top general – the person who makes ultimate strategic and tactical decisions. That designation assures civilian control of the military<sup>27</sup> and prevents Congress from trying to leverage its numerous enumerated war powers into a power to direct troop movements,<sup>28</sup> but it does not seem to speak directly to the extent or scope of presidential power beyond the field of battle. Does the President's status as Commander-in-Chief, for instance, authorize him or her to seize steel mills to ensure continued production of necessary military supplies? The Supreme Court has famously said no,<sup>29</sup> and while that may be *prima facie* grounds to believe otherwise, just like a stopped clock, even the Supreme Court can stumble into the right answer on occasion.<sup>30</sup> In this case, I think that they did get it right, though not necessarily for the right reasons or with the best explanation.<sup>31</sup> Suppose that the military officer directly below the President – the Commander-in-Almost-But-Not-Quite-Chief of the Armed Forces – decided that a looming labor strike in the steel industry would threaten a war effort. Could he or she, without statutory authorization, seize and run the steel

---

<sup>26</sup> Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 83 (2007). *But see* Yoo, *supra* note 14, at 569.

<sup>27</sup> *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowet Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 792-93 (2008).

<sup>28</sup> *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 29-30 [hereafter Lawson & Seidman, *Treaty Clause*].

<sup>29</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952).

<sup>30</sup> The standard tendency in the legal academy is to treat Supreme Court decisions as privileged pronouncements on constitutional meaning. It is a very, very bad tendency. There is nothing in the Constitution on which to ground any such idea, nor does the Supreme Court's actual track record as a constitutional interpreter inspire much confidence. As a matter of realpolitick, Supreme Court opinions matter, just as decisions of presidents, congresspersons, and state and local officials matter. Ignore them and you risk getting shot by federal marshals. But as a matter of objective constitutional meaning, there is no good reason to think that Supreme Court opinions are better evidence of that meaning than are the pronouncements of the Department of Justice, the Congressional Research Service, or Gary Lawson – and there are good reasons to think them worse.

<sup>31</sup> Justice Jackson's famous concurrence, which has acquired near-canonical status in some circles, *see* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314-15 (2006), was a particularly unhelpful bit of twaddle, but that is a topic for another day.

mills or is that a decision constitutionally committed to Congress rather than to the military? If the answers are, respectively, “no” and “yes,” then it is hard to see how designating someone one spot ahead of that person on the organization chart could change the outcome. The Commander in Chief Clause reads far less like a grant of presidential power than like a specification of decision making hierarchy, and the NSA wiretap program seems much more like steel mill seizures than like ordering air strikes in Afghanistan.<sup>32</sup> And, again, it is a more interesting conversation if we assume that to be the case, so that the Commander in Chief Clause does not constitute direct, extra-statutory authority for the NSA surveillance operation.

A fourth possibility is that the President has certain inherent powers that need not be located in any particular constitutional clause. Arguments for inherent federal powers of various kinds have been made from time to time, on matters ranging from a power of eminent domain<sup>33</sup> to a power to establish military governments during times of peace,<sup>34</sup> but anyone seriously committed to the enterprise of constitutional interpretation must categorically reject any arguments for inherent, unenumerated federal power. The principle of enumerated federal power is the single most basic precept of the Federal Constitution.<sup>35</sup> Especially in view of the clarification provided by the Tenth Amendment,<sup>36</sup> arguments for unenumerated federal power should be inadmissible in constitutional discourse.<sup>37</sup>

So at this point the NSA wiretapping program is 0-4. But one hit will keep it, even if just barely, above the Mendoza Line,<sup>38</sup> and there is one more at-bat

---

<sup>32</sup> Cf. Letter from Laurence H. Tribe, Professor, Harvard Univ., to Honorable John Conyers, Jr., U.S. Congressman 3 (Jan. 6, 2006) (arguing that if the President cannot constitutionally seize “certain critical publicly held [steel] corporations . . . in order to avert the threat that would be posed to our national security . . . then certainly an unchecked presidential program of secretly recording the conversations of . . . private citizens in the United States” is likewise unconstitutional under *Youngstown*).

<sup>33</sup> See *United States v. Jones*, 109 U.S. 513, 518 (1883); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

<sup>34</sup> See Letter from James Buchanan, Secretary of State, to William V. Vorhies (Oct. 7, 1848), reprinted in S. DOC. NO. 31-18, at 7-8 (1850). The Supreme Court upheld the legality of peacetime military governments in *Cross v. Harrison*, 57 U.S. (16 How.) 164, 189-90 (1853). For a critical assessment of that episode, and of the claims of inherent governmental authority that it spawned, see generally Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581 (2001).

<sup>35</sup> See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 22-23 (2004).

<sup>36</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>37</sup> See LAWSON & SEIDMAN, *supra* note 35, at 22-23.

<sup>38</sup> Mario Mendoza was a slick-fielding shortstop who played nine seasons in the Major Leagues from 1974-82. He was such a miserable hitter (lifetime batting average: .215) that it was always questionable whether he would break .200 in any given year – which he failed



to go. The last possibility is that the President gets power to, among other things, authorize intelligence gathering during wartime from the first sentence of Article II, which states that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>39</sup> If this sentence grants the President a chunk of power called “executive Power,” and *if* that power includes the ability to gather foreign intelligence during wartime even off the battlefield, then the Constitution itself grants the President the necessary authority to put in motion something like the NSA wiretapping program.<sup>40</sup> Thus, one of the most important questions of any kind, on any subject, under the Federal Constitution is whether the first sentence of Article II grants power to the President or whether, as opponents of the Vesting Clause thesis argue,<sup>41</sup> it merely designates the office of the presidency and indicates that there will be one President rather than an executive council.

## II

There is nothing remotely resembling a consensus on the Article II Vesting Clause thesis either in the legal academy<sup>42</sup> or in the halls of government.<sup>43</sup> To see just how deeply divisions on this question run, consider two dueling memoranda issued in early 2006 concerning the NSA wiretapping program.

On January 19, 2006, the Department of Justice released a document entitled “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,”<sup>44</sup> which defended on multiple grounds the legality of electronic eavesdropping on suspected terrorist communications into or out of the United States.<sup>45</sup> The first substantive sentence in the “Analysis” section of the document reads: “Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces.”<sup>46</sup> At first glance, this reads like a straightforward assertion of the Article II Vesting Clause thesis, which would

---

to do on five occasions. For the past three decades, .200 has widely been known in baseball circles as the “Mendoza Line,” though I gather there is some controversy over the term’s precise origin and referent. *See* Mendoza Line – Wikipedia, [http://en.wikipedia.org/wiki/Mendoza\\_Line](http://en.wikipedia.org/wiki/Mendoza_Line) (last visited Feb. 24, 2008). And yes, his fielding really was good enough to keep him in the majors for nine seasons, including two seasons as the starting shortstop for my beloved Seattle Mariners. *See id.*

<sup>39</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>40</sup> Whether that authority can be exercised in the face of a contrary congressional statute is discussed *infra* Part III.

<sup>41</sup> *See, e.g.,* Bradley & Flaherty, *supra* note 3, at 554 & n.29; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-48 (1994).

<sup>42</sup> *See infra* text accompanying notes 59-66.

<sup>43</sup> *See infra* text accompanying notes 44-58.

<sup>44</sup> DOJ Memo, *supra* note 19.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.* at 6.

locate the President's war-making powers in the Vesting Clause rather than the Commander in Chief Clause. After all, the sentence states that Article II grants to the President "all executive power of the United States," which is the central proposition of the Vesting Clause thesis.<sup>47</sup> On that understanding, the powers that are exercisable by the American Commander-in-Chief fall under the category of "executive Power" and would vest in the President even without the Commander in Chief Clause's clarification of the President's role in the military hierarchy. But on closer examination, the phrasing of the Memo is more ambiguous. It could also be read to suggest that whatever executive power is vested in the President stems from the enumerations in Sections 2 and 3 of Article II. Indeed, the only constitutional provision cited in support of the previously quoted sentence in the DOJ Memo is Article II, Section 2, which contains the Commander in Chief Clause; there is no specific reference in that DOJ discussion to the Vesting Clause as a source of power.<sup>48</sup> On the other hand, the DOJ Memo repeatedly, and one might even say ad nauseum, refers to "inherent" presidential power.<sup>49</sup> It is possible that the Memo means to invoke the specter of unenumerated power to claim that the President has certain powers because all executives have such power simply by virtue of being executives. But it is also possible, and considerably more plausible, to think that the DOJ Memo used the term "inherent" to mean "constitutionally granted." And the only constitutional grant that can support the kinds of presidential powers discussed by the DOJ Memo, including something called "the President's general foreign affairs powers," which has no conceivable grounding in Sections 2 and 3 of Article II,<sup>50</sup> is the Article II Vesting Clause. Indeed, the Memo expressly invokes the Vesting Clause in support of the President's preeminent role in foreign affairs.<sup>51</sup> Thus, although the DOJ Memo does not articulate the Vesting Clause thesis with clarity, it seems clear that the Vesting Clause thesis lurks beneath the argument and provides it with substance.<sup>52</sup>

<sup>47</sup> See *supra* text accompanying notes 39-40.

<sup>48</sup> See DOJ Memo, *supra* note 19, at 6-10.

<sup>49</sup> See *id.* at 6-10, 29-31.

<sup>50</sup> See *id.* at 31.

<sup>51</sup> See *id.* at 30. For a detailed defense of the claim that the Article II Vesting Clause supports at least some (though not necessarily all) of the foreign-affairs powers traditionally claimed by presidents, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 257 (2001). For a sustained rebuttal, which I believe largely talks past the main line of the Prakash/Ramsey thesis, see Bradley & Flaherty, *supra* note 3, at 687.

<sup>52</sup> Why does the Memo not proudly proclaim the Vesting Clause thesis but instead smuggle it in under cover of claims of "inherent" presidential power? The answer is surely that, although the Article II Vesting Clause thesis is crucial for getting the right answer to questions about the legality of the NSA program, the DOJ Memo is not really trying to get the right answer to those questions. The Memo spends far more energy explaining how the NSA wiretapping program is consistent with Supreme Court decisions than it does

Contemporaneously with the Department of Justice memorandum, the Congressional Research Service produced its own analysis of the NSA surveillance program that was considerably more skeptical of presidential authority.<sup>53</sup> The two memoranda exchanged fire over the proper interpretation of FISA and the AUMF, the requirements of the Fourth Amendment, and, of course, the nature and extent of the President's independent constitutional power in this area. With specific respect, however, to the Article II Vesting Clause thesis, either abstractly or in its application to the NSA wiretapping program, the CRS Memo said . . . absolutely nothing.<sup>54</sup> Not a word – not even an acknowledgment that the Article II Vesting Clause is something that might be thought, even mistakenly, to be pertinent to questions of presidential power. A footnote in the memo<sup>55</sup> specifically lists the power-granting constitutional provisions that, in the authors' view, address “the domain of foreign affairs and war powers, both of which areas are inhabited to some degree by the President together with the Congress.”<sup>56</sup> The footnote identifies seven of the provisions from Article I, Section 8 (including one that is not a grant of power at all<sup>57</sup>) and the Commander in Chief and Take Care Clauses from Article II.<sup>58</sup> There is no mention in the footnote of the Article II Vesting Clause, meaning that the CRS memo not only does not regard the Vesting Clause as a grant of power but does not even consider it to be the kind of clause that a reasonable person might think is a grant of power.

---

explaining how the program is consistent with the Constitution, *see* DOJ Memo, *supra* note 19, at 34, and the corpus of Supreme Court decisions is not favorable to the Vesting Clause thesis. Indeed, Supreme Court opinions are far more favorably inclined to the idea of unenumerated executive powers (i.e., “inherent powers” in the bad sense) than to the Article II Vesting Clause thesis – which tells you everything that you need to know about Supreme Court opinions. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). Accordingly, if one is trying to map legal arguments onto the United States Reports rather than onto the Constitution itself, the Vesting Clause thesis will make at most a token appearance. (Similarly, if one is trying to map legal arguments onto the Constitution itself, the United States Reports will make at most a token appearance.) Whether the Department of Justice ought to be trying to outguess the Supreme Court rather than to get the right answer is an interesting question for another day.

<sup>53</sup> *See* DOJ Memo, *supra* note 19, at 44.

<sup>54</sup> *See* CRS Memo, *supra* note 14, at 27-33.

<sup>55</sup> *See id.* at 4 n.11.

<sup>56</sup> *Id.*

<sup>57</sup> The Memo states that “[t]he Constitution specifically gives to Congress the power to ‘provide for the common Defence.’” *Id.* The Constitution does no such thing. The internally-quoted language, drawn from the Taxing Clause, U.S. CONST. art. I, § 8, cl. 1, identifies one of the permissible purposes for which taxes may be levied, but it is not an independent grant of power to Congress.

<sup>58</sup> *See* CRS Memo, *supra* note 14, at 4 n.11 (“The President is responsible for ‘tak[ing] Care that the Laws [are] faithfully executed,’ U.S. CONST., art. II, § 3, and serves as the Commander in Chief of the Army and Navy, *id.* § 2, cl. 1.”).

Academic opinion is also sharply divided. The Vesting Clause thesis in its modern form was first articulated in a path-breaking 1992 article by Steve Calabresi and Kevin Rhodes that identified the crucial role of the Article II and Article III Vesting Clauses in empowering the President and the federal courts.<sup>59</sup> Professor Calabresi, responding to some criticisms by Michael Froomkin,<sup>60</sup> then laid out the primary textual and structural considerations that underlie the Vesting Clause thesis in an analysis that continues to be the foundation for modern defenses of the thesis.<sup>61</sup> Larry Lessig and Cass Sunstein launched the first extended assault on the Vesting Clause thesis,<sup>62</sup> to which Professor Calabresi and Sai Prakash responded with equal extension.<sup>63</sup> Professor Prakash and Mike Ramsey applied the Vesting Clause thesis to the foreign-affairs realm,<sup>64</sup> which prompted a lengthy response from Curtis Bradley and Martin Flaherty that included a reformulation of the case against the thesis.<sup>65</sup> Guy Seidman and I have chimed in with detailed responses to Bradley, Flaherty, Lessig, and Sunstein.<sup>66</sup> The sheer volume of literature conducting, applying, and commenting upon this debate is enormous.

Because my views on the Vesting Clause thesis are offered in considerable detail elsewhere,<sup>67</sup> I will present here only an abbreviated account of the proper resolution of this debate. As it happens, an abbreviated account is enough, because despite the depth and breadth of the controversy over the Vesting Clause thesis and the extraordinary scholarly prowess of the opponents of the thesis, it does not turn out to be a close question – at least once one properly formulates the question. If one is looking for objective constitutional meaning, the correct question is how the Article II Vesting Clause would have been understood by a hypothetical reasonable observer at the time of the Constitution's ratification. The primary tools of analysis for this inquiry are textual, intratextual, and structural arguments; historical surveys of the actual views of concrete individuals and of actual practices over time may be relevant for that inquiry but are strictly secondary considerations.<sup>68</sup> In other words,

---

<sup>59</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1215 (1992).

<sup>60</sup> A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1373 (1994) [hereinafter Froomkin, *Vestments*].

<sup>61</sup> See Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1389-90 (1994).

<sup>62</sup> See Lessig & Sunstein, *supra* note 41, at 118.

<sup>63</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 663 (1994).

<sup>64</sup> See Prakash & Ramsey, *supra* note 51, at 252-56.

<sup>65</sup> See Bradley & Flaherty, *supra* note 3, at 687-88.

<sup>66</sup> See Lawson & Seidman, *Treaty Clause*, *supra* note 28, at 22-43.

<sup>67</sup> See *id.* at 34.

<sup>68</sup> For an explication and defense of this methodology, see generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

“[o]riginal *understandings* were not necessarily original *meanings*.”<sup>69</sup> From the standpoint of this “reasonable-person originalism,” four considerations overwhelmingly establish that the Article II Vesting Clause is a grant of “[t]he executive Power” to the President.

First, it is tough to get around the plain language of the clause: “The executive Power shall be vested in a President of the United States of America.”<sup>70</sup> Indeed, “[i]t is very hard to read a clause that speaks of vesting power in a particular actor as doing anything other than vesting power in a particular actor.”<sup>71</sup>

Second, as Steve Calabresi has elegantly documented, the etymology of the word “vest,” with its ties to the Latin term “vestment” and its connotations of (ecclesiastical or royal) authority, supports the view that the verb “vest” denotes the granting of power.<sup>72</sup> Given the founding generation’s familiarity with Latin,<sup>73</sup> the power-granting implications of the use of the word “vest” could not have escaped the notice of a founding-era reasonable observer.

Third, an intratextual examination of the Constitution’s use of the term “vest” seals the Vesting Clause thesis. Apart from the three Vesting Clauses, the Constitution uses the term “vest” twice – in the Sweeping Clause<sup>74</sup> and the Appointments Clause<sup>75</sup> – and both usages unambiguously carry a power-granting meaning. The proposition that “vest” merely designates a status without granting power is utter gibberish in these contexts.

Fourth, a structural comparison of the Article II Vesting Clause with the Article I and Article III Vesting Clauses confirms the Vesting Clause thesis. Article III’s Vesting Clause contains a parallel formulation to the Article II Vesting Clause.<sup>76</sup> If the Article III Vesting Clause does not constitute a power grant of the “judicial Power of the United States” to the federal courts, then there is simply no other clause in the Constitution that grants the federal courts any power.<sup>77</sup> If the Article III Vesting Clause serves as a grant of power, there

---

<sup>69</sup> LAWSON & SEIDMAN, *supra* note 35, at 12.

<sup>70</sup> *Id.*

<sup>71</sup> Lawson & Moore, *supra* note 2, at 1281.

<sup>72</sup> See Calabresi, *supra* note 61, at 1380-81; Lawson & Moore, *supra* note 2, at 1281.

<sup>73</sup> See Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 830-31 (2006).

<sup>74</sup> U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” (emphasis added)).

<sup>75</sup> *Id.* art. II, § 2, cl. 2 (“Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments” (emphasis added)).

<sup>76</sup> See *id.* art. III, § 1, cl. 1.

<sup>77</sup> Professor Froomkin has labored hard to try to show that the jurisdictional definitions in Article III, Section 2 can function as grants of power. See Froomkin, *Vestments*, *supra* note 60, at 1352-53; A. Michael Froomkin, *Still Naked After All These Words*, 88 NW. U. L.

is every reason to think that the near-identical Article II Vesting Clause serves as a grant of power as well.<sup>78</sup> The case is even stronger when the Article II and Article III Vesting Clauses are contrasted with the Article I Vesting Clause, which vests in Congress only “[a]ll legislative Powers *herein granted*” rather than all legislative powers *simpliciter*.<sup>79</sup> The Article I Vesting Clause refers the reader to power grants contained elsewhere in the Constitution, which indicates that Congress is receiving only a subset of the conceptual category of “legislative Powers.”<sup>80</sup> The Article II and Article III Vesting Clauses, by contrast, grant the objects of those clauses the full scope of the conceptual categories of executive and judicial power.<sup>81</sup> Article I enumerates the individual powers of Congress. Articles II and III enumerate the powers of the President and the federal courts in a “lump sum.”

The case against the Vesting Clause thesis, from the standpoint of reasonable-person originalism,<sup>82</sup> turns almost wholly on what might be called an “argument from redundancy.” A number of provisions in Sections 2 and 3 of Article II expressly take the form of power grants to the President,<sup>83</sup> and other provisions seem to have the import of power grants.<sup>84</sup> Many, if not all, of the functions described in these provisions would likely fall within the

---

REV. 1420, 1430 (1994). If the Article III Vesting Clause thesis was false, and the choice was either to read the jurisdictional definitions as grants of power or to conclude that the Constitution fails to grant any power to the federal courts, perhaps a reasonable observer would prefer the latter construction. But the fact that Article III, Section 2 could possibly serve as a “hail Mary” grant of power does not make it the most plausible source of the federal courts’ power.

<sup>78</sup> See Calabresi & Rhodes, *supra* note 59, at 1187.

<sup>79</sup> U.S. CONST. art. I, § 1 (emphasis added); Calabresi, *supra* note 61, at 1395-96.

<sup>80</sup> See U.S. CONST. art. I, § 1.

<sup>81</sup> Lawson & Moore, *supra* note 2, at 1282 n.75.

<sup>82</sup> One can build a strong case against the Vesting Clause thesis based on judicial doctrine or the subjective intentions of specific historical individuals, but those considerations, while admissible as evidence of constitutional meaning, become vanishingly insignificant in the face of the overwhelming textual, intratextual, and structural case for the thesis.

<sup>83</sup> See U.S. CONST. art. II, § 2, cl. 1 (the President “shall have Power to grant Reprieves and Pardons”); *id.* art. II, § 2, cl. 2 (the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”); *id.* art. II, § 2, cl. 3 (the President “shall have Power to fill up all Vacancies that may happen during the Recess of the Senate”).

<sup>84</sup> See *id.* art. II, § 2, cl. 1 (the President “shall be Commander in Chief of the Army and Navy”); *id.* (the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments”); *id.* art. II, § 2, cl. 2 (the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” officers); *id.* art. II, § 3, cl. 1 (the President “may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper”); *id.* (the President “shall receive Ambassadors and other public Ministers”).

conceptual category of “executive Power,” so if the Vesting Clause thesis is true, these numerous provisions would all seem to be surplusage.<sup>85</sup>

Even if it was sound, the argument from redundancy would not be enough to crack the powerful *prima facie* case for the Vesting Clause thesis established by the textual, linguistic, intratextual, and structural arguments advanced by its defenders. But the argument from redundancy is unsound for two distinct reasons. First, it applies equally to the only other plausible interpretation of the Article II Vesting Clause. Opponents of the Vesting Clause thesis posit that the Vesting Clause designates the office of the presidency.<sup>86</sup> But, to rephrase an argument elegantly pioneered by Professors Calabresi and Prakash,<sup>87</sup> “an interpretation of the Article II Vesting Clause as a designation of office is even more flagrantly redundant than is the Vesting Clause thesis; provisions of the Constitution other than the Article II Vesting Clause consistently refer to a single chief executive known as the President.”<sup>88</sup> Moreover, the enumerations in Sections 2 and 3 of Article II are best understood, not as grants of power, but as clarifications, qualifications, or limitations of power granted by the Vesting Clause.<sup>89</sup> Enumerations serve a very different purpose when the Article containing them starts with a vesting clause that refers to powers “herein granted” than when the relevant Article starts with a vesting clause that grants a conceptual category of power.<sup>90</sup>

From the standpoint of reasonable-person originalism, the Vesting Clause thesis is not merely true; it is obviously true. Of course, the Vesting Clause thesis merely states that the first sentence of Article II grants power to the President. It does *not* state how far that power extends, or more particularly whether it extends to foreign intelligence surveillance off the battlefield.<sup>91</sup> One could believe, for example, that the *only* power granted by the Article II Vesting Clause is the power to execute the laws. But that is a difficult position to defend. The contours of the executive power in the eighteenth century were very far from precise,<sup>92</sup> but that does not make the category meaningless or without content. Without engaging the issue here in depth, I am willing to rest my case on the proposition that a hypothetical reasonable observer in 1788 would have concluded that the “executive Power” includes those things traditionally done by executives, including various foreign-affairs functions and specifically including traditional wartime activities. Gathering foreign

---

<sup>85</sup> For the classic renditions of these arguments, see Bradley & Flaherty, *supra* note 51, at 555-57; Lessig & Sunstein, *supra* note 62, at 48.

<sup>86</sup> See, e.g., Lessig & Sunstein, *supra* note 62, at 47-48.

<sup>87</sup> See Calabresi & Prakash, *supra* note 63, at 576-77.

<sup>88</sup> Lawson & Seidman, *Treaty Clause*, *supra* note 28, at 28.

<sup>89</sup> For a clause-by-clause analysis of Article II, Sections 2 and 3, see *id.* at 28-34.

<sup>90</sup> See *id.* at 21.

<sup>91</sup> See Lawson & Moore, *supra* note 2, at 1283.

<sup>92</sup> Professors Bradley and Flaherty spent a good portion of a 144-page article establishing this proposition with compelling force. See Bradley & Flaherty, *supra* note 51.

intelligence during wartime is well within the most plausible construction of executive power,<sup>93</sup> even if taking over steel mills would not be.<sup>94</sup> And this is true even if the intelligence gathering is not done on an actual battlefield.<sup>95</sup> Imagine, for instance, if during the War of 1812, a ship carrying mail from Lisbon was headed for an American port in which there were known British sympathizers. If the President had reason to believe that British agents in Lisbon were communicating with their sympathizers in the United States and ordered interception of that mail, and some Harvard ACLU-type wearing a “no blood for sailors” T-shirt objected that the President was exceeding his power and needed to get a warrant or statutory authorization, I am willing to bet that a reasonable observer in the founding era would have tossed the schlub into the Charles River.

Does this mean that the Constitution grants the President a near-limitless reservoir of powers, under the general label “executive Power,” that could justify a wide range of highly intrusive measures justified in the name of national security? Take away the “near-limitless” part and the answer is “mostly yes.” The whole point of the Vesting Clause thesis is that the Constitution grants to the President whatever falls within the conceptual category of “executive Power.”<sup>96</sup> But that grant of power contains its own set of limiting principles. First, and most obviously, any power claimed by the President must be executive power rather than something else.<sup>97</sup> That rules out such things as the seizure of steel mills (which the Supreme Court got right)<sup>98</sup> or an order to federal courts to dismiss lawsuits (which the Supreme Court got wrong).<sup>99</sup> Second, exercises of the executive power are subject to the so-called “principle of reasonableness,” which is a fundamental principle of administrative law – very well established in the eighteenth century – that requires delegated implementational power to be used in a measured, proportionate, and rights-regarding fashion.<sup>100</sup> Wartime may well expand the range of executive actions that satisfies the principle of reasonableness, but it

---

<sup>93</sup> See John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 49, 57 (2006); DOJ Memo, *supra* note 19, at 14-17.

<sup>94</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>95</sup> See DOJ Memo, *supra* note 19, at 15.

<sup>96</sup> See Lawson & Moore, *supra* note 2, at 1281-84.

<sup>97</sup> *Id.*

<sup>98</sup> See *Youngstown*, 343 U.S. at 587.

<sup>99</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

<sup>100</sup> For a brief discussion of the principle of reasonableness, see Lawson & Seidman, *Treaty Clause*, *supra* note 28, at 48-54. I am profoundly grateful to Guy Seidman for many things; bringing the critical role of the principle of reasonableness to my attention is one of them.



does not expand it to infinity.<sup>101</sup> If the NSA wiretapping program extended into every communication that comes into or out of the United States, there is a good chance that it would fail the “reasonableness” test of proportionality.<sup>102</sup> But if the program actually corresponds to what the Bush Administration claims about it,<sup>103</sup> it is very hard to say that it exceeds the bounds of reasonableness during wartime.<sup>104</sup>

If the Vesting Clause thesis is correct, the Bush Administration’s NSA program as it has been described by the Administration appears to be lawful – and indeed mandatory if I am right that failure to conduct such surveillance under present circumstances would be an impeachable offense.<sup>105</sup>

### III

The preceding Section concludes by observing that if the Vesting Clause thesis is correct, then the NSA surveillance program “appears to be lawful.” The conclusion is qualified because there is one more step in the argument. If the Vesting Clause thesis is right, then the President has constitutionally granted authority to order reasonable, off-battlefield intelligence gathering. Such authority does not require statutory authorization because it comes directly from a constitutional grant of power.<sup>106</sup> But what if Congress interposes a statutory *prohibition*? That is precisely what Congress appears to have done in FISA.<sup>107</sup> FISA purports to specify an exclusive mechanism for securing the kind of information sought through the NSA surveillance, unless authorization external to FISA is provided by statute.<sup>108</sup> Can Congress override the President’s constitutionally granted power?

---

<sup>101</sup> See Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 306-10 (2007).

<sup>102</sup> See *id.* at 307.

<sup>103</sup> See George W. Bush, President’s Radio Address, *supra* note 12 (explaining the basic nature of the surveillance program).

<sup>104</sup> Many of the same considerations establish whether the program is consistent with the Fourth Amendment, which expressly imposes a reasonableness requirement on searches and seizures. See U.S. CONST. amend. IV. Critics of the NSA program often focus heavily on the fact that many searches under the program take place without warrants. See, e.g., *Wartime Executive Power and the National Security Agency’s Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 426 (2006) (statement of Harold Hongju Koh, Dean, Yale Law School). This focus accurately reflects the (mistaken) view of the modern Supreme Court that warrantless searches are presumptively unreasonable, see, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-30 (2002), but it has no foundation in the Constitution, which creates no necessary connection between reasonableness and warrants. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 68-71 (1998).

<sup>105</sup> See *supra* text accompanying note 16.

<sup>106</sup> See *supra* text accompanying notes 92-104.

<sup>107</sup> See 50 U.S.C. § 1802(a)(1) (2000 & Supp. IV 2004).

<sup>108</sup> See *id.*

This question takes us far afield, and I will leave for another day the difficult problem of determining how the constitutional powers of the Congress and the President operate when they come into direct conflict. But a few tentative words on the subject are appropriate (or at least irresistible).

The question whether Congress can restrict through FISA the President's constitutionally granted power to gather intelligence during wartime is easily answered "no" *if* Congress has no enumerated constitutional power to enact FISA. It is quite possible that it does not. There is no way that FISA is a direct exercise of any specifically enumerated power of Congress other than the clause at the end of Article I, Section 8 that authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>109</sup> There is, alas, no power, foregoing or otherwise, that FISA can plausibly be said to carry into effect.<sup>110</sup> FISA is certainly not a statute that is "necessary and proper for carrying into Execution" the President's executive power; one does not carry a power into execution by restricting its use, no more than it would be "necessary and proper for carrying into Execution" the judicial power for Congress to require all judicial opinions to be reviewed and approved by a special panel of Justice Department officials before they can be issued.<sup>111</sup> Nor is FISA necessary and proper for carrying into execution any of Congress's own enumerated powers – as a casual glance at the list of enumerated congressional powers will demonstrate.<sup>112</sup>

But to make the inquiry more interesting, let us assume that Congress can somehow gin up some enumerated power that it is plausible to view FISA as implementing. Because the President has a constitutional obligation to "take Care that the Laws be faithfully executed,"<sup>113</sup> does that mean that the President is obliged to obey FISA because it is a law to execute?

If FISA is a constitutional statute, the answer is yes: the President must obey constitutional statutes. That is the basic import of the Take Care Clause.<sup>114</sup> But the President does not have to (and indeed must not) obey *unconstitutional*

---

<sup>109</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>110</sup> *See id.* art. I, § 8.

<sup>111</sup> *See* Saikrishna Prakash, 91 CORNELL L. REV. 215, 232-40 (book review) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)).

<sup>112</sup> Modern doctrine, of course, would find authorization for FISA in the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3. After all, if the Commerce Clause authorizes Congress to regulate what kind of plants one can grow in one's kitchen, *see* *Gonzalez v. Raich*, 545 U.S. 1, 31-32 (2005), surely it authorizes Congress to regulate the channels of electronic communication. But if the antecedent in this argument is false – and laughably false does not begin to describe it – then the conclusion does not follow. For a careful study of the original meaning of the term "commerce," under which it would be very difficult to justify FISA, *see* Natelson, *supra* note 73, at 845.

<sup>113</sup> U.S. CONST. art. II, § 3.

<sup>114</sup> *See id.*

statutes – no more than do (or may) the federal courts.<sup>115</sup> An unconstitutional enactment is a legal nullity.<sup>116</sup> And in order to be constitutional, FISA must not only carry into execution some federal power but must also be “necessary and proper” for that purpose. If the President has constitutional authority to monitor the conversations of suspected terrorists, there is a very serious question whether it can be “necessary and proper” for Congress to try to regulate the practice. Suppose Congress decided that presidents were granting too many pardons under suspicious circumstances. Could Congress set up a special Presidential Pardon Court that would have to screen all proposed pardons and issue a “certificate of pardonability” before a lawful pardon could issue? It will not suffice to say that the pardon power is “enumerated” while the power to monitor suspected terrorist communications is not, because both powers are enumerated in the same place: the Article II Vesting Clause. The Pardons Clause is a clarification, qualification, and limitation on the previously granted pardon power.<sup>117</sup> If the President really has constitutional authority to engage in certain conduct, it is very unclear why Congress should be allowed to limit its exercise, much less to make its exercise turn on the approval of other governmental actors. If the requirement that laws be “necessary and proper” has any bite at all – and I have spent much of my professional life arguing that it does – this is the context in which it would bare its incisors.<sup>118</sup>

If Congress has no authority to interfere with the President’s constitutionally granted powers, then FISA is the legal equivalent of a congressional declaration of National Asparagus Week. It expresses the attitude of Congress but has no legal effect. If the Constitution vests in the President enough power to authorize the NSA surveillance program, Congress can say “boo, hiss” but it cannot say “no.”

---

<sup>115</sup> See Lawson & Moore, *supra* note 2, at 1325-26.

<sup>116</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>117</sup> See *supra* text accompanying notes 89-90.

<sup>118</sup> See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993); Gary Lawson, *Discretion As Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 237 (2005).