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The Imperial Presidency and the War on Terror

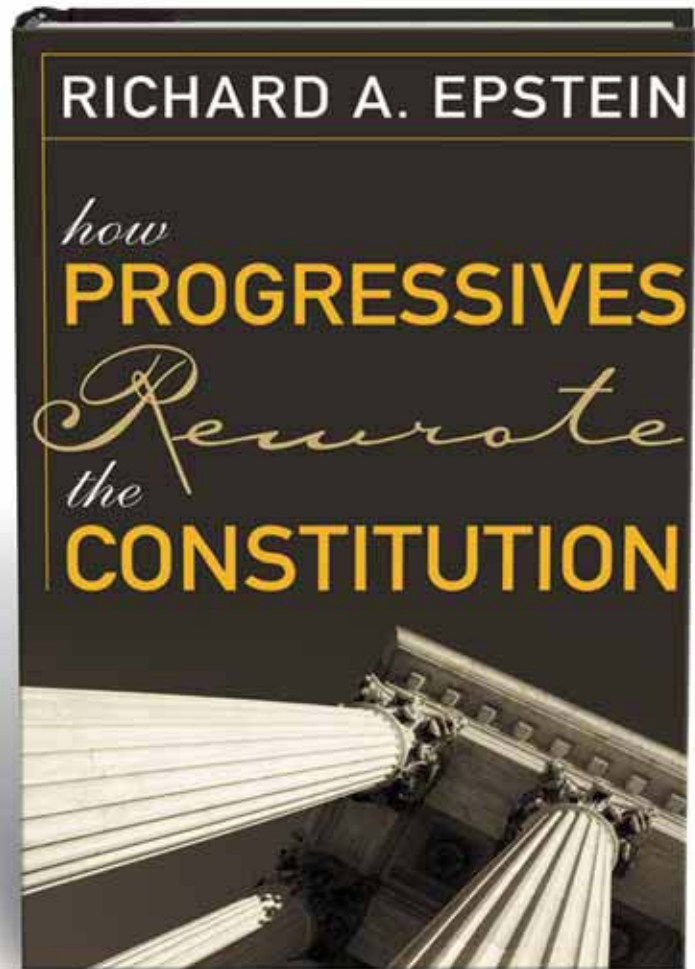
BY GENE HEALY

Trust the president.” That was the Bush administration’s main defense of the president’s bizarre choice of corporate lawyer Harriet Miers for a seat on the Supreme Court. But the administration also had a backup rationale: as D.C.’s *Hill* newspaper reported, in an October 3, 2005, conference call with conservative leaders, Republican National Committee chair Ken Mehlman stressed “the need to confirm a justice who will not interfere with the administration’s management of the war on terrorism.”

It was a bit unsettling to hear that proposition stated so baldly, but no one who has followed the administration’s drive to expand executive power could have been altogether surprised that leaving that power unchecked was a key goal for the Bush team. Since the start of the war on terror, the Bush administration has single-mindedly advanced the view that, in time

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In his new book Richard A. Epstein, professor of law at the University of Chicago and adjunct scholar at the Cato Institute, shows how the Progressives of the early 20th century transformed James Madison’s Constitution into one that accommodated the New Deal and subsequent regulatory and transfer schemes. **MORE ON PAGE 16**

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of war, the president is the law, and no statute, no constitutional barrier, no coordinate branch of the U.S. government can stand in the president’s way when, by his lights, he is acting to preserve national security. Bush administration officials have argued

- that the president has the inherent constitutional authority to designate American citizens suspected of terrorist activity as “enemy combatants,” strip them of any constitutional protection, and hold them for the duration of the war on terror;
- that the president has the power to ignore validly enacted statutes prohibiting war crimes if he believes those statutes impede his prosecution of the war on terror; and
- that the president has the power to launch invasions of other countries at his discretion, without so much as a by-your-leave to Congress.

In a 1977 interview with David Frost, Richard Nixon described his view of the president’s national security authority: “Well, when the President does it, that means it is not illegal.” In the arguments it has advanced, both publicly and privately, for untrammelled executive power, the Bush administration comes perilously close to that view.

A Presidential Power to Imprison?

In recent months the executive power issue has come to the fore with the revelation that the Bush administration has repeatedly bypassed the Foreign Intelligence Surveillance Act by conducting warrantless surveillance of Americans. President Bush has asserted that he has inherent authority as commander in chief to ignore the statutory framework set up by Congress. Judging by the polls and the press, many Americans find that line of argument alarming.

It’s unclear why it was domestic surveillance that finally drew public attention to the administration’s proclivity for evading the law in the name of national security. The claims the administration has made in the FISA debate are consistent with the view of executive authority that they’ve pressed since 9/11. Nowhere is that clearer than in the case of José Padilla, perhaps the starkest example of the administration’s drive for unchecked presidential power. Padilla, a Brooklyn-born American citizen, was arrested by federal agents at Chicago’s O’Hare Airport in May 2002 and held on a material witness warrant. Two days before a hearing in federal court on the validity of that warrant, the president declared Padilla an “enemy combatant” plotting a “dirty bomb” attack in the United States and ordered him transferred to a naval brig in South Carolina, hundreds of miles away from his lawyer. Padilla was held there for three and a half years without being charged, until his recent transfer to federal prison.

There’s little in Padilla’s background to suggest he’s an innocent man wrongly accused—he’s a violent ex-con with apparent ties to Al Qaeda. But “the innocent have nothing to fear” is cold comfort and poor constitutional argument. The very principle that imprisons the guilty can be used to seize the innocent. And the principle the Bush administration has advanced to justify Padilla’s detention is broad indeed. The

administration has argued in federal court that the power to seize an American citizen on American soil, unilaterally designate him an “enemy combatant,” and hold him for the duration of the war on terrorism is “a basic exercise of [the president’s] authority as Commander in Chief.” The power claimed here amounts to the assertion that the executive branch can serve as judge, jury, and jailer in cases involving terrorist suspects.

That power cannot be found in the Constitution. The Bill of Rights does not come with an asterisk reading “unenforceable during time of war.” As the Supreme Court declared in *Ex Parte Milligan* (1866), rejecting the military trial of a civilian during the Civil War, “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times.”

Thus far, President Bush has wielded this extraconstitutional power sparingly, but there’s no guarantee that he—or his successors—will continue to show restraint. In fact, in 2002 the administration considered broader use of domestic detention. As *Newsweek* reported in April 2004, Vice President Dick Cheney and Defense Secretary Donald Rumsfeld wanted to invoke the “enemy combatant” concept to hold six Americans from Lackawanna, New York, in a military brig without access to the courts. “They are the enemy, and they’re right here in the country,” Cheney declared, according to an administration official. The administration also considered using the power against other Americans, including a group of suspected terrorists in Portland, Oregon. It was, surprisingly enough, then-attorney general John Ashcroft who spoke up for civil liberties and the rule of law, convincing the administration to pursue the Lackawanna Six through ordinary

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constitutional processes. The six pleaded guilty and are now in federal prison.

On September 9, 2005, in *Padilla v. Commander C.T. Hanft*, a Fourth Circuit Court of Appeals panel reversed the federal district court that had ordered the government either to charge Padilla with a crime or to release him. The decision, written by Judge J. Michael Luttig, long said to be on the president’s “short list” for the Supreme Court, rests on somewhat narrower grounds than the administration’s claim of an inherent executive power to intern terrorist suspects. Judge Luttig held that the use-of-force resolution Congress passed prior to the war in Afghanistan was broad enough to authorize the seizure and prolonged detention of American citizens here in the United States. Luttig in effect reads the resolution as a standing grant of emergency power to the president for the duration of the war on terror. But if Congress intended to give the president the power to declare an American citizen a constitutional “nonperson” and hold him without charges or a trial, the very least our courts could require is a clear statement from Congress to that effect.

Padilla’s attorneys have appealed to the Supreme Court for a ruling on the merits. Two days before the government’s response was due, the Bush administration announced Padilla’s indictment in civilian court and requested that he be transferred to Florida for trial. Judge Luttig viewed the request as an attempt by the government to avoid Supreme Court review of the case and issued a sharp rebuke. As of this writing, the Supreme Court has not yet announced whether it will take the case. One hopes it will grant review and reject the administration’s contention that ordinary constitutional processes can be suspended at the will of the president. No president should be trusted with a power that vast.

Is the President above the Law?

In the *Padilla* case, the Bush administration has argued that the courts cannot interfere with the president’s decision to imprison terrorist suspects without trial. In a series of internal memoranda written in 2002 and 2003 and publicly revealed in 2004, Bush administration lawyers argue that Congress is similarly powerless to interfere with the president’s authority to order torture of enemy prisoners, if the president decides such action will be useful in prosecuting the war on terror.

Much of the public discussion about those memos has focused on the narrowness of their definition of torture and the question of whether the Geneva Convention covers Al Qaeda and Taliban prisoners. Reasonable people can debate those issues, but what’s most disturbing about the memos is their assertion that the president cannot be restrained by validly enacted laws.

In 1988 the United States signed the United Nations Convention Against Torture; in 1994 the Senate ratified that agreement. Later that year, Congress passed a statute implementing the agreement, a statute that makes acts of torture committed under color of law outside the United States a federal crime. (Acts of torture committed within the United States were already prohibited by federal law.) But according to the Bush administration’s Justice Department, that statute is without effect, should the

president decide it impedes his ability to wage war on terror.

According to the memos, prohibiting torture infringes on the president’s constitutional power as commander in chief. As an August 1, 2002, memo puts it, “Congress can no more interfere with the president’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.” The legal reasoning employed in that memo resurfaced in a March 2003 Pentagon memo prepared for Secretary of Defense Donald Rumsfeld, which holds that “any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”

The Constitution’s text, structure, and history will not support anything like the doctrine of presidential absolutism the administration flirts with in the torture memos. Explaining the commander-in-chief clause in *Federalist* 69, Hamilton noted that the authority it granted “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.” Moreover, the Constitution gives Congress powers that bear directly on the issue of military conduct and war crimes, including the power “to define and punish . . . Offences against the Law of Nations”—such as violations of international covenants against torture. And the president, in addition to his oath to uphold the Constitution, is commanded by that document to “take Care that the Laws be faithfully executed.”

Amazingly, the torture memos decline to address—or even to cite—*Youngstown Co. v. Sawyer* (1952), the key Supreme Court case on the relative powers of Congress and

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the executive. In *Youngstown*, popularly known as the *Steel Seizure Case*, the Court struck down President Truman’s executive order seizing the nation’s steel mills, issued to avert a strike in the midst of the Korean War. In his concurrence, Justice Jackson rejected the government’s broad view of the commander-and-chief power and noted that when the president acts in contradiction to the will of Congress, his power is “at its lowest ebb.” As Justice Jackson put it, “No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.”

It’s hard to divine anything in the administration’s legal reasoning that would prohibit the seizure and torture of an American citizen on American soil, if the president concluded such action would be useful in fighting the war on terror. After all, administration officials have argued repeatedly that the United States is as much a combat zone in that war as are the hills of Afghanistan. During oral argument in the *Padilla* case, Judge Luttig told Deputy Solicitor General Paul Clement that accusations that Padilla was an enemy combatant “don’t get you very far, unless you’re prepared to boldly say the United States is a battlefield in the war on terror.” Clement replied, “I can say that, and I can say it boldly.”

In response to public pressure, on December 30, 2004, the Justice Department’s Office of Legal Counsel issued a memorandum superseding the August 2002 memo that generated much of the controversy. While repudiating the practice of torture, the Office of Legal Counsel refused to recant its broad assertion of executive authority. Indeed, given the president’s actions with regard to the McCain amendment to prohibit “cruel, inhuman, and

degrading” treatment of U.S. detainees, that theory of executive power appears to be alive and well. In December 2005, after long threatening to veto the amendment, President Bush, faced with veto-proof majorities in the House and Senate, decided to sign. Yet, in his signing statement, he declared, “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.” Given the president’s capacious view of his own authority, that could well signal an intent to interpret the law out of existence.

Instead of penalizing any of the figures responsible for the torture memos, the president has promoted them. Jay S. Bybee, coauthor of the August 2002 memo, now sits on the Ninth Circuit Court of Appeals. Alberto Gonzales, who ran the Office of Legal Counsel during its elaborate effort to rationalize lawbreaking, is now the nation’s chief law enforcement officer, as attorney general of the United States.

A Presidential Power to Declare War?

As revealed by the torture memos, in the administration’s theory, Congress is powerless to prevent the president

from doing whatever he believes to be necessary to win a war. And, as it turns out, Congress is also powerless to prevent the president from starting a war, if he believes that war is in the national interest. Administration officials have repeatedly advanced the claim that the president’s powers include the power to decide, unilaterally, the question of war or peace.

In testimony given before the Senate Subcommittee on the Constitution in April 2002, an official from the Office of Legal Counsel expressed the administration’s view: “The President has the constitutional authority to introduce the U.S. Armed Forces into hostilities when appropriate, with or without specific congressional authorization.” That is consistent with Vice President Cheney’s long-held view of the president’s powers and consistent with what administration figures were telling the press in the run-up to the congressional debate over war with Iraq.

The administration also had a fallback theory: administration officials argued that the president didn’t need congressional authorization for *this* war with Iraq, because a previous president (George W. Bush’s father) had secured authorization for the *previous* war with Iraq, 11 years earlier. Then–White House counsel Alberto Gonzales argued that the 1991 congressional resolution for the Persian Gulf War, drafted to authorize expulsion of Iraqi forces from Kuwait, still had enough life left in it to authorize a new war aimed at regime change in Iraq. That sort of argument might be appropriate for a trial lawyer zealously pressing his client’s interest, but when it comes to matters of war and peace, the people are entitled to what the Constitution requires: a vote.

In fairness, the administration did eventually secure a use-of-force resolution from

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Congress, all the while denying that any authorization was needed. But, given the administration's broad view of the president's war power taken in conjunction with its arguments in the *Padilla* case and the torture memos, the administration's position can be summed up starkly: When we're at war, anything goes; and the president gets to decide when we're at war.

Reflexive Militarism

The administration's drive for greater presidential power isn't limited to the prosecution of the war on terror. Twice in a matter of weeks last fall, President Bush suggested weakening the Posse Comitatus Act, the longstanding federal statute that restricts the president's ability to use the army to keep order domestically.

On September 15, in the midst of public recriminations over the government's response to Hurricane Katrina, President Bush declared, "It is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces" and called upon Congress to give him that authority. Again on October 4, the president raised the possibility of military quarantines in the event of an outbreak of avian flu.

A free society flirts with domestic militarization at its peril. Therefore, one would like to imagine that those proposals had been carefully considered before being brought to public attention. Instead, they appear to have been thrown out carelessly as a way to appear decisive in the wake of a massive government failure.

Nothing about the Katrina fiasco suggests that broad legal changes are necessary. The Posse Comitatus Act does not prevent the army from providing logistic help during a natural disaster. It merely sets a high bar to clear before the president can order the military to play a policing role over the

objection of a sitting state governor. And there should be a high bar. Even the president's brother, Florida governor Jeb Bush, recoiled at the suggestion that the president should automatically be granted military command within any state suffering a severe hurricane.

American law calls for civilian peace officers to keep the peace or, failing that, for National Guard troops under the command of their state governors to do so. With proper planning—and if the federal government stops overtaxing the Guard through deployments overseas—there is no reason why future disasters cannot be handled under current law. Even in the case of Katrina, we've learned that early reports of large-scale violence in the Superdome and elsewhere were largely urban myths. There is no need for a militarized federal war on hurricanes.

Avian flu is also potentially a very serious concern. Yet few public health experts think large-scale military quarantines are a proper or useful response to that concern. Less than a month after President Bush suggested the military option, his Department of Health and Human Services released its 396-page *HHS Pandemic Influenza Plan*, years in the making. The document does not outline a role for the military in enforcing quarantines; instead, it calls for voluntary quarantines, except for "extreme situations . . . [in which] community-level interventions may become necessary." Even then, the report

notes, "measures designed to increase social distance, such as snow days, may be preferred alternatives to quarantine."

The administration's conduct in the wake of Katrina suggests that its reflexive response to any crisis—whether real or hypothetical—is the same: *we need more power*. That is a dangerous reflex.

Don't Trust; Verify

None of this is meant to imply that President Bush is unscrupulous or potentially despotic. Far from it; there's little in his life, his career, or his character to suggest any such thing. A man who didn't decide he wanted to be president until well into his forties certainly is an unlikely tyrant.

But President Bush will not be the last president to wield the broad new powers his administration is forging in the domestic and foreign affairs arenas. The war on Al Qaeda terror will not end with a peace treaty in Paris. Ending the war will take decades, and when victory is achieved, we may not know with any certainty that we've won. The extraconstitutional powers we tolerate now will be available to all future presidents, scrupulous or otherwise. And our entire constitutional system repudiates the notion that electing good men is a sufficient check on abuse of power. As my colleague Bob Levy has noted, conservatives who trust George W. Bush not to abuse the vast authority he claims might not be as comfortable with those powers in the hands of his predecessor or his successor—particularly if his successor has the same last name as his predecessor. In this, as in so much else, Jefferson had it right: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."