Terrorist Surveillance and the Constitution

J. MADISON

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FOREWORD

The Federalist Society for Law and Public Policy is pleased to make a contribution to the current debate about the scope of the President's powers in wartime by publishing this monograph on the legal and constitutional issues implicated by NSA's global al Qaeda surveillance program. Although this surveillance program is important in its own right, the ongoing dialogue about its proper legal and policy parameters has become a surrogate for a broader discourse about the wartime constitutional balance among the Executive, Congress and the Judiciary. This issue has stimulated a heated debate, with the bulk of the academy and the media arguing that the President's actions violated both the 1978 Foreign Intelligence Surveillance Act and the Constitution. This viewpoint was vigorously presented in an ABA Resolution, dated February 13, 2006 and in the Letter of Scholars to Congress dated January 9, 2006. Both of these products have been extensively referenced in congressional hearings on the subject, which commenced several weeks ago and are still ongoing.

By contrast, the accompanying study by Andrew C. McCarthy, David B. Rivkin, Jr., and Lee A. Casey posits that the NSA's al Qaeda surveillance program does not run afoul of FISA and is fully within the ambit of the President's authority as the Commander-and-Chief and the Chief Executive. The authors further maintain that any congressional efforts to micromanage or regulate further the President's gathering of foreign and military intelligence unduly trenches upon his core constitutional responsibilities. They also argue that any efforts to have the judiciary review what are essentially discretionary Executive Branch policy determinations would consign the Judiciary to a role that is fundamentally incompatible with its Article III authority and is therefore also unconstitutional.

The ABA Resolution and Scholars' Letter are reproduced herein, along with the Andrew C. McCarthy- David B. Rivkin, Jr.- Lee A. Casey study. In the spirit of this discussion on domestic surveillance, the Federalist Society also had an online exchange between one of the authors of this study, David Rivkin, and Robert Levy of the Cato Institute. For those readers who are interested, the piece can be found on the Federalist Society's website under the War on Terror Special Projects page. It is titled "NSA Surveillance," and available at http://www.fed-soc.org/Publications/White%20Papers/nationalsecurity.htm.

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES

February 13, 2006

RESOLVED, that the American Bar Association calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees;

FURTHER RESOLVED, that the American Bar Association opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization;

FURTHER RESOLVED, that the American Bar Association urges the Congress to affirm that the Authorization for Use of Military Force of September 18, 2001, Pub.L. No. 107-40, 115 Stat. 224 § 2(a) (2001) (AUMF), did not provide a statutory exception to the FISA requirements, and that any such exception can be authorized only through affirmative and explicit congressional action;

FURTHER RESOLVED, that the American Bar Association urges the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies; and (e) whether this information was used in legal proceedings against any U.S. citizen.

FURTHER RESOLVED, that the American Bar Association urges the Congress to ensure that such proceedings are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information; and

FURTHER RESOLVED, that the American Bar Association urges the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the President to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

SCHOLARS' LETTER TO CONGRESS*

January 9, 2006

Dear Members of Congress:

We are scholars of constitutional law and former government officials. We write in our individual capacities as citizens concerned by the Bush administration's National Security Agency domestic spying program, as reported in the New York Times, and in particular to respond to the Justice Department's December 22, 2005, letter to the majority and minority leaders of the House and Senate Intelligence Committees setting forth the administration's defense of the program.[1] Although the program's secrecy prevents us from being privy to all of its details, the Justice Department's defense of what it concedes was secret and warrantless electronic surveillance of persons within the United States fails to identify any plausible legal authority for such surveillance. Accordingly the program appears on its face to violate existing law.

The basic legal question here is not new. In 1978, after an extensive investigation of the privacy violations associated with foreign intelligence surveillance programs, Congress and the President enacted the Foreign Intelligence Surveillance Act (FISA). Pub. L. 95-511, 92 Stat. 1783. FISA comprehensively regulates electronic surveillance within the United States, striking a careful balance between protecting civil liberties and preserving the "vitally important government purpose" of obtaining valuable intelligence in order to safeguard national security. S. Rep. No. 95-604, pt. 1, at 9 (1977).

With minor exceptions, FISA authorizes electronic surveillance only upon certain specified showings, and only if approved by a court. The statute specifically allows for warrantless *wartime* domestic electronic surveillance—but only for the first fifteen days of a war. 50 U.S.C. § 1811. It makes criminal any electronic surveillance not authorized by statute, *id.* § 1809; and it expressly establishes FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigation) as the "*exclusive* means by which electronic surveillance...may be conducted," 18 U.S.C. § 2511(2)(f) (emphasis added).[2]

The Department of Justice concedes that the NSA program was not authorized by any of the above provisions. It maintains, however, that the program did not violate existing law because Congress implicitly authorized the NSA program when it enacted the Authorization for Use of Military Force (AUMF) against al-Qaeda, Pub. L. No. 107-40, 115 Stat. 224 (2001). But the AUMF cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance to the first fifteen days of war.

The DOJ also invokes the President's inherent constitutional authority as Commander in Chief to collect "signals intelligence" targeted at the enemy, and maintains that construing FISA to prohibit the President's actions would raise constitutional questions. But even conceding that the President in his role as Commander in Chief may generally collect "signals intelligence" on the enemy abroad, Congress indisputably has authority to regulate electronic surveillance within the United States, as it has done in FISA. Where Congress has so regulated, the President can act in contravention of statute only if his authority is *exclusive*, that is, not subject to the check of statutory regulation. The DOJ letter pointedly does not make that extraordinary claim.

Moreover, to construe the AUMF as the DOJ suggests would itself raise serious constitutional questions under the Fourth Amendment. The Supreme Court has never upheld warrantless wiretapping within the United States. Accordingly, the principle that statutes should be construed to avoid serious constitutional questions provides an additional reason for concluding that the AUMF does not authorize the President's actions here.

I. CONGRESS DID NOT IMPLICITLY AUTHORIZE THE NSA DOMESTIC SPYING PROGRAM IN THE AUMF, AND IN FACT EXPRESSLY PROHIBITED IT IN FISA

The DOJ concedes (Letter at 4) that the NSA program involves "electronic surveillance," which is defined in FISA to mean the interception of the *contents* of telephone, wire, or e-mail communications that occur, at least in part, in the United States. 50 U.S.C. §§ 1801(f)(1)-(2), 1801(n). The NSA engages in such surveillance without judicial approval, and apparently

without the substantive showings that FISA requires—e.g., that the subject is an "agent of a foreign power." *Id.* § 1805(a). The DOJ does not argue that FISA itself authorizes such electronic surveillance; and, as the DOJ letter acknowledges, 18 U.S.C. § 1809 makes criminal any electronic surveillance not authorized by statute.

The DOJ nevertheless contends that the surveillance is authorized by the AUMF, signed on September 18, 2001, which empowers the President to use "all necessary and appropriate force against" al-Qaeda. According to the DOJ, collecting "signals intelligence" on the enemy, even if it involves tapping US phones without court approval or probable cause, is a "fundamental incident of war" authorized by the AUMF. This argument fails for four reasons.

First, and most importantly, the DOJ's argument rests on an unstated general "implication" from the AUMF that directly contradicts *express* and *specific* language in FISA. Specific and "carefully drawn" statutes prevail over general statutes where there is a conflict. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987)). In FISA, Congress has directly and specifically spoken on the question of domestic warrantless wiretapping, including during wartime, and it could not have spoken more clearly.

As noted above, Congress has comprehensively regulated all electronic surveillance in the United States, and authorizes such surveillance only pursuant to specific statutes designated as the "*exclusive* means by which electronic surveillance...and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). Moreover, FISA *specifically* addresses the question of domestic wiretapping during wartime. In a provision entitled "Authorization during time of war," FISA dictates that "notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information *for a period not to exceed fifteen calendar days following a declaration of war by the Congress*." 50 U.S.C. § 1811 (emphasis added). Thus, even where Congress has declared war—a more formal step than an authorization such as the AUMF—the law limits warrantless wiretapping to the first fifteen days of the conflict. Congress explained that if the President needed further warrantless surveillance during wartime, the

fifteen days would be sufficient for Congress to consider and enact further authorization.[3] Rather than follow this course, the President acted unilaterally and secretly in contravention of FISA's terms. The DOJ letter remarkably does not even *mention* FISA's fifteen-day war provision, which directly refutes the President's asserted "implied" authority.

In light of the specific and comprehensive regulation of FISA, especially the fifteen-day war provision, there is no basis for finding in the AUMF's general language implicit authority for unchecked warrantless domestic wiretapping. As Justice Frankfurter stated in rejecting a similar argument by President Truman when he sought to defend the seizure of the steel mills during the Korean War on the basis of implied congressional authorization:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is...to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

Second, the DOJ's argument would require the conclusion that Congress implicitly and *sub silentio* repealed 18 U.S.C. § 2511(2)(f), the provision that identifies FISA and specific criminal code provisions as "the exclusive means by which electronic surveillance...may be conducted." Repeals by implication are strongly disfavored; they can be established only by "overwhelming evidence," *J.E.M. Ag. Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001), and "'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable,'" *id.* at 141–142 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). The AUMF and § 2511(2)(f) are not irreconcilable, and

there is *no* evidence, let alone overwhelming evidence, that Congress intended to repeal § 2511(2)(f).

Third, Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because it was advised that Congress would reject such an amendment.[4] The administration cannot argue on the one hand that Congress authorized the NSA program in the AUMF, and at the same time that it did not ask Congress for such authorization because it feared Congress would say no.[5]

Finally, the DOJ's reliance upon *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), to support its reading of the AUMF, see DOJ Letter at 3, is misplaced. A plurality of the Court in *Hamdi* held that the AUMF authorized military detention of enemy combatants captured on the battlefield abroad as a "fundamental incident of waging war." *Id.* at 519. The plurality expressly limited this holding to individuals who were "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*." *Id.* at 516 (emphasis added). It is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked warrantless *domestic* spying as included in that authorization, especially where an existing statute specifies that other laws are the "exclusive means" by which electronic surveillance may be conducted and provides that even a declaration of war authorizes such spying only for a fifteen-day emergency period.[6]

II. CONSTRUING FISA TO PROHIBIT WARRANTLESS DOMESTIC WIRETAPPING DOES NOT RAISE ANY SERIOUS CONSTITUTIONAL QUESTION, WHILE CONSTRUING THE AUMF TO AUTHORIZE SUCH WIRETAPPING WOULD RAISE SERIOUS QUESTIONS UNDER THE FOURTH AMENDMENT

The DOJ argues that FISA and the AUMF should be construed to permit the NSA program's domestic surveillance because there otherwise might be a "conflict between FISA and the President's Article II authority as Commander-in-Chief." DOJ Letter at 4. The statutory scheme described above is not ambiguous, and therefore the constitutional avoidance doctrine

is not even implicated. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (the "canon of constitutional avoidance has no application in the absence of statutory ambiguity"). But were it implicated, it would work against the President, not in his favor. Construing FISA and the AUMF according to their plain meanings raises no serious constitutional questions regarding the President's duties under Article II. Construing the AUMF to *permit* unchecked warrantless wiretapping without probable cause, however, would raise serious questions under the Fourth Amendment.

A. FISA's Limitations are consistent with the President's Article II role

We do not dispute that, absent congressional action, the President might have inherent constitutional authority to collect "signals intelligence" about the enemy abroad. Nor do we dispute that, had Congress taken no action in this area, the President might well be constitutionally empowered to conduct domestic surveillance directly tied and narrowly confined to that goal—subject, of course, to Fourth Amendment limits. Indeed, in the years before FISA was enacted, the federal law involving wiretapping specifically provided that "nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President...to obtain foreign intelligence information deemed essential to the security of the United States." 18 U.S.C. § 2511(3) (1976).

But FISA specifically *repealed* that provision, FISA § 201(c), 92 Stat. 1797, and replaced it with language dictating that FISA and the criminal code are the "exclusive means" of conducting electronic surveillance. In doing so, Congress did not deny that the President has constitutional power to conduct electronic surveillance for national security purposes; rather, Congress properly concluded that "even if the President has the inherent authority *in the absence of legislation* to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted." H.R. Rep. No. 95-1283, pt. 1, at 24 (1978) (emphasis added). This analysis, Congress noted, was "supported by two successive Attorneys General." *Id.*

To say that the President has inherent authority does not mean that his authority is exclusive, or that his conduct is not subject to statutory

regulations enacted (as FISA was) pursuant to Congress's Article I powers. As Justice Jackson famously explained in his influential opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 635 (Jackson, J., concurring), the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." For example, the President in his role as Commander in Chief directs military operations. But the Framers gave Congress the power to prescribe rules for the regulation of the armed and naval forces, Art. I, § 8, cl. 14, and if a duly enacted statute prohibits the military from engaging in torture or cruel, inhuman, and degrading treatment, the President must follow that dictate. As Justice Jackson wrote, when the President acts in defiance of "the expressed or implied will of Congress," his power is "at its lowest ebb." 343 U.S. at 637. In this setting, Jackson wrote, "Presidential power [is] most vulnerable to attack and in the least favorable of all constitutional postures." *Id*. at 640.

Congress plainly has authority to regulate domestic wiretapping by federal agencies under its Article I powers, and the DOJ does not suggest otherwise. Indeed, when FISA was enacted, the Justice Department agreed that Congress had power to regulate such conduct, and could require judicial approval of foreign intelligence surveillance.[7] FISA does not prohibit foreign intelligence surveillance, but merely imposes reasonable regulation to protect legitimate privacy rights. (For example, although FISA generally requires judicial approval for electronic surveillance of persons within the United States, it permits the executive branch to install a wiretap immediately so long as it obtains judicial approval within seventy-two hours. 50 U.S.C. § 1805(f).)

Just as the President is bound by the statutory prohibition on torture, he is bound by the statutory dictates of FISA.[8] The DOJ once infamously argued that the President as Commander in Chief could ignore even the criminal prohibition on torture,[9] and, more broadly still, that statutes may not "place *any* limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[10] But the administration withdrew the August 2002 torture memo after it was disclosed, and for good reason the DOJ does not advance these extreme arguments here. Absent a serious question about FISA's constitutionality, there is no reason even to consider

construing the AUMF to have implicitly overturned the carefully designed regulatory regime that FISA establishes. *See, e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993) (constitutional avoidance canon applicable only if the constitutional question to be avoided is a serious one, "not to eliminate all possible contentions that the statute *might* be unconstitutional") (emphasis in original; citation omitted).[11]

B. Construing the AUMF to authorize warrantless domestic wiretapping would raise serious constitutional questions

The principle that ambiguous statutes should be construed to avoid serious constitutional questions works against the administration, not in its favor. Interpreting the AUMF and FISA to permit unchecked domestic wiretapping for the duration of the conflict with al-Qaeda would certainly raise serious constitutional questions. The Supreme Court has never upheld such a sweeping power to invade the privacy of Americans at home without individualized suspicion or judicial oversight.

The NSA surveillance program permits wiretapping within the United States without *either* of the safeguards presumptively required by the Fourth Amendment for electronic surveillance—individualized probable cause and a warrant or other order issued by a judge or magistrate. The Court has long held that wiretaps generally require a warrant and probable cause. *Katz* v. *United States*, 389 U.S. 347 (1967). And the only time the Court considered the question of national security wiretaps, it held that the Fourth Amendment prohibits domestic security wiretaps without those safeguards. *United States* v. *United States District Court*, 407 U.S. 297 (1972). Although the Court in that case left open the question of the Fourth Amendment validity of warrantless wiretaps for foreign intelligence purposes, its precedents raise serious constitutional questions about the kind of open-ended authority the President has asserted with respect to the NSA program. *See id.* at 316-18 (explaining difficulty of guaranteeing Fourth Amendment freedoms if domestic surveillance can be conducted solely in the discretion of the executive branch).

Indeed, serious Fourth Amendment questions about the validity of warrantless wiretapping led Congress to enact FISA, in order to "provide the secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context

of this nation's commitment to privacy and individual rights." S. Rep. No. 95-604, at 15 (1978) (citing, *inter alia*, *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), in which the court of appeals held that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of, nor acting in collaboration with, a foreign power).

Relying on *In re Sealed Case No. 02-001*, the DOJ argues that the NSA program falls within an exception to the warrant and probable cause requirement for reasonable searches that serve "special needs" above and beyond ordinary law enforcement. But the existence of "special needs" has never been found to permit warrantless wiretapping. "Special needs" generally excuse the warrant and individualized suspicion requirements only where those requirements are impracticable and the intrusion on privacy is minimal. *See, e.g.*, *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). Wiretapping is not a minimal intrusion on privacy, and the experience of FISA shows that foreign intelligence surveillance can be carried out through warrants based on individualized suspicion.

The court in *Sealed Case* upheld FISA itself, which requires warrants issued by Article III federal judges upon an individualized showing of probable cause that the subject is an "agent of a foreign power." The NSA domestic spying program, by contrast, includes none of these safeguards. It does not require individualized judicial approval, and it does not require a showing that the target is an "agent of a foreign power." According to Attorney General Gonzales, the NSA may wiretap any person in the United States who so much as receives a communication from anyone abroad, if the administration deems either of the parties to be affiliated with al-Qaeda, a member of an organization affiliated with al-Qaeda, "working in support of al Qaeda," or "part of" an organization or group "that is supportive of al Qaeda."[12] Under this reasoning, a US citizen living here who received a phone call from another US citizen who attends a mosque that the administration believes is "supportive" of al-Qaeda could be wiretapped without a warrant. The absence of meaningful safeguards on the NSA program at a minimum raises serious questions about the validity of the program under the Fourth Amendment, and therefore supports an interpretation of the AUMF that does not undercut FISA's regulation of such conduct.

In conclusion, the DOJ letter fails to offer a plausible legal defense of the NSA domestic spying program. If the administration felt that FISA was insufficient, the proper course was to seek legislative amendment, as it did with other aspects of FISA in the Patriot Act, and as Congress expressly contemplated when it enacted the wartime wiretap provision in FISA. One of the crucial features of a constitutional democracy is that it is always open to the President—or anyone else—to seek to change the law. But it is also beyond dispute that, in such a democracy, the President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable.[13]

We hope you find these views helpful to your consideration of the legality of the NSA domestic spying program.

Sincerely,

Curtis Bradley
Richard and Marcy Horvitz Professor of Law, Duke University, and former Counselor on International Law in the State Department Legal Adviser's Office[14]

David Cole
Professor of Law, Georgetown University Law Center

Walter Dellinger
Douglas Blount Maggs Professor of Law, Duke University, and former Deputy Assistant Attorney General, Office of Legal Counsel; Former Acting Solicitor General of the United States

Ronald Dworkin
Frank Henry Sommer Professor, New York University Law School

Richard Epstein
James Parker Hall Distinguished Service Professor, University of Chicago Law School, and Peter and Kirsten Bedford Senior Fellow, Hoover Institution

Philip B. Heymann
James Barr Ames Professor, Harvard Law School, and former Deputy Attorney General

Harold Hongju Koh
Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, and former Assistant Secretary of State for Democracy, Human Rights and Labor; Former Adviser, Office of Legal Counsel, DOJ

Martin Lederman
Visiting Professor, Georgetown University Law Center and former Attorney-Adviser, Office of Legal Counsel, DOJ

Beth Nolan
Former Counsel to the President and Deputy Assistant Attorney General, Office of Legal Counsel

William S. Sessions
Former Director, FBI and former Chief United States District Judge

Geoffrey R. Stone
Professor of Law and former Provost, University of Chicago

Kathleen Sullivan
Stanley Morrison Professor and former Dean, Stanford Law School

Laurence H. Tribe
Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School

William Van Alstyne
Lee Professor, William & Mary Law School, and former Attorney, Department of Justice

* The addressees of the Scholars' Letter were Senators Bill Frist, Harry Reid, Arlen Specter, Patrick Leahy, Pat Roberts, John D. Rockefeller, IV, and Representatives J. Dennis Hastert, Nancy Pelosi, F. James Sensenbrenner, Jr., John Conyers, Peter Hoekstra, and Jane Harman.

Footnotes

[1] The Justice Department letter can be found at www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

[2] More detail about the operation of FISA can be found in Congressional Research Service, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information" (January 5, 2006). This letter was drafted prior to release of the CRS Report, which corroborates the conclusions drawn here.

[3] "The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. . . . The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." H.R. Conf. Rep. No. 95-1720, at 34 (1978).

[4] Attorney General Gonzales stated, "We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (December 19, 2005), *available at* www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

[5] The administration had a convenient vehicle for seeking any such amendment in the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, enacted in October 2001. The Patriot Act amended FISA in several respects, including in sections 218 (allowing FISA wiretaps in criminal investigations) and 215 (popularly known as the "libraries provision"). Yet the administration did not ask Congress to amend FISA to authorize the warrantless electronic surveillance at issue here.

[6] The DOJ attempts to draw an analogy between FISA and 18 U.S.C. § 4001(a), which provides that the United States may not detain a US citizen "except pursuant to an act of Congress." The DOJ argues that just as the AUMF was deemed to authorize the detention of Hamdi, 542 U.S. at 519, so the AUMF satisfies FISA's requirement that electronic surveillance be "authorized by statute." DOJ Letter at 3-4. The analogy is inapt. As noted above, FISA specifically limits warrantless domestic wartime surveillance to the first fifteen days of the conflict, and 18 U.S.C. § 2511(2)(f) specifies that existing law is the "exclusive means" for domestic wiretapping. Section 4001(a), by contrast, neither expressly addresses detention of the enemy during wartime nor attempts to create an exclusive mechanism for detention. Moreover, the analogy overlooks the carefully limited holding and rationale of the *Hamdi* plurality, which found the AUMF to be an "explicit congressional authorization for the detention of individuals in the narrow category we describe...who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network," and whom "Congress sought to target in passing the AUMF." 542 U.S. at 518. By the

government's own admission, the NSA program is by no means so limited. *See* Gonzales/Hayden Press Briefing, *supra* note 4.

[7] *See*, *e.g.*, S. Rep. No. 95-604, pt. I, at 16 (1977) (Congress's assertion of power to regulate the President's authorization of electronic surveillance for foreign intelligence purposes was "concurred in by the Attorney General"); Foreign Intelligence Electronic Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess., at 31 (1978) (Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978)) ("it seems unreasonable to conclude that Congress, in the exercise of its powers in this area, may not vest in the courts the authority to approve intelligence surveillance").

[8] Indeed, Article II imposes on the President the general *obligation* to enforce laws that Congress has validly enacted, including FISA: "he *shall* take Care that the Laws be faithfully executed..." (emphasis added). The use of the mandatory "shall" indicates that under our system of separation of powers, he is duty-bound to execute the provisions of FISA, not defy them.

[9] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), at 31.

[10] Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President, Re: *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (September 25, 2001), *available at* www.usdoj.gov/olc/warpowers925.htm (emphasis added).

[11] Three years ago, the FISA Court of Review suggested in dictum that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance. *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam). The FISA Court of Review, however, did not hold that FISA was unconstitutional, nor has any other court suggested that FISA's modest regulations constitute an impermissible encroachment on presidential authority. The FISA Court of Review relied upon *United States* v. *Truong Dihn Hung*, 629 F.2d 908 (4th Cir. 1980)—but that court did not suggest that the President's powers were beyond congressional control. To the contrary, the *Truong* court indicated that FISA's restrictions were constitutional. 629 F.2d at 915 n.4 (noting that "the imposition of a warrant requirement, beyond the constitutional minimum

described in this opinion, *should be left to the intricate balancing performed in the course of the legislative process by Congress and the President*") (emphasis added).

[12] *See* Gonzales/Hayden Press Briefing, *supra* note 4.

[13] During consideration of FISA, the House of Representatives noted, "The decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted is and should be a political decision...properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other. Under our Constitution legislation is the embodiment of just such political decisions." H.R. Conf. Rep. No. 95-1283, pt. 1, at 21-22. Attorney General Griffin Bell supported FISA in part because "no matter how well intentioned or ingenious the persons in the Executive branch who formulate these measures, the crucible of the legislative process will ensure that the procedures will be affirmed by that branch of government which is more directly responsible to the electorate." Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcommittee on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 12 (1997).

[14] Affiliations are noted for identification purposes only.

NSA'S WARRANTLESS SURVEILLANCE PROGRAM: LEGAL, CONSTITUTIONAL, AND NECESSARY

By: Andrew C. McCarthy, David B. Rivkin, Jr., and Lee A. Casey***

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Introduction

The "constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack …, [and] to obtain foreign intelligence information deemed essential to the security of the United States" obviously trumps any limitations on that authority that Congress may enact. Who says so? Why Congress itself. The passage quoted above is drawn directly from the first federal wiretapping legislation ever passed in the United States, in 1968.[1]

Unfortunately, this inconvenient admission has been forgotten in the ongoing maelstrom over the Bush administration's terrorist surveillance program, an initiative in which the National Security Agency ("NSA") intercepts wartime international communications, crossing into and out of the U.S., by the enemy – a transnational terrorist network comprised of al Qaeda and its affiliates which has already struck the United States in one devastating domestic attack, claiming nearly 3000 innocent lives, and which has made no secret of its feverish work toward reprisals that would dwarf the carnage of 9/11.

Critics of the NSA program naturally prefer to focus on Congress's enactment, in 1978, of the Foreign Intelligence Surveillance Act (FISA). Tactically, this permits them to shift the focus of debate to the NSA program's statutory lawfulness rather than its constitutional propriety or its practical effectiveness. Thus, President Bush's initiative – *which arguably circumvents FISA's regulatory scheme* – is rhetorically cast as an example of an imperious chief executive, elevating himself "above the law." Little mention is made of the inescapable, albeit *for the critics* embarrassing, fact that by the same logic, the FISA Congress placed itself "above" the far more consequential law – i.e., the Constitution – to which it had expressly, and quite correctly, paid homage only a decade before.

Of course, the President would not be proved right simply because his actions are consistent with the Congress's traditional depiction of executive authority in 1968, any more than he would be proved wrong by inconsistency with the construction of that authority adopted by a more radical Congress ten years later. Presidential power is a matter of objective constitutional fact. It is inevitable that this power should collide and compete with the power of Congress. That, indeed, is the nature of a system based on divided authority. If, however, the powers of any of the three branches came to be *defined*, rather than checked and balanced, by one of the others, that constitutional system, the basis of both our liberty and our security, would collapse.

This is the fatal flaw of the leading critiques of the NSA program, including the Report promulgated on February 13, 2006, by the American Bar Association's Task Force on Domestic Surveillance in the Fight Against Terrorism (ABA Report),[2] and one on which the ABA heavily relies, set forth in a January 9, 2006, Letter to Members of Congress "On NSA Spying" by fourteen self-described "scholars of constitutional law and former government officials" (Scholars' Letter).[3] The critiques essentially assume that the world began in 1978 with FISA's enactment; that, together with Title III, Congress intended FISA as a comprehensive scheme for the permissible conduct of all electronic surveillance activities by the executive branch; and, therefore, that the NSA program, or, indeed, any electronic monitoring that fails to hew to that scheme, is perforce illegal.

Yet, notwithstanding the effort to bleach it out, a rich 200 plus-year history intrudes on this facile account. It elucidates: (a) that the President of the United States is the preeminent constitutional official in the interwoven arenas of international affairs and the collection of foreign intelligence; (b) that the Congress is armed with important checks on this presidential authority, but those checks are external to, not infiltrative of, that authority – meaning, they do not include the power to exercise executive power, to dictate how it is to be exercised, or to delegate its exercise to other governmental actors; and (c) that the federal courts have no proper role to play in securing the United States from foreign threats – the role Congress endeavored to delegate to them in FISA is constitutionally dubious (to say nothing of its potentially disastrous practical consequences for national security), and any effort to extend judicial review further into the executive's national security portfolio would be unlawful and fraught with peril for the public welfare.

Conflating Separate Realms

It is an aspirational commonplace to assert that we live in an "international community." The truth is far from that. There is no such thing as a global body politic, all members adhering to the same laws and recognizing the same authorities. To the contrary, the domestic realm and the international realm have always been and will always remain fundamentally different in kind. It is, consequently, a critical error to presume that antecedent, positive rule-making, the foundation for the rule of law in the domestic sphere, can be transposed to the arena of foreign relations without enormous risk to national security.[4] The Framers understood the distinction well, and bequeathed us a Constitution that is adaptable to both

settings but operates very differently in each. It does not delineate precisely a boundary between presidential and congressional authority. "The great ordinances of the Constitution," Justice Oliver Wendell Holmes admonished, "do not establish and divide fields of black and white."[5] Rather, our fundamental law allows for situational dynamism in the relations between these two competing allies.[6] Much of the ebb and flow is ascribable to the fact that the domestic and international realms implicate distinct species of executive power.

In the purely domestic arena, the executive exercises police powers on society's behalf in order to discipline errant members of the body politic, who have allegedly violated its rules.[7] Such members, whether citizens or lawful resident aliens, are woven into our national fabric and thus possessed of the panoply of constitutional protections.[8] With respect to exclusively domestic matters, courts have become accepted as a bulwark against suspect executive action; presumptions exist in favor of privacy and innocence; and both accused defendants and investigative subjects enjoy the assistance of counsel, who put the government to maximum effort if it is to gather intelligence and obtain convictions. The line our society has painstakingly drawn here is buttressed by an enlightened conviction that it is preferable for government to fail in punishing the guilty than for a single innocent person to be wrongly convicted or otherwise deprived of his rights.[9]

This is emphatically not so in foreign relations. For, as Alexander Hamilton observed,

> [I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[10]

Internationally, our government confronts a host of sovereign states and sub-national entities (particularly international terrorist organizations), all claiming the right to use force against the United States, its citizens and interests. Here, the president stands as the embodiment of the American people, their sovereign representative, singularly responsible for their security. The executive mission is not to enforce American law against suspected criminals. Rather, it is to exercise foreign affairs powers, and

their concomitant national defense powers, against predominantly external challenges, which may metastasize into existential threats.

Moreover, hostile foreign operatives acting from without are not vested with rights under the American constitution. Their accomplices acting within our Nation may or may not enjoy constitutional protections, depending on their citizenship status or state of alienage; but in this sphere, pride of place belongs, in any event, to the collective safety of Americans. As Justice Holmes wrote for a unanimous Supreme Court in 1909, "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[11]

When true threats to national security are at issue, we do not presume the threatening operatives to be innocent. Instead, the galvanizing concern is to defeat the enemy, and as former Attorney General William P. Barr has aptly put it, to "preserve the very foundation of all our civil liberties."[12] Far from countenancing failure, the line drawn here is that government cannot be permitted to fail if we are to have freedom worthy of the name.

The Plenary Executive Power over Foreign Affairs

Our defense against failure is the Constitution's breathing into the executive the "energy" so "essential to the protection of the community against foreign attacks."[13] It is the executive alone who can summon the common defense with the necessary vigor and speed required to fend off attack. Therefore, while "the essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation *of the society*[,]" Hamilton maintained that "the *employment of the common strength ... for the common defense*, seem[s] to comprise all the functions of the executive magistrate." (Emphasis added.)[14] The Framers understood that the vigor required to muster that strength demanded "competent powers"[15] to defend against "the propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments."[16] It also called for "unity": the conjunction of control over executive prerogatives, lest they be "destroyed" by allowing other branches to share or control them, even "in part."[17]

The ABA Report (at 12) and the Scholars' Letter (at 2, 5-7) do their utmost to cabin and trivialize the relevant presidential authorities by myopic attention to the Commander in Chief Clause of Article II, Section 2. The Framers, to the contrary, reposed in the executive a congeries of powers.

There is, to begin with, the executive power itself, *all* of which is vested in the President by Article II, Section 1.[18] As Professor Yoo has recounted,

> Both political theory, as primarily developed by thinkers such as Locke, Montesquieu, and Blackstone, and shared Anglo-American constitutional history from the seventeenth century to the time of the framing, established that foreign affairs was the province of the executive branch of government. Thus, when the Framers ratified the Constitution, they would have understood that Article II, Section 1 contained the Anglo-American constitutional tradition of locating the foreign affairs power generally in the executive branch.[19]

The inherently executive nature of foreign policy, moreover, is manifest from practice and function tracing back to the very beginning of American government under the Constitution. Drawing on the constitutional framework, which commits the whole of executive power to the president and "submit[s] only special articles of it to a negative by the senate," no less seminal a figure than Thomas Jefferson himself, while functioning as the Nation's first Secretary of State, observed: "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly."[20] These conclusions accord with the interpolation of John Marshall, who, prior to becoming Chief Justice of the United States, famously declared: "The President is the sole organ of the nation in its external affairs, and its sole representative with foreign nations.… The [executive] department is entrusted with the whole foreign intercourse of the nation."[21]

Article II, Section 1 of our founding law furthermore imposes on the President alone the duty to "preserve, protect, and defend the Constitution of the United States."[22] This, too, must be considered in conjunction with the general vesting clause of Article II and the explicit grant of commander-in-chief authority, which confers upon the President "the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy."[23] Consequently, throughout the Nation's history, the President's singular responsibility for the protection of American national security, flowing from the chief executive's "plenary" foreign affairs authority, has been recognized by the federal courts and executive branch opinions

under presidential administrations of both parties – just as it was expressly acknowledged by Congress in the 1968 iteration of the federal wiretapping law previously described. Indeed, as the Justice Department asserted in a formal 1898 opinion:

> The preservation of our territorial integrity and the protection of our foreign interests is [*sic*] intrusted, in the first instance, to the President. The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the Commander in Chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, *the President is not limited to the enforcement of specific acts of Congress.* He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.[24]

The Supreme Court has repeatedly reaffirmed these conclusions. In 1850, it upheld the President's power to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."[25] In the Civil War era *Prize Cases* (arising out of President Lincoln's blockade of secessionist states), the Court construed the reservoir of Article II powers not merely to permit but, in fact, to oblige the President, even in the absence of authorizing legislation, to resist by all appropriate measures, including the use of force, any forcible attack against the United States.[26] And the Court was at perhaps its most forceful in 1936, when it recognized, in *United States v. Curtiss-Wright Export*,

> the delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a

> basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[27]

The Court reiterated in *Johnson v. Eisentrager* (1950) that "the President is exclusively responsible" for "the conduct of diplomatic and foreign affairs."[28] And yet again in *Navy v. Egan* (1988), it reaffirmed "the generally accepted view that foreign policy was the province and responsibility of the Executive."[29]

Foreign Intelligence Operations Are a Bedrock Component of the Executive's Plenary Foreign Affairs Power

There is no more fundamental element of the President's plenary authority over foreign affairs and national defense than the collection of foreign intelligence. This, of course, flows implicitly from the principles already seen that the executive power includes those authorities necessary and proper to confront and defeat external threats. But the matter is not one of inference – the obvious has often been made explicit.

Following the Civil War, addressing even the wholly domestic context, the Supreme Court found it "undoubt[able]" that the President was "authorized during war, as commander-in-chief … to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy."[30] In the post-World War II era, moreover, the Court provided both a sweeping assessment of presidential supremacy in intelligence operations, and, most significantly for present purposes, a profound skepticism regarding judicial intrusion into this domain.

Interestingly, the Court's opinion in that case, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,[31] was written by Justice Robert Jackson – also the author of a famous concurrence in the 1952 Steel Seizure case[32] on which the ABA and constitutional scholars rely heavily, and who, as U.S. Attorney General in the run-up to World War II, carried out warrantless electronic surveillance within the United States at the direction of President Franklin D. Roosevelt.[33] In *Chicago & Southern Air Lines*, Justice Jackson wrote:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant

> information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[34]

Not surprisingly given these realities, the Court has continued to defer to presidential authority in the field of intelligence operations. In 1988, for example, it upheld the power of the executive branch to terminate a CIA employee based on nothing more than sexual preference.[35] In a concurring opinion, Justice O'Connor stressed, "The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations.'"[36]

The President of the United States Has Inherent Constitutional Authority to Conduct Warrantless Electronic Surveillance To Protect the Nation Against Attack by Foreign Powers, Particularly during Wartime.

Introduction

It merits emphasis that "[w]e are at war, and al Qaeda is not a conventional enemy. Since the September 11 attacks, it has promised again and again to deliver another, even more devastating attack on America. In the meantime, it has killed hundreds of innocent people around the world through large-scale attacks in Indonesia, Madrid, and London[,] and [its] plans include infiltrating our cities and communities and plotting with affiliates abroad to kill innocent Americans."[37] Given the foregoing firmly rooted principles, it is odd that there should be any question whether the President

of the United States is empowered under Article II to direct agents of the executive branch to conduct electronic surveillance of foreign operatives, absent court supervision, particularly (a) during wartime, and (b) under circumstances in which the enemy has not only already succeeded in one massive strike against the homeland (in addition to several other attacks against sovereign American targets),[38] but continues to threaten (indeed, to promise, as recently as March 10, 2006) more such attacks, even as it confronts over 150,000 members of the U.S. armed forces on foreign soil.[39] The Congress itself, as we have recounted, expressly recognized this formidable executive authority when it enacted Title III in 1968. The constitutional anomaly, if there is one in this equation, is FISA, not the President's inherent authority.

Even if one assumes, for argument's sake, that presidential power in this regard should be assessed under the jurisprudence of judicially sanctioned searches, warrantless national security searches against a foreign enemy in wartime would easily pass muster. The more interesting question is whether FISA, which has never, in its 28-year history, been tested in the Supreme Court, would survive constitutional challenge.

To be clear, it is not the purpose of the instant memorandum to establish that FISA is necessarily *ultra vires*. Our point is merely that FISA's patent incongruities must be evaluated in connection with any contention that the NSA's terrorist surveillance program is either unlawful or should, as a matter of prudence, be brought within the FISA scheme. For bringing the program within the ambit of FISA would mean one of two things, neither of which can be defended: either the Nation must be deemed powerless to take commonsense measures to protect itself against an enemy determined to ravage the homeland, very likely with weapons of mass destruction capable of dwarfing the carnage of 9/11;[40] or the Fourth Amendment's Warrant Clause must be deemed a nullity.

FISA, in sum, is problematic here for at least two reasons. First, if regarded as binding in all instances, it simply could not be squared with separation-of-powers principles because it has invaded a presidential power – in truth, a *core* presidential power, one which is immanently political and on which, as we have seen, the existential security of the Nation depends. It has, in fact, not merely invaded and diminished that power, but delegated it to the non-political branch which – as the Supreme Court forcefully observed in *Chicago & Southern Air Lines* – has neither the requisite expertise nor the requisite accountability to the public whose lives are at stake. Second, imposing FISA's regime on the NSA program would inevitably

transgress the only proper judicial role prescribed by the Fourth Amendment, to wit, to determine in connection with those searches for which a warrant is required whether there is probable cause to permit the search.

Inherent Executive Authority To Order Electronic Surveillance

Critics have tirelessly portrayed the NSA's terrorist surveillance program as "domestic spying."[41] This is a distortion. As the Justice Department has explained, "the President … since shortly after the attacks of September 11, 2001, … has authorized the [NSA] to intercept *international* communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations" (emphasis added).[42] "The program only applies to communications where one party is located outside of the United States. … It is only focused on members of Al Qaeda and affiliated groups. Communications are only intercepted if there is a reasonable basis to believe that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda."[43] The program, furthermore, is not designed to secure evidence for prosecuting terrorists in eventual court proceedings; rather, it is a *wartime* program with "a military nature that requires speed and agility."[44]

While there is a very good argument that there would be nothing constitutionally untoward were the President to authorize the warrantless interception of *wholly domestic* electronic communications involving operatives of a foreign power (especially one with which the Nation is at war),[45] that has not been done. We are dealing, instead, with communications that are international in character. Though they have a domestic component, they necessarily implicate the collection of foreign intelligence, an exclusively presidential prerogative which, as we have seen, is basic to the executive function.[46]

As a practical matter, moreover, it is worth pausing for a moment to consider what we now know about al Qaeda and 9/11. The most destructive enemy attack in the history of the United States was carried out by a relative handful of terrorist operatives stationed inside the U.S. homeland (some for well over a year). Their activities were orchestrated, and their marching orders given, by higher ranking terrorists overseas, with whom they communicated intermittently. The NSA, it is noted, regularly monitors communications as to which all interlocutors are situated outside the United States (that, of course, is the lion's share of NSA's institutional mission), and those communications are excluded from coverage by the FISA regime.[47] Yet, it cannot be gainsaid in the post-9/11 world that the peril posed by

virtually all such contacts pales in comparison to enemy communications *that reach into the United States*. That is to say, at stake here are the communications which potentially pose the greatest threat to national security.[48]

In any event, consistent with the centrality of intelligence collection to national security,[49] with the executive's incontestable constitutional supremacy in this field, and with what the Supreme Court has regarded as the "obvious and unarguable" proposition "that no governmental interest is more compelling than the security of the Nation,"[50] American presidents have been directing the penetration of enemy communications, i.e., conducting signals intelligence both inside and outside U.S. territory, since Samuel Morse invented the electric telegraph in 1844.[51] During the Civil War, both Union and Confederate forces engaged extensively in clandestine intelligence activities, including the interception of both mail and telegraph communications.[52]

The first formal U.S. intelligence agencies, the Office of Naval Intelligence and the Army's Military Intelligence Division, were formed during the 1880's and used sources inside Western Union in Havana to intercept vital enemy communiqués from Madrid during the Spanish-American War of 1898.[53] During the Mexican Revolution, and, particularly, the 1916 Pancho Villa Expedition under the command of General John J. Pershing, the army conducted signals intelligence operations in Mexico City against both Villa's forces and those of the Mexican government.[54]

World War I saw the establishment in the army of the first permanent communications intelligence agency, the earliest forerunner of today's NSA;[55] while the FBI's forebear, the Justice Department's Bureau of Investigation, joined Secret Service and military counter-intelligence squads in disrupting German covert operations within the United States.[56] Among other tactics, the growing intelligence apparatus intercepted communications that crossed American borders, including those by wireless telegraph and by telephone (those technologies having been developing since the 1870s).[57] "President Woodrow Wilson (citing only his constitutional powers and the joint resolution declaring war) ordered the censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines."[58]

In World War II, the military employed code-breaking and counter-intelligence skills honed during the 1920s and -30s, while the FBI launched counter-intelligence operations against enemy operatives in the Western Hemisphere.[59] Even before American entry into the war, President Roosevelt

instructed Attorney General Jackson,

> … in such cases as you may approve, after investigation[,]… to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested to limit these investigations so conducted to a minimum and limit them insofar as possible to aliens.[60]

The attack on Pearl Harbor (until 9/11, the worst ever against the United States in death-toll terms) was at least partially the result of an intelligence debacle directly traceable to the failure to collect and effectively analyze enemy communications.[61] Immediately following the attack, President Roosevelt first gave FBI Director J. Edgar Hoover "temporary powers to direct all news censorship and to *control all other telecommunications traffic* in and out of the United States," then refined the effort, under the War Powers Act of 1941, to a more permanent government office which conducted electronic surveillance.[62] The President's directives gave the government access to "communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country."[63]

Soon after Pearl Harbor, the Office of the Coordinator of Information (which had been responsible for analyzing developments in Japan) evolved into the Office of Strategic Services which, after the war, itself became the CIA.[64] In the interim, U.S. communications intelligence coups, such as the "MAGIC" interceptions of Japanese diplomatic code traffic and the penetration of "Enigma" encrypted traffic from German U-boats, were crucial to the war effort.[65] As the Justice Department has recently summarized, "signals intelligence 'helped shorten the war by perhaps two years, reduce the loss of life, and make inevitable an Allied victory.'"[66]

Notably, the President's power over the collection of foreign intelligence, manifest both from the historic understanding of the executive role and from the consistent practice of American presidents, has been explicitly recognized by the United States courts, both before and after FISA's 1978 enactment. Of course, the constitutional implications of most wiretapping – national security and otherwise – lay undetected in the early decades of telecommunications technology. In 1928, the Supreme Court

held that telephone taps posed no Fourth Amendment issue, in part because they generally did not call for a physical intrusion of the premises where the target device was located.[67] Nevertheless, adherence to a property-based understanding of the Fourth Amendment gave way in the 1960s to a privacy-based interpretation.[68] With respect specifically to wiretapping, this new outlook resulted, in 1967, in the Court's landmark decision in *Katz v. United States*, invalidating warrantless electronic eavesdropping, despite the absence of physical trespass by law enforcement, because it violated the subject's reasonable expectation of privacy.[69]

Katz soon prompted Congress to act, establishing in the afore-described Title III a comprehensive electronic surveillance regime for federal criminal investigations. It is essential to register, however, that both the Supreme Court in *Katz* and the Congress in Title III expressly conceded the existence of inherent presidential power in the realm of national defense against foreign threats. In homing in on the vastly different area of eavesdropping in anticipation of securing evidence for use at domestic, civilian trials of ordinary crimes, the *Katz* Court took pains to qualify that it was not speaking to "a situation involving the national security" as to which it suggested "safeguards other than prior authorization by a magistrate" might satisfy any Fourth Amendment concern.[70] Justice White was more emphatic in a concurring opinion, recognizing both the President's inherent authority and the judiciary's inferior institutional competence in assessing the needs of national defense:

> In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, … the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. … We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.[71]

In enacting Title III, Congress codified this recognition of presidential authority in Section 2511(3) of Title 18, United States Code:

> Nothing contained in this chapter or in section 605 of the

> Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit *the constitutional power of the President* to take such measures as *he deems* necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, *to obtain foreign intelligence information deemed essential to the security of the United States*, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication *intercepted by authority of the President in the exercise of the foregoing powers* may be *received in evidence in any trial hearing, or other proceeding only where such interception was reasonable*, and shall not be otherwise used or disclosed except as is necessary *to implement that power*.

(Emphasis added.) Especially worthy of attention here is Congress's careful delineation not only of the President's prerogatives but of its own. In this regard, section 2511(3) acknowledged the executive's power over, and superior institutional competence in, foreign intelligence collection – noting both the inherent authority to gather such information and, foundationally, that the decision whether public safety called for any particular intelligence collection was for the President alone to make.

By contrast, Congress viewed itself as being supreme in determining the standards (beyond relevant constitutional thresholds) for admissibility of evidence in federal judicial proceedings. Thus, while the legislative branch did not question the President's power to obtain national security intelligence, it hewed to the Fourth Amendment cynosure, *reasonableness*, in its own distinct, albeit related, role of determining whether such intelligence seized by the executive branch could be used as evidence in a criminal prosecution.[72]

Four years after Title III's enactment, the Supreme Court decided what is known as the *Keith* case, invalidating a warrantless search undertaken by the executive branch for purely domestic national security purposes.[73] The Court "emphasize[d]" that "the scope of our decision … involves only

the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[74] Of equal importance for present purposes, it also stressed that the occurrence of national security interceptions *inside* the United States did not render them *domestic* in nature; to the contrary, if such surveillance targeted *foreign* powers, it would be beyond the scope of *Keith*'s warrant requirement, no matter who or where the subject was.[75] Justice Powell's majority opinion, moreover, relied heavily on the fact that the purely domestic national security context typically involved "citizens" (as opposed to alien enemies) and thus entailed "a convergence of First and Fourth Amendment values" that posed, in the Court's view, "greater jeopardy to constitutionally protected speech" than cases involving "'ordinary' crime."[76]

That said, however, *Keith* is a poorly reasoned decision – a reality that ought to be accounted for to the extent the case is seen, despite the Court's unambiguous disavowal, as bearing on the foreign intelligence realm.[77] In determining that the Constitution called for a judicial warrant based on probable cause before a search – indeed, a *national security* search – could be deemed "reasonable," the Court resorted to an implausible Fourth Amendment analysis that has since fallen into disfavor and that *Keith* itself discredits.[78] No doubt it was not as clear in 1972 as it surely is in post-9/11 America, but, especially when the goal is preventing, rather than prosecuting, a massive, deadly attack, a probable-cause pre-requisite would irresponsibly endanger the public,[79] and a requirement of *ex ante* court-sanction would place the judiciary, rather than the executive branch, in charge of national security. And as Justice White observed, concurring in the *Keith* judgment, the majority's expansive ruling was wholly unnecessary – it could easily have held the fruits of the search inadmissible at the criminal trial under Title III and not reached the weighty constitutional question whether the executive was empowered to conduct a warrantless search in the first place.[80]

The NSA Program Easily Qualifies As a Legitimate "Special Needs" Search

As demonstrated above, the executive branch, since its constitutional inception in 1788, has had plenary authority over foreign relations, the collection of foreign intelligence, and, in particular, the penetration of enemy communications in wartime. These powers flow from the Constitution. Therefore, FISA could not and, as the federal courts have stated, did not vitiate or limit them. If a crisis presented dire enough exigencies, there is

little question that the executive branch would be within its authority – indeed, within its *duty* – to conduct warrantless interception of communications *wholly within* the United States.[81] A fortiori, there should be no doubt that the President may direct the monitoring of wartime international communications of suspected enemy operatives – given his supreme constitutional authority in the international arena and over the conduct of war, to say nothing of the drastically reduced expectation of privacy attendant to communications outside U.S. territory even in ordinary times.

Presidential authority in this regard does not undermine constitutional privacy interests. The touchstone of the Fourth Amendment is reasonableness, and reasonableness depends on an evaluation of all the relevant circumstances.[82] What is reasonable under peacetime conditions is often drastically different from what obtains in the wartime environment. This is not, as the trite hyperbole holds, a case of war "suspending the Constitution;" it is the Constitution in action. It is not extending the President "a blank check;" it is a recognition that the executive always has the power to take measures reasonably necessary to protect Americans from external threats – a recognition that readily discerns the manifest difference between intercepting the international communications of a demonstrably capable enemy striving to carry out a massive attack on U.S. soil and, say, seizing control of the domestic steel industry to secure an attenuated benefit to a war effort.

Even if, *arguendo*, the NSA program were not justified by the executive's inherent authority, and were found to be outside of FISA statutory prescriptions, it would still be licit under the Supreme Court's "special needs" doctrine.[83] This doctrine holds that special public interests "beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[84] The existence vel non of a "special need" turns on whether the compelling interest identified, even if it overlaps with or implicates the machinery of the criminal law, sufficiently transcends the state's "general interest in law enforcement."[85]

This, in turn, is determined by a variety of factors, including whether prosecution is the dominant purpose of, and whether police participation is pervasive in, the search at issue – although the Supreme Court has made clear that even searches "primarily related to law enforcement" will be upheld as long as the "primary purpose" goes sufficiently beyond "advanc[ing] the general [public] interest in crime control."[86] Thus, for example, the "State's operation of a probation system," has been held to be a special

need dispensing with the "usual warrant and probable-cause requirements[,]" as has state "operation of a school, government office or prison, or its supervision of a regulated industry."[87] On the other hand, narcotics checkpoints and drug screening primarily focused on obtaining evidence for prosecution have been held too consonant with the ordinary needs of law enforcement to sanction departure from the usual requirements, in the law enforcement realm, of a warrant or particularized suspicion.[88]

When government alleges that a public interest is adequately compelling to permit warrantless searches, courts "employ a balancing test that weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that supported the program."[89] The gravity of a particular threat is a crucial factor, although obviously, as Supreme Court explained in *Indianapolis v. Edmond*, gravity "alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given *purpose.*" (Emphasis added).[90] As the Court of Review elaborated while considering special needs searches in the FISA context, by "purpose," the *Edmond* Court "was referring not to a subjective intent [of police officers], which is not relevant in ordinary Fourth Amendment probable cause analysis, but rather to a *programmatic* purpose." (Emphasis added).[91]

Under these standards, the warrantless surveillance of international calls involving al Qaeda operatives during wartime easily passes muster. To be sure, eavesdropping on communications is intrusive. Nevertheless, as further discussed infra, the expectation of privacy one has in making or receiving a communication which crosses international boundaries is greatly diminished, assuming it exists at all, particularly if one is communicating with persons tied to a wartime enemy, located in a zone of active combat, or situated in a place where government is authoritarian or otherwise known for monitoring telecommunications.[92]

Even if the expectation of privacy were reasonable, however, the other side of the ledger vastly outweighs it. First, at issue here is the most paramount of public interests, the security of the American people and their government from ruinous attack. This special need is manifestly more central than the important public interests in, for example, highway safety, transit safety and immigration control that have been upheld in the special needs cases. Indeed, in *Edmond*, though it invalidated checkpoints set up primarily to search for drug trafficking violations, the Supreme Court specifically acknowledged that an appropriately tailored road block could be used "to thwart an imminent terrorist attack."[93] As the Foreign Intelligence Surveillance Court of Review observed in construing *Edmond*, this is

because "[t]he nature of the 'emergency,' which is simply another word for threat, takes the matter out of the realm of ordinary crime control."[94]

Which brings us to a more elementary point: the NSA program is not about crime control at all, much less "ordinary" crime control. Indeed, it is not even a law enforcement program. As the administration has pointed out, it is a wartime *military* intelligence program which is conducted not by law enforcement, or even an intelligence arm of a domestic law enforcement agency, but by the NSA under the auspices of the Department of Defense. Its purpose is not to develop prosecutions. It is to provide an early warning system against terrorist attacks by an enemy which is well known to be plotting such attacks and has shown itself fully capable of executing them.

Thus, the special wartime need of national security against an enemy strike by mass-destruction weapons would render the NSA program eminently reasonable and permissible under the Fourth Amendment.

The Post-*Keith* Case Law

In any event, with respect to the presently germane question of inherent executive search authority in the foreign affairs sphere, the judiciary's answer has been cut-and-dried, however much critics endeavor to befog it. Ever since *Keith*, both before and after the enactment of FISA, all federal appellate courts to have squarely confronted the issue have found that the President is constitutionally empowered, under Article II, to conduct warrantless electronic surveillance when he deems it necessary to protect the Nation from external threats.[95] The rationale was perhaps best amplified by the Fifth Circuit in *United States v. Brown*, decided the year after *Keith*:

> [B]ecause of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm [that] the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. *Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere*. [This principle] is buttressed by a thread which runs through the Federalist Papers: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations.[96]

In addition, the Third Circuit recognized the President's inherent authority prior to FISA's passage in *United States v. Butenko*.[97] The Fourth Circuit did so in *United States v. Truong Dinh Hung*, a case involving pre-FISA events though decided after FISA became law.[98] But most significant in this regard is clearly the 2002 decision in *In re Sealed Case*[99] by the Foreign Intelligence Surveillance Court of Review – the most specialized tribunal ever to review FISA. Though critics now implausibly claim that Congress, in enacting FISA, a mere statute, was somehow at liberty to diminish authority inherent in the President under Article II of the Constitution, the Court of Review did not see it that way. Notwithstanding that FISA had, by 2002, been on the books for nearly a quarter-century, the Court stated:

> The *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…. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.[100]

Separation of Powers

The Framers perceived no greater intrinsic threat to liberty than the accretion of too much power in any department of government. Consequently, they painstakingly designed a tripartite system premised on a strict separation of powers. "Even before the birth of this country," the Supreme Court related in 1996, "separation of powers was known to be a defense against tyranny … [and] it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."[101] As Madison wrote, "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty[.]"[102]

Of particular concern in this regard was what the Framers saw as "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments[.]"[103] In fact, it was thought common sense that even if no such propensity "to invade the rights of the executive" had ever manifested itself "in the legislative body, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not be left to the mercy of the other but ought to possess a constitutional and effectual power of self-defense."[104]

It is thus especially regrettable that so much of the controversy over the NSA program has been driven (or, better, skewed) by the claim that President Bush has placed himself "above the law," or that impropriety must be afoot if the President takes actions arguably outside a legislative framework. In shoring up the separation of powers, the Framers did not content themselves with "a mere parchment delineation of the boundaries" between departments.[105] Instead, as Madison averred, "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department *the necessary constitutional means and personal motives to resist encroachments of the others*. The *provision for defense* must in this, as in all other cases, be made commensurate to the danger of attack" (emphasis added).[106] Palpably, the departments were not expected to take intrusions lying down; the President was not expected to accept in obsequious good cheer a congressional pronouncement that its prescription was to be the "exclusive means" for carrying out some task or another – notwithstanding suggestions to the contrary from the ABA and the scholars, who appear to think their case is somehow improved by italicizing the word *exclusive* when not chanting it like a mantra.[107] To the contrary, when the actions of one branch invaded another's turf, the offended branch was expected to fight back – in truth, was obliged to do so if liberty and constitutional governance were to be vindicated.

The executive branch was accorded a considerable arsenal for this purpose. The chief executive, of course, was given a qualified veto over legislative enactments.[108] More basically, however, all Article II authority was concentrated in a single set of hands: "The executive Power shall be vested in a President of the United States of America."[109] With respect to any power or prerogative that is executive in nature, the President is the exclusive master. If a constitutional power is properly deemed "executive," it belongs to the President and those under his direct and complete control. Congress may neither exercise it nor delegate it to the Judiciary. The presidential power contemplated by the Constitution, as Hamilton put it, would be "destroyed" if it were made "subject in whole or in part to the control and cooperation of others[.]"[110]

Over two centuries ago, in the landmark case of *Marbury v. Madison*,[111] Chief Justice Marshall stated the immutable principle:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise

> of which he is to use *his own discretion*, and is accountable only to his country *in his political character, and to his own conscience*. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with *his* orders. … In such cases, their acts are his acts; *and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. … The acts of such an officer, as an officer, can never be examinable by the courts.* [Emphasis added.].[112]

As already noted, the Constitution does not definitively mark terrain where the power of one branch ends and another's begins. The powers of the branches interrelate and depend on one another. Our foundational law is intended to be dynamic and adaptable to crises. But in their core functions, each branch stands supreme and inviolable. Congress may no more delegate to the Judiciary the ultimate authority to decide which potential enemy communications should be monitored in wartime than it could transfer to the President by mere legislation the power to decide, say, what standards should govern the admissibility of confessions at trial, a paramount judicial function.[113] As the contemporary Supreme Court has explained, in *Clinton v. Jones*, "The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our government. … Thus, for example, the Congress may not exercise … the executive power to manage an airport."[114]

This is a significant point, and a significant example, for present purposes. As critics of the NSA program often point out, Congress undeniably has very broad authority to regulate domestic affairs, and it has a few narrow, albeit highly consequential, prerogatives in the arena of foreign affairs. Congress is empowered to prescribe rules for the conduct of government; only Congress may declare war; and Congress has the ultimate check over all presidential initiatives in the international sphere, including the NSA program, for it may starve any or all of them of funding.[115]

But Congress may not invade the President's "central prerogatives."[116] In this regard, the President has no more central prerogatives than the management of international affairs, the collection of

foreign intelligence, the direction of military operations, and the defense of the United States in wartime against an enemy determined to strike U.S. territory and slaughter Americans. It should, therefore, come as no surprise that, even after nearly twenty years of FISA's operation, the *Jones* Supreme Court would take pains to instruct that the conduct of foreign affairs is "a realm in which the Court has recognized that [i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."[117] Moreover, as that Court's airport example demonstrates, the legislature may not *execute* the laws, or assign their execution to the courts or some other non-executive actor. If the function involved is paradigmatically executive, Congress may not dictate how the President fulfills his duty. It may not direct the President regarding which target to strike, what day to attack, or how to deploy the military – including its intelligence-collection assets – to best protect the homeland.

Meanwhile, caterwauling to the contrary, this comes very far from rendering the executive imperial or the legislature impotent. Congress could end the NSA program tomorrow, just as it can terminate any military operation or excursion, by cutting off financial support. It would be a perversion of our system, however, for Congress first to enact a carnivorous law (or to construe a questionable law in a way) that purports to consume an executive prerogative, then to claim the President is acting lawlessly by resisting the arrangement.

It is only natural, then, that long part of the armamentarium by which the President defends his prerogatives, just as the Framers intended each of the branches to do, is the ability to ignore or refuse to execute laws he believes violate the Constitution. In 1876, for example, Congress passed a law purporting to make its approval necessary before the President could remove certain executive-branch officials. The law was blatantly ignored by President Wilson as an unconstitutional incursion into the executive's appointments power.[118] In 1926, far from concluding that Wilson had placed himself "above the law" or taken lawless action, the Supreme Court struck down the statute in *Myers v. United States*.[119]

Similarly, the War Powers Resolution – like FISA, an artifact of the hyper-aggressive Congress of the Watergate and post-Vietnam era – blatantly intruded on the executive's war-fighting and foreign affairs powers.[120] Unsurprisingly, since its enactment over President Richard Nixon's veto in 1973, it has been regarded by all Presidents as an unconstitutional infringement on Article II powers to utilize the armed forces

in defense of what the President deems to be vital American interests, and thus it has consistently been either ignored or paid only the barest lip-service to.[121] In 1999 for example, President Clinton unapologetically disregarded it by committing American forces to combat operations in the Balkans without formal congressional authorization for well beyond the statute's 60-day limit.[122] The federal courts, prudently, demurred from immersing themselves in this classic political dispute.[123] Congress, of course, had an entirely effective, politically accountable remedy: it could have cut off funding.[124]

Given the depth and clarity of this history and practice, it makes perfect sense that there should be formal opinions of the Justice Department's Office of Legal Counsel (OLC), under administrations of both parties, regarding it as – to borrow the terms of Walter Dellinger, then-Assistant Attorney General in charge of the Clinton administration's OLC – a "general" and "uncontroversial" proposition that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional." As Dellinger elaborated, in a 1994 memorandum to the White House Counsel's Office, which he entitled "Presidential Authority to Decline to Execute Unconstitutional Statutes" (with a subheading, "This memorandum discusses the President's constitutional authority to decline to execute unconstitutional statutes"):

> [T]he Court's decision in *Myers v. United States*, 272 U.S. 52 (1926) … sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring); *see also* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).[125]

Dellinger further underscored that this practice was entrenched and bipartisan: "[C]onsistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the

President's authority to decline to effectuate enactments that the President views as unconstitutional."[126]

In 2000, furthermore, a new head of the Clinton Justice Department's OLC issued yet another formal opinion – one with ironic bearing on the current controversy – which was called "Sharing Title III Electronic Surveillance Material with the Intelligence Community."[127] In addition to other Title III provisions already alluded to, Congress had strictly limited the sharing of eavesdropping evidence.[128] Nevertheless, the OLC admonished that there would be times when the wiretapping of Americans might "yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III."[129]

There appears to have been little, if any, concern within President Clinton's Justice Department that this might be tantamount to "domestic spying."[130] As the OLC flatly maintained, "Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be 'subject to an implied exception in deference to such presidential powers.'"[131]

Against this overwhelming tide of separation-of-powers authority and practice, which the NSA program opponents (many of whom worked in the Clinton administration) largely deal with by ignoring, the critics gamely cling to a misreading of Justice Jackson's *Steel Seizure* opinion[132] – a concurrence which even Justice Jackson regarded as "somewhat over-simplified,"[133] which did not capture a Court majority, and which has since, in any event, been refined by the Court's 1981 opinion in *Dames & Moore v. Regan*.[134] Then-Justice Rehnquist's *Dames & Moore* opinion, which described Justice Jackson as having "elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case,"[135] recounted the Jackson test as follows:

> When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who

> might attack it." [*Youngstown*, 343 U.S.] at 637. When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Ibid.* In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." *Ibid*. Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id*., at 637-638.[136]

The critics construe this test as having effectively accomplished the Framers' worst nightmare. Put aside for a moment the incorrectness of their contention that President Bush's NSA program is at total loggerheads with FISA, thus putting us, so the argument goes, in the last Jackson category.[137] Their position boils down to the following: In any field in which Congress may permissibly act at all, it may pre-empt the President, who is impotent to act unless his authority is "exclusive."[138] In other words, Congress, not the Constitution, becomes the master of executive power.

This legislature-on-steroids contention can be squared neither with the Framers' precise caution against permitting such a legislative behemoth to arise, nor with the Supreme Court's elaborate separation-of-powers jurisprudence. Recognizing the lack of bright lines, the Court adopts a far more balanced and cautious approach.[139] It accounts not only for the comparative enumerated powers implicated in any situation but also the areas in which they are exercised (*e.g*., foreign or domestic), the times at which they are exercised (*e.g*., war or peace), the relative institutional competence of the departments in those areas, and the relative significance of the implicated powers to the particular department's given portfolio.[140] Consequently, while giving him credit for having constructed a useful analytical tool, the *Dames & Moore* Court concurred with Justice Jackson's own conclusion that his three-part test was "over-simplified," and concluded, to the contrary, that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional

authorization to explicit congressional prohibition."

Of course, Justice Jackson clearly did not intend to suggest that either the President or Congress would always have no power whatsoever at the "lowest ebb." Indeed, he added that the President would still be relying "upon his own constitutional powers minus any constitutional powers of Congress over the same matter"[141] – implying that there might be situations in which, for example, an immense constitutional power of the executive was pitted against one of congress's undeniable but less-weighty prerogatives.

It is pointless, however, to wrestle with what this implicates for the critics' "exclusivity" argument, because that argument is a red-herring. It is a crude pigeonhole, and *Dames & Moore* illustrates that there are no pigeonholes. As Justice Kennedy assessed the situation eight years after *Dames & Moore* (and some 37 years after *Youngstown*), "In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President 'from accomplishing [his] constitutionally assigned functions' . . . . and whether the extent of the intrusion on the President's powers 'is justified by an overriding need to promote objectives within the constitutional authority of Congress.'"[142]

There are powerful reasons to doubt the constitutional propriety of FISA. It arguably purports to diminish the President's power to defend the Nation against foreign threats. In order to justify bringing the courts into the national security equation, it imposes the Warrant Clause standard on searches that would be entirely reasonable if conducted on less than probable cause, thus potentially putting the Nation in grievous danger. And, again arguably, it gives the ultimate say as to which threatening alien operatives may be subjected to electronic surveillance and searches to federal judges unaccountable to the public, rather than to the President of the United States, the only constitutional officer elected by all of the American people – and elected by them specifically to vouchsafe their security from external enemies.

Yet, FISA has not caused a constitutional crisis because, in its nearly 30-year history, it has not been construed that way. In essence, the branches have respectfully given each other the benefit of the doubt and endeavored to work cooperatively within the system. While by-and-large submitting to FISA (and perhaps even benefiting from the procedural discipline its regime imposes[143] – at least when those procedures have not frustrated the need to act with dispatch), the executive branch has nonetheless maintained its

rightful claim of inherent authority to dispense with FISA's restrictions if, in the President's judgment, national security demands it.[144] The courts, while administering FISA in a manner that has generally – albeit, not always – been appropriately deferential to the executive's superior institutional competence in matters of intelligence and foreign threats, have conceded that, if push comes to shove, the Constitution does empower the President to conduct warrantless surveillance to counter external national security threats. Congress has achieved more efficient oversight due to FISA's reporting regime,[145] and has occasionally amended the statute (though, it is fair to say, not frequently or thoroughly enough), to minimize its impediments to public safety efforts.

All this is to say, there is no reason in law or in fact to adopt the critics' ill-conceived, mechanistic "exclusivity" approach. Indeed, though they quote Justice Jackson's obsolete (and never actually binding) third category, they fail to cite a single case that has arisen in the 54 years since the concurrence was written in which it was applied as they articulate it – viz., one which reasons that upholding executive power necessitates finding that Congress has been pre-empted from the field.[146]

FISA Should Not Be Construed to Preclude the NSA Program

As suggested above, (a) if FISA and the President's Article II power to defend the United States against foreign threats were, in fact, at loggerheads, it would be FISA that would have to give way; and (b) there is no algorithm prescribed by the Supreme Court's jurisprudence, including Justice Jackson's *Youngstown* concurrence, which compels a conclusion that the NSA program and FISA cannot coexist. Significantly, however, a careful reading of FISA illuminates that there is little, if any, reason to read the statute as at loggerheads with the President's powers – particularly if that reading is guided by long-settled principles favoring the avoidance of constitutional disputes, rather than the critics' approach of gratuitously provoking such a dispute.

FISA, as the ABA points out, was a reaction (in many ways, an overreaction) to the Church Committee Hearings, as well as other inquiries, into the intelligence abuses of the Watergate era, which infamously included domestic spying.[147] To the extent this is offered as constitutional pedigree for FISA, such an argument is badly flawed. (To the extent it is offered for any other reason, it is, here, an irrelevant atmospheric.) That FISA may have seemed a sensible *political* response to executive abuses did not make it an appropriate *constitutional* response – nor, a fortiori, an appropriate

national security response since it is the Constitution, not the ephemeral politics of any single moment, that undergirds the liberty and the security of the American people.

The Framers took second-place to no one in their suspiciousness of overbearing government and their revulsion against tyranny. The powers enumerated in our fundamental law are vested in the national government, and self-policed by the rigors of separation, because those powers are necessary, not because they are incapable of abuse. In 1849, while pointedly rejecting a claim that affirming the President's Article IV power to suppress insurrection would be "dangerous to liberty," the Supreme Court, in *Luther v. Borden*, trenchantly cautioned that "[a]ll power may be abused if placed in unworthy hands."[148] The remedy for abuse is to dispense with the unworthy hands, as was done in the Watergate crisis. The remedy is not to dispense with, hamstring, or gut the power itself, for doing so imperils the Nation by leaving it unfortified when the power is inevitably needed for public safety.

In this regard, our insurance, while concededly imperfect because no human process can avoid imperfection, is two-fold. First, the American people, a good and decent people, thoroughly vet their presidents (today more than ever) before directly electing them, for very limited terms – the President, as Hamilton observed, is no hereditary king.[149] Even after election, the American people remain a source of considerable suasion. (This is powerfully illustrated even now: If public opinion polls did not show strong support for the interception of al Qaeda's communications, is there any real question that the NSA program's congressional detractors would by now have introduced legislation to cut off funding?).

As the *Luther* Court elaborated, "[T]he elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide."[150] Thus, the Court amplified, "it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual."[151] In times of crisis, when public safety is most threatened, governmental response "must be prompt, or it is of little value."[152] This, paradigmatically, is the summons for the energy and dispatch that was the Framers' very purpose in vesting national defense powers in a single person, the President. In such circumstances, "the ordinary course of proceedings in courts of justice would be utterly unfit[.]"[153] Naturally, the *Luther* Court

fully recognized that Presidents might abuse or err in the application of their enormous powers; but the remedy, it explained, was for Congress, *after* any errors have occurred, to make whole those who have been wronged, not to tether the power or transfer to a different, less institutionally competent department, the judiciary, control over its use.[154]

Thus is Congress itself, in its oversight capacity, our second insurance. The historic abuses which form the tableau for the critics' contentions cannot be gainsaid. Neither should it be denied, however, that history is dynamic because we learn from it. The sins of Watergate – like the civil liberties abuses that flowed from Sedition Act of 1798, some of the Civil War executive detentions and military proceedings, the Espionage Act of 1917, and the Japanese internment of World War II – are far less likely of repetition precisely because they have happened, and the relevant constitutional actors, like the rest of the American people, have learned from them. Indeed, from a civil libertarian perspective, it is quite remarkable progress that we are now arguing over the monitoring of international enemy communications in wartime – a historical commonplace that pales in comparison to the true blights of the past which we needn't argue over today because they seem presently inconceivable.

The lesson of history, nonetheless, is that robust powers are vital to our defense, that rogues will be rogues whatever the rules are, and that the intolerance of the American people for governmental overreach is a condign political restraint. This makes it imperative to oversee the use of great power and to remove the rogues – which the Constitution fully empowers Congress to do by conducting hearings, defunding executive initiatives, and, in extreme cases, impeaching a President who commits high crimes and misdemeanors.[155] Nonetheless, constraining *power* instead of *political actors* endangers our country. It diminishes the arsenal available to meet profound threats, and it ties the hands only of those honorably disposed to hew to the law – that is, those in whose hands the power is safe in the first place. To the contrary, the Framers believed there could be "no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to the defense of its efficacy[.]"[156]

In contrast, FISA's general approach is to harness presidential power in the arena of foreign intelligence collection, the very core of executive authority. Congress's pursuit of this end was a transparent instantiation of the legislative propensity – adumbrated by Hamilton and Madison – to devour the prerogatives of other branches. As previously described, Section 2511(3) of the original federal wiretap statute, Title III, had carved national

security monitoring out of its regulation of electronic surveillance, expressly recognizing the "constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack ... [and] to obtain foreign intelligence information deemed essential to the security of the United States." This admission, so well-established as to be undeniable in 1968, was a major inconvenience when the political environment of the 1970s provided lush opportunities for the curtailment of executive authority in general,[157] and executive eavesdropping authority in particular.

So, coterminous with erecting the wide-ranging FISA scheme, which purported to regulate much – though by no means all – electronic surveillance in the foreign intelligence field, Congress also repealed Section 2511(3). In its place – as if a measure as facile as legislative tinkering could somehow alter the "constitutional power of the President" – was enacted Section 2511(2)(f), which pronounced that the "procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of wire and oral communications may be conducted."[158] The loop was closed by a FISA provision, codified at Section 1809(a)(1) of Title 50, which criminalizes the intentional conduct of "electronic surveillance under color of law except as authorized by statute." Thus is the linchpin of the critics' claim that these two statutes, FISA and Title III, are the "exclusive" legal means of electronic eavesdropping.[159]

This statutory exclusivity claim is, to put it mildly, of dubious validity given the centrality of the executive power implicated; the utter implausibility that the Framers' ingenious construct ever contemplated even legislative, much less judicial, control over which foreign enemy communications could be monitored (especially in wartime); and the Foreign Intelligence Court of Review's assumption of the obvious: that notwithstanding a quarter-century of FISA, the President maintains inherent authority to conduct warrantless surveillance for foreign intelligence purposes. But leaving all that aside, there are several reasons for concluding that one need not invalidate FISA in order to uphold the NSA program.

The most manifest – although completely unmentioned by the program's critics (and, to be fair, given little attention by the administration) – comes right out of the most rudimentary aspect of FISA itself: the statutorily defined species of "electronic surveillance" which come within FISA's ambit. There are four of these set forth in Section 1801(f):

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any *wire or radio* communication sent by or intended to be received by a *particular, known United States person who is in the United States*, if the contents are acquired by *intentionally targeting* that United States person, *under circumstances in which a person has a reasonable expectation of privacy* and a warrant would be required for law enforcement purposes;
>
> (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any *wire* communication to or from a person *in the United States*, without the consent of any party thereto, *if such acquisition occurs in the United States*, …;
>
> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any *radio* communication, *under circumstances in which a person has a reasonable expectation of privacy* and a warrant would be required for law enforcement purposes, and *if both the sender and all intended recipients are located within the United States*; or
>
> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, *under circumstances in which a person has a reasonable expectation of privacy* and a warrant would be required for law enforcement purposes.

(Emphasis added.) Parsed carefully, for all the high dudgeon about extensive "domestic spying," the range of conversations implicated in this controversy – which is to say, the ground where the NSA surveillance and FISA actually converge – may be much narrower than commonly supposed.[160]

To begin with, a "United States person" is, generally speaking, an American citizen or a lawful permanent resident alien.[161] If the initiator or recipient of an international communication does not have such status – if he or she is, for example, an illegal alien or an alien who is, say, a tourist, student, guest worker, or otherwise legally present but not woven into the

fabric of American society – FISA does not apply unless a communication falls within subsection 2 (on which, more momentarily) or subsection 4 (which is largely immaterial for present purposes);[162] and FISA has no application whatsoever to non-U.S. persons if communications are physically intercepted outside the United States.

FISA does apply to extra-territorial interceptions that specifically target U.S. persons who are inside the United States, *but only if they have a reasonable expectation of privacy*. This element goes nigh-unmentioned in critiques of the NSA program, but it is a gaping omission. As Justice Harlan centrally articulated the test in *Katz*, an *expectation of privacy* is reasonable only if, apart from subjective belief, it is "one that *society* is prepared to recognize as 'reasonable'" (emphasis added).[163] The problem with international communications, of course, is that they are not limited to a single "society." They implicate at least two societies, and, in every instance, at least one in which the laws and constitutional guarantees of the United States have no application, and as to which the American government is thus powerless to insure or vindicate any right to privacy.

International practice regarding telecommunications privacy varies widely – and all the more when the communications in question cross national boundaries. Much of the globe is sufficiently authoritarian that it has, as a cost of doing business, bent service providers into censoring the Internet and disclosing to government the content of subscribers' email communications.[164] In many countries, telecommunications are tightly controlled by the government rather than private enterprise. In many nations, regardless of who nominally operates telecommunications services, government routinely eavesdrops. In others still, regular practices give way to exigencies and instabilities which, thankfully, are largely without parallel in the American experience.

It is simply absurd to suggest that one engaged in an international telecommunication has anything approaching the same expectation of privacy he or she enjoys when making contact with others wholly within our society, under the exclusive guise of domestic American law. It is more unreasonable still to suggest that privacy is a reasonable expectation when one communicates with someone in a combat zone, a nation teetering on the brink of revolt or insurrection, an authoritarian country, or even a country that ostensibly aspires to democratic norms but adheres to civil liberties standards antithetical to American notions.

And it is all the more irrational to expect that one can engage in private communications with members and affiliates of an international

terrorist network that nearly every national intelligence organization in the world is desperate to penetrate – said network, just since 9/11, having visited its atrocities on Djerba, Morocco, Mombassa, Makassar, Bali, Casablanca, Riyadh, Istanbul, Madrid, London, and more targets in Afghanistan, Iraq and Israel than one can easily recount. Further, even if we were willing to suspend common sense in the arid legal exercise of delineating the contours of the "reasonable," such an approach would be catastrophic for national security. It would clamp down *only on our own government* – the shield on which our own security and our liberties depend – while granting every other nation in the world, hostile or not, the untrammeled license to surveil communications.

As Justice Harlan elaborated,

> a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

International communications are not those which traverse from home-to-home within our society. They are, instead, analogous to the open field, projected beyond our society, to or from a place where the protection of law cannot be assured and where it is highly unreasonable to suppose otherwise. While the critics have tagged the misleading label of "domestic spying" on their depictions of the NSA program, it is more likely than not that any "intentional targeting" of U.S. persons by the NSA program would not implicate FISA Section 1801(f)(1) at all since international communications, especially with al Qaeda members and associates, simply cannot be attended by a reasonable expectation of privacy.

The critics do not address the innate unreasonableness of expecting international communications to be private. Presumably, had they deigned to engage the subject, they might have suggested that FISA implicitly suggests the possibility that such communications might be thought private. Section 1801(f)(3), for example, expressly covers radio communications "in which a person has a reasonable expectation of privacy and … *both the sender and all intended recipients are located within the United States*" (emphasis added). Conversely, while subsections (f)(1) and (f)(4) also require

a reasonable expectation of privacy, they, unlike subsection (f)(3), do not specify that all participants must be inside the United States. Thus, one might logically deduce that Congress must have concluded an expectation of privacy might be reasonable under at least some circumstances where a communication crossed national boundaries.

Construing FISA to contain such a tacit legislative finding, while not implausible, would nevertheless defy abundant, explicit judicial authority. It is well settled, for example, that no expectation of privacy – and thus neither a warrant nor a probable-cause requirement – attaches to ingress and egress at our national border.[165] That principle has long embraced communications. In *United States v. Ramsey* (1977), the Supreme Court held that all international postal mail may be searched without warrant.[166] Significantly, rejecting any distinction between international communications and other types of cross-border transport, the Court turned aside contentions based on (a) purported First Amendment free-expression concerns and (b) the suggestion that the stream of communications represented by mail conveyance differed meaningfully from an individual's physically carrying a letter across the border.[167] Then-Justice Rehnquist, writing for the Court, put it succinctly: "There is no reason to infer that mailed letters somehow carry with them a greater *expectation of privacy* than do letters carried on one's person" (emphasis added).[168] Given that no expectation of privacy attends letters physically transported across borders, neither do such expectations attend communications placed in the stream of international commerce by telecommunications networks.[169] Were that not the case, then the United States would no longer retain sovereign control over its own territory.

Consequently, even if Congress were arguably understood to have reasoned that an expectation of privacy might theoretically attend international communications, the Supreme Court's contrary conclusion would be dispositive for constitutional purposes.[170] Here, moreover, Congress's reasoning is even more suspect, for two reasons. First, FISA, clearly, is an ill-conceived project to begin with: specifically, it endeavors to force suggestions that that the *Keith* Court made for the regulation of electronic surveillance in the arena of purely *domestic* national security threats onto the arena of *foreign* national security threats – an arena that is vastly different precisely because, among other reasons, the unpredictability of foreign conditions is not conducive to settled expectations. Second, because the dispute provoked by the statute is a separation-of-powers conflict between the political branches, FISA is not entitled to the usual

presumption that Congress has correctly interpreted the Constitution, for the President is entitled to no less deference.[171]

The NSA's specifically targeting U.S. persons would not, therefore, by itself bring international communications within the regulatory ambit of FISA. That, however, does not end the matter because of subsection (f)(2). To repeat, it applies FISA's regime to "the acquisition … of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States."

It is once again important here to take stock of the sundry communications which fall outside this scope. The subsection applies only to wire communications. In theory, this would preclude coverage of international calls conducted exclusively by cell-phone.[172] It would also be inapplicable to any call as to which the interception occurs outside U.S. territory. On this point, it must be noted that the lack of available information due to the NSA program's (appropriate) classified status renders legal analysis highly speculative. Nonetheless, if we assume *arguendo* that the NSA is intercepting telephone calls and emails transmitted by wire or cable, and that it is doing so from within the United States, there could be no serious question that subsection (f)(2) would apply. It does not condition its application on any reasonable expectation of privacy on the part of interlocutors.

It is worth observing that subsection (f)(2) illustrates well how FISA is a prisoner of the antiquated technology of its enactment era. Plainly, it was written in a way that would exclude most satellite interception of international telephone traffic – which was what the NSA principally did in the late 1970s. There has, however, been a telecommunications revolution since then. Millions of messages are now conveyed internationally with the click of a mouse by email, a development not anticipated by FISA at all. Furthermore, telephone calls now travel in compressed digital packets that are routed through switches based not necessarily on the shortest distance between two points but the most efficient (or least congested) one.

That means the statutory distinction that bases coverage on whether an interception occurs inside or outside the United States is a relic. It may well be that Congress, in 1978, concluded that limiting (f)(2)'s coverage to wire interceptions within the United States would permit the NSA broad discretion to continue monitoring international traffic via satellite. Modern technology, however, now permits a wire communication between two points anywhere on the globe (say, from Kandahar to Baghdad) to be routed

through the United States, and, in theory, be captured here by wire. This efficiency is a great stride for our intelligence community. But it renders utterly arbitrary a provision that purports to make the legality of the interception of the communications most crucial to American national security – i.e., international communications that cross our borders and thus may involve al Qaeda operatives planning domestic attacks – dependent on a modern-day irrelevancy, viz., whether NSA physically acquires the communication inside or outside our borders.

Fortunately, even if the President's Article II authority in this area did not trump any statutory limits, there is no need to construe FISA as compelling so capricious a result. FISA is written to accommodate interceptions outside its framework. Apart from the fact that, as we have seen, its definitions of "electronic surveillance" quite purposely do not cover a broad range of foreign intelligence monitoring, FISA's criminal prohibition provision, Section 1809 of Title 50, makes eavesdropping under color of law illegal only if it is not "authorized by statute." If Congress's intention had been to identify particular federal statutes that could accomplish this authorizing, it could easily have done just that.[173] Instead, it left open the door to future legislation.

Such a law is the Authorization for the Use of Military Force (AUMF),[174] enacted by Congress in the aftermath of the 9/11 attacks, which empowered 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," in order to prevent "any future acts of international terrorism against the United States." As we have seen, the penetration of enemy communications is a rudimentary component of the wartime use of force. The object of war is to defeat the enemy, and the enemy cannot be defeated in the absence of intelligence.[175] Plainly, a license to use any quantum of force encompasses all of the inherent elements of war-fighting. This necessarily includes the interception of suspected al Qaeda phone calls, emails and other methods of contacting its operatives, especially in the United States, where they have done, can do, and are energetically trying to do the American people the most harm.

The Supreme Court has already ruled, on analogous facts, that the AUMF authorizes the President to engage in the fundamental aspects of war-fighting notwithstanding their lack of specific, explicit mention by Congress, and even if such tacit grants appear to fly in the face of other statutes. In *Hamdi v. Rumsfeld*,[176] the Supreme Court confronted a claim from an American citizen captured on the battlefield while fighting for al

Qaeda in Afghanistan that his detention without trial as an enemy combatant violated both the Constitution and Section 4001(a) of Title 18, United States Code. Section 4001(a) proscribes the detention of American citizens "except pursuant to an Act of Congress." A majority of the Court rejected these claims, holding that it was "of no moment that the AUMF does not use specific language of detention," because detention was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[177] Thus, the Court continued, Hamdi's detention also satisfied Section 4001(a) because it was authorized by the AUMF, an act of Congress.[178]

Therefore, the critics' claims that the AUMF does not qualify as a "statute" authorizing electronic surveillance as contemplated by Section 1809 are unavailing – just as their effort to avoid the force of *Hamdi* is unconvincing.[179] These claims are best exemplified by the ABA's contention that "nothing in the text or history of the AUMF" suggests that Congress intended to permit warrantless electronic surveillance "in the United States," and that there must be some such indication for the AUMF to have such effect given how "heavily regulated and … important to basic notions of privacy" electronic surveillance is under FISA and Title III.[180]

To begin with, the NSA program is not accurately portrayed as domestic electronic surveillance. It is *international* surveillance that reaches into the United States but is not exclusively domestic. As we have already seen, the Supreme Court's decision in *Keith* elucidates that foreign intelligence surveillance does not lose its foreign character simply because some aspect of it touches U.S. soil.[181] The germane issue is what the surveillance undertakes to accomplish, not where it leads. But that aside, the ABA's emphasis on "basic notions of privacy" evaporates in the face of *Hamdi*, where at issue was not merely privacy but liberty itself. The Court having found that the AUMF conveyed authority to detain, a fortiori it conveys authority to listen. By the ABA's lights, the United States could use force to capture and even kill al Qaeda operatives planning an attack, but it could not listen to them speak absent a warrant or additional input from Congress. To state such a proposition is to refute it.

Hamdi, moreover, illustrates that Congress need not consider, let alone state, every conceivable aspect of war-fighting when, in a time of crisis with the Nation under attack, it authorizes the President to confront the enemy. As the Supreme Court instructed in *Dames &* Moore,

> Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or

> every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "*especially . . . in the areas of foreign policy and national security*," imply "congressional disapproval" of action taken by the Executive. Haig v. Agee, [453 U.S. 280, 291 (1981)]. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U.S., at 637 (Jackson, J., concurring).[182]

This reality is even more apparent in wartime. The fact that the AUMF does not expressly mention electronic surveillance is immaterial, and to be expected. Use of force resolutions are typically broad. First, Congress recognizes that the President has his own residuum of authority as chief executive and commander-in-chief. A provision that attempted an exacting itemization of what Congress, within its own constitutional warrant, was authorizing could only instigate a pointless dispute between the political branches regarding what the President could legitimately do irrespective of congressional action. It would be suicidal to provoke such a crisis at a time when the demand for national unity was at its very peak, and, as Justice Jackson famously observed, the Constitution is not a suicide pact.[183]

Moreover, it is worth repeating that the goal of war is to defeat the enemy. That objective would be undermined by a system that impelled the President to return to Congress every time battlefield developments warranted new tactics. It would not only impossibly hamper military advance; it would inescapably educate the enemy about tactics and strategy.

There is, in any event, no reason to interpret FISA as if it were in irresolvable conflict with the NSA program such that one or the other of them would have to be invalidated. Section 1809 opens the door to the possibility that another statute, besides FISA, can authorize electronic surveillance for foreign intelligence purposes. The AUMF, as construed by *Hamdi*, easily fits the bill. That this may not be the only conceivable construction of FISA is unimportant. What matters is that it is a "fairly possible" construction.[184] As the Justice Department convincingly argues,

> The first task of any interpreter faced with a statute that may present an unconstitutional infringement on the powers of the

> president is to determine whether the statute may be construed to avoid the constitutional difficulty. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." INS v. Cyr, 533 U.S. 289, 299-300 (2001); Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Moreover, the canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See* Department of Navy v. Egan, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security").[185]

In the critics' world, this rule is stood on its head. There, in wartime no less, we are to proceed on the assumption that one must go out of one's way to create a constitutional crisis when there is a fair and obvious way to avoid one. A way that gives both political branches the benefit of the doubt. A way that would allow the courts to conclude (as they properly did when the political branches tussled over military operations in Kosovo[186]) that in the unlikely event such deference is misplaced, Congress can very easily enact legislation indicating that it objects to the NSA program, that it does not regard the penetration of enemy communications to be fundamental to the use of force, and that the program will be defunded and ended. It is telling that the program has now been exposed for over four months, and Congress – which could have reacted decisively at any time – has shown no inclination to do so.

Wisely, Congress hasn't done that because construing FISA to prohibit the NSA program would imperil the Nation. It would, as the Justice Department points out, provoke both (a) the question whether Congress has any power to interfere with a signals intelligence collection that the President, as Commander in Chief, has determined is vital in wartime to protect the homeland from a demonstrably real foreign threat; and (b) the question whether FISA is an unconstitutional encroachment on presidential power.[187] In stark contrast, although the President has found the NSA program to be necessary to guard against a reprise of 9/11, he has not, in exercising his constitutional authority, sought a showdown with the

legislature. Rather than taking the position that FISA is an unjustifiable hamstring on executive power, the President has been deferential to Congress, continuing to use FISA and regard it as an important tool.[188]

Clearly, it is "fairly possible" for FISA and the NSA program to coexist. While the President's constitutional authority to order monitoring of the enemy's international, wartime communications would trump FISA if it were actually necessary to force that issue, controlling law makes such a confrontation unnecessary. It should not be gratuitously provoked.

Bringing the NSA Program into the FISA Regime Would Be Unwise and, Very Likely, Unlawful.

a. FISA Is Legally Dubious and Cannot Accommodate Wartime Surveillance that Is Both Constitutionally Proper and Ill-suited for Prior Judicial Approval.

The optimal structure for preserving American national security against foreign threats is the one the Framers bequeathed us: a strong executive balanced by the searching oversight and conclusive spending powers of the Congress. This is the system that provides the speed and flexibility necessary to deal with any threat, yet tends appropriately to the civil liberties of Americans.

The system contemplates no role for the federal courts in connection with the political judgment whether to conduct surveillance to secure the nation against hostile outsiders. This reflects neither disrespect for, nor lack of confidence in, the judiciary. It is, instead, a reflection of abiding respect. It is reverence for the central role of the independent judiciary, a role that guarantees the rule of law and safeguards individual liberty. It is homage to the Fourth Amendment, which recognizes that many kinds of government searches are reasonable, including some based on less than probable cause, but mandates an *ex ante* showing of probable cause in any instance when a judicial warrant is called for. It is admiration for how seriously judges, though themselves government actors, tend to their solemn duties as the citizen's citadel against overbearing government.

Those duties *inside* the body politic are inimical to national security responsibilities as government confronts threats *against* the body politic from external forces, operating within and without. The courts of the United States are our society's check against lawless action by other divisions of American government. They are not a forum for other societies and factions hostile to our Nation to press their case against the United States. When

our government confronts the outside world, including the agents of hostile powers operating inside our borders (who, as we have ruefully learned, can do us grave harm), the highest interest of the American people is that our government prevail. It is not to ensure that our Nation's enemies have an available tribunal before which the executive branch can be compelled to explain itself. If our Nation has committed an international wrong, that is a diplomatic problem to be addressed by the political representatives of sovereigns. It is not a judicial matter in which outsiders are vested with an array of rights backed by the power of our government – enabling them to transform the public's own processes into a parasite that feeds on its host.[189]

The FISA regime strains these bedrock premises. It presumes that national security is essentially a *legal* task rather than a quintessentially *political* one. It thus reckons that task to be fit for management by detached judges. Judges who (a) are statutorily obligated (and institutionally hardwired) to protect the interests of concerned persons before them – even if those persons happen to be operatives of foreign terrorist organizations (i.e., persons who are overwhelmingly non-American, and whose claim on constitutional protections is often dubious at best); and (b) are politically unaccountable to the people whose lives are at stake – people who elect a President precisely to "employ[] … the common strength … for the common defense."[190]

FISA further presumes, in misplaced reliance on the *Keith* Court's suggestion that a specialized court might become institutionally competent in matters related to purely *domestic* threats to national security, that this same reasoning should govern *foreign* national security threats, a field different in kind, not just degree. The folly of such an assumption should have been clear from *Keith* itself, which, notwithstanding the ambitiousness of its dicta, still pointedly resolved that foreign threats to national security should be excluded.

The immersion of judges into the national security arena is of suspect wisdom, which is no doubt why it had not been done in the two centuries before *Keith* was decided. But in the context of threats sprung from within our society, there is at least a certain logic to it. Such threats are "domestic" because they exclusively involve Americans, not foreign powers. When government intrudes in this area, it is intruding on persons whose rights in our system stand them on equal footing with the government before the bar of justice. Their machinations, as the *Keith* Court noted, are bound up with grievances against a government they are constitutionally entitled to petition, and frequently implicate political expression that is at the heart of

First Amendment protection. While treason, sedition and insurrection are abhorrent, that ignominy stems exactly from the fact that the malefactors are members of our society.

Not so with foreign threats. As the Supreme Court explained in the related *Verdugo-Urquidez* context, the purpose of the Fourth Amendment's proscription against unreasonable searches "was to protect *the people of the United States* against arbitrary action *by their own Government*; it was never suggested that the provision was intended to restrain the actions of the Federal Government *against aliens outside of the United States territory*."[191] The actions of aliens outside of the United States, of course, are the compulsion behind foreign intelligence collection, even if the immediate focus of any individual collection exercise is a foreign operative who happens to be inside our borders.[192]

Our Nation does not owe to foreign powers and their agents the solicitude due members of our own society. We do not owe them the deferential presumptions in favor of privacy and innocence that are accorded to our own people. They do not stand as equals to our government because, for these purposes, our government is the embodiment of the people its first obligation is to protect. We are a civilized people – even, perhaps, a "maturing society" ever-marked by "evolving standards of decency"[193] – but we do not owe potential foreign terrorists and spies the benefit of the doubt. In this arena, the security of the American people and of the system on which our liberties depend, takes precedence. The reasonableness of searches is gauged by balancing the privacy interest of the individual against the public interest to be vindicated by government.[194] While there is no higher government interest than national security,[195] the cognizable interests of many subjects of foreign intelligence investigations are nigh-non-existent. Indeed, such is the urgency of our national security that even Americans who make common cause with hostile foreign powers have found their access to our courts sharply curtailed.[196]

When the security of our Nation is at stake, the collective safety of our society and the protection of the system without which our liberties would vanish take precedence over individual rights. For this reason, the *Verdugo-Urquidez* Court explicitly cautioned, in a different but related context, that national security is the business of the political branches, not the courts, and that extension of the Fourth Amendment's Warrant Clause to circumstances in which it was not meant to apply could frustrate American national interests.[197]

To the contrary, FISA incongruously analogized protection against

foreign threats, over which the executive branch has plenary authority, to protection against domestic threats, over which the executive branch has authority which, though considerable, is tempered. In the latter context, investigative subjects overwhelmingly tend to be U.S. persons (i.e., citizens and resident aliens). The investigative setting is exclusively American and bereft of foreign participation – i.e., it is an environment akin to law enforcement in that U.S. authorities have a monopoly on the legitimate use of force, congressional power to regulate is broad, and judicial processes are inevitably triggered. In contrast, while FISA does cover U.S. persons, it does so only to the extent they are acting in concert with foreign powers – and generally hostile ones, which are either nations or terrorist organizations (some of which, like al Qaeda, exist primarily to levy war against the United States and kill Americans).

Otherwise, the protective cloak of FISA is anomalously extended only to foreign powers. Although the Constitution makes them the exclusive responsibility of the executive branch, FISA substantially hamstrings the President in this regard. Foreign powers and their agents may be subjected to electronic surveillance not if the President in his discretion determines that this is in the best interest of the Nation, but only if the executive branch, through a high-ranking official can represent to a court (a la criminal surveillance under Title III) that, among other things, foreign intelligence is sought, "such information cannot reasonably be obtained by normal investigative techniques," and minimization procedures are in place to insure against the executive branch's hearing or retaining various information.[198] Absent such showings, FISA purports that a judge may prevent the executive branch from conducting electronic surveillance against foreign actors who may have few if any rights under our Constitution, and who may be actively plotting to mass-murder Americans.

In *Keith*, moreover, the Court, after repeatedly "emphasiz[ing]" that it was addressing "only the domestic aspects of national security," suggested that because purely domestic threats "may involve different policy and practical considerations from the surveillance of 'ordinary crime,'" Congress might consider that "different standards" for a judicial warrant "may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and *the protected rights of our citizens*."[199] Such standards, the Court elaborated, should involve allegations of other circumstances more appropriate to *domestic* security cases."[200] In stark contrast, we deal here with *foreign* security cases. In this realm, the "protected rights of our citizens" are

generally not implicated – except to the extent our citizens have a right to be protected by their government from foreign aggression. Yet, FISA again forced the square peg into the round hole. It requires, in the foreign threat context, a demonstration of "probable cause" that: (a) the target of electronic surveillance "is a foreign power or an agent of a foreign power"; (b) "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power"; (c) "the proposed minimization procedures" are adequate; and (d) that the application sets forth myriad "statements and certifications" from executive branch officials.[201]

Assuming *arguendo* that the vastly different threat environment of the 1970s may have obscured this reality, it is patently clear today that not all – or perhaps even most – threats posed to the American people from outside forces will be discernible to a degree allowing for a probable cause showing. As Judge Posner has pointed out,

> FISA, enacted in 1978 – long before the danger of global terrorism was recognized and electronic surveillance was transformed by the digital revolution – is dangerously obsolete. It retains value as a framework for monitoring the communications of known terrorists, but it is hopeless as a framework for detecting terrorists. It requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance is a terrorist, when the desperate need is to find out who is a terrorist.[202]

Probable cause is a confirmatory standard, not an anticipatory one. It provides a basis for investigating someone the executive branch already knows is likely to be dangerous. It can tell us nothing of the Mohammed Attas in our midst – terrorist operatives coordinated by foreign enemies, burrowed into our society and virtually unknown until the moment they strike. The *Keith* Court understood, even in the domestic threat context, that the overriding aim of intelligence collection is the *prevention* of threatening actions, not the prosecution of them after damage has been wrought – which is not unimportant but is cold comfort.[203] The imposition of an immutable probable cause standard – even if the facts that must be shown are different from those to be proved by probable cause in the ordinary law enforcement context – would endanger our country. It would seriously undermine an option the executive branch must have to conduct

electronic surveillance based on reasonable suspicion in a matrix where fewer people than ever before, able to conceal their capacity to project immense deadly force as never before, are potentially able to kill tens of thousands (or more) despite their limited resources.

If this is so obvious, it is fair to ask, why have a probable cause requirement in the first place? The answer, again, lies in the ill-conceived premise that foreign threats are just like domestic ones, and amenable to routine law enforcement procedures. The Congress which enacted FISA was clearly determined not merely to shackle the executive's constitutional powers (even to the point, as we have seen, of redacting from federal law the prior legislative acknowledgement of those powers). It was further determined to place foreign threats to national security under the watchful eye of judges, no matter how ill-fit they might be for such responsibilities.

Implicitly acknowledging that judges were not institutionally competent, Congress sought to overcome that hurdle by creating a specialized court – a suggestion the *Keith* Court had advanced for the very different thicket of domestic security threats, in which classified information does not play nearly as prominent a role, and delicate matters of diplomacy, such as the need for assistance from foreign intelligence services, have virtually no relevance.[204] While this specialized court may have papered over the separation-of-powers-based competence problem, one other constitutional difficulty could not be glossed over so easily. The Supreme Court, as we have seen, has held since 1967 that electronic surveillance can implicate protected Fourth Amendment interests.[205] This would mean that, even if it were called an "order," a FISA Court authorization for electronic surveillance would almost certainly be the functional equivalent of a judicial warrant.[206] Under the Fourth Amendment, a judicial warrant incontestably requires a showing of probable cause.[207] Therefore, if FISA's novel experiment of judicial intrusion into foreign intelligence collection was to steer clear of constitutional and jurisdictional red flags, a probable cause requirement would be essential.

This is a point much missed. Searches need only be reasonable under the Fourth Amendment. The Supreme Court has turned away from the view it took in the 1970s, expressed in *Keith* and other cases, that the Unreasonable Search Clause of the Fourth Amendment is defined by the Amendment's Warrant Clause, such that a search is unreasonable unless it is conducted pursuant to an *ex ante* judicial warrant based on a finding of probable cause[208] – a standard overwhelmingly tied to the criminal justice context and that has little relevance outside of it.[209] The executive branch is supreme

in the performance of its own constitutional functions; the judiciary does not oversee government, and has no general authority to manage the executive.[210] A court has no standing to entertain a claim absent a case or controversy which makes the matter justiciable. What makes a search question justiciable is a reasonable expectation of privacy that triggers Fourth Amendment protection. Absent an expectation of privacy that rises to this threshold, the Fourth Amendment does not apply and courts, which are not empowered to give advisory opinions, have no standing to weigh in on whether the executive branch should conduct a particular type of investigation.

Indeed, it is ironic that Senator Arlen Specter, the Chairman of the Senate Judiciary Committee, has recently intimated that legislation might be proposed to ask the FISA Court for its opinion regarding the legality of the NSA program.[211] As it happens, the Chief Judge of that tribunal, Judge Colleen Kollar-Kotelly, has – in a non-FISA case – been emphatic on the issue of advisory opinions:

> [T]he "core of Article III's limitation on federal judicial power" [is] that federal courts cannot issue advisory opinions. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2 (3d ed. 1999). It is well settled that Article III of the United States Constitution limits this Court's exercise of judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2; Flast v. Cohen, 392 U.S. 83, 94-95 (1968). "Justiciability is the term of art employed to give expression to the limitation placed upon federal courts by the case-and-controversy doctrine." *Id.* at 95. "It is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Id.* at 96 (quoting C. Wright, Federal Courts 34 (1963)).
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> In the typical advisory opinion case, "the federal judicial power is invoked to pass upon the validity of actions [taken] by the Legislative and Executive Branches of the Government." *Id.* In this instance, the United States' request for leave attempts to invoke the federal judicial power, in advance of any action by the government, to obtain authorization for a particular form of executive action in response to a statutory mandate. Just as an "attempt to obtain a judicial declaration of the validity of [an]

> act of Congress is not presented in a 'case or controversy,' to which, under the Constitution of the United States, the judicial power alone extends," Muskrat v. United States, 219 U.S. 346, 361 (1911), the government's present attempt to obtain a judicial declaration that a particular action, as yet untaken, comports with [a statutory provision] cannot be said to present a justiciable case or controversy.[212]

In any event, to the extent a court may have jurisdiction based on the Fourth Amendment in the field of foreign intelligence collection, its only power would be to issue or decline to issue a warrant based on whether the executive has established probable cause.[213]

FISA's injection of a warrant requirement based on a probable cause finding – although, not necessarily probable cause of a crime – is what ostensibly renders it permissible for a court to participate. Simultaneously, and in equal legal and policy dubiousness, what saves the exercise from insuperable separation-of-powers invalidity is a point that has never been pressed, until now. Namely, the executive branch has always maintained, and the federal courts have (largely) not disputed, that the President, not the FISA Court, retains ultimate authority in matters of foreign intelligence collection.[214] That is, the executive adheres to a practice analogous to that followed with respect to the War Powers Resolution – whereby Presidents, when not ignoring the statute outright, comply with its terms out of respectful deference to a coordinate branch rather than provoking unnecessary constitutional tugs-of-war, but reserve their right not to do so. Until recent years, the FISA Court has generally been deferential to the executive branch's judgments, very few applications for surveillance have been denied or modified, and, as we've seen, there has been only one appeal in 28 years, during which the government chose not to challenge the constitutionality of FISA. Inter-branch accommodation has obviated the need to deal with suspect aspects of the arrangement.

Nonetheless, to repeat, the purpose of this analysis is not challenge FISA's constitutionality but rather to illustrate that the statute is already pressing precariously against constitutional barriers, both in terms of interfering with the President's performance of his duty to thwart foreign threats to national security, and in terms of the Fourth Amendment and the court's own jurisdiction under it. Any attempt to bring the NSA's terrorist surveillance program within the FISA regime would push this tenuous arrangement past the breaking point.

The executive branch has essentially maintained that surveillance under the NSA program is triggered by a "reasonable basis" showing of evidence which is the functional equivalent of "probable cause" – that is, evidence which establishes, in the view of intelligence professionals, "a reasonable basis to conclude that one party to the communication [that is monitored] is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda."[215] The Justice Department, moreover, has in the past refrained from support of an amendment to FISA that would permit searches premised on a less demanding "reasonable suspicion" standard, owing to constitutional concerns "in the FISA context."[216] In our view, this is the right conclusion for the wrong reason based on the wrong assumptions.[217]

What is crucial here is to preserve the security of the American people, not the vitality of FISA. The Justice Department was quite correct that a standard short of probable cause would be problematic *for FISA*. The premise of FISA is that electronic surveillance must be approved by a federal judge. Such approval is functionally a warrant, which under the Fourth Amendment can only issue based on probable cause. But that hardly means surveillance to protect the American people from foreign threats is *unreasonable* if it is based on reasonable suspicion. From a Fourth Amendment perspective, whether a search is reasonable or not, as we have noted, is based on a totality of the circumstances, balancing the public and private interests involved. If the search is reasonable – as, we submit, a search based on *reasonable* suspicion would, by definition, be – the mere fact that it should not be ordered by a judge under FISA is very far from meaning that it should not be done.[218]

But even assuming, *arguendo*, that searches based on less than probable cause would never be necessary for the protection of the American people, an interpretation of FISA that undermined the NSA program would, as the Justice Department has aptly contended, violate separation of powers and endanger national security – rendering it legally impossible for the President, notwithstanding his plenary power to safeguard the Nation from attack, to penetrate the enemy's wartime communications and design an early warning system that is, in his judgment, the Nation's best defense against a reprise of 9/11. This cannot be, and is not, the law. If FISA and the NSA program are incompatible, it is FISA that must give way to the President's inherent constitutional authority.

b. It Would Be Imprudent Policy to Refer a Vital National Security Program to the FISA Court When FISA is in Need of Overhaul and the FISA Court Has a History of Giving the Hypothetical Rights of Terrorists Precedence over the Safety of the American People.

As a legal matter, FISA is a deeply questionable judicial intrusion into core executive powers, petrifying that on which the Nation relies for vigor in a time of war when our homeland is a target. As a technological matter, its framework is antiquated and badly in need of overhaul. That is, even if one accepted that a judicial role in foreign intelligence collection was worth preserving (rather than assuring an untethered executive, able to maneuver with the same agility as the enemy but subject to more exacting congressional oversight to guard against the excesses of the past), FISA must account for the telecommunications revolution of the last three decades.

Congress should, for example, narrow FISA's definitions of covered "electronic surveillance" so that they capture only the communications of U.S. persons who contact other U.S. persons within American territory. The statute should make the obvious explicit: there is no reasonable expectation of privacy when one communicates outside the jurisdiction governed by our society's laws. It should pare down the high-level approvals which are a pre-requisite to surveillance applications, and which render illusory the current 72-hour retroactive approval provision.[219] It should extend the retroactive approval window to a time-frame that is more realistic, given the labor involved in each application and the current burdens on the government and FISA court due to the unprecedented need for surveillance against a secretive, agile, transnational terror network. (We believe a three-week period would be far more realistic than a three-day period.)[220] FISA should also expressly provide for a parallel track: electronic surveillance premised on reasonable suspicion which is not subject to judicial approval or oversight but which, instead, is reported to a subset (or subsets) of the intelligence committees from both Houses of Congress on reasonably tight schedules. It should, moreover, be made clear that there is nothing illegitimate about using the information obtained in any such reasonable-suspicion surveillance – whether it takes place under FISA or under the President's inherent authority – in later surveillance or search applications made to the FISA court.[221]

Nonetheless, whatever Congress decides to do about restructuring FISA, energetic oversight will continue to be necessary. That oversight should not be directed solely at executive branch compliance. The performance of the FISA court is also desperately in need of review. It is

one of the oddities of the current controversy that the FISA court itself has escaped much attention. In fact, as already noted, some have regarded the FISA court as a sort of high-minded oracle in whose lap the entire inter-branch dispute ought to be dropped for what would purportedly be a dispositive advisory opinion – notwithstanding firmly rooted jurisdictional restraints against such exercises, the independent duty of both Congress and the President to interpret and perform their own constitutional obligations faithfully, and the political means available to both departments to settle their differences without resort to the judiciary.

There is no gainsaying, however, that the performance of the FISA court in the last several years has been disappointing and, at times, abysmal. It has imperiously sought to intimidate the executive branch – in the performance of a function which is paradigmatically executive – regarding what applications could be brought and what affiants it would deign to accept information from. Consistent with our previously expressed fear that courts, by nature, veer towards pristine fairness to the persons before them (even if those persons are suspected terrorists) rather than the security of the American people (which is the imperative in this arena), the FISA court labored mightily to preserve and fortify the infamous regulatory "wall" which prevented information sharing between intelligence agents on one side and criminal prosecutors and investigators on the other. That effort included a breathtaking attempt to rewrite the Patriot Act's dismantling of the wall and to re-impose it on the Justice Department by judicial fiat – an attempt that was thoroughly rejected by the FISA Court of Review in 2002.

In the wake of that rejection, it appears that FISA applications, in record numbers, have been subjected to judicial narrowing and rewriting. Meanwhile, outside the ambit of FISA proceedings, judges assigned to that tribunal, in the performance of their regular duties as district judges, seriously undermined the wartime intelligence collection efforts of the executive branch in connection with captured enemy combatants held in Guantanamo Bay, Cuba – rulings that alternatively had to be undone by Congress and a federal appellate court. Finally, and inexplicably, FISA court judges reportedly leaked to the media their views about the merits of legal questions stemming from disclosure of the NSA program.

Much, but not all, of the pertinent history of how the "wall" metastasized from the germ of a legal misconception to a suicidal fortress against efficient intelligence analysis is set forth in the Foreign Intelligence Surveillance Court of Review's 2002 decision in *In re Sealed Case*.[222] Basically, in the years after FISA was enacted, the Justice Department and

the federal courts obsessed over the hypothetical possibility that FISA could be misused – i.e., that agents unable to develop sufficient evidence of criminal wrongdoing to establish probable cause for Title III surveillance would use national security eavesdropping authority under FISA as a pretext for conducting what was really a criminal investigation. Thus, they gratuitously construed FISA as if it required the government to prove that its "primary purpose" for seeking a national security wiretap was intelligence-gathering against foreign agents, rather than evidence-collection against criminals engaged in run-of-the-mill offenses. For its part, the Justice Department employed informal protocols to preclude prosecutors and criminal agents from steering intelligence investigations – so that FISA authority would not appear as if it were being used as a pretext to end-run the normal criminal procedures. As written, FISA required none of this.

That is where things stood when militant Islam's terrorist wave began in 1993 with the bombing of the World Trade Center. Terrorism, it emerged, was the mirror that best reflected the fallacy that *intelligence* could somehow be neatly segregated from *criminal evidence*. International terrorists, predictably, turned out to be both foreign agents and quotidian criminals – typically committing numerous ordinary violations of law in the course of plotting and carrying out terrorist operations. Thus the legal arsenal which provided the flexibility to attack terrorists by multiple tools – FISA or traditional criminal investigation – should have been a boon to national security. The threat of prosecution can induce terrorists, like others facing lengthy jail time, to surrender valuable intelligence. Symmetrically, obtaining valuable intelligence about terrorists makes it easier to locate, disrupt and prosecute them before they can kill. In a rational security strategy, intelligence and criminal investigations should go hand-in-hand.

To the contrary, the "primary purpose" test was the seed of a catastrophic roulette game. In practice, it forced government to make a premature and, therefore, ill-informed choice of which tool, to the exclusion of the other, would work best in a particular case. If the government were to seek a criminal wiretap against a suspected terrorist and be turned down, it would have effectively laid the groundwork for a claim that any later-sought national security wiretap was a pretext for the originally anticipated criminal investigation.[223] If it instead decided to use FISA in the first instance against terrorists, and predictably developed evidence of crimes in the course of the ensuing surveillance, it would be accused of having harbored all along a real purpose to bring a criminal case, not to collect intelligence. Through the early 1990's, such bad-faith-use-of-FISA claims became a

commonplace. But they should not have been worrisome, for they were routinely rejected by federal courts.

Nevertheless, Justice Department officials obsessed over them. The angst reached its zenith in 1995, when the Department issued internal protocols which dramatically heightened pre-existing impediments to information sharing. A March 1995 memorandum that was a building block for the procedures finalized four months later, explained that the goal was to "clearly separate [ongoing] counterintelligence investigations from the more limited, but continued, criminal investigations." These procedures, the memorandum added, would "*go beyond what is legally required* . . . [to] *prevent any risk of creating an unwarranted appearance* that FISA is being used to avoid procedural safeguards which would apply in a criminal investigation."[224]

Not surprisingly, agents in the field were puzzled by the regulations. At sea regarding what was and was not permissible to share, sharing came to a halt.[225] The chain of command only encouraged this desultory ethos. According to the 9/11 Commission, the FBI's Deputy Director admonished agents that "too much information sharing could be a career stopper."[226] Regrettably, the FISA court itself was a key ingredient of this ethos that information sharing was a wrong to be avoided rather than a virtue essential to the mission of foreign intelligence collection, viz., the welfare of the American people.

For over the first decade of its existence, before the explosion of Islamist terrorism in the 1990s, the FISA Court handled a modest number of surveillance applications and approved virtually all of them.[227] This caused some critics to refer to it as a "rubber stamp." Such derision, however, betrayed a fundamental lack of appreciation for the comparative inter-branch roles. Foreign intelligence collection and guarding the Nation against outside threats are *executive* functions. If we assume these powers are being used in good faith, the executive branch should be able to conduct surveillance on any targets it judges worthy of monitoring. The FISA court, which is not institutionally responsible for national security and is in place only as a brake against potential executive abuse, should by nature be a very low hurdle.[228]

In the late 1990s, however, this balance began to break down. The Court, like the Justice Department, plunged from the ill-conceived premise that intelligence and criminal evidence were severable to active overreach in the misguided effort to keep them apart. Indeed, the Justice Department blamed the FISA Court's exuberance on this point as a rationale for both

ratcheting up the wall and not seeking authorization to monitor potential threats who should have been subjected to surveillance.[229]

In the years immediately preceding the 9/11 attacks, the FISA court accused an FBI agent of making misleading statements in FISA applications about whether certain FISA targets were also subjects of criminal investigations, and whether procedures were in place to make certain that information gleaned from FISA surveillances was not being shared with criminal investigators and prosecutors. In autumn 2000, then-Attorney General Reno was summoned by the FISA court judges for an in-person session to discuss the Court's concerns.[230] On March 9, 2001, similar concerns were raised in a letter to then-Attorney General John Ashcroft from the FISA court's then-Chief Judge Royce Lamberth.[231] This resulted, among other things, in the referral of the agent, evidently well-regarded among his peers, for internal investigation by the Justice Department's Office of Professional Responsibility, as well as that agent's being barred from submitting future applications to the FISA court. It also resulted in accusations by the FISA court (later recounted in an opinion written by Judge Lamberth, and released by Judge Kollar-Kotelly, the Court's current Chief Judge, on May 17, 2002), that the executive branch had made "erroneous statements" in eavesdropping applications about "the separation of the overlapping intelligence and criminal investigators and the unauthorized sharing of FISA information with F.B.I. criminal investigators and assistant U.S. attorneys."[232]

The FISA court's over-estimation of its role, its failure to better balance civil liberties against the needs of public safety, and the impact it had on investigators already grappling with Byzantine internal regulations, had wrenching consequences. In mid-summer 2001, relying on the wall, FBI headquarters stopped its criminal division from assisting intelligence agents who were searching for two suspected terrorists, Khalid al-Midhar and Nawaf al-Hazmi, who, the intelligence division had deduced, were in the United States. A few weeks later, al-Midhar and al-Hamzi were two of the nineteen suicide hijackers. They piloted Flight 77 into the Pentagon on 9/11.[233] During the same critical time, Zacarias Moussaoui was arrested on immigration charges after his conduct at flight training raised suspicions.[234] The wall – specifically, the fear of tainting a prospective FISA warrant application by pursuing criminal investigative avenues – became part of the justification for the FBI's failure to seek a search warrant for Moussaoui's laptop computer. Moussaoui later pled guilty to charges related to the 9/11 attacks.[235]

Following the 9/11 attacks, of course, several investigations into intelligence failure were launched, including the 9/11 Commission's inquiry. In his April 2004 testimony before that panel, then-Attorney General John Ashcroft averred that "the single greatest structural cause for September 11 [intelligence failure] was the wall that segregated criminal investigators and intelligence agents."[236] Patrick J. Fitzgerald, now-United States Attorney for the Northern District of Illinois who, as a federal prosecutor in the Southern District of New York, played a pivotal role in several successful terrorism cases (including leading the successful prosecution against four al Qaeda operatives convicted in the 1998 bombings of the U.S. embassies in Kenya and Tanzania), described the wall in 2003 testimony before the Senate Judiciary Committee in 2003:

> I was on a prosecution team in New York that began a criminal investigation of Osama bin Laden in early 1996. . . . We could talk to local police officers. We could talk to other U.S. government agencies. We could talk to foreign police officers. Even foreign intelligence personnel. . . . But there was one group of people we were not permitted to talk to. Who? The FBI agents across the street from us in lower Manhattan assigned to a parallel intelligence investigation of Osama bin Laden and al Qaeda. We could not learn what information they had gathered. That was "the wall."[237]

Not surprisingly, among Congress's top priorities in the aftermath of the 9/11 attacks was to raze the wall. This was accomplished in October 2001 with the passage of the USA PATRIOT Act, Section 218 of which dismantled barriers to information-sharing.[238] This, however, proved unacceptable to the FISA Court. When the Justice Department undertook to implement new procedures in response to the Patriot Act, the FISA Court convened an extraordinary en banc proceeding (for which there was no statutory authority[239]), and issued a May 17, 2002 opinion which effected a judicial repeal of the Patriot Act's elimination of the wall.[240]

Specifically, the FISA Court ordered that

> law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division [of the

> Department of Justice] shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives.[241]

As the Court of Review later elaborated:

> To ensure the Justice Department followed these strictures the court also fashioned what the government refers to as a "chaperone requirement"; that a unit of the Justice Department, the Office of Intelligence Policy and Review (OIPR) (composed of 31 lawyers and 25 support staff), "be invited" to all meetings between the FBI and the Criminal Division involving consultations for the purpose of coordinating efforts "to investigate or protect against foreign attack or other grave hostile acts, sabotage, international terrorism, or clandestine intelligence activities by foreign powers or their agents." If representatives of OIPR are unable to attend such meetings, "OIPR shall be apprized of the substance of the meetings forthwith in writing so that the Court may be notified at the earliest opportunity."[242]

This unfortunate effort to trump Congress' considered decision to encourage information sharing within the Justice Department bespoke a tribunal reluctant to give the proper deference to either the legislature's law-making authority or the executive branch's plenary authority over foreign intelligence matters. In a sweeping rejection of both the judicially mandated procedures and their theoretical underpinnings – in particular, the "false dichotomy" between intelligence and criminal evidence – the Court of Review reversed the FISA Court and instructed it to withdraw such restrictions on FISA surveillance.[243]

Regrettably, that is far from the end of the story. In the years prior to finally being reversed by a higher court, the FISA Court routinely granted the executive branch's applications to conduct monitoring. As we have seen, its determination to maintain some form of "wall" may well have intimidated the FBI and the Justice Department into declining to pursue

FISA surveillances that should have been undertaken; but when surveillances were sought, they were approved with numbing regularity, at a rate of over 99 percent.[244] However, that began to change after the *In re Sealed Case* opinion was issued The pattern is easily discernible from reports to Congress which the Justice Department provides every April for the preceding calendar year.[245] For example, in 2001, the Court granted all 932 applications that were made.[246] In 2002, the first full year after 9/11, 1228 applications were made to the Court; all were fully approved except two, which were "approved as modified."[247] Those two were the applications which were the subject of the appellate litigation in *In re Sealed Case*, and thus the Justice Department's Report indicates that they were ultimately approved in full.

The new pattern emerges in 2003. In that year, the Justice Department made 1727 applications. The Court denied three applications outright.[248] Perhaps more significantly, of the 1724 applications granted, the Justice Department reports that the FISA Court made "substantive modifications" in 79.[249] The following year, 2004, there was a slight uptick in applications, to 1755. The Court approved all of the orders, but the number of "substantive modifications" surged to 94.[250]

Figures for 2005 will not be released until the end of April 2006. But it is already fair to say that the FISA Court, since the Court of Review's reversal of its attempt to rebuild the wall, has made modifications of unknown extent in 173 applications for electronic surveillance or search warrants that the executive branch had judged necessary for national security purposes. It is safe to assume that this number is higher than 200 by now – and probably significantly higher. Given, for example, the still-ringing recriminations over the executive branch's failure to seek a single FISA surveillance order for Moussaoui in 2001, this trend can only be viewed with alarm.

That alarm is increased by other developments, and by a general (and understandable in the domestic criminal law context) inclination by many judges to be protective of the individual vis-à-vis the state. Judges of the FISA Court have been prominently involved in the litigation over alien enemy combatants captured in the war on terror and detained in Guantanamo Bay, Cuba. Those detainees were permitted by the Supreme Court, in *Rasul v. Bush*,[251] to seek review of their detention under the federal habeas corpus statute.[252] There is, of course, no right to counsel in habeas proceedings, and the vast majority of prisoners in the American criminal justice system must represent themselves in raising collateral attacks on their convictions

or challenging the conditions of their confinement.

Nonetheless, in October 2004, having been assigned one matter involving three such prisoners (not in her capacity as presiding FISA court judge but in the course of her ordinary responsibilities as a judge of the federal district court in Washington, D.C.), Judge Kollar-Kotelly exercised her discretion to grant the enemy combatants counsel at taxpayer expense.[253] Without authority in the habeas statute, the Judge relied on the All Writs Act and the Criminal Justice Act, reasoning that it was exceedingly important for these particular petitioners to have publicly-subsidized lawyers because they had "clearly presented a nonfrivolous claim."[254] In the Court's view, what rendered these claims "non-frivolous" was the fact that the detainees "have been detained virtually incommunicado for nearly three years without being charged with any crime," even though – as enemy combatants captured overseas while waging war against the United States – they were held under laws of war centuries older than our Nation.

Concededly, three years of detention is a serious matter, but it has no bearing on whether there could be any conceivable color to potential detainee claims.[255] The Judge went on to support her rationale based on a subjective sense of fairness, explaining:

> To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel.[256]

The detainees are, of course, at a disadvantage having been captured and held by a foreign government. Still, the fact that they are not lawyers and lack mastery of the U.S. Court system does not particularly distinguish them from the great majority of habeas petitioners in the American prison system, who routinely press habeas claims without counsel. What does

make them unusual, however, are the circumstances of their capture and detention: they are enemy combatants in a war the United States is waging against an international terrorist network – i.e., a stateless organization which has no territory to be conquered or national assets to be seized, but which can be beaten only by the acquisition of intelligence necessary both to thwart its operations and to kill or capture of its operatives. Granting counsel to detainees makes this imperative far more difficult, if not impossible.

In addition, the Court also invalidated a number of measures adopted by the Defense Department to ensure that detainees were not communicating with enemy forces on the outside. Because a number of the detainees already had lawyers volunteering to represent them, the Defense Department had sought to impose safeguards on contacts between the combatants and counsel. These included monitoring attorney-client meetings and examining the content of written materials brought in or out of the holding facility by lawyers. The protective measures were carefully designed to avoid compromising the ability of the detainees and their counsel to communicate meaningfully: all of the aforementioned monitoring and examination was to be carried out by military personnel who were excluded from participation in any litigation and whose sole purpose was to ensure that terrorist communications were not passed out of the holding facility.[257] In this regard, the Defense Department's safeguards were not materially different from special administrative measures that are commonly applied to convicted terrorists in civilian prisons.[258]

Nevertheless, Judge Kollar-Kottely held that the safeguards were an impermissible incursion into the combatants' attorney-client privilege that would undermine the administration of justice, chill meaningful communication, and deprive attorneys of the "certain degree of privacy" that was "essential" to their work.[259] She ordered that the detainees be permitted to have unmonitored communications with counsel, and that the lawyers were essentially on their honor not to disclose the substance of communications to third parties and to report – if they chose to – any communications indicating that future terrorist acts were being planned.[260] The Court's opinion provides a valuable insight into the individuals involved:

> Brigadier General Lucenti states that Petitioner al Kandari may have "served as a spiritual advisor to Usama bin Laden," and "[h]e is clearly a well-trained member of the al Qaida network with significant influence" who "has exhibited counter-

> interrogation methods that reveal his training by al Qaida.". . . Of Petitioner al Odah, Brigadier General Lucenti states that he has admitted to having "Taliban connections and has admitted to being a member of al Qaida," he is "believed to be connected to Usama bin Laden's bodyguards," and that "al Odah's ability to communicate effectively with his comrades and leadership is not substantially reduced by the fact that he has been in detention." … Finally, Brigadier General Lucenti states that during interrogation, Petitioner al Mutairi "has expressed his anti-American views and his desire to engage in terrorist and other violent activity against Americans," he "has an extensive history of violent assaults on detention facility personnel," and he "has demonstrated extensive knowledge of counter-interrogation techniques." … For these three individuals, Brigadier General Lucenti expresses his belief that they "will attempt to further terrorist operations or otherwise disclose information that will cause immediate and substantial harm to national security if [they are] granted unmonitored communications with . . . counsel."

Obviously, neither Judge Kollar-Kotelly, nor her colleagues on the FISA Court and District Courts, are responsible for *Rasul*'s unprecedented ruling which – by construction of the habeas corpus statute, not the Constitution – gave enemy captives in wartime the ability to use the courts and judicial processes of the American people as a weapon against the executive branch prosecuting the war on behalf of the American people. Yet, the mere fact that *Rasul* opened the doors of the federal courts to detainees added nothing to the substance of their claims, for, as the D.C. Circuit observed in a related case, "[t]hat a court has jurisdiction over a claim does not mean the claim is valid."[261] Nothing in Judge Kollar-Kotelly's opinion remotely suggests a reason to suspect there is any legal substance to the challenges filed by the three detainees. More importantly for present purposes, nothing compelled the Judge either to find a right to counsel or to appoint counsel at public expense – and thereby virtually assure that that this accommodation would be made for every detainee who sought it, there having been nothing case-specific about Judge Kollar-Kotelly's rationale.

As chief of the FISA court, Judge Kollar-Kotelly must have been aware of how critical intelligence is to the war on terror. She must also have

understood that to make a ruling, not required by law, in favor of a new, quasi-constitutional right to free counsel for alien enemy combatants, would perforce shut off an essential intelligence channel. Yet, she chose to exercise her discretion in the combatants' favor anyway – strongly suggesting a fundamental rejection of the whole notion that the Nation is at war, and a determination to forge ahead as if these cases were part and parcel of the normal criminal justice process.

In late 2005, Congress took up, and ultimately enacted, legislation to undo *Rasul* and remove this type of combatant litigation from the district courts.[262] On December 21, Senators John Kyl and Lindsey Graham, in the course of urging enactment, took to the Senate floor to describe how catastrophic the provision of counsel to enemy combatants had had been to vital intelligence collection. As Senator Kyl observed:

> Keeping war-on-terror detainees out of the court system is a prerequisite for conducting effective and productive interrogation, and interrogation has proved to be an important source of critical intelligence that has saved American lives…. Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities. Under the new *Rasul*-imposed system, shortly after al-Qaida and Taliban detainees arrive at Guantanamo Bay, they are informed that they have the right to challenge their detention in Federal court and the right to see a lawyer. Detainees overwhelmingly have exercised both rights. The lawyers inevitably tell detainees not to talk to interrogators…. Effective interrogation requires the detainee to develop a relationship of trust and dependency with his interrogator. The system imposed last year as a result of *Rasul* – access to adversary litigation and a lawyer – completely undermines these preconditions for successful interrogation.[263]

Senator Graham's responsive comments, directed to the actual practice at Guantanamo Bay, were startling in their account of the brazenness of detainee counsel:

> I agree entirely. If I could add one thing on this point: perhaps the best evidence that the current *Rasul* system undermines effective interrogation is that even the detainees' lawyers are

bragging about their lawsuits' having that effect. Michael Ratner, a lawyer who has filed lawsuits on behalf of numerous enemy combatants held at Guantanamo Bay, boasted in a recent magazine interview about how he has made it harder for the military to do its job. He particularly emphasized that the litigation interferes with interrogation of enemy combatants:

> The litigation is brutal [for the United States]. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation … with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?[264]

Meanwhile, another member of the FISA court, Judge James Robertson, in the course of his regular duties as a district judge in the District of Columbia, was assigned to the case of enemy combatant Salim Ahmed Hamdan. Hamdan, a Yemeni national, had been captured in Afghanistan and detained in Guantanamo Bay. There, he was confirmed by a military "combatant status review tribunal" (CSRT) to be an enemy combatant who had taken up arms against the United States in the war on terror, and was designated for trial by military commission, pursuant to President Bush's executive order of November 7, 2001.[265]

Hamdan, who has admitted being Osama bin Laden's personal driver, was charged with serving as the al Qaeda leader's bodyguard, transporting bin Laden to training camps and safe havens, delivering weapons for the terror network, and training to commit terrorist acts.[266] But he managed to derail his commission – for a time, at least – by taking advantage of *Rasul*'s invitation to file a habeas petition in the district court. On November 8, 2004, Judge Robertson issued an astounding decision, inconsistent with over half a century of Supreme Court precedent supporting the trial and punishment of enemy combatants by military commissions,[267] holding that Hamdan was presumptively entitled to prisoner-of-war protections under the 1949 Geneva Conventions, that the CSRT's contrary determination was not competent, and that the military commission was thus impermissible.[268] Not surprisingly, on November 7, 2005, the D.C. Circuit issued a sweeping

reversal of all the district court's major conclusions in *Hamdan v. Rumsfeld*. The unanimous panel (a member of which was now-Chief Justice John G. Roberts, Jr., and the opinion of which was written by Circuit Judge A. Raymond Randolph) was particularly emphatic in rejecting the grant of Geneva Convention protections, reserved in this instance to honorable prisoners of war, to an obviously unprivileged combatant in the form of an al Qaeda operative.[269]

As already observed, these and other district court decisions, finally spurred Congress in December 2005 to mitigate *Rasul*'s impact by enacting the Detainee Treatment Act of 2005.[270] Combatant cases will now be handled by military courts, with an opportunity for appeal to the D.C. Circuit. The district courts were bypassed. The legislature sensibly concluded that national security was being imperiled by the manner in which the courts were handling the detainee cases. The natural tendency of judges to be solicitous of the litigants before them was, in this context, manifesting itself by the creation of new rights for the enemy in wartime, frustrating the desperate need for intelligence to protect the public – which, in a final indignity, was expected to pay for the courts' largesse. It is worth stressing that the same powerful theoretical and practical reasons that induced Congress to take the detainees' legal claims out of the courts equally support keeping the NSA surveillance program insulated from court review. The overlap in judicial personnel between the detainee cases and the FISA court only underscores the point.

In the frenzied media coverage after the NSA program's exposure, it emerged that the two judges who had served as chief of the FISA court since the 9/11 attacks, Judges Lamberth and Kollar-Kotelly, had been briefed by the executive branch about the NSA's warrantless surveillance activities. Both were reported to have expressed doubt about the legality of the program, which is said to have "infuriated" Judge Kollar-Kotelly.[271] Consequently, shades of the wall, they reportedly directed the Justice Department to set up a new "screening system" to "shield" the FISA court from information from the NSA program, which they considered "tainted" and thus feared would invalidate any FISA surveillances authorized in partial reliance on NSA information.[272]

It is worth pausing for a moment to evaluate the merits of this concern.[273] The United States, of course, is at war, and the overriding priorities in the war are to develop intelligence that might help protect the American people from further attacks and assist the government (and, particularly in this phase of active hostilities, the military) in locating and

neutralizing al Qaeda operatives. Prosecution of terrorists, while not insignificant, does not compare in importance to these other goals. "Taint" from NSA surveillances would only be an issue if (a) there were a prosecution (b) that actually used FISA interception or search evidence (c) which had actually been derived from FISA authorizations that relied, at least in part, on NSA evidence. Cases meeting these conditions would be exceedingly rare.[274] Further, in the highly unusual occurrence of such a case, involving a criminal prosecution, defendants would be represented by counsel, who would be given an opportunity to file motions to suppress evidence on any conceivable basis. Thus, any taint issue could be litigated, as legal issues are supposed to be litigated, in the factual context of a case or controversy by a claimant with standing.[275]

Were such a defendant to raise such a taint claim, it would obviously be unavailing if the NSA program is legal – a finding that is highly likely given, among other reasons, that the tribunal which is directly superior to the FISA court, the Foreign Intelligence Surveillance Court of Review, has assumed that the President maintains inherent surveillance authority notwithstanding FISA.[276] In the unlikely event the program were held illegal, however, the chance of a successful suppression motion would still be remote for several reasons.

First, the abundant law suggesting that the NSA program is legal, coupled with the fact that the administration revealed the program's existence to members of Congress and the chief judges of the FISA court, would argue powerfully for a good faith exception to suppression.[277] Second, the species of privacy right at issue is *personal*, not transferable.[278] Even if, arguendo, the NSA program illegally intercepted the conversations of "A," there would be no legal impediment to using the fruits of that surveillance to obtain FISA authorization for "B," since B is not affected by, and does not benefit from, any intrusion on the privacy of A. Finally, even if the defendant on trial were A, the subject directly affected by the allegedly illegal NSA surveillance, any FISA authorization premised in part on NSA evidence would still be valid if the underlying application, stripped of the NSA evidence, contained sufficient "untainted" evidence to support the FISA authorization.[279]

In other words, when it comes to alleged "taint," we are talking here about a highly unlikely suppression scenario, pertinent only to a tiny number of cases, within the low priority category of prosecution, attendant to which there would inevitably be counsel fully competent and equipped by discovery rules to raise any conceivable suppression issues.

That is to say, there was little reason, if any, to be concerned at this point over the remote possibility of litigation risk (a comparatively low priority) when the President of the United States – the constitutional officer responsible for defending the Nation from outside threats – had determined that the NSA program was necessary to protect the homeland from being attacked, again, by al Qaeda. As we have seen, it was just such obsessive concern over hypothetical litigation risk that forged the disastrous wall between criminal and intelligence investigators in the years prior to 9/11.

Nevertheless, it appears that on at least two occasions the chief judge of the FISA Court, upon being advised by a government lawyer about executive branch failures to comply with this new form of wall, namely, the barrier between NSA intelligence and FISA information, vigorously complained. In fact, *The Washington Post* reports that Judge Kollar-Kotelly's first complaint, in 2004, caused the NSA program to be shut down temporarily.[280] The second incident, in 2005, is said to have "prompted Kollar-Kotelly to issue a stern order to government lawyers to create a better firewall or face more difficulty obtaining warrants."[281]

Finally, the illegal leaking of the NSA surveillance program's existence to *The New York Times*, and the consequent public revelation of the program by the *Times* on December 15, 2005,[282] sparked genuinely extraordinary behavior on the part of at least some FISA court judges. In early January 2006, about two weeks after the revelations in *The New York Times*, the Bush administration agreed to provide all of the FISA judges a briefing on the NSA program, similar to the ones Judges Lamberth and Kollar-Kotelly had gotten while the effort was still secret. On January 5, 2006, *The Washington Post* reported on the upcoming briefing in a story entitled "Surveillance Court is Seeking Answers – Judges Were Unaware of Eavesdropping."[283] That news account contained the following, jaw-dropping paragraph:

> Some judges who spoke on the condition of anonymity yesterday said they want to know whether warrants they signed were tainted by the NSA program. Depending on the answers, the judges said they could demand some proof that wiretap applications were not improperly obtained. Defense attorneys could have a valid argument to suppress evidence against their clients, some judges said, if information about them was gained through warrantless eavesdropping that was not revealed to the defense.[284]

It should go without saying that there is always impropriety in judges' speaking to the press regarding matters that may end up in litigation before them, regardless of the kind of cases involved. Canon 3 of the federal Code of Judicial Conduct expressly admonishes: "A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control."[285] This is so elementary to fairness and impartiality, the hallmarks of the judicial function, that violations are nearly unheard of – no surprise given the generally high caliber of the men and women who serve on the federal bench.

To find FISA court judges leaking to *The Washington Post* about an upcoming closed meeting with administration officials about the highest classified matters of national security in the middle of a war is simply shocking. Perhaps even more stunning, though, is to find them discussing what they see as the *merits of the issues*. Without having heard any facts or taken any submissions on the governing law – and in the cowardice of anonymity – at least two of them are here reported to have speculated for the media about what positions they might take depending on how the administration answered their questions. They are here reported to be preliminarily weighing in on the validity of potential defense claims in cases where FISA evidence was introduced.

By any objective measure, the experiment, commenced in 1978, of injecting unelected federal judges into the prototypically political arena of foreign intelligence collection has had a very checkered history. The judiciary has often performed ably and honorably. But it cannot be denied that there have been monumental blunders and excesses. Further, it cannot be denied that judges have instinctively gone the extra mile, and more, to do what they personally regarded as justice for the investigative subjects before them – even at the expense of public safety. This may be understandable, and even appropriate, in the context of the criminal justice system, where processes are geared, and judges thus impelled, toward the protection of the individual and his liberties. The antithesis, however, is true in the field of foreign affairs, where the collective security of the Nation is paramount.[286]

Conclusion

In the beginning of this debate, shortly after the NSA's terrorist surveillance program was leaked to *The New York Times*,[287] the Bush administration's critics professed to be concerned only about the legal framework. Stated differently, there was a seeming consensus about the

program's policy parameters, namely that we want to be able to listen in on all conversations between al Qaeda operatives overseas and the entire range of their interlocutors in the United States. Indeed, members of Congress, while criticizing the President, invariably opined that they wanted to listen in on as much of al Qaeda-related traffic as did the administration. This, unfortunately, turned out to be an illusion, which was exposed as Congress began to consider how to revise FISA.

By now, a number of critics have advanced policy arguments in furtherance of the proposition that it is neither essential nor even desirable to monitor all al Qaeda-related conversations. For example, Harvard's Philip Heymann, in a recent *New Republic* exchange with Judge Richard Posner,[288] argues that it is not important to protect the executive's ability to listen in on all al Qaeda-related conversations, claiming that casting an excessively wide surveillance net is not particularly useful and that there are other, more elegant and less liberty-threatening ways (Heymann dubiously suggests recruiting more informers, for example) to thwart al Qaeda attacks. Meanwhile, the ACLU's Nadine Strossen, in a recent debate at New York Law School with two of the authors of this memorandum, also expressed a distinct preference for such things as giving FBI and NSA better computers and interpreters/analysts, and a disinclination to give them broader surveillance powers.[289]

The reason this policy division has become clear is very simple – the critics insist that all instances of NSA surveillance must be blessed by the FISA court judges and realize that this can be done only with a relatively narrow portion of the overall al Qaeda-related communications, namely, the ones as to which there is probable cause to believe overseas-based al Qaeda operatives are interacting with their U.S.-based agents. The willingness of the critics, so soon after the savagery of September 11 and in the face of continuing al Qaeda efforts to launch new attacks against the United States, to abandon any effort to surveil a broad range of potentially useful al Qaeda communications – allegedly to better protect the civil liberties of those whose liberties will be forever lost if the enemy is successful – is nothing short of stunning.

Unfortunately, the critics' willingness to sacrifice reasonable public-safety measures on the altar of exaggerated civil liberties concerns is not unique to the NSA surveillance debate. It is replicated across the entire range of legal and policy issues related to the war on terror. The common perception of the media and the academy is that the Bush Administration is reviving the Imperial Presidency paradigm, stretching core executive power

to its limits and threatening liberty in the process. This, to put it mildly, is a myth.[290] Instead, we are witnessing an unprecedented assault by Congress on the executive's foreign policy and national defense powers, targeting such matters as the interpretation of American international law obligations, whether treaty-based or derived from custom; the right to use force preemptively, without securing Security Council approval (a matter heatedly debated in the months leading up to the 2003 Iraq war); the detention and interrogation of captured enemy combatants (capped by the passage in December 2005 of the McCain-Graham amendment); intelligence-gathering; the conduct of diplomacy; and, now, the NSA wiretapping controversy. While Senator Russell Feingold's proposed March 2006 resolution to censure the President – for lawful behavior entirely consistent with his constitutional duty to protect Americans from foreign enemies – is certain to fail, it also deserves to be mentioned, if only as a symbolic manifestation of the current anti-executive sentiment.

The post-September 11 national catharsis appeared to have restored, at least for a time, a political and inter-branch consensus regarding the President's authority to take vigorous action against the terrorist network which attacked us, and against the states that support it. Unfortunately, within a relatively short time, a new and even more dangerous assault on presidential foreign affairs prerogatives has taken shape. In the 1970s and -80s, Congress primarily sought to buttress its power vis-à-vis the executive by insisting on such measures as more disclosure, more reporting, and more opportunities for Congress to have its say (tendencies reflected in such key pieces of foreign policy-related legislation as the 1973 War Powers Resolution, the 1974 Intelligence Oversight Act, FISA, various laws governing the dispensation of foreign aid and military assistance, provisions requiring the executive branch to certify that aid recipients comply with certain human rights standards, etc.). In the post-September 11 environment, however, the order of the day is not merely high-handed maneuvering in the guise of "transparency." Congress's new approach is far less subtle: a presidency of eviscerated constitutional independence, laden with regulations so that its core institutional and political functions – such as its foreign policy and national defense prerogatives – are downgraded to ministerial legal tasks, to be second-guessed and micro-managed by the federal judiciary.

This new approach is illustrated in the positions taken by many members of Congress in the aforementioned assault on executive authority. Indeed, even when the President has exhibited a deference which would

have satisfied aggressive proponents of congressional power in the 1970s – *e.g.*, by seeking (and obtaining) congressional authorizations to use force in the immediate aftermath of 9/11 and in the run-up to military operations in Iraq, or by fully briefing the relevant party and intelligence committee leaders in the House and Senate about the warrantless surveillance of suspected al Qaeda associates – this has proved not to be sufficient for today's critics.

One of the best examples of the post-9/11, anti-presidential zeitgeist is the claim by congressional Democrats and Republicans alike that the September 2001 AUMF, despite its extremely broad language – "all necessary means" – nevertheless did not contemplate a war-fighting technique as basic as the gathering of electronic intelligence about the enemy. We have discussed in considerable detail in this memorandum why, as a matter of law, this argument does not hold water. Legal issues aside, though, congressional unwillingness to remain faithful to the letter and spirit of previous legislative actions fundamentally undermines the most compelling rationale often advanced for a prominent congressional role in decision-making: viz., the idea that if a president expends the effort to get Congress's support at the front end of some major and risky foreign policy venture, Congress will stay with the venture through thick and thin.

Ironically, then, aside from the public, which is imperiled whenever there is doubt about presidential power to respond decisively to threats, the major loser in these hairsplitting power-plays against presidential authority is Congress itself. The executive, after all, remains a single actor, capable – even through political difficulty – of proceeding in a nuanced and case-specific manner as crises warrant. To the contrary, Congress can legislate only through the use of general standards, and only as quickly as 535 actors can mobilize – which will never be as quickly as al Qaeda can mobilize. If members of Congress take the position that anything short of a very narrow and very specific authorization to perform each and every individual aspect of war-fighting is no authorization at all, they devalue their own authorizations and make it less likely such authorizations will be sought – thus depriving the Nation and the executive of their counsel, compromising their own relevancy, and, all the while, casting doubt on the legitimacy of the President's constitutional use of commander-in-chief powers in wartime, with American forces in harm's way.

The effort to avoid accountability and responsibility for its own decisions – *e.g.*, authorizing war and then complaining that basic war-fighting components, such as intercepting enemy communications, are illicit – certainly validates the Framers' belief that Congress is ill-suited to steer

foreign policy-related ventures. There is, of course, another branch of government that is even less suited to become involved in the planning and execution of American foreign policy – the judiciary.

As the Supreme Court itself has repeatedly recognized throughout our history, courts lack the expertise and information necessary to engage in successful foreign policy-making. The judiciary is also the least cohesive branch. Competence aside, jurisdictional rules prevent courts from approaching problems in the holistic manner of a legislature or an expert in the pertinent discipline. Judges, instead, are trapped in the prism of litigation, and must take problems as presented by the litigants before them – which may not be at all reflective of how those problems are viewed by the Nation at large. (For example, the ACLU's spin on the NSA program is unrecognizable from the vision of the general public.) At any given time, moreover, various trial and appellate level courts adopt inconsistent decisions on different issues; the Supreme Court, in turn, reviews only a very small percentage of lower court cases, and, even when it does, is often unsuccessful in bringing the lower courts into harmony – due either to the failure to guide them adequately or the institutional impossibility of imposing discipline on insulated actors reacting to the intricacies of unpredictable litigation. Last, but not least, the courts, by design, are government's least accountable branch, in the democratic sense. Indeed, it is not at all clear why Bush administration critics view federal judges as inherently more liberty-conscious than politically accountable executive branch officials.

As the Framers understood, there are certain aspects of governmental power – particularly regarding the management of crisis – that necessarily entail the exercise of discretion, and can only be wielded successfully by the executive.[291] The way to prevent abuses in the exercise of this discretionary power is through political accountability; it is emphatically not by having either the judiciary or Congress participate in the discretionary decision-making. The growing body of opinion hostile to the very notion of discretionary executive power – seeing it as inherently unconstitutional and inimical to civil liberty – is extremely unfortunate. It not only endangers us by diminishing the power on whose vitality our civil liberties depends. It also smacks of hubris – presuming, despite daily, innumerable lessons to the contrary, that we mere humans are equipped to anticipate all life's contingencies and legislate them ahead of time. In our view, this argument is both ahistorical and stands the Constitution on its head. While the totality of the executive powers and actions is meant to be checked and balanced by the other two branches, the notion that every single executive

activity, particularly in the national security area, has to be checked either by Congress or by the judiciary, is absurd.

To ensure their security, the American people elect a President – the only political official, other than the Vice President, elected by all of them. The President is accountable to them, and hence institutionally geared to promote their security above all other considerations. In the prosecution of war, and within it the determination of which enemy communications merit monitoring, the American people are entitled to have ultimate decisions made by the President, just as the Framers intended. This is simply not a role that the courts are constitutionally permitted to play.

***Andrew C. McCarthy heads the Center for Law and Counterterrorism at the Foundation for the Defense of Democracies, and is a contributor at National Review Online. In 1995, he led the prosecution against Sheikh Omar Abdel Rahman and eleven others in connection with the World Trade Center bombing and a plot to bomb New York City Landmarks. David B. Rivkin, Jr., is a partner at Baker & Hostetler LLP, a Visiting Fellow at the Nixon Center and a Contributing Editor to the National Review and National Interest magazines. He served in the Department of Justice and the White House Counsel's office in the Reagan and George H.W. Bush Administrations. Lee A. Casey is a partner at Baker & Hostetler LLP and served in the Department of Justice during the Reagan and George H.W. Bush Administrations.

Footnotes

[1] 82 Stat. 214, formerly codified at 18 U.S.C. 2511(3) (the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")).

[2] *See* Resolution and Report Adopted by the House of Delegates, February 13, 2006, *available at* http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf).

[3] *Available at* http://www.nsawatch.org/DOJ.Response.AUMF.final.pdf; *see also The New York Review of Books*, *Vol. 53, No. 2*, *available at* http://www.nybooks.com/articles/18650.

[4] *See* John Yoo, The Powers of War and Peace (University of Chicago Press 2005), at 37 & ff . (in particular, discussing John Locke's *Second Treatise of Government*).

[5] Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting); *see also* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (quoting Holmes).

[6] *Cf.* Dames & Moore v. Regan, 453 U.S. at 663 (observing "the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances").

[7] *See* Former Attorney General William P. Barr, Testimony before the House Intelligence Committee (Oct. 30, 2003) at 2-3, *available at* http://intelligence.house.gov/Media/PDFS/TestimonyofWilliamPBarr.pdf.

[8] *See* United States v. Verdugo-Urqidez, 494 U.S. 259, 269 (1990); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).

[9] *See* Barr Testimony 2-3.

[10] The Federalist, No. 23 (Alexander Hamilton) (Penguin ed. 1987) at 184-85; *see also* The Federalist, No. 41 (James Madison), *id*. at 267 ("If a Federal Constitution could chain the ambition, or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own Government, and set bounds to the exertions of its own safety…. The means of security can only be regulated by the means and danger of attack. They will in fact be ever determined by these rules, and by no others.") *Compare* Dames & Moore v. Regan, 453 U.S. at 678 (in the areas of foreign policy and national security, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act[.]").

[11] Moyer v. Peabody, 212 U.S. 78, 85 (1909).

[12] *See* Barr Testimony 3; *see also, e.g.*, United States v. United States District Court ("*Keith*"), 407 U.S. 297, 312 (1972) ("unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered"); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.").

[13] The Federalist, No. 70 (Alexander Hamilton) (Penguin ed. 1987), at 402.

[14] The Federalist, No. 75 (Alexander Hamilton) (Penguin ed. 1987), at 425.

[15] The Federalist, No. 70, (Alexander Hamilton) (Penguin ed. 1987), at 403.

[16] The Federalist, No. 73 (Alexander Hamilton) (Penguin ed. 1987), at 418.

[17] The Federalist, No. 70, (Alexander Hamilton) (Penguin ed. 1987), at 403.

[18] *See* Morrison v. Olson, 487 U.S. 684, 705 (1988) (Scalia, J., dissenting).

[19] Yoo, The Powers of War and Peace, at 19. Locke, for example, drew a distinction between executive power in the purely domestic realm, responsible for the execution of laws enacted by the legislative authority, and the "federative" power, which was necessary to manage the full gamut of relations between a commonwealth and the outside world, in relation to which it remained "in the state of nature." Because international relations are uniquely unpredictable, and what is to be done with respect to foreign nations depends greatly on their own actions – which the commonwealth is often powerless to control, much less regulate by legislation – governance in the realm of foreign relations (particularly including matters of war and peace) "must be left in great part to the prudence of those who have this [federative] power committed to them." Because the executive power embodies the force of the public – to enforce the public's laws within and manage the security and interest of the public without – the federative power must repose within the executive, for to separate the two would lead to "disorder and ruin." *Ibid.*, 37 (quoting from Locke, *The Second Treatise of Government*, Sections 145-148). Blackstone found the conduct of foreign affairs to be purely executive in nature, stressing in society's dealings with the outside world the need for "unanimity" and "strength" instantiated by a single, undivided sovereign power. Montesquieu, whom Madison labeled "the oracle" on separation of powers doctrine (The Federalist No 47 (Penguin ed. 1987), at 303), also echoed Locke's assessment of the federative power, and while his major innovation in the development of separation-of-powers doctrine was the independent judiciary, it is noteworthy that his vision provided no role for that judiciary in foreign affairs. In that arena, the executive would enjoy broad discretion, checked almost exclusively by the legislature's power of the purse. *Ibid.* 37-41.

[20] Jefferson, Opinion on the Powers of the Senate (1790), *in* 5 The Writings of Thomas Jefferson 161 (Paul L. Ford ed., 1895); Yoo, The Powers of War and Peace, at 19 & n.53. Prof. Yoo elaborates that Jefferson's conclusions in this regard were expressly shared by, for example, Hamilton, who contended that the president was "[t]he constitutional organ of intercourse between the States [*sic*] & foreign nations." *Id.*, at 20 (quoting Hamilton, Pacificus No. 7 (1793), *in* 15 Papers of Alexander Hamilton 135).

[21] 10 Annals of Congress 613-14 (1800); Yoo, The Powers of War and Peace, at

20 & n.55.

[22] *See Keith*, 407 U.S. at 310 ("the President of the United States has the fundamental duty, under Art. II, 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President – through the Attorney General – may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government").

[23] The Federalist No. 69 (Alexander Hamilton) (Penguin ed. 1987), at 398. *See also* The Federalist No. 74 (Alexander Hamilton) (*id*.), at 422 ("The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part of the executive authority"); Johnson v. Eisentrager, 339 U.S. 763, 788 (1950) ("this grant of war power includes all that is necessary and proper for carrying these powers into execution") (citations omitted); Lichter v. United States, 334 U.S. 742, 767 n.9 (1948) ("The war power of the national government is 'the power to wage war successfully.'") (Quoting Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238).

[24] 22 U.S. Op. Atty. Gen. 13, 25-26, *Foreign Cables*, (1898) (emphasis added) (citing, *inter alia*, Cunningham v. Neagle, 135 U.S. 1 (1890)); *see* H. Bryan Cunningham, Esq, Letter to the Chairman and Ranking Member of the Senate Judiciary Committee (February 3, 2006) (Cunningham is a former national security legal adviser to both the Clinton and George W. Bush administrations.) (hereafter, "Cunningham Letter"), at 9.

[25] Fleming v. Page, 9 How. 603, 615 (1850).

[26] 67 U.S. (2 Black) 635, 688 (1863).

[27] 299 U.S. 304, 320 (1936). *Curtiss-Wright* has not only never been overruled but has been cited as authority over 150 times. Cunningham Letter 10.

[28] 339 U.S. at 789.

[29] 484 U.S. 518, 527, 530 (1988).

[30] Totten v. United States, 92 U.S. 105, 106 (1876); *see* Tenet v. Doe, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such intelligence matters); *see also* Memorandum from the U.S. Justice Department (January 19, 2006)("Legal Authorities Supporting the Activities of the National

Security Agency Described by the President") (hereafter, "DOJ Mem."), at 14; *see also Curtis-Wright,* 299 U.S. at 320 (observing that the chief executive's constitutional mission was necessarily aided by "confidential sources of information. He has his agents in the form of diplomatic, consular and other officials").

[31] 333 U.S. 103 (1948).

[32] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

[33] *See* DOJ Mem. at 7-8 (citation omitted).

[34] *Chicago & Southern Air Lines*, 333 U.S. at 111; *cf. Ex parte Quirin*, 317 U.S. 1, 25 (1942) (Wartime detention of enemy combatant ordered by the President in the declared exercise of Commander in Chief power may not "be set aside by the courts without clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted.").

[35] Webster v. Doe, 486 U.S. 592 (1988).

[36] *Ibid.* at 605-06 (O'Connor, J., concurring).

[37] Release, Department of Justice, The NSA Program to Detect and Prevent Terrorist Attacks – Myth v. Reality (Jan. 27, 2006) (hereafter, "DOJ Release"), *available at* http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf.

[38] Al Qaeda, along with its affiliates and its allies (such as the Taliban in Afghanistan), attacked U.S. military personnel in Somalia in 1993; bombed the United States embassies in Kenya and Tanzania on August 7, 1998; attempted to bomb the U.S.S. *The Sullivans* on January 2, 2000; and bombed the U.S.S. *Cole* on October 12, 2000. In addition, Islamic terrorists known to have conspiratorial relationships with al Qaeda have been connected to the February 26, 1993 bombing of the World Trade Center, a subsequent Spring 1993 plot to bomb New York City landmarks (the United Nations complex, the Lincoln and Holland Tunnels, and the Javits Federal Building that houses the FBI's New York Field Office), and 1994 plans to bomb U.S. airliners in flight over the Pacific Ocean and to murder President Bill Clinton. (*See* 9/11 Commission Report 147-48). It is also now believed that al Qaeda may well have participated with the Iranian government and Saudi Hezbollah in the June 1996 bombing of the Khobar Towers in Saudi Arabia where U.S. Air Force personnel were headquartered. (*See* 9/11 Commission Report 60 & n.48 (at 468)). The enemy, furthermore, continues to confront U.S. forces on the ground in both Iraq and Afghanistan.

[39] *See, e.g.*, Al-Qa'ida spokesman Suleiman Abu Gheith (Website of the Center for Islamic Research and Studies, June 7, 2002), *available at* http://memri.org/bin/articles.cgi?Page=subjects&Area=middleeast&ID=SP38802. ("[W]e are continuing with our blows against the Americans and the Jews[.] … Allah willing, the blow will come from where they least expect it[.]… The Americans have still not tasted from our hands what we have tasted from theirs. The [number of] killed in the World Trade Center and the Pentagon were no more than fair exchange for the ones killed in the Al-'Amiriya shelter in Iraq, and are but a tiny part of the exchange for those killed in Palestine, Somalia, Sudan, the Philippines, Bosnia, Kashmir, Chechnya, and Afghanistan. … We have not reached parity with them. We have the right to kill four million Americans – two million of them children – and to exile twice as many and wound and cripple hundreds of thousands. Furthermore, it is our right to fight them with chemical and biological weapons, so as to afflict them with the fatal maladies that have afflicted the Muslims because of the [Americans'] chemical and biological weapons. … America knows only the language of force. This is the only way to stop it and make it take its hands off the Muslims and their affairs. America does not know the language of dialogue!! Or the language of peaceful coexistence!! America is kept at bay by blood alone…"); Osama bin Laden (Al-Jezeera, Dec. 16, 2004), *available at* http://memri.org/bin/articles.cgi?Page=subjects&Area=jihad&ID=SP83804. ("O Allah, turn against the American-Zionist coalition, their allies, and their agents. O Allah, destroy them and break them; remove them from power and disperse them and scatter them; make their wives widows and turn them against one another. Seek out their weak spots just as they seek out the *mujahideen*'s weak spots. Shame them before all humanity. Rid us of them however you wish. … We ask Allah to give His grace to the *mujahideen* who stormed the American consulate in Jeddah. How can they expect to enjoy security while they bring death and destruction upon our people in Palestine and in Iraq. They do not deserve to be secure anywhere in the world"); Ayman al-Zawahiri (al-Jezeera, Aug. 4, 2005), *available at* http://memritv.org/search.asp?ACT=S9&P1=791. ("Oh Americans, what you have seen in New York and Washington, and the casualties you witness in Afghanistan and in Iraq, … are nothing but the casualties of the initial clashes. If you continue the same policy of aggression against the Muslims, you will see, Allah willing, horrors that will make you forget what you saw ... in Vietnam"); Ayman Zawahiri (al-Jezeera, Sept. 1, 2005, *available at* http://memritv.org/search.asp?ACT=S9&P1=835.) ("I speak to you today about the blessed London raid[.] …This blessed raid, like its glorious predecessors in New York, Washington, and Madrid, brought the battle to the enemy's soil[.] … Oh peoples of the crusader coalition, we have warned you, but it appears that you want us to make you taste the horrors of death. So taste some of what you made us taste. … Bush, Blair, and all those who march behind their crusader-Zionist banner should know that the mighty mujahideen of Islam have pledged before their God to fight them until either victory or martyrdom. … The beggar-scholars who issue *fatwas* in line with the head of the Anglican Church say

that the response to the crimes of Bush and Blair cannot be to attack civilians. Our answer to them is that treatment in kind is just. … [T]hese civilians are the ones who pay taxes to Bush and Blair, so they can equip their armies and give aid to Israel, and they are the ones who serve in their armies and security services. … Just as they have made rivers of blood flow in our countries, we will blow up volcanoes of rage, with Allah's help, in their countries"). "Rakan Ben Williams" (an alias for one who also calls himself the "al-Qaeda undercover soldier, USA") (Global Islamic Media Front, March 10, 2006) *available at* http://memri.org/bin/latestnews.cgi?ID=SD111206. ("Final Warning to the American People") ("[T]he New York, Washington, Madrid, and London expeditions have been carried out a few years back. … Let me also inform you that we are [now] talking about two operations, not one. The scale of one of them is larger than the other but both are large and significant. However, we will start with the smaller, and temporarily put the larger on hold to see how serious the Americans are about their lives. … Do not put your hopes on Bush and his clan, they are incapable of protecting you[.] … Let me now inform you why we opted to inform you about the two operations and your inability to stop them before they are carried out. The reason is simple; you cannot uncover or stop them[.] … [T]he best you could do would be to accelerate the day of carrying out the operations. … I will not give any more clues; this is enough as a wake up call. Perhaps the American people will start thinking about the magnitude of the danger that is coming their way. … Oh you helpless Americans, especially those living in States far away from Washington, D.C.! Your country is comprised of many States that should not have anything to do with Muslims. Take the State of Arizona for example[.] What interest of theirs serving, helping, and siding with the Jews and Israel? … [T]he net result for you is death, losses and insecurity. … The operations are ready to go, we are just waiting for orders from the commander in chief, Osama Ben Laden. … He will decide whether to strike or to hold. We swear by Allah that there are so many tricks and tactical maneuvers that will make your heads spin, by the grace of Allah. You will be brought to your knees, but not until you lose more loved ones and experience significant destruction").

[40] *See* Richard A. Posner, *What if Wiretapping Works?* (The New Republic, Feb. 6, 2006 ed.), *available at* http://www.tnr.com/doc.mhtml?i=20060206&s=posner020606) ("Washington, D.C. … could be destroyed by an atomic bomb the size of a suitcase. Portions of the city could be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that had been coated with radioactive material. The smallpox virus – bioengineered to make it even more toxic and the vaccine against it ineffectual, then aerosolized and sprayed in a major airport – could kill millions of people. Our terrorist enemies have the will to do such things. They may soon have the means as well. Access to weapons of mass destruction is becoming ever easier.").

[41] *See, e.g.*, Scholars' Letter 1.

[42] DOJ Mem. 1.

[43] DOJ Release.

[44] *Ibid*.

[45] *Cf., e.g., Totten v. United States*, *supra* 31 & n.30, and *Moyer v. Peabody*, *supra* at 28 & n. 11; *but see Keith*, *infra* at 38-39 & nn.73-80.

[46] *See Keith*, discussed *infra* at 39 & n.75 (fact that surveillance occurs domestically does not alter fact that surveillance is prompted by national security concerns arising from the involvement of foreign powers).

[47] 50 U.S.C. Sec. 1801(f)(1)-(4) (definition of "electronic surveillance" excludes, among other types of communications, those involving parties each of whom is situated outside the United States).

[48] Curiously absent from the debate over the NSA program – no doubt because that debate has focused obsessively on the question of technical compliance with FISA at the expense of the far more consequential matters of empirical knowledge about the enemy and the utility of the NSA's monitoring – has been the role of communications in Islamist terrorism. Plainly, all entities that project power must communicate in order to do so. Militant Islam is notable, however, for the role of the *fatwa*, or religious edict, in directing and legitimizing various power projection-related activities. That is, its modus operandi includes not merely the exchange of strategic and tactical information, but also explanations that particular terrorist operations (which typically contemplate death on a massive scale – including likely or inevitable killings of Muslims) have won the approval of religious authorities. The machinations of the notorious "Blind Shiekh," Omar Abdel Rahman, provide useful examples. In 1992, Sayyid Nosair, the murderer of Meir Kahane and a co-conspirator in the 1993 World Trade Center bombing, was overheard explaining that any bombing initiatives would require a *fatwa* from Abdel Rahman before they could be executed. United States v. Abdel Rahman, 189 F.3d 88, 106-07, 124 (2d Cir.), *cert. denied*, 528 U.S. 982 (1999). Abdel Rahman himself bragged that the authority to issue *fatwas* was an "honor" and thus that "we ask Allah … that we be worthy to issue a *fatwa* to kill tyrants, oppressors and infidels." (United States v. Abdel Rahman, 93 Cr. 181 (S.D.N.Y.) Government Exhibit 461R at 12; *see also Abdel Rahman*, 189 F.3d at 104). Following the 9/11 attacks, Osama bin Laden made public statements indicating that the suicide hijackings were permissible based on a fatwa issued by Abdel Rahman from an American prison – and, indeed, Abdel Rahman, following imposition of a life sentence for his federal terrorism convictions, had decreed of Americans that "Muslims everywhere [should] dismember their nation, tear them apart, ruin their economy, provoke their

corporations, destroy their embassies, attack their interests, sink their ships, . . . shoot down their planes, [and] kill them on land, at sea, and in the air. Kill them wherever you find them." (*See* United States v. Ahmed Abdel Sattar, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003), *available at* http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwrt111903sind.html) at 4, para. 7). (Bin Laden, it should be noted, had preceded the 1998 embassy bombings with a February 1998 *fatwa* directing the murder of Americans wherever they could be found. (9/11 Commission Report 69)). Finally, in 2005, three defendants were convicted on material support to terrorism charges based on their efforts to help Abdel Rahman run his Egyptian terrorist organization (*Gama'at al Islamia*, or "the Islamic Group") by, among other things, communicating his directives to Egypt from the United States. *Id.*.

[49] As George Washington put it while being the general in command of the first American forces, the "necessity of procuring good intelligence is apparent and need not be further urged... [U]pon Secrecy, Success depends in Most Enterprises...and for want of it, they are generally defeated." *An Overview of American Intelligence until World War II,* CIA Factbook on Intelligence, *available at* http://www.cia.gov/cia/publications/facttell/intel_overview.html (page last updated Jan. 17, 2006).

[50] Haig v. Agee, 453 U.S. 280, 307 (1981), quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) (internal quotations omitted); *see also* The Federalist, No. 23 (Alexander Hamilton), at 184 ("The principal purposes to be answered by union are these – the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks …").

[51] *See, e.g.*, National Army Security Agency Association (NASAA), History of U.S. Army Signal Intelligence (SIGINT) Activity and Organizations (Ch. 1, "1800s – Civil War, Spanish American War, Philippine War"), *available at* http://www.nasaa-home.org/history/indexhis.htm; DOJ Mem. 16 (citations omitted).

[52] NASAA, History of U.S. Army Signal Intelligence (SIGINT) Activity and Organizations; CIA Factbook on Intelligence; DOJ Mem. 16 (citing G.J.A. O'Toole, The Encyclopedia of American Intelligence and Espionage 498 (1988)) (other citations omitted).

[53] CIA Factbook on Intelligence.

[54] DOJ Mem. 16; Paul Johnson, A History of the American People (Harper Collins, 1997), at 645.

[55] When President Truman created the NSA in October 1952, it supplanted the Armed Forces Security Agency (AFSA), which had directed the communications and electronic intelligence activities of the military services' signals intelligence

units. Though renamed the National Security Agency/Central Security Service (NSA/CSS) in 1971, the second part of the NSA's title, which refers to its coordination of signals intelligence activities for the military services, is rarely used. Officially a component of the Defense Department, NSA is responsible for the communications intelligence functions of the armed services and the signals intelligence responsibilities of the CIA. NASAA, History of U.S. Army Signal Intelligence (SIGINT) Activity and Organizations (Ch. 6, "Between World War II and the Korean War ASA Begins").

[56] *Ibid*.

[57] Bartholomew Lee, *Radio Intelligence Developments during World War One and between the Wars, available at* http://www.antiqueradios.com/chrs/journal/intelligence.html.; NASAA, History of U.S. Army Signal Intelligence (SIGINT) Activity and Organizations (Ch. 3, "World War I – COMINT in its Infancy, 1917-1919").

[58] DOJ Mem. 16, citing Exec. Order No. 2604 (April 28, 1917).

[59] CIA Factbook on Intelligence.

[60] DOJ Mem. 7-8. After Roosevelt's death, the Justice Department elaborates, President Truman approved Attorney General Tom Clark's proposal to take investigative measures similar to those ordered in 1940, "in cases vitally affecting domestic security." *Id*.

[61] CIA Factbook on Intelligence; *see also* Mark Riebling, Wedge – From Pearl Harbor to 9/11, How the Secret War between the FBI and CIA Has Endangered National Security (Touchstone, 1994), at 19-31.

[62] DOJ Mem. 16 (emphasis in original) (quoting Jack A. Gottschalk, *"Consistent with Security" ... A History of American Military Press Censorship*, 5 Comm. & L. 35, 39 (1983).

[63] DOJ Mem. 16 (citations omitted).

[64] CIA Factbook on Intelligence; Riebling, Wedge, 19-31.

[65] History of U.S. Army Signal Intelligence (SIGINT) Activity and Organizations (Ch. 5, "World War II: The importance of COMINT is fully recognized 1941-1944").

[66] DOJ Mem. 16-17 (quoting Carl Boyd, American Command of the Sea through

Carriers, Codes, and the Silent Service: World War II and Beyond (Mariners Museum 1995), at 27).

[67] Olmstead v. United States, 277 U.S. 438, 466-67 (1928). By contrast, if physical invasion of the premises was involved in installing a listening device, the Fourth Amendment was implicated. *See* Silverman v. United States, 365 U.S. 505, 510-11 (1961); *cf.* Goldman v. United States, 316 U.S. 129, 134-36 (1942).

[68] *See* Warden v. Hayden, 387 U.S. 294, 304 (1967); *see also* Katz v. United States, 389 U.S. 347, 353-61 (1967); *Keith*, 407 U.S. at 312-13.

[69] 389 U.S. at 353-61 (1967).

[70] *Ibid*., 389 U.S. at 358 & n.23.

[71] *Ibid*, 389 U.S. at 363-64 (White, J., concurring); *see also* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 at 634 (Jackson, J., concurring) ("A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves"), and id. at 594 (Frankfurter, J., concurring) (the Framers "did not make the judiciary the overseer of our government"). Both Justice Jackson and Justice Frankfurter's monitory passages were quoted by then-Justice Rehnquist's opinion for the Court in *Dames & Moore* v. *Regan*, 453 U.S. at 660. *See also Chicago & Southern Air Lines*, 333 U.S. at 111 (excerpted *supra* at 31-32).

[72] Plainly, constitutional considerations aside, this line-drawing sensibly vindicated both public safety and individual liberty – in a way FISA did not. Interestingly, Judge Richard Posner has returned to this theme adumbrated by the 1968 Title III. In a recent op-ed proposing an overhaul of FISA that would embrace the NSA program, he suggested that such a new federal law might "[f]orbid any use of intercepted information for any purpose other than 'national security' as [narrowly] defined in the [overhaul] statute[.] ... Thus the information could not be used as evidence or leads in a prosecution for ordinary crime." Richard A. Posner, *A New Surveillance Act*, Wall St. J., Feb. 15, 2006, at A16); *cf. Keith*, 407 U.S. at 344 (White, J., concurring) (criticizing majority for reaching the constitutional issue, and thus invalidating the domestic intelligence collection, when it would have been sufficient for purposes of the case to rule evidence inadmissible under Title III).

[73] United States v. United States District Court ("*Keith*"), 407 U.S. 297, 320-24 (1972).

[74] *Ibid*., 407 U.S. at 321-22; *see also In re Sealed Case*, 310 F.3d 717, 744 (FIS Court of Review 2002) ("It will be recalled that *Keith* carefully avoided the issue of

a warrantless foreign intelligence search"). It is noteworthy that, in drawing a constitutional distinction that could allow for warrantless surveillance in the *foreign* national security realm, the *Keith* Court relied, in part, on the musings of a bygone era's American Bar Association. *See ibid.*, 407 U.S. at 322 n.20, citing *ABA Project on Standards for Criminal Justice, Electronic Surveillance* 120, 121 (Approved Draft 1971, and Feb. 1971 Supp. 11). In stark contrast, the current ABA's position on the matter is schizophrenic. Where the Foreign Intelligence Surveillance Court of Review – the highest, most specialized court ever to review FISA – has acknowledged, in *In re Sealed Case,* that the president maintains inherent power to conduct warrantless surveillance in connection with foreign threats, the ABA waves its magic want and purports to make the acknowledgment disappear with the talismanic assessment that it is mere "dictum." (ABA Report 19). Moreover, though the Supreme Court explicitly said that its *Keith* rational did not apply to foreign national security threats, the ABA claims that reservation should be ignored because these same "considerations also apply to electronic surveillance … for foreign intelligence purposes." *Id*. at 21.

[75] *Keith*, 407 U.S. at 308 ("the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of *foreign* powers, *within* or without this country") (emphasis added).

[76] *Ibid*, 407 U.S. at 312-13; *cf. Verdugo-Urquidez*, 494 U.S. at 269 (non-resident alien subjected to search by American agents in a foreign country unable to claim privacy rights under the Fourth Amendment); Johnson v. Eisentrager**,** 339 U.S. 763, 784 (1950) (the Constitution and its Bill of Rights protections do not have extraterritorial application); *See also cf.* Zadvydas v. Davis, 533 U.S. 678, 695-96 (2001) (while construing immigration statute to contain an implicit due process right for an alien who has been lawfully admitted into the U.S. to challenge indefinite detention pending effectuation of removal order, the Court caveats that the case did not involve, and its decision did not extend to, "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security").

[77] *See, e.g*., A B A Report 21.

[78] After construing the Fourth Amendment's Unreasonable Search Clause to be controlled by its related Warrant Clause, such that searches conducted without warrant were perforce unreasonable, the Court conceded, *en passant*, "It is true that there have been some exceptions to the warrant requirement" – a concession it then attempted to marginalize as "few in number and carefully delineated." *Keith*, 407 U.S. at 318 (citations omitted). Of course, even accepting, *arguendo*, *Keith*'s description, that is no longer the case, and many warrantless searches – based on

less than probable cause and conducted in circumstances that are trifles compared with the public safety imperatives implicated by the NSA's terrorist surveillance program – are deemed constitutionally valid. The Court, more to the point, was proceeding from a flawed premise when it pointedly shunned those who "have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'" *Id*. at 315, quoting United States v. Rabinowitz, 339 U.S. 56, 66 (1950). In fact, *Rabinowitz*'s articulation states *precisely* the relevant test – reasonableness, not prior judicial approval, is the touchstone of the Fourth Amendment.

[79] *Cf. In re Sealed Case*, 310 F.3d at 744-45 ("The main purpose of ordinary criminal law is twofold: to punish the wrongdoer and to deter other persons in society from embarking on the same course. The government's concern with respect to foreign intelligence crimes, on the other hand, is overwhelmingly to stop or frustrate the immediate criminal activity…. [T]he criminal process is often used as part of an integrated effort to counter the malign efforts of a foreign power. Punishment of the terrorist or espionage agent is really a secondary objective;[footnote omitted] indeed, punishment of a terrorist is often a moot point").

[80] The Court further gilded the lily by providing an improper advisory opinion about how Congress might go about constructing a regime for judicial warrants in *domestic* national security cases – tacking on a lip-service disclaimer which maintained that this advice in its opinion should not "of course" be thought of as an advisory opinion ("the above paragraph does not, of course, attempt to guide the congressional judgment"). *Keith*, 407 U.S. at 322-24. Congress later added to the confusion by using this dicta as part of its FISA template for judicial warrants in national security cases involving *foreign* threats. *Cf. In re Sealed Case*, 310 F.3d at 742-44 (criticizing the Fourth Circuit in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) for conflating in a case involving *foreign* security threats the advice offered by *Keith* for *domestic* security threats).

[81] *See* The Prize Cases, *supra* at 30 & n.26. If, for example, al Qaeda or some other foreign force were to successfully seize some section of U.S. territory, there could be no serious question that, in the course of military operations to regain control, the President could intercept all communications in and out of that territory, even though many (if not the vast majority of) those communications would be wholly domestic. It is also worth remembering that one of the hijacked planes on 9/11, Flight 93, was almost certainly en route to attack the Capitol or the White House when its brave passengers gave their lives to force it down. By the critics' lights, the President would be bound by FISA restrictions even in an emergency situation where it was impossible for Congress to convene to revisit them. That, quite clearly, is not what the Framers had in mind.

[82] United States v. Knights, 534 U.S. 112, 118, 119-122 (2001) (reasonableness determined by a "general Fourth Amendment approach of 'examining the totality of the circumstances,'" regardless of whether they serve a special need or fall under another exception to the warrant requirement) (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)). *Compare* Stanley C. Brubaker, *The Misunderstood Fourth Amendment – The originalist reading is better both for civil liberties and for fighting the war on terror*, The Weekly Standard, Mar. 6, 2006, *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/011/911wzgse.asp. (arguing that "exceptions" to the Warrant Clause are not really exceptions at all but rather instances of situation-based "reasonableness").

[83] *See* Ferguson v. Charleston, 532 U.S. 67, 98 (2001) (Scalia, J., dissenting) ("special-needs doctrine … operates only to validate searches and seizures that are otherwise unlawful").

[84] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); *see also, e.g*., Indianapolis v. Edmond, 531 U.S. 32, 49 (2000) (Rehnquist, C.J., dissenting) ("the constitutionality of a seizure turns upon 'a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the pubic interests, and the severity of the interference with individual liberty'") (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

[85] *See Ferguson*, 532 U.S. at 79-80.

[86] *Edmond*, 531 U.S. at 44 & n.1 (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990), and United States v. Martinez- Fuerte, 428 U.S. 543, 551-54, 561-64 (1976)).

[87] *Griffin*, 483 U.S. at 873-874; *see also* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (upholding warrantless drug-screening of student-athletes); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upholding suspicionless drug testing of Customs Service employees whose jobs would involve drug interdiction or require carrying firearms); Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 628 (1989) (warrantless searches of railroad employees due to diminished expectation of privacy of employees in a pervasively regulated industry and the "compelling" public interest since operation of trains by anyone the impaired "can cause great human loss before any signs of impairment become noticeable"); O'Connor v. Ortega, 480 U.S. 709, 725 (plurality) (1987) (and *id*. at 732 (Scalia, J., concurring) (warrantless searches of public employees for work-related reasons); New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985) (school); Hudson v. Palmer, 468 U.S. 517, 526 (1984) (prison).

[88] *See e.g*. *Ferguson*, 532 U.S. at 77-86 (invalidating drug screening urinalysis of

pregnant women where the central purpose was to develop criminal evidence for prosecution which, secondarily, could be used to pressure patients into substance abuse treatment); *Edmond*, 531 U.S. at 42-47 (rejecting vehicle checkpoints whose primary purpose was to detect evidence of ordinary criminal wrongdoing, namely, drug trafficking); *compare* Michigan Dep't of State Police v. Sitz, 496 U.S. at 451 (checkpoints upheld where public interest involved the gravity of drunken driving and the government's compelling interest to keep intoxicated motorists off the roadways, not criminal prosecution), *and* United States v. Martinez- Fuerte, 428 U.S. at 551-54, 561-64 (upholding checkpoints near Mexico as vindicating the public interest in policing the border from the tide of illegal immigration); *see also In re Sealed Case*, 310 F.3d at 745-46 (discussing Supreme Court's distinction of *Ferguson* from *Martinez-Fuerte* and *Sitz*).

[89] *See Ferguson*, 532 U.S. at 78.

[90] *Edmond*, 531 U.S. at 42; *see also Ferguson*, 532 U.S. at 86 (same, quoting *Edmond*).

[91] *In re Sealed Case*, 310 F.3d at 745; *see also, e.g.*, Whren v. United States, 517 U.S. 806 (1996); Scott v. United States, 436 U.S. 128, 136 (1978) ("[s]ubjective intent alone … does not make otherwise lawful conduct illegal or unconstitutional").

[92] *Cf.* Skinner v. Railway Labor Executives' Association, 489 U.S. at 628 (special needs justification bolstered by "diminished expectation of privacy").

[93] *Edmond*, 531 U.S. at 44.

[94] *In re Sealed Case*, 310 F.3d at 745-46; *see also id.* at 746 & n.33 (distinguishing *Ferguson* from a situation in which the primary government interest at stake would be "simply to save lives").

[95] *But cf.* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation); *see also* DOJ Mem. 8.

[96] United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), citing The Federalist No. 64 (John Jay), at 434-36; The Federalist No. 70 (Alexander Hamilton), at 471; and The Federalist No. 74 (Alexander Hamilton), at 500 (J. Cooke ed. 1961); *see also Chicago & Southern Air Lines*, 333 U.S. at 111.

[97] 494 F.2d 593 (*en banc*) (3d Cir. 1974).

[98] 629 F.2d 908 (4th Cir. 1980). *See also In re Sealed Case*, 310 F.3d at 725-33

(explaining that, while *Truong* acknowledged the executive's inherent authority, it was the launch pad for the errant "primary purpose" test repealed by the Patriot Act in October 2001 and rejected by the Court of Review in *In re Sealed Case*. This test presented a "false dichotomy," requiring the government to demonstrate that intelligence-gathering, as purportedly distinct from criminal investigation, was the primary purpose behind its decision to use national security electronic surveillance authority, rather than seek a criminal wiretap under Title III).

[99] On Motions [by the government] for Review of Orders of the United States Foreign Intelligence Surveillance Court (Nos. 02-662 and 02-968), reported as *In re Sealed Case* at 310 F. 3d 717 (FIS Court of Review 2002). The decision is the only one ever rendered by the Court of Review since FISA's inception in 1978. *See also* April 29, 2003 Letter Report of Attorney General John Ashcroft to the Director, Administrative Office of the United States Courts, recounting that, during calendar 2002, "Two applications were 'approved as modified,' [by the Foreign Intelligence Surveillance Court,] and the United States appealed these applications to the Foreign Intelligence Surveillance Court of Review, as applications having been denied in part. On November 18, 2002, the Court of Review issued a judgement [*sic*] that 'ordered and adjudged that the motions for review be granted, the challenged portions of the orders on review be reversed, the Foreign Intelligence Surveillance Court's Rule 11 be vacated, and the cases be remanded with instructions to grant the United States' applications as submitted.'"

[100] *Ibid.*, 310 F.3d at 742. The ABA's only response to *In re Sealed Case* is to label it "dictum made without any analysis, in a case which raised no issue about the President's inherent authority or the constitutional power of Congress to regulate the president's exercise of that authority under FISA." (ABA Report 19). As previously noted (*supra* at 104 & n.74), this is a remarkable position for the ABA to take given its urging of the rationale of *Keith*, a case which was not about, and expressly disclaimed application to, foreign intelligence collection. In any event, however, the "without any analysis" detraction does not withstand scrutiny of *In re Sealed Case'*s survey of all the relevant law. Moreover, at issue in *In re Sealed Case*, was, in fact, the authority of the executive branch to lay the parameters for electronic surveillance in the foreign intelligence field in the analogous context of judicial interference. That, of course, is different from congressional interference, but it is unserious to intimate, as the ABA does, that the case is irrelevant.

[101] Loving v. United States, 517 U.S. 748, 757 (1996).

[102] The Federalist No. 47 (James Madison) (Penguin ed. 1987), at 303; *see also* Morrison v. Olson, 487 U.S. 684, 697 (1988) (Scalia, J., dissenting) (quoting Madison and adding: "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world

that have adopted, or even improved upon, the mere words of ours.").

[103] The Federalist No. 73 (Alexander Hamilton), at 418.

[104] *Ibid. See also* The Federalist No. 48 (James Madison) (Penguin ed. 1987), at 309; (criticizing those among the "founders of our republics" who "seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations").

[105] The Federalist No. 73 (Alexander Hamilton), at 418.

[106] The Federalist, No. 51 (James Madison) (Penguin ed. 1987), at 319; Morrison v. Olson, 487 U.S. at 698 (Scalia, J., dissenting).

[107] *See* 18 U.S.C. Sec. 2511(2)(f); ABA Report 6, 10 & n.11, 11, 13, 16, 17 ; Scholars' Letter 2, 3, 4, 5 & n.6, 6; *See also* DOJ Mem. 20-23.

[108] U.S. Const., art. I, §. 7.

[109] U.S. Const., art. II, §. 1, cl. 1.

[110] The Federalist, No. 70 (Alexander Hamilton), at 403.

[111] 5 U.S. (Cranch) 137 (1803).

[112] *Ibid*., 5 U.S. at 166. Marshall went on to explain that when the legislature proceeds to add "other duties" on one of the President's officers, directing him to perform certain acts on which the rights of individuals depend, he is, *insofar as those added duties are concerned*, "the officer of the law" and thus "amenable to the laws for his conduct," including the laws that vindicate individual rights. But, when executive branch officials act "in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable," and an individual has no remedy.

[113] Morrison v. Olson, 487 U.S. at 709-10 (Scalia, J., dissenting) (pointing out that neither the legislature nor the judiciary would tolerate even a slight diminution or delegation of their own enumerated powers).

[114] Clinton v. Jones, 520 U.S. 681, 697 (1997).

[115] U.S. Const., art. I, § 8.

[116] Loving v. United States, 517 U.S. at 757; *see also* Clinton v. Jones, 520 U.S. at 702 (test for whether separation of powers has been violated is whether another branch's action rises to "the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions").

[117] Clinton v. Jones, 520 U.S. at 701, citing *Chicago & Southern Air Lines*, 333 U.S. at 111. It is worth noting that the Clinton/Jones dispute had nothing directly to do with foreign policy. The Court patently chose to resort to the President's management of international affairs because it is the most irrefutable example of a core presidential power. *See also* Cunningham Letter 22 & n.50 (noting the rationale of *United States* v. *Brown*, 484 F.2d at 426, in which the Court held that "because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm … that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence").

[118] Art. II, § 2, cl. 2.

[119] Myers v. United States, 272 U.S. 52 (1926); *see also* Freytag v. Commissioner, 501 U.S. 868, 906 (1991) (Scalia, J., concurring), (the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional"); Morrison v. Olson, 487 U.S. at 711 (Scalia, J., dissenting) ("the executive can decline to prosecute under unconstitutional statutes") (citing United States v. Lovett, 328 U.S. 303 (1946)); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 635-38 (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).

[120] *See generally* Richard F. Grimmet, Congressional Research Service Report, The War Powers Resolution: After Thirty Years, No. RL32267 (March 11, 2004), *available at* http://www.fas.org/man/crs/RL32267.html#Back73. (hereafter, "CRS War Powers Resolution Report").

[121] *Ibid.; see also* Richard F. Grimmet, Congressional Research Service Report, Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments, No. RS20775 (Jan. 10, 2001), *available at* http://www.fas.org/man/crs/RS20775.pdf. (hereafter, "CRS Funding Cutoff Report"), at 3-4.

[122] *See* CRS War Powers Resolution Report, Subsection "Kosovo," *available at* http://www.fas.org/man/crs/RL32267.html#_1_31. The Kosovo episode demonstrates the folly of a "lawfare" approach which endeavors to convert a political issue into a legal one. The crucial issues in the Balkans circa 1999 were whether military operations there were in the national security interest of the

United States (a question primarily for the President) and whether those operations had the support of the American people (a question on which Congress and its funding powers are the best barometer). This was a constitutional and political dispute, and it was thus irrelevant – both legally and practically – whether those operations comported with the War Powers Resolution statute. Appropriately, the dispute was treated just that way. Members of Congress advanced various proposals to curtail funding in the absence of explicit legislative approval of President Clinton's decision to use force. These proposals often tracked the rationale of the War Powers Resolution, but they were defeated because they lacked political support.

[123] *See* CRS War Powers Resolution Report, Subsection "Kosovo," *available at* http://www.fas.org/man/crs/RL32267.html#_1_31. ("On June 8, 1999, Federal District Judge Paul L. Friedman dismissed the suit of Rep. [Tom] Campbell and others that sought to have the court rule that President Clinton was in violation of the War Powers Resolution and the Constitution by conducting military activities in Yugoslavia without having received prior authorization from Congress. The judge ruled that Representative Campbell and the other Congressional plaintiffs lacked legal standing to bring the suit. On June 24, 1999, Representative Campbell appealed the ruling to the U.S. Court of Appeals for the District of Columbia. The appeals court subsequently agreed to hear the case on an expedited basis[.] … On February 18, 2000, the appeals court affirmed the opinion of the District Court that Representative Campbell and his co-plaintiffs lacked standing to sue the President. On May 18, 2000, Representative Campbell and 30 other Members of Congress appealed this decision to the United States Supreme Court. On October 2, 2000, the United States Supreme Court, without comment, refused to hear the appeal of Representative Campbell, thereby letting stand the holding of the U.S. Court of Appeals.") (citations and footnotes omitted).

[124] Indeed, Congress used precisely this prerogative to curtail combat operations in, for example, Vietnam, Somalia and Rwanda; *see* CRS Funding Cutoff Report at 1-3, and, as just noted, attempted to do so without success with respect to Kosovo.

[125] Dellinger memorandum (November 2, 1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm; *see also* Cunningham Letter 14. Interestingly, Dellinger is one of the signatories of the Scholars' Letter, which opposes the NSA program on the purported ground that the President has failed to follow FISA.

[126] Dellinger memorandum,(citing *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer)").

[127] Memorandum from the OLC to the Office of Intelligence and Policy Review

(OIPR) (October 17, 2000), *available at* http://www.usdoj.gov/olc/titleIIIfinal.htm. It bears noting that OIPR was then the Justice Department component responsible for applications submitted to the Foreign Intelligence Surveillance Court.

[128] *See* Title 18, U.S.C., Sec. 2511, 2517.

[129] Memorandum from the OLC to the Office of Intelligence and Policy Review (OIPR).

[130] *Cf.* Scholars' Letter 1.

[131] *Ibid*, quoting Rainbow Navigation, Inc. v. Department of the Navy, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.).

[132] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

[133] *Ibid*, 343 U.S. at 635.

[134] 453 U.S. 654 (1981).

[135] *Ibid*, 453 U.S. at 668.

[136] *Ibid*, 453 U.S. at 668-69.

[137] In point of fact, we are in the first Jackson category since the NSA can and should be squared with FISA, as further explained infra.

[138] *See* ABA Report 17-18 ; Scholars' Letter 6; *cf.* Cunningham Letter 6-8.

[139] *Cf. Dames & Moore*, 453 U.S. at 661 (recalling with humility "the statement of Justice Jackson – that we decide difficult cases presented to us by virtue of our commissions, not our competence"; adding, with respect to separation-of-powers, that the Court would "attempt to lay down no general 'guidelines' covering other situations not involved here," and observing, "Perhaps it is because it is so difficult to reconcile … Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases").

[140] *Cf.* United States v. Salerno, 481 U.S. 739, 748 ("in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals

whom the Government believes to be dangerous.")."

[141] *Youngstown*, 343 U.S. at 637; Cunningham Letter 7.

[142] Public Citizen v. Department of Justice, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring) (citations omitted).

[143] To be sure, such disciplines could have been achieved without FISA. However, FISA created the opportunity for them to be developed.

[144] The ABA Report cites to President Jimmy Carter's signing statement at FISA's enactment (ABA REPORT 8 (citation omitted)), to the senate report's characterization of Attorney General Griffin Bell's testimony regarding the Carter administration's position on the President's inherent authority (*Id*. at 17 (citation omitted)), and to *some* of Attorney General Bell's congressional testimony on FISA – viz., testimony before the senate, which indicated a conceit that FISA would "sacrifice[] neither our security nor our civil liberties[.]" (*Id*. at 8 (citation omitted)). The ABA neglects to mention, however, balancing testimony given by Attorney General Bell in the House, which elaborates on why he did not think security would be compromised – viz., because he believed the President maintained inherent power to conduct electronic surveillance notwithstanding FISA. *See* Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcommittee on Legislation of the house Committee on Intelligence, 95th Cong., 2d Sess. 15 (1978) (Bell: "The current [FISA] bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution*") (emphasis added); *see* DOJ Mem. 8; *cf.* testimony of Deputy Attorney General Jamie S. Gorelick in Hearings before the House Permanent Select Committee on Intelligence on amending the Foreign Intelligence Surveillance Act, 103d Cong. 2d Sess. 61 (1994) ("[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes"). Of course, even if history were as the ABA has sanitized it, rather than as it actually happened, a President is incapable of giving away Article II authority for it is the Constitution, not an individual President's assessment of his prerogatives, that empowers the executive branch.

[145] Like the executive disciplines alluded to earlier (*supra* at n.143), legislative oversight could similarly have been improved without all that FISA otherwise entails.

[146] *See* Cunningham Letter 6. There is, as Cunningham points out, ample reason to conclude that *Youngstown*, in the minds of both Justice Jackson and his brethren,

involved a presidential incursion into Congress's authority over the domestic economy (an arena in which Congress's power is palpably greater and the President's comparatively less significant) rather than a dispute over foreign affairs authorities (where that relation is reversed). The Court's five opinions, including Justice Jackson's, focused principally on Congress's enumerated *domestic* powers. Furthermore, the "same Justice Robert Jackson who wrote the 1952 *Youngstown* concurrence in the primarily domestic context, several years earlier, in *Johnson v. Eisentrager*, wrote for the majority of the Supreme Court that the issues in that case involved "a challenge to [the] conduct of diplomatic and foreign affairs, *for which the President is exclusively responsible*." *Id*. at 8, 10 (emphasis in Letter).

[147] ABA Report 7-8.

[148] Luther v. Borden*,* 48 U.S. (7 How.) 1, 44 (1849).

[149] The Federalist, No. 69 (Alexander Hamilton), at 396-402; *see also* The Federalist, No. 71 (Alexander Hamilton), at 409-12 (discussing the finite duration of the office of President).

[150] Luther v. Borden*,* 48 U.S. at 44.

[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid*.

[154] *Ibid*, 48 U.S. at 45.

[155] *See* Morrison v. Olson, 487 U.S. at 711 (Scalia, J., dissenting).

[156] The Federalist No. 23 (Alexander Hamilton) (Penguin ed. 1987 at 185).

[157] As already noted, this era also witnessed passage of the War Powers Resolution. Also enacted in 1974 was the Congressional Budget and Impoundment Control Act, Public Law 93-344; 88 Stat. 297-339, which nullified presidential power to control spending by requiring congressional approval before programs could be effectively terminated by the withholding of funds.

[158] This section was amended again in 1999 to add "electronic" communications. [CITE] The critics dwell on Section 2511(2)(f) but are silent on its predecessor, Section 2511(3). Thus we remain in the dark regarding whether they believe, back when Congress unambiguously acknowledged it, the President in fact once had the

constitutional power they would now deny him.

[159] *See supra* at 44 & n.107.

[160] It is worth noting that the NSA program has become public because its existence was improperly leaked. Quite appropriately, much about how it works remains classified. Thus, it is impossible to draw categorical conclusions about the application of FISA, since, under the statute, much depends on fact-specific matters (*e.g.*, the citizenship or immigration status of the participants in a communication; whether the transmission is oral or by wire; whether interception occurs inside or outside the U.S., etc.).

[161] Section 1801(i) defines a "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power[.]"

[162] Subsection 4 is generally aimed at *information* not *communications*. The other three subsections address the *acquisition* of *communications*; subsection 4, to the contrary, involves the *installation of a device* inside the U.S. for the purpose of *monitoring to acquire information*.

[163] Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

[164] *See, e.g.*, *Google to censor itself in China*, CNN (Jan. 26, 2006), *available at* http://www.cnn.com/2006/BUSINESS/01/25/google.china/; *Yahoo! Helped Jail China Writer,* BBC (Sept. 7, 2005), *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/4221538.stm.

[165] United States v. Montoya De Hernandez, 473 U.S. 531, 537-38 (1985) (executive branch has plenary authority to conduct warrantless searches "in order to regulate the collection of duties and to prevent the introduction of contraband into this country"); Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (border search justified by government's "inherent sovereign authority to protect its territorial integrity"); *cf*. California Bankers Association v. Schultz, 416 U.S. 21, 23 (1974) (rationale behind border search exception also applies to persons or objects leaving the United States). The government's right to conduct such warrantless searches extends even to persons and property passing through the United States, advertently or inadvertently, as they transit between other countries. *See, e.g.*, United States v. Lamela, 942 F.2d 100, 102 (1st Cir. 1991); United States v. McKenzie, 818 F.2d. 115, 117 (1st Cir. 1987).

[166] 431 U.S. 606 (1977).

[167] *Ibid*, 431 U.S. at 623.

[168] *Ibid*, 431 U.S. at 623 & n.16.

[169] Indeed, warrantless searches of computers attempted to be carried across borders are similarly permissible. *See* United States v. Ickes, 393 F.3d 501 (4th Cir. 2005). It bears noting, furthermore, that, as we have seen (*see supra* at 37), the entire concept of applying Fourth Amendment search principles to communications as well as physical property is rooted in the conceit that the privacy vouchsafed by the Amendment applies to persons, not property. There would thus be no principled basis for distinguishing communications that cross borders from other forms of property that does so simply because the latter is a traditionally understood physical object rather than a digital packet (or packets) of information.

[170] *See, e.g.*, City of Boerne v. Flores 521 U.S. 507, 535-36 (1997) (citing Marbury v. Madison, 5 U.S. at 177).

[171] *See* Morrison v. Olson, 487 U.S. at 704-05 (Scalia, J., dissenting) (quoting The Federalist, No. 49 (James Madison) (C. Rossiter ed. 1961), at 314) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

[172] FISA defines a "wire communication" as "any communication while it is being carried by a wire, cable, or other like connection[.]" 50 U.S.C. Sec. 1801(l). This definition is broader than its Title III cognate, see 18 U.S.C. Sec. 2510(1) (under which wire communications must be "aural"), and embraces many of what would be considered "electronic communications" under Title III as amended in 1986. *See* 18 U.S.C. Sec. 2510(12) & 2516(3). But cell-phones imply *radio*, not *wire*, communications – at least when they communicate with other cell-phones. FISA appears to target radio communications only when all the participants are located within the United States. 50 U.S.C. Sec. 1801(f)(3).

[173] *Cf*. Title III, which, in 18 U.S.C. Sec. 2511(2)(f), prescribes that "procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in [50 U.S.C. Sec. 1801(f)], and the interception of domestic wire, oral, and electronic communications may be conducted." Since Section 2511(2)(f) permits electronic surveillance conducted in compliance with FISA, it would by extension allow electronic surveillance under other statutes if FISA does so. *See* DOJ Mem. 21-22.

[174] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C.A. Sec. 1541 nt.

[175] This truism is perhaps more apt in this war than in any other in the Nation's history. This war is waged against a transnational terror network. It holds no territory to be conquered or national treasure to be seized. It can be defeated in only two ways: killing or capturing its operatives, and thwarting its plots to strike – particularly, to strike American cities with mass-destruction weapons. Palpably, these two goals can be accomplished only by acquiring intelligence. Nothing else will do.

[176] 542 U.S. 507 (2004).

[177] *Ibid*, 542 U.S. at 518-21 (plurality opinion); *see also id*. at 587 (Thomas, J., dissenting) (concurring in the plurality's conclusion that the President was empowered to detain enemy combatants without trial).

[178] *Ibid*, 542 U.S. at 518; *see also id*. at 579-89 (Thomas, J., dissenting). We note that if the AUMF authorizes the NSA's terrorist surveillance program, that would place the program in the first category of Justice Jackson's test (*see supra* at 48-49), marking the apex of presidential authority, rather than the third (which marks the nadir), as the critics claim. As we have argued, however, Justice Jackson's analytical tool has been refined and is not, in any event, dispositive.

[179] The ABA strains to avoid *Hamdi* in several ways. First, it disingenuously suggests the holding that the AUMF tacitly upheld detention despite an express anti-detention statute was a mere "plurality." ABA Report 15. Nevertheless, while Justice Thomas's *Hamdi* opinion is called a "dissent," there can be no serious doubt that he did concur with Justice O'Connor's four-justice plurality opinion for the Court on this point (indeed, he could not have done so more forcefully; *see* 542 U.S. at 579 & ff.), rendering this ruling a clear *majority* holding. Second, the ABA attempts to limit *Hamdi* to events in Afghanistan. ABA Report 15. Hamdi was obviously captured there, and, given the significance of detaining Americans without trial, the Court's ruling went no further than necessary to uphold his detention. But that hardly means that the Court ruled that the war was only taking place in Afghanistan. Like Congress, the Court was quite mindful that American military force was provoked by savage strikes in New York City and Virginia. See, *e.g*., this passage near the very start of the *Hamdi* opinion. ("On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets *in the United States*. Approximately 3,000 people were killed in those attacks."), *Hamdi*, 542 U.S. at 510. *See also* Hamdan v. Rumsfeld, 415 F.3d 33, 41-42 (D.C. Cir. 2005) (rejecting claim that the war against al Qaeda is indistinct from the war against the Taliban in Afghanistan). Finally, illustrating the penchant for galactic overstatement that pervades its Report, the ABA speciously urges that the

administration is reading *Hamdi* "to suggest that AUMF repeals all limitations on Executive power previously contained in any federal statute as long as the Executive in its sole discretion deems additional power useful in the general fight against terror." The administration has not claimed, and we certainly do not, that the executive can ignore any federal statute it chooses to. Detaining enemy combatants goes to the heart of war-fighting. So does penetrating enemy communications. War cannot be fought and won without these rudimentary actions. To affirm such elemental activities (which, of course, we believe the President has inherent wartime authority to pursue in any event) is not to license an emperor.

[180] ABA Report 12-14.

[181] *See supra* at 39 & n.75.

[182] *See also* DOJ Mem. 13. The ABA's hyperbolic stridency in this regard is bracing. "The argument that the AUMF implicitly creates an exception to FISA and is therefore consistent with [Section] 2511(2)(F) strains credibility," the ABA claims, because "[i]t rests on the notion that Congress, although it never mentioned electronic surveillance or FISA in the AUMF, nevertheless intended to create an undefined, unrestrained exception to FISA and give the Executive unlimited power to engage in electronic surveillance with no judicial review." ABA Report 14. That is simply preposterous. It is akin to saying that construing the AUMF as a statute authorizing detention of a citizen as an enemy combatant and thus as consistent with Section 4001's proscription of same absent a more explicitly worded enabling statute, is suggestive of a congressional intent to repeal Section 4001 wholesale and give the President carte blanche to detain anyone in the United States for any reason whatsoever. In *Hamdi*, the Supreme Court upheld the detention, no doubt, because doing so did not mean anything so monstrous. Similarly, the President is not claiming, and no one defending the NSA program is contending, that the AUMF gives him, "unrestrained" or "unlimited" power to engage in warrantless electronic surveillance. Instead, quite modestly, the argument is that the AUMF authorizes the commander-in-chief, in wartime, to monitor the *international* communications of suspected enemy operatives, even if those communications cross into U.S. territory. This is hardly an imperious claim given (a) the long history of such wartime monitoring, and (b) the unquestioned constitutional supremacy of the executive branch in connection with the policing of our borders.

[183] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

[184] INS v. St. Cyr, 533 U.S. 289, 299-300 (2001).

[185] DOJ Mem. 28-29.

[186] *See supra* at 47.

[187] DOJ Mem. 29.

[188] The ABA's counter to the Justice Department's constitutional avoidance argument is gossamer stuff. It contends that the avoidance doctrine is irrelevant unless there is an ambiguity to begin with, which there is not here, because, so the argument goes: "[N]either FISA nor the AUMF are [*sic*] ambiguous on the question of electronic surveillance. FISA explicitly makes its procedures the exclusive means for conducting electronic surveillance. Meanwhile, the AUMF contains no reference to electronic surveillance[.]…" ABA REPORT 16. The "exclusive means" assertion to which the ABA refers is, of course, found in Title III's Section 2511(2)(f). That section refers to electronic surveillance under FISA, and, as relevant here, what FISA "explicitly" alludes to (in 50 U.S.C. Sec. 1809) is the possibility of surveillance permitted by some other, undefined "statute." What that statute might be is left for interpretation – i.e., it *is not clear* from FISA itself. And, patently, the fact that the AUMF is silent on surveillance is hardly unambiguous given that the Supreme Court has only recently held that inferable from the AUMF's broad terms is authority to detain an American citizen without trial notwithstanding the weight of Section 4001. The ABA further elaborates that FISA enjoyed the support of Presidents Carter and Ford (*see* ABA REPORT 16-17), which is no more pertinent to its constitutional validity than is the fact that Congress once statutorily acknowledged, in Title III, the very unregulability of inherent executive authority over foreign intelligence surveillance that it later decided to regulate in FISA. The ABA conclusorily pronounces, moreover, that "Congress … has the authority under Article I to regulate" the President's conduct of foreign surveillance. (ABA REPORT 17). Not surprisingly, it cites no case law for that proposition, contenting itself with fleeting references to Congress's Article I authorities to provide for the common defense and to regulate commerce. (*Id*., citing U.S. CONST, art. I, § 8). It is anything but apparent that those powers have any bearing on the President's plenary authority over the conduct of foreign affairs and its core component of foreign intelligence collection. As we have conceded, Congress also has the power to make rules for the conduct of government – a source of authority unmentioned by the ABA, but one that is plainly pertinent. Nonetheless, if one actually grapples with separation-of-powers jurisprudence discussed above, it is manifest that whatever the parameters of its prerogatives may be, Congress may not prescribe how the President performs his core functions, nor may it delegate those functions to the judiciary. Congress may check the President by using its exclusive power of the purse; but it may not tell the President how to be the chief executive.

[189] It is thus firmly settled law that international treaties are generally not judicially enforceable by individual claimants. *See* Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. *It is obvious that with all this the judicial courts have nothing to do and can give no redress*") (emphasis added); *see also* Johnson v. Eisentrager, 339 U.S. at 789-91 (1929 Geneva Convention not judicially enforceable); Hamdan v. Rumsfeld, 415 F.3d at 39-43 (same with respect to 1949 Geneva Conventions); Kang Joo Swan v. United States, 272 F.3d 1360, 1363 (2d Cir. 2001).

[190] The Federalist, No. 75 (Alexander Hamilton), at 425; *cf. Chicago & Southern Air Lines*, 333 U.S. at 111 (foreign affairs involve "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry").

[191] United States v. Verdugo-Urqidez, 494 U.S. at 266 (emphasis added).

[192] *See supra* at 38-39 (discussing *Keith*).

[193] *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

[194] *See Keith*, 487 U.S. at 314-15; See also*, e.g*., the discussion of "special needs" searches, *supra* at 39-42.

[195] *See, e.g*., United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring) ("The right of a government to maintain its existence – self-preservation – is the most pervasive aspect of sovereignty").

[196] *See* Hamdi v. Rumsfeld, 542 U.S at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant"); *Ex parte Quirin*, 317 U.S. at 31, 37-38. *Compare* United States v. Verdugo-Urquidez, 494 U.S. at 269-70 (noting that in *Reid v. Covert*, 354 U.S. 1 (1957), a majority of the Court was unwilling to hold that Bill of Rights protections apply in all instances to American citizens situated outside U.S. territory).

[197] *Verdugo-Urquidez*, 494 U.S. at 273-74 (reasoning that approving a claim of foreign entitlement to Fourth Amendment protection from American agents "would have significant and deleterious consequences for the United States in conducting

activities beyond its boundaries. [Such a] rule … would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in 'searches or seizures.' The United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security. … Application of the Fourth Amendment to those circumstances could significantly disrupt the ability *of the political branches* to respond to foreign situations involving our national interest") (emphasis added) (citation omitted).

[198] 50 U.S.C. 1805(a); *see also In re Sealed Case*, 310 F.3d at 724 (citing 50 U.S.C. Sections 1804(a)(7)(E)(ii) & 1805(a)(5)). It is not at all clear why the President of the United States, guarding against potential threats to the American people orchestrated by non-Americans, should not be able to employ electronic surveillance whenever he believes it might be fruitful, much less justify resort to electronic surveillance by excluding other investigative tactics as insufficient to attain intelligence objectives.

[199] *Keith*, 407 U.S. at 322-23 (emphasis added). The Court opined that the different policy and practical considerations included the following: "The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *See also In re Sealed Case*, 310 F.3d at 738-39 & n.22.

[200] *Keith*, 407 U.S. at 323.

[201] 50 U.S.C. Sec. 1805(a)(3). A U.S. person may not "be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States. *Id*., Sec. 1805(a)(3)(A).

[202] Richard A. Posner, *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16. *See also* Heather MacDonald, *Why the FBI Didn't Stop 9/11*, CITY JOURNAL, Autumn 2002, *available at* http://www.city-journal.org/html/12_4_why_the_fbi.html) ("A worried Senate Select Committee on Intelligence reported in 2000 that the OIPR was taking months scrutinizing FISA applications from the field, even though the nation's safety depended on swift action against terrorist threats. … The practical effect? 'We absolutely were unable to check people out,' reports James Kallstrom, former head of the FBI's New York office, in anger. 'How can you have a proactive

agency that protects citizens, if, in order to even start an investigation, you have to show that someone is a member of a known terrorist organization, with the wherewithal to carry out an attack and the intention to do so?').

[203] *See supra* at 39 n.79.

[204] *Keith*, 407 U.S. at 323. Given the extent to which the United States, because of its lack of assets in parts of the globe from which anti-American terrorist threats often stem, is dependent on foreign intelligence services, see generally Silberman-Robb Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (March 31, 2005), *available at* http://www.whitehouse.gov/wmd/. *See also, e.g.*, 9/11 Commission Report 414-15 (it is patent now, even if it was not so in the late 1970s, that injecting courts into foreign intelligence matters is fraught with risk. Plainly, foreign intelligence services have a powerful reason not to share vital intelligence with the United States based on concerns that judges – unaccountable to the public whose protection is at stake and often inclined to stretch due process principles in the direction of individual rights – will not maintain secrecy regarding information, collection methods, and sensitive sources with the same vigor as the executive branch, given its reciprocal needs, would exercise.).

[205] *See* discussion of *Katz*, *supra* at 37 n.69.

[206] In *In re Sealed Case*, 310 F.3d at 737-42, the Foreign Intelligence Surveillance Court of Review, after noting that the government (for reasons not explained) had not challenged the constitutionality of FISA on Warrant Clause (or any other) grounds, but that certain amici curiae had raised the issue, conducted an exhaustive comparison between FISA and both the Fourth Amendment's warrant thresholds (probable cause, particularity, and issuance by a detached magistrate) and the requirements of Title III (which, as extensive additions to the Fourth Amendment baseline, the Court deemed a useful barometer for assessing whether FISA searches were "reasonable" regardless of whether the orders authorizing them were properly considered "warrants"). The Court determined, under the circumstances, that it did not need to resolve what it plainly saw as the intricate question whether a FISA order was a judicial warrant. It noted, however, (a) that the Fourth and Ninth Circuits, along with one District Court, had concluded that a FISA order is a judicial warrant (*see* United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987); and United States v. Falvey, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982)), and (b) that even if a FISA order was not a warrant, "the extent [to which] a FISA order comes close to meeting Title III … certainly bears on its reasonableness under the Fourth Amendment."

[207] *See* U.S. Const., amend. IV; *see also Keith*, 407 U.S. at 323; Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967).

[208] This theory was never tenable. After originally believing a provision such as the Fourth Amendment would be unnecessary (because it was not thought that the federal government would have search-and-seizure power in the domestic context), the Framers opted to include the amendment, suspecting that Congress might think it necessary and proper to authorize general warrants for the purpose of collecting revenue. *Verdugo-Urquidez*, 494 U.S. at 266 (citations omitted). Their galvanizing concern "was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel." *Id*., citing Boyd v. United States, 116 U.S. 616, 625-26 (1886); *see also* Entick v. Carrington, 19 Howell's State Trials 1029, 95 Eng. 807 (1705). But the Fourth Amendment on its own terms does not require a warrant for a search to be reasonable, and even in England, and in the United States at the time the Fourth Amendment was ratified, warrantless searches were permitted – primarily incident to arrest. *See* FindLaw, *U.S. Constitution: Fourth Amendment Search and Seizure, History and Scope of the Amendment*, *available at* http://caselaw.lp.findlaw.com/data/constitution/amendment04/. (collecting cases).

[209] Until the 1960s, the Fourth Amendment's Warrant Clause was confined to the criminal context. *See, e.g*., Abel v. United States, 362 U.S. 217, 225-30 (1960); Frank v. Maryland, 359 U.S. 360, 366 (1959); Oklahoma Press Club v. Walling, 327 U.S. 186, 195-96 (1946); *In re Strousse*, 23 Fed.Cas. 261 (No. 13,548) (D. Nev. 1871). In 1967, however, the Supreme Court applied the Warrant Clause to administrative searches. *Camara*, 387 U.S. at 528-34; *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 311-13 (1978); See v. Seattle, 387 U.S. 541, 545 (1967). In modern times, that break with prior precedent has been sharply limited. *See, e.g*., Donovan v. Dewey, 452 U.S. 594, 598-602 (1981); *see also* New York v. Burger, 482 U.S. 691, 699-703 (1987); and discussion of special needs searches, *supra* at 39-42.

[210] *See Dames & Moore*, 453 U.S. at 660.

[211] *See, e.g*., *Judges on Secretive Panel Speak Out on Spy Program*, N.Y. Times, Mar. 29, 2006, *available at* http://www.nytimes.com/2006/03/29/politics/29nsa.html; Sen. John Kyl, *The NSA Anti-terrorist Spying Program*, FrontPage Magazine, Mar. 8, 2006. (adapted from a speech Feb. 2006 Speech), *available at* http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=21564; *Specter Says Surveillance Program Violated the Law*, International Herald Tribune (and reprinted in *The New York Times*) (Feb. 5, 2006), *available at* http://

www.frontpagemag.com/Articles/ReadArticle.asp?ID=21564. ("Senator Specter said that he would ask [Attorney General Alberto] Gonzales to seek the FISA court's own assessment of whether the program is legal.").

[212] United States v. Microsoft Corp., No. (Feb. 22, 2002), *available at* http://www.dcd.uscourts.gov/98-1232al.pdf. (denying government application for an ex ante ruling).

[213] *See* Stanley C. Brubaker, *The Misunderstood Fourth Amendment – The originalist reading is better both for civil liberties and for fighting the war on terror,* The Weekly Standard, Mar. 6, 2006, *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/011/911wzgse.asp. (urging a "first [Unreasonable Search] clause dominant" approach to the Fourth Amendment, and explaining, among other things, that sub-probable-cause "exceptions" to the Warrant Clause are not really exceptions at all but rather instances of situation-based "reasonableness," that judicial warrants were historically disfavored because they conferred civil immunity on executing officials, and that both national security and civil liberties are better protected by focus on governmental reasonableness than probable cause).

[214] It is telling in this regard that FISA proceedings take place in a secure area of the Justice Department, not in a courthouse.

[215] DOJ Mem. 5; *see also* Interview of General Michael Hayden, Deputy Director of National Intelligence (and former head of NSA)(*Fox News Sunday,* Feb. 5, 2006), *available at* http://www.foxnews.com/story/0,2933,183844,00.html. ("Under this program, … the only justification we can use to target a specific communication [is] that a reasonable person — in this case, an analyst — with all the facts available to him or her at the time, has cause to believe that one or both of these communicants are Al Qaeda or Al Qaeda affiliates. … [T]he standard that we use in order to determine whether or not we want to cover a communication is in that probable cause range.") (*Compare* Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (in law enforcement, probable cause based on facts as observed by a reasonable police officer)).

[216] *See* James A. Baker, Justice Department Counsel for Intelligence Policy, Testimony before the Senate Select Committee on Intelligence (July 31, 2002) (Withholding support of measure because "[t]he Department's Office of Legal Counsel [was] analyzing relevant Supreme Court precedent to determine whether a 'reasonable suspicion' standard for electronic surveillance and physical searches would, *in the FISA context*, pass constitutional muster") (emphasis added).

[217] *See* William Kristol and Gary Schmitt, *Vital Presidential Power*, Wash. Post,

Dec. 20, 2005, at A31, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121901027_pf.html.

[218] There are, of course, several other types of government collection efforts – applications for, *e.g.*, pen register/trap-and-trace surveillance, records in the hands of third parties under Section 215 of the Patriot Act, access to stored email that is beyond a certain age – which are manifestly not searches. (A search is a direct governmental invasion of an individual's privacy. *See* Oliver v. United States, 466 U.S. 170, 177-78 (1984)). To be sure, Congress has enacted legislation calling for the executive branch to seek court authorization for these types of collection efforts, based on less (sometimes substantially less) than a probable cause showing. Any definitive analysis of whether that arrangement theoretically creates separation-of-powers issues is beyond the scope of this memorandum. It would suffice to point out that, to the extent the protection of the American people from foreign threats requires, in the President's judgment, a particular pen register surveillance, for example, we do not believe Congress or a court could properly act to frustrate such a surveillance. On the other hand, many investigations have little or nothing to do with national security in the foreign relations context, and the Congress's authority to regulate is probably often indisputable. The more difficult question is whether, in the course of regulating these executive branch activities, Congress can involve the judiciary. The task that the judiciary is being asked to perform in the case of, for example, a Section 215 request, is clearly not a case or controversy and thus, to be amenable to judicial resolution, it has to be related to Fourth Amendment compliance. About the best argument that can be made in favor of judicial involvement in these tasks is that they are sufficiently similar to the warrant request to be a permissible exercise of judicial power and yet, because no privacy interests are implicated, the Fourth Amendment "probable cause" requirement need not be met.

[219] *See* Attorney General Alberto Gonzales's written answers to questions from Senate Judiciary Committee Chairman Arlen Specter (Feb. 3, 2006), at 6 (answer number 8).

[220] It is important to bear in mind here that, ideally, oversight is the job of Congress, not the courts, including the FISA court, which are there to deal with constitutionally cognizable cases and controversies. Whatever the retroactive approval window would be, it would be for Congress to determine whether it was working, and whether it ought to be tweaked based on such factors as the percentage of applications denied upon retroactive judicial review, and the Justice Department's reports regarding whether applications were not being made to the court because the use of the window was not practical.

[221] In fact, as further addressed *infra* at 87 & n.278, it is permissible to use even

information unlawfully obtained in making applications for surveillance. Fourth Amendment rights are personal. One must have standing to assert them – meaning one must have a claim that his own expectation of privacy was violated by the search in question.

[222] *See supra* at 43 & n.99.

[223] This is precisely why the FBI failed to seek an urgently needed search warrant for the laptop of Zacarias Moussaoui in August 2001. The resulting indecision, not unusual in the times, resulted in neither a criminal nor a FISA warrant being sought. Moussaoui has since pled guilty to charges related to the 9/11 attacks. House and Senate Intelligence Committees, Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001 ("Joint Intelligence Committee Inquiry") (Dec. 2002), *available at* http://www.gpoaccess.gov/serialset/creports/911.html, at 319.

[224] Deputy Attorney General Jamie S. Gorelick Memorandum (March 1995) at 2#(emphasis added), *available at* http://www.usdoj.gov/ag/testimony/supplementarymaterial.pdf (document collection p. 2). In the process leading to the final guidelines, signed off on by Attorney General Janet Reno in a July 1995 memo, then-U.S. Attorney for the Southern District of New York, Mary Jo White, whose office prosecuted most of the terrorism cases of the 1990s, and one of the recipients of the March 1995 memorandum, wrote to Attorney General Reno:

> You have asked whether I am generally comfortable with the instructions. It is hard to be totally comfortable with instructions to the FBI prohibiting contacts with the United States Attorney's Offices when such prohibitions are not legally required. . . . Our experience has been that the FBI labels of an investigation as intelligence or law enforcement can be quite arbitrary depending on the personnel involved and that the most effective way to combat terrorism is with as few labels and walls as possible so that wherever permissible, the right and left hands are communicating.

Available at http://www.usdoj.gov/ag/testimony/supplementarymaterial.pdf; (document collection, at 6).

[225] As guidance to the field, the guidelines were, to put it mildly, labyrinthine, as evidenced, for example, by this instruction:

> Additionally, the FBI and Criminal Division [of DOJ] should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of

> the Criminal Division's directing or controlling the [foreign intelligence] or [foreign counterintelligence] investigation toward law enforcement objectives.

Justice Department Memorandum, July 19, 1995, at 2, 6. As the Court of Review put it:

> Although these procedures provided for significant information sharing and coordination between criminal and FI or FCI investigations, based at least in part on the "directing or controlling" language, they eventually came to be narrowly interpreted within the Department of Justice, and most particularly by [the Justice Department's Office of Intelligence Policy Review (OIPR)], as requiring OIPR to act as a "wall" to prevent the FBI intelligence officials from communicating with the Criminal Division regarding ongoing FI or FCI investigations. . . . Thus, *the focus became the nature of the underlying investigation, rather than the general purpose of the surveillance*. Once prosecution of the target was being considered, the procedures, as interpreted by OIPR in light of the case law, prevented the Criminal Division from providing any meaningful advice to the FBI.

In re Sealed Case, 310 F.3d at 727-28 (emphasis added).

[226] 9/11 Commission Report at 79 & n.36. The transition of administrations did not cause a reassessment. The 1995 regulations were substantially reaffirmed by the Justice Department in August 2001. *Id.* at 210.

[227] *See* compilation of statistics, *available at* http://www.fas.org/irp/agency/doj/fisa/#rept.

[228] This is markedly different from the role of the federal courts in domestic law enforcement, where the executive branch does not have the same primacy, there are presumptions of innocence and privacy at work, and the judiciary is expected meaningfully to protect vested constitutional rights from abuse by overzealous prosecutorial activity. While some suggest that the number of FISA approvals should mirror those for Title III or criminal search warrant applications, such mirroring would actually be more reflective of malfunction than procedural regularity.

[229] *See* 9/11 Commission Report, 78-79 & nn.32, 35 & 36; *see also In re Sealed Case*, 310 F.3d at 727-28 & n.14 (the Court of Review acknowledging that it could "certainly understand the 1995 Justice Department's effort to avoid difficulty with the FISA court, or other courts").

[230] *See F.B.I. Inaction Blurred Picture Before Sept. 11*, N.Y. Times, May 27, 2002, *available at* http://www.nytimes.com/2002/05/27/national/27THRE.html?ex=1143090000&en=5300b0e96cc2197d&ei=5070).

[231] 9/11 Commission Report, 210, 512 & n.234.

[232] *See, Secret Court Says F.B.I. Aides Misled Judges in 75 Cases*, N.Y. Times, Aug. 23, 2002; *see also, e.g.*, Heather MacDonald, *FBI Handcuffed*, N.Y. Post, Oct. 27, 2002, *available at* http://www.manhattan-institute.org/html/_nypost-fbi_handcuffed.htm; *Secret Court Rebuffs Ashcroft. Justice Dept. Chided On Misinformation*, Wash. Post, Aug. 23, 2002, at A1; *F.B.I. Inaction Blurred Picture Before Sept. 11;" "Officials Say 2 More Jets May Have Been in the Plot*, N.Y. Times, Sept. 19, 2001.

[233] *See* 9/11 Commission Report at 3-4, 8-10, 153-60; *see also, e.g.*, Stewart Baker, *Wall Nuts – The wall between intelligence and law enforcement is killing us*, Slate, Dec. 31, 2003, *available at* http://www.slate.com/id/2093344/.

[234] *See* 9/11 Commission Report 247; Report of the Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001 by the House and Senate Intelligence Committees (Joint Intelligence Committee Inquiry) (Dec. 2002), *available at* http://www.gpoaccess.gov/serialset/creports/911.html, at 316-17.

[235] *See* Joint Intelligence Committee Inquiry 319-23.

[236] John Ashcroft, Testimony before the 9/11 Commission (April 13, 2004), *available at* http://www.9-11commission.gov/hearings/hearing10/ashcroft_statement.pdf, at 2.

[237] Patrick Fitzgerald, Testimony before the Senate Judiciary Committee, Hearing on "Protecting Our National Security From Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions," (Oct. 21, 2003), *available at* http://www.fas.org/irp/congress/2003_hr/102103fitzgerald.html.

[238] Pub.L. 107-56 (Oct 26, 2001) (The name "USA PATRIOT Act" is derived from the provision's unwieldy formal name, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" Act). Section 203 of the Act also facilitated information sharing by permitting criminal investigators to share foreign intelligence information with the intelligence community despite grand jury secrecy rules.

[239] *In re Sealed Case*, 310 F.3d at 721 & n.5.

[240] *Ibid*, 310 F.3d at 721 ("We think it fair to say, however, that the May 17 opinion of the FISA court does not clearly set forth the basis for its decision. It appears to proceed from the assumption that FISA constructed a barrier between counterintelligence/intelligence officials and law enforcement officers in the Executive Branch – indeed, it uses the word "wall" popularized by certain commentators (and journalists) to describe that supposed barrier. Yet the opinion does not support that assumption with any relevant language from the statute").

[241] *Ibid*, 310 F.3d at 720.

[242] *Ibid*.

[243] *Ibid*, 310 F.3d at 725-36.

[244] *See Bush was denied wiretaps, bypassed them*, UPI (Dec. 27, 2005), *available at* http://www.upi.com/NewsTrack/view.php?StoryID=20051226-122526-7310r (reporting that in the first 22 years of FISA, only two of 13,102 applications were modified by the FISA Court).

[245] *See* 50 U.S.C. Sec. 1807. The annual reports are compiled by the Federation of American Scientists, and available at its website, *available at* http://www.fas.org/irp/agency/doj/fisa/#rept.

[246] Letter from Attorney General John Ashcroft to Speaker of the House Dennis J. Hastert (April 29, 2002).

[247] Letter from Attorney General John Ashcroft to L. Ralph Meacham, Director, Administrative Office of U.S. Courts (April 29, 2003).

[248] *See* Letter from Assistant Attorney General William E. Moschella Letter to L. Ralph Meacham, Director, Administrative Office of U.S. Courts (April 30, 2004). One of those denials was later granted (in 2004) after the government's reconsideration motion was granted "in part," and its request was modified in a manner consistent with the court's order.

[249] *Ibid*. FISA matters, of course, are sealed, and there is no indication of what is meant by a "substantive modification."

[250] *See* Letter from Assistant Attorney General William E. Moschella to Speaker Hastert (April 1, 2005). The original number of application was 1758. It was reduced to 1755 because the Justice Department withdrew three applications before the FISA court could rule on them.

[251] 542 U.S. 466, 124 S. Ct. 2686 (2004).

[252] *See* 28 U.S.C. Sec. 2241, *et seq*.

[253] Odah v. United States, No. 02-828 (D.C. Oct. 20, 2004), *available at* http://www.dcd.uscourts.gov/02-828a.pdf.

[254] *Ibid*, op. 7-12 (finding the claim "nonfrivolous," and discussing both the All Writs Act, 28 U.S.C. Sec. 1651, and the power of the court to direct the appointment of counsel at public expense under the Criminal Justice Act, 18 U.S.C. Sec. 3006).

[255] *Cf*. Hamdan v. Rumsfeld, 415 F.3d at 40 (that a court has jurisdiction over a claim of a person who has been incarcerated for some length of time does not, by itself, make the claim valid).

[256] *Ibid*, op. 12.

[257] *Ibid*, op. 13-16.

[258] *See* United States v. Ahmed Abdel Sattar, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003), *available at* http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwrt111903sind.html, at 10-11, para. 25-26 (describing special administrative measures imposed on inmate convicted of terrorist crimes).

[259] *Ibid*, op. 16-17.

[260] *Ibid*, op. 18-22.

[261] Hamdan v. Rumsfeld, 415 F.3d at 40.

[262] Detainee Treatment Act of 2005, Pub. L. 109-148 (Dec. 30, 2005).

[263] Congressional Record, S14260 (Dec. 21, 2005).

[264] Congressional Record, S14261 (Dec. 21, 2005); Michael Ratner heads the Center for Constitutional Rights. The interview to which Senator Graham referred occurred on March 21, 2005, and was published in *Mother Jones*. *Available at* http://www.motherjones.com/news/qa/2005/03/ratner.html.

[265] Hamdan v. Rumsfeld, 415 F.3d at 35-36.

[266] *Ibid*.

[267] *See* Yamashita v. United States, 327 U.S. 1, 11 (1946); 10 U.S.C. Sections 821, 835(a). *See also Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (upholding use of military commission for enemy combatants, including a U.S. citizen, based on the predecessor of Section 821); *Hamdan*, 415 F.3d at 38 ("Given these [statutory] provisions and *Quirin* and *Yamashita*, it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions").

[268] Hamdan v. Rumsfeld, No. 04-1519 (Nov. 8, 2004), *available at* http://www.dcd.uscourts.gov/04-1519.pdf.

[269] The D.C. Circuit easily concluded that Geneva Conventions were unavailing to Hamdan for several reasons. It is black letter law that international agreements do not create private, judicially enforceable rights. As the panel elaborated, alleged treaty violations are resolved by "international negotiations and reclamation," not by lawsuits. The court derided Judge Robertson for not only "disregard[ing]" these settled principles but failing even to mention, let alone address, the two precedents directly controlling Hamdan's claims: *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Supreme Court held that Geneva Conventions' cognate 1929 forerunner was not judicially enforceable, and *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), in which the D.C. Circuit ruled similarly with respect to the NATO Status of Forces Agreement. *Hamdan*, 415 F.3d at 39-40. The panel stressed that *Eisentrager* had specifically rejected the contention that Geneva rights could be enforced by habeas corpus. Id. at 40. The Court added that even if Hamdan were not foreclosed from litigating his Geneva Convention-related claims, the treaty would not help him. First, Hamdan did not fit Geneva Conventions' definition of a privileged combatant because al Qaeda members do not wear uniforms and fail to "conduct their operations in accordance with the laws and customs of war." Second, al Qaeda obviously is not a party to the Geneva Conventions, nor does it fall into either of two recognized exceptions to that requirement. *Id*. at 40-43.

[270] *See supra* at 84 & n.262.

[271] *See Secret Court's Judges Were Warned About NSA Spy Data – Program May Have Led Improperly to Warrants*, WASH. POST, Feb. 9, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/08/AR2006020802511_pf.html. Judges Lamberth and Kollar-Kotelly are reported to have agreed not to reveal the program to other judges on the court (just as the legislators who were briefed were not at liberty to disclose it to other members of Congress). Their condition for that agreement was apparently that any FISA applications dependent in any way on NSA-derived information would be assigned to one of them rather than another FISA court judge. Judge Kollar-Kotelly became the presiding judge in May 2002, when Judge Lamberth left the FISA court. *Id*.

[272] *Ibid.*

[273] The same concern was reiterated by at least some former FISA Court judges at a March 28, 2006 Judiciary Committee hearing convened by the Committee's Chairman, Senator Specter, to consider his aforementioned proposal to have the FISA Court opine on the legality of the NSA program. *See Judges on Secretive Panel Speak Out on Spy Program*, N.Y. Times, Mar. 29, 2006, *available at* http://www.nytimes.com/2006/03/29/politics/29nsa.html.

[274] *See Secret Court's Judges Were Warned About NSA Spy Data – Program May Have Led Improperly to Warrants*, Wash. Post, Feb. 9, 2006 ("[E]arly in 2002, the wary court and government lawyers developed a compromise. Any case in which the government listened to someone's calls without a warrant, and later developed information to seek a FISA warrant for that same suspect, was to be carefully 'tagged' as having involved some NSA information. *Generally, there were fewer than 10 cases each year*") (emphasis added).

[275] *See supra* at 70-71 (discussing standing and justiciability principles).

[276] *See supra* at 43.

[277] Cf. Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (good faith exception to suppression applied when statute authorizing warrantless searches, under which incriminating evidence was seized, was later held unconstitutional. Objectively reasonable reliance on authority to conduct warrantless searches meant excluding evidence would have little deterrent effect on bad police behavior).

[278] It is well settled that a person may not challenge the government's use of evidence – including the admission of that evidence against that person at a criminal trial – unless that person's *own* constitutional rights were violated in the acquisition of that evidence. United States v. Salvucci, 448 U.S. 83, 86-87 (1980); Rakas v. Illinois, 439 U.S. 128, 134 (1978). In the Fourth Amendment context, a person must himself have a cognizable expectation of privacy in the item seized. Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980). This rule has been applied by the Supreme Court in the context of electronic surveillance: *evidence obtained by an unlawful wiretap may be challenged only by a person whose expectation of privacy was actually violated.* United States v. Alderman, 394 U.S. 165, 171-76 & n.9 (1969) ("We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted") (citing Simmons v. United States, 390 U.S. 377 (1968), and Jones v. United States, 362 U.S. 257 (1960) (other citations omitted) *See also, e.g.*, United States v. Swift, 220 F.3d 502, 510 (7th Cir. 2000) (defendant lacked standing to challenge search of co-defendant's cell-phone); United States v. Harrison, 103

F.3d 986, 989 (D.C. Cir. 1997) (even though defendant used apartment to store drugs, he lacked standing to challenge search because he neither lived in the apartment nor was a guest there); *cf*. Bellis v. United States, 417 U.S. 85, 89-90 (1974) (Fifth amendment privilege against self-incrimination is personal, and purported violations of it may not be asserted by others affected).

[279] *See, e.g*., United States v. Zagari, 111 F.3d 307, 322 (2d Cir. 1997) (defendant not even entitled to a hearing if probable cause for warrant still exists once contested evidence is extracted).

[280] *Ibid* ("Kollar-Kotelly complained to then-Attorney General John D. Ashcroft, and her concerns led to a temporary suspension of the program. The judge required that high-level Justice officials certify the information was complete – or face possible perjury charges").

[281] *See, Secret Court's Judges Were Warned About NSA Spy Data – Program May Have Led Improperly to Warrants*, Wash. Post, Feb. 9, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/08/AR2006020802511_pf.html.

[282] *See, Bush Secretly Lifted Some Limits on Spying in U.S. after 9/11, Officials Say*, N.Y. Times, Dec. 15, 2005, at A1.

[283] *See* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/04/AR2006010401864.html.

[284] *Ibid*.

[285] *See* Code of Conduct for United States Judges, *available at* http://www.uscourts.gov/guide/vol2/ch1.html#N_3_.

[286] It is a measure of how skewed perceptions have become that Judge Robertson, who resigned from the FISA Court after the NSA program was publicly revealed, argued in a recent letter to the Senate Judiciary Committee that FISA Court judges were the government officials best suited to evaluate an effort such as the NSA program because they "are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record." *See, Judges on Secretive Panel Speak Out on Spy Program*, N.Y.Times, Mar. 29, 2006, *available at* http://www.nytimes.com/2006/03/29/politics/29nsa.html. Obviously, Judge Robertson's sentiments are a drastic departure from the real-world understanding of judicial limitations evinced by Justice Holmes' 1909 admonition that "[p]ublic danger warrants the substitution of executive process for judicial process." (*See supra* at 28). And Judge Robertson's emphasis on judicial independence as if it were a virtue

in the arena of foreign affairs stands separation-of-powers and institutional competence on their heads. The federal judiciary is a core part of the United States government which, together with the American people, confronts hostile outsiders. It is not a neutral arbiter between the people's representatives and the people's enemies. Judges are ill-suited to make national security decisions in the international realm precisely because they are independent – which is to say, precisely because they are unaccountable to the American people. It is the safety of the American people, not the rights of individuals, which is the paramount concern of U.S. foreign policy and foreign intelligence collection, especially in wartime. It was for that reason, of course, that Justice Jackson – no stranger to either the judicial or the political orb – maintained that foreign affairs matters "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (*See supra* at 31-32).

[287] *See Bush Secretly Lifted Some Limits on Spying in U.S. after 9/11, Officials Say*, N.Y. Times, Dec. 15, 2005, at A1.

[288] *See Tap Dancing*, The New Republic (online debate) (beg. Jan. 31, 2006), *available at* http://www.tnr.com/doc.mhtml?i=w060130&s=heymannposner013106).

[289] For a comprehensive expression of Professor Strossen's views on governmental use of post-9/11 investigative authorities, see*, e.g.*, her written statement to the U.S. Civil Rights Commission's Hearing on Security and Liberty (March 19, 2004), *available at* http://www.aclu.org/safefree/general/17493leg20040319.html.

[290] Interestingly, one of the scholars who signed the Scholars' Letter is the University of Chicago's Geoffrey Stone, who has recently written a fascinating account of the history of civil liberties in wartime, *Perilous Times* (W.W. Norton 2004). (Another worthy study of the same topic is the late Chief Justice William Rehnquist's *All the Laws but One* (Knopf 1998).). If one objectively analyzes the episodes surveyed by Prof. Stone – the Adams-era sedition prosecutions, the Civil War suspension of habeas corpus and use of military tribunals, Wilson's World War I espionage act prosecutions, FDR's World War II internment of Japanese Americans, the use of the intelligence community by several presidents for actual, politically motivated domestic spying, etc. – the initiatives of President Bush in responding to the reality and prospects of mass-destruction attacks against the homeland look remarkably tame.

[291] This point, of course, has been made by a number of renowned scholars and political philosophers, including Harvey Mansfield, in his brilliant book on the nature of executive power, *Taming the Prince* (Free Press 1989).