IS CONGRESS THE REAL "LAWBREAKER"?:

Reconciling FISA with the Constitution

Prepared Statement of

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Warrantless Surveillance and the Foreign Intelligence Surveillance Act:
The Role of Checks and Balances in Protecting Americans' Privacy Rights

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About the Witness

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His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left twenty years ago to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law,* which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution,* has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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GOOD MORNING, MR. CHAIRMAN. It is an honor to appear before this distinguished Committee to discuss issues of checks and balances and the FISA statute.

These are not new issues to me. I have focused much of my academic career on the separation of national security constitutional powers since first becoming interested in these issues more than four decades ago. I witnessed first hand the tragic consequences of the breakdown of legislative-executive relations in Indochina, and as a Senate staff member I followed the Church Committee hearings on intelligence abuse. Three years later in that same capacity I followed the enactment of FISA; and three years after that I was hired to oversee executive branch compliance with FISA and other intelligence laws and executive orders as Counsel to the President's Intelligence Oversight Board in the White House.

I was raised in a military family and taught to believe that when our nation goes to war we set aside our differences and unite against the common enemy. My father and his brother each served in the Army in Europe in World War II, and my only brother and I each served twice in Vietnam – he as a Marine sergeant and later lieutenant, and I as an Army lieutenant and captain. Because I had written my undergraduate honors thesis on the conflict, I was detailed to work for the American Embassy. Ironically, a major part of my work involved investigating Viet Cong terrorism. Long before the attacks of September 11, 2001, I was warning that America was vulnerable and the only issue was *when* and not *whether* we were going to be hit.

After 9/11, I was delighted to see America come together in a display of unity not seen since World War II. I think one of the reasons we have not been hit at home again may be the message that display of bipartisan unity sent to our enemies – they had united and awakened a sleeping giant. Watching the way partisan politics has torn this nation apart these past few years has therefore been a source of great sadness to me, as it has undone much of the good we accomplished and provided incentives for our enemies to strike us again.

And sadly, much of the discord appears to be a result of *ignorance*. I don't question the sincerity of either side, but it would be difficult to overstate the harm that has resulted from the failure of our education system to train our public leaders about our constitutional system in the realm of national security and foreign affairs.

This morning, I would like to examine some important constitutional history that I hope may help both sides better understand this dispute. I will quote to you from the *Federalist* Papers and from the writings of men like Washington, Jefferson, Madison, Hamilton, Jay, and John Marshall – letting their words explain their understanding of our Constitution in this specialized area. I will also quote to you from congressional documents and court opinions, and I will show that there was a broad consensus among all three branches of government about the control of foreign intelligence activities under our Constitution prior to the Vietnam War. It is as if during the heated debates which

characterized the later years of that conflict we had a collective national hard-drive crash, and both sides forgot the original understanding. I think it is time that we pause for a few moments and revisit that history.

Introduction

Let me start by setting forth my perception of the two major competing interests here today. On one side we have people focused heavily on the terrorist threat who believe we need to unite behind our elected president and give him the flexibility and discretion to collect the intelligence we need to identify and neutralize the al Qaeda threat. At least some of them believe the Constitution gives the president the discretion to do that without being told how by Congress. On the other side we have people who agree it is important to collect foreign intelligence to protect America against terrorism, but who don't want to sacrifice the Bill of Rights in the process. To them, claims of broad "executive power" over intelligence, war, and other issues ring of the regime of King George III rather than a constitutional president in a free and democratic republic. They want to protect our nation, but not at the expense of the Constitution and the rule of law. I respect that view, but I am now going to tell you why I believe they are mistaken.

I would like to to begin by summarizing a few basic points:

- In our system of government we have a hierarchy of "laws," with the Constitution being supreme and superior to a conflicting act by either the president or Congress. Article V provides several means for amendment, but they do not include merely passing an inconsistent legislative statute or an informal agreement that a particular president will comply with a statute that in reality seeks impermissibly to narrow his constitutional discretion. Congress may no more usurp the constitutional powers of the president by statute that it may usurp the rights guaranteed to the people by enacting legislation contrary to the First Amendment.

- Not all presidential decisions were intended by the Constitution to be "checked" by Congress or the courts.

- This is especially true with respect to the conduct of business with foreign states and protecting the security of the nation against foreign powers and their agents within this country. When the Founding Fathers gave the nation's "executive" power to the president, they understood that this power included the general control of our nation's relations with the external world. To be sure, both the Senate and Congress were given certain "negatives" in this area as well as several affirmative powers often viewed as part of "foreign affairs"; but, as "exceptions" in the eyes of the Framers of our Constitution to the general grant of executive power to the president, these powers were intended to be construed strictly.

• At the core of exclusive presidential constitutional powers are the conduct of diplomacy, the collection of foreign intelligence, and the supreme command of military forces and conduct of military operations. Into these areas, Congress was not intended by the Founding Fathers to interfere. This was the consistent view of the *Federalist Papers* and the courts have repeatedly affirmed these principles.

• The distinction between domestic or internal affairs that affect the rights of individuals, on the one hand, and foreign or external affairs that affect the nation, on the other, is fundamental to understanding our constitutional separation of powers. That is the difference between the Steel-Seizure case (*Youngstown*) and *Curtiss-Wright*. And the failure of many scholars to see this distinction has led to a great deal of confusion and misunderstanding.

• Admittedly, not every decision can be neatly placed into a "domestic" or "foreign" box. Many decisions touch on both areas. And often in resolving them we must balance competing interests. But the distinction is nevertheless an important one.

The Constitution and Control Over "The Business of Intelligence"

It is often noted that the Constitution does not even mention the words "national security" and "foreign affairs," and from this many modern commentators conclude that this area is no different from domestic affairs – Congress has the power to set policy by law and the job of the Executive is to see that those laws and the policies they embody are "faithfully executed." Some who are familiar with our history note that this was not in reality the paradigm that prevailed, and it is speculated that when the beloved President George Washington seized control in this area the other branches went along rather than risk offending this wonderful old man.

In reality, there was a broad consensus among all three branches that foreign affairs were different than domestic affairs, and the reason we don't understand this today is because of changes in our language over the centuries. I remember once being confused when I read a letter from one of the great champions of our new Constitution around 1788 who described it to a friend as an "awful" document. It took some research into the etymology of "awful" to realize that in the eighteenth century the term described something that filled one with awe or was awe inspiring. And in a similar way, concepts like "executive power" and "declaration of war" had specific meanings when the Constitution was written that have largely been forgotten.

The Founding Fathers were remarkably well-read men, and they were familiar with John Locke's *Second Treatise on Civil Government*, Montesquieu's *Spirit of the Laws*, and Blackstone's *Commentaries on the Laws of England*. Each of these distinguished theorists – and most of their contemporaries as well – viewed the control of foreign affairs (what Locke described as control over 'war, peace, leagues, and alliances") as part of the "executive" power.

We know that this was the shared understanding of the content of the grant in Article II, Section 1, of the Constitution of the nation's "executive Power" to the president, because it was widely discussed at the time. For example, in a June 1789 letter, Representative James Madison explained: "[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. . . ."[1]

Relying upon this same clause ten months later, Thomas Jefferson wrote in a memo to President Washington:

> The Constitution . . . . has declared that "the Executive power shall be vested in the President," submitting only special articles of it to a negative by the Senate . . . . *The 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.[2]

Three days later, Washington recorded in his diary that he had discussed Jefferson's memo with Representative Madison and Chief Justice John Jay – who was by far the nation's most experienced authority on foreign relations – and both shared Jefferson's view that the Senate had "no constitutional right to interfere" with the business of diplomacy save for its expressed constitutional negatives. As Washington explained, "all the rest being Executive and vested in the President by the Constitution."[3]

Writing as *Pacificus* in 1793, the third author of the *Federalist Papers* (in addition to Madison and Jay), Alexander Hamilton, also pointed to the grant to the president in Article II, Section 1, of the Constitution of the nation's "executive" power in remarking:

> [A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.[4]

Another of Jefferson's political enemies to make this observation was the legendary John Marshall, who as a Federalist member of the House of Representatives in 1800 defended President Adams' decision to surrender an alleged British deserter pursuant to the extradition clause of the Jay Treaty without any involvement of the judiciary by reasoning: "The President is the sole organ of the nation in its external relations, and its

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[1] *Madison to Edmund Pendleton*, 21 June 1789, *in* 5 WRITINGS OF JAMES MADISON 405-06 n. (Gaillard Hunt, ed. 1904).

[2] *Jefferson's Opinion on the powers of the Senate Respecting Diplomatic Appointments,* April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16 (Mem. ed. 1903) (italics added).

[3] 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' Ed. 1925).

[4] 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969)

sole representative with foreign nations. . . . He possesses the whole Executive power. . . . In this respect the President expresses constitutionally the will of the nation."[5]

Arguably the finest book on this topic is the late Quincy Wright's 1922 classic, *The Control of American Foreign Relations*. As you may know, Professor Wright served as president of the American Political Science Association and was a leading constitutional scholar for most of the twentieth century. (My own interest in the field was sparked by a lecture I heard him give in 1966.) He wrote that "When the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto."[6]

Many of you will remember the late Senator J. William Fulbright, who served as chairman of the Senate Foreign Relations Committee for fifteen years and was a leading critic of the Vietnam War. Speaking at Cornell Law School in 1959, Chairman Fulbright captured the conventional wisdom shared by all three branches until that time when, in arguing for even greater presidential power, he explained:

> The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.[7]

I would emphasize the word "formulation" here. The president's authority was not merely to carry out policies established by Congress, as is the case domestically, but to *make* policy as well. When those policies took the form of a solemn treaty, the Senate had a negative. But otherwise foreign policy was an executive function.

Does this mean that Congress and the Senate have no powers related to foreign affairs? Of course not. Congress has important powers, including control over foreign commerce, a negative over a decision to launch a major offensive war, control over appropriations,[8] and many other powers enumerated in Article I, Section 8. But none of these give Congress a role in the conduct of war or diplomacy or the business of intelligence. The Senate has even more authority related to foreign affairs. It shares the powers of

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[5] 10 ANNALS OF CONG. 613-15 (1800).

[6] QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).

[7] J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961).

[8] However, Congress may not use "conditions" on appropriations bills to indirectly do things it is prohibited from doing directly. Congress may no more properly condition military appropriations upon the president's agreement to fight the war as instructed by Congress than it may condition appropriations for the judiciary upon the Supreme Court's deciding a particular case as directed by Congress or promising never to strike down legislation on constitutional grounds.

Congress with the House, and also is given several negatives – such as the right to block a completed treaty or a diplomatic nomination. But it is important to keep in mind that when the Senate considers treaties and nominations, it is acting not as a chamber of the legislature but rather in "executive session" considering business from the "executive calendar."

Congress and the Keeping of Secrets

A key consideration in the decision to deny Congress a role in diplomacy and the conduct of war (both of which involve the critically important function of gathering foreign intelligence and safeguarding secrets) is that Congress was not thought able to keep secrets. I testified at length on this issue in 1994 before the House Permanent Select Committee on Intelligence (HPSCI), so I will not spend a great deal of time on this issue this morning.[9] But it is important to understand that this was not just a concern of the executive branch. Indeed, before there was an executive branch, under the Articles of Confederation in 1775, the Continental Congress understood that it was not competent for the business of diplomacy and its members could not be relied upon to keep secrets, so it established a "Committee of Secret Correspondence" to conduct diplomacy, run spies, and the like. And in setting up this committee, the Continental Congress expressly instructed it to delete the names of intelligence sources in any reports it made to Congress.[10]

In reality, the Committee of Secret Correspondence found it necessary to conceal from Congress many secrets other than the names of spies and other intelligence sources. When France agreed to a major covert operation to provide support to the American Revolution, the committee members were delighted. But Benjamin Franklin and the other four members unanimously resolved that they could not share the information with others in Congress, explaining "We find by fatal experience that Congress consists of too many members to keep secrets."[11]

The *Federalist Papers* are replete with references to the need for secrecy, unity of design, and speed and dispatch in war and foreign affairs – and each of these was recognized as a strength of the executive branch. Since the official journal and Madison's notes on the proceedings of the Federal Convention were not made public until decades after the Constitution was ratified, these brilliant essays on the principles of our new government were the most important single source in explaining the Constitution to the people. And in *Federalist* No. 64, John Jay made it clear that neither Congress nor the Senate were to have any role in the business of intelligence. His essay is worth quoting at length:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are

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[9] My prepared statement is available on line at: http://www.fas.org/irp/congress/1994_hr/turner.htm.

[10] 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 345 (Worthington C. Ford, *et al*. eds, 1905.)

[11] "Verbal statement of Thomas Story to the Committee," 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, 5th Ser., 819 (1837-53).

> actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest*.[12]

Sadly, my experience both in the legislative and executive branches and as a scholar have persuaded me that the Framer's concern was justified. I've seen far too many harmful leaks from Capitol Hill. (To be sure, too many leaks also come from the executive department.)

Unchecked Presidential Discretion

It is popular today to teach that in our government, all presidential powers must be checked by Congress and/or the courts. But that is in fact neither an accurate statement nor the original understanding as explained by the Framers of our Constitution – especially with respect to the nation's external relations. We have already seen that the "executive" power was only to be checked by the expressed "exceptions" clearly vested in Congress or the Senate and that these were to be construed strictly. Obviously, some powers not involving foreign affairs – such as the president's pardon power – are also exclusive. But as the Supreme Court noted in the landmark 1936 *Curtiss-Wright* decision – which remains by far the most frequently cited Supreme Court case on foreign affairs – there was a marked difference between domestic and foreign affairs. The Court explained:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but *participation in the exercise of the power is significantly limited.* In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it*.[13]

That this was consistent with the original understanding of the Constitution is apparent from perhaps the most famous Supreme Court case of all times, Chief Justice John Marshall's landmark opinion in the 1803 case of *Marbury v. Madison*:

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[12] FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).
[13] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added).

> 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. . . . [A]nd *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*.[14]

To illustrate this point, Chief Justice Marshall continued:

> The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.[15]

So it is apparent that the idea of presidential supremacy is foreign affairs – subject to narrow but very important "negatives" or "checks" vested in Congress and the Senate – is not some grand scheme for seizing monarchial powers for another "King George" dreamed up by John Yoo or David Addington, but was in fact the original design of our Constitution.

Another key point from Chief Justice Marshall's *Marbury* opinion is equally important and addresses a situation in which Congress acts without constitutional authority or attempts to exercise powers vested by the people through the Constitution in another branch. Marshall declared, and again I quote: "an act of the legislature, repugnant to the constitution, is void."

The Fourth Amendment

In *Curtiss-Wright* and many other cases, the Supreme Court has noted that all constitutional powers "must be exercised in subordination to the applicable provisions of the Constitution."[16] This is critically important. And while Congress was not given constitutional authority to interfere in the business of intelligence, that does not mean there are no checks at all – particularly when a foreign affairs or intelligence issue also involves the constitutional rights of Americans.

The Bill of Rights – including the Fourth Amendment – is every bit as in effect in wartime as in peacetime. To be sure, the determination of what is a "reasonable" search

[14] *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).
[15] *Id*. at 165-66.
[16] *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 320 (1936).

may well shift when the government is seeking to prevent a WMD attack on the American mainland versus more traditional peacetime concerns like enforcing laws against white-collar criminals. But all exercises of presidential power must comply with relevant provisions of the Constitution.

One popular myth today is that the Fourth Amendment requires probable cause and a judicial warrant for any lawful search or seizure. When I entered this building a short time ago a government agent demanded to search my briefcase and made me pass through a metal detector. This was a "search" under the Fourth Amendment, and that government agent had neither probable cause to believe that I had done anything wrong nor a judicial warrant for the search. And since the First Amendment guarantees "the right of the people . . . to petition the Government," such "searches" are arguably an impediment to the exercise of a constitutional right.

Yet few would argue that such searches are a bad idea, and perhaps fewer that they are unconstitutional. For the Constitution does not prohibit "searches and seizures" by government, but only those searches and seizures that are "unreasonable." And as I will discuss, these public safety searches have long been upheld as reasonable by the courts without the slightest degree of individualized suspicion or probable cause and without a warrant. They are similar to the searches we all endure before boarding a commercial airplane. In a similar way, monitoring the electronic communications of foreign nationals outside this country who are believed to be affiliated with terrorist groups – particularly during a period of congressionally-authorized war – is reasonable. And it is perhaps even *more* reasonable when they are communicating with people inside the United States, who might be plotting the next catastrophic terrorist attack.

In assessing the Fourth Amendment, we need to remember that the Supreme Court has repeatedly observed that its language is not absolute. Thus, speaking for a unanimous Court in the so-called *Keith* case (*United States v. United States District Court*), which will be discussed in some detail in a few minutes, Justice Powell observed: "As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression."[17]

In making this balance, we should keep in mind that – even in peacetime – the Supreme Court has repeatedly recognized that "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. . . ."[18] This is presumably all the more true in situations like the present, when the nation is involved in a war authorized by Congress. As the unanimous Supreme Court noted in the Keith case, "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."[19]

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[17] *United States v. United States District Court*, 407 U.S. 297 at 314-15 (1972).
[18] *Haig v. Agee*, 453 U.S. 280, ___ (1981).
[19] 407 U.S. at ___.

On the other side of the scale, the interception of electronic communications is not generally viewed as among the more egregious violations of individual privacy. Indeed, it was not until 1967 that the Supreme Court decided that wiretaps even involved a Fourth Amendment interest, and when they did the great defender of the Constitution, Justice Hugo Black, refused to accept it. Lower courts have also recognized that wiretaps are "a relatively nonintrusive search."[20]

In addition, the Fourth Amendment was designed primarily to guard against unreasonable searches and seizures in a *criminal law* context, and in other settings the Supreme Court has recognized a number of exceptions. As the Court explained in *Von Raab* in 1989:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, . . . our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . As we note in *Railway Labor Executives,* our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[21]

These "special needs" cases usually involve some aspect of public safety or security. The Court has permitted warrantless searches of individuals crossing into the United States from other countries or even within a certain distance of national borders,[22] safety inspections of restaurants and certain types of factories, and even fairly intrusive mandatory drug testing of customs agents and even high school athletes.[23]

I suspect that each of you regularly encounters one classic example of these exceptions to the warrant requirement each time you enter a public airport and have to submit to a search of your person and baggage. These can be more than a little annoying and costs each of us many hours of time each year that we can never recover. Yet most of us recognize that being inconvenienced by our government to guard against our plane being hijacked or blown up is a good trade-off.

American courts have recognized that airport security screenings constitute a "search" under the Fourth Amendment, yet have consistently upheld their legality despite the slightest individualized suspicion, much less "probable cause" and a judicial warrant. As the legendary Second Circuit jurist Henry Friendly —rumored to have achieved the

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[20] *United States v. Ehrlichman*, 376 F. Supp. 29, __ (1974).
[21] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 at 665-66 (1989).
[22] *See, e.g., Schmerber v. California,* 384 U.S. 757 (1966).
[23] *See, e.g., Von Raab, supra* at 656; *Board of Education v. Earls,* 536 US 822 (2002).

highest grade-point average in the history of Harvard Law School – explained in the 1974 *Edwards* case:

> The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion. We need not labor the point with respect to need; the success of the FAA's anti-hijacking program should not obscure the enormous dangers to life and property from terrorists, ordinary criminals, or the demented. The search of carry-on baggage, applied to everyone, involves not the slightest stigma . . . . More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it is essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment.[24]

Given the risks inherent in modern terrorist attacks, one might think that the same logic that leads courts to conclude that conducting mandatory drug tests for student athletes and rather intrusive personal searches of any American who wishes to travel by airplane would, *a fortiori*, apply to electronic searches designed to obtain foreign intelligence information, and in reality, every federal court of appeals to have decided the issue has held that the president has independent constitutional authority to approve foreign intelligence national security wiretaps without a warrant. But let me save that discussion for later.

Presidential Recognition of Executive Control Over Foreign Intelligence Activities

I shall not take your time to document the long history of both affirmative assertions of constitutional power for presidents to authorize the collection of foreign intelligence information and the actual exercise of that power, for I suspect that point is not in controversy. Even before we had a Constitution, General George Washington authorized the opening of mail coming from Great Britain – instructing that it be carefully resealed before delivery so as not to disclose it had been read and risk losing a valuable source of future intelligence.

Thomas Jefferson and his Secretary of State James Madison conducted a number of foreign intelligence activities ddand even paramilitary operations without informing or seeking authorization from Congress, including sending two-thirds of the new American navy half-way around the known world with instructions to sink and burn ships and raising an small army of Greek and Arab mercenaries to send across a vast North African dessert to attack a foreign government.[25]

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[24] *United States v. Edwards*, 498 F.2d 496, 500 (2d. Cir. 1974).

[25] *See, e.g.,* Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHICAGO J. INT'L LAW 121 (2003).

In an 1804 letter to Treasury secretary Albert Gallatin, President Jefferson explained:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[26]

This was in fact a longstanding practice. Save for the Senate's legitimate authority to reject or consent to the ratification of treaties, it was not until my lifetime that Congress made serious efforts to seize control of presidential powers in this area. Most of those came in the wake of the Vietnam War.

Discussing Jefferson's behavior in 1996, Dr. Stephen F. Knott – a leading authority on the history of covert operations in this country – observed: "Jefferson's employment of covert operations was not an example of an extraconstitutional abuse of power but a simple exercise of the president's prerequisite to implement foreign policy."[27]

In the twentieth century, both Woodrow Wilson and Franklin D. Roosevelt acted unilaterally to authorize wartime interception of international cable traffic. Every American president from Roosevelt to Carter authorized the warrantless collection of foreign intelligence information without judicial or legislative sanction.[28]

Congressional Recognition of Executive Control Over Foreign Intelligence Activities

In his first State of the Union Address on Jan 8, 1790, President Washington asked for "a competent fund designated for defraying the expenses incident to the conduct of foreign affairs."[29] The statute that resulted reflected the broad recognition in Congress that foreign affairs was the president's business. Despite the requirement in Article I, Section 9, of the Constitution that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," the statute permitted the president at his discretion to conceal how he had spent the money:

> [T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of

[26] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).
[27] STEPHEN F. KNOTT, SECRET AND SANCTIONED 83 (1996).
[28] Cite to 1 House Rep't 95-1283 at 13-17. For information on the use of a warrantless national security wiretap by the Carter administration for more than 250 days without judicial or legislative involvement, see [*Truong* case] XX
[29] Available on line at:
http://dems.gov/index.asp?Type=B_BASIC&SEC=%7BA31FEC3A-8CFA-4D86-A3BE-4708342FD755%7D .

> such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually . . . .[30]

This deferential language was incorporated in similar bills for many years.

Similarly, although Article II, Section 2, of the Constitution gave the Senate a negative over many presidential appointments, Congress recognized that the president needed no legislative sanction to hire spies.[31] Indeed, in 1818, when a debate occurred in the House chamber about reports of a diplomatic mission to a South American country, the legendary Henry Clay declared that expenditures from the president's "secret service fund" were not "a proper subject for inquiry" by Congress, and others quickly echoed this view.[32]

The congressional view of presidential authority over the collection of foreign intelligence could hardly have been more clearly explained as in the Omnibus Crime Control and Safe Streets Act of 1968, when Congress enacted Title III establishing legal rules for wiretaps for the first time in our history. (This followed the Supreme Court's decision of the previous year declaring that wiretaps constituted a "seizure" under the Fourth Amendment.) But in so doing, Congress emphasized that it was not attempting to usurp the constitutional powers of the president over foreign intelligence:

> Nothing contained in this chapter . . . 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.[33]

Some have attempted to play down the significance of this language, correctly observing that it did not constitute a grant of any power to the president. It did, however, constitute a clear recognition by Congress that the president has independent constitutional authority to collect foreign intelligence. Others have dismissed it on the grounds that, in enacting FISA a decade later, Congress repealed this language. However, that does not change the fact that in 1968 Congress itself, as a matter of law, recognized the independent constitutional power of the president to authorize warrantless foreign intelligence wiretaps.

Judicial Recognition of Executive Control Over Foreign Intelligence Activities

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[30] 1 STAT. 129 (1790) (emphasis added).
[31] HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 224-39 (1929).
[32] 32 ANNALS OF CONG. 1466 (1818).
[33] 18 USC § 2511(3) (1970) (emphasis added).

Not only did both political branches from the earliest days of our nation recognize exclusive presidential control over the business of intelligence, but the courts, too, have been consistent in recognizing that authority. To be sure, there are no cases directly addressing a legislative challenge to presidential authority – in large part because until relatively recently no such challenges existed. But there have been several criminal cases in which defendants challenged the president's authority to authorize warrantless surveillance, and a brief review of some of those is instructive. But first we should briefly deal with *Katz*.

Katz v. United States (1967)

In 1967, for the first time the Supreme Court held that wiretaps "conducted without prior approval by a judge or magistrate were *per se* unreasonable, under the Fourth Amendment."[34] However, in footnote 23 the Court specifically distinguished its holding from a case involving national security wiretaps, writing: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."[35] While this footnote clearly left the issue of the constitutionality of presidentially-authorized national security wiretaps unresolved, the fact that the Court included it strongly suggested that at least some of the justices believed such activities were lawful.

The *Keith* Case (1972)

The issue of warrantless national security wiretaps came before the Court five years after *Katz*, when a member of the White Panther Party (an ally of the better-known Black Panthers) named "Pun" Plamondon, who had been on the FBI's Most Wanted list for bombing a CIA office in Ann Arbor, Michigan in 1968, was arrested with sixty-five pounds of dynamite in his possession along with maps showing military installations in the area.[36] This was one of the first opinions written by Justice Lewis Powell, and to fully understand it some background on Justice Powell may be useful.

As an OSS officer during World War II, Powell had worked on the ULTRA Project with British Intelligence breaking German codes. He thus brought to the bench a rare personal expertise in the business of intelligence. He had also served as president of the American Bar Association, and in that capacity had been involved in creating and serving on an ABA blue-ribbon committee to establish standards for electronic surveillance. Completed in 1971, the ABA committee endorsed the use of warrantless electronic surveillance in cases involving threats from a "foreign power" or "to protect military or other national security information against foreign intelligence activities"; and

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[34] *Katz v. United States*, 389 U. S. 347 (1967).
[35] *Id.* at ___ n. 23.
[36] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 375 (1994).

recommended as well that evidence obtained through such activities be admissible in criminal court when the search was found to be "reasonable."[37]

However, in the commentary to the ABA report, the committee explained that the foundation for this recommendation was "the relation between this country and foreign nations," adding: "The Committee considered and rejected language which would have recognized a comparable residuary power in the President not subject to prior judicial review to deal with purely domestic subversive groups."[38]

Noting that the Supreme Court had carved out a number of special needs exceptions to the warrant requirement, the ABA Committee observed:

> Indeed, if the interest of 'national self protection' warrants the present far-reaching practice in border searches, the interest of protecting the national security from foreign powers would seem to do no less. . . . The standard, therefore, recognizes that the techniques must be, ought to be, and will be employed in the national security area.[39]

Justice Powell's biographer and former law clerk, University of Virginia Law School Dean John Jeffries, writes that a year later in a Richmond newspaper article, Powell expressed serious doubts about the decision to exclude domestic national security wiretaps from the proposed exception to the Fourth Amendment's warrant requirement. Three months later, Powell found himself facing confirmation hearings in the Senate to become a member of the Supreme Court. During this process, Senator Birch Bayh and others grilled him repeatedly about the propriety of "warrantless surveillance in domestic security cases."[40] Powell sought to dodge some of the more detailed questions, but in the end promised to "consider the entire case in light of the Bill of Rights and the restrictions in the Constitution of the United States for the benefit of the people of our country."[41] Within a year, Powell was called upon to write what turned out to be the unanimous Supreme Court opinion in the *Keith* case.

To the surprise of many, Powell declared that the warrant requirement would apply to national security investigations involving purely domestic targets with no suspected ties to a foreign power. But he carefully distinguished this from a foreign intelligence case, writing: "Further, 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*."[42] Powell found the distinction important enough to reemphasize it near the end of the opinion:

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[37] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE 120 (Approved Draft 1971 and Feb. 1971 Supp. 11). This study was footnoted by Justice Powell the following year in *Keith* at 322 n.20.

[38] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE 121.

[39] *Id*. at 123.

[40] JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 377.

[41] *Id*.

[42] *United States v. United States District Court,* 407 U.S. 297, 308 (1972) (emphasis added).

> We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case 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*.[43]

From the opinion alone, it is difficult to divine the views of the justices on the issue before us, the constitutional power of the president to authorize warrantless foreign intelligence surveillance. Fortunately, Powell's able biographer fills in some of the blanks for us, writing that only Powell, Douglas, Brennan, Stewart, and Marshall were prepared to "say once and for all that warrantless wiretaps in domestic security cases were flatly unconstitutional."[44] Justice Rehnquist did not participate, presumably because he had been involved in the matter while a senior Justice Department official. The other three justices were willing to join the opinion on non-constitutional grounds.

We of course cannot be certain, but on the basis of Justice Powell's well-established belief that warrantless wiretaps *were* constitutional in the *foreign* intelligence area, and the fact that only four other justices were prepared to strike down such wiretaps even in a case involving a purely *domestic* target, there is little reason to believe that had this case involved an agent of a foreign power the surveillance would have been declared unconstitutional. One might add to this equation the strongly pro-national security views of Justice Rehnquist had he been in a position to vote on a case.

Before leaving the *Keith* case, one more observation is in order. It has often been alleged that FISA was enacted at the urging of the Supreme Court in *Keith*. That is simply not true, and this is absolutely clear from the language of the opinion:

> Given those potential distinctions between Title III criminal surveillances and those involving the *domestic* security, Congress may wish to consider protective standards for *the latter* which differ from those already prescribed for specified crimes in Title III. Different standards 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. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[45]

Thus, the Court was inviting Congress to legislate standards for "domestic security" surveillance, not to enact a *foreign* intelligence surveillance act. But few people actually read Supreme Court decisions, and by 1978 Congress was on a roll in grabbing control

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[43] *Id*. at 321-22 (emphasis added)

[44] *Id*. at 379.

[45] 407 U.S. at 322-23 (emphasis added).

over national security powers that has for nearly two centuries been recognized by all three branches as the province of the executive.

Other Pre-FISA Cases

Since the *Keith* case, every U.S. Court of Appeals to consider the issue has ruled in favor of an independent presidential constitutional power to collect foreign intelligence information without a warrant. A useful summary is provided in the June 8, 1978, report of the House Permanent Select Committee on Intelligence on the FISA bill:

> Since the *Keith* case, four circuit courts of appeals have addressed the question the Supreme Court reserved. The fifth circuit in *United States v. Brown* . . . upheld the legality of a surveillance in which the defendant, an American citizen, was incidentally overheard as a result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. The court found that on the basis of
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>> the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign intelligence.
>
> In *United States v. Butenko*, . . . the third circuit similarly held that electronic surveillance conducted without a warrant would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court found that such surveillance would be reasonable under the fourth amendment without a warrant even though it might involve the overhearing of conversations.[46]

The HPSCI report then mentioned a warrantless wiretap case involving a purely *domestic* target and noted that, in *dicta*, a plurality of judges, applying *Keith*, had "questioned whether any national security exception to the warrant requirement would be constitutionally permissible.[47] The HPSCI report then continued:

> Finally, in *United States v. Buck*, . . . the ninth circuit following *Brown* and *Butenko*, referred to warrantless surveillance of foreign powers and agents of foreign powers as a "recognized exception to the general warrant requirement."
>
> *On the basis of the three circuit court decisions upholding the power of the President* in certain circumstances to authorize electronic surveillance without a warrant, and in *the absence of any court holding to the contrary*, the [Carter] Justice Department firmly maintains that in the absence of legislation, such warrantless surveillances are constitutional.
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> Thus, after almost 50 years of case law dealing with the subject of warrantless electronic surveillance, and despite the *practice* of warrantless

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[46] 1 H. REP'T 95-1283 at 19-20.

[47] *Id*. at 20 (discussing *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir, 1975)).

> foreign intelligence surveillance sanctioned and engaged in *by nine administrations*, constitutional limits on the President's powers to order such surveillances *remains an open question*.[48]

Right! Every president has done it and every appeals court to decide the issue has upheld the power of the president – Congress itself has recognized the president's constitutional power as a matter of law, and the Supreme Court has repeatedly taken pains not to limit the president in this area – so Congress concludes the issue is a toss-up.

Consider also the sleight-of-hand used by HPSCI to explain away the admitted fact that every president had engaged in warrantless foreign intelligence surveillance and every court to address the issue had upheld such a power. "Under H. R. 7308, as amended, the authority of the President to engage in surveillance in certain cases without a warrant will derive from statute, not the Constitution . . . ."[49] This certainly seems to be asserting that statutes trump the Constitution – once Congress passes FISA, any constitutional power of the president will vanish – which suggests that someone didn't pay enough attention to *Marbury v. Madison* in law school. Imagine the consequences if this theory were applied to the First Amendment or judicial review.

United States v. Truong **(1980)**

Before FISA was enacted, the Carter Administration engaged in extensive warrantless wiretapping and "bugging" with hidden microphones and video cameras to track the espionage activities of a Vietnamese national who had resided in the United States for more than a decade and was a vocal critic of American involvement in the Vietnam War. Some of the surveillance equipment had been in operation for nearly a year, running continuously and recording virtually every call. The effort paid off with evidence that Truong Dinh Hung was obtaining classified documents from a government employee and delivering them to another Vietnamese (who happened to be a CIA and FBI informant) for delivery to representatives of the Socialist Republic of Vietnam in Paris. The surveillance operation was personally approved by Attorney General Griffin Bell, without any effort to obtain judicial sanction or any notification of Congress.

At the district court level, the judge admitted into evidence the recordings that had been made prior to July 20, 1977, on the theory that their purpose was to gather foreign intelligence information. Recordings made after that date were excluded on the theory that the investigation had shifted from foreign intelligence gathering to law enforcement.

The Fourth Circuit Court of Appeals noted that the Carter administration had "relied upon a 'foreign intelligence' exception to the Fourth Amendment's warrant requirement," contending that no warrant was necessary because of the president's "constitutional prerogatives in the area of foreign affairs."[50]

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[48] *Id*. at 20-21 (emphasis added).
[49] *Id*. at 26.
[50] *United States v. Truong*, 629 F.2d 908, 912 (1980).

Relying upon *Keith* and applying a balancing test, the court of appeals provided a lengthy analysis of why the executive branch was better suited to decide these issues than federal district judges and relied on *Curtiss-Wright* for the proposition that "separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance."[51] It emphasized that this "foreign intelligence exception to the warrant requirement" was only applicable to cases involving "a foreign power, its agent or collaborators."[52]

So both before and after FISA, federal appeals courts have remained *unanimous* in recognizing presidential power to authorize warrantless foreign intelligence surveillance. Indeed, as the next case will demonstrate, things got even worse for Congress after FISA was enacted.

In re Sealed Case (2002)

In addition to establishing the FISA Court to consider applications and grant or refuse[53] warrants, Congress established a FISA Court of Review consisting of U.S. Court of Appeals judges to review appeals from the FISA Court. That special appeals chamber has only issued one opinion to date, in 2002. And in that opinion the Court of Review unanimously declared:

> 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.*[54]

Congress appears to have largely ignored this judicial declaration that it has broken the law by usurping an exclusive presidential power. But perhaps that's not surprising, given the other areas where Congress has decided to flagrantly thumb its nose at the Supreme Court and the Constitution. For example, since the Supreme Court nearly twenty-five years ago declared that "legislative vetoes" were unconstitutional on several grounds, Congress had made no effort to repeal them but instead has enacted *hundreds* of new ones.

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[51] *Id*. at 914.
[52] *Id*. at 912, 915.
[53] There is a common misperception that the FISA Court is but a "rubber stamp" because it has approved the overwhelming majority of the applications submitted. Having been involved in this process in the early days, I can explain that the reason the court did not need to reject applications was because a truly remarkable woman named Mary Laughton, who set up and ran the Justice Department's Office of Intelligence Policy and Review for many years prior to her untimely death, made *certain* that no application went forward to the court that was not totally in order and consistent with the statute.
[54] *In re Sealed Case,* 310 F.3d 717, 742 Foreign Int. Surv. Ct. Rev., November 18, 2002 (NO. 02-002, 02-001).

What About *Youngstown*?

I will be shocked if at least one of the other witnesses at this morning's hearing does not rely heavily on Justice Robert Jackson's concurring opinion in the 1952 "Steel-Seizure" case of *Youngstown Sheet and Tube Co. v. Sawyer*.[55] Even if they don't, it was relied upon by HPSCI in its 1978 FISA report,[56] so it deserves some discussion.

My old friend Professor Harold Koh, now Dean of Yale Law School, probably deserves a large part of the credit for the theory that Jackson's *Youngstown* concurrence somehow has replaced *Curtiss-Wright* as the appropriate paradigm for foreign affairs cases in his prize-winning 1990 volume *The National Security Constitution*.

Like Lou Fisher and many others, Harold favors the "shared powers" concept of foreign affairs. I'm not fond of the term, not because I don't agree that many decisions in foreign affairs ultimately require the participation of more than one branch but because the specific role of each branch tends to be unique. The President "nominates" and "appoints," while the Senate may either consent to or veto the person nominated. The President has the exclusive power to speak to foreign governments on behalf of the nation, but before a treaty he has negotiated may bind the United States as conventional international law it must be approved by two-thirds of those Senators present and voting. I think it best not to merge these distinct roles with language that might suggest that the actual functions of each branch are interchangeable or "shared" in some way. It is not that Harold and Lou are necessarily *wrong* in this explanation, but rather that I fear the use of the term "shared powers" may promote sloppy thinking by readers less knowledgeable about the actual workings of government.

My real quarrel with Harold's scholarship involves his suggestion that there is some struggle going on between the Supreme Court's landmark 1936 *Curtiss-Wright* opinion and the concurring opinion of Justice Jackson in *Youngstown*. Candidly, I think this argument is silly. When properly understood, the two opinions are not at all in conflict. But before turning to that, let me put the issue in context by quoting from Harold's highly-acclaimed volume:

> At the Republic's birth, the Framers deliberately drafted a Constitution of shared powers and balanced institutional participation, fully aware of the risks that arrangement posed to the nation's international well-being. By mandating that separated institutions share powers in foreign as well as domestic affairs, the Framers determined that we must sacrifice some short-term gains for speed, secrecy, and efficiency in favor of the longer-term consensus that derives from reasoned interbranch consultation and participatory decision making. Although in the early years of the Republic, all three branches condoned a de facto transformation of the

[55] 343 U.S. 579.
[56] 1 H. REP'T 95-1283 at 24.

> original National Security Constitution from a scheme of congressional primacy to one of executive primacy, they never rejected the concept of power sharing and institutional participation . . . .[57]

He then goes on the explain how *Curtiss-Wright* radically changed the historic paradigm:

> In 1936, *Curtiss-Wright's* dicta boldly asserted the alternative vision of unfettered presidential management. But even as the Cold War raged, the 1947 National Security Act, *Youngstown*, and finally the post-Vietnam era framework statutes (e.g., War Powers Resolution) definitively rejected that vision as America's constitutional model for dealing with the outside world. Vietnam (and Watergate, as well, to the extent that it arose from Vietnam) then taught that even in a nuclear age, America would not conduct globalism at the price of constitutionalism. It is therefore ironic that the *Curtiss-Wright* model should now resurface . . . .[58]

In reality, throughout the Cold War the Supreme Court routinely relied upon *Curtiss-Wright* as the established foreign affairs paradigm, as it does today. If its status was weakened in any way by *Youngstown*, someone clearly forgot to tell the Court, which continues to cite *Curtiss-Wright* more than any other case dealing with foreign affairs more than half-a-century later.[59]

I was particularly amused by this passage of the Koh book:

> Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.[60]

I think what I enjoyed the most was that, of the ten or so "[c]ritics on the right" he footnotes to this passage, he listed me *first* – well ahead of such distinguished scholars as former Yale Law School Dean Eugene Rostow and my University of Virginia colleague and mentor John Norton Moore. But, flattery aside, I've never been able to get Harold to come up with statements from men like Washington, Jefferson, Madison, Hamilton, or Jay supporting his theory that foreign and domestic affairs involved the same basic "sharing of powers" or that Congress was intended to be the senior partner in foreign affairs. Perhaps other witnesses here this morning can do so.

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[57] HAROLD HONGKU KOH, THE NATIONAL SECURITY CONSTITUTION 211 (1990).
[58] *Id*. at 211-12.
[59] A WestLaw search reveals that *Curtiss-Wright* has been relied upon in Supreme Court cases in five of the last seven years. *See, e.g., Pasquantino v. United States,* 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is "the sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright* . . . .")
[60] *Id*. at 225.

I hope I've demonstrated the broad consensus among these key Founders that Congress and the Senate were to be excluded from many decisions in the foreign affairs realm, and the powers they were given that were viewed as *exceptions* to the broad grant of "executive Power" to the President and were thus intended to be construed strictly. In contrast, without any effort to document his assertion, Harold simply tells his reader "the first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role."[61] And sadly, in the post-Vietnam era, this is the prevailing paradigm being taught in our universities and law schools.

Elsewhere in the volume, Professor Koh writes:

> This structural vision of a foreign affairs power shared through balanced institutional participation has inspired the National Security Constitution since the beginning of the Republic, receiving its most cogent expression in justice Robert Jackson's famous 1952 concurring opinion in *Youngstown*. Yet throughout our constitutional history, what I call the *Youngstown* vision has done battle with a radically different constitutional paradigm. This counter image of *unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in *United States v. Curtiss-Wright Export Corp.* As construed by proponents of executive power, the *Curtiss-Wright* vision rejects two of *Youngstown's* central tenets, that the National Security Constitution requires congressional concurrence in most decision on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.[62]

One wonders if Dean Koh has carefully *read* Justice Jackson's *Youngstown* concurrence, or the majority opinion in the case written by Justice Black. For both went to considerable lengths to emphasize that they were *not* endeavoring to constrain the powers of the President in dealing with the external world. At issue in that case was whether the President's "war powers" (in a conflict Jackson noted had not been approved by Congress[63]) authorized him to order the Secretary of the Interior to seize domestic steel mills – the *private property* of American citizens – in order to prevent a labor strike that

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[61] *Id*. at 75.
[62] *Id*. at 72.
[63] In fairness, despite subsequent attacks from Republicans, Truman played the Korean conflict by the book. He repeatedly asked to address a joint session of Congress and had Secretary of State Acheson draft an authorization for the use of military force. But he decided not to push the idea when in consultation with congressional leaders he was repeatedly told th stay away from Congress and assured he had the power to send troops into hostilities pursuant to the Constitution and the UN Charter. *See* Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth.* 19 HARV. J. L. & PUB. POL. 533 (1996).

might affect the availability of steel for the Korean War. (And keep in mind that the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . .")

There is no reason to believe that Justice Jackson was in any way hostile to *Curtiss-Wright* as the appropriate foreign policy paradigm. On the contrary, just two years before *Youngstown*, he wrote for the majority in *Johnson v. Eisentrager*:

> Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. . . . The issue . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States v. Curtiss-Wright Corp* . . . .[64]

And consider this excerpt from Justice Black's majority opinion in *Youngstown*:

> The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[65]

Similarly, Justice Jackson in *Youngstown* was very deferential to presidential power with respect to the external world:

> [N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often is even unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign adventure. . . .
> That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy . . . .

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[64] 339 U.S. 763 (1950).
[65] 343 U.S. 579, 587 (1952) (bold emphasis added).

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize person or property because they are important or even essential for the military or naval establishment.[66]

Even more fundamentally, in *Youngstown* Justice Jackson actually cited *Curtiss-Wright* as authority, but then explained: "That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories . . . ."[67] And as both Justice Black and Jackson repeatedly emphasized, *Youngstown* was an "internal affairs" case.

That is also the consensus of scholars like Professor Louis Henkin, who in *Foreign Affairs and the Constitution* noted:

> *Youngstown* has not been considered a "foreign affairs case." The President claimed to be acting within "the aggregate of his constitutional powers," but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.[68]

Consider also the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter's constitutional power to terminate the mutual security treaty between the United States and Taiwan. Senator Goldwater had urged the Court to decide the case on *Youngstown*, but Rehnquist wrote:

> The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United

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[66] *Id*. at 642, 644, 645.
[67] *Id*. at 637 n.2 (bold emphasis added).
[68] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 341 n.11.

> States, and [falls] within the category of foreign affairs.[69]

Others may disagree, but my own sense is that *The National Security Constitution* is not a particularly useful contribution to the literature in this highly-specialized field. Indeed, my strong sense is that when the book was written Harold was unaware of many of the materials I have mentioned earlier from Washington, Jefferson, and all three authors of the *Federalist* papers.

Post-Vietnam Congressional Usurpation of Presidential Power and Its Consequences

Mr. Chairman, the FISA statute needs to be understood in the context of a period of congressional assault on the constitutional power of the executive that developed during the heat of the VietnamWar debates. We can quarrel about how many legislators believed they were defending the Constitution from another "imperial president" and how many realized they were violating their oaths of office, but in the end that doesn't much matter. The reality is that Congress took advantage of the flow of public opinion as the Vietnam War became unpopular, the weakness of Richard Nixon following Watergate, and the reality that Gerald Ford had not even been elected to the position of *Vice* President and had no clear pubic constituency. A very nice but largely (in this field) clueless Jimmy Carter then came to Washington, anxious to work with Congress to bring an end to intelligence abuse and restore power where he probably honestly assumed it belonged.

The earliest reference I have found proposing that Congress challenge presidential authority over foreign intelligence was in a 1969 book by radical activist Richard Barnet, a founder of the Institute for Policy Studies, who wrote:

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing congressional committee to review the classification system and to monitor secret activities of the government such as the CIA.[70]

Revelations a few years later of abuses in the intelligence area set the stage for that to become a reality.

Were there in fact "abuses" in the Intelligence Community? Anyone who followed the Church and Pike Committee hearings knows there were. But even Frank Church ultimately admitted that the CIA had not been a "rogue elephant" (as he had initially

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[69] *Goldwater v. Carter* 444 U.S. 996 (1979) (bold emphasis added).
[70] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-789 (1969).

charged), and that virtually every activity of which he disapproved had been ordered by a president or senior policy official.

President Franklin D. Roosevelt had bypassed his attorney general in 1936 and directly ordered J. Edgar Hoover to start "spying" on Americans thought possibly to be connected with Communism or Fascism, and Hoover had on his own initiative banned FBI "black bag" jobs nearly a decade before the Church Committee hearings took place.[71] Most of the abuses had already been investigated and made public by the Attorney General before the hearings even began. And some of the sensationalized charges in the end turned out to be largely unfounded.

For example, most people who followed the hearings in the press came away with the idea that the CIA routinely went around "assassinating" foreign leaders who would not do what America demanded. In fact, when the Church Committee published its massive volume on the subject,[72] it admitted it had not found a *single* case in which the CIA had ever assassinated anyone. And Directors of Central Intelligence Richard Helms and William Colby had each issued orders that no one connected with the CIA would have anything to do with assassination long before the hearings began.[73]

What about Fidel Castro? Yes, at the instructions of Presidents Eisenhower and Kennedy the CIA did make several plots to dispatch the Cuban dictator with extreme prejudice. But given Castro's unlawful intervention in several Latin American countries, one might make a plausible case that a use of lethal force was permissible as an act of collective self-defense under Article 51 of the UN Charter. There was also a decision made to kill the Congo's Patrice Lumumba, but before any action was taken he was arrested by his own government and killed soon thereafter by rival leftist guerrillas.[74] In all of the other cases investigated by the Committee, the CIA was cleared of wrongdoing.

What about allegations of "spying" on Dr. Martin Luther King and anti-war leaders? The charges appear to have been true. But as the 1978 HPSCI report on FISA observed, most of the truly objectionable disclosures involved "domestic" targets.[75] The Bush administration has agreed to obtain warrants from the FISA Court any time U.S. persons in this country are targeted for surveillance, so that problem is not in dispute. (In reality, with the extensive oversight mechanisms already in place within the executive branch, it is highly unlikely that any politician would even consider repeating those errors of the past. NSA alone is said to have a staff of 100 people in the office of its inspector general.)

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[71] 2 S. Rep't No. 94-755 at 24; 3 *id.* at 355 (1976)

[72] ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975).

[73] *See* Robert F. Turner, *It's Not Really "Assassination" Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, UNIVERSITY OF RICHMOND LAW REVIEW, vol. 37, March 2003 at 791-98.

[74] S. REP. NO. 94-465 at 256.

[75] 1 H. REP'T No. 85-1283 at 21.

But in response to public perceptions of CIA assassins running loose and with weakened presidents in the White House, Congress passed a series of new laws claiming powers all three branches had historically recognized belonged exclusively to the executive.

Five years before FISA was enacted, Congress overrode President Nixon's veto to enact the War Powers Resolution. The constitutional shortcomings of the War Powers Resolution were expressed eloquently by Senate Majority Leader George Mitchell, who on May 19, 1988, declared on the Senate floor:

> Although portrayed as an effort "to fulfill"—not to alter, amend or adjust—"the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war….
>
> By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
>
> …[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.
>
> The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.[76]

Senator Mitchell might have added that the highly partisan September 1983 congressional debates over extending the U.S. peacekeeping force in Beirut, Lebanon – a deployment that did not even arguably infringe upon the power of Congress to "declare war" – sent a signal to Islamic terrorists that America was "short of breath" and would abandon their commitment if more casualties were experienced. Indeed, shortly after the Congressional debate, we intercepted a message between two radical groups saying that if they killed 15 Marines, the rest would "go home." Presumably, the fact that congressional leaders had announced they would reconsider the vote by which the mission had been extended for 18 months if there were any more casualties might have been a factor in that analysis. In any event, a few days later, on October 23, 1983, 241 sleeping Marines were killed by a terrorist truck bomb. As predicted, we did bring the rest home.[77] And Osama bin Laden later said that our quick withdrawal after the attack had persuaded him that Americans were unwilling to accept casualties – which in turn

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[76] CONGRESSIONAL RECORD, May 19, 1988.

[77] For a discussion of congressional responsibility for this tragedy, *see* P.X. Kelley & Robert F. Turner, *Out of Harm's Way: From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994 at C2; and ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 141-42.

just might have been a factor in his decision to attack the World Trade Center and other American targets on September 11, 2001.[78]

It seems very clear as well that FISA itself was a contributing factor to the success of the 9/11 attacks. I'm sure everyone here recalls the compelling congressional testimony of FBI lawyer Colleen Rowley, who was named one of *Time* magazine's "Persons of the Year" in 2002 because of her scathing memo to FBI Director Bob Mueller denouncing the incompetent bureaucrats in the FBI's Office of General Counsel who had repeatedly refused to even process her requests for a FISA warrant so field agents could examine the laptop computer of Zacharias Moussaoui. Most Americans never did learn the reason Rowley's requests had been denied. There was simply no evidence that Moussaoui was an officer, employee, member, or agent of al Qaeda or any other foreign terrorist organization. He was what we call a "lone wolf," a "sympathizer" or perhaps a "fellow-traveler." But in its wisdom, Congress made it a *felony* for anyone in the Intelligence Community to engage in surveillance of Moussaoui without a FISA warrant – and it also made it illegal for the FISA Court to issue such a warrant in Moussaoui's case. What those contemptible FBI lawyers had done was to obey the law passed by Congress.

If anyone doubts that FISA was intended to make such surveillances unlawful, I would urge you to read the 1978 HPSCI report of FISA. On page 34 it emphasizes that the term "agent of a foreign power" intentionally excluded "mere sympathizers, fellow-travelers, or persons who may have merely attended meetings of the group . . . ."[79]

I honestly don't know if FBI surveillance of Moussaoui prior to September 11, 2001, would have led to clues that might have prevented the attacks and saved 3000 lives. I do know that General Michael Hayden, who served as Director if the National Security Agency for more than six years starting in 1999 and has a reputation for the highest integrity, has publicly stated with respect to the Terrorist Surveillance Program so many legislators struggled so hard to destroy: "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."[80] He did not connect the dots and suggest that, once having identified al Qaeda terrorists in our midst we might have monitored their activities and even prevented the attacks, but that's not an unreasonable conclusion.

In 2004, Congress quietly amended FISA to address the "lone wolf" problem. Some might view that as a bit late – 3000 lives too late. In fairness, of course, no one in Congress expected that FISA would make it easier for foreign terrorist to slaughter thousands of innocent people in this country, and certainly no one in Congress wished for such a result. But one of the reasons John Locke explained that foreign affairs needed to

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[78] Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available on line at: http://deseretnews.com/dn/view/0,1249,515039782,00.html (bold italics added). *See also.,* Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut attack set off a chain of events, some say,* TAMPA TRIB., October 23, 2003.

[79] 1 H. REP'T NO. 95-1283 at 34.

[80] A copy of General Hayden's address to the National Press Club on January 23, 2006, can be found on line at: http://www.fas.org/irp/news/2006/01/hayden012306.html.

be entrusted to the executive was because it was not possible to anticipate all of the changed circumstances that might occur during negotiations, war, or other events by "antecedent, standing, positive laws" – and thus this business of necessity had to be entrusted to the executive "to be managed for the public good."[81]

Indeed, the congressional assault on presidential powers has given us textbook examples of this principle at work. In May 1973, Congress snatched defeat from the jaws of victory in Indochina (in the process consigning millions of human beings we had repeatedly pledged to assist by treaty and statute to death and tens of millions of others to a Communist tyranny that decades later still ranked among the "worst of the worst" human rights violators in the world) by cutting off all funds for combat operations "in the air, on the ground, or off the shores" of North Vietnam, South Vietnam, Laos or Cambodia. Two years later to the month, Cambodian forces seized the American merchant ship *S.S. Mayaguez* and took 42 crewmembers to an island. When Senator Frank Church was later asked whether he was upset that President Ford had repeatedly violated the amendment he had sponsored by using force in the air, on the ground, and off the shores of Cambodia to rescue those Americans, he explained that Congress had not "intended" to prevent something like *that*.

Then there was the statute that authorized the elder President Bush to use force in Operation Desert Storm in 1991. Congress carefully drafted the statute to prevent the president from using force for any objective beyond ejecting Iraqi forces from the territory of Kuwait. No one anticipated that General Norman Schwarzkopf would pull off a brilliant "left hook" that would leave Saddam's Revolutionary Guard fleeing across the desert with only minimal American casualties, and not a few congressional Democrats who had voted to deny Bush any authority to enforce the UN Security Council decision quickly denounced the president as a wimp for failing to go all the way to Baghdad to exploit the great victory and bring an end to Saddam's rule.

We don't have to go back years to find examples of serious harm being done to our national security by a Congress that usurped presidential power and then failed to anticipate the consequences of its actions. Time and again, the 1998 HPSCI report of FISA emphasized that that the new statute would only regulate "electronic surveillance conducted *within the United States* for foreign intelligence purposes."[82] The report explained: "The committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillance."[83]

And yet, if leaks in the newspapers are to be believed – and some are specifically attributed to congressional sources – changes in technology have led the FISA Court to declare that communications between bin Laden in Pakistan and his top lieutenants in Afghanistan can no longer be intercepted without a FISA warrant if they happen to pass

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[81] JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 147 (1689).
[82] H. REP'T NO. 95-1283 at 24. *See also, id.* at 26, 36, and other references.
[83] *Id*. at 27.

through an Internet switch in northern Virginia or Sillicone Valley. Because of this, we are reportedly getting twenty-five percent less intelligence this year than we got last year. Congress has not only usurped the constitutional powers of the president, but in the process it has given a special gift to al Qaeda by immunizing communications that clearly were not intended to be affected by FISA. And yet I am told that more than four House Democrats out of five voted to prevent this situation from being corrected.

If you want to find other horror stories about how Congress through FISA is undermining America's ability to protect the lives of our people, read the testimony and statements of Director of National Intelligence McConnell and other senior officials. Responding to a question from Senator Bond during his May 1 appearance before the Senate Select Committee on Intelligence, DNI McConnell declared that, "under the construct today, the way the definitions have played out and applied because technology changes, *we're actually missing a significant portion of what we should be gathering*." Kenneth Wainstein, the Assistant Attorney General for National Security, noted during that same hearing that the current interpretation of FISA prevents the government from collecting intelligence with non-U.S. persons who are temporarily visiting the United States and who we *know* have important foreign intelligence information that might well help us prevent terrorist attacks. But because we can't clearly connect that person – who might be a "tourist" from Pakistan or Iran – as an "agent" of a "foreign power," we are helpless. Does Congress really place greater value on the privacy interests of foreign visitors than it does on the lives of American citizens?

In his August 6 letter to Senators Reed and McConnell, the DNI noted that because of FISA the Intelligence Community was "diverting scarce counterterrorism analysts who speak the languages and understand the cultures of adversaries to compiling lengthy court submissions to support probable cause findings on an individualized basis by the FISA Court in order to gather foreign intelligence from foreign terrorists located overseas." He added: "This is an unacceptable and irresponsible use of Intelligence Community resources." We have a horrible shortage of skilled linguists, and rather than allow the DNI to prioritize their assignments Congress is taking them away from the task of trying to find bin Laden and prevent attacks on America so they can prepare paperwork to persuade the FISA Court that perhaps we ought to be keeping an eye on our enemies during a war that Congress has authorized. If you people were in business during World War II, I suspect we would all be speaking German or Japanese today.

Conclusions

Mr. Chairman, I have gone on far too long. I would not have done so were the stakes involved not so serious, and were not my frustration over the ignorance and misinformation that has clouded this debate so great. Let me try to make a few final observations and bring things to a close.

FISA Was Essentially a Gentleman's Agreement Between Congress and President Carter

When Congress enacted FISA in the face of unanimous views to the contrary by those who had expressed an opinion in the other two branches of our government, I'm sure most members believed their decision was "law" and would bind future presidents. But a careful reading of the hearing record suggests that that was not the view of the Carter Administration (which, as discussed, had taken the position that there was a foreign intelligence exception to the warrant requirements of the Fourth Amendment). Consider this excerpt from the HPSCI testimony of Attorney General Griffin Bell:

> [C]landestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies. . . .
> [T]he current 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*. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. *The President, by offering this legislation, is agreeing to follow the statutory procedure*.[84]

Now this statement may be subject to more than one interpretation, but it sounds to me like the Attorney General was asserting that the president had independent constitutional power to conduct foreign intelligence, and affirmed the truism that a mere legislative statute can not take away a constitutional power – precisely the unanimous conclusion of the FISA Court of Review nearly a quarter-century later. And then he goes on to say that the statute will nevertheless be followed because the president – despite his constitutional power to act outside of FISA – was "agreeing to follow the statutory procedure." There may be other interpretations, but that to me is the most reasonable one.

And if that interpretation is correct, then the foundation of FISA from the start was not a lawful and binding Act of Congress at all but rather a usurpation of presidential

[84] Testimony of Attorney General Griffin Bell, FOREIGN INTELLIGENCE ELECTRONIC SURVEILLANCE, HEARINGS BEFORE THE SUBCOMMITTEE ON LEGISLATION OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, HOUSE OF REPRESENTATIVES, January 10, 1978 at 14-15 (emphasis added).

constitutional power that as a matter of U.S. constitutional law was void, but which the sitting president had nevertheless agreed as a matter of policy to observe. If that is true, then if Congress insists on trying to control this area it must come up with language that the current president will also be willing to accept. For it is axiomatic that neither Congress by itself nor Congress in cooperation with a sitting president can amend the Constitution so as to deny future presidents the full use of their independent powers.

Why President's Like FISA

I've been out of the intelligence business for nearly twenty-four years, and while I have many friends still working in the Intelligence Community I don't pretend to speak for them. But my own sense is that most administrations basically *like* FISA. Certainly many prosecutors and law enforcement officials do, because if surveillance is carried out pursuant to a FISA judicial warrant and authorizing statute they don't have to worry as much about whether evidence acquired in the process will be found admissible in a criminal trials. And in a setting where speed and dispatch are not essential, it also adds another layer of review to ensure that the right thing is being done.

So even though I do not believe that Congress has the constitutional power to demand secret information from the president or to compel him to conduct foreign intelligence operations in accordance with the statute, with appropriate revisions I can see FISA being accepted and observed on the basis of an understanding that it is mutually convenient to do so. But if Congress continues to stonewall, and refused even to correct the obvious technical problems that are preventing NSA from monitoring communications between foreign terrorists outside of this country – communications FISA was clearly not intended to govern – in my view the president would be derelict in his duty if he did not authorize a more robust program of foreign intelligence collection outside of FISA. And if America gets hit again by a major terrorist attack before the next election, were I a legislator who had voted to undermine efforts by our Intelligence Community to gather intelligence on al Qaeda and its affiliates I think I might want to get my resume in order.

Confusing Law Enforcement Search Warrants and the Business of Foreign Intelligence Collection

With the caveat again that I have been out of the intelligence business for nearly twenty-five years, I must nevertheless say that I don't understand this insistence on imposing a warrant requirement, complete with "probable cause," on the collection of foreign intelligence information. In law enforcement, you have evidence that a crime has been committed or is about to be committed and you search for evidence to identify wrongdoers and bring them to justice. In that process, the Fourth Amendment quite properly limits the extent to which police or other government authorities may infringe upon the reasonable expectations of privacy of citizens and others in the community. Certain activities are prohibited in the absence of probable cause that an individual has committed or intends to commit a criminal act.

There are occasions in the intelligence business where a similar situation occurs and law enforcement personnel are brought in to try to collect the necessary evidence to win a conviction. But much of the time, the task of the Intelligence Community is to look around and try to identify individuals who may be foreign spies or agents. Historically, much of that difficult and often thankless task has involved trying to make associations – who spends a lot of time with a known spy or terrorist, who calls his telephone, who socializes with him time and again. No one is punished for telephoning a foreign agent or terrorist. Spies and terrorists do things other than steal secrets and blow up buildings, and there is not the slightest thing wrong with innocently but repeatedly communicating with an enemy spy you have no idea is a spy. Perhaps an eBay transaction will lead to a series of e-mails, or the illness of a mutual friend will prompt repeated phone calls. Our intelligence officers patiently look for and check out lead after lead, and sometimes they get lucky and identify another spy or terrorist.

Technology can greatly assist in this business. If NSA can get access to telephone records of millions and millions of customers, sophisticated programs can search and find which numbers are time and again connecting to numbers known or suspected to be used regularly by other terrorists. Again, no one is sent to jail for talking on the telephone with a covert enemy agent. Perhaps the calls are between teenagers in both houses who have fallen in love and are totally oblivious to the reality that one of their parents is a terrorist. They often lead to dead ends, but such leads are worth checking.

Professor Philip Bobbitt, a distinguished scholar and Director of the Columbia University Center for National Security, recently published an outstanding op-ed in the *New York Times* that is worth quoting. He explained:

> It made sense to require that the person whose communications were intercepted be a spy when the whole point of the interception was to gather evidence to prosecute espionage. This makes much less sense when the purpose of the interception is to determine whether the person is in fact an agent at all. This sort of communications intercept tries to build from a known element in a terror network — a person, a telephone number, a photograph, a safe house, an electronic dead-drop — to some picture of the network itself. By crosshatching vast amounts of information, based on relatively few confirmed elements, it is possible to detect patterns that can expose the network through its benign operations and then focus on its more malignant schemes.
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> For this purpose, warrants are utterly beside the point.[85]

Philosophers sometimes ask whether a tree falling on a desert island makes a noise.[86] In a similar vein, one might ask whether a computer that in a nanosecond scans my

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[85] Philip Bobbitt, *The Warrantless Debate Over Wiretapping*, N.Y. TIMES, Aug. 22, 2007 at A19.

[86] The answer, it has always seemed to me, depends upon whether one defines "noise" as a series of vibrations created by the falling tree, or the impulse transmitted to the human brain when the ear receives those vibrations. But that's not my point in making this comparison this morning.

anonymous telephone records to see if I have been communicating with known terrorists has violated my legitimate privacy rights? In more than 99.999 percent of the searches, no relationship will be found and no human being will be told anything about me. When in May of last year *USA Today* reported that some telephone companies had provided telephone records to the NSA – without any names, addresses, or content information about the calls – some civil libertarians went ballistic. Senator Patrick Leahy asked: "Are you telling me tens of millions of Americans are involved with al-Qaeda?"[87]

Obviously, Senator Leahy knows that no one is suggesting that every record searched belongs to a suspected Qaeda operative. He is either being silly about a very serious matter or playing partisan politics. We search millions of records to try to identify a small number that show a pattern of communicating with known or suspected terrorists in order to identify possible leads that may result in preventing the next major terrorist attack.

As I see it, this is no more a violation of my "privacy rights" than is the common practice (as I understand it) of having government computers scan my fingerprints – and they presumably have lots of them, starting with the ones I submitted while earning my Boy Scout fingerprinting merit badge half-a-century ago to my military records and the various times I was printed in connection with government jobs and security clearances – along with those of millions of other Americans. Am I really "injured" when their computer scans over my prints in trying to find a match to the ones found on a murder weapon? Unless there is at least a partial match, no human being even sees my name. I just don't see the problem here.

I stand in line patiently at airports because I want my government to make it difficult for terrorists to hijack my plane or blow it up. I am *glad* the FBI is scanning vast digital files that include my fingerprints when it searches for criminals, because I know searching more records should increase the chance of finding a match and I want to get criminals off the street. And I would be very glad to learn that the government is having a computer examine my phone and e-mail connection records if there is even a slight chance that the process will expose a real terrorist and prevent him from killing me, my family, or other innocent human beings.

Unless one is actually involved in criminal activity or terrorism, to say the privacy intrusion associated with these "searches" is *de minimis* is a gross overstatement. The Supreme Court held years ago that there is no reasonable expectation of privacy concerning such telephone records,[88] but even were there a recognized privacy interest it would obviously pale beside the government's interest in preventing terrorist attacks. Anyone who doubts that has forgotten the events of September 11, 2001. And when Members of Congress – or witnesses at congressional hearings, for that matter – make

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[87] Susan Page, *NSA Secret Database Report Triggers Fierce Debate in Washington*, USA TODAY, May 11, 2006 at A1.

[88] *Smith v. Maryland*, 442 U.S. 735 (1979) (upholding the use of pen registers that record numbers of phones that communicate with a particular telephone without a warrant).

alarmist pronouncements calculated to anger the public they serve neither themselves nor their constituents. We have to make enough really difficult calls in trying to reach the right balance between privacy and safety without being led astray by unwarranted hysteria.

Revising FISA

I was absolutely shocked to read in *Newsweek* that 82 percent of House Democrats had voted against the "Protect America Act" prior to going on recess.[89] As I read the statute, it was an emergency six-month fix to permit our Intelligence Community to resume intercepting communications by foreign terrorists outside this country until Congress could return from a month-long recess and enact a more permanent fix. It may not have been perfect, but Congress was unwilling to stay in town long enough to try to make it perfect.

I'm not here as an expert on the details of proposed revisions to FISA. I'm sure you have had, or will soon have, an opportunity to discuss the details with people involved in the drafting who can give you much more authoritative answers that I could.

I have of course read the testimony of the DNI and Mr. Wainstein of the Justice Department, and I find both entirely compelling. Making FISA technology neutral and focusing our limited resources on protecting the civil liberties of U.S. persons in this country makes tremendous sense to me. The key issue ought to be who is being *targeted*, and the fact that bin Laden places a telephone call to Joe Sixpack in Peoria (about whom the government knows nothing) ought not require NSA monitors to unplug their headphones. If I telephone someone in this country whose phone calls the government has a lawful right to record – e.g., if they have a judicial criminal warrant – then my voice can lawfully be recorded. And if I begin the conversation by confessing to having committed a crime or announcing an intention to do so, the government can introduce that tape into court against me without needing a separate prior warrant in my name. My privacy rights are essentially "collateral damage" in the reasonable effort to get information on the target of the surveillance. Why on earth should we apply a more difficult standard to intercepting communications of foreign enemies who wish to murder large numbers of Americans than we do to white collar criminals in this country?

It seems to me that Congress ultimately has two choices. You can work with the president to try to find a mutually agreeable solution – one that will give him the benefit of knowing that foreign intelligence information will likely be admissible in a court of law, without in the process preventing him from taking the necessary measures to collect the intelligence needed to prevent the next catastrophic terrorist attack – or you can play hardball, intentionally preventing our Intelligence Community from collecting essential foreign intelligence information, until either we are attacked again and your constituents vote you out of office or the president simply decides to ignore FISA.

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[89] Jonathan Alter, *I Know What You Did Last Summer,* NEWSWEEK, Aug. 27, 2007, available on line at: http://www.msnbc.msn.com/id/20226453/site/newsweek/.

In *Federalist* No. 41, James Madison cautioned:

> The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.[90]

In this instance, a decision by the president to ignore FISA would not involve a usurpation of power. For as I have demonstrated, he would merely be reclaiming authority that the Founding Fathers expressly said he had, that other presidents have exercised since the earliest days of our country, that Congress itself has recognized by statute to exist, and that every court to consider the issue – including a unanimous opinion by the appellate court Congress created to oversee FISA decisions – had affirmed. When the facts get out, this is not a fight that Congress is likely to win in the struggle for public opinion.

As a political matter, it is very much in your interest to fix permanently the inadvertent consequences of technological changes and outdated statutory language that prevents our Intelligence Community from listening to every word we can intercept from Osama bin Laden and his associates in other countries. If the American people learn what you have done, the approval rating of Congress –which the August 13-16 Gallup Poll reports has now dropped to 18 percent (a 38 percent drop since May), with a 76 percent disapproval rate[91] – may fall still further before next year's elections.

Mr. Chairman, lest there be any misunderstanding, I have the highest respect for this institution and its members. I worked as a staff member in the legislative branch for five years, and as a student of the Constitution I understand the critically important role assigned to Congress in maintaining our freedoms. If my testimony this morning seems critical of Congress, that is intentional. For the reasons I have tried to carefully explain, I believe Congress is violating the Constitution and endangering the safety of the American people. I come from the University of Virginia, whose founder, Thomas Jefferson, wrote in his *Summary View of the Rights of British America*: "Let those flatter who fear; it is not an American art."[92] America is at war, and the stakes in this debate are far too serious for anything short of honest and full candor.

Focus on Minimization Issues

I would leave you with but one final thought. As you seek to find a workable solution to this very difficult problem, consider the oath you took upon assuming the important

[90] THE FEDERALIST, No. 41 at 269-70 (Jacob E. Cooke, ed. 1961), available on line at: http://www.yale.edu/lawweb/avalon/federal/fed41.htm.
[91] A series of recent job rating polls on Congress may be found on line at: http://www.pollingreport.com/CongJob.htm.
[92] Available on line at: http://www.yale.edu/lawweb/avalon/jeffsumm.htm.

position of trust and honor that has been bestowed upon your by your constituents – a solemn oath to support our Constitution. It is our supreme law. And in this instance, it is absolutely clear that Congress has grossly usurped presidential power. In so doing, it has contributed to the success of one major terrorist attack and may soon bear responsibility for others if no quick solution is found.

My own recommendation is that you focus on the later stages of the intelligence process. At least with respect to activities outside this country, trying to ascertain the intentions and capabilities of our enemies in a war you have authorized, don't focus on how the president decides to *collect* intelligence. Just as in war there is inevitable "collateral damage" and lives are lost because of inaccurate intelligence or imperfect execution, accept the fact that to do its job effectively and protect our nation from catastrophic terrorist attacks some private information about innocent Americans will inevitably be swept up. That's not ideal, but it is okay – and it is far better that the alternative of allowing our enemies to kill thousands of our fellow citizens so that no U.S. person's privacy will be disturbed.

I would urge you instead to work with the DNI and others who understand these issues and focus on the *retention* and *dissemination* phases of the process. I don't have access to the latest minimization rules because they are presumably still at least in part classified. But having worked with those drawn up by Attorney General Levy when I served in the White House in the early 1980s, I can tell you that they work. And rather than compromise a vigorous collection effort, let's concentrate on making as certain as reasonably possible – consistent with operational success – that when information about specific U.S. persons that does not constitute legitimate foreign intelligence information is intercepted, it is identified, isolated, and ultimately destroyed.

Such measures may impose some costs on the Intelligence Community, as they will involve a certain number of man-hours over a continuing period of time. But my strong sense from reading the testimony of senior executive branch officials is that they favor these procedures, and they, too, are committed to trying to protect the civil liberties of U.S. persons.

The Stakes Are High for Congress Too

Admittedly, to date the president's critics have scored some major points by accusing him of being insensitive to civil liberties and charging him with breaking the law. Indeed, the administration has done a truly *atrocious* job of explaining its position in this struggle to the American people. But their case is a strong one – supported by revered names like Washington, Jefferson, Hamilton, Madison, Jay, and Chief Justice John Marshall himself – as well by past legislative statues and every court to address the issue, including the unanimous appellate court established by FISA itself.

If you refuse to seek a reasonable and workable compromise and the American people eventually learn the truth, you will lose. I think you will lose big. The American people may sometimes be uninformed and even misinformed, but they are not stupid. And they

will not likely forgive you if they learn that Congress has been playing politics with the lives and safety of their families and friends. If before this issue is resolved, America is hit by another catastrophic terrorist attack, maintaining your 18 percent public approval rating may prove to be but a pipe dream. The clock is running, our Intelligence Community is anxious to get back to business, and the ball is in your court.

Thank you, Mr. Chairman. That concludes my prepared statement.