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Comment

“THE WAR OF INFORMATION”: THE FOREIGN INTELLIGENCE SURVEILLANCE ACT,
HAMDAN V. RUMSFELD, AND THE PRESIDENT'S WARRANTLESS-WIRETAPPING PROGRAM

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Introduction

It is easy to eavesdrop:

Every time an American calls in sick to work, or sits on hold with the phone company, or phones a coconspirator to discuss a criminal plot, he or she occupies one of the 379,597,000 phone lines in the United States, which amount to more than five for every four people.¹ Nearly 178 million of these are landlines,² and, as they travel through the two billion miles of cable crisscrossing the country,³ almost all are transferred at digital switches.⁴ At the behest of a government agency, the switching computer can make an undetectable digital copy of any conversation it processes.⁵ The other 201 million plus are *292 cellular phone lines,⁶ on which conversations can be intercepted by IMSI catchers, so named because they pose as legitimate base stations to log the line's International Mobile Standard Identifier and tap and record its audio feed.⁷ The advent of the digital age and the cooperation of telecommunications companies have made more detectable spy-movie techniques like direct-line tapping or radio bugging unnecessary, although law-enforcement and government agencies can and do use them as well.⁸ Conversations intended to pass directly between the mouths and ears of private individuals traverse miles of government-regulated copper wire and airwaves and pass through locations easily accessed by eavesdroppers.

Wiretaps are not only easy to use, but also valuable. Over the past few decades, federal, state, and local authorities in the United States have used wiretaps to bust drug-trafficking rings,⁹ uncover corruption *293 among federal officers,¹⁰ build evidence in bank-fraud cases,¹¹ track down fugitives,¹² root out espionage,¹³ and bring down organized crime families.¹⁴ Wiretaps have also helped expose terrorist plots.¹⁵ This track record has given rise to what Jack Balkin and Sanford Levinson call the National Surveillance State.¹⁶ It is unsettling to wonder whether one's own phone conversations might have had uninvited listeners. Yet, if their interference with the private conversations of innocent individuals is minimized, and if they appropriately target those who harm society, wiretaps by law enforcement officers are so effective and vital that the risk of misuse is acceptable.

*294 Because of the perpetual tension between civil liberties and the need for security,¹⁷ society demands that safeguards be built with acumen and balanced with precision, diminishing misuse while preserving wiretaps' usefulness. The procedures and regulations ensuring balance are outlined in statutes including Title III of the Omnibus Crime Control and Safe Streets Act,¹⁸ the Communications Assistance for Law Enforcement Act,¹⁹ numerous state statutes,²⁰ and, perhaps most famously, the Foreign Intelligence Surveillance Act.²¹ *295 In addition to statutory provisions, the Constitution itself affords some

protection: generally, surveillance via wiretap constitutes “search and seizure,” thus triggering Fourth Amendment rights.²² If, in communicating over the telephone under particular circumstances, a person has a reasonable expectation of privacy, law-enforcement officers generally cannot use electronic surveillance to eavesdrop without a warrant that meets Fourth Amendment requirements.²³

In December 2005, uproar broke out over news that President George W. Bush had secretly authorized the National Security Agency (NSA) to wiretap, without warrants, the international e-mails and telephone calls of people inside the United States.²⁴ Lawmakers called for an inquiry into wrongdoing and demanded an explanation.²⁵ Arlen Specter, a five-term senator representing President Bush's own Republican Party, called such warrantless wiretapping “wrong,” adding, “[I]t can't be condoned at all.”²⁶ Amid the scandal the day the story broke, the Senate temporarily blocked renewal of the USA PATRIOT Act,²⁷ a law that was not directly related to the wiretapping in question but, in its post-9/11 expansion of law enforcement powers, had come to symbolize a similar tension between security and civil liberties.²⁸ The American Civil Liberties Union, Al-Haramain Islamic *296 Foundation, and Center for Constitutional Rights filed suits in federal court to block the activities.²⁹ The ACLU suit led to an injunction against the program, stayed pending appeal.³⁰ The Senate entertained a resolution to censure the President over his role in authorizing the program.³¹ President Bush was defiant in the face of criticism, addressing the nation in an unusually pointed radio broadcast with the argument that his actions were “consistent with U.S. law and the Constitution” and that it was the leak of information about the program that was “improper [],” resulting in “our enemies learn[ing] information they should not have.”³² Indeed, the administration fought *297 back by opening up an investigation into the source of the leak.³³ Attorney General Alberto Gonzales maintained that “winning the war on terror requires winning the war of information.”³⁴

The revelations brought political America to an emotional boiling point, but nearly lost in the ruckus was careful discussion of whether the wiretaps were unconstitutional, illegal, neither, or both. This Comment will address these issues through the lens of constitutional law in light of the Supreme Court's recent ruling in *Hamdan v. Rumsfeld*.³⁵ Part I will investigate the known factual details of the warrantless-wiretapping program. Part II will explore the threshold question of whether wiretapping is within the scope of the executive's Article II authority and conclude that, broadly speaking, it is. Part III will lay out the arguments whether, despite the President having the constitutional power to wiretap, that power is nonetheless necessarily forestalled in this case because it runs afoul of the Fourth Amendment rights of the surveilled. With constitutional issues set aside, Part IV will apply statutory law to the program and find it illegal and, directly contradicting administration contentions, lacking statutory authority under either the Foreign Intelligence Surveillance Act or the Authorization for Use of Military Force against terrorists to override its general illegality. Part V will return to the Article II analysis to controvert the assertion that the President's constitutional authority supersedes the statutory prohibition. The Comment will conclude by addressing the intelligence options with which the government is left in the absence of the NSA eavesdropping program.

I. President Bush's Warrantless Wiretapping Program

In March 2002, Pakistani police and U.S. agents raided homes in Faisalabad, Pakistan, in an effort to arrest suspects linked to a church bombing in Islamabad that month.³⁶ One of those captured was subsequently discovered to be Abu Zubaydah, a high-ranking member of the terrorist group al-Qaeda who is believed to have participated in *298 planning the 9/11 attacks on the World Trade Center and the Pentagon as well as failed attempts to bomb embassies and, on New Year's Eve 1999-2000, hotels.³⁷ His capture turned out to be one of the most important in the months following 9/11: he divulged vital information

about the 9/11 plot after interrogation,³⁸ and his computer and personal phone directory gave U.S. law-enforcement officials names, phone numbers, and addresses that were potential leads for catching other terrorists.³⁹

To take advantage of those leads without delay, President Bush issued a classified executive order authorizing the NSA to wiretap the phone lines and e-mail addresses gathered in the arrests of Abu Zubaydah and others.⁴⁰ Indeed, the President had already authorized such NSA activities in October of 2001, before the passage of the USA PATRIOT Act.⁴¹ Intelligence gathered from this monitoring of communications between al-Qaeda operatives led to more phone numbers *299 and more e-mail addresses, which, once surveilled, themselves spiraled into more leads.⁴² According to President Bush, “the program was limited to monitoring phone conversations or e-mails of someone inside the United States and someone beyond its borders in which ‘one of the numbers would be reasonably suspected to be an Al Qaeda link or affiliate.’”⁴³

Most of the numbers and addresses gathered were overseas, but hundreds if not thousands were inside the United States.⁴⁴ This meant that the NSA was venturing into new territory. The NSA, a Fort Meade, Maryland-based intelligence agency believed to be the largest in the country,⁴⁵ has as its mission the gathering and analysis of foreign intelligence.⁴⁶ The agency had a history of collecting intelligence abroad and emphasizing its protection of domestic privacy. In an April 2004 address before the Senate, then-NSA head General Michael V. Hayden called the NSA “the most aggressive agency in the intelligence community when it comes to protecting U.S. privacy”; the agency's website once featured a presentation proclaiming “Court Order Required in the United States.”⁴⁷ Under this new program, the agency began collecting data from, not only communications taking place wholly outside the country, but also those between someone overseas and someone located in the United States, though it abstained from purposefully surveilling entirely domestic calls and messages.⁴⁸ NSA shift supervisors made case-by-case decisions to intercept *300 communications.⁴⁹ This on-the-spot decision-making was undertaken “like the police officer on the beat in terms of what is reasonable.”⁵⁰

There is an ordinary channel for authorization of this kind of surveillance: the warrant-application process in the Foreign Intelligence Surveillance Court, which, established under the Foreign Intelligence Surveillance Act (FISA), meets secretly at the Department of Justice.⁵¹ Typically, it had been the Federal Bureau of Investigation, not the NSA, that applied for such warrants for electronic surveillance within the United States.⁵² According to the administration, the reason for using the NSA and circumventing the FISA court was the increased need for swift information-collection in the wake of major terrorist attacks.⁵³

The Justice Department and NSA reviewed the program every forty-five days, and the President personally signed off on its reauthorization over thirty times.⁵⁴ After the program commenced, the administration repeatedly briefed a handful of congressional leaders on it,⁵⁵ though the level of detail given to legislators remains unclear. *301⁵⁶ The Senate Intelligence Committee's ranking Democrat, Jay Rockefeller, claimed that “the administration never afforded members briefed on the program an opportunity to either approve or disapprove” the program, and wrote in a concerned 2003 letter to the White House that, “[g]iven the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse, these activities.”⁵⁷ The administration countered with the assertion that, though the number of members of Congress informed was kept low for security reasons, the program had sufficient congressional oversight.⁵⁸ To accord with the law requiring the President to keep the congressional intelligence committees “fully and currently informed of . . . intelligence activities,”⁵⁹ the administration briefed the “Gang of Eight”: the Speaker and minority leader of the House, the majority and minority leaders of the Senate, and the chairs and ranking minority members of the House and Senate Intelligence Committees.⁶⁰ Senator Specter argued that informing only eight members *302 was

improper for a program of this magnitude: “You can't have the administration and a select number of members alter the law. . . . It can't be done.”⁶¹

According to senior government officials cited in the New York Times, when the program began, it had “few controls” and “little formal oversight.”⁶² The NSA could target individuals it suspected of having ties to terrorists without the approval of the Attorney General or President.⁶³ In mid 2004, in response to growing concerns about the fate of the program in the event of the election of presidential candidate John Kerry and to complaints from Judge Colleen Kollar-Kotelly,⁶⁴ the Justice Department audited the wiretapping program and provided a checklist for NSA officials to determine whether there was probable cause in a given case.⁶⁵ Still, the program continued without direct executive oversight.⁶⁶

***303** A second wave of controversy erupted nearly five months after the initial New York Times disclosure: In May, USA Today reported that, in addition to wiretapping international calls, the NSA was collecting the phone-number and call-time data from billions of domestic telephone calls.⁶⁷ Major telecommunications companies were cooperating to provide the agency with data to form a massive database, constructed with an eye toward detection of terrorist activity in a social-network analysis of call patterns.⁶⁸ The newly revealed program differed from the warrantless wiretapping program in the purely domestic nature of its targeted calls and in its abstention from capturing the contents of phone conversations, focusing instead on its metadata.⁶⁹

Not surprisingly, the President and other government officials denied existence of the wiretapping program until it was made public. When in 2005 Senator Barbara Mikulski asked Attorney General Gonzales and FBI Director Robert Mueller whether “the National Security Agency, the great electronic snooper, [can] spy on the American people,” Gonzales responded, “There are limits upon the NSA in terms of what they can do in spying upon the American people,” and Mueller added, “The investigation or development of intelligence overseas is in the hands of the CIA and NSA. And generally, I would say generally, they are not allowed to spy or to gather information on American citizens,” pointing to exceptions in those cases where a court granted warrants.⁷⁰ In a 2004 speech discussing the importance and scope of the USA PATRIOT Act, President Bush assured his audience that domestic wiretaps require warrants:

[T]here are such things as roving wiretaps. Now, by the way, any time you hear the United States Government talking about wiretap, it requires--a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think PATRIOT Act, constitutional

***304** guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.⁷¹ After the revelations broke, however, the administration was candid about its involvement in, if not the details of, the wiretapping program.⁷²

II. The President's Power to Conduct Surveillance as Grounded in Article II

A threshold question in determining the validity of the NSA program authorized by the President is whether the Executive has the power to authorize surveillance programs at all. Absent such power, questions of individual rights and statutory law become moot. A survey of case law determines that the Executive has a constitutionally granted power to wiretap.

Article II of the Constitution anoints the President commander in chief of the nation's military⁷³ and grants him or her powers to conduct various aspects of foreign affairs.⁷⁴ These powers in relation to foreign affairs are broader than the specific examples

outlined in Article II, and courts have recognized the necessity of executive dominion in such areas. In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court observed that,

[i]n 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. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁷⁵ *305 The Court also linked the commander-in-chief and foreign-affairs powers when reasoning about the relationship between congressional acts and presidential orders.⁷⁶ Likewise, Justice Thurgood Marshall called it “beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief.”⁷⁷

In wartime, these executive powers may be interpreted with particular breadth. In *Hirabayashi v. United States*, the Court faced the question whether Congress and the Executive collectively had the power to impose a wartime curfew on “all persons of Japanese ancestry.”⁷⁸ The Court found that both the President and Congress should be given wide latitude in time of war:

[s]ince the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.⁷⁹ The Supreme Court noted the breadth of the President's wartime commander-in-chief and foreign-affairs powers during both World War II⁸⁰ and the present wars on terrorism and in Iraq and Afghanistan.⁸¹

*306 These powers include the power to electronically surveil foreign and international communications. In *United States v. Butenko*, two defendants, charged with transmitting sensitive information concerning the Strategic Air Command to the Soviet Union, challenged the U.S. government's electronic surveillance of their communications.⁸² In ruling that “a warrant prior to search is not an absolute prerequisite in the foreign intelligence field when the President has authorized surveillance,”⁸³ the Third Circuit grounded the surveillance power in the broadly defined commander-in-chief and foreign-affairs powers of Article II:

As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.⁸⁴ This sentiment was echoed in *United States v. Truong Dinh Hung*.⁸⁵ There, the defendants had been convicted of espionage for transmitting “diplomatic cables and other classified papers” to representatives of the Socialist Republic of Vietnam at the 1977 Paris peace talks.⁸⁶ To find Truong's source for the papers, the FBI, without seeking a warrant, tapped his phone line and bugged his apartment.⁸⁷ The Fourth Circuit ruled that the Executive did not need a warrant from the judiciary to conduct foreign-intelligence surveillance:

[T]he executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. Just as the separation of powers . . . force[s] the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President *307 for foreign affairs and concomitantly for foreign intelligence surveillance.⁸⁸ The President's power to conduct foreign-intelligence surveillance, so grounded in the Constitution, predated

the Foreign Intelligence Surveillance Act.⁸⁹ Though that statute purported to regulate this power and proscribe its use in certain instances,⁹⁰ it did not destroy it.

The additional Article II basis for the presidential power to eavesdrop is rooted in the Section 1 Oath of Office Clause, which recognizes the duty of the President to “preserve, protect and defend the Constitution of the United States.”⁹¹ The Supreme Court has read into this duty

the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President-- through the Attorney General--may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.⁹² The Oath of Office Clause thus provides grounds over and above those in the commander-in-chief and foreign-affairs powers. Hence, the Executive has an Article II power to engage in foreign intelligence surveillance.

III. The Fourth Amendment Rights of the Surveilled

In mid February, 1965, a man named Charles Katz frequently visited telephone booths on the Sunset Strip in Los Angeles.⁹³ He would insert a dime, dial Miami or Boston, and say things into the receiver like “Give me Duquesne minus 7 for a nickel.”⁹⁴ Charles Katz was transmitting gambling information across state lines, and he knew it was a crime, but he didn't know that the FBI was listening.⁹⁵ After microphones secretly wired to the top of the booths picked up Katz's incriminating end of the conversation, FBI agents visited Katz's *308 apartment and arrested him.⁹⁶ Though he was convicted at trial, Katz continued to argue that the recording of his conversation violated his Fourth Amendment rights.⁹⁷

While the President's Article II powers facilitate the endeavor for national security, the Fourth Amendment balances them with a protection of privacy rights.⁹⁸ As noted earlier, a wiretap constitutes a “search and seizure” within the meaning of the Fourth Amendment.⁹⁹ In general, this means a warrant is a necessary prerequisite to electronic surveillance by law enforcement.¹⁰⁰ There may, however, be an exception to the warrant requirement in cases involving national security and foreign intelligence.¹⁰¹ The NSA program may fall into *309 such an exception if one exists, but there remain strong arguments that it is counter to the Fourth Amendment, throwing its constitutionality into question.

When first applying the Fourth Amendment to surveillance cases, the Court left open a national-security exception. In *Katz v. United States*, the Court applied the standards of the Fourth Amendment¹⁰² and reasoned that constitutional constraints required the agents to apply for and acquire a warrant from a judicial body to assure that the spying was appropriately limited to ensure Charles Katz's privacy, which they had failed to do.¹⁰³ Nevertheless, the Court left open the question whether requirements would apply in a case involving the interests of national security.¹⁰⁴ Justice Byron White, in a concurring opinion, postulated an exception for cases involving such interests: “[w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”¹⁰⁵

The Court later held that warrants are required for domestic spying even when national security is implicated,¹⁰⁶ but still left open the *310 possibility of an exception for the surveillance of foreign intelligence. In *United States v. United States District Court*--known as *Keith* after the name of the district court judge against whom the United States sought mandamus--Judge Keith

had ordered the United States to disclose to one of the initial defendants conversations it had wiretapped.¹⁰⁷ The defendants in question were allegedly members of a domestic organization that planned the dynamite bombing of a Central Intelligence Agency building in Ann Arbor, Michigan, prompting the Court to note, “There is no evidence of any involvement, directly or indirectly, of a foreign power.”¹⁰⁸ The Court limited the question to whether the President had “power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval.”¹⁰⁹ They answered no:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.¹¹⁰ Still, the Court left open the prospect of warrantless foreign intelligence surveillance in the interest of national security, maintaining that “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.”¹¹¹

Though the Supreme Court never resolved this open issue, a few circuit courts weighed in, holding that warrantless foreign-intelligence surveillance for national security interests may be permissible under the Fourth Amendment. In *Butenko*, for example, the Third Circuit held that the facts fell into the foreign-intelligence gray area left unresolved in *Keith* and refused to find surveillance contrary to the Fourth Amendment's warrant requirement:

While we acknowledge that requiring prior approval of electronic surveillance in cases like the present one might have some salutary effects--a judge, for example, could assure that the Executive was not using the cloak of foreign intelligence information gathering to engage in indiscriminate surveillance of domestic political organizations--on balance, *311 the better course is to rely, at least in the first instance, on the good faith of the Executive and the sanctions for illegal surveillances incident to post-search criminal or civil litigation. . . . In the present case . . . a strong public interest exists: the efficient operation of the Executive's foreign policy-making apparatus depends on a continuous flow of information. A court should be wary of interfering with this flow.¹¹² The court also found the Amendment's “probable cause” standard met wherever the surveillance is limited and undertaken “solely for the purpose of gathering foreign intelligence information.”¹¹³

The Fourth Circuit followed a similar line of reasoning in *United States v. Truong Dinh Hung*.¹¹⁴ It held that in foreign-intelligence cases the balance between “individual privacy” and “government needs” shifts:

[T]he needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, “unduly frustrate” the President in carrying out his foreign affairs responsibilities. . . . A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.¹¹⁵ The court reasoned that, because of the complexity of foreign affairs, the political branches were much better suited to weigh this balance than the judiciary.¹¹⁶ In doing so, *Truong* laid out the most compelling case for the foreign-intelligence exception to the warrant requirement. The Supreme Court had already rejected the argument that the Fourth Amendment could not infringe on a constitutionally granted “ownership” of foreign affairs national security issues by the President: “[W]e think [the President's role] must be exercised in a manner compatible with the Fourth Amendment.”¹¹⁷ Rather than contradicting the Supreme Court by asserting that the power was the Executive's alone, the Fourth Circuit relied on the inexperience of “district courts . . . to judge the importance of particular information to the security of the United States”¹¹⁸ This distinction in reasoning is important, because the prevailing analysis permits Congress to regulate the

balance, as it did with FISA. Truong specifically exempted *312 the FISA Court judges from its conclusion that judges lacked expertise in foreign affairs¹¹⁹ and impliedly approved of FISA as a constitutional balance.¹²⁰

In *Zweibon v. Mitchell*, members of the Jewish Defense League brought suit against the Attorney General and certain FBI agents alleging that their wiretapping violated both Title III and the Fourth Amendment.¹²¹ The D.C. Circuit, calling the Fourth Amendment “a bulwark against unreasonable governmental intrusion,”¹²² held that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security.¹²³ The court, despite issuing a holding so narrowly focused on the facts before it, further expressed “serious doubts as to the methodology employed” by courts who found an exception to the warrant requirement.¹²⁴ Although there are strong war-powers concerns in national-security cases, so too are First Amendment rights more likely to be implicated in cases where the government believes itself to be protecting national security.¹²⁵ National security could conceivably be *313 jeopardized by airing information acquired via surveillance in open court. But courts could, without unduly frustrating national-security interests, make in camera inquiries after the fact into the propriety of foreign-intelligence surveillance before determining whether it improperly produced evidence for a criminal trial,¹²⁶ so national security should not stand in the way of such inquiries before the fact.¹²⁷ Although the Constitution and the practices of the various branches demonstrate that the President has undeniable foreign-affairs authority, they “do not preordain the procedures with which the President must comply in exercising that authority.”¹²⁸ And although courts might be better equipped to inquire into domestic-affairs matters than those involving foreign intelligence, “federal judges will [not] be insensitive to or uncomprehending of the issues involved in foreign security cases,”¹²⁹ and Congress has authorized the judiciary to examine foreign affairs without deferring entirely to the expertise of the Executive, especially in light of Executive abuses of that expertise:¹³⁰ “If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.”¹³¹

Even assuming a foreign-intelligence exception to the Fourth Amendment exists to some degree, it remains unclear whether it would apply to President Bush's surveillance program. Most circuits, presented with the opportunity, have recognized a foreign-intelligence exception to the warrant requirement of the Fourth Amendment.¹³² The *Zweibon* court, however, refused to do so, and the *Butenko* court carefully undertook a Fourth Amendment analysis even while identifying such an exception, allowing the surveillance only where it had post-hoc judicial approval, because “there would seem to *314 be nothing in the language of the Constitution to justify completely removing the Fourth Amendment's requirements in the foreign affairs field and, concurrently, imposing those requirements in all other situations.”¹³³ The *Butenko* and *Zweibon* courts probably would have found a Fourth Amendment violation had their facts been similar to the NSA program at issue, where there were no post-hoc warrants. In consideration of the open question of a foreign-intelligence-surveillance exception,¹³⁴ it is difficult to say which precedent is controlling.

In *Keith*, the Court reasoned that the Fourth Amendment inquiry in electronic-surveillance cases boils down to two questions: “whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken[, and] whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.”¹³⁵ Perhaps, in light of the emergency-surveillance provisions of the Foreign Intelligence Surveillance Act discussed *infra*, a court would find the warrant requirement not unduly burdensome for national security; perhaps public-policy concerns suggest that a Solomonic rule like *Butenko's* is the most prudent for

balancing national security against civil liberties. If that were the case, it would be unlikely that the NSA activities would pass muster. Still, a court could go either way on the constitutionality of the President's program.

***315 IV. Violation of the Foreign Intelligence Surveillance Act**

In the middle of the 1972 presidential election, five men were arrested in an elaborate plot to bug the headquarters of the Democratic National Committee at the Watergate in Washington.¹³⁶ One of the five men, James W. McCord Jr., was a security coordinator for President Nixon's Committee for the Re-election of the President,¹³⁷ and another, Bernard L. Barker, received in his bank account a twenty-five-thousand-dollar cashier's check made out to Kenneth H. Dahlberg and intended as a contribution to the Nixon campaign.¹³⁸ The FBI eventually discovered that the break-in was just part of “a massive campaign of political spying and sabotage conducted on behalf of President Nixon's reelection and directed by officials of the White House and the Committee for the Re-election of the President.”¹³⁹ The burglars later claimed that they believed they were on a mission related to national security.¹⁴⁰ Throughout the parallel journalist and FBI investigations into impropriety,¹⁴¹ President Nixon grew concerned with the imminent uncovering of his campaign's and administration's involvements in the illegal activities, attempting to draw the investigators off his trail by telling the FBI it was risking divulging sensitive national-security information.¹⁴² President Nixon later asserted that “when the President does it, that means that it is not illegal.”¹⁴³ Congress and the Gerald Ford administration responded with investigations into the effects of the surveillance activities of President Nixon and others¹⁴⁴ on the individual rights of Americans.¹⁴⁵

***317** In 1978, against this backdrop, Congress passed the Foreign Intelligence Surveillance Act.¹⁴⁶ FISA was Congress's and the President's attempt to provide a framework for foreign-intelligence surveillance that took into account the need for both national security and the preservation of civil liberties.¹⁴⁷ FISA sets out “the exclusive means by which [foreign intelligence] electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.”¹⁴⁸ President Bush's NSA surveillance program consisted of exactly the sort of activities FISA sought to regulate.¹⁴⁹ Congress proscribed certain presidential action in FISA's section ***318** 1809(a)(1), which declares, “A person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute.”¹⁵⁰ The NSA wiretapping program almost certainly violated this provision.

The administration essentially conceded that most of this provision applies to its actions.¹⁵¹ It seems likely that the wiretapping in question constituted “electronic surveillance” as defined in section 1801(f).¹⁵² It is equally likely that the program met the “color of law” element because the President and the NSA were conducting such surveillance in their official capacity and thus “clothed with the authority of the state.”¹⁵³ Given the administration's statements after the ***319** news broke, the intentionality of its actions is beyond question.¹⁵⁴ The crucial issue, then, is whether the program is excepted under FISA because it is “authorized by statute.”¹⁵⁵

A. Statutory Authorization Under FISA?

FISA contains three “emergency” provisions that allow surveillance without a warrant. Two of these have time frames that are too short to allow for the ongoing NSA program,¹⁵⁶ and the third, as we shall see, is too restricted in scope to provide authorization for it. Section 1802(a)(1) authorizes warrantless surveillance similar to that undertaken by the NSA, but the lawful program varies in several important respects. First, it requires that the surveillance be “solely directed” at “communications used

exclusively between or among foreign powers, as defined in section [1801](a) (1), (2), or (3)” or at “technical intelligence . . . under the open and exclusive control of a foreign power” as defined in the same section.¹⁵⁷ The definition of “foreign power” in section 1801 includes six alternatives, of which only the first three qualify as targets of warrantless surveillance:

(1) a foreign government or any component thereof whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments¹⁵⁸ Suspected members of or sympathizers with al-Qaeda and other terrorist groups, the targets of the NSA wiretapping program, were better candidates for fitting one of the other three definitions of “foreign power”--“(4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments” *320¹⁵⁹--but these three definitions are explicitly excluded as legitimate targets of emergency warrantless wiretapping under section 1802(a)(1).

Furthermore, the section 1802 warrantless-wiretapping provision requires that “there [be] no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party,”¹⁶⁰ which clearly eliminates the applicable conduct of the NSA under the Bush program. “United States person” is defined in section 1801(i) as “a citizen of the United States, an alien lawfully admitted for permanent residence,” or an association or corporation with sufficient ties to the United States.¹⁶¹ Because the NSA program was spying on communications where one party was inside the United States,¹⁶² it is undeniable that it captured conversations where a United States person was a party,¹⁶³ or at least that the surveillance was undertaken when there was a “substantial likelihood” that it would capture such conversations. Since some surveillance under the program targeted “United States persons” rather than “foreign powers,” section 1802(a) affords no exception to the general requirement of a warrant.

FISA's section 1811 also provides an emergency exception under which the President can authorize warrantless surveillance during time of war, but only for a period of fifteen days immediately following a congressional declaration of war.¹⁶⁴ Since this program lasted significantly longer than fifteen days, it finds no justification in section 1811. FISA cannot be construed to give the President carte blanche for electronic foreign-intelligence surveillance without a court order in light of its provisions explicitly limiting such authority to the fifteen-day period after Congress declares war, to a seventy-two hour period preceding a post-hoc order, or to situations that target limited types of foreign powers and do not risk capture of the conversations of United States persons.¹⁶⁵

***321 B. Statutory Authorization Under the AUMF?**

The other candidate for providing statutory authorization, the Authorization for Use of Military Force (AUMF) against terrorists,¹⁶⁶ also falls short of defeating the general prohibition against warrantless surveillance. The brief resolution straightforwardly authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.¹⁶⁷ The administration and its supporters vehemently argued that this resolution, passed a week after the 9/11 attacks, grants authority

for the warrantless wiretapping program.¹⁶⁸ Upon examination of the statutory text itself, the Court's interpretation thereof in *Hamdi v. Rumsfeld*,¹⁶⁹ and the relationship of the joint resolution to another, contemporaneous statute, the program was outside the purview of the AUMF.

The President's actions are directly constrained by the AUMF's own terms. The AUMF was meant to authorize the war against the Taliban and al-Qaeda in Afghanistan and surrounding regions; its text was left indefinite because it remained unclear in those first few days after the 9/11 attacks who exactly was responsible.¹⁷⁰ While it *322 may be “necessary and appropriate” to detain enemies captured in Afghanistan to prevent them from returning to the battlefield,¹⁷¹ the appropriateness of warrantless domestic wiretapping is in question because it was proscribed by law at the time of the authorization. Further, the object of the AUMF is “force,” which in its plain meaning¹⁷² seems to contemplate the action of “detention” but not “wiretapping.”¹⁷³

If the reactions of many senators and representatives after the wiretapping story broke were any indication of their legislative intent, they appeared unlikely to have agreed to include authorization for the program in the AUMF.¹⁷⁴ Several senators have spoken out *323 against the NSA program, including President Bush's fellow Republicans Senator Arlen Specter, who has held hearings into the legality and constitutionality of the program, and Senator John McCain, who “said he did not think the president had the legal authority for this operation, adding that the White House should seek Congressional approval to alter the 1978 provisions if it thinks they are not working now.”¹⁷⁵ Senator Russell Feingold noted that “[n]obody, nobody thought when we passed a resolution to invade Afghanistan and to fight the war on terror--including myself who voted for it--that this was an authorization to allow a wiretapping against the law of the United States.”¹⁷⁶

The AUMF should not be read to repeal or amend the FISA procedures because it is too vague. The Supreme Court frowns upon “repeals by implication,”¹⁷⁷ and has held that “[o]nly a clear repugnancy between the old law and the new results in the former giving *324 way and then only pro tanto to the extent of the repugnancy.”¹⁷⁸ The intent to change the existing law must be “clear and manifest” in the new one.¹⁷⁹ Since the AUMF does not specifically address the procedures outlined in FISA, or even expressly mention foreign-intelligence surveillance, it is too ambiguous to repeal or amend the former statute and must be interpreted as contemplating FISA and avoiding conflict with it in order to “harmonize the impact of the two statutes.”¹⁸⁰

The Supreme Court interpreted the scope of the AUMF in *Hamdi v. Rumsfeld*.¹⁸¹ Yaser Esam Hamdi, a Louisiana-born U.S. citizen who lived in the Middle East most of his life, had been captured in Afghanistan by the Northern Alliance and turned over to the U.S. military, which, suspecting him of taking up arms alongside the enemy Taliban, detained him as an “enemy combatant” first at Guantánamo and then in various naval brigs.¹⁸² In determining whether the Executive had the authority to detain enemy combatants captured in Afghanistan, the main plurality opinion, authored by Justice Sandra Day O'Connor, declined to address the question of plenary authority under Article II, instead ruling that the AUMF granted such authority.¹⁸³ *325 In reaching this conclusion, the Court considered both the individuals targeted by the President's action and the nature of the action itself:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.¹⁸⁴ Justice O'Connor reiterated

that “the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war,’”¹⁸⁵ and that

it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.¹⁸⁶ The executive authority for detention granted by the AUMF and recognized by the plurality is not absolute; it exists only where “it is sufficiently clear that the individual is, in fact, an enemy combatant” because of concession or “proof of enemy-combatant status in a proceeding that comports with due process.”¹⁸⁷ Hamdi thus provides a rule for determining whether a particular executive action not explicitly mentioned in the AUMF is nevertheless within its purview: the action must be directed toward individuals targeted by Congress and must be a “fundamental,” “accepted,” or “important” “incident of war” or “incident of waging war.”

The administration and President Bush's supporters argue that warrantless electronic surveillance is a fundamental incident of waging war.¹⁸⁸ They may be partly correct: intelligence-gathering, broadly defined, could be construed as a fundamental incident of *326 war. Indeed, as a Justice Department white paper noted in the wake of the wiretapping revelations,¹⁸⁹ the Supreme Court has ruled on the importance of intelligence collection in wartime. In *Totten v. United States*, the Court recognized that President Lincoln “was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.”¹⁹⁰ Still, that case, and those that followed it, dealt with the President's use of spies, not electronic surveillance. Human spies have been a necessary part of wartime intelligence-gathering for millennia.¹⁹¹ In relation to other forms of intelligence gathering, electronic surveillance is by its nature more problematic. Wiretapping gathers information more generally, extends less definitely, and records more concretely than a traditional search.¹⁹² Further, the administration could have opted to conduct its intelligence-gathering through electronic surveillance while still abiding by accepted legal procedures, namely by securing a court order. Though the administration cited some historic examples of its use,¹⁹³ warrantless *327 wiretapping itself cannot be considered “fundamental” when there are feasible, less insidious alternatives for collecting intelligence.

Whether or not the action undertaken in the NSA program was a “fundamental incident of war,” the Hamdi analysis of the AUMF requires that it also be directed toward individuals Congress “sought to target.”¹⁹⁴ While those “who fought against the United States in Afghanistan as part of the Taliban” qualified,¹⁹⁵ citizens and permanent residents carrying on telephone or e-mail conversations inside the *328 United States did not. While Hamdi noted that the AUMF language is broad,¹⁹⁶ the language is not as broad as the administration would have liked it to be or as Congress contemplated. An original White House proposal to Congress the day after 9/11 would have granted executive authority for “the use of military force to ‘deter and pre-empt any future acts of terrorism or aggression against the United States.’”¹⁹⁷ The actual text of the AUMF, adopted by Congress on September 14, 2001,¹⁹⁸ was meant as a more narrow authorization “den [ying] the president the more expansive authority he sought and insist[ing] that his authority be used specifically against Osama bin Laden and al Qaeda.”¹⁹⁹ Senator Tom Daschle, who as minority leader took part in the negotiations over the particular language of the resolution, recounted an additional rejection:

Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words “in the United States and” after “appropriate force” in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas--where we all understood he wanted authority to act--but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I

refused.²⁰⁰ *329 This explicit rejection of permission to use force inside the United States clearly puts the use of such force outside the scope of the final AUMF.²⁰¹ Though Congress can be said to have intended for the President to use types of force not specifically outlined in the thinly worded resolution,²⁰² it cannot be said to have intended dominion it directly declined to include. As Justice Frankfurter noted in the Steel Seizure case,

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.²⁰³ Even Attorney General Gonzales has acknowledged that Congress would have been unwilling to directly and explicitly authorize a similar program: “We have had discussions with Congress in the past--certain members of Congress--as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.”²⁰⁴ If it *330 would have been “difficult, if not impossible” for Congress to agree to directly authorize the program by amending FISA, it is unlikely that Congress would have intended to authorize the program through the AUMF.²⁰⁵

A further argument of omission similarly implies that Congress did not intend to authorize warrantless wiretapping: Congress addressed similar surveillance procedures with the USA PATRIOT Act²⁰⁶ and Intelligence Authorization Act for Fiscal Year 2002.²⁰⁷ The Supreme Court has held that “it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” and so courts must “interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.”²⁰⁸ The AUMF should be read in the context of the 9/11-reponse statutory program of which it was a part. The USA PATRIOT Act and the Intelligence Authorization Act, both of which, like the AUMF, were passed shortly after the 9/11 attacks, explicitly amended several provisions of FISA.²⁰⁹ Despite the warrantless-wiretapping program *331 already being in effect at the time of the Act's passage,²¹⁰ the Act failed to explicitly amend [title 50, sections 1809\(a\)\(1\), 1802\(a\), or 1801\(a\)\(1\), \(2\), or \(3\) of the U.S. Code](#) to either make warrantless wiretapping legal or provide an exception to the general rule of illegality of warrantless wiretapping for the type of program undertaken by the NSA. The administration claims that such revision was unnecessary because authority for warrantless wiretapping had already been granted by the AUMF,²¹¹ but it remains unclear why the administration distinguishes between the warrantless wiretapping it claims is inherent in the AUMF and similar surveillance tools, such as roving wiretaps²¹² and increased pen-register authority,²¹³ it advocated to include *332 in the USA PATRIOT Act.²¹⁴ Had Congress intended to authorize broad presidential wiretapping authority with the AUMF, many provisions of the USA PATRIOT Act would have been superfluous. Rather, Congress authorized those procedures it expressly passed in the USA PATRIOT Act and did not authorize warrantless surveillance with the AUMF.

In January 2003, over a year after Congress passed the AUMF and, the Bush administration contends, with its statutory authorization for a program of indefinite warrantless wiretapping for foreign intelligence surveillance, which had also been continuing for over a year, the Department of Justice drafted legislation entitled the Domestic Security Enhancement Act of 2003 and then abandoned it after it was leaked to the press.²¹⁵ Section 103 of the draft bill would have amended the section 1811 emergency provision of FISA, which allows warrantless wiretapping for the fifteen days following a declaration of war, to extend the same authorization to the fifteen days following “the enactment of legislation authorizing the use of military force, or an attack on the United States”²¹⁶ Had the AUMF truly authorized the NSA wiretapping program, this provision would

have been duplicative and meaningless.²¹⁷ This also points out an important feature of the structure of FISA: the section-1811 emergency provision provides a framework for FISA surveillance after a declaration of war, suggesting that even such a declaration, much less a force authorization, cannot implicitly override FISA, but must instead operate within its framework.²¹⁸

Since neither the authority for warrantless wiretapping nor the authority to target U.S. citizens or permanent residents were within the scope of the AUMF, it provides no exception to FISA's rule against warrantless surveillance. Nor does FISA's own [section 1802](#), which only applies when foreign powers are targeted and it is substantially *333 unlikely that the surveillance will eavesdrop upon American citizens or permanent residents. The President's authorization and the NSA's warrantless surveillance are therefore both illegal under FISA [section 1809\(a\)\(1\)](#).²¹⁹

V. The President Does Not Have Inherent Article II Authority for Warrantless Electronic Surveillance that Overrides the Statutory Prohibition

After determining that Article II authorizes surveillance but that warrantless electronic surveillance of people inside the United States may be unconstitutional under the Fourth Amendment and is illegal under the Foreign Intelligence Surveillance Act, the inquiry must return to Article II to determine whether the executive possesses plenary authority for such surveillance that renders statutory limitations upon it unconstitutional. The Bush administration has argued not only that Article II grants the President authority to conduct warrantless electronic surveillance, but also that this authority is so fundamental that it cannot be destroyed by statute.²²⁰ Since Congress retains certain powers over the regulation of foreign affairs, Article II confers no such absolute authority on the President.

The President undoubtedly possesses authority to conduct surveillance in wartime rooted in his or her powers as commander in chief and as the nation's organ in foreign affairs.²²¹ Nevertheless, Congress too holds important powers over foreign affairs and war. [Article I, Section 8 of the Constitution](#) vests the legislative branch with the powers [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence[,] . . . [t]o regulate Commerce with foreign Nations[,] . . . [t]o establish an uniform Rule of Naturalization[,] . . . [to] regulate the Value . . . of foreign Coin[,] . . . [t]o define and punish . . . Offences against the Law of Nations[,] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water [,] [t]o raise and support Armies, . . . [t]o provide and maintain a Navy [,] [t]o make Rules for the Government and Regulation of the land and naval Forces[,] [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[,] [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States[,] [and to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *334 and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.²²² In *Johnson v. Eisentrager*, the Court noted the breadth of congressional war powers: “[i]ndeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare.”²²³

The Court has long recognized that “Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs.”²²⁴ In 1915, Justice Joseph McKenna reasoned that, because “the United States is invested with all the attributes of sovereignty,” those powers unenumerated in [Article I](#) were especially broad with respect to international affairs.²²⁵ While noting broad executive foreign affairs powers in *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland found that Congress possessed such powers as “necessary concomitants of nationality” to delegate.²²⁶ In 1958, Justice Felix Frankfurter issued a most direct statement of such authority: “[a]lthough there is in the Constitution no specific

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grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of this nation.”²²⁷ Recently the Court has held that this legislative power applies all the more when individual rights, as well as foreign affairs, are implicated.²²⁸

There is an interaction between Congress and the President in the field of foreign affairs during wartime, and presidential authority in the area does not inherently trump legislative authority.²²⁹ Our system *335 of government's philosophical forebears sought to locate power, including the power to regulate military affairs, in separate yet interdependent branches.²³⁰ The Framers, eternally concerned with the threat of building a nation with executive power so similar to England's *336 monarchy that history would repeat itself,²³¹ noted that the President's commander-in-chief power would not be unchecked: The President is to be commander-in-chief In this respect his authority would nominally be the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies--all which, by the Constitution under consideration, would appertain to the legislature.²³² During the 1787 convention, the Framers debated whether the legislature or the executive was the proper body for the war power, finally agreeing to divide it:

Mr. [Pierce] Butler. The objections ag[ainst vesting the power to make war] in the Legislature lie in great degree ag[ainst] the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

Mr. [James] Madison and Mr. [Elbridge] Gerry moved to insert “declare,” striking out “make” war; leaving to the executive the power to repel sudden attacks.

. . . .

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.²³³ *337 When President Thomas Jefferson addressed Congress regarding his decision to place frigates along the Barbary Coast for defensive purposes, he recognized that his ships were “[u]nauthorized by the Constitution, without the sanction of Congress, to go out beyond the line of defence,” because it was up to Congress, not the executive, to “authoriz[e] measures of offence.”²³⁴

That the control of the military, as that of so many government functions, is divided between branches which must agree, cooperate, and compromise to produce results is as clear today as it was at the nation's birth.²³⁵ In June 2006, the Supreme Court handed down *338 *Hamdan v. Rumsfeld*, a reconciliation of due-process rights with “the exigencies of war” on the issue of trial of Guantánamo detainees by military commission.²³⁶ Salim Ahmed Hamdan, a Guantánamo detainee, alleged member of al-Qaeda, and personal driver and bodyguard to Osama bin Laden, was charged with conspiracy and slated for trial by military commission pursuant to President Bush's order regarding “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”²³⁷ Hamdan attacked the procedures of the commission, especially its denial of his right to be present to hear accusations against him, by filing writs of habeas corpus and mandamus in the Western District of Washington.²³⁸ Ultimately invalidating the commission because of its violation of laws of war laid out in the Geneva Conventions, the Supreme Court, in an opinion by Justice John Paul Stevens, ruled that the President had no inherent authority to circumvent congressional limitations on military commissions.²³⁹ In describing “the interplay between [congressional and executive war] powers,”²⁴⁰ the Court quoted Chief Justice Salmon P. Chase's dissent from *Ex Parte Milligan*:

The power to make the necessary laws is in Congress; the power to execute in the President. . . . [N]either can the President in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians²⁴¹ *339 Stevens then observed that congressional approval of military commissions, outlined in [Article 21 of the Uniform Code of Military Justice](#),²⁴² included “the express condition that the President and those under his command comply with the law of war.”²⁴³ With particular clarity the Court reaffirmed centuries-old principles regarding the wartime interplay of legislative and executive powers: “[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”²⁴⁴

In a concurrence joined by three Justices in the majority, Justice Anthony Kennedy drew the same distinction, his words seemingly influenced by the already-swirling debate regarding the warrantless-wiretapping program:

This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches.²⁴⁵ Both the majority of the Hamdan Court and Justice Kennedy cited Justice Robert Jackson's oft-quoted concurrence in *Youngstown Sheet & Tube Co v. Sawyer*, the so-called Steel Seizure case, which also recognized this interplay:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.²⁴⁶ *340 At the height of the Korean War in 1952, as the result of a dispute with steel-mill owners over collective bargaining agreements, the United Steelworkers of America called a strike.²⁴⁷ Because of “indispensability of steel as a component of substantially all weapons and other war materials,” President Harry Truman ordered Commerce Secretary Charles W. Sawyer to take possession of the steel mills to keep them operating.²⁴⁸ The majority opinion, authored by Justice Hugo Black, found that it was within the domain of Congress, not the President, to make legislative decisions concerning wartime policy.²⁴⁹ Justice Jackson proceeded to lay out a scheme of three situations vis-à-vis presidential and congressional authority.²⁵⁰ Since the administration maintains that the program was authorized by Congress through the AUMF,²⁵¹ it estimates that its actions fall within the first of these, where “the President acts pursuant to an express or implied authorization of Congress”²⁵² and so is “at the zenith of his powers.”²⁵³ Only in such a situation, Justice Jackson maintains, “may [the President] be said (for what it may be worth) to personify the federal sovereignty.”²⁵⁴ As we have seen, however, Congress provided no such authorization and has in fact criminalized such action.²⁵⁵ While ambiguous statutory language may be interpreted within the realm of plausibility to reconcile constitutional claims,²⁵⁶ Congress's plain and explicit language in setting forth the “exclusive means” for electronic *341 surveillance²⁵⁷ can only be read as meaning what it says.²⁵⁸ In this light, the President has “take[n] measures incompatible with the expressed or implied will of Congress, [and so] his power is at its lowest ebb, for . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²⁵⁹

Recent cases have recognized that the powers of the Executive may be more significantly checked in situations like the present that confront individual rights. In interpreting the AUMF in *Hamdi*, the Supreme Court noted that, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when the rights of individuals are at stake.”²⁶⁰ Congress has its own inherent authority in balancing the First and Fourth Amendments against national-security interests. Since Congress retains constitutional powers to declare war, make rules regarding enemy capture, and the like, the President cannot rely on inherent authority to trump the statutory prohibition.

As the Court realized in *Hamdan*, Congress passed [Article 21 of the Uniform Code of Military Justice](#) as both an acknowledgement of and a limitation on executive powers regarding military commissions.²⁶¹ By passing FISA, Congress recognized constitutionally vested executive surveillance authority but, in a move even more explicit than the one at issue in *Hamdan*, asserted the power to regulate it:

The basis for this legislation is the understanding--concurrent in by the Attorney General--that even if the President has an “inherent” constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.²⁶² The Senate Intelligence Committee noted that the purpose of FISA was “to curb the practice by which the Executive Branch may conduct *342 warrantless electronic surveillance on its own unilateral determination that national security justifies it.”²⁶³ The administration cited cases decided prior to the enactment of FISA and pre-FISA historical examples of executive wiretapping authorizations as support for its actions,²⁶⁴ but that argument ignored that the explicit intent of Congress in passing FISA was to “moot the debate” over inherent Presidential authority by providing a statutory framework.²⁶⁵ The House's Permanent Select Committee on Intelligence concluded that the Act

[did] not recognize, ratify, or deny the existence of any Presidential power to authorize warrantless surveillances in the United States in the absence of the legislation. . . . [N]o matter whether the President has this power, few have suggested that his power would be exclusive. Rather, as two Attorneys General have testified, Congress also has power in the foreign intelligence area.²⁶⁶ Congress identified FISA as an exercise of its own constitutionally vested authority to regulate the execution of war powers. Further, as Marty Lederman has argued, FISA claims authority not only from congressional action through its passage but also from executive action through President Jimmy Carter's signature; the statute already is a reconciliation drawing from both congressional and presidential war powers.²⁶⁷

In arguing that, FISA notwithstanding, the President possesses unchecked, plenary authority for warrantless wiretapping, the administration relied heavily on dicta from what is to date the only case ever appealed to the Foreign Intelligence Surveillance Court of Review.²⁶⁸ In *In re Sealed Case No. 02-001 (Sealed Case)*, the government had applied for and been granted an order for surveillance of an “agent of a foreign power” in the FISA court.²⁶⁹ The lower court had nevertheless imposed restrictions on the surveillance aimed at ensuring that law *343 enforcement or criminal prosecution, rather than foreign-intelligence collection, was not the primary purpose of the surveillance.²⁷⁰ The FISA Court of Review was faced with the question of whether the “significant purpose” test, introduced into FISA by the USA PATRIOT Act,²⁷¹ was consistent with the Fourth Amendment.²⁷² Noting that the question before it was “the reverse,”²⁷³ the court commented, “We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence information] and, assuming that is so, FISA could not encroach on the President's constitutional power.”²⁷⁴

This strained reading bases its analysis on split circuit-court opinions that analyzed the President's Article II power's relationship with the Fourth Amendment, not with the subsequently passed FISA.²⁷⁵ The administration likewise relies on such cases.²⁷⁶ As the Second Circuit noted in *United States v. Duggan*, the courts that “concluded that the President had the inherent power to conduct warrantless electronic surveillance to collect foreign intelligence information” ruled so prior to the enactment of FISA, and “[a]gainst this background, Congress passed FISA to settle what it believed to be the unresolved question of the applicability of the Fourth Amendment warrant requirement to electronic surveillance for foreign intelligence *344 purposes”²⁷⁷ In *Duggan*, alleged members of the Provisional Irish Republican Army had challenged their convictions for transporting explosives and firearms on the grounds that wiretap evidence against them should have been suppressed because FISA was unconstitutional.²⁷⁸ The court found that FISA reflects both Congress's “legislative judgment” that the court orders and other procedural safeguards laid out in the Act “are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment,” and its attempt to fashion a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights.”²⁷⁹ It then proceeded to rule FISA “a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information.”²⁸⁰

*345 What the Second Circuit recognized is what the Sealed Case court in its dicta failed to see: FISA represents the constitutional reconciling of presidential authority with both congressional authority and individual rights.²⁸¹ The President's authority, important though it is, does not permit a disregard of both Congress's foreign-affairs and war-making powers and the Fourth Amendment rights of the people on either end of wiretapped communications. If the President's power is not “exclusive” “in the absence of legislation,”²⁸² it is certainly not exclusive when it directly contradicts existing legislation. When the President attempts to “disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers”²⁸³ and circumvent the framework established in FISA, his power is at “its lowest ebb.” Whatever little doubt about this existed before *Hamdan* should certainly have disappeared with the Court's ruling.

Conclusion: Where the Absence of the President's Warrantless-Wiretapping Program Would Leave the Balance of National Security and Civil Liberties

President Bush has maintained that his program is essential in combating terrorism and preventing future attacks.²⁸⁴ In light of the foregoing, one must conclude that the NSA warrantless wiretapping program is at the very least in criminal violation of FISA and possibly counter to the Fourth Amendment. This permits two feasible courses of action: abandoning the program in favor of a legal and constitutional alternative, or tweaking the program to ensure its constitutional validity and amending the law to ensure its legality. Either of these is a viable option and preferable to abstaining from wiretapping altogether.²⁸⁵

*346 If the President abandoned the current program, it would not mean that the federal government would have no way to eavesdrop on the communications of terrorists coming into and going out of the United States. Rather, a special court was constructed under FISA for explicitly that purpose. Section 1804 of FISA outlines the requirements for a federal officer, under the approval of the attorney general as authorized by the President, to submit applications for electronic surveillance.²⁸⁶ Section 1803 sets up the Foreign Intelligence Surveillance Court “to hear applications for and grant orders approving electronic surveillance” and the Foreign Intelligence Surveillance Court of Review to review the denial of applications.²⁸⁷ The FISA

court grants an order approving surveillance if it finds that (1) the attorney general has the authority to approve applications; (2) the application was appropriately submitted; (3) on the basis of the facts submitted by the applicant there is probable cause to believe that --

(A) the target of the electronic surveillance is a foreign power or agent of a foreign power: Provided, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power; [and]

(4) the proposed minimization procedures meet the definition of minimization procedures under section [1804(h)]²⁸⁸ Such an order constitutes a “warrant” within the meaning of the Fourth Amendment;²⁸⁹ FISA court rules refer to the order as a “warrant.” *347²⁹⁰ Under previous administrations, and indeed throughout the Bush administration, applications were submitted to the FISA court following this protocol on a regular basis, and the court typically approved the applications without requiring modification.²⁹¹ Between *348 the start of the court in 1979 and the end of 2005, the latest year for which the Attorney General has submitted records, the Foreign Intelligence Surveillance Court has granted 20,814 orders for 20,806 applications, denying only four and granting leave to modify 238.²⁹² With the exception of one early modification, all denials and ordered modifications have come since 2001.²⁹³ Without knowing the facts of *349 these necessarily secret proceedings, it is hard to say whether the rarity of denials is a mark of good policy or bad oversight.²⁹⁴ Whatever the reason, one can safely conclude that having an application approved is relatively easy.²⁹⁵

This ease has prompted some to question why President Bush saw the need to circumvent the process in the first place: “Jeffrey H. Smith, former general counsel to the CIA, said the FISA process ‘should have permitted, or enabled, the president to conduct this surveillance.’ Smith said the court sometimes was slow to act in the past but became ‘much more responsive’ after the Sept. 11 attacks.”²⁹⁶ William E. Moschella, Assistant Attorney General for Congressional Affairs, said the program was necessary because FISA “could not have provided the speed and agility for the early warning system” that was needed.²⁹⁷ Though an anonymous counterterrorism official told the Los Angeles Times that approval of FISA warrants can take between twenty-four and forty-eight hours,²⁹⁸ section 1805(f) allows for an emergency protocol wherein the Attorney General, after reasonably determining that there is an urgent or time-sensitive need for the kind of surveillance contemplated by FISA, can authorize surveillance up to seventy-two hours in advance of an application to the court.²⁹⁹ It is implausible that, in an emergency situation, an NSA official could *350 make a determination weighing the necessity of the surveillance in the interests of national security against the threat to civil liberties of those eavesdropped upon³⁰⁰ significantly faster than the Attorney General could in following the section 1805(f) protocol. Seventy-two hours is an appropriate amount of time for such application; indeed, the window was expanded to seventy-two hours from twenty-four to address flexibility concerns--a move adopted two months after the President first authorized the warrantless-surveillance program.³⁰¹ Most of the surveillance conducted in the warrantless-wiretapping program probably could have received authorization from the normally approving FISA court, and all of it would have received authorization had it met such basic requirements as section 1805 probable cause.³⁰² What is clear, by inference, is that the only information the *351 NSA program yielded that would not have been gathered in following the normal FISA channels is that which was collected from surveillance without sufficient specificity, probable cause, or minimization to meet section 1805 standards. Whether it is in the interests of public policy in maintaining a free and secure society to conduct such surveillance remains to be answered.

If the authorities empowered to make this decision come to the conclusion that it is in the interests of public policy to permit intelligence agencies to eavesdrop on communications beyond the scope of FISA, the remaining option is for the Executive to ask Congress to change both the NSA program and the applicable law to comply with that policy.³⁰³ There are several courses of action the government could take to alter the program to fit the Constitution and the law to fit the program.

Congress could, if it so desired, pass a resolution directly authorizing the President to conduct warrantless surveillance for foreign-intelligence purposes, assuming such surveillance would not run afoul of the Fourth Amendment.³⁰⁴ An explicit authorization would be direct enough to override its past measures to contain the exercise of such power, such as FISA.³⁰⁵ The authorization could be designed to meet the requirements of FISA [section 1809](#).³⁰⁶ The Bush administration *352 reached out to Congress in an attempt to win this sort of approval for its program post hoc.³⁰⁷

Congress might also amend the warrantless-surveillance provision of FISA³⁰⁸ to take into account a broader definition of “foreign power.”³⁰⁹ William C. Banks and M.E. Bowman argue that the recent emergence of al-Qaeda demands a reconsideration of that definition:

Indeed, as terrorists such as [Ramzi] Yousef and Usama bin Ladin illustrate, a primary threat from terrorism today appears to have evolved from large, highly-organized state sponsored terrorist groups to loosely organized but technically competent persons affiliated through common goals, not national origin. This new phenomenon, which the FBI has labeled International Radical Terrorism (“IRT”), includes any extremist movement or group, international in nature, that conducts acts of crime or terrorism under the banner of personal beliefs in furtherance of political, social, economic, or other objectives. Because of the influence they wield, and their ability to act globally, IRT groups now exercise the type of destructive power historically held solely by nations and large, hierarchically structured organizations.³¹⁰ *353 The latter three definitions of “foreign power” listed in FISA but excluded from the procedure outlined in [section 1802](#) are more appropriate categories for these IRT groups.³¹¹ Broadening [section 1802](#) to include them would authorize something very similar to the program already in place.³¹²

Like Banks and Bowman, Seth Kreimer advocates a new look at the intelligence-gathering system in light of 9/11.³¹³ System changes, in Kreimer's view, should move toward constraints such as legal transparency, limited access to sensitive information, and oversight.³¹⁴ Peter P. Swire would similarly like to see more oversight and a more adversarial “devil's advocate” system in both the FISA court and the FISA Court of Review.³¹⁵ In the months following the public's discovery of the NSA activities, many members of Congress seemed to push for more oversight, demanding hearings and inquiries to evaluate the program.³¹⁶ The abuses of the 1970s prompted one such reevaluation and settlement, and in this new historical context we must “find a set of structures and commitments that will achieve a new settlement that preserves American liberty.”³¹⁷

Months after the program was made public, senators and representatives from both parties introduced bills that would take divergent paths in lending a legislative voice to the debate. As part of broad legislation called the Real Security Act, Senators Harry Reid *354 and Dick Durbin included a provision announcing the “sense of Congress” that the FISA warrant requirement “should remain in place to protect the privacy of law abiding Americans with no ties to terrorism” and that “the President is not above the law and must abide by congressionally-enacted procedures for engaging in electronic surveillance.”³¹⁸

Senator Specter backed the National Security Surveillance Act, which would override portions of FISA by giving jurisdiction to the FISA Court to approve or deny applications for entire surveillance programs rather than individual warrants.³¹⁹ Key provisions of FISA would no longer apply to the warrantless-surveillance program or similar future programs, which would instead be approved based on findings that they were constitutional, in accordance with certain minimization procedures, and “reasonably designed” to intercept communications of a “foreign power . . . engaged in . . . terrorism,” an agent thereof, or a person communicating with such a foreign power or agent.³²⁰ The bill would further yield authority to the President by acknowledging his “constitutional authority . . . to collect intelligence” and adding constitutional authorization as an alternative to statutory authorization throughout FISA.³²¹

Senator Specter cosponsored a competing bill introduced by Senator Dianne Feinstein that would reiterate the exclusive nature of FISA³²² while bolstering and expanding its emergency provisions.³²³ Senator Mike DeWine's Terrorist Surveillance Act would grant the President broad power to authorize warrantless-surveillance programs for forty-five days based on his own determinations³²⁴ and renew them every forty-five days,³²⁵ subject to congressional oversight.³²⁶ It would also criminally penalize program whistleblowers with fines up to one million dollars and maximum fifteen-year prison sentences.³²⁷

The House passed Representative Heather Wilson's Electronic Surveillance Modernization Act.³²⁸ The bill sought to amend FISA to *355 provide for ninety-day periods of emergency surveillance following terrorist attacks³²⁹ or whenever the President determines that the country is in danger of an imminent threat and presents that determination to Congress and the FISA Court.³³⁰ It also allowed for surveillance of United States persons for up to sixty days or longer if the President certified the reasons for the necessity of the surveillance to the congressional intelligence committees.³³¹ The Senate could not reach a compromise between its various bills and the House bill before it adjourned for the 2006 election, leaving the problem of warrantless surveillance to a future Congress.³³²

The administration has argued that whoever leaked the details of the secret program to the public jeopardized national security.³³³ The *356 silver lining of the leak is that it will give the President, Congress, the judiciary, and the voters a new framework in which to openly debate the balancing of national security and civil liberties and find a solution that will make the United States stronger.

Footnotes

- a1 J.D. Candidate, 2007, University of Pennsylvania Law School; A.B., 2000, Stanford University. I am grateful to Professors Geoffrey Hazard, Nathaniel Persily, and Kermit Roosevelt for their comments. All errors are the author's alone.
- 1 Int'l Telecomm. Union, Communication Technology Statistics, at A-5 (2005), available at http://www.itu.int/ITU-D/ict/statistics/at_glance/basic05.pdf [hereinafter Telecomm. Statistics]. Statistics in this textual paragraph refer to information gathered in 2005.
- 2 Id. at A-9, available at http://www.itu.int/ITU-D/ict/statistics/at_glance/main05.pdf.
- 3 Dan Bart, Private Sector Co-Chair, Am. Nat'l Standards Inst. Homeland Sec. Standards Panel, Address at the Defense Standardization Program Conference (Mar. 17, 2004) (slides available at <http://www.dsp.dla.mil/2004-DSP-conf/Bart-031704.ppt>).
- 4 See Joginder S. Dhillon & Robert I. Smith, [Defensive Information Operations and Domestic Law: Limitations on Government Investigative Techniques](#), 50 A.F. L. Rev. 135, 137 n.5 (2001) (“The telecommunications system itself no longer uses operators to manually plug in calls to a switchboard but depends on computerized switching stations to handle the billions of calls placed each day.” (quoting Cybercrime, Transnational Crime and Intellectual Property Theft: Hearing Before the J. Economic Comm., 105th

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Cong. 146 (1998) (statement of Michael A. Vatis, Deputy Assistant Director and Chief, National Infrastructure Protection Center, Federal Bureau of Investigation))).

5 See Admin. Office of the U.S. Courts, 2004 Wiretap Report 5 (2004), <http://www.askcalea.net/reports/docs/2004wiretap.pdf> (discussing generally the government's use of electronic surveillance); Office of Tech. Assessment, U.S. Congress, *Electronic Surveillance in a Digital Age* 29-61 (1995) (discussing generally the “technical aspects of electronic surveillance”).

6 Telecomm. Statistics, *supra* note 1, at A-29, available at http://www.itu.int/ITU-D/ict/statistics/at_glance/cellular05.pdf; see also David Alan Jordan, [Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice over Internet Protocol](#), 47 B.C. L. Rev. 505, 535, 544 (2006) (discussing the particular surveillance concerns with an additional voice-transmission technology, Voice over Internet Protocol, or VoIP, and arguing for enhanced regulatory protection in light of them).

7 See Roger Boyes, *Berlin Revives Spy Story*, *Times* (London), Oct. 23, 1999, at 16 (describing the use of IMSI catchers).

8 See Roberta K. Flowers, [A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors](#), 37 B.C. L. Rev. 923, 948 (1996) (“Unbeknownst to the defendant, the co-defendant agreed to work for the government and allowed government agents to install a radio transmitter in his car.” (citing [Massiah v. United States](#), 377 U.S. 201, 202-03 (1964))); *Surveillance and Individual Privacy*, 20 U.N. Chron. 25, 26 (Apr. 1983) (“Long before the Second World War, phones were tapped by means of direct cuts into telephone wires and spliced into a set of earphones, which permitted eavesdroppers to overhear both sides of telephone conversations.”); see also Louis Lavelle, *Private Eye Pleads Guilty to Illegal Wiretap: A Court Is Told Bankers Insurance Did Not Know a Regulator's Telephone Was Tapped*, *Tampa Trib.*, June 25, 1996, *Florida/Metro*, at 1 (“According to court documents, Rayner's wiretap--a short-range radio transmitter with a nine-volt battery and antenna wire--was discovered in August 1995 by telephone company employees on the junction box on McCarty's lawn.”); Jon Van, *Eavesdropping Getting Easier*, *Chi. Trib.*, Feb. 7, 1994, *Business*, at 1 (“For \$20 or \$30, Ross said, one can buy a radio transmitter/microphone smaller than a cigarette lighter from any consumer electronics store. ‘You can toss one into a potted plant in someone's office and hear everything that goes on there,’ Ross said.”); *The Conversation* (Paramount Pictures 1974) (depicting the realistic use of listening devices and the paranoia that accompanies them). But see Bruce Berkowitz, *Terrorists' Talk: Why All That Chatter Doesn't Tell Us Much*, *N.Y. Times*, Feb. 16, 2003, §4, at 5 (“Today, a direct tap is often impossible. Digital messages, via cellphone or Internet, can follow any number of paths from Point A to Point B.”); Mark Brown, *Trying to Uncover FBI Bugs? It's Not Hard to Beat the Clock*, *Chi. Sun-Times*, Feb. 11, 2004, at 2 (describing various countermeasures for confronting radio bugging devices).

9 See, e.g., Richard Boyd, *Narcotics Chief Named Investigator Supervisor*, *Times-Picayune* (New Orleans, La.), Sept. 26, 1999, at 14H2 (recounting how a sheriff's captain used wiretapping to bring down a drug kingpin and his trafficking ring); Carrie Johnson, *Prosecutor Wins Ruling in Wiretap Dispute*, *St. Petersburg Times* (Fla.), Dec. 19, 2002, *Citrus Times*, at 1 (reporting a judge's ruling on the admissibility of evidence gathered from a wiretap on the phone of an alleged drug trafficker); see also Nathan Odgaard, *Omaha Crack Dealer Sentenced to Prison*, *Omaha World Herald*, May 26, 2001, at 15 (noting that a convicted crack dealer's arrest was based on information received from a wiretap); *Suspect Pleads Guilty to Being a Drug Courier*, *Buffalo News*, Dec. 1, 1998, at 7B (relating that an alleged drug mule was arrested based on information from federal wiretaps).

10 See, e.g., Matt O'Connor, *US Charges 2 at Midway: Federal Officers Are Accused of Aiding Drug Ring*, *Chi. Trib.*, Oct. 20, 2004, at C3 (detailing how wiretapping was used to connect federal officers to drug traffickers).

11 See, e.g., *Court Rules Wiretaps Lawful*, *Orlando Sentinel*, Oct. 13, 2002, at A22 (reporting the admissibility of wiretap evidence against members of the anti-government group Montana Freemen in a trial for bank fraud).

12 See, e.g., John Spano, *Ex-Real Estate Broker Guilty in Chatsworth, Newhall Land Swindle*, *L.A. Times*, May 25, 1988, *Metro* pt. 2, at 8 (mentioning that wiretaps of the phones of a fugitive's relatives helped bring him in).

13 See, e.g., Brooke A. Masters, *Jury Rejects Entrapment Defense, Convicts D.C. Couple of Spying*, *Wash. Post*, Oct. 24, 1998, at A8 (noting that three years' worth of tapes from FBI wiretaps helped convict former campus radicals of spying for East Germany).

- 14 See, e.g., Ralph Blumenthal, *How Tapes and a Turncoat Helped Win the War Against Gotti*, N.Y. Times, Apr. 5, 1992, §1, pt. 1, at 30 (explaining the role FBI wiretaps played in prosecuting mob boss John Gotti); see also Faye Bowers, *Case May Clarify Rules for Using Informants*, Christian Sci. Monitor (Boston), June 30, 1997, at 3 (mentioning the wiretapping of a mafia induction ceremony, which led to five arrests).
- 15 See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1 (“[E]avesdropping...had helped to uncover a plot...to bring down the Brooklyn Bridge with blowtorches.... [A]nother...plot, involving fertilizer bomb attacks on British pubs and train stations, was exposed....”). However, “most people targeted for NSA monitoring have not been charged with a crime, including an Iranian-American doctor in the South who came under suspicion because of what one official described as dubious ties to Osama bin Laden.” Id. Daniel J. Solove argues that surveillance can have a significant indirect effect on crime: “The Panopticon achieves obedience and discipline by having all prisoners believe they could be watched at any moment. Their fear of being watched inhibits transgression. Surveillance can thus prevent crime by making people decide not to engage in it at all.” Daniel J. Solove, [Reconstructing Electronic Surveillance Law](#), 72 *Geo. Wash. L. Rev.* 1264, 1267 (2004).
- 16 Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, *Fordham L. Rev.* (forthcoming) (manuscript at 43), available at <http://ssrn.com/abstract=930514>. Balkin and Levinson argue that geopolitical developments, in particular the War on Terror, and technological innovation have combined to create “a significant increase in...government bureaucracies devoted to promoting domestic security and...gathering intelligence and surveillance using all of the devices that the digital revolution allows.” Id. at 43-47.
- 17 Compare Remarks in a Discussion in Canton, Ohio, 41 *Weekly Comp. Pres. Doc.* 2533 (Oct. 22, 2004) (“Talking about education and health care, these are very important issues. But let me say to you that it all goes to naught if we don’t secure this country, that the security of the American people is the most important responsibility of the President.”), and *A Few Good Men* (Sony Pictures 1992) (“Son, we live in a world that has walls, and those walls have to be guarded by men with guns....[Y]ou need me on that wall....[Y]ou cannot sleep] under the blanket of the very freedom that I provide, then question[] the manner in which I provide it.”), with [United States v. Robel](#), 389 U.S. 258, 264 (1967) (Warren, C.J.) (“Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart....It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the Nation worthwhile.”), and Assembly (Pa. 1755) (statement of Benjamin Franklin), reprinted in 6 *The Papers of Benjamin Franklin* 442 (Leonard W. Labaree ed., 1963) (“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”).
- 18 18 U.S.C. §§2510-2520 (2000 & Supp. IV 2004), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, [Pub. L. No. 109-177](#), §§ 110(b)(3)(C), 113, 506(a)(6), 120 Stat. 192, 208, 209, 248 (2006) and Violence Against Women and Department of Justice Reauthorization Act of 2005, [Pub. L. No. 109-162](#), § 1171(b), 119 Stat. 2960, 3123 (2006).
- 19 47 U.S.C. §§1001-1010 (2000).
- 20 See, e.g., [Alaska Stat. §§42.20.300-390](#) (2004) (addressing when it is permissible to transmit private conversations and engage in eavesdropping); [Colo. Rev. Stat. §§16-15-101 to -104](#) (2005) (defining the appropriate situations for courts to grant ex parte orders regarding the interception of wire, oral and electronic communications); [Conn. Gen. Stat. §§54-41a to -41u](#) (2005) (listing the requirements and procedures for wiretapping and electronic surveillance); [Del. Code Ann. Tit. 11, §§2401-2434](#) (2005) (outlining lawful and unlawful surveillance procedures); [Ga. Code Ann. §§16-11-60 to -69](#) (2004) (describing the guidelines concerning wiretapping, electronic surveillance and the interception of communication); [Md. Code Ann., Cts. & Jud. Proc. §§10-401 to -414](#) (LexisNexis 2005) (establishing the lawful procedure for intercepting communication and disclosing it); [Mo. Rev. Stat. §§542.400-424](#) (2005) (addressing permissible wiretapping and the necessary procedural requirements); [N.H. Rev. Stat. Ann. §§570-A:1-11](#) (2005) (detailing the lawful mechanisms for wiretapping, eavesdropping, and disclosure); [N.J. Stat. Ann. §§2A:156A-1 to -34](#) (2005) (establishing the wiretapping and electronic guidelines for the state); [N.D. Cent. Code §§29-29.2-01 to -05](#) (2005) (listing the procedural requirements for wiretapping in drug offense investigations); [Ohio Rev. Code Ann. §§2933.51-.66](#) (LexisNexis 2006) (explaining the procedural and disclosure requirements for interception of wire, oral or electronic communications); 18 *Pa. Cons. Stat. §§5701-5782* (2000) (articulating the wiretapping and electronic surveillance guidelines); [Tenn. Code Ann. §§40-6-301 to -311](#)

(2002) (detailing the order requirements for electronic surveillance); [W. Va. Code §§62-1D-1 to -16 \(2005\)](#) (establishing wiretapping and electronic surveillance guidelines).

21 [50 U.S.C. §§1801-1871 \(2000 & Supp. IV 2004\)](#), amended by USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, [Pub. L. No. 109-178, §§ 3-4, 120 Stat. 278, 278-81](#) and USA PATRIOT Improvement and Reauthorization Act of 2005, [Pub. L. No. 109-177, §§105-106, 108-109, 128, 506, 120 Stat. 192, 195-200, 203-05, 228-29, 247-48 \(2006\)](#).

22 See [Katz v. United States, 389 U.S. 347, 353 \(1967\)](#) (“[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements....”); cf. [U.S. Const. amend. IV](#) (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...and particularly describing the place to be searched, and the persons or things to be seized.”).

23 See [Berger v. New York, 388 U.S. 41, 55-56 \(1967\)](#) (declaring a New York wiretapping statute unconstitutional because it did not meet the probable cause and particularity requirements of the Fourth Amendment). But see [United States v. Koyomejian, 946 F.2d 1450, 1455 \(9th Cir. 1991\)](#) (noting that since-enacted statutory requirements go beyond the constitutional requirements outlined in [Berger](#)).

24 Dan Eggen, [Bush Authorized Domestic Spying: Post-9/11 Order Bypassed Special Court](#), *Wash. Post*, Dec. 16, 2005, at A1; [Risen & Lichtblau](#), *supra* note 15.

25 Maura Reynolds & Greg Miller, [Spying Scandal Draws Heat: Lawmakers Call on Bush to Explain His Post-9/11 Order Allowing a Secret Agency to Monitor U.S. Citizens Without First Getting a Warrant](#), *L.A. Times*, Dec. 17, 2005, at A8.

26 *Id.*

27 See Richard B. Schmitt, [Senate Blocks the Renewal of Patriot Act: The Rebuff to Bush Comes Amid News that He Authorized Wiretaps of Americans without Court Clearance; Fate of Post-9/11 Law Is Unclear](#), *L.A. Times*, Dec. 17, 2005, at A1 (discussing prospects for renewal of [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 \(USA PATRIOT Act\)](#), [Pub. L. No. 107-56, 115 Stat. 272 \(2002\)](#) [hereinafter USA PATRIOT Act]).

28 Compare Bob Barr, [USA PATRIOT Act and Progeny Threaten the Very Foundation of Freedom](#), 2 *Geo. J.L. & Pub. Pol'y* 385, 385-86 (2004) (“[T]he Act, and the progeny of other policies, regulations, programs, and acts it has spawned, threatens not just to weaken, but eviscerate fully, the Fourth Amendment to the Constitution of the United States.”), with Viet D. Dinh, [How the USA Patriot Act Defends Democracy](#), 2 *Geo. J.L. & Pub. Pol'y* 393, 399 (2004) (“During these times, when the foundation of liberty is under attack, it is critical that we both reaffirm the ideals of our constitutional democracy and also discern the techniques necessary to secure those ideals against the threat of terrorism.”). See generally Richard Henry Seamon & William Dylan Gardner, [The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement](#), 28 *Harv. J.L. & Pub. Pol'y* 319 (2005) (discussing the USA PATRIOT Act's blurring of the distinction between law-enforcement and foreign-intelligence-surveillance functions); Douglas J. Sylvester & Sharon Lohr, [Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law After the USA PATRIOT Act](#), 2005 *Wis. L. Rev.* 1033 (discussing the levels of confidentiality and trust required for legislation from the perspective of law and statistics); [Symposium, The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & the USA PATRIOT Act](#), 72 *Geo. Wash. L. Rev.* 1139 (2004) (discussing various aspects of surveillance and privacy under the USA PATRIOT Act regime).

29 [Complaint, Ctr. for Constitutional Rights v. Bush](#), No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006), available at http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/NSAcomplaintFINAL11706.pdf; [Complaint, Al-Haramain Islamic Found. v. Bush](#), No. 06-274-KI, 2006 U.S. Dist. LEXIS 64102 (D. Or. Sept. 7, 2006); [Complaint for Declaratory & Injunctive Relief, ACLU v. NSA](#), 438 *F. Supp. 2d* 754 (E.D. Mich. 2006), available at http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf.

30 [ACLU v. NSA](#), 438 *F. Supp. 2d* 754 (E.D. Mich. 2006) (mem.). Judge Anna Diggs Taylor found that the government-asserted state-secrets privilege did not apply, *id.* at 765, that plaintiff U.S. persons who conduct calls overseas for legitimate reasons had standing to sue, *id.* at 771, that the program “obviously” violated the Fourth Amendment, *id.* at 775, that violation of the First Amendment followed, *id.* at 776, that the program violated separation-of-powers principles, *id.* at 778, that it violated FISA, *id.* at 778-79, that

the AUMF did not override FISA, *id.* at 780, and that neither any inherent executive power nor practical concerns justified the program, *id.* at 780-82. Judge Taylor's opinion in the case has come under scrutiny by legal scholars. See Posting of Laurence Tribe to Balkinization, <http://balkin.blogspot.com> (Aug. 19, 2006, 15:10 EDT) (“[The opinion] seems almost to have been written more to poke a finger in the President's eye than to please the legal commentariat or even, alas, to impress an appellate panel, although I certainly agree with the many who predict that, while her reasoning is bound not to be embraced, her bottom line is very likely to survive appellate review.”); Posting of Eugene Volokh to Volokh Conspiracy, <http://volokh.com> (Aug. 17, 2006, 19:15 PDT) (“[Judge Taylor's] opinion...seems not just ill-reasoned, but rhetorically ill-conceived. A careful, thoughtful, detailed, studiously calm and impartial-seeming opinion might have swung some higher court judges....A seemingly angry, almost partisan-sounding opinion...is unlikely to sway the other judges.”).

The Al-Haramain case has survived a state-secrets-privilege challenge. *Al-Haramain Islamic Found. v. Bush*, No. 06-274-KI, 2006 U.S. Dist. LEXIS 64102 (D. Or. Sept. 7, 2006).

31 152 Cong. Rec. S1987, 2011-16 (daily ed. Mar. 13, 2006).

32 Rick Schmitt & Mary Curtius, *Bush Defends Eavesdropping as Defense Against Terrorism: He Vows to Continue the Newly Acknowledged Domestic Program Despite Mounting Criticism, Even from Within His Own Party*, *L.A. Times*, Dec. 18, 2005, at A1 (quoting The President's Radio Address, 41 Weekly Comp. Pres. Doc. 1880, 1881 (Dec. 17, 2005)).

33 Dan Eggen, *Justice Dept. Investigating Leak of NSA Wiretapping: Probe Seeks Source of Classified Data*, *Wash. Post*, Dec. 31, 2005, at A1; see also Posting of Brian Ross & Richard Esposito to The Blotter, <http://blogs.abcnews.com/theblotter/> (May 15, 2006, 10:33 EDT) (reporting that a federal intelligence agency was tracking the phone records of ABC News reporters as part of an investigation into leaks).

34 Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, *Wash. Post*, Dec. 17, 2005, at A1.

35 126 S. Ct. 2749 (2006), superseded by statute, Military Commissioners Act of 2006, *Pub. L. No. 109-366*, 120 Stat. 2600.

36 Brian MacQuarrie & Absar Alam, *Fighting Terror: Pakistan Crackdown Police Raids; US Said to Aid in Roundup of Bomb Suspects*, *Boston Globe*, Mar. 29, 2002, at A13.

37 See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 174 (2004) (“On November 30, 1999, Jordanian intelligence intercepted a telephone call between Abu Zubaydah, a longtime ally of Bin Ladin, and Khadr Abu Hoshar, a Palestinian extremist. Abu Zubaydah said, ‘The time for training is over.’” (citing Judith Miller, *Holy Warriors: Dissecting a Terror Plot from Boston to Amman*, *N.Y. Times*, Jan. 15, 2001, at A1)); Romesh Ratnesar, reported by Jason Tedjasukmana et al., *Confessions of an al-Qaeda Terrorist; American Interrogators Finally Got to Omar al-Faruq, Who Detailed Plans to Launch a New Terror Spree in Southeast Asia*, *Time*, Sept. 23, 2002, at 37 (discussing Zubaydah's alleged involvement in embassy-bombing plots); Philip Smucker, *How Bin Laden Outsmarted America's Military Might in the Caves of Tora Bora*, *Daily Telegraph (London)*, Sept. 11, 2002, at 9 (“Pakistani border troops and FBI officials picked up Abu Zubaydah, a senior al-Qa'eda military planner, who is suspected of direct involvement in planning the September 11 attacks....”). Contra Jane Mayer, *Outsourcing Torture: The Secret History of America's “Extraordinary Rendition” Program*, *New Yorker*, Feb. 14, 2005, at 106 (casting doubt on Zubaydah's connection to the embassy-bombing plot).

38 See, e.g., The 9/11 Commission Report, *supra* note 37, at 466 n.18 (noting that cited information was gathered from Abu Zubaydah during interrogation of Oct. 29, 2002); *id.* at 470 n.76 (interrogation of unspecified date in 2003); *id.* at 491 n.31 (interrogation of Aug. 29, 2002); *id.* at 491 n.35 (interrogation of May 16, 2003); *id.* at 500 n.5 (interrogation of July 10, 2002); *id.* at 500 n.8 (interrogation of June 24, 2003); *id.* at 507 n.125 (interrogation of Dec. 13, 2003); *id.* at 524 n.90 (interrogation of Feb. 19, 2004); *id.* at 527 n.108 (interrogation of Feb. 18, 2004). But see Douglas Jehl & Eric Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, *N.Y. Times*, Nov. 24, 2005, at A1 (reporting that the United States reduced the charges against alleged dirty-bomber Jose Padilla because allowing the defense to confront Zubaydah in court would divulge classified, and perhaps abusive, interrogation techniques).

39 Risen & Lichtblau, *supra* note 15; see also David E. Kaplan et al., *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After al Qaeda*, *U.S. News & World Report*, June 2, 2003, at 18 (“The Pakistanis also recovered a trove of materials in

Zubaydah's safe house--CDs, address books, financial records, a satellite phone.... 'Zubaydah's capture felt like a turning point.' By the end of spring 2002, more than 100 CIA officers and FBI agents had poured into Pakistan....”)

40 Risen & Lichtblau, *supra* note 15.

41 Letter from Alberto R. Gonzales, U.S. Attorney General, to Senator Arlen Specter, Chairman, Comm. on the Judiciary (Feb. 28, 2006), available at <http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/gonzales.letter.pdf> [sic] [hereinafter Gonzales Letter].

42 *Id.*

43 James Gerstenzang, In Long Address, Bush Defends Spying Program: He Calls It and the Patriot Act Needed and Legal Tools to Fight Terrorism, L.A. Times, Jan. 24, 2006, at A11; accord Alberto R. Gonzales, U.S. Attorney General, & Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence, Press Briefing at the James S. Brady Briefing Room (Dec. 19, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>) (describing the target of the surveillance as situations where there is “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda” (statement of Attorney General Gonzales)).

44 Risen & Lichtblau, *supra* note 15.

45 Maura Reynolds, Gonzales Defends Spying as ‘Limited and Lawful,’ L.A. Times, Feb. 7, 2006, at A1.

46 Risen & Lichtblau, *supra* note 15.

47 Scott Shane, At Security Agency, News of Surveillance Program Gives Reassurances a Hollow Ring, N.Y. Times, Dec. 22, 2005, at A22.

48 The President's News Conference, 41 Weekly Comp. Pres. Doc. 1885, 1889 (Dec. 19, 2005) (“[T]hese calls are not intercepted within the country. They are from outside the country to in the country or vice versa.”); cf. Eric Lichtblau, Bush Defends Spy Program and Denies Misleading the Public, N.Y. Times, Jan. 2, 2006, at A11 (“[President Bush] said several times that the eavesdropping was ‘limited to calls from outside the United States to calls within the United States.’”); Lisa Rein, Bush Defends Spying Program as Necessary to Protect U.S.: But President Acknowledges Civil Liberties Concerns, Wash. Post, Jan. 2, 2006, at A2 (“The White House clarified that the program monitors incoming and outgoing calls.”). *Contra* James Risen & Eric Lichtblau, Spying Program Snared U.S. Calls, N.Y. Times, Dec. 21, 2005, at A1 (“[The] surveillance program...has captured what are purely domestic communications in some cases, despite a requirement by the White House that one end of the intercepted conversations take place on foreign soil....”); see Josh Meyer & Joseph Menn, U.S. Spying Is Much Wider, Some Suspect, L.A. Times, Dec. 25, 2005, at A1 (reporting that some U.S. officials and experts in intelligence hypothesize that the NSA spying program may be a much broader, “look-at-everything type program”); cf. Gonzales Letter, *supra* note 41 (“The Department believes that the interception of the contents of domestic communications would present a different question from the interception of international communications, and the Department would need to analyze that question in light of all current circumstances before any such interception would be authorized.”).

49 See Gonzales & Hayden, *supra* note 43 (“The judgment is made by the operational work force at the National Security Agency using the information available to them at the time....and it’s a two-person standard that must be signed off by a shift supervisor....” (statement of Gen. Hayden)); cf. [Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Judiciary Comm., 109th Cong. \(2006\) \(transcript available at 2006 WL 270364\)](#) [hereinafter Senate Judiciary Surveillance Hearing] (statement of Attorney General Alberto R. Gonzales) (“The decision as to which communications will be surveilled are made by intelligence experts out at NSA.”).

50 Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Attorney General Gonzales).

51 Risen & Lichtblau, *supra* note 15. For an explanation of these procedures, see *infra* Conclusion.

52 Risen & Lichtblau, *supra* note 15.

53 *Id.*

- 54 Schmitt & Curtius, *supra* note 32; accord The President's Radio Address, *supra* note 32. Attorney General Gonzales maintained that this oversight was effective:
NSA's Office of the General Council has informed us that the oversight process conducted both by that office and by the NSA Inspector General has uncovered no abuses of the Terrorist Surveillance Program, and, accordingly, that no disciplinary action has been needed or taken because of abuses of the Program.
Gonzales Letter, *supra* note 41.
- 55 See Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Attorney General Gonzales) (“[W]e have advised bipartisan leadership of the Congress and the Intel Committees about this program.”); The President's Radio Address, *supra* note 32 (“Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it.”).
- 56 See Greg Miller & Maura Reynolds, U.S. Spying Plan Lacked Congress' Scrutiny, Leading Democrat Says: Sen. Rockefeller Accuses the Bush Administration of Misleading the Public in Saying that Lawmakers Were Kept Informed on the Wiretap Program, *L.A. Times*, Dec. 20, 2005, at A32 (noting complaints by leading Democrats over limited briefings and a lack of administration response to issues raised).
- 57 *Id.*
- 58 *Id.*
- 59 50 U.S.C. §413(a) (2000 & Supp. IV 2004).
- 60 John Diamond, Congressional Oversight of Intelligence Never Easy: Secret Nature Has Restricted Briefings with Little Recourse, *USA Today* (McLean, Va.), Dec. 21, 2005, at 8A. The article discusses both the general workings of Gang of Eight briefings and some details of the briefings on the NSA program:
That meeting in September 2004 is when [Representative Pete] Hoekstra first learned [of the warrantless surveillance]. Hoekstra was not allowed to take notes or attend with a staff member. At the end, he was asked if he had any questions.
“It was, ‘Speak now or forever hold your peace,’” Hoekstra said.
Id. Under the National Security Act of 1947, 50 U.S.C. §413-13b (2000 & Supp. IV 2004), the President is required to keep the House and Senate intelligence committees “fully and currently informed” of intelligence activities, including “significant anticipated... activit[ies].” In amending the Act to require the reporting of anticipated activities in addition to current activities, Congress noted that the change “means, in practice, that the committees should be advised of important new program initiatives and specific activities that have major foreign policy implications.” *S. Rep. No. 102-85, at 32 (1991)*. Reporting to the Gang of Eight is a procedure outlined in section 413b(c)(2) governing the reporting of covert actions:
If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.
50 U.S.C. §413b(c)(2) (2000 & Supp. IV 2004). However, that provision is limited to “the reporting of covert actions” where the President finds “extraordinary circumstances affecting vital interests of the United States.” *Id.* §413b (emphasis added). “Covert action” is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly,” and the definition expressly excludes “activities the primary purpose of which is to acquire intelligence[] [or] traditional counterintelligence activities.” *Id.* §413b(e). Since the warrantless wiretapping program is excluded by this definition, it falls under the category of “all intelligence activities[] other than a covert action,” making its reporting to the intelligence committees as a whole required by section 413a. See Memorandum from Alfred Cumming, Specialist in Intelligence & Nat'l Sec. Foreign Affairs, Def. & Trade Div., for the Cong. Research Serv. 6-8 (Jan. 18, 2006), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv38.pdf> (analyzing the statutory reporting procedures for intelligence programs as applied to the reporting of the warrantless wiretapping program).
- 61 Miller & Reynolds, *supra* note 56.
- 62 Risen & Lichtblau, *supra* note 15.

63 Id.

64 Judge Kollar-Kotelly sits on the U.S. District Court for the District of Columbia and, since 2002, has been presiding judge over the Foreign Intelligence Surveillance Court of Review. Id.

65 Id.; see also Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data: Program May Have Lead Improperly to Warrants*, Wash. Post, Feb. 9, 2006, at A1 (“James A. Baker...discovered...that the government's failure to share information about its spying program had rendered useless a federal screening system that the judges had insisted upon to shield the court from tainted information. He alerted Kollar-Kotelly,...prompting a temporary suspension of the NSA spying program....”). Though the Department of Justice devised a tagging system to prevent the use of information gathered in the controversial program for obtaining FISA Court orders, “the NSA was not providing [Baker] with a complete and updated list of the people it had monitored, so Justice could not definitively know--and could not alert the court--if it was seeking FISA warrants for people already spied on....” Id. Judge Kollar-Kotelly and her predecessor, Judge Royce C. Lamberth, expressed their concern that the program was unconstitutional, though they did not believe themselves to be in a position to address the issue. Id.

Another possible factor in the decision to reevaluate the program was the March 2004 refusal of then-Acting Attorney General James B. Comey to sign off on its renewal, prompting Andrew Card, President Bush's chief of staff, and Alberto Gonzales, then-White House counsel, to visit then-Attorney General John Ashcroft in the hospital and implore him to approve the program. Eric Lichtblau & James Risen, *Justice Deputy Resisted Parts of Spy Program*, N.Y. Times, Jan. 1, 2006, §1, at 1. Even Ashcroft was reportedly wary of certifying the program at that meeting “in light of concerns among some senior government officials about whether the proper oversight was in place at the security agency and whether the president had the legal and constitutional authority to conduct such an operation.” Id.

66 Risen & Lichtblau, *supra* note 15.

67 Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls: 3 Telecoms Help Government Collect Billions of Domestic Records*, USA Today (MacLean, Va.), May 11, 2006, at 1A.

68 Id.

69 Id. These differences are substantial enough to consider the domestic data-mining a different type of surveillance program, one that this Comment will not directly address. For rough sketches of the distinct legal issues involved in the data-mining program, see Posting of Kate Martin, Director, Center for National Security Studies, to ACSBlog, [http:// www.acsblog.org/](http://www.acsblog.org/) (May 11, 2006, 16:26 EDT); OrinKerr.com, [http:// www.orinkerr.com/](http://www.orinkerr.com/) (May 11, 2006, 12:11 EDT). For further exploration of the details of the program, see Seymour M. Hersh, *Listening In*, New Yorker, May 29, 2006, at 24; Mark Hosenball et al., *Hold the Phone*, Newsweek, May 22, 2006, at 22.

70 Hearing on the USA PATRIOT Act of 2001 Before S. Select Comm. on Intelligence, 109th Cong. (Apr. 27, 2005).

71 Remarks in a Discussion on the PATRIOT Act in Buffalo, New York, 40 Weekly Comp. Pres. Doc. 638, 641 (Apr. 20, 2004).

72 See, e.g., Schmitt & Curtius, *supra* note 32 (outlining the administration's justification for its actions).

73 U.S. Const. art. II, §2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States....”).

74 See, e.g., id. at cl. 2 (“He shall have Power...to make Treaties;...and he shall nominate, and...shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States....”).

75 299 U.S. 304, 319 (1936). The defendants in *Curtiss-Wright* were charged with providing machine guns to Bolivia in violation of a joint resolution making it illegal to sell weapons to countries engaged in South America's Chaco War, a 1930s skirmish over a disputed desert between Bolivia and Paraguay. Id. at 311-12. According to the terms of the resolution, the prohibition would only take effect if the President proclaimed that it would be beneficial to peace. Id. at 312. The defendants demurred, urging that Congress

could not delegate such a policy decision to the President. *Id.* at 314. The Court, in an opinion by Justice George Sutherland, found the delegation proper because of the President's broad foreign affairs authority. *Id.* at 319.

76 See, e.g., *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (“The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.”). In *Chicago & Southern*, both *Chicago & Southern Air Lines* and *Waterman Steamship* applied to the Civil Aeronautics Board for certificates to engage in foreign and overseas air transportation pursuant to the Civil Aeronautics Act. *Id.* at 104-05. *Waterman* brought suit when the Board denied its application and granted *Chicago & Southern's*. *Id.* The Court found that where, as in the area of overseas and foreign air transportation, the application requires presidential approval, the decision is political and therefore in the dominion of the executive and not the judiciary. *Id.* at 106, 111.

77 *N.Y. Times Co. v. United States*, 403 U.S. 713, 741 (1971) (Marshall, J., concurring). The United States had brought suit against the *New York Times* and *Washington Post* for publishing the classified report “History of U.S. Decision-Making Process on Viet Nam Policy.” *Id.* at 714. The Court found that the United States had not overcome the heavy presumption against imposing a prior restraint. *Id.* Justice Marshall wrote separately to pose the question whether the Court had jurisdiction to protect information classified as “secret” or “top secret” by the executive. *Id.* at 741.

78 320 U.S. 81, 83-84 (1943).

79 *Id.* at 93. But see Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (apologizing and making reparations “on behalf of the people of the United States [for] the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II”).

80 See, e.g., *Hirabayashi*, 320 U.S. at 93 (“[T]he Constitution...has necessarily given [the Executive] wide scope....”); *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (“[The President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.”). In *Quirin*, the German-born (and, with one disputed exception, German-citizen) petitioners had landed in 1942 on the U.S. East Coast in German submarines wearing German military uniforms and bearing explosives. *Id.* at 20-21. After they were apprehended, the President appointed a special military commission to try them. *Id.* at 22-23. The petitioners applied for leave to file for habeas corpus, alleging that the President lacked authority to appoint the military commission. *Id.* at 24. The Court found that the President was acting under authority granted by Article II and by Congress's Articles of War. *Id.* at 28.

81 See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) (“[The] Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them.”). For a discussion of *Hamdi*, see *infra* Part IV.B.

82 494 F.2d 593, 596-97 (3d Cir. 1974) (en banc).

83 *Id.* at 605-06.

84 *Id.* at 608.

85 629 F.2d 908 (4th Cir. 1980).

86 *Id.* at 911.

87 *Id.* at 912.

88 *Id.* at 914 (internal citations omitted). But see *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc plurality opinion) (holding unconstitutional the attorney general's surveillance of a domestic organization without a court-ordered warrant, even where the President ordered it in the name of national security). For a discussion of the facts of *Zweibon*, see *infra* Part III.

- 89 Both Butenko and Truong concerned surveillance that took place before the Foreign Intelligence Surveillance Act of 1978, [Pub. L. No. 95-511](#), [92 Stat. 1783](#), took effect.
- 90 For an analysis of whether the President retains power to conduct wiretapping outside of the scope of FISA regulation, see *infra* Part V.
- 91 [U.S. Const. art. II, §1, cl. 6](#).
- 92 [United States v. U.S. Dist. Court \(Keith\)](#), [407 U.S. 297](#), [310 \(1972\)](#). For a discussion of the facts of *Keith*, see *infra* Part III.
- 93 See [Katz v. United States](#), [369 F.2d 130](#), [131-32 \(9th Cir. 1966\)](#) (describing the circumstances surrounding Katz's surveillance and arrest for interstate transmission of gambling information), *rev'd*, [389 U.S. 347 \(1967\)](#).
- 94 *Id.* at 132.
- 95 *Id.* at 131.
- 96 *Id.*
- 97 *Id.* at 133.
- 98 Though many of the individual freedoms protected in the Bill of Rights were responses to what the Framers saw as historical government oppression of the colonies, the Fourth Amendment warrant requirement is particularly rooted in British abuses: The British general warrant was a search tool employed without limitation on location, and without any necessity to precisely describe the object or person sought. British authorities were simply given license to “break into any shop or place suspected” wherever they chose....General warrants executed during the reign of Charles I sought to intimidate dissidents, authors, and printers of seditious material by ransacking homes and seizing personal papers....
In the colonies, complaints that royal officials were violating the privacy of colonists through the use of writs of assistance, equivalent to general warrants, grew. Because English law did not, as yet, recognize a right of personal privacy, the crown's abuses in the colonies were not remediable at law.
William C. Banks & M.E. Bowman, [Executive Authority for National Security Surveillance](#), [50 Am. U. L. Rev. 1](#), 2-3 (2000) (citations omitted).
- 99 [U.S. Const. amend. IV](#); see [Katz v. United States](#), [389 U.S. 347](#), [353 \(1967\)](#) (“[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements....”).
- 100 See [Berger v. New York](#), [388 U.S. 41](#), [50 \(1967\)](#) (declaring a New York eavesdropping statute unconstitutional because it did not meet the probable-cause and particularity requirements of the Fourth Amendment). The *Berger* petitioner was convicted as a go-between for principal conspirators in a scheme to bribe a liquor licensing official based on evidence gathered through electronic surveillance pursuant to a New York permissive statute. *Id.* at 43-45. But see [United States v. Koyomejian](#), [946 F.2d 1450](#), [1455 \(9th Cir. 1991\)](#) (noting that the constitutional requirements outlined in *Berger* are ordinarily outshined by since-enacted statutory requirements). In *Koyomejian*, a case concerning the surveillance of defendants believed to be involved in drug-related money laundering, the Ninth Circuit faced the question of whether domestic video surveillance was permissible for criminal prosecution purposes. *Id.* at 1452.
- 101 Another possible exception exists. The “border search” exception, discussed in [United States v. Ramsey](#), [431 U.S. 606](#), [616 \(1977\)](#), and noted in [United States v. Montoya de Hernandez](#), [473 U.S. 531](#), [538 \(1985\)](#), allows for the warrantless searching of all international postal mail. Such an exception may apply to electronic communications which cross the “border” of the country as well. Posting of Orin Kerr to Volokh Conspiracy, [http:// volokh.com](http://volokh.com) (Dec. 19, 2005, 16:02 PST). However, there is little legal support for this argument beyond the speculative. In *Zweibon v. Mitchell*, the D.C. Circuit noted that the justification for the border search exception applies in only very limited circumstances:
[T]here are several crucial considerations which possibly justify the special treatment for border searches and which differentiate such searches from normal searches governed by the Fourth Amendment or the national security searches involved in this case. First and most important is the fact that a border search is conducted incident to conferral of the privilege of admittance to the country, and it is certain that the subject of the search is in fact receiving that benefit. In effect, a reasonable border search is “consented” to in order to obtain a benefit that is only to be accorded those who can show that they should gain admittance and who can demonstrate

that they are only transporting goods which can lawfully be brought into the country. Moreover, there is little danger of abuse of such searches. The whole class of those entering the country is treated fairly homogeneously, inspections take place at identifiable places, over-intrusive searches will be apparent to their subjects and may thus be challenged in court, and there is a minimal invasion of privacy since there is an expectation on the part of those entering that they and their possessions will in all probability be searched to at least some extent. Finally, unlike the national security searches involved in our case, there is no substantial likelihood that border searches will chill the exercise of First Amendment rights.

516 F.2d 594, 631 n.93 (D.C. Cir. 1975) (en banc plurality opinion) (internal citations omitted).

102 389 U.S. at 351-52.

103 *Id.* at 354-57. The Court stressed that the issue should be framed in terms of the person who is the subject of the surveillance, not the location of it:

The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given “area,” viewed in the abstract, is “constitutionally protected” deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52 (internal citations omitted) (emphasis added).

104 *Id.* at 358 n.23.

105 *Id.* at 364 (White, J., concurring).

106 A court would likely be even more reluctant to find a general national-security exception to the warrant requirement today than it would have been in the early seventies; after all, FISA was inspired in part “by Nixon’s abuse of surveillance powers under the guise of national security.” Solove, *supra* note 15, at 1277 (emphasis added).

107 407 U.S. 297, 301 (1972).

108 *Id.* at 299, 308-09, 309 n.8.

109 *Id.* at 299 (emphasis added).

110 *Id.* at 316-17 (internal citations omitted).

111 *Id.* at 308.

112 *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc) (internal citations omitted).

113 *Id.* at 606. But see *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (permitting surveillance where foreign-intelligence gathering was not the “sole” but “a significant” purpose).

114 629 F.2d 908 (4th Cir. 1980).

115 *Id.* at 913.

116 *Id.* at 913-14.

117 *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972).

118 *Truong*, 629 F.2d at 914.

119 *Id.* at 914 n.3 (“The statute will encourage the development of foreign intelligence expertise among these seven judges by empowering them to hear all foreign intelligence warrant requests.”).

- 120 See [id.](#) at 914 n.4 (distinguishing a maximum warrant requirement from the appropriate balancing of individual rights and foreign-intelligence realities in FISA, which went into effect between the events underlying *Truong* and the decision itself).
- 121 [516 F.2d 594, 605-06 \(D.C. Cir. 1975\)](#) (en banc plurality opinion).
- 122 [Id.](#) at 633.
- 123 [Id.](#) at 614.
- 124 [Id.](#) at 613.
- 125 See [id.](#) at 633-34 (“Though the investigative duty of the executive may be stronger in [national security] cases, so also is there greater jeopardy to constitutionally protected speech....History abundantly documents the tendency of Government--however benevolent and benign its motives--to view with suspicion those who most fervently dispute its policies.” (quoting [United States v. U.S. Dist. Court \(Keith\)](#), 407 U.S. 297, 313-14 (1972))). The court believed that even domestic political discussion could colorably fall under “foreign intelligence” and “national security” headings:
For example, even the quantity of domestic wheat production could be said to relate to foreign assistance to underdeveloped countries or to trade with such powers as the Soviet Union....The tendency has been to give the term “national security” an overly broad definition, and the whole point of Fourth Amendment protection in this area is to avoid such Executive abuses through prior judicial review. Moreover, the exception advocated by the Government and accepted by some courts is not limited to “national security” wiretapping in its traditional sense, but extends to any information which “affects” foreign affairs or which may be of use in formulating foreign policy decisions. Indeed, if the asserted Executive exception is based on the President’s plenary powers in the field of foreign affairs, it is difficult to see how any principled approach could distinguish his power to wiretap without a warrant... on the basis of the importance of the information as it relates to foreign affairs.
[Id.](#) at 636 n.108 (internal citations omitted).
- 126 [Id.](#) at 606 n.14 (citing [Alderman v. United States](#), 394 U.S. 165, 182 (1969)).
- 127 See [id.](#) at 638 n.113 (“[W]e see no reason why in camera inspection is any more opportune during post hoc review than it would be in a warrant proceeding.”).
- 128 [Id.](#) at 616.
- 129 [Id.](#) at 641-42 (quotations omitted). But cf. [Hamdi v. Rumsfeld](#), 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) (“This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”).
- 130 [Zweibon](#), 516 F.2d at 642-43.
- 131 [United States v. U.S. Dist. Court \(Keith\)](#), 407 U.S. 297, 320 (1972); cf. [United States ex rel. Knauff v. Shaughnessy](#), 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (“Security is like liberty in that many are the crimes committed in its name.”); Charles W. Yost, Op-Ed, Security Cloak Has a Way of Deceiving the Deceiver, *Balt. Sun*, Nov. 3, 1973, Opinion, at 17 (“In my thirty-five years in foreign affairs...the public disclosure of political measures or plans could [almost never] be truthfully said to jeopardize national security....[O]nce [politicians] slip into the national security psychosis, they easily begin to equate...the nation’s security with their own political power....”).
- 132 See, e.g., [United States v. Truong Ding Hung](#), 629 F.2d 908 (4th Cir. 1980); [United States v. Buck](#), 548 F.2d 871 (9th Cir. 1977); [United States v. Butenko](#), 494 F.2d 593 (3d Cir. 1974) (en banc); [United States v. Brown](#), 484 F.2d 418 (5th Cir. 1973).
- 133 [Butenko](#), 494 F.2d at 603. The court explicitly agreed that the Fourth Amendment warrant requirement did apply to some degree: [T]he Fourth Amendment is also applicable where, as here, the President is acting pursuant to his foreign affairs duties even though the object of the surveillance is not a domestic political organization. Our differences with [the dissenting opinion arguing for an ordinary application of the warrant requirement] center on the necessity for prior judicial authorization under the circumstances of this case.
[Id.](#)

- 134 See *S. Rep. No. 95-604, pt. 1, at 15 (1977)*, as reprinted in 1977 U.S.C.C.A.N. 3904, 3916 (“[A]fter almost 50 years of case law dealing with the subject of warrantless electronic surveillance, and despite the practice of warrantless foreign intelligence surveillance sanctioned and engaged in by nine administrations, constitutional limits on the President's powers to order such surveillances remains [sic] an open question.”). Though the Foreign Intelligence Surveillance Act sought to address those limits statutorily, the Constitution's words on the issue have remained unchanged since.
- 135 Keith, 407 U.S. at 315.
- 136 Alfred E. Lewis, 5 Held in Plot to Bug Democrats' Office Here, Wash. Post, June 18, 1972, at A01.
- 137 Bob Woodward & Carl Bernstein, GOP Security Aide Among Five Arrested in Bugging Affair, Wash. Post, June 19, 1972, at A01.
- 138 Carl Bernstein & Bob Woodward, Bug Suspect Got Campaign Funds, Wash. Post, Aug. 1, 1972, at A01.
- 139 Carl Bernstein & Bob Woodward, FBI Finds Nixon Aides Sabotaged Democrats, Wash. Post, Oct. 10, 1972, at A01.
- 140 *United States v. Barker*, 514 F.2d 208, 211 (D.C. Cir. 1975) (“[A]ppellants now claim that...they sincerely, though erroneously, believed [they were] authorized by a ‘government intelligence agency,’ to examine alleged financial ties between the Democratic Party and the Castro regime in Cuba...”).
- 141 The investigations mirrored each other because the Post's principal investigative reporters on the case, Bob Woodward and Carl Bernstein, were receiving inside information from “Deep Throat,” who was revealed more than three decades later as FBI Associate Director W. Mark Felt. See David von Drehle, FBI's No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of the Post's Watergate Source, Wash. Post, June 1, 2005, at A01.
- 142 President Nixon had his own Oval Office conversations bugged in an effort “to record things for posterity, for the Nixon library” according to former White House aide Alexander P. Butterfield. Lawrence Meyer, President Taped Talks, Phone Calls: Lawyer Ties Ehrlichman to Payments; Principal Offices Secretly Bugged Since Spring 1971, Wash. Post, July 17, 1973, at A01. Many of these tapes were ultimately used against the President in the trial arising out of the Watergate affair. See *United States v. Nixon*, 418 U.S. 683 (1974) (ruling that the President did not have absolute immunity from prosecution and affirming the denial of a motion to quash a subpoena for Oval Office tapes in an 8-0 decision (William Rehnquist, then the most junior associate Justice, abstained because of his former position in the Justice Department and relationship with the underlying trial's named defendant, Attorney General John N. Mitchell)). In the “smoking gun” tape, used as the prosecution's Exhibit 1, President Nixon and Chief of Staff Bob Haldeman discussed a plan to have the CIA convince the FBI that their investigation was dredging up sensitive issues involving national security: When you get in these people when you...get these people in, say: “Look, the problem is that this will open the whole, the whole Bay of Pigs thing, and the President just feels that” ah, without going into the details...don't, don't lie to them to the extent to say there is no involvement, but just say this is sort of a comedy of errors, bizarre, without getting into it, “the President believes that it is going to open the whole Bay of Pigs thing up again. And ah, because these people are plugging for, for keeps and that they should call the FBI in and say that we wish for the country, don't go any further into this case”, period!
Transcript of a Recording of a Meeting Between the President and H.R. Haldeman in the Oval Office on June 23, 1972 from 10:04 to 11:39 a.m., *United States v. Mitchell*, 397 F. Supp. 191, Crim. No. 74-110 (D.D.C. 1975) (words of President Nixon).
- 143 David Frost Interviews Richard Nixon (television broadcast May 19, 1977). Nevertheless, Presidents can and are held to objective legal standards:
[Political leaders] are likely to treat all moral criticism as an illegitimate displacement of political controversy....Legal accusation can be a very powerful form of political attack, but though it is often used in that way, and often degraded in the use, it remains true nevertheless that political leaders are bound by the legal code and can rightly be charged and punished for criminal acts.
Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 291 (3d ed. 2000); cf. *Nixon*, 418 U.S. at 715 (“[A] President is [not in any sense] above the law.”).
- 144 Congress was wary of several examples of executive abuses of political eavesdropping under the guise of national security:

(1) Installation in 1969 of warrantless wiretaps on 13 Government officials and four newsmen, purportedly because they were leaking or publishing sensitive foreign intelligence information. Two of these wiretaps were even continued after their subjects had left Government service and had begun working on Senator Muskie's presidential campaign[;]

(2) White House authorization in 1969 of a burglary of the home of newspaper columnist Joseph Kraft for installation of an alleged national security wiretap[;]

(3) Invocation of national security in inducing the CIA to assist in the burglary of Daniel Ellsberg's psychiatrist's offices[;]

(4) The 1970 drafting by the White House of a plan to engage in massive warrantless wiretapping and burglary which, although approved on national security grounds, was scrapped after objections from FBI Director Hoover[; and]

(5) Surveillance by the Kennedy Administration of Dr. Martin Luther King, Jr. and other civil rights activists who were suspected of being Communist sympathizers or dupes.

[Zweibon v. Mitchell](#), 516 F.2d 594, 635-36 n.107 (D.C. Cir. 1975) (en banc plurality opinion) (internal citations omitted). The Church Committee, the Senate committee formed to look into such abuses, noted rampant nefarious historical examples:

Since the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of a judicial warrant....[P]ast subjects of these surveillances have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to national security, such as two White House reporters and an anti-Vietnam War protest group.

[S. Rep. No. 95-604](#), *supra* note 134, at 12.

145 See, e.g., [S. Rep. No. 94-755](#), bk. II (1976) (investigating the effects of government intelligence activities on the rights of Americans); see also Comm'n on CIA Activities within the U.S., Report to the President 3-5 (1975) (assessing CIA activities in light of “the [Commission] members' deep concern for both individual rights and national security”). For a discussion of the historical context of these investigations, see [Banks & Bowman](#), *supra* note 98, at 32-35.

146 [Pub. L. No. 95-511](#), 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§1801-1871 (2000 & Supp. IV 2004), amended by USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, [Pub. L. No. 109-178](#), §§3-4, 120 Stat. 278, 278-81 and USA PATRIOT Improvement and Reauthorization Act of 2005, [Pub. L. No. 109-177](#), §§105-106, 108-109, 128, 506, 120 Stat. 192, 195-200, 203-05, 228-29, 247-48 (2006)). Senator Patrick Leahy observed the connection between the executive abuses of the seventies and the passage of FISA:

FISA was originally enacted in the 1970s to curb widespread abuses by Presidents and former FBI officials of bugging and wiretapping Americans without any judicial warrant--based on the Executive Branch's unilateral determination that national security justified the surveillance. The targets of those wiretaps included a Member and staff of the United States Congress, White House domestic affairs advisors, journalists and many individuals and organizations engaged in no criminal activity but, like Dr. Martin Luther King, who expressed political views threatening to those in power.

The USA PATRIOT Act in Practice: Shedding Light on the FISA Process; Hearing Before the S. Comm. on the Judiciary, 107th Cong. (2002) (statement of Sen. Patrick Leahy). For a more in-depth treatment of the historical background for the Act, see generally [Americo R. Cinquegrana](#), [The Walls \(and Wires\) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978](#), 137 U. Pa. L. Rev. 793 (1989).

147 See [The Foreign Intelligence Surveillance Act of 1978: Statement on Signing S. 1566 into Law](#), 2 Pub. Papers 1853, 1853 (Oct. 25, 1978) (“[O]ne of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other.” (quoting Foreign Intelligence Surveillance: Remarks of the President, Attorney General Bell, and Several Members of Congress on Proposed Legislation, 2 Pub. Papers 921, 921 (May 18, 1977))). President James E. Carter added of FISA, “This is a difficult balance to strike, but the act I am signing today strikes it.” *Id.*; see also [S. Rep. No. 95-604](#), *supra* note 134, at 16 (“The bill provides external and internal checks on the executive.”). See generally [Ira S. Shapiro](#), [The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment](#), 15 Harv. J. on Legis. 119 (1978) (concluding that the Act is an appropriate balance of constitutional interests).

148 18 U.S.C. §2511(2)(f) (2000 & Supp. II 2002) (emphasis added).

- 149 See Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Sen. Patrick Leahy, Ranking Member, S. Judiciary Comm.) (“On July 31, 2002, the Justice Department testified that [FISA] ‘is a highly flexible statute that has proven effective’ and noted: ‘When you are trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind.’”).
- 150 50 U.S.C. §1809 (2000).
- 151 See, e.g., Charles Lane, White House Elaborates on Authority for Eavesdropping, *Wash. Post*, Dec. 20, 2005, at A10 (noting that the President is arguing that he has inherent authority and that the authority was supplemented by congressional resolution, but not denying that he intentionally authorized the surveillance); Eric Lichtblau & James Risen, Legal Rationale by Justice Dept. on Spying Effort, *N.Y. Times*, Jan. 20, 2006, at A1 (reporting a Justice Department white paper that makes similar arguments); Gonzales & Hayden, *supra* note 43 (“[FISA] requires a court order before engaging in this kind of surveillance that I’ve just discussed and the President announced on Saturday, unless there is somehow--there is--unless otherwise authorized by statute or by Congress. That’s what the law requires.” (statement of Attorney General Gonzales)).
- 152 The technical aspects of the program are still hazy. See *supra* Part I. However, the definition from the Act is sufficiently broad to cover the common definition of electronic surveillance to which the administration has admitted, especially the general second definition: “Electronic surveillance” means --
....
(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States....
50 U.S.C. §1801 (2000 & Supp. I 2001), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, *Pub. L. No. 109-177*, § 506(a)(5), 120 Stat. 192, 248 (2006). Administration officials have been willing to assume *arguendo* that the activities do constitute “electronic surveillance” within the meaning of FISA. See, e.g., Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Attorney General Gonzales) (“Because I cannot discuss operational details, for purposes of this discussion, I will assume that intercepts of international al Qaeda communications under the terrorist surveillance program fall within the definition of ‘electronic surveillance’ in FISA.”); cf. Memorandum of the Constitution Project and the Center for National Security Studies in Response to U.S. Department of Justice’s Defense of Warrantless Electronic Surveillance at 6, *In re Warrantless Electronic Surveillance* (FISA Ct. Feb. 28, 2006) (no docket number because the amicus memo was filed generally, not in response to a particular case) [hereinafter Constitution Project Memorandum] (“[T]he seminal fact necessary for [the determination that the surveillance in unlawful] is not meaningfully in dispute: the President has authorized “electronic surveillance” as defined by FISA without seeking or obtaining the warrants that FISA requires.”).
- 153 Black’s Law Dictionary 282 (8th ed. 2004). FISA does not provide a statutory definition of “color of law.” Cases dealing with 42 U.S.C. §1983 have determined that that statute’s “color of law” language requires merely a Fourteenth Amendment state action. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (“The ultimate issue in determining whether [an action is ‘under color of law’] is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights ‘fairly attributable to the State?’” (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982))); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (“In cases under §1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment.”). By this standard, it is clear that surveillance by the National Security Agency on behalf of the President takes place “under color of law.”
- 154 See, e.g., Schmitt & Curtius, *supra* note 32 (reporting Bush’s justification for his actions).
- 155 50 U.S.C. §1809 (2000).
- 156 *Id.* §1805 (2000 & Supp. IV 2004) (allowing the attorney general to authorize emergency wiretapping so long as a FISA court order is sought and obtained within seventy-two hours) (see *infra* Conclusion); *id.* §1811 (allowing the President to authorize warrantless wiretapping for the first fifteen days after a congressional declaration of war) (see *infra* notes 164-65 and accompanying text).
- 157 *Id.* §1802 (2000 & Supp. IV 2004).

- 158 Id. §1801 (2000 & Supp. I 2001), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, [Pub. L. No. 109-177, § 506\(a\)\(5\)](#), 120 Stat. 192, 248 (2006).
- 159 Id.
- 160 Id. §1802 (2000 & Supp. IV 2004).
- 161 Id. §1801 (2000 & Supp. I 2001).
- 162 Risen & Lichtblau, *supra* note 15; Risen & Lichtblau, *supra* note 48.
- 163 See, e.g., Risen & Lichtblau, *supra* note 15 (noting that the program “helped uncover a plot by Iyman Faris, an Ohio trucker and naturalized citizen,” presumably by targeting his phone conversations).
- 164 [50 U.S.C. §1811 \(2000\)](#).
- 165 In a letter to leaders of Congress responding to a Department of Justice white paper making the case for the program, U.S. Dep’t of Justice, *Legal Authority Supporting the Activities of the National Security Agency Described by the President 2* (2006), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>, fourteen distinguished professors analogously argued that [section 1811](#) of FISA should be read in counterpoint to the Authorization for Use of Military Force against terrorists: “Since Congress specifically provided that even a declaration of war—a more formal step than an authorization to use military force—would authorize only fifteen days of warrantless surveillance, one cannot reasonably conclude that the AUMF provides the President with unlimited and indefinite warrantless wiretapping authority.” Letter from Curtis A. Bradley, Professor of Law, Duke Univ., et al. to Bill Frist, Majority Leader, U.S. Senate, et al. (Feb. 2, 2006), available at <http://balkin.blogspot.com/FISA.AUMF.ReplytoDOJ.pdf> [hereinafter *Professors' Letter*].
- 166 [Pub. L. No. 107-40, 115 Stat. 224 \(2001\)](#).
- 167 Id.
- 168 See David Johnston & Linda Greenhouse, ‘01 Resolution Is Central to ‘05 Controversy, *N.Y. Times*, Dec. 20, 2005, at A25 (“President Bush cited the resolution...on Monday at his news conference. So did Attorney General Alberto R. Gonzales, who in a session with reporters said the Congressional measure...gave the government the power ‘to engage in this kind of signals intelligence.’”); U.S. Dep’t of Justice, *supra* note 165 (“The AUMF places the President at the zenith of his powers in authorizing the NSA activities.”).
- 169 [542 U.S. 507 \(2004\)](#).
- 170 See generally [147 Cong. Rec. S9416-21, H5632-83](#) (daily ed. Sept. 14, 2001) (debating the indeterminate language of the joint resolution yet generally supporting its passage as a show of unity). Some have argued that the broad language was more significant than a mere demonstration of a lack of certainty. See, e.g., Letter from William E. Moschella, Assistant Attorney General, to Pat Roberts, Chairman, Sen. Select Comm. on Intelligence, et al. (Dec. 22, 2005), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv34.pdf> (“The AUMF cannot be read as limited to authorizing the use of force against Afghanistan....Indeed, those who directly ‘committed’ the attacks of September 11 resided in the United States for months before those attacks.”). Whether or not Congress intended to limit the authorization to international warfare, it certainly did not intend it to include permission for surveillance actions that overrode FISA and so profoundly affected the rights of Americans without more specific statutory authorization. See *infra* notes 172-74 and surrounding text.
- 171 [Hamdi, 542 U.S. at 519](#).
- 172 “Power, violence, or pressure directed against a person or thing.” *Black’s Law Dictionary* 673 (8th ed. 2004). Webster’s offers a more in-depth examination of the many senses of the word, but none appear to apply to surveillance:
[S]trength or energy exerted or brought to bear: cause of motion or change: active power...military strength...a body (as of troops or ships) assigned to a military purpose...a body of persons or things available for a particular end...an individual or group having the power of effective action...violence, compulsion, or constraint exerted upon or against a person or thing....

Force, in Merriam-Webster's Collegiate Dictionary 489 (11th ed. 2004).

- 173 Justice Clarence Thomas, in his Hamdi dissent, was persuaded by the administration's argument that intelligence was linked with detention: “[D]etention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism.” *Hamdi*, 542 U.S. at 595 (Thomas, J., dissenting) (citing Brief for the Respondents in Opposition at 15, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)). The plurality Justices did not address intelligence gathering as a force or purpose of force.
- 174 The first Republican on either chamber's judiciary committee to call for an inquiry into the constitutionality and legality of the program was Rep. Heather Wilson of New Mexico. Sheryl Gay Stolberg, Republican Speaks Up, Leading Others to Challenge Wiretaps, N.Y. Times, Feb. 11, 2006, at A1. Republican Senators Olympia Snowe and Chuck Hagel also expressed concern about the program. Charles Babington, White House Working to Avoid Wiretap Probe, but Some Republicans Say Bush Must Be More Open About Eavesdropping Program, Wash. Post, Feb. 20, 2006, at A08. Pat Roberts, Republican chairman of the Senate Intelligence Committee, declared that he would prefer the surveillance be brought under FISA Court authority. Sheryl Gay Stolberg with Elisabeth Bumiller, Senate Chairman Splits with Bush on Spy Program, N.Y. Times, Feb. 17, 2006, at A1. Senator Roberts, however, also argued that a legislative change would eliminate the need for an inquiry. Editorial, Doing the President's Dirty Work, N.Y. Times, Feb. 17, 2006, at A22. But cf. Maura Reynolds, Consensus Grows for Curbs on Surveillance: A Senate Panel Goes behind Closed Doors to Hear More About Bush's Program of Warrantless Eavesdropping, L.A. Times, Feb. 10, 2006, at A26 (“[Senator Russell] Feingold said such legislation would not remove the need to hold the administration accountable for any improprieties already committed. ‘You can't fix illegality after the fact,’ Feingold said.”). On February 26, 2006, eighteen House Democrats wrote to President Bush to urge him to direct the Attorney General to appoint a special counsel to investigate the impropriety of the program. Letter from Zoe Lofgren et al. to the President (Feb. 26, 2006), reprinted in Press Release, Members of Congress Call for Special Counsel Investigation into NSA Domestic Spying After Being Refused by Government Agencies (Feb. 27, 2006), available at http://www.house.gov/apps/list/press/ca16_lofgren/022706_Lofgren_Special_Counsel_letter.html. Compare 152 Cong. Rec. S1457-58 (daily ed. Feb. 17, 2006) (statement of Sen. Byrd) (“[The administration's] arguments are transparently contrived, intellectually deficient, indefensible excuses being served up like tripe to silence legitimate criticism of the White House, a White House so infused with its own hubris that it has talked itself into believing that its inhabitants are above the law.”), and 152 Cong. Rec. H63 (daily ed. Feb. 1, 2006) (statement of Rep. Scott of Virginia) (“A review of wiretaps...is appropriate, the roving wiretaps and...the President's new NSA policy which many legal scholars believe are just illegal. Those are spying on domestic law-abiding citizens. If there is probable cause that someone is breaking the law, obviously a criminal warrant could be given.”), with 152 Cong. Rec. H335-36 (daily ed. Feb. 16, 2006) (statement of Rep. Foxx of North Carolina) (“I don't know about you, but I want to use all the tools in our arsenal to catch the terrorists and prevent another 9/11.”), 152 Cong. Rec. H227 (daily ed. Feb. 14, 2006) (statement of Rep. Miller of Michigan) (“I do not care one iota about protecting the privacy of terrorists who have been sent to this country to murder innocent Americans.”), 152 Cong. Rec. S877-79 (daily ed. Feb. 9, 2006) (statement of Sen. Sessions) (“It is time for us to realize that we are in a war...Our military and our intelligence agencies have been charged by us--indeed, they have been criticized by us for not being effective enough in this effort.”), and 152 Cong. Rec. S783-84 (daily ed. Feb. 8, 2006) (statement of Sen. McConnell) (“To combat this deadly threat, the President has rightly--rightly--asserted his constitutional authority to use every tool at his disposal to fight the war on terror. One of those tools is the NSA's terrorist surveillance program.”).
- 175 Adam Nagourney, Seeking Edge in Spy Debate, N.Y. Times, Jan. 23, 2006, at A1; see also Senate Judiciary Surveillance Hearing, supra note 49 (statement of Sen. Patrick Leahy, Ranking Member, S. Judiciary Comm.) (“[The AUMF] did not authorize domestic surveillance of United States citizens without a warrant from a judge. Nothing in the Authorization for the Use of Military Force was intended secretly to undermine the liberties and rights of Americans....”).
- 176 Johnston & Greenhouse, supra note 168; cf. 152 Cong. Rec. S2013 (daily ed. Mar. 13, 2006) (statement of Sen. Feingold) (“Members of Congress did not pass this resolution to give the President blanket authority to order warrantless wiretaps....Anyone in this body who tells you otherwise either was not there at the time or isn't telling the truth. We authorized the President to use military force in Afghanistan....”).
- 177 *United States v. Fausto*, 484 U.S. 439, 452-53 (1988) (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456-57 (1945)).

- 178 Pa. R.R. Co., 324 U.S. at 457 (citing [United States v. Borden Co.](#), 308 U.S. 188, 198 (1939)); cf. [Lockhart v. United States](#), 126 S. Ct. 699, 703-04 (2005) (Scalia, J., concurring) (noting that the Court has an “already-powerful presumption against implied repeals”).
- 179 [Borden](#), 308 U.S. at 198 (quoting [Red Rock v. Henry](#), 106 U.S. 596, 602 (1883)).
- 180 [United States v. Estate of Romani](#), 523 U.S. 517, 530 (1998); cf. Memorandum from David Kris 3-4 (Jan. 25, 2006), available at <http://balkin.blogspot.com/kris.fisa.pdf> (arguing that the AUMF must not be construed as an authorization for a program that violates FISA, and suggesting that the AUMF may not even count as a “statute” that can “authorize” surveillance outside the purview of FISA because it does not explicitly repeal FISA provisions, by noting that construing FISA as a whole, “the penalty provision’s reference to surveillance ‘authorized by statute’ is best read to incorporate another statute only if it is listed in the exclusivity provision (or...if it effects an implicit repeal or amendment of that provision)”). This reading of FISA would preclude authorization through the AUMF even if surveillance was read into its scope.
- 181 542 U.S. 507 (2004) (plurality opinion).
- 182 *Id.* at 510.
- 183 *Id.* at 516-17. *Hamdi* has been interpreted as both an assertion of the judiciary’s power to review wartime executive decisions and an example of judicial deference thereto. See Nicholas G. Green, Note, [A “Blank Check”: Judicial Review and the War Powers in Hamdi v. Rumsfeld](#), 56 S.C. L. Rev. 581, 581, 581 nn.6 & 7, 599-605 (2005) (“[T]he Court chose to defer to the President rather than exercise the judicial power it appeared to support.”). These differing interpretations may come as no surprise in light of the profound fragmentedness of the judgment, which featured four distinct opinions, none of which were joined by five of the nine justices. Justice Thomas, dissenting as to the judgment because of a disagreement over the rigor with which the judiciary was permitted to review wartime executive decisions, sided with the four justices joined on the plurality opinion (Justice O’Connor, Chief Justice Rehnquist, and Justices Anthony Kennedy and Stephen Breyer) in determining that *Hamdi*’s detention was within the scope of the AUMF. [Hamdi](#), 542 U.S. at 584 (Thomas, J., dissenting). Justice David Souter, joined by Justice Ruth Bader Ginsburg, wrote separately to argue that, while the Court did have judicial review power, the AUMF did not confer authority for the detention. *Id.* at 540-41 (Souter, J., dissenting). Justice Antonin Scalia, in rare opposition to Justice Thomas, penned a dissent joined by Justice John Paul Stevens contending that, beyond Justice Souter’s view, Congress could not confer authority for enemy-combatant detention of an American citizen unless it specifically suspended habeas corpus according to the Suspension Clause of [Article I, Section 9](#), which it had not. *Id.* at 554 (Scalia, J., dissenting).
- 184 [Hamdi](#), 542 U.S. at 518 (plurality opinion).
- 185 *Id.* (quoting [Ex parte Quirin](#), 317 U.S. 1, 28 (1942)).
- 186 *Id.* at 519. But see *id.* at 536 (“[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”); cf. H.W.R. Wade, *Administrative Law* 285 (2d ed. 1967) (“It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.”).
- 187 [Hamdi](#), 542 U.S. at 523.
- 188 See, e.g., U.S. Dep’t of Justice, *supra* note 165, at 14 (“Warrantless intelligence surveillance against the enemy is a fundamental incident of the use of military force....”).
- 189 *Id.*
- 190 92 U.S. 105, 106 (1876); cf. [Tenet v. Doe](#), 544 U.S. 1, 5 (2005) (affirming the Totten rule “prohibiting suits against the Government based on covert espionage agreements” as applied to Cold War spies as well).
- 191 See, e.g., Faye Bowers and Jonathan S. Landay, *Terrorist Threat Spurs New Debate on ‘Human’ Spies*, *Christian Sci. Monitor* (Boston), Aug. 2, 1996, at 1 (linking the capture of Ramzi Yousef to human informants and discussing the necessity of actual spies above and beyond high-tech methods); Rafael Lorente, *Budget Hike Will Spread Spy Net: U.S. Must Catch up*, *Graham Says*, *Sun-Sentinel* (Fort Lauderdale, Fla.), Dec. 6, 2001, at 10A (highlighting increased funding for spies as the aim of a new congressional

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intelligence-budget bill); Warren P. Strobel, *Decision Comes at Bad Time for Bush*, Agency, Detroit Free Press, June 4, 2004, at 9A (“Within the CIA, officials said, more must be done to create a cadre of highly trained human spies who can crack terrorist cells or weapons-smuggling rings.”). As fictional White House press secretary C.J. Cregg put it,

We need spies--human spies. Spy satellites are great if you're trying to detect whether or not Krushev's put missiles in Cuba, but if you want to overhear a conversation over Turkish coffee in Khyber Pass, you need a spy. You guys want to get a great job after college and serve your country? Study Arabic, Chinese, and Farsi.

The West Wing: Isaac and Ishmael (NBC television broadcast Oct. 3, 2001).

192 Solove, *supra* note 15, at 1269. Wiretapping is additionally problematic because it invades the privacy of not only its target, but also all those who have phone conversations with him or her. See *id.* (“As Justice Douglas observed, wiretapping can become ‘a dragnet, sweeping in all conversations within its scope.’” (quoting *Berger v. New York*, 388 U.S. 41, 65 (1967) (Douglas, J., concurring))).

193 See U.S. Dep't of Justice, *supra* note 165, at 16-17 (noting uses of warrantless surveillance in the Civil War, the Spanish-American War, and both World Wars). The administration points specifically to an example of President Franklin Roosevelt authorizing surveillance arguably in violation of statute. See Gonzales Letter, *supra* note 41 (“President Roosevelt authorized this activity notwithstanding the language of 47 U.S.C. §605,...which, at the time, provided that ‘no person not being authorized by the sender shall intercept any communication and divulge or publish [it].’” (citing Federal Communications Act of 1934, 47 U.S.C. §605 (2000))). Indeed, the authorization came on the heels of a Supreme Court decision applying the provision to the activities of government officials. See *Nardone v. United States*, 302 U.S. 379, 383-84 (1937) (“[W]e think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.”). The May 1940 memorandum to Attorney General Robert H. Jackson concerning the need for wiretapping was mindful of the statute and *Nardone* decision: I have agreed with the broad purpose of the Supreme Court decision relating to wiretapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and it is also right in its opinion that under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights. However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

....

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

Confidential Memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson (May 21, 1941), reprinted in *S. Rep. No. 94-755*, bk. III, at 279 (1976). The Attorney General justified the discrepancy by applying the text of the statute to the administration's actions: “The only offense under the present law is to intercept any communication and divulge or publish the same...Any person, with no risk of penalty, may tap telephone wires...and act upon what he hears or make any use of it that does not involve divulging or publication.” *S. Rep. No. 94-755*, bk. III, at 280 (1976) (quoting Letter from Attorney General Robert H. Jackson to Rep. Hatton Summers (Mar. 19, 1941) (emphasis in *S. Rep.*)). Congress and the courts acquiesced to this reading of [section 605](#): The import of these two statements was undoubtedly clear to the members of the House Judiciary Committee to whom they were addressed. The FBI would use wiretaps in the investigation of espionage and sabotage, despite the Federal Communications Act, since the results of the wiretaps would not be “divulged” outside the government. Legislation was needed only in order to use wiretap-obtained evidence or the fruits thereof in criminal prosecutions; a new statute was not necessary if the purpose of wiretapping was to gather intelligence that would not be used in court.

Id. After 1978 and until President Bush's NSA program, however, no President authorized warrantless surveillance in contradiction of FISA. See Gonzales Letter, *supra* note 41 (“If the question is limited to ‘electronic surveillance’ as defined by FISA,...we are unaware of any such authorizations.”).

194 *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

- 195 Id.
- 196 Id. at 517-18.
- 197 Tom Daschle, Op-Ed., *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005, at A21.
- 198 The resolution was passed by both chambers of Congress the Friday following the 9/11 attacks, a day the President declared a “National Day of Prayer and Remembrance.” Debates occurred deep in the shadow of that tragedy and tribute. See 147 Cong. Rec. S9411 (daily ed. Sept. 14, 2001) (statement of Sen. Daschle) (“I also remind Senators that there is a memorial service at the National Cathedral at noon....[W]e will be boarding [buses] a little later than [10 o'clock] to accommodate whatever other considerations there will be this morning.”); Remarks at the National Day of Prayer and Remembrance Service, 2 Pub. Papers 1108 (Sept. 14, 2001) (eulogizing the victims of the attacks at the National Cathedral).
- 199 Daschle, *supra* note 197.
- 200 Id.; see also Barton Gellman, *Daschle: Congress Denied Bush War Powers in U.S.*, Wash. Post, Dec. 23, 2005, at A04 (“[The disclosure] suggests that Congress refused explicitly to grant authority that the Bush administration now asserts is implicit in the resolution.”). The proposed language would have changed the wording of the resolution to authorize the “use [of] all necessary and appropriate force in the United States and against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001....” Id. Senator Carl Levin elaborated on the nature of the change during floor debate on the resolution:
I believe it is also important to note that this authorization for the use of force is limited to the nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks.
This joint resolution is based upon and is an exercise of the Congress' constitutional war powers role as codified in the War Powers Resolution. It also expressly confirms the conditions on the exercise of Executive power under that resolution. In that regard, I want to note that the statement in the last “Whereas” clause relating to the constitutional authority of the President to take action to deter and prevent acts of international terrorism against the United States is to be read in conjunction with the War Powers Resolution. That is why words in earlier drafts of this joint resolution, which might have been interpreted to grant a broader authority to use military force, were deleted and that is why the references to the War Powers Resolution were added. It does not recognize any greater presidential authority than is recognized by the War Powers Resolution nor does it grant any new authority to the President.
147 Cong. Rec. S9416 (daily ed. Sept. 14, 2001) (statement of Sen. Levin) (emphasis added).
- 201 Gellman, *supra* note 200.
- 202 See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (“[I]t is of no moment that the AUMF does not use specific language of detention.”); *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“[F]ailure of Congress specifically to delegate authority does not, especially...in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.” (internal quotations omitted)).
- 203 *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring); see also *id.* at 586 (majority opinion) (finding no statutory authority granted for President Truman's wartime actions where a congressional committee explicitly rejected a proposal to grant such authority); *id.* at 599-601 (Frankfurter, J., concurring) (“The Senate Labor Committee, through its Chairman, explicitly reported to the Senate that a general grant of seizure powers had been considered and rejected in favor of reliance on ad hoc legislation....Congress chose not to lodge this power in the President.”); *id.* at 663 (Black, J., concurring) (reasoning that the rejection demonstrated congressional intent to withhold authority); cf. *Dames & Moore*, 453 U.S. at 678-79 (“[T]he enactment of legislation closely related to the question of the President's authority...which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility. At least this is so where there is no contrary indication of legislative intent....” (internal quotations omitted) (emphasis added)).
- 204 Gonzales & Hayden, *supra* note 43 (statement of Attorney General Gonzales).

- 205 Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 19, *Ctr. for Constitutional Rights v. Bush*, No. 06-cv-313 (S.D.N.Y. Mar. 9, 2006).
- 206 USA PATRIOT ACT, *supra* note 27. The Act was signed into law on Oct. 26, 2001.
- 207 Pub. L. No. 107-108, 115 Stat. 1394 (2002).
- 208 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations and quotation marks omitted).
- 209 E.g., Intelligence Authorization Act for Fiscal Year 2002 §314 (amending several provisions of FISA to extend the emergency post-hoc authorization period to seventy-two hours from twenty-four and rearrange subsections); USA PATRIOT Act §206 (providing authority for “roving surveillance” by amending 50 U.S.C. §1805(c)(2)(B)); *id.* §207 (extending the allowed duration of surveillance of non-United States persons by amending several FISA provisions); *id.* §208 (increasing the number of district court judges participating in FISA courts by amending 50 U.S.C. §1803(a)); *id.* §214 (widening scope of pen-register and tap-and-trace authority under 50 U.S.C. §§ 1842-1843); *id.* §215 (striking 50 U.S.C. §§1861-1863 to alter the protocol for access to records); *id.* §218 (requiring that the obtaining of foreign intelligence information be only “a significant purpose” rather than “the purpose” of surveillance under 50 U.S.C. §1804(a)(7)(B) and §1823(a)(7)(B)); *id.* §225 (creating civil immunity for those conducting surveillance in compliance with FISA by amending 50 U.S.C. §1805); *id.* §504 (allowing coordination between eavesdroppers and other law enforcement officials by amending 50 U.S.C. §1806 and §1825); *id.* §1003 (amending the definition of “electronic surveillance” in 50 U.S.C. §1801(f)(2)). For a further exploration of the USA PATRIOT Act’s impact on FISA and the argument that its relaxing of FISA’s foreign-intelligence purpose standard violates the Fourth Amendment, see David Hardin, Note, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 *Geo. Wash. L. Rev.* 291, 294 (2003). See also Solove, *supra* note 15, at 1290 (“Previously, FISA applied only when ‘the purpose’ of the investigation was to gather foreign intelligence; the USA PATRIOT Act enlarged FISA’s scope to apply when foreign intelligence gathering was ‘a significant purpose’ of the investigation. This seemingly subtle change has potentially dramatic ramifications.”). This alteration “[tore] down the ‘wall’ that had largely separated foreign intelligence activities from the usual prosecution of domestic crimes.” Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 *Geo. Wash. L. Rev.* 1306, 1307 (2004). The change, however, relates to the purposes for which the government can wiretap, which is not at particular issue when discussing the NSA program that explicitly seeks foreign intelligence; the change leaves unaffected restrictions on whom wiretaps can target and with what authority.
- 210 Gonzales Letter, *supra* note 41.
- 211 See Risen & Lichtblau, *supra* note 15 (“President Bush did not ask Congress to include...the program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution...provided ample authorization, officials said.”).
- 212 Section 206 of the USA PATRIOT Act, entitled Roving Surveillance Authority Under the Foreign Intelligence Surveillance Act of 1978, directs the FISA court, if it finds “that the actions of the target of the application may have the effect of thwarting the identification of a specified person,” to include in its approval order a direction to “such other persons” to “furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance.” USA PATRIOT Act, *supra* note 27, at §206. These so-called roving wiretaps have been used in criminal investigations since 1986. Am. Civil Liberties Union, *How the Anti-Terrorism Bill Limits Judicial Oversight of Telephone and Internet Surveillance* (2001), <http://www.aclu.org/natsec/emergpowers/12484leg20011023.html>. They are directed at targets who may be attempting to conceal their identities by switching phones, and are meant to provide authority to “wiretap” a person rather than a specific phone line. *Id.*; see also Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 1987 *U. Ill. L. Rev.* 401, 409-11 (discussing the new developments in both technology and criminal behavior that allowed roving surveillance to emerge). They may mean “law enforcement agents can listen in on any phone the target might use because he is nearby. When the target of a roving wiretap order enters another person’s home, law enforcement agents can tap the homeowner’s telephone.” Am. Civil Liberties Union, *supra*. In amending FISA by enacting the USA PATRIOT Act, Congress meant to provide this authority, already in place for criminal investigations, to intelligence investigations as well. *Id.*

- 213 A pen register is a list of phone numbers dialed out from a telephone line or, more broadly, a list of destinations of communications outgoing from a particular site. Jerrold K. Footlick with Jon Lowell & Anthony Marro, *How to Get Your Man*, Newsweek, Dec. 1, 1975, at 113. Section 214 of the USA PATRIOT Act, entitled Pen Register and Trap and Trace Authority Under FISA, modifies the existing pen-register and tap-and-trace provision of FISA by broadening the scope of possible targets so long as the target is not a “United States person” and directing the FISA court, upon its findings pursuant to 50 U.S.C. §1805, to grant a request for a pen-register that treats telephone lines like “other facilities.” USA PATRIOT Act, *supra* note 27, at §214. The USA PATRIOT Act provisions were aimed at making it easier to target Internet communications. See John Jerney, *Is Big Brother Watching You While You Surf?*, Daily Yomiuri (Tokyo), Jan. 25, 2005, at 18 (“In the context of the Internet, the Patriot Act enables authorities to use [pen registers] to gather e-mail addresses as well as the IP addresses of communicating systems. In fact, the U.S. Justice Department has publicly stated that these activities are within their interpretation of the Patriot Act.”).
- 214 See Memorandum from David Kris, *supra* note 180, at 6-7 (“[G]iven the nearly simultaneous Congressional overhaul of FISA, it is hard to read the AUMF as carving out a wide slice of ‘electronic surveillance’ involving U.S. persons and others located inside the United States.”).
- 215 Dan Eggen, *2003 Draft Legislation Covered Eavesdropping: Justice Dept. Officials Call Measure Unrelated; Critics Say Bush Claims Are Undermined*, Wash. Post, Jan. 28, 2006, at A02.
- 216 Domestic Security Enhancement Act of 2003, §103, 108th Cong. (2003) (draft legislation), available at <http://www.pbs.org/now/politics/patriot2-hi.pdf>.
- 217 Cf. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 20-21, *Ctr. for Constitutional Rights v. Bush*, No. 06-cv-313 (S.D.N.Y. Mar. 9, 2006). Compare Eggen, *supra* note 215 (“‘These proposals were drafted by junior staffers and never formally presented to the attorney general or the White House,’ said [Justice] [D]epartment spokeswoman Tasia Scolinos. ‘They were not drafted with the NSA program in mind.’”), with *id.* (“‘It’s rather damning to their current view that they didn’t need legislation,’ said Timothy H. Edgar, a national security lawyer at the American Civil Liberties Union. ‘Clearly the lawyers at the Justice Department, or some of them, felt that legislation was needed to allow the government to do what it was doing.’”).
- 218 Constitution Project Memorandum, *supra* note 152, at 3.
- 219 50 U.S.C. §1809 (2000).
- 220 The President’s Radio Address, *supra* note 32; accord U.S. Dep’t of Justice, *supra* note 165, at 29-36.
- 221 See *supra* Part II.
- 222 U.S. Const. art I, §8.
- 223 339 U.S. 763, 788 (1950). The Eisentrager Court framed these congressional powers as parallel to the President’s commander-in-chief power and noted that the “grant of war power includes all that is necessary and proper for carrying these powers into execution,” presumably referring to both congressional and presidential war powers. *Id.*; see also 147 Cong. Rec. S9419 (daily ed. Sept. 14, 2001) (statement of Sen. Feingold) (“Congress owns the war power. But by [the AUMF], Congress loans it to the President in this emergency. In doing so, we demonstrate our respect and confidence in both our Commander in Chief and our Constitution.”).
- 224 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).
- 225 *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).
- 226 299 U.S. 304, 318 (1936).
- 227 *Perez v. Brownell*, 356 U.S. 44, 57 (1958), overruled by *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (rejecting the specific holding that “Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent”).

- 228 [Hamdi v. Rumsfeld, 542 U.S. 507, 536 \(2004\)](#) (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when the rights of individuals are at stake.”).
- 229 A Congressional Research Service memorandum locates foreign intelligence collection between Congress's and the President's constitutional authorities:
Foreign intelligence collection is not among Congress's powers enumerated in Article I of the Constitution, nor is it expressly mentioned in Article II as a responsibility of the President. Yet it is difficult to imagine that the Framers intended to reserve foreign intelligence collection to the states or to deny the authority to the federal government altogether. It is more likely that the power to collect intelligence resides somewhere within the domain of foreign affairs and war powers, both of which areas are inhabited to some degree by the President together with the Congress.
Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, American Law Division, for the Congressional Research Service CRS-3 to -4 (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>; see also John Cary Sims, [What the NSA Is Doing...and Why It's Illegal, 33 Hastings Const. L.Q. 105, 133 \(2006\)](#) (“There does not appear to be any precedent...where Congress legislated in an area within its legislative authority but it was nonetheless held by the Supreme Court that the President had inherent authority to act contrary to the statute.”); Laurence H. Tribe, [Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1278 \(1995\)](#) (“[I]n invocation of [a single Article] without regard to the structural relationships among various constitutional provisions is an inadequate mode of constitutional interpretation”); John C. Yoo, [War and the Constitutional Text, 69 U. Chi. L. Rev. 1639, 1662 \(2002\)](#) (“Placing the Declare War Clause in its textual context shows that the Constitution does not define a legalistic procedure for warmaking, but instead creates a flexible system that permits different variations to be created through the interaction of the political branches.” (emphasis added)). While Yoo agrees that constitutional war powers are shared between the executive and Congress, he strangely views Congress's role as limited to its holding of the purse strings. See [id. at 1650, 1683](#) (“[T]he executive should exercise full powers over the beginning and operation of war, subject to the legislature's power over funding.”). Senator Feingold refuted this view during the debate upon the passage of the AUMF:
I also recognize that power-of-the-purse legislation relating to the commitment of U.S. armed forces is an available remedy, but not an ideal model....
But I worry, nonetheless, about how close we would come to a constitutional crisis if we were to rely on such measures as a last resort in a war powers struggle with the President. In a way, it illustrates our level of urgency about preserving our constitutional war power responsibilities, and they risk infringement upon the President's equally valid constitutional responsibilities as Commander in Chief. 147 Cong. Rec. S9419 (daily ed. Sept. 14, 2001) (statement of Sen. Feingold). Article I's many provisions specifying Congress's war powers contradict Yoo's narrow view.
- 230 See, e.g., John Locke, *Second Treatise of Government* §§143-47 (C.B. Macpherson ed., Hackett 1980) (1690) (discussing the legislative, executive, and federative powers and their location in different bodies of government); Montesquieu, *The Spirit of Laws* bk. XI ch. 6 P 4 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (originally translated in Montesquieu, *The Spirit of Laws* (Thomas Nugent trans., Nourse 1750)) (“When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”). These ideas of checks and balances were echoed in the words of James Madison:
Ambition must be made to counteract ambition....If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).
- 231 See, e.g., The Declaration of Independence para. 2-29 (U.S. 1776) (enumerating the ways in which the King had established “an absolute Tyranny” over the colonies); James Madison, *Notes of Debates in the Federal Convention of 1787*, at 45 (Bicentennial ed. 1987) (“Mr. Pinkney [sic] was for a vigorous Executive but was afraid [of] render[ing] the Executive a monarchy, of the worst kind, to wit an elective one.”); [id. at 53](#) (“[T]here is a natural inclination in mankind to Kingly Government....I am apprehensive therefore,... that the Government of these States, may in future times, end in a Monarchy.” (statement of Dr. Benjamin Franklin)); [id. at 67](#) (“Mr.

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[John] Rutledge [sic] was by no means disposed to grant [the judicial appointment power] to any single person. The people will think we are leaning too much towards Monarchy.”); *id.* at 357 (“It was pretty certain [Hugh Williamson] thought that we should at some time or other have a King; but he wished no precaution to be omitted that might postpone the event as long as possible.”).

232 The Federalist No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The entire paper is concerned with tempering fears that the President would become a new king and, worse, a tyrant:

The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

Id. at 414.

233 Madison, *supra* note 231, at 476. George Mason saw problems in focusing the war power in either the executive, “because not safely to be trusted with it,” or the Senate, “because not so constructed as to be entitled to it.” *Id.* He favored dividing the powers and using the word “declare” rather than “make” so that engaging in war would be more difficult. *Id.*; see also Letter from Gouverneur Morris to Lewis R. Morris (Dec. 10, 1803), in 3 *The Records of the Federal Convention of 1787*, at 405 (Max Farrand ed., 1911) (“[T]o the Senate was given a considerable share of those powers exercised by the old Congress. One important point, however, that of making war, was divided between the Senate and House of Representatives.” (emphasis added)). See generally *The Federalist* No. 45, at 290 (James Madison) (Clinton Rossiter ed., 1961) (“The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed [Constitution]...only substitutes a more effectual mode of administering them.” (emphasis added)). James Madison emphasized the importance of the constitutional war powers granted to Congress, not just those of the President:

Securing against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war [Article 1, Section 8, Clause 11] necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies [Article 1, Section 8, Clause 12] and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.

The Federalist No. 41, at 252 (James Madison) (Clinton Rossiter ed., 1961).

While the *Federalist* authors frequently stressed the importance of national defense, see, for example, *id.*; *The Federalist* No. 23, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The authorities essential to the common defense...ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.”), they also underscored the need to check the president's authority with that of Congress.

234 President Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801) (transcript available at <http://www.yale.edu/lawweb/avalon/presiden/sou/jeffmes1.htm>) (emphasis added).

235 Jane E. Stromseth agrees that “the framers desired a democratic check on the power of the President to initiate armed conflict.” Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 *Geo. L.J.* 597, 597 (1993). She argues that this should be understood in the realm of current affairs to require a model wherein the President and Congress come to an agreement on the use of forces, at least in actions sanctioned by the United Nations. *Id.* at 601-20; see also *Loving v. United States*, 517 U.S. 748, 773 (1996) (“Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs.”); *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 668 (1863) (discussing the various constitutional roles of Congress and the President vis-à-vis war); Senate Intelligence Surveillance Hearing, *supra* note 49 (“I think we can all agree that both of the elected branches have important roles to play during a time of war.” (statement of Attorney General Gonzales)); 147 Cong. Rec. H5632 (daily ed. Sept. 14, 2001) (statement of Rep. Peter DeFazio) (“[W]e must be careful not to cede our constitutional duties now or set a precedent for doing so in the future.... [M]aintaining this solemn congressional prerogative to send our young men and women into battle is critical to protecting the delicate balance between the legislative and executive branches.” (emphasis

added)); *id.* at H5634 (statement of Rep. Brad Sherman) (“Supreme Court opinions...indicate that it is Congress, rather than the President, that was really given the obligation to form American foreign policy under the Constitution....[W]e in Congress need to do more than just provide \$40 billion and a blank check and leave town.”); Edward S. Corwin, *The Presidency: Office and Powers, 1787-1984*, at 500 (5th ed. 1984) (calling the Constitution “an invitation to struggle for the privilege of directing American foreign policy”). When relying on *The Federalist* as authority for the proposition that the judiciary should defer to the executive, Justice Thomas’s Hamdi dissent nevertheless acknowledged that “Congress, to be sure, has a substantial and essential role in both foreign affairs and national security.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (emphasis added), enforced, 378 F.3d 426 (4th Cir. 2004).

236 126 S. Ct. 2749, 2773 (2006), superseded on other grounds, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

237 *Id.* at 2760-61 (citing Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002)).

238 *Id.* at 2759, 2761-62.

239 *Id.* at 2774-75.

240 *Id.* at 2773.

241 71 U.S. (4 Wall.) 2, 139-40 (Chase, C.J., dissenting).

242 10 U.S.C. §821 (2000).

243 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006), superseded by statute, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

244 *Id.* at 2774 n.23 (emphasis added); cf. *id.* at 2799 (Breyer, J., concurring) (“Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” (internal citation omitted)).

245 *Id.* at 2799 (Kennedy, J., concurring).

246 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

247 *Id.* at 582-85 (majority opinion).

248 *Id.*

249 *Id.* at 587-89.

250 *Id.* at 636-38 (Jackson, J., concurring).

251 Compare *Johnston & Greenhouse*, supra note 168 (“President Bush cited the resolution...on Monday at his news conference. So did Attorney General Alberto R. Gonzales, who in a session with reporters said the Congressional measure...gave the government the power ‘to engage in this kind of signals intelligence.’”), with U.S. Dep’t of Justice, supra note 165, at 2 (“The AUMF places the President at the zenith of his powers in authorizing the NSA activities.”).

252 *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

253 U.S. Dep’t of Justice, supra note 165, at 2.

254 *Steel Seizure*, 343 U.S. at 636 (Jackson, J., concurring); cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”) (quoting 10 Annals of Cong. 613 (1800) (statement of Marshall, J.)).

255 See supra Part IV.

- 256 See [Clark v. Martinez](#), 543 U.S. 371, 380 (2005) (“It is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.” (emphasis added)); [INS v. St. Cyr](#), 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” (emphasis added) (citation omitted)); cf. U.S. Dep’t of Justice, *supra* note 165, at 28-36 (arguing that the doctrine of constitutional avoidance applies to the interpretation of FISA).
- 257 18 U.S.C. §2511(2)(f) (2000 & Supp. II 2002).
- 258 See [United States v. Oakland Cannabis Buyers’ Coop.](#), 532 U.S. 483, 494 (2001) (“[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity.”); [Salinas v. United States](#), 522 U.S. 52, 66 (1997) (“The rule [of constitutional avoidance] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text.”).
- 259 [Steel Seizure](#), 343 U.S. at 637 (Jackson, J., concurring) (emphasis added); cf. [H.R. Rep. No. 95-1720, at 35 \(1978\)](#) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 4048, 4064 (discussing the intent to make FISA the exclusive means for electronic surveillance and citing Justice Jackson’s concurrence).
- 260 [Hamdi v. Rumsfeld](#), 542 U.S. 507, 536 (2004) (plurality opinion).
- 261 [Hamdan v. Rumsfeld](#), 126 S. Ct. 2749, 2774-75 (2006), superseded by statute, Military Commissions Act of 2006, [Pub. L. No. 109-366](#), 120 Stat. 2600.
- 262 [S. Rep. No. 95-604](#), *supra* note 134, at 16 (citing [Steel Seizure](#), 343 U.S. at 634-55 (Jackson, J., concurring)).
- 263 *Id.* at 8.
- 264 See generally U.S. Dep’t of Justice, *supra* note 165 (citing historical examples of warrantless wiretapping not authorized by Congress, some of which were upheld in court, but all of which took place before Congress passed FISA).
- 265 [H.R. Rep. No. 95-1283, pt. I, at 24 \(1978\)](#).
- 266 *Id.* (emphasis added). The report continues by observing that, [g]iven the fact that Congress created the Central Intelligence Agency, delimiting its authorized functions and jurisdiction, and appropriates funds for the entire intelligence community, there can be little debate as to the fact that Congress has at least concurrent authority to enable it to legislate with regard to the foreign intelligence activities of departments and agencies of this Government either created or funded by Congress.
- Id.*
- 267 Martin S. Lederman, Georgetown University Law Center, Address to the Philadelphia Lawyer Chapter of the American Constitution Society: Torture, Domestic Surveillance and Executive Aggrandizement (June 7, 2006).
- 268 See, e.g., U.S. Dep’t of Justice, *supra* note 165, at 8 (citing [In re Sealed Case No. 02-001](#), 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (per curiam)).
- 269 310 F.3d 717, 720 (FISA Ct. Rev. 2002) (per curiam).
- 270 *Id.* at 720-21.
- 271 USA PATRIOT Act, *supra* note 27, at §218.
- 272 [Sealed Case](#), 310 F.3d at 738.

- 273 The court was asked not whether FISA could or did limit presidential power, but whether “FISA amplif[ies] the President’s power by providing a mechanism that at least approaches a classic warrant and which therefore supports the government’s contention that FISA searches are constitutionally reasonable.” *Id.* at 742 (emphasis added).
- 274 *Id.*; cf. *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“[T]he real question is whether the [statutory provisions] are of such a nature that they impede the President’s ability to perform his constitutional duty....”). The Morrison holding was based on a finding that the principal-officers portion of the Appointments Clause of Article II, Section 2, did not apply to the appointment of the independent counsel because the position was that of an inferior officer. *Id.* at 670-71. Unlike the Appointments Clause as applied to the facts in Morrison, the war-powers provisions of the Constitution do not specifically address the procedures for or assign the duties of surveillance between the branches of government; indeed, it would have been anachronistic for the Constitution to address wiretapping. With the surveillance power situated in a gray area between and among both Congress and the President, it would be less plausible for a court to find that Congress “impede[d] the President’s ability to perform his constitutional duty” on the subject. *Id.* at 691.
- 275 See supra Part III.
- 276 U.S. Dep’t of Justice, supra note 165, at 8. The paper glosses over the nuanced Third Circuit decision in Butenko, lumping it in with others that find broader authority. Compare *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc) (undertaking a Fourth Amendment analysis and finding an instance of surveillance constitutional because a warrant was subsequently acquired), with *United States v. Truong Ding Hung*, 629 F.2d 908 (4th Cir. 1980) (finding no warrant requirement in foreign intelligence cases), and *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc plurality opinion) (finding no exception to the Fourth Amendment warrant requirement).
- 277 743 F.2d 59, 72-73 (2d Cir. 1984).
- 278 *Id.* at 64-65.
- 279 *Id.* at 73 (internal citations omitted); cf. *United States v. Andonian*, 735 F. Supp. 1469, 1474 (C.D. Cal. 1990) (“Congress intended [for FISA] to sew up the perceived loopholes through which the President had been able to avoid the warrant requirement. The exclusivity clause makes it impossible for the President to ‘opt-out’ of the legislative scheme by retreating to his ‘inherent’ Executive sovereignty over foreign affairs.”), *aff’d* 29 F.3d 1432 (9th Cir. 1994).
- 280 *Duggan*, 743 F.2d at 73; accord *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005) (ruling FISA consistent with the Fourth Amendment rights of a defendant convicted of fraudulently obtaining U.S. citizenship by denying membership in terrorist organizations); *In re Grand Jury Proceedings of the Special April 2002 Grand Jury (April 2002 Grand Jury)*, 347 F.3d 197, 206 (7th Cir. 2003) (ruling that FISA materials were not required to be disclosed to a witness who refused to testify); *United States v. Johnson*, 952 F.2d 565, 573 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (finding FISA consistent with the Fourth Amendment rights of a defendant who offered to sell defense secrets to agents of the USSR); see also *id.* at 791-92 (finding that FISA is adequately constituted under Article III and does not violate separation of powers principles or Article II); *United States v. Belfield*, 692 F.2d 141, 148-49 (D.C. Cir. 1982) (finding that FISA passes Fifth and Sixth Amendment requirements despite special evidentiary and in camera, ex parte rules in the FISA Court). For a complete list of cases in ordinary federal court reviewing FISA through its first ten years, see Cinquegrana, supra note 146, at 817 n.126. None of those cases found FISA unconstitutional. Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 *Geo. Wash. L. Rev.* 1380, 1396 n.100 (1993). Indeed, all twelve circuit courts (the Federal Circuit excepted) have reviewed FISA without finding it unconstitutional. See, e.g., *Damrah*, 412 F.3d 618 (Sixth Circuit); *April 2002 Grand Jury*, 347 F.3d 197 (Seventh Circuit); *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994); *United States v. Barr*, 963 F.2d 641 (3d Cir. 1992); *Johnson*, 952 F.2d 565 (First Circuit); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *Pelton*, 835 F.2d 1067 (Fourth Circuit); *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987); *Cavanagh*, 807 F.2d 787 (Ninth Circuit); *Duggan*, 743 F.2d 59 (Second Circuit); *Belfield*, 692 F.2d 141 (D.C. Circuit). Though the Supreme Court has never directly reviewed the constitutionality of FISA, the Court mentioned it as a positive example of Congress “balanc[ing] individual rights and government secrecy needs” in *Ponte v. Real*, 471 U.S. 491, 515 (1985).

- 281 The “persuasive authority” of Sealed Case might also be “undercut[.]” by its reliance on pre-FISA cases, which, unlike those after FISA, were decided under the “twilight area” Steel Seizure regime because Congress had not yet ruled one way or another on the matter. Bazan & Elsea, *supra* note 229, at CRS-31 to -32.
- 282 H.R. Rep. No. 95-1283, pt. I, at 24 (1978).
- 283 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006), superseded on other grounds, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.
- 284 Michael A. Fletcher, Bush Again Defends Wiretapping Program: Departing from Usual Practice, President Fields Questions at Town-Hall-Style Event, Wash. Post, Jan. 12, 2006, at A07; see also Walter Pincus, Spying Necessary, Democrats Say: But Harman, Daschle Question President's Legal Reach, Wash. Post, Feb. 13, 2006, at A03 (noting that, even among those who oppose the administration, most agree that surveillance is necessary in fighting terrorism).
- 285 Even the most outspoken of the President's political critics agree that surveillance is necessary:
We all agree that we should be wiretapping al Qaeda terrorists--of course we should. Congress has given the President authority to monitor these messages legally, with checks to guard against abuses when Americans' conversations and email are being monitored. But instead, the President has chosen to do it illegally, without those safeguards.
Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Sen. Patrick Leahy, Ranking Member, S. Judiciary Comm.).
- 286 50 U.S.C. §1804 (2000 & Supp. IV 2004), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 108(a)(1), 120 Stat. 192, 203 (2006).
- 287 *Id.* §1803 (2000 & Supp. IV 2004), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106(f)(1), 109(d), 120 Stat. 192, 197-98, 205 (2006).
- 288 *Id.* §1805 (2000 & Supp. IV 2004), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 105(a), 108(a)(2), (b), 120 Stat. 192, 195, 203-04 (2006). The standard in §1805(a)(3) is considered lower than the general probable-cause standard for criminal proceedings. See Risen & Lichtblau, *supra* note 15. There is an additional requirement in §1805(a)(5) reiterating that the requirements of the application under §1804 must be met. For a more in-depth discussion of the procedures for securing a FISA warrant, see Louis A. Chiarella, “So Judge, How Do I Get That FISA Warrant?": The Policy and Procedure for Conducting Electronic Surveillance, 1997 Army Law. 25.
- 289 *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987).
- 290 See, e.g., Rules of the Foreign Intelligence Surveillance Court 10 (discussing the procedure for “search warrant returns”). Rule 10 “was initiated sua sponte in 1995 [and amended in 2000]...to establish a means of notification as to how, in fact, search warrants previously authorized were carried out.” Letter from Colleen Kollar-Kotelly, Presiding Judge, U.S. Foreign Intelligence Surveillance Court, to Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, et al. (Aug. 20, 2002), available at <http://www.cnss.org/judgeresponse082002.pdf> (emphasis added). But cf. Letter from Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, et al. to Colleen Kollar-Kotelly, Presiding Judge, U.S. Foreign Intelligence Surveillance Court (July 31, 2002), available at <http://www.cnss.org/senatorsletter073102.pdf> (“Rule 10, added November 2000 [sic], provides for ‘search warrant returns.’ The terms ‘warrant’ and ‘return’ do not appear in FISA, which instead uses the terms ‘court order’ and ‘report to the court.’”).
- 291 Per 50 U.S.C. §1807, the Attorney General is required to submit to Congress and the Director of the Administrative Office of the United States Courts a letter stating the number of applications submitted, granted, modified, and denied. See, e.g., Letter from William E. Moschella, Assistant Attorney General, to J. Dennis Hastert, Speaker, House of Representatives (Apr. 28, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/2005rept.pdf> (2005: 2074 applications, 2072 granted, 61 modified, 0 denied (2 were withdrawn, with 1 of these resubmitted and approved)); Letter from William E. Moschella, Assistant Attorney General, to J. Dennis Hastert, Speaker, House of Representatives (Apr. 1, 2005), available at <http://www.fas.org/irp/agency/doj/fisa/2004rept.pdf> (2004: 1758 applications, 1754 granted, 94 modified, 0 denied (3 were withdrawn, with 1 of these resubmitted and approved)); Letter from William E. Moschella, Assistant Attorney General, to L. Ralph Mechem, Director, Administrative Office of the United States Courts (Apr. 30, 2004), available at <http://www.fas.org/irp/agency/doj/fisa/2003rept.pdf> (2003: 1727 applications, 1724 granted,

79 modified, 4 denied); Letter from Attorney General John Ashcroft to L. Ralph Mechem, Director, Administrative Office of the United States Courts (Apr. 29, 2003), available at <http://www.fas.org/irp/agency/doj/fisa/2002rept.html> (2002: 1228 applications, 1228 granted, 0 modified, 0 denied (2 applications had been modified, with those modifications subsequently overturned by the FISA Court of Review)); Letter from Attorney General John Ashcroft to Dennis Hastert, Speaker, House of Representatives (Apr. 29, 2002), available at <http://www.fas.org/irp/agency/doj/fisa/2001rept.html> (2001: 932 applications, 934 granted, 2 modified, 0 denied); Letter from Attorney General John Ashcroft to Richard Cheney, President, United States Senate (Apr. 27, 2001), available at <http://www.fas.org/irp/agency/doj/fisa/2000rept.html> (2000: 1005 applications, 1012 granted, 0 modified, 0 denied (two applications filed in 2000 were approved in 2001; nine applications filed in 1999 were approved in 2000)); Letter from Attorney General Janet Reno to Dennis Hastert, Speaker, House of Representatives (Apr. 27, 2000), available at <http://www.fas.org/irp/agency/doj/fisa/1999rept.html> (1999: 886 applications, 880 granted, 0 modified, 0 denied (remaining six applications were approved in 2000)); Letter from Attorney General Janet Reno to Dennis Hastert, Speaker, House of Representatives (Apr. 29, 1999), available at <http://www.fas.org/irp/agency/doj/fisa/1998rept.html> (1998: 796 applications, 796 granted, 0 modified, 0 denied); Letter from Attorney General Janet Reno to Newt Gingrich, Speaker, House of Representatives (Apr. 29, 1998), available at <http://www.fas.org/irp/agency/doj/fisa/1997rept.html> (1997: 749 applications, 748 granted, 0 modified, 0 denied (“In one case,...the court declined to approve the application as plead for [reasons other than probable cause], and gave the government leave to amend the application. The government has filed a motion to withdraw that case as it has become moot.”)); Letter from Attorney General Janet Reno to Albert Gore, Jr., President, United States Senate (Apr. 18, 1997), available at <http://www.fas.org/irp/agency/doj/fisa/1996rept.html> (1996: 839 applications, 839 granted, 0 modified, 0 denied); Letter from Attorney General Janet Reno to Albert Gore, Jr., President, United States Senate (Apr. 16, 1996), available at <http://www.fas.org/irp/agency/doj/fisa/1995rept.html> (1995: 697 applications, 697 granted, 0 modified, 0 denied); Letter from Attorney General Janet Reno to Albert Gore, Jr., President, United States Senate (May 1, 1995), available at <http://www.fas.org/irp/agency/doj/fisa/1994rept.html> (1994: 576 applications, 576 granted, 0 modified, 0 denied); Letter from Attorney General Janet Reno to Albert Gore, Jr., President, United States Senate (May 3, 1994), available at <http://www.fas.org/irp/agency/doj/fisa/1993rept.html> (1993: 509 applications, 509 granted, 0 modified, 0 denied); Letter from Stuart M. Gerson, Acting Attorney General, to Albert Gore, Jr., President, United States Senate (Mar. 10, 1993), available at <http://www.fas.org/irp/agency/doj/fisa/1992rept.html> (1992: 484 applications, 484 granted, 0 modified, 0 denied); Letter from Attorney General William P. Barr to Dan Quayle, President, United States Senate (May 29, 1992), available at <http://www.fas.org/irp/agency/doj/fisa/1991rept.html> (1991: 593 applications, 593 granted, 0 modified, 0 denied); Letter from Attorney General Dick Thornburgh to Dan Quayle, President, United States Senate (May 10, 1991), available at <http://www.fas.org/irp/agency/doj/fisa/1990rept.html> (1990: 595 applications, 595 granted, 0 modified, 0 denied); Letter from Attorney General Dick Thornburgh to Dan Quayle, President, United States Senate (Apr. 13, 1990), available at <http://www.fas.org/irp/agency/doj/fisa/1989rept.html> (1989: 546 applications, 546 granted, 0 modified, 0 denied); Letter from Attorney General Dick Thornburgh to Dan Quayle, President, United States Senate (Apr. 12, 1989), available at <http://www.fas.org/irp/agency/doj/fisa/1988rept.html> (1988: 534 applications, 534 granted, 0 modified, 0 denied); Letter from Attorney General Edwin Meese III to George Bush, President, United States Senate (Mar. 30, 1988), available at <http://www.fas.org/irp/agency/doj/fisa/1987rept.html> (1987: 512 applications, 512 granted, 0 modified, 0 denied); Letter from Attorney General Edwin Meese III to George Bush, President, United States Senate (Mar. 24, 1987), available at <http://www.fas.org/irp/agency/doj/fisa/1986rept.html> (1986: 573 applications, 573 granted, 0 modified, 0 denied); Letter from Attorney General Edwin Meese III to George Bush, President, United States Senate (Mar. 5, 1986), available at <http://www.fas.org/irp/agency/doj/fisa/1985rept.html> (1985: 587 applications, 587 granted, 0 modified, 0 denied); Letter from Attorney General Edwin Meese III to George Bush, President, United States Senate (Mar. 6, 1985), available at <http://www.fas.org/irp/agency/doj/fisa/1984rept.html> (1984: 635 applications, 635 granted, 0 modified, 0 denied); Letter from Attorney General William French Smith to George Bush, President, United States Senate (Mar. 6, 1984), available at <http://www.fas.org/irp/agency/doj/fisa/1983rept.html> (1983: 549 applications, 549 granted, 0 modified, 0 denied); Letter from Edward C. Schmults, Acting Attorney General, to George Bush, President, United States Senate (Apr. 4, 1983), available at <http://www.fas.org/irp/agency/doj/fisa/1982rept.html> (1982: 473 applications, 475 granted, 0 modified, 0 denied); Letter from Attorney General William French Smith to William E. Foley, Director, the Administrative Office of the United States Courts (Apr. 15, 1982), available at <http://www.fas.org/irp/agency/doj/fisa/1981rept.html> (1981: 431 applications, 433 granted, 0 modified, 0 denied); Letter from Attorney General William French Smith to the Director of the Administrative Office of the United States Courts (Apr. 22, 1981), available at <http://www.fas.org/irp/agency/doj/fisa/1980rept.html> (1980: 319 applications, 322 granted, 1 modified, 0 denied); Letter from Attorney General Benjamin R. Civiletti to the Vice President (undated), available at <http://www.fas.org/irp/agency/doj/fisa/1979rept.html> (1979: 199 applications, 207 granted, 0 modified, 0 denied) [hereinafter collectively FISA Court Letters].

292 FISA Court Letters, *supra* note 291.

293 *Id.*

294 Americo R. Cinquegrana notes the dual interpretations of the high application success rate: Proponents of FISA argue that the lack of a denial demonstrates the careful consideration and judgment exercised by the executive branch in reviewing and preparing applications for submission to the FISC, and that only cases that satisfactorily meet the statutory standards are brought before the Court. Opponents argue that the secrecy that surrounds the FISC prevents a determination of whether these figures indicate instead that the FISC has become a captive of the national security establishment and serves only to encourage executive officials, now protected by judicial approval, to conduct activities that would otherwise never have been proposed. Cinquegrana, *supra* note 146, at 815 (internal citations omitted); see also Jeremy D. Mayer, [9-11 and the Secret FISA Court: From Watchdog to Lapdog?](#), 34 *Case W. Res. J. Int'l L.* 249, 249 (2002) (“In many ways, the judiciary has become little more than a rubberstamp to the executive's trashing of the Fourth Amendment in the name of national security.”).

295 See Solove, *supra* note 15, at 1289 (“FISA is very permissive; it provides for expansive surveillance powers with little judicial supervision.”). The FISA procedures keep wiretap orders so secret that they might pose problems themselves. See, e.g., Banks & Bowman, *supra* note 98, at 87 (“The secrecy that attends FISC proceedings, and the limitations imposed on judicial review of FISA surveillance, may insulate unconstitutional surveillance from any effective sanction.”). The innovation of President Bush's warrantless-wiretapping approach is in its attempt to keep its affairs secret from a secret court.

296 David G. Savage & Bob Drogin, *Legality of Wiretaps Remains in Question*, L.A. Times, Dec. 18, 2005, at A1.

297 David Johnston & Neil A. Lewis, *Defending Spy Program, Administration Cites Law*, N.Y. Times, Dec. 23, 2005, at A20.

298 Savage & Drogin, *supra* note 296.

299 50 U.S.C. §1805 (2000 & Supp. IV 2004), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, *Pub. L. No.* 109-177, §§ 105(a), 108(a)(2), (b), 120 Stat. 192, 195, 203-04 (2006).

300 The administration has asserted that the program was “limited” in scope and took civil liberties concerns into account. See, e.g., Gerstenzang, *supra* note 43 (“‘I’m mindful of your civil liberties, and so I had all kinds of lawyers review the process,’ Bush told the Kansas gathering.”).

301 50 U.S.C. §1805 (as amended by Intelligence Authorization Act for Fiscal Year 2002, *Pub. L. No.* 107-108, 115 Stat. 1394 (2002) (enacted Dec. 28, 2001)), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, *Pub. L. No.* 109-177, §§ 105(a), 108(a)(2), (b), 120 Stat. 192, 195, 203-04 (2006).

302 Cf. Constitution Project Memorandum, *supra* note 152, at 33-34 (“FISA merely requires that the executive seek and receive a judicial warrant upon probable cause to believe that the communication is by an agent of a foreign power—a determination that the Administration has stated it can and does make under the warrantless NSA program.”). The administration contends that all eavesdropping under the program would be approved by the FISA court:

[The] statement that “[w]e cannot monitor anyone today whom we could not have monitored [September 10, 2001]” [is] accurate with respect to the President's Terrorist Surveillance Program, because the Program involves the interception of communications only when there is probable cause (‘reasonable grounds to believe’) that at least one party to the communication is an agent of a foreign power (al Qaeda or an affiliated terrorist organization).

Gonzales Letter, *supra* note 41. Attorney General Gonzales elaborated that this is his interpretation of the language the President used: I think it's [a] probable cause [standard]. But it's not probable cause as to guilt [or] probable cause as to a crime being committed. It's probable cause that a party to the communication is a member or agent of AL Qaida. The precise language that I'd like to refer to is, “There are reasonable grounds to believe that a party to communication is a member or agent or [sic] AL Qaida or of an affiliated terrorist organization.” It is a probable cause standard, in my judgment.

Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Attorney General Gonzales). Other top officials have interpreted this to be a significant change in standard, however:

QUESTION:Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, the change from going around the FISA law...was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it over to a shift supervisor at NSA.... [S]ince you lowered the standard, doesn't that decrease the protections of the U.S. citizens?

GEN. HAYDEN:I think you've accurately described the criteria under which this operates....

General Michael V. Hayden, Principal Deputy Director of National Intelligence and former Director of the National Security Agency, Address to the National Press Club: What American Intelligence & Especially the NSA Have Been Doing to Defend the Nation (Jan. 23, 2006) (transcript available at <http://www.freerepublic.com/focus/f-news/1564046/posts>); see also id. (“The trigger is quicker and a bit softer than it is for a FISA warrant....”).

303 Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (Breyer, J., concurring) (“Where, as here, no emergency prevents [executive] consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine--through democratic means--how best to do so.”), superseded on other grounds, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. For discussions of possible legislative solutions to the controversy over warrantless surveillance, see Adam Burton, *Fixing FISA for Long War: Regulating Warrantless Surveillance in the Age of Terrorism*, 4 *Pierce L. Rev.* 381, 398-404 (2006) (proposing the creation of an agency to handle ex post review of warrantless surveillance); Katherine Wong, Recent Development, *The NSA Terrorist Surveillance Program*, 43 *Harv. J. on Legis.* 517, 530-34 (2006) (advocating a streamlined warrant process and a “more flexible probable-cause requirement”).

304 For an argument in favor of warrantless surveillance limited only by a traditional reasonableness standard, see Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 *Yale L.J.* 179, 208-15 (2003). But see Robert M. Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 105 *B.C. L. Sch. Legal Stud. Res. Paper Series* 56-68 (2006) (arguing that the NSA program could not be justified under reasonableness “special needs” requirements).

305 Cf. Professors’ Letter, supra note 165 (“As the Supreme Court recently noted, “‘Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.’” ’ (quoting *Gonzales v. Oregon*, No. 04-623, 2006 U.S. LEXIS 767, at *921 (Jan. 17, 2006) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)))).

306 See 50 U.S.C. §1809(a)(1) (2000) (“A person is guilty of an offense if he intentionally...engages in electronic surveillance under color of law except as authorized by statute....” (emphasis added)).

307 See Sheryl Gay Stolberg & David. E. Sanger, *Facing Pressure, White House Seeks Approval for Spying*, *N.Y. Times*, Feb. 20, 2006, at A9 (“After two months of insisting that President Bush did not need court approval to authorize the wiretapping of calls between the United States and suspected terrorists abroad, the administration is trying to resist pressure for judicial review while pushing for retroactive Congressional approval of the program.”). The *Washington Post* reported that political pressure forced the White House to deal with Congress:

[T]he administration was spared the outcome it most feared, and it won praise in some circles for showing more openness to congressional oversight.

But the actions have angered some lawmakers who think the administration’s purported concessions mean little. Some Republicans said that the White House came closer to suffering a big setback than is widely known, and that President Bush must be more forthcoming about the eavesdropping program to retain Congress’s good will.

Babington, supra note 174.

308 50 U.S.C. §1802(a)(1) (2000 & Supp. IV 2004); see supra Part IV.A. (discussing how the current incarnation of section 1802 falls short of authorizing the program). But cf. *Gonzales Letter*, supra note 41 (“The Administration believes that it is unnecessary to amend FISA to accommodate the Terrorist Surveillance Program.”).

309 For the purposes of the warrantless surveillance provision, only three of the six previously listed definitions of “foreign power” apply: (1) a foreign government or any component thereof whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments....

Id. §1801 (2000 & Supp. I 2001).

310 Banks & Bowman *supra* note 98, at 104 (internal citations omitted); see also 147 Cong. Rec. S9417 (daily ed. Sept. 14, 2001) (statement of Sen. McCain) (“No longer do we perceive the only great threat to our security in the hostile maneuvers of foreign armies;...no longer do we sit in splendid isolation, flush with prosperity and naïve with peace.”); *id.* at S9418 (statement of Sen. Feingold) (“Our enemy is not a state with clearly defined borders. We must respond instead to what is quite likely a loose network of terrorists.... We must respond to a...diffuse enemy that operates largely beyond the reach of our conventional war-fighting techniques.”).

311 The targets of the program might be “(4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments....” 50 U.S.C. §1801 (2000 & Supp. I 2001), amended by USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §506(a)(5), 120 Stat. 192, 248 (2006).

312 Senator Specter's bill would allow the executive branch to devise new surveillance programs so long as they were approved by the FISA Court and sought “to obtain foreign intelligence information or to protect against international terrorism.” National Security Surveillance Act, S. 3876, 109th Cong. § 4 (2006).

313 Seth F. Kreimer, [Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror](#), 7 U. Pa. J. Const. L. 133 (2004).

314 *Id.* at 169-81.

315 Swire, *supra* note 209, at 1365.

316 See generally Eric Lichtblau and Sheryl Gay Stolberg, *Accord in House to Hold Inquiry on Surveillance*, N.Y. Times, Feb. 17, 2006, at A1 (noting that some Republican camps want an inquiry into the propriety of the program, while others want to focus exclusively on new policy proposals); Maura Reynolds, *Congress Weighs Options for Domestic Spy Program: Some Lawmakers Seek to Make the Surveillance Legal While Others Press for an Inquiry*, L.A. Times, Feb. 16, 2006, at A20 (discussing different proposals for congressional oversight); Maura Reynolds & Greg Miller, *U.S. Lawmakers Signal Plans to Monitor Spying: The Type of Oversight Is Unclear as Moderate Republicans and Bush Loyalists Approach Reviews and Potential Legislation Differently*, L.A. Times, Feb. 18, 2006, at A21 (outlining the players and positions in the congressional debate over the wiretapping program).

317 Kreimer, *supra* note 313, at 181.

318 Real Security Act of 2006, S. 3875, 109th Cong. §2315(b) (2006).

319 National Security Surveillance Act of 2006, S. 3876, 109th Cong. §4 (2006).

320 *Id.* §6.

321 *Id.*

322 Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006, S. 3877, 109th Cong. §101 (2006).

323 See *id.* §201 (extending the [section 1805](#) emergency provision from seventy-two hours to one week); *id.* §203 (granting additional authority for surveillance ahead of post-hoc warrants); *id.* §208 (adding force authorizations and national emergencies to the list of circumstances triggering fifteen-day warrantless surveillance).

324 Terrorist Surveillance Act of 2006, S. 3874, 109th Cong. §2 (2006).

325 *Id.* §4.

- 326 Id. §6.
- 327 Id. §8.
- 328 H.R. 5825, 109th Cong. (2006).
- 329 Id. §13.
- 330 Id. §14.
- 331 Id. §§13(e), 14(e).
- 332 Editorial, *A Do-Little Congress*, Chi. Trib., Oct. 3, 2006, at C14.
- 333 See, e.g., Senate Judiciary Surveillance Hearing, *supra* note 49 (statement of Attorney General Alberto R. Gonzales) (“All United States laws and policies governing the protection and nondisclosure of national security information, including the information relating to the activities described by the President, remain in full force and effect. The unauthorized disclosure of classified information violates federal criminal law.”); Greg Miller, *Lawmakers Question Effectiveness of Spy Program: Leading Republicans Say Al Qaeda Suspects Probably Have Altered Their Methods of Communication in Light of the Controversy*, L.A. Times, Feb. 13, 2006, at A13 (“Rep. Peter Hoekstra (R-Mich.), chairman of the House Intelligence Committee[said,] ‘...Does anyone really believe that after 50 days of having this program on the front page of our newspapers...that Al Qaeda has not changed the way that it communicates?’”); Scott Shane, *Criminal Inquiry Opens into Leak in Eavesdropping*, N.Y. Times, Dec. 31, 2005, at A1 (“[Vice President Dick] Cheney said: ‘Eventually [the New York Times] ran [the eavesdropping story]. I think that’s unfortunate. I think it damages national security.’”). But cf. Scott Shane, *Bipartisan Support Emerges For Federal Whistle-Blowers*, N.Y. Times, Feb. 17, 2006, at A17 (“Representative Christopher Shays...is leading the defense of whistle-blowers who have spoken out about...illicit federal wiretapping and other matters. ‘It’s absolutely essential that we have a system that allows people to speak out about abuses, especially in the national security realm,’ Mr. Shays said in an interview.”). Answering a reporter’s question, President Bush gave an example of the kind of effect on enemy behavior he feared the leak might cause:
- Let me give you an example about my concerns about letting the enemy know what may or may not be happening. In the late 1990s, our Government was following Usama bin Laden because he was using a certain type of telephone. And then the fact that we were following Usama bin Laden because he was using a certain type of telephone made it into the press as the result of a leak. And guess what happened? Saddam--Usama bin Laden changed his behavior. He began to change how he communicated.
- The President’s News Conference, *supra* note 48. Unlike the case in the President’s example, however, this leak concerned not the details of a target or manner of surveillance, but the existence of a program of surveillance that differed in legal authorization, but presumably not target or manner, from surveillance under FISA. Given the publicly acknowledged framework already in place for eavesdropping on telephone and e-mail conversations in the United States and abroad, at first blush it seems implausible that the leak about the warrantless wiretapping program would give terrorists any valuable information or cause them to alter their behavior in any way. The only seemingly salient differences between surveillance in the NSA program and that under FISA were the agency conducting it (usually the FBI under FISA) and the presence or lack of a secret court order. Cf. Steve Chapman, *Op-Ed., The Administration Investigates: Scrutinizing the Wrong People*, Chi. Trib., Jan. 5, 2006, at C23 (“[A]n opposing coach doesn’t have to steal the Indianapolis playbook to find out that Peyton Manning sometimes throws the ball...‘No terrorist with half a brain thinks his communications are protected by 4th Amendment strictures against unlawful search and seizure.’” (internal citations omitted)). Depending on one’s inclination, one can chalk up the claim that the leak is a serious blow to national security to either material facts unknown to the general public that remain classified, or politics.