

## Constitutional Intelligence: Restoring Politics in the War on Terror\*

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We are invited in this symposium to draw lessons from Lincoln's constitutionalism for today's War on Terror—and on this panel to consider whether a wartime decline in civil liberties can be justified by a gain of civil rights. As an initial matter, let me suggest that the distinction between civil liberties and civil rights is less than conspicuous. Notwithstanding Wesley Newcomb Hohfeld's efforts in the 1913 and 1917 *Yale Law Journal* to distinguish rights, powers, privileges, and immunities—all of which could be reduced to rights, he concluded—I have never been persuaded that a clear contrast between the two could be drawn, other than nominally.<sup>1</sup>

Accordingly, I will take the basic questions before us to be: Do we at times give up a measure of liberty for a measure of security? And should we? Those questions take us to fundamental moral, political, and legal principles. And the answers to both, I submit, are yes—at times we do and we should sacrifice a measure of liberty for a greater measure of security. Thus, Benjamin Franklin was as wrong when he said that those who would sacrifice liberty for security deserve neither,<sup>2</sup> even if that is sometimes true, as when he said that “there never was a good war or a bad peace.”<sup>3</sup> History, of course, is replete with peace agreements that have led only to future wars.<sup>4</sup>

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<sup>1</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed.) (photo. reprint 2002) (1946) (Originally in 1913 and 1917 *Yale Law Journal*).

<sup>2</sup> *HISTORICAL REVIEW OF PENNSYLVANIA* 289 (1812) (attributed to Jackson and Franklin but disowned by Franklin according to World Cat) (“Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.”).

<sup>3</sup> Letter from Benjamin Franklin to Sir Joseph Banks (July 27, 1783), in *JARED SPARKS, THE WORKS OF BENJAMIN FRANKLIN* 547 (1882).

<sup>4</sup> See, e.g., 12 *THE NEW ENCYCLOPEDIA BRITANNICA* 331 (15th ed. 2002) (discussing how the Treaty of Versailles led to an upsurge in German militarism, fostered deep resentment, and encouraged future German aggression).

## I. LINCOLN'S CONSTITUTIONAL LEGACY

Abraham Lincoln understood those questions. But if one takes some of the things he did during the Civil War out of context, it is easy to fault him, as many have. Early in the war, for example, he suspended the writ of habeas corpus, a power the Constitution seems to reserve to Congress under limited circumstances,<sup>5</sup> but look at the context.

In brief, having participated in the election of 1860 and lost, all but four of the southern states that would soon form the Confederacy seceded from the Union and began seizing federal property in the South.<sup>6</sup> After his inauguration in March of 1861, Lincoln was initially prepared to live with the situation.<sup>7</sup> But when he sought to resupply Fort Sumter, a beleaguered island garrison in Charleston Bay that had remained in Union hands, Confederate forces began firing on the fort before the supply ships could arrive.<sup>8</sup> Two days later the men at the fort surrendered.<sup>9</sup> Northern reaction was intense.<sup>10</sup> When Lincoln called up 75,000 volunteers, the four remaining southern states, including Virginia, joined the Confederacy.<sup>11</sup>

Soon after, Lincoln's focus shifted to Maryland when northern troops traveling to Washington by rail were attacked by a mob in Baltimore.<sup>12</sup> With southern sympathies running high in Maryland, and Virginia now firmly in the Confederacy, Lincoln feared that the capital of the Union would soon be isolated, so he ordered the writ of habeas corpus suspended along any "military line" between Philadelphia and Washington.<sup>13</sup> Notwithstanding the placement of the Suspension Clause in Article I, the Constitution is silent, of course, about who has the power to suspend the writ.<sup>14</sup> More to the point here, however, Congress was not in session and would not again be in session until July

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<sup>5</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 22–25, 36 (1998).

<sup>6</sup> JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 264, 267, 271, 273 (1988) [hereinafter "MCPHERSON, BATTLE CRY OF FREEDOM"]; JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 9 (2008) [hereinafter "MCPHERSON, TRIED BY WAR"].

<sup>7</sup> MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 6, at 262–64.

<sup>8</sup> *Id.* at 264, 267, 271, 273.

<sup>9</sup> *Id.* at 273–74.

<sup>10</sup> *Id.* at 274–75.

<sup>11</sup> *See* MCPHERSON, *TRIED BY WAR*, *supra* note 6, at 22; MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 6, at 280.

<sup>12</sup> MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 6, at 285.

<sup>13</sup> REHNQUIST, *supra* note 5, at 20–25.

<sup>14</sup> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

4.<sup>15</sup> When Congress finally did convene, it ratified a number of Lincoln's wartime actions, but it would be another two years before it ratified this and Lincoln's later, broader suspension of habeas corpus.<sup>16</sup>

In the meantime, Chief Justice Roger Taney, sitting as a United States circuit judge for the District of Maryland, tried to thwart Lincoln's habeas suspension;<sup>17</sup> but Lincoln ignored Taney's order to bring one John Merryman before the court, famously asking Congress, "[Are] all the laws, *but one* [i.e., habeas corpus], to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>18</sup> Three years later, Lincoln would reflect on his action with an analogy:

Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution through preservation of the nation.<sup>19</sup>

Thus, Lincoln understood that the Constitution is not a suicide pact.<sup>20</sup> Our Constitution, in particular, vests powers flexibly enough to protect both security *and* liberty, as the circumstances warrant. But that becomes clear only if one is clear about the first principles of the matter, which is where I want now to turn.

I will begin by briefly setting forth the general theory or framework. Within that framework I will then look, again briefly, at one crucial element of the current War on Terror—the gathering of foreign intelligence—leaving other elements of the war to others on the panel. As revealed by the *New York Times* on December 16, 2005,<sup>21</sup> based on information leaked by a Justice Department official with a top secret Sensitive Compartmented

<sup>15</sup> At that time in our history, Congress normally met in December of the year after the elections in even-numbered years. But several states held their congressional elections only in the spring of odd-numbered years. As a result, Congress could not meet in 1861 until all representatives had been elected. See MCPHERSON, TRIED BY WAR, *supra* note 6, at 23–24.

<sup>16</sup> See Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

<sup>17</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.).

<sup>18</sup> *Memorandum: Military Arrests*, c. May 17, 1861, in WITH LINCOLN IN THE WHITE HOUSE: LETTERS, MEMORANDA, AND OTHER WRITINGS OF JOHN G. NICOLAY, 1860–1865, 430 (2000) (original emphasis); See also REHNQUIST, *supra* note 5, at 38.

<sup>19</sup> MCPHERSON, TRIED BY WAR, *supra* note 6, at 30 (original emphasis).

<sup>20</sup> Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004).

<sup>21</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

Information clearance,<sup>22</sup> President George W. Bush launched the “Terrorist Surveillance Program”<sup>23</sup> shortly after the terrorist attacks of September 11, 2001, briefing eight key members of Congress as he did so. Although the program was and still is secret, in essence it was designed for gathering intelligence on suspected terrorists by monitoring the electronic communications of individuals outside the United States, even when those communications travel through or involve persons in the United States, and even when doing so would seem to violate the strictures of the Foreign Intelligence Surveillance Act of 1978 (FISA),<sup>24</sup> which purports to provide the administration the “exclusive” means for such monitoring. Finally, I will argue that the administration’s various foreign intelligence-gathering activities have been and continue to be not only legal but also perfectly consistent with those background principles.

## II. CONSTITUTIONAL BASICS: POWERS GRANTED, RIGHTS RETAINED

Starting at the top, then, let me begin with the very function of a constitution: in the American context, certainly, our Constitution is the document through which “We the People of the United States” authorized, instituted, empowered, and limited the government we created through it. That places us squarely in the individualist, state-of-nature tradition: the people come together in the original position to give the government its powers; the government does not give the people their rights—they are born with those rights. That is the theory of the Constitution’s Preamble. Before that, it was the theory of the Declaration of Independence; and before that of John Locke, the philosophical father of the nation.<sup>25</sup>

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<sup>22</sup> Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40.

<sup>23</sup> President Bush first used the term “Terrorist Surveillance Program” publicly in a Jan. 23, 2006 speech. See *AP picks up White House’s ‘terrorist surveillance program’ terminology*, Media Matters for America, Feb. 9, 2006, available at <http://mediamatters.org/items/200602090010> (last visited March 31, 2009). Because the administration has modified its secret foreign intelligence gathering activities over time, I will speak generically of those activities rather than use the term “Terrorist Surveillance Program,” which seems to refer to the program that was in place from shortly after 9/11 until sometime after it was revealed to the public in December of 2005.

<sup>24</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (amended 2008). FISA has been amended several times, including by the FISA Amendments Act of 2008, HR 6304, Pub. L. No. 110-261, 122 Stat. 2436 (2008), signed into law on July 10, 2008; The Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (amending 50 U.S.C. § 1801 (2006)), signed into law on August 5, 2007; and the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), signed by President Bush on October 26, 2001.

<sup>25</sup> See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1998) (1690) (discussing the origin and purpose of government).

Too often, however, both libertarians and civil libertarians focus only on the last of those constitutional functions—on the limits on power—and understandably so. As Thomas Jefferson observed, and history has amply demonstrated, “the natural progress of things is for liberty to yield, and government to gain ground.”<sup>26</sup> But limits on government power are only one side of the constitutional equation; grants of power are the other side, and an undue focus on limits slights that side. The reason we create government in the first place, after all, is to better protect ourselves than we would be able to do, absent government, in the state of nature—where life, Thomas Hobbes reminded us, is “solitary, poore [*sic*], nasty, brutish, and short.”<sup>27</sup>

In a word, we came out of the state of nature for our own safety.<sup>28</sup> There are thus *two* rights at issue here, both held against the government we created in the original position: the right to privacy; and the prior right to be secure in our “lives, liberties, and estates.”<sup>29</sup> And no matter how finely one tries *a priori* to calibrate the relation between the two, in a world of risk and imperfect knowledge, there will be times *a posteriori* when the calculus must be overridden and liberty must yield to security. All of which is to say that an undue obsession with overweening government can leave us exposed to the very threats we created government to protect us from in the first place, undermining the very purpose of government.

That much is elementary, of course, yet to listen to much of the recent discourse one would think it had been utterly forgotten. Thus, in the debate over the proper role of the National Security Agency (NSA) in gathering foreign intelligence, the critics’ obsession with privacy has all too often ignored the calculus entailed in the trade-off between privacy and security. On one hand, if the NSA intercepts your communications in an effort to detect terrorist threats, you will not even know it, much less be able to show an actionable harm.<sup>30</sup> On the other hand, if intelligence gathering is restricted out of an excessive concern for privacy, the communications that precipitated 9/11 may very well

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<sup>26</sup> DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 3 (Univ. Press of Va. 1994).

<sup>27</sup> THOMAS HOBBS, *THE LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

<sup>28</sup> See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (Basic Books, Inc. 1974) (for a sophisticated discussion of the matter).

<sup>29</sup> “And ’tis not without reason, that [man] seeks out, and is willing to joyn in Society with others who are already united, or have mind to unite for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property.” LOCKE, *supra* note 25, § 123 at 350 (original emphasis).

<sup>30</sup> In fact, it was for lack of standing that the Sixth Circuit dismissed the complaint in *ACLU v. Nat’l Sec. Agency*, 493 F.3d 644, 648, 653 (6th Cir. 2007).

go undetected. The costs of erring on the side of security are miniscule; while on the side of privacy they can be catastrophic, as we have seen. Intelligence is the first line of defense in the War on Terror. Without timely and adequate intelligence we are defenseless, which is why this war cannot be fought using the reactive, law enforcement model.<sup>31</sup>

### III. EXECUTIVE DOMINANCE IN FOREIGN AFFAIRS

But the Constitution hardly precludes that kind of cost-benefit analysis. Nor is it insensitive to where in the government the balance is best struck. Through Article II, it vests responsibility for the security of the nation, and hence for making such calculations, primarily in the *executive*, whose power in such matters is checked in limited ways by Congress, and in still more limited ways by the judiciary, a pattern our history has repeatedly demonstrated.<sup>32</sup> Thus, it is no accident that when Lincoln explained his actions to Congress he pointed to his oath of office, which required him to “preserve, protect, and defend” the Constitution, a duty that overrode any specific constitutional constraints.<sup>33</sup> And he added that the attack on Fort Sumter left him with no choice “but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”<sup>34</sup>

That distribution of powers is perfectly consistent with our theoretical foundations and our historical practices. Thus, Locke, early on, speaks of the “Executive Power” as the power each of us has in the state of nature to secure his rights.<sup>35</sup> That is the main power we yield up to government once we create it in the original position, charging government to exercise it on our behalf. Later on, once powers are separated—for better protection *against* government—Locke speaks of the “Federative Power,” which the executive exercises over *foreign* affairs.<sup>36</sup> And about that power he says, importantly, “it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the *Executive*; and

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<sup>31</sup> See generally, ANDREW C. MCCARTHY, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD 51–58 (2008) (discussing the intelligence failures that have led to terrorist attacks in the United States and the shortcomings of the law enforcement model for fighting terrorism).

<sup>32</sup> See JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 1–9 (2005); Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1020–23 (2007).

<sup>33</sup> See Pushaw, *supra* note 32, at 1030–31 n.108.

<sup>34</sup> MCPHERSON, TRIED BY WAR, *supra* note 6, at 24.

<sup>35</sup> LOCKE, *supra* note 25, § 13, at 275–76.

<sup>36</sup> *Id.* § 147–48, at 365–66.

so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good.”<sup>37</sup>

Likewise, Montesquieu, described by James Madison in *Federalist* 47 as “the oracle who is always consulted”<sup>38</sup> concerning the separation of powers, writes of the Executive that he “establishes the public security, and provides against invasions.”<sup>39</sup>

And not just the theorists but experience too, under the Articles of Confederation, had taught the Framers the folly of legislative dominance in foreign affairs. Here, for example, is Madison at the Constitutional Convention: “Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent.”<sup>40</sup>

Madison somewhat overstates the point, however. To be sure, one of the main concerns at the Convention, and a principal reason for urging a new constitution, was the lack under the Articles of Confederation of a unified, forceful executive—remember, the new nation was surrounded by three European powers all stronger than itself.<sup>41</sup> But experience in the states was mixed. As Professor John Yoo has shown, the constitutions of New York (1777), Massachusetts (1780), and New Hampshire (1784) provided for relatively strong and successful executives.<sup>42</sup> By contrast, Pennsylvania (1776), with its twelve-man executive council, and South Carolina (1776), where the executive was all but powerless absent express authority from the legislature, offered models the Convention could have chosen but did not.<sup>43</sup>

Thus, it is no surprise that during the nation’s first year under the new Constitution we find Madison writing, “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, *not particularly taken away* must belong to that department.”<sup>44</sup> And a year later, here is Thomas Jefferson, Secretary of State, writing in an April 24, 1790 memorandum to President George Washington:

<sup>37</sup> *Id.*, § 147, at 366 (original emphasis).

<sup>38</sup> THE FEDERALIST No. 47 (James Madison).

<sup>39</sup> BARON DE MONTESQUIEU, 11 THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1748).

<sup>40</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 312 (Adrienne Koch ed., Ohio Univ. Press 1966).

<sup>41</sup> See YOO, *supra* note 32, at 68.

<sup>42</sup> *Id.* at 67–68.

<sup>43</sup> *Id.* at 63, 72–73.

<sup>44</sup> Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 THE WRITINGS OF JAMES MADISON, 405–06 n. 1 (Gaillard Hunt ed., G.P. Putnam’s Sons 1904) (1904) (emphasis added).

The Constitution . . . has declared that ‘the Executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the Senate . . . It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate.<sup>45</sup>

And then he adds: “*Exceptions* are to be construed strictly”<sup>46</sup>—a rare point of agreement between Jefferson and Alexander Hamilton.

That balance, until very recently, has only been confirmed by the great preponderance of cases, which hold that the foreign affairs power belongs mainly to the executive, except as specifically reserved. Reviewing recent scholarship that rejects that view, Professor H. Jefferson Powell, who served in the Office of Legal Counsel in the Clinton Justice Department, noted that the problem for those “adopting the congressional-primacy view is that one [must] repudiate or distinguish away most of what the Supreme Court appears to have said on the subject.”<sup>47</sup> To be sure, the constitutional text is considerably more underdetermined in foreign than in domestic affairs. But that means only that theory, structure, history, and precedent loom larger, and they all point to executive dominance in foreign affairs.

#### IV. THE GATHERING OF FOREIGN INTELLIGENCE

Turning, then, to the matter at hand, how does this brief background shed light on the power to gather foreign intelligence? I submit that the question here is not whether the Bush administration’s foreign intelligence surveillance activities amount to “warrantless wiretapping” in violation of the Foreign Intelligence Surveillance Act (FISA), for that would beg the separation-of-powers question by presuming congressional supremacy. Rather, to avoid that circularity, the questions at the end of the day are whether FISA was wise and whether it is an unconstitutional intrusion on the vested Article II power of the president,<sup>48</sup> and the two are closely connected.

Consider, as a preliminary matter, whether it was wise. Let us start with the facts, and the overriding fact is that we do not

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<sup>45</sup> Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments in 16 PAPERS OF THOMAS JEFFERSON 378–79 (Julian P. Boyd ed., 1961) (2000) (original emphasis).

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

<sup>47</sup> H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1472 (1999).

<sup>48</sup> See Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U.L. REV. 375 (2008).



know many of the facts. Foreign intelligence gathering is done in secret, understandably, and the issues are technical. We are not talking here about agents putting on headphones and going down to the telephone company's offices to clamp alligator clips on copper wires.

The practical problem, however, is clear, and it was put well by Judge Richard Posner, writing in the *Wall Street Journal* shortly after the NSA surveillance story broke:

The administration is right to point out that FISA, enacted in 1978—long before the danger of global terrorism was recognized and electronic surveillance was transformed by the digital revolution—is dangerously obsolete. It retains value as a framework for monitoring the communications of *known* terrorists, but it is hopeless as a framework for *detecting* terrorists. It requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance *is* a terrorist, when the desperate need is to find out *who* is a terrorist.<sup>49</sup>

Posner likened that task to looking for a needle in a haystack.<sup>50</sup>

But the technical problems surrounding FISA are more daunting still. Professor K.A. Taipale, executive director of the Center for Advanced Studies in Science and Technology Policy, has summarized them as follows:

In modern networks, data and increasingly voice communications are broken up into discrete packets that travel along independent routes between point of origin and destination where these fragments are then reassembled into the original whole message ["packet based"]. Not only is there no longer a dedicated circuit, but individual packets from the same communication may take completely different paths to their destination. To intercept these kinds of communications, filters ["packet-sniffers"] and search strategies are deployed at various communication nodes to scan and filter all passing traffic with the hope of finding and extracting those packets of interest and reassembling them into a coherent message. Even targeting a specific message from a known sender requires intercepting (i.e., scanning and filtering) the entire communication flow. Were FISA to be applied strictly according to its terms prior to any "electronic surveillance" of foreign communication flows passing through the US or where there is a substantial likelihood of intercepting US persons, then no automated monitoring of any kind could occur.<sup>51</sup>

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<sup>49</sup> Richard Posner, *A New Surveillance Act*, WALL STREET J., Feb. 15, 2006, at A16 (emphasis added).

<sup>50</sup> *Id.*

<sup>51</sup> K.A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance*, N.Y.U. REV. OF L. & SEC., NO. 7, SUPL. BULL. ON L. & SEC., Spring 2006, available at <http://ssrn.com/abstract=889120>. See also K.A. Taipale, *The Ear of Dionysus: Rethinking Foreign Intelligence Surveillance*, 9 YALE J. L. & TECH.

## V. THE STATUTORY ARGUMENTS

Turning now to the legal questions, after the *New York Times* revealed the secret terrorist surveillance program on December 16, 2005,<sup>52</sup> there was an immediate outcry among many civil libertarians.<sup>53</sup> The administration responded six days later with a Department of Justice letter to the majority and ranking members of the House and Senate Intelligence Committees,<sup>54</sup> defending the president's actions on statutory, constitutional, and practical grounds.

The administration's statutory argument rests on the Authorization to Use Military Force (AUMF),<sup>55</sup> which Congress passed only one week after 9/11.<sup>56</sup> Section 2(a) of the Act authorizes the president:

[T]o 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.<sup>57</sup>

At a minimum, that authorization would seem to entail the power to obtain the foreign intelligence necessary for accomplishing the authorization's purpose—preventing any future terrorist attacks on America.

The critics answered with narrow legal arguments, oblivious it seems to the pressing practical problems the administration faced in the immediate aftermath of 9/11, to say nothing of possible political remedies for the critics' concerns. Thus, their main charge was that the AUMF could not be read as implicitly overriding FISA's prohibition on warrantless domestic wartime surveillance because Congress in FISA expressly and specifically

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128, 135–36 (2007) (noting, like Posner, that FISA “provides no mechanisms for authorizing advanced technical methods” to identify terrorists).

<sup>52</sup> Risen & Lichtblau, *supra* note 21.

<sup>53</sup> See, e.g., Letter from 14 self-described scholars of constitutional law and former government officials “concerned by the Bush administration’s National Security Agency domestic spying program” to Members of Congress (Jan. 9, 2006) available at <http://www.nsawatch.org/DOJ.Response.AUMF.final.pdf> [hereinafter “Letter to Members of Congress”]; David Cole, et al., *On NSA Spying: A Letter to Congress*, 53 THE N.Y. REV. OF BOOKS 42, (Nov. 2, 2006). On its editorial page, of course, the *New York Times* itself has kept up what often has seemed like a daily drumbeat of criticism of this and other elements of the War on Terror.

<sup>54</sup> Letter from William E. Moschella to Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman (December 22, 2005) available at <http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf>.

<sup>55</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

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

<sup>57</sup> *Id.*

addressed that issue and limited that surveillance to the first 15 days of war.<sup>58</sup> In short, even though FISA excepts surveillance authorized by statute, and the AUMF was later in time, an unstated *general* “implication” overriding the *specific* and *express* language of FISA cannot reasonably be drawn, critics argued, for the law disfavors repeals by implication.<sup>59</sup>

That is generally true, of course, and were Congress to have drafted the AUMF in the fullness of time—something it rarely does under the best of circumstances—it would be a more compelling argument. But in the wake of the terrorist attacks on New York and Washington on 9/11—recall, the AUMF was passed seven days later—Washington, even when business was able to resume, was an armed camp, with military personnel and equipment on every corner. The AUMF uses few words. A natural reading of its “general” implications aside, one can only assume that legislators did not consider every implication or every related statute, as they might have (but only might) under more normal circumstances.<sup>60</sup>

But if one wishes, later in time, to focus on and argue from narrow points of statutory interpretation, the place to begin is with a thorough and detailed rebuttal of the critics, published by the Federalist Society.<sup>61</sup> There the authors note, among much else, “several reasons for concluding that one need not invalidate FISA in order to uphold the NSA program.”<sup>62</sup> Parsing carefully the statutorily defined species of “electronic surveillance” that comes within FISA’s ambit, “the range of conversations implicated in this controversy,” they conclude, “may be much narrower than commonly supposed.”<sup>63</sup>

This is not the forum for close discussion of the statutory arguments, save for an additional practical consideration. The administration’s critics have invariably assumed that a fairly sharp line could be drawn between foreign and domestic communications, or persons, or interceptions, when in fact that line is often unknown and unworkable and, worst of all, would seem to require ending the interception once it “crossed our

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<sup>58</sup> Letter to Members of Congress, *supra* note 53, at 3–4.

<sup>59</sup> *Id.*

<sup>60</sup> Still, the critics note correctly that insofar as the administration relies on a statutory argument, it had an opportunity to obtain authorization for warrantless surveillance when it sought and obtained amendments to FISA through the USA Patriot Act in October 2001. *Id.* at n. 5.

<sup>61</sup> See Andrew C. McCarthy, David B. Rivkin, Jr. & Lee A. Casey, *NSA’s Warrantless Surveillance Program, Legal, Constitutional, and Necessary* (May 22, 2007), available at [http://www.fed-soc.org/doclib/20070522\\_terroristsurveillance.pdf](http://www.fed-soc.org/doclib/20070522_terroristsurveillance.pdf).

<sup>62</sup> *Id.* at 54–60.

<sup>63</sup> *Id.* at 55.

border”—precisely when we might most want to follow it.<sup>64</sup> Among the absurd results that have flowed from that focus is a recent secret decision by a FISA judge that the statute prohibited the warrantless interception of communications between individuals located *outside* the United States if the communications passed through an Internet switch located *in* the United States.<sup>65</sup> After the decision came to light, the administration pressed Congress strongly and obtained a temporary fix in the form of the Protect America Act of 2007.<sup>66</sup>

## VI. THE CONSTITUTIONAL ARGUMENTS

### A. The Fourth Amendment

But the main weakness of the critic's statutory argument is circularity: it begs the basic question. In the name of "constitutional avoidance" it simply assumes that Congress has the power to regulate the president's Article II power to gather foreign intelligence, a power presidents have exercised since the nation's founding, in war and peace alike, quite without any statutory micromanagement, and with consistent judicial deference.<sup>67</sup> Notwithstanding that history, critics maintain that congressional regulation of the executive's domestic electronic surveillance for foreign intelligence purposes is constitutional, pointing in part to the Fourth Amendment: Congress may regulate the president's conduct, they say, to ensure that the

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<sup>64</sup> Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. TIMES, Aug. 2, 2007, at A16. Those who point to FISA's emergency provisions invariably ignore what they actually entail. As the administration has put it: "There is a serious misconception about so-called 'emergency authorizations' under FISA, which allow 72 hours of surveillance without a court order." In particular, the attorney general must determine *in advance* that the FISA application will be approved. Moreover, among other things, "a typical FISA application involves a substantial process in its own right: The work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security Advisor, the Director of the FBI, or another designated Senate-confirmed officer; and, finally the approval of an Article III judge." See Memorandum from the U.S. Dep't of Justice on The NSA Program to Detect and Prevent Terrorist Attacks: Myth v. Reality (Jan. 27, 2006) available at [http://www.usdoj.gov/opa/documents/nsa\\_myth\\_v\\_reality.pdf](http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf). Critics often complain that the FISA Court is a "rubber stamp." See Del Quentin Wilber, *Surveillance Court Quietly Moving*, WASH. POST, Mar. 2, 2009, at A2. In 2007, the last year for which statistics are available, the court approved all but three of 2,370 applications while making substantive modifications to 86 others. *Id.* But that complaint ignores the applications that were never brought for fear of disapproval.

<sup>65</sup> See Miller, *supra* note 64.

<sup>66</sup> See The Protect America Act of 2007, *supra* note 24.

<sup>67</sup> See *A Tragic Legacy of Serious Harm to the Constitution and American Security Resulting from Legislative Usurpation of Executive Power: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Congress 27–31 (2008) (statement of Robert F. Turner, Cofounder, Center for National Security Law) [hereinafter "Turner, *Tragic Legacy*"] available at <http://www.virginia.edu/cnsl/pdf/Turner-War-Powers-in-21stCentury-April08.pdf>.

amendment's warrant and probable cause "requirements" are met.<sup>68</sup> To the administration's response that the NSA surveillance at issue, undertaken mainly for national security rather than for law enforcement purposes, falls under the "special needs" exception to such requirements, critics answer that "special needs" generally excuse the warrant and individualized suspicion requirements only where those requirements are impracticable and the intrusion on privacy is minimal.<sup>69</sup>

The Fourth Amendment prohibits only "unreasonable" searches, of course, not warrantless searches.<sup>70</sup> But to the critics' points: Is satisfying those warrant and individualized suspicion "requirements" impracticable? That is a judgment call that none but those conversant with the classified facts and practices can make.<sup>71</sup> To be sure, officials charged with detecting terrorist activity have an interest in minimizing the difficulties of doing so. But the assurances of the critics, most with no personal acquaintance with the matter, that "the experience of FISA shows that foreign intelligence surveillance can be carried out through warrants based on individualized suspicion"<sup>72</sup> does not give confidence.<sup>73</sup> And is the NSA's intrusion on privacy more than minimal? The critics' assertion that "[w]iretapping is not a minimal intrusion on privacy"<sup>74</sup> would be more convincing if, as noted earlier, they could produce people who even knew that their communications had been intercepted, much less could show that they had been harmed. Here again, the contrast between the respective harms is stark—and surely must play into the meaning of "unreasonable."

In fact, the issue of a "special needs" exception was addressed very recently by the United States Foreign Intelligence Surveillance Court of Review, in only its second opinion, *In re: Directives*,<sup>75</sup> decided on August 22, 2008, but made

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<sup>68</sup> Letter to Members of Congress, *supra* note 53, at 8.

<sup>69</sup> *Id.*

<sup>70</sup> "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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>71</sup> See *infra* notes 109–111 and the accompanying text.

<sup>72</sup> Letter to Members of Congress, *supra* note 53, at 8.

<sup>73</sup> See *supra* notes 49, 51, 61 and the accompanying text. Indeed, if the *In re Sealed Case*, discussed *infra*, brought anything to light, it is how difficult and confusing it can be for intelligence officials and courts alike to discern and apply FISA's provisions. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curiam).

<sup>74</sup> Letter to Members of Congress, *supra* note 53, at 8.

<sup>75</sup> *In re Directives*, 551 F.3d 1004 (FISA Ct. Rev. 2008).

public only on January 16, 2009. Ruling under provisions of the then-recently-expired Protect America Act of 2007, which had temporarily revised FISA,<sup>76</sup> the court held that “a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”<sup>77</sup> Moreover, after considering the totality of the circumstances and balancing the relevant interests, the court also held “that the surveillances at issue satisfy the Fourth Amendment’s reasonableness requirement.”<sup>78</sup>

#### B. The Separation of Powers

Congressional regulation pursuant to the Fourth Amendment is only one branch of the constitutional argument, of course. More fundamental, arguably, is the separation-of-powers issue. And here, it should be noticed, the critics’ push for congressional dominance in foreign affairs is but part of a much larger trend, stretching back over more than a century. Today’s congressional supremacists see a broad scope for legislation in foreign affairs, which means, ultimately, for adjudication *by the courts*—in short, for the judicialization of war, promoted today largely by the international law branch of the legal academy.<sup>79</sup> But that development did not begin with foreign affairs. Its roots are in the Progressive Era, with an emphasis on the statutory ordering of domains the Constitution had left largely to private ordering, albeit with judicial oversight under the common law.<sup>80</sup> That Progressive vision was finally constitutionalized by the New Deal Court, which is seen by many today, erroneously, as having checked the “activism” of the “Old Court.”<sup>81</sup> In truth, however, the New Deal Court opened the floodgates for a surfeit of Progressive legislation—federal, state, and local—regulating vast areas of life, following which the courts were increasingly called

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<sup>76</sup> See The Protect America Act of 2007, *supra* note 24.

<sup>77</sup> *In re Directives*, 551 F.3d at 1012.

<sup>78</sup> *Id.* at 1016.

<sup>79</sup> See David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, 51, 60; cf. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 44–6. For a critique of the move from traditional liberal internationalism to progressive transnationalism, see John Fonte, *The World Is My Constituency*, NATIONAL REVIEW, Nov. 2, 2008 available at [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=5852](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=5852).

<sup>80</sup> See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 2–8 (2006).

<sup>81</sup> *Id.* at 71–77.

upon to adjudicate the often inconsistent and incoherent legislative tangle that poured through.<sup>82</sup>

With the Vietnam War, however, we saw that same Progressive impulse directed to foreign affairs. Between 1964 and 1984, for example, the congressional publication *Legislation on Foreign Relations* increased four-fold, from one 659-page volume to two volumes of over 1,300 pages each.<sup>83</sup> It was a massive expansion of congressional micromanagement of the executive's conduct of foreign affairs, no better illustrated than by the War Powers Resolution (1973) and FISA (1978).<sup>84</sup>

Not surprisingly, those who argue for congressional supremacy in foreign affairs usually ignore the early sources cited above. Instead, they take as their template the 1952 concurrence of Justice Robert Jackson in the *Youngstown* case,<sup>85</sup> which in their hands has achieved all but iconic status. Recall that Jackson distinguished three scenarios: the president's power is at its height when supported by congressional action, he said; in a "zone of twilight" when Congress is silent; and "at its lowest ebb" when at odds with the expressed or implied will of Congress.<sup>86</sup>

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<sup>82</sup> I have discussed those issues more fully in *Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War: Hearing Before the Comm. on Homeland Security and Government Affairs, Subcomm. on Fed. Financial Management, Government Information, and International Security, United States S., 109th Cong.* (statement of Roger Pilon, Vice President for Legal Affairs, B. Kenneth Simon Chair in Constitutional Studies, and Director, Center for Constitutional Studies, Cato Institute), available at <http://www.cato.org/testimony/ct-rp102005.html>, reprinted as *The United States Constitution: From Limited Government to Leviathan*, A.I.E.R. ECONOMIC EDUCATION BULLETIN, 2005.

<sup>83</sup> COMM. ON FOREIGN RELATIONS AND FOREIGN AFFAIRS OF THE SENATE AND HOUSE OF REPRESENTATIVES, LEGISLATION ON FOREIGN RELATIONS THROUGH 1964 (1964); COMM. ON FOREIGN RELATIONS AND FOREIGN AFFAIRS OF THE SENATE AND HOUSE OF REPRESENTATIVES, LEGISLATION ON FOREIGN RELATIONS THROUGH 1984 (1984).

<sup>84</sup> See Turner, *Tragic Legacy*, *supra* note 67. In the aftermath of the 1960s, congressional intrusion into matters the Constitution left mainly to politics was not limited to foreign affairs, of course. Another area that has seen congressional micromanagement, with predictable consequences, is campaign finance. See, e.g. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. At oral argument in a case now before the Supreme Court, *Citizens United v. Federal Election Commission*, former solicitor general Theodore B. Olson, arguing for the petitioner, described the current law as "one of the most complicated, expensive, and incomprehensible regulatory regimes ever invented by the administrative state"—a regime that Deputy Solicitor General Malcolm Stewart, arguing for the government, later admitted would allow for the regulation not only of the movie at issue but of books as well. Transcript of Oral Argument at 3, 37, *Citizens United v. Federal Election Commission*, No. 08-205, March 24, 2009, available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf).

<sup>85</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>86</sup> *Id.* at 637.

There are several problems with using that template as a substitute for the Constitution as originally understood and as interpreted and applied by the courts over the years to foreign affairs. First, *Youngstown* was arguably a domestic, not a foreign affairs, case, notwithstanding President Truman's effort to bootstrap a local labor dispute into a foreign affairs matter. Second, Jackson's concurrence was the opinion of only one justice.<sup>87</sup> Third, it was dicta. Fourth, it was metaphor. Fifth, even on its own terms the passage did not say that the president did *not* have power; it said only that his power was "at its lowest ebb,"<sup>88</sup> which is a *political*, not a *legal*, point. Finally, Jackson carefully distinguished the seizure of private property within the United States from a case involving external affairs, noting expressly that the president's "conduct of foreign affairs" was "largely uncontrolled, and often even is unknown," by the other branches.<sup>89</sup> And he added: "I should indulge the widest latitude of interpretation to sustain [the president's] *exclusive* function to command the instruments of national force, at least when turned against the *outside* world for the security of our society."<sup>90</sup>

Administration critics also cite the so-called *Keith* case of 1972.<sup>91</sup> But that too was a domestic case. And the Court there *repeatedly* distinguished it from one involving the president's constitutional power to collect *foreign* intelligence.<sup>92</sup> Writing for an unanimous Court, Justice Lewis Powell quoted from the wiretap provisions of the 1968 Crime Control and Safe Streets Act:<sup>93</sup>

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.<sup>94</sup>

But, critics respond, "FISA specifically *repealed* that provision, FISA § 201(c), 92 Stat. 1797, and replaced it with language dictating that FISA and the criminal code are the

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<sup>87</sup> *Id.* at 642.

<sup>88</sup> *Id.* at 637.

<sup>89</sup> *Id.* at 642.

<sup>90</sup> *Id.* at 645 (emphasis added).

<sup>91</sup> *United States v. United States District Court*, 407 U.S. 297 (1972).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 303.

<sup>94</sup> *Id.*



‘exclusive means’ of conducting electronic surveillance.”<sup>95</sup> Clearly, Congress can repeal that provision. Consistent with the separation of powers, however, it cannot, by mere statute, repeal or otherwise restrict “the *constitutional* power of the President”—a power it had recently recognized—by “dictating” how the president shall exercise his constitutional power.

To be sure, Article I, section 8 of the Constitution vests power in Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the powers vested in the government, including the power of the president to gather foreign intelligence.<sup>96</sup> But FISA is hardly “necessary” for carrying that power into execution—presidents have exercised it since the nation’s inception, quite without any congressional micromanagement. Nor is FISA “proper” insofar as its restrictions intrude on the president’s vested foreign affairs powers or hinder his protection of the nation for so little gain—both of which, unfortunately, are the case.

Those conclusions emerged in various ways in the most authoritative opinion to date on FISA, post 9/11 and post Patriot Act, the *In re: Sealed Case*,<sup>97</sup> decided on November 18, 2002, by the United States Foreign Intelligence Surveillance Court of Review—its first decision since FISA was enacted.<sup>98</sup> Although the government was not bringing an Article II challenge to FISA, it was seeking reversal of the lower FISA court’s grant of a surveillance order that imposed restrictions on the internal workings of the Justice Department, restrictions that arose, the court of review found, from several erroneous readings of the statute by prior courts.<sup>99</sup> But in the course of its exhaustive opinion, the court of review spoke directly to the issue of inherent (more properly, vested<sup>100</sup>) executive power.<sup>101</sup> Citing an earlier Fourth Circuit decision, *United States v. Truong*,<sup>102</sup> which dealt with pre-FISA surveillance based on “the President’s constitutional responsibility to conduct the foreign affairs of the United States,”<sup>103</sup> the court said:

The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct

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<sup>95</sup> Letter to Members of Congress, *supra* note 53, at 6 (original emphasis).

<sup>96</sup> U.S. CONST. art. I, § 8.

<sup>97</sup> *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curium).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Lawson, *supra* note 48.

<sup>101</sup> *In re Sealed Case* was also cited repeatedly in the second opinion of the FISA Court of Review, *In re Directives*, 551 F.3d 1004 (FISA Ct. Rev. 2009).

<sup>102</sup> *United States v. Truong Dinh Hung*, 629 F.2d. 908, 911 (4th Cir. 1980).

<sup>103</sup> *In re Sealed Case*, 310 F.3d at 742.

warrantless searches to obtain foreign intelligence information . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.<sup>104</sup>

That does not settle the separation-of-powers question, of course, for it leaves open the relation, in various factual situations, between the president's and Congress's concurrent powers. But it points in the right direction by noting the unmistakable history of judicial support for the president's "inherent authority to conduct warrantless searches to obtain foreign intelligence information."<sup>105</sup> In deciding the issue before it, however, the *Sealed Case* court's main concern was with how there arose a "false dichotomy" between surveillance for foreign intelligence purposes and surveillance for law enforcement purposes—leading to the "primary purpose" test for admitting evidence into criminal prosecutions—and how that led in turn to a "wall" between law enforcement and counterintelligence agents and agencies.<sup>106</sup> In painstaking detail the court traces those errors.<sup>107</sup> Yet the inescapable conclusion that emerges from that troubled history is really quite simple: How could it have been otherwise?

#### VII. CONGRESSIONAL OVERREACHING AND POLITICS

The complex layers of confusion the *Sealed Case* court lays bare—among prior courts and government officials alike—is the product, quite simply, of repeated efforts by Congress to "get it right." But in a matter so fraught with infinite variety as foreign intelligence gathering, in a world of ever changing technology, statutory micromanagement of the kind revealed in *Sealed Case* is a fool's errand. Classical economists like F.A. Hayek have demonstrated the folly of legislative efforts to manage the economy—the kinds of efforts that emerged from Congress with the New Deal.<sup>108</sup> *Mutatis mutandis*, the same principles apply here. All of which brings us back, not surprisingly, to John Locke: the foreign affairs power "is much less capable to be directed by antecedent, standing, positive Laws, than [by] the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good."<sup>109</sup>

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<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> *Id.*

<sup>106</sup> *See Id.*

<sup>107</sup> *See Id.*

<sup>108</sup> *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. J., 519 (Sept. 1945).

<sup>109</sup> Locke, *supra* note 25.

And recent experience bears that out. Recall the Senate testimony of former FBI agent Coleen Rowley, based in the FBI's Minneapolis office, about the difficulties she encountered with FBI headquarters agents who feared she did not have enough evidence to obtain a FISA warrant to search the laptop of Zacarias Moussaoui, later convicted as the twentieth 9/11 hijacker.<sup>110</sup> And at Moussaoui's trial, four years later, Rowley's former colleague, FBI agent Harry Samit, testified that only days before 9/11 he tried to get a FISA warrant to search Moussaoui's laptop, only to be told that he didn't have enough to satisfy the FISA restrictions.<sup>111</sup> When FISA was enacted, Congress decided to err on the side of privacy, not security, and we paid the price for it.

None of this is to say, of course, that Congress is powerless in these matters. In foreign affairs in general it has certain enumerated constitutional powers that historically have checked the executive in limited ways. Most prominently, it has the power of the purse—and, ultimately, the power of impeachment. But short of those, it has the *political* power that is inherent in its oversight functions, whether conducted in public or, as is often necessary in these matters, in closed sessions. When Congress tries to micromanage the executive through *legislation*, however, it is the courts that often end up doing the micromanaging, indulging the judicial hermeneutics we see in so many of these cases, trying to discern what Congress “really” meant, issuing fractured opinions and inscrutable guidance over matters beyond their competence. The *In re: Sealed Case* illustrates the struggle: it shows, beyond doubt, how earlier courts, doing the same, led to the erection of the “wall” that may have led, tragically, to the terrorist attacks of September 11.<sup>112</sup>

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<sup>110</sup> *Oversight Hearing on Counterterrorism: Hearing before the S. Comm. on the Judiciary*, 107th Cong. (2002), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=279&wit\\_id=628](http://judiciary.senate.gov/hearings/testimony.cfm?id=279&wit_id=628) (statement of Coleen Rowley, Federal Bureau of Investigation agent).

<sup>111</sup> Transcript of Record at 907–51, *United States v. Moussaoui*, 483 F.3d 220 (2007), available at <http://www.law.umkc.edu/faculty/projects/ftrials/moussaoui/zmsamit.html> (last visited July 16, 2009).

<sup>112</sup> See *In re Sealed Case*, 310 F.3d 717, n.29 (FISA Ct. Rev. 2002) (per curiam):

An FBI agent recently testified that efforts to conduct a criminal investigation of two of the alleged hijackers were blocked by senior FBI officials—understandably concerned about prior FISA court criticisms—who interpreted that court's decisions as precluding a criminal investigator's role. One agent, frustrated at encountering the “wall,” wrote to headquarters: “[S]omeday someone will die—and wall or not—the public will not understand why we were not more effective and throwing every resource we had at certain ‘problems.’ Let's hope the National Security Law Unit will stand behind their decisions then, especially since the biggest threat to us now, [Usama Bin Laden], is getting the most ‘protection.’” The agent was told in response that

In the end, as the Framers understood, foreign affairs, with all its variables and subtleties, is more a matter for politics than law. Early on, in secret sessions, President Bush briefed eight key members of Congress about the Terrorist Surveillance Program, to the apparent satisfaction of all. It was only after details of the program were leaked to the press, more than three years later, that opinions shifted. Still, as politics have played out since then, opinion has shifted again as cooler heads have come to the fore. On July 10, 2008, President Bush signed The FISA Amendments Law of 2008, which members of Congress, including then Senator Barack Obama, supported overwhelmingly.<sup>113</sup> Whether those amendments, which substantially loosen FISA's restrictions on the president's foreign intelligence surveillance power, will survive the test of time in an ever-changing world remains to be seen. But a history of repeated revisions suggests that the Framers got it right when they left such matters mainly to the president and politics.

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headquarters was frustrated with the issue, but that those were the rules, and the National Security Law Unit does not make them up. *The Malaysia Hijacking and September 11th: Joint Hearing Before the Senate and House Select Intelligence Committees* (Sept. 20, 2002) (written statement of New York special agent of the FBI).

<sup>113</sup> H.R. 6304: FISA Amendments Act of 2008, available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-6304>; See Michael Hayden, *Warrantless Criticism*, N.Y. TIMES, July 27, 2009, at A21:

Some critics claim that Congress was not aware of the full extent of the program, but the ultimate judgment on the effectiveness of much of the program may actually have been the actions of Congress. In the 2008 amendment to the Foreign Intelligence Surveillance Act, Congress judged it appropriate not only to provide additional legal underpinnings for much of what the agency had been doing but also to recognize the value of its activities by providing additional critically needed capabilities. In my briefings to Congressional overseers from 2001 to 2005, I continually made the point that we simply could not achieve the program's operational effect under FISA procedures as they then existed and it is clear that Congress ultimately agreed.