

Presidential Authority to Gather Foreign Intelligence

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President George W. Bush has claimed inherent constitutional authority to collect foreign intelligence on his say-so alone in contravention of the warrant requirements stipulated in the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended six times since 9/11. The constitutionality of FISA, however, is incontestable. It is justified by the Necessary and Proper Clause of Article I, section 8, clause 18 in light of the massive foreign intelligence abuses compiled during forty years of absolute executive power. FISA leaves the separation of powers undisturbed. It regulates only a microscopic percentage of foreign intelligence collection. To sustain President Bush's constitutional claims would "trust me" the measure of our civil liberties, not the checks and balances intended by the Constitution's architects.

President George W. Bush has claimed inherent constitutional power to target American citizens on American soil for warrantless electronic surveillance or physical searches by the National Security Agency (NSA) in defiance of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (FISA). The statute has been amended six times since 9/11 to accommodate the heightened danger and new stratagems for communicating without detection.¹ Why has President Bush's nonsense on stilts garnered nontrivial homage?

Conflict summons fear.

Fear breeds imbalanced judgments.

Imbalanced judgments manufacture constitutional interpretations from trifles light as air to exploit and to placate exaggerated popular alarm.

9/11 fits the historical pattern. The aftermath of that abomination resembles Pearl Harbor, one of its most execrable ancestors. Five months elapsed after the Japanese attack

1. 50 U.S.C. § 1801 et seq.

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with no evidence of internal disloyalty or sabotage in the United States by citizens or permanent resident aliens sporting Japanese ancestry. Yet 120,000 were interned until the closing months of World War II, a duration that was extended to avoid antagonizing bigoted voters in the November 1944 elections. The professed justification was national security. The genuine reason was racism, as Congress found in the Civil Liberties Act of 1988.²

President Bush has chosen to flout FISA for more than five years with no evidence that its mild restraints on foreign intelligence collection impair the defeat of international terrorism. His motivations have been fivefold: to gather political intelligence against his domestic critics, to chill dissent by creating an aura of intimidation, to cripple Congress as a check on presidential power, to warn courts against second-guessing national security decisions of the commander in chief, and to concoct an appearance of toughness on terrorism.

FISA did not facilitate the success of the 9/11 hijackers. The 9/11 Commission did not find that the hijackings would have been averted if the president had enjoyed unchecked power to spy. On July 31, 2002, the Bush administration testified to the Senate Intelligence Committee that FISA was nimble, flexible, and impeccable as an instrument for nipping terrorist plots in the bud.³

The NSA's circumvention of FISA has yielded no demonstrable national security benefits. President Bush has not identified even one terrorist attack that was frustrated by warrantless spying on American citizens. In contrast, the White House has described in some detail the terrorism that was allegedly frustrated by the CIA's secret imprisonments and interrogations of the "Al Qaeda 14." In signing the Military Commissions Act of 2006, President Bush elaborated: "The CIA program helped us identify terrorists who were sent to case targets inside the United States, including financial buildings in major cities on the East Coast. And the CIA program helped us stop the planned strike on U.S. Marines in Djibouti, a planned attack on the U.S. consulate in Karachi, and a plot to hijack airplanes and fly them into Heathrow Airport and Canary Wharf in London."⁴ Bush has conspicuously remained as silent as the Sphinx about the NSA's warrantless surveillance success stories because there are none to tell. If there were, they would have been leaked and declassified long ago.

Pearl Harbor and 9/11 have in common the cynical assertions of power to advance a partisan political agenda at the expense of the Constitution and the rule of law. To borrow from Madam Roland about the French Revolution: "O National Security! O National Security! What crimes are committed in thy name!"

Congressional Power to Enact FISA

There may be statutes with even more solid constitutional foundations than FISA, but if there are, they do not readily come to mind.

2. Public Law 100-383; 50 U.S.C. App. 1989 (b-3(e)).

3. 50 U.S.C. §§ 1801-1811 and 1821-1829.

4. "President Bush Signs Military Commissions Act of 2006." Available from <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

Article I, section 8, clause 18 empowers Congress “to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof” (Necessary and Proper Clause). Chief Justice John Marshall, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), explained the breadth of authority it confers:

A constitution, to contain an accurate detail of the subdivisions of which its great powers will admit, and of all the means by which they shall be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a *constitution* we are expounding. . . . [The Necessary and Proper Clause] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* in human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise reason, and to accommodate its legislation to circumstances. . . . [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (emphasis added)

It may be conceded that Article II of the Constitution vests in the president authority to gather foreign intelligence, that is, intelligence useful to the foreign policy or national security of the United States. FISA, nevertheless, is a “necessary and proper” law regulating the execution of that authority. Its legitimate goals are to fortify the Fourth Amendment’s protection of privacy and the First Amendment’s protection of free speech and association. Both were chronically abused during forty years of unchecked executive power over intelligence collection. The Constitution did not require Congress to blind itself to this experience. Absolute power corrupts absolutely in all times and places. Human nature does not change.

U.S. Circuit Judge Richard A. Posner has written: “FISA was a legislative reaction (indeed overreaction) to executive branch abuses” (Posner 2006, 149). But he insists that a changed cultural environment more adulatory of civil liberties has antiquated the statute: “The point is not that human nature has changed, since the days when J. Edgar Hoover ran roughshod over civil liberties; it hasn’t. It’s the environment in which law enforcement and intelligence personnel work that has changed reducing the risk of abuse of private information by its governmental custodians at the same time that the menace of terrorism has increased” (ibid., 145). Posner adds: “Although there is a history of

misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history. The legal and bureaucratic controls over such misuse are much tighter today than they used to be" (ibid., 144). The judge's argument is unconvincing.

As chronicled hereafter, intelligence abuses are frequently orchestrated by the president or his political appointees, not by trained bureaucrats. Ambassador Joseph Wilson and Valery Plame, for example, were defamed through intelligence leaks from President Bush's inner circle, including Vice President Dick Cheney, his Chief of Staff Scooter Libby, and Karl Rove, President Bush's Rasputin. Further, the incentives for law enforcement and intelligence personnel since 9/11 is to spy more and pay less heed to civil liberties under the patriotic marquee, "No more 9/11's." Even before that infamous date, Wen Ho Lee's life had been ruined by government leaks falsely identifying him as a Chinese Communist spy. Ditto for Stephen Hatfill, a so-called person of interest in the FBI anthrax villain investigation. On November 3, 2006, the *New York Times* reported that FBI Director Robert S. Mueller had issued a stern message to the bureau's thirty thousand employees against leaking confidential information after recent news articles disclosed criminal investigations involving congressional incumbents, especially House Republicans. The leaks could have affected the Democratic capture of the 110th Congress.

The state secrets doctrine protects wrongdoers who abuse foreign intelligence from civil liability. And criminal liability will be averted or absolved by presidential pardons or retroactive immunity enacted by Congress. Think of President Ronald Reagan's pardons of Ed Miller and Mark Felt for illegal burglaries, President George H. W. Bush's pardons of Elliot Abrams and Caspar Weinberger for Iran-Contra deceptions, and President Bill Clinton's pardon of CIA Director John Deutch for his mishandling of classified information. The Military Commissions Act also exonerated violations of the War Crimes Act of 1987. The Civil Liberties Board created by the Patriot Act is a nonfunctioning joke.

Posner also undercuts his own "changed environment" thesis by proposing a qualified "good faith" immunity defense to shield national security officials who violate a constitutional right (ibid., 155). But the defense would be unnecessary if officials were scrupulous in obeying the law.

Finally, the FBI's and CIA's intelligence wrongdoings receded from their historical high watermark because of statutes like FISA. That understanding is a reason for retaining the laws, not for their relaxation.

A special committee of the U.S. Senate dubbed the "Church committee" held lengthy and televised hearings beginning in 1975.⁵ The Church committee was complemented by a less responsible and professional committee in the House of Representatives styled the "Pike committee."⁶ Both committees surveyed forty years of unchecked executive spying for intelligence purposes from President Franklin D. Roosevelt through President Richard M. Nixon. The examination revealed decades of illegal mail openings, decades of illegal interceptions of international telegrams, a history of illegal burglaries,

5. Hearings before the Select Committee to Study Government Operations with Respect to Intelligence Activities of the U.S. Senate, 94th Cong., 1st sess., vol. 4, Mail Opening, October 21-24, 1975.

6. *Congressional Record*, 94th Cong., 2d sess. (January 29, 1976).

misuse of the NSA for non-foreign intelligence purposes, spying to gather political intelligence and embarrassing personal information on political opponents and dossiers on political dissenters.

The FBI's investigation of the leak to the *New York Times* of President Nixon's secret bombing of Cambodia in 1970 was emblematic (Gentry 1991, 632). It began with wiretaps on Morton Halperin, an aide to National Security Adviser Henry Kissinger. It expanded to persons whom Kissinger suspected were undermining his White House influence. Two months of wiretaps and bugs yielded nothing, but Kissinger insisted on their continuance to enable the suspects to establish a "pattern of innocence," a concept worthy of Franz Kafka's *The Trial*.

Identifying the leaker soon degenerated into collecting political intelligence, for example, a planned magazine article by Clark Clifford critical of Nixon's Vietnam War policy. In all, the FBI employed technical means against seventeen individuals. The information retained concerned sex lives, drug use, drinking habits, mental problems, marital disputes, vacation plans, and social contacts.

FISA was a "necessary and proper" answer to this long train of presidential spying abuses. It requires the attorney general to obtain a warrant from a FISA judge to conduct electronic surveillance or physical searches that target American citizens on American soil for foreign intelligence purposes. An application must demonstrate probable cause to believe the American target is implicated in international terrorism or is otherwise acting as an agent of a foreign power. That threshold is not difficult to satisfy. Since the inception of FISA, approximately twenty thousand warrant applications have been granted.⁷ A handful have been denied.

FISA accommodates the special needs of emergencies or wartime. It authorizes electronic surveillance or physical searches in such circumstances without a warrant for seventy-two hours⁸ and fifteen days,⁹ respectively.

Probably 99 percent or more of foreign intelligence is gathered outside the constraints of FISA. As the NSA has testified, its targets are typically aliens abroad, who enjoy neither Fourth Amendment nor FISA protection.¹⁰ In other words, FISA regulates but a tiny crumb of foreign intelligence collection. Even in that domain, the statute is not unworkable, as the Department of Justice has testified after 9/11. Moreover, the NSA's warrantless surveillance program excludes domestic-to-domestic communications, which remain governed by FISA.¹¹ The latter statute is circumvented only where one communicant is abroad. But FISA's warrant rules are identical in both situations. If warrants are workable for domestic-to-domestic interceptions, the same is true for domestic-to-foreign communications.

7. Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee, "Wartime Executive Power and the NSA's Surveillance Authority," February 6, 2006. Available from <http://leahy.senate.gov/press/200602/020606.html>.

8. 50 U.S.C. § 1802.

9. 50 U.S.C. § 1011.

10. H.R. 5825, "Electronic Surveillance Modernization Act."

11. Testimony to the Judiciary Committee of the U.S. Senate by General Michael V. Hayden, Director, CIA, July 26, 2006.

The Bush administration sophomorically contends that FISA unconstitutionally encroaches on executive power. James Madison explained in *Federalist no. 47* that the Constitution's separation of powers is violated only when one branch exercises a decisive or predominating influence over a power assigned to another. FISA's regulation of the president's foreign intelligence authority, however, is narrow and measured. It was born not of flagrant and persistent presidential spying violations of the First and Fourth Amendments. In addition, the statute does not aggrandize Congress at the expense of the White House, but simply subjects foreign intelligence surveillances and physical searches to independent judicial scrutiny. If FISA falls short of the "necessary and proper" benchmark, then the clause is meaningless, and *McCulloch* has been de facto overruled.

9/11 neither diminished FISA's constitutional standing nor required rethinking its application to a world beset by terrorism. Al Qaeda is but a shadow of the Soviet Union as it then stood when FISA was enacted in 1978. The Soviet invasion of Afghanistan was but one year away. The Cuban missile crisis was in recent memory. The USSR brandished thousands of nuclear warheads and delivery vehicles, MIRVs, submarines, long-range bombers, and a formidable Red Army. It enjoyed a vast industrial base, oil supplies, and sister resources to support a prolonged hot war. The USSR also sported first-rate scientists capable of developing sophisticated chemical and biological weapons. The United States' need for instant and reliable foreign intelligence to thwart a nuclear attack by the Soviet Union was of the highest order. If FISA did not handcuff the president in meeting the Soviet danger, a fortiori, the statute does not encumber the president in foiling Al Qaeda's loathsome aims.

To be sure, technologies for communicating have advanced since 1978. But Congress has amended FISA six times since 9/11 to insure against technological obsolescence.

Historical uses of the power of the purse to curb the president's war powers as commander in chief have been far more intrusive than FISA constraints in foreign intelligence collection. (The power of the purse is subject to constitutional limits. It is not invincible, as in *United States v. Lovett*, 328 U.S. 303 [1946], where the Supreme Court invalidated an appropriations measure as an unconstitutional bill of attainder.) As part of a strategy to force President Nixon to scale back or end the U.S. military presence in Indochina, Congress enacted four major appropriations measures. In late December 1970, Congress passed the Supplemental Foreign Assistance Appropriations Act. It prohibited the use of funds to introduce U.S. ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia.

In late June 1973, Congress approved the second Supplemental Appropriations Act for FY1973. It declared: "None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose."

That prohibition was carried forth in the June 30, 1973 Continuing Appropriations Resolution for FY1974. In December 1974, Congress passed the Foreign Assistance Act of 1974, which capped American personnel in Vietnam at 4,000 within six months of enactment and 3,000 after one year.

In late September 1994, Congress passed the Department of Defense Appropriations Act for FY1995. It stipulated: “None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel after September 30, 1994.” Congress similarly decreed through Title IX of the Department of Defense Appropriations Act for FY1995 that “no funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”

Both Attorney General Alberto Gonzales in testimony before the Senate Judiciary Committee and former Deputy Assistant Attorney General John Yoo in his book *War by Other Means* have affirmed that Congress could constitutionally terminate the NSA’s warrantless surveillance program through the power of the purse (Yoo 2006, 125). The text of such a statute would provide: “No funds of the United States may be expended to gather foreign intelligence except pursuant to the Foreign Intelligence Surveillance Act.” The encroachment on the president’s foreign intelligence authority is the same whether effectuated through the power of the purse or through FISA. An encroachment by any other name is still an encroachment. To argue, as do Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, that the Constitution makes a distinction between the two is to exalt form over substance.

Constitutional Philosophy

President Bush’s claim of supreme authority to gather foreign intelligence contrary to FISA also wars with the constitutional philosophy of the Founding Fathers. They understood that men were not angels, that human nature and the corrupting influence of absolute power do not change, that “trust me” was no substitute for making ambition to counteract ambition, and that a separation of powers was essential to avoiding tyranny. Not a single word in either the Constitution or the *Federalist Papers* indicates that, in contemplating necessary restraints on the three branches of government, proper deductions should be made for the ordinary depravity of human nature, except for the executive branch. Indeed, the Founders were further especially fearful of executive abuses or megalomania. The Declaration of Independence indicted King George III, not the British Parliament: “The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States.” The congressional power of the purse, the president’s obligation to take care that the laws be faithfully executed, and the Fourth Amendment’s prohibition of unreasonable searches and seizures responded to the excesses of King Charles I, King James II, and King George III, respectively.

It is inconceivable that the Constitution’s makers would have frowned on FISA’s narrow and modest regulation of the president’s authority to spy on American citizens on American soil under the banner of foreign intelligence. To paraphrase Chief Justice Marshall, the Necessary and Proper Clause aimed to enable Congress to avail itself of

experience. Forty years of flagrant illegalities in violation of the Fourth and First Amendment rights of U.S. citizens occasioned by unchecked presidential power was enough.

The Founding Fathers, nevertheless, understood that situations could arise when a president might find it necessary to flout the law to rescue the nation from peril. They were versed in John Locke's *Second Treatise of Civil Government*, which addressed the matter in explaining executive prerogative. The gist of Locke was that laws might be violated by the executive to preserve society, but at the risk of repudiation or overthrow by the people or legislature. Their approvals were necessary to make what was illegal legal.

Following Locke and the Founding Fathers, if President Bush thought it necessary to violate FISA in the wake of 9/11, he should have informed Congress and the people of his transgression and pleaded for statutory ratification of his actions, just as President Abraham Lincoln did after unilaterally suspending the Great Writ of habeas corpus in the Civil War.¹²

In seeming anticipation of 9/11, Locke elaborated:

Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to executive power, or rather to this fundamental law of nature and government, viz. That as much as may be, all members are to be preserved. . . . This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous and too slow, for the dispatch requisite to execution. . . . This power, whilst employed for the benefit of the community, and suitability to the trust and ends of government, is undoubted prerogative, and never is questioned: for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant . . . but if there comes to be a question between the executive power and the people, about a thing claimed as a prerogative; the tendency of the exercise of such prerogative to the good or hurt of the people, will easily decide the question. . . . And therefore they have a very wrong notion of government, who say, that the people have encroached upon the prerogative, when they have got any part of it to be defined by positive law: for in so doing they have not pulled from the prince any thing that of right belonged to him, but only declared, that that power which they indefinitely left in his or his ancestors hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise. (1690, §§ 161-63)

Controlling Supreme Court Decisions

The Supreme Court's decision in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), further fortifies the constitutionality of FISA. There Congress rejected an amendment to the 1947 Taft-Hartley Act that would have authorized the president to seize private businesses to resolve labor disputes. Five years later, in the midst of the Korean War, President Harry Truman seized private steel mills to avert a threatened

12. "Habeas Corpus Act of 1863," United States Statutes at Large, vol. 12, 37th Cong., 3d sess., 755-58.

strike that could have upset the supply of steel used in weapons manufacture. The Supreme Court rebuked the president's claim of inherent constitutional power as commander in chief to justify a seizure that Congress had declined to authorize. Writing for the majority, Justice Hugo Black amplified: "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes." But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

Four features of *Youngstown* deserve emphasis. First, Congress did not find that there had been presidential abuses of the power to seize private businesses for partisan political purposes. Second, the congressional prohibition on seizures was absolute. There were no exceptions or alternatives. Third, Congress had not affirmatively declared that the president enjoyed no seizure power, but simply failed to authorize the same, a less vigorous expression of legislative sentiment. Fourth, the president's seizure of a private business violated the constitutional injunction against the taking of property without just compensation. The right to operate a private business enterprise is less central to a democratic dispensation than the Fourth or First Amendments, which safeguard rights most cherished by civilized peoples.

FISA is a much easier case than *Youngstown*. Congress was provoked to act by decades of widespread presidential abuses. In addition, the statute does not prohibit the president's collection of foreign intelligence through electronic surveillance or physical searches of American citizens, but simply lightly regulates the techniques by requiring a FISA warrant. Moreover, FISA leaves completely undisturbed the collection of 99 percent or more of foreign intelligence, which is derived from targeting aliens located abroad. And unlike the Taft-Hartley Act on presidential seizures, FISA explicitly declares that gathering foreign intelligence on Americans in contravention of FISA is criminal, the highest octave of legislative intent to restrain the executive. Finally, FISA protects against violations of the Fourth and First Amendments, which stand atop the Constitution's hierarchy of values.

Youngstown is not distinguishable from FISA on the theory that the former involved nonbattlefield actions in the domestic arena whereas the latter regulates battlefield intelligence. FISA leaves the president uncircumscribed in targeting aliens or Americans abroad for electronic surveillance or physical searches, whether in Afghanistan, Iraq, Indonesia, or otherwise. It is confined to Americans on American soil and who command a reasonable expectation of privacy within the Fourth Amendment. President Bush has unpersuasively argued that all the world's a battlefield because Al Qaeda is eager to kill Americans at any time in any place. But if that theory were accepted, then the U.S. military could employ rockets or firearms to kill any person in the country suspected of Al Qaeda sympathies without asking questions, such as American citizen Jose Padilla when he landed in Chicago. (Padilla was first detained as a material witness, further detained as an illegal enemy combatant, and then indicted for providing material assistance to an international terrorist organization.) The theory would sound the death knell for the Bill of Rights and the rule of law.

The Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), also discredits the argument that FISA unconstitutionally undermines the president's authority over foreign intelligence. Article II entrusts the president with responsibility for faithfully executing the laws. Criminal law enforcement lies at the core of that authority. Congress may not limit the president's choice of the attorney general to ensure that law enforcement marches to a presidential drummer, according to the rationale of the Supreme Court in *Myers v. United States*, 272 U.S. 52 (1926). Yet in *Morrison*, the Court sustained the Independent Counsel Act, which removed from the president's complete control a certain category of criminal law enforcement.

The act provided for the appointment of an independent counsel by a special three-judge court on the application of the attorney general. An application was required when nontrivial evidence surfaced justifying a criminal investigation of one or more of the president's men or his party's bigwigs. After appointment, an independent counsel could be removed only for "good cause." In sum, an independent counsel encroached on the president's Article II power to enforce the criminal law.

Writing for the Court in *Morrison*, Chief Justice William Rehnquist denied that the "good cause" removal limitation impermissibly interfered with the president's exercise of his constitutionally appointed functions. He reasoned: "There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that have been typically undertaken by officials within the executive branch." But the independent counsel exercised limited criminal jurisdiction and enjoyed a limited tenure. Accordingly, the chief justice concluded: "Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." In addition, the independent counsel did not confound the president's duty to faithfully execute the laws because incompetence or misbehavior would justify a "good cause" dismissal. Chief Justice Rehnquist added that "the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office [to conduct politically sensitive investigations]. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."

The Constitution's separation of powers was undisturbed by the Independent Counsel Act because the principle does not require the three branches of government to operate with absolute independence. While separation of powers does prohibit Congress from preventing the executive branch from accomplishing its constitutionally assigned functions, the independent counsel was subject to sufficient control by the attorney general and the policies of the Department of Justice to ensure that the president was not sidelined in his law enforcement duties.

The *Morrison* rationale clearly sustains FISA against a separation of powers attack. It does not prevent the president from gathering foreign intelligence. Indeed, it regulates less than 1 percent of foreign intelligence activities. Further, the regulation is measured,

not draconian. The president is obligated to obtain a FISA warrant based on probable cause to believe an American target on American soil is a foreign agent before conducting electronic surveillance or physical searches. The threshold for a FISA warrant is undemanding, which explains why virtually every warrant application has been granted. In addition, Congress did not enact FISA to aggrandize its own powers, but to confer on the judiciary a checking function to prevent Fourth and First Amendment abuses by the executive. As *Morrison* expressly holds, the fact that a function has been constitutionally assigned to the executive does not, ipso facto, shield it from congressional regulation under the Necessary and Proper Clause or otherwise.

The Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), is not to the contrary. In upholding a broad delegation of legislative power to the president in the field of foreign affairs, Justice George Sutherland amateurishly ruminated about the primacy of the executive in fashioning the external relations of the United States. He observed (*ibid.*, 320):

Moreover, he, not Congress, has the opportunity of knowing conditions which prevail in foreign countries, and especially is this true in times of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Sutherland's paean to the executive in foreign affairs misleads by omission. Presidents regularly lie to Congress and the American people by misrepresenting foreign intelligence. Falsehoods were told about Spain's responsibility for the explosion on the *USS Maine* to push the nation toward the Spanish-American War. President Franklin Roosevelt lied about a Nazi attack on the *USS Greer* to propel the nation into World War II (Kimball 2004, 83). President Lyndon Johnson lied about the North Vietnamese attacks on the *USS Mattox* and *USS Turner Joy* to justify the Tonkin Gulf Resolution.¹³ President George W. Bush lied about Iraq's weapons of mass destruction, including attempts to purchase uranium in Niger, to defend his invasion of Iraq. In sum, Justice Sutherland neglected completely presidential abuses of foreign intelligence, which easily establishes the constitutionality of congressional checks like FISA.

Curtiss-Wright did not canonize the White House as the sole organ of the nation in foreign policy or national security. If it had, the many neutrality acts of Congress in the 1930s would have been unconstitutional.¹⁴ Decided at the zenith of neutrality fever in Congress, *Curtiss-Wright* did not even insinuate a doubt as to the constitutionality of the neutrality laws.

FISA's Chief Critics

FISA's critics, like Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, argue that the Constitution grants the president the leading role in

13. H.R. Res. 1145 (August 7, 1964).

14. 49 Stat. 1081 (1935), 49 Stat. 1153 (1937), 50 Stat. 121 (1937), 54 Stat. 12 (1939).

foreign affairs. Assuming the truth of that proposition, FISA leaves the primacy of the president in gathering foreign intelligence intact. As amplified above, the statute regulates less than 1 percent of foreign intelligence collection, and even in that tiny universe the president is authorized to conduct electronic surveillance or physical searches against American citizens on American soil with a FISA warrant.

The major critics also bemoan that establishing probable cause to obtain a FISA warrant is too difficult. Mr. Yoo complains in his book that Al Qaeda does not advertise its membership or wear pictures of Osama bin Laden on their shirts. He observes: "Our best information about Al Qaeda will be scattered and tough to gather, and our agents need to be able to follow many leads quickly, and to move fast on hunches and educated guesses" (Yoo 2006, 105). He also maintains: "FISA operates within a framework that assumes foreign intelligence agents are relatively simple to detect" (*ibid.*, 104-5).

But Yoo's indictments are misconceived. FISA does not assume that foreign agents are easy to detect. Its probable cause threshold is routinely satisfied, as noted above. What FISA does assume, based on forty years of experience, is that unchecked executive power to gather foreign intelligence as championed by Yoo will degenerate into political spying and rampant violations of the Fourth and First Amendments to harass or to deter political dissent. Yoo naïvely insinuates that President Bush, unlike Nixon and other predecessors, is a saint who would never stoop to spy for partisan objectives. He can be trusted with supreme power. Yoo forgot to interview Ambassador Joseph Wilson and his wife Valery Plame about Bush's saintliness. Indeed, any president who asserts that "trust me" should be the measure of civil liberties in the United States should not be trusted.

Yoo also neglects to remember that virtually all Al Qaeda intelligence is gathered outside of FISA because the NSA's electronic surveillance and physical searches generally target persons in foreign countries. Intelligence experts estimate the number of genuine Al Qaeda members in the United States at one to two dozen. They pose less of a threat to the people of the United States than do the perpetrators of the approximately twenty thousand murders committed annually here.¹⁵ The latter criminals do not make known their antisocial propensities to the world. It is more difficult to establish probable cause to obtain a search or arrest warrant against them than it is to obtain a FISA warrant to spy on a suspected foreign agent. Yet the Constitution does not permit abandonment of the Fourth Amendment to make foiling murder easier. It does not even permit watering down the Fourth Amendment to thwart domestic terrorism à la Timothy McVeigh. There is even less reason for relaxing the amendment's privacy protection in targeting American citizens on American soil for electronic surveillance and physical searches in pursuit of foreign intelligence on international terrorism.

Judge Posner argues: "One reason why people don't much mind having their bodies examined by doctors is that they know that doctors' interest in bodies is professional rather than prurient; we can hope the same is true of intelligence professionals" (Posner 2006, 143). But the hope is naïve. Intelligence is political power. The people who control the use of foreign intelligence are political appointees. Their prime interest in intelli-

15. FBI Uniformed Crime Reporting Program, "Crime in the United States" (1986-2005). Available from http://www.fbi.gov/ucr/05cius/data/table_01.html.

gence is not professional, but in its manipulation to cripple political opposition or dissent. Posner further maintains: "An electronic search no more invades privacy than does a dog trained to sniff out illegal drugs" (*ibid.*, 130). The analogy seems preposterous. The privacy protected by the confidentiality of communications is essential to spontaneity, political dissent, and personal intimacies that are central to a democratic dispensation and a rewarding human existence. If all communications were known to the world, life would become guarded or rehearsed as in the former Soviet Union. A dog sniff for drugs discloses nothing about the mind or ideas of the target. It is highly accurate in identifying contraband, and false positives do not result in anything akin to political intelligence that can be retained indefinitely to intimidate or blackmail. If Posner feels no differently about a dog sniffing his luggage for drugs and the NSA's reading all his e-mails and listening to all his phone calls, he is probably a minority of one.

The nation might be marginally safer from foreign terrorists if the Constitution crowned the president with absolute power to spy on American citizens at any time or place on his say-so alone. But it would cripple democracy. The people would be frightened from criticizing the government or undertaking anything unorthodox or nonconformist. The president would assemble a vast pool of political intelligence to intimidate or destroy his opponents. With little or no public questioning or challenge, presidential hubris would inescapably give birth to foreign follies. The Founding Fathers had a better idea in sticking with checks and balances, the worst architecture for maintaining a strong and flourishing democracy except for all others that have been attempted or conceived.

Concluding Observations

The constitutionality of FISA is indisputable according to customary canons of interpretation, especially original intent. The credence that has been afforded constitutional attacks on the statute testifies to the constitutional illiteracy of most members of Congress, the legal profession, and the public. They are unschooled in the philosophy of the Constitution, the *Federalist Papers*, Montesquieu's *Spirit of the Laws*, John Locke, the English Bill of Rights of 1688, or Magna Charta. They do not know that the history of unchecked power is a history of tyranny, that enlightened presidents do not crave absolute power, and that a government of laws is superior to a government of men in protecting fundamental individual freedoms or otherwise.

Thomas Jefferson presciently wrote that a people cannot expect to be both free and ignorant.¹⁶ The Constitution is not self-executing. It must live in the hearts and minds of the American people to flourish. At present, that is not the case, as substantiated by the enactment of the Military Commissions Act of 2006 and a companion effort (not yet enacted) to give congressional sanction to President Bush's warrantless domestic surveillance program.¹⁷ If the alarming trend toward ever-greater constitutional illiteracy is not

16. John Bartlett and Justin Kaplan, *Bartlett's Familiar Quotations*, 16th ed. (Boston: Little Brown, 1992), 344, no. 18.

17. S. 3930, 109th Cong., 2d sess. (2006).

reversed, the United States is destined to become a second edition of *The Decline and Fall of the Roman Empire* as chronicled by Edward Gibbon.

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