

Subject: 11/28 Remarks on Immigration #2 -- for Dan, Nicolle and Brett's review
From: "Drouin, Lindsey E."
Date: 11/18/05, 7:34 PM
To: "Violette, Aimee E.", "Kavanaugh, Brett M.", "Burdick, Amanda K."
CC: "Michel, Christopher G.", "Thiessen, Marc A.", "Drouin, Lindsey E.", "Carson, Melissa M.", "Currin, John", "Ward, Frank P."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 16 16:15:02 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P6,P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: updated draft 12 compare to 10
From: "Drouin, Lindsey E."
Date: 11/23/05, 5:12 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 16 16:15:04 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P6,P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: 11/28 Remarks on Border Security and Immigration Reform #8 -- for the President's review

From: "Sherzer, David"

Date: 11/22/05, 11:38 PM

To: "Kavanaugh, Brett M.", "Drouin, Lindsey E."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 16 16:15:03 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P6,P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Updated Immigration speech
From: "Drouin, Lindsey E."
Date: 11/23/05, 4:02 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 16 16:15:04 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P6,P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: 11/28 UPDATED: Remarks on Border Security and Immigration Reform #12 --
for the President's review
From: "Drouin, Lindsey E."
Date: 11/23/05, 6:10 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 16 16:15:05 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P6,P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: immigration
From: "Kavanaugh, Brett M."
Date: 11/27/05, 1:38 AM
To: "McClellan, Scott"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:25 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: Border security remarks ...

From: "Kavanaugh, Brett M."

Date: 11/27/05, 6:49 PM

To: "17435416", "Haenle, Paul T.", "Crouch, Jack D.", "Naranjo, Brian R."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:58:49 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,P5,b(6)

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: Here is Border #13
From: "Michel, Christopher G."
Date: 11/27/05, 7:38 PM
To: "Kavanaugh, Brett M.", "Drouin, Lindsey E.", "Green, Anneke E."
CC: "Thiessen, Marc A."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:28 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: Fw: Border security remarks ...

From: "Haenle, Paul T."

Date: 11/27/05, 7:46 PM

To: "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Fisk, Daniel W.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:31 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: FW: staffing: 11/28 Remarks on Border Security and Immigration Reform #4
From: "Sherzer, David"
Date: 11/27/05, 7:57 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:31 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: Re: Border security remarks ...

From: "Fisk, Daniel W."

Date: 11/27/05, 8:32 PM

To: "Haenle, Paul T.", "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:35 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: FW: 11/28 UPDATED: Remarks on Border Security and Immigration Reform #13 --
for the President's review
From: "Drouin, Lindsey E."
Date: 11/27/05, 8:38 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:54:36 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2014-0198-F.1

Additional Information:

Subject: Re: Border security remarks ...

From: "Hodgkinson, Sandra L."

Date: 11/27/05, 9:59 PM

To: "Fisk, Daniel W.", "Haenle, Paul T.", "Zarate, Juan C.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:47:53 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Border security remarks ...

From: "Zarate, Juan C."

Date: 11/27/05, 10:23 PM

To: "Hodgkinson, Sandra L.", "Fisk, Daniel W.", "Haenle, Paul T.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:47:58 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Border security remarks ...

From: "Kavanaugh, Brett M."

Date: 11/27/05, 10:25 PM

To: "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Fisk, Daniel W.", "Haenle, Paul T.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:48:00 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Border security remarks ...

From: "Haenle, Paul T."

Date: 11/27/05, 10:27 PM

To: "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Fisk, Daniel W.", "Kozak, Michael G.", "17435416"

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:48:04 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: 11/28 UPDATED: Remarks on Border Security and Immigration Reform #14 --
for the President's review
From: "Drouin, Lindsey E."
Date: 11/27/05, 10:59 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:12 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Border security remarks ...

From: "17435416"

Date: 11/27/05, 11:19 PM

To: "Haenle, Paul T.", "Kavanaugh, Brett M.", "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Fisk, Daniel W.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:14 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: latest immigration
From: "Kavanaugh, Brett M."
Date: 11/28/05, 12:21 AM
To: "McClellan, Scott"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:16 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Border security remarks ...

From: "Fisk, Daniel W."

Date: 11/28/05, 12:35 AM

To: "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Haenle, Paul T.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:18 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Border security remarks ...

From: "Kavanaugh, Brett M."

Date: 11/28/05, 12:41 AM

To: "Fisk, Daniel W.", "Zarate, Juan C.", "Hodgkinson, Sandra L.", "Haenle, Paul T.", "Kozak, Michael G."

CC: "Naranjo, Brian R.", "17657638"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:21 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Updated immigration remarks for Monday (draft #14)

From: "Kavanaugh, Brett M."

Date: 11/28/05, 1:47 AM

To: "17324305", "West, Christal R.", "Weinstein, Jared B.", <kr@georgewbush.com>, "Hughes, Taylor A.", "Morgan, Derrick D.", "Rove, Karl C.", "Bolten, Joshua B.", "Kaplan, Joel", "Wolff, Candida P.", "Badger, William D.", "Ho, Allyson N.", "Hook, Brian H.", "Rapuano, Kenneth", "Townsend, Frances F.", "Gerdelman, Sue H.", "Taylor, Michael J.", "Holand, AnnaLisa", "Dick, Denise Y.", "Dryden, Logan E.", "Miers, Harriet", "Kelley, William K.", "Drummond, Michael"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:23 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: Updated immigration remarks for Monday (draft #14)
From: "Kavanaugh, Brett M."
Date: 11/28/05, 1:48 AM
To: "Hook, Brian H."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:24 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Border security remarks ...

From: "Haenle, Paul T."

Date: 11/28/05, 3:21 AM

To: [P6/b(6)]; et al

CC: "Kavanaugh, Brett M.", "17657638", "Naranjo, Brian R."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:22:23 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Border security remarks ...
From: "Kavanaugh, Brett M."
Date: 11/28/05, 3:42 AM
To: "Haenle, Paul T."; et al
CC: "17657638", "Naranjo, Brian R."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:21:31 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Updated immigration remarks for Monday (draft #14)
From: "Hook, Brian H."
Date: 11/28/05, 4:00 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:30:25 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: On border speech ...
From: "Drouin, Lindsey E."
Date: 11/28/05, 1:42 PM
To: "Kavanaugh, Brett M."
CC: "Michel, Christopher G."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:54 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: 11/28 UPDATED: Remarks on Border Security and Immigration Reform #17 –
for the President's review
From: "Drouin, Lindsey E."
Date: 11/28/05, 2:05 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:55 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

FW: updated draft of immigration remarks.

Subject: FW: updated draft of immigration remarks.
From: "Sherzer, David"
Date: 11/28/05, 3:43 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:56 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

RE:

Subject: RE:
From: "Drouin, Lindsey E."
Date: 11/28/05, 4:24 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:56 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

FW: updated draft of immigration remarks.

Subject: FW: updated draft of immigration remarks.

From: "Baker, Douglas B."

Date: 11/28/05, 4:59 PM

To: "Kavanaugh, Brett M."

CC: "Drouin, Lindsey E.", "Sherzer, David", "Jacobs, Robert", "Neifach, Michael H."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:57 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: embargoed
From: "Kavanaugh, Brett M."
Date: 11/28/05, 6:07 PM
To: "Drouin, Lindsey E.", "Sherzer, David"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:58 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: El Paso remarks
From: "Drouin, Lindsey E."
Date: 11/28/05, 7:40 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:58 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Immigration remarks
From: "Drouin, Lindsey E."
Date: 11/28/05, 11:30 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:26:59 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: Staffing – Remarks at U.S. Border Patrol Headquarters
From: "Drouin, Lindsey E."
Date: 11/29/05, 1:17 AM
To: "Kavanaugh, Brett M."
CC: "Robinson, Matthew S."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jul 08 15:27:00 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P5,P6

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: The Dire Consequences of Letting the USA PATRIOT Act Expire
From: "Perino, Dana M."
Date: 12/16/05, 10:56 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:43 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: The Dire Consequences of Letting the USA PATRIOT Act Expire
From: "Kavanaugh, Brett M."
Date: 12/16/05, 10:58 PM
To: "Thiessen, Marc A.", "McGurn, William J.", "Bartlett, Dan"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:44 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

From: "Murer, Marguerite A."
To: "Kavanaugh, Brett M."
Subject: FW: Remarks on 18 December in the Oval Office
Received(Date): Mon, 19 Dec 2005 12:58:06 -0500

FYI on incoming e-mail traffic below, many positive e-mails. Also, Comment Line is very positive on remarks last night and very positive on Press Conference today.

From: Maxwell, Kyle D.
Sent: Monday, December 19, 2005 12:13 PM
To: Murer, Marguerite A.
Cc: Kraft, Nathaniel
Subject: Remarks on 18 December in the Oval Office

Regarding the President's remarks from the Oval Office on Sunday evening...

Approximately 70% of the incoming e-mails were positive. The remaining 30% were negative. Below are samples.

-----Original Message-----

From: Mahoney, Mildred P6/b(6)
Sent: Monday, December 19, 2005 10:10 AM
To: president@whitehouse.gov
Subject: 12 18 05 speech

Dear Sir

Thank you for addressing a few important concerns of mine in your speech Sunday December 18, 2005.

I listened to your explanation, clarifying the situation in Iraq, and would like you to know that I agree. I have watched two elections take place, each one better than the last. I think that Democracy is taking hold in that nation, giving her people a better future. With Gods' help, it will flourish and her people will have a better life. I do think that we need to continue to support this fledging nation. However, please do your utmost to protect our soldiers.

Additionally, thank you for stepping up and accepting responsibility, admitting that mistakes were made, and acknowledging that you are responsible for the errors. Our Nation needs to regain its Integrity. That speech was a good step.

Perhaps those who gather the information you rely on, could find a way to insure that they are more accurate. Perhaps they can recheck and insure that the facts are accurate, and (more importantly) that the meaning of the facts are represented accurately, and not spun to support what someone wants them to show.

I am also concerned about our own Nations' actions since 911. I understand the need of the government

to do everything to protect her citizens, I lost relatives in the twin towers. I am an American who understands what our freedom means. My family came over before the Civil War, in fact one of my relatives fought for the Union in the Civil War. So, even though I would not speak against you for disregarding our hard gained freedoms in gathering information to protect us, I will remind you that the reason our Great Nation is great, is that we honor and respect these freedoms.

I will continue to support you and your decisions, as long as I see this.

Thank you

Mildred Mahoney

P6/b(6)

-----Original Message-----

From: John S. R. Lawrence [P6/b(6)]

Sent: Monday, December 19, 2005 8:30 AM

To: Public Comments

Subject: Last night's speech.

President Bush,

I just wanted to add my voice to what I am sure, is a growing chorus of praise for the speech last night. It was the first time that you have been able to get the message across in a clear, compassionate and personal way. If you really want to win [ie. have the Iraqis get freedom & unleash freedom in the Middle East] and I have no doubt you do, you must be more effective explaining what is at stake. This speech was a great start. Keep up the good work.

John S. R. Lawrence

-----Original Message-----

From: Gale Thomas [P6/b(6)]

Sent: Monday, December 19, 2005 1:16 AM

To: Public Comments

Subject: Speech Dec 18, 2005

Dear Mr. President

I have never written to any elected representative before today but I can no longer stand idly by and not comment on how proud I am of you and the job that you are doing. I feel that your decision recently to debate the Iraq position and defending your right to NSA surveillance will only rally the American people behind you even further. You have such a difficult job and you work and the work of all in your administration is greatly appreciated by this American. Please don't stop defending your position and showing the to us that the Democrats are the party of NO! And would you please give Scott McClellan a gold star and one to the person who pulls the arrows out of his back after news conferences. He does a terrific job and I wouldn't want his on a bet. We both pray for you and your wonderful family and wish you a very Merry Christmas.

Sincerely,

Gale Thomas

-----Original Message-----

From: Bernie Polikowsky [redacted] P6/b(6)

Sent: Monday, December 19, 2005 12:06 AM

To: Public Comments

Subject: Speech

Dear President Bush,

You did a good job on the speech to the nation Sunday. I am glad that you are on the offense with these speeches. I also think you did the right thing taking on Sadam. Usually it is easier to do nothing, but sometimes you have to take a chance and do what you think is right. As you know, history will make the final determination. However, I think that freedom will always eventually rule.

As many have said, the American people have very little patience for anything, but our enemies seem to have unlimited patience. Although I am not the one making the sacrifices, I believe that we need to give this thing a chance. What does it say to the world if we are so eager to give up?

So, although I know the closest that you will come to actually reading this will be the fraction of a percentage point that this registers in the response numbers that your staff compiles. But, that is OK. It will be fine for me to know that this e-mail makes a tally in the column of those Americans who support you and feel that you are doing a good job as president.

Respectfully,

Bernie Polikowsky

Do You Yahoo!?

Tired of spam? Yahoo! Mail has the best spam protection around <http://mail.yahoo.com>

-----Original Message-----

From: Ashley Phillips [redacted] P6/b(6)

Sent: Monday, December 19, 2005 2:02 AM

To: Public Comments

Cc: sf.nancy@mail.house.gov

Subject: your speech tonight

Mr. Bush:

I saw your speech tonight. I was thoroughly dissappointed. Yes, you did finally accept responsibility for many of the wrongs that have led to the deaths of over 2,000 of our most honored citizens of our country, those who have committed their lives to protect America. But it is simply not enough.

These people who are among the most brave, the most courageous among Americans, should not have ever fought in this very wrong war, no matter how you try to explain it. The American people now understand just how wrong this war is, but we will continue to stand aside our troops there. For you to use our patriotic sensibilities for your own political gain is shameful.

Yes, you must now finish the job there, since that is the only way out. But you know as much as me and the many millions of Americans that we shouldn't have ever been there in the first place. Please bring our troops home as soon as possible.

Mr. Bush, I don't feel anymore safe than before 9/11. In fact I feel more vulnerable living near several sea ports. Your advisors, including the obviously formidable VP Cheney, have led you down the wrong path. Instead of investing in home security, you have chosen to wage this war. Yes, Saddam Hussein was a bad person, but it seems that there are many more worse leaders, who are much smarter than Saddam in the world, that poses much more threat to America.

You have weakened our national security as obviously discovered in the aftermath of Katrina. What more evidence do you need to see that this war is wrong? When will you come to the realization that you are supposed to represent all Americans?

Sincerely,

Ashley Phillips

P6/b(6)

-----Original Message-----

From: P6/b(6)

Sent: Sunday, December 18, 2005 11:47 PM

To: Public Comments

Subject: President Bush Speech 12-18-05

Dear President Bush:

As we listened to your speech tonight we found it neither convincing nor reasonable. It is our opinion that the war in Iraq was a poor decision from the beginning. A preemptive, unilateral war does not reflect our identity or character as a people or a nation. It was neither a "just war": or a necessary one.

The first-person, "I" seemed to permeate your speech with respect to troop withdrawal and the notion of victory in Iraq. For some reason, I thought "we the people" had something to do with the decision-making process. We support our military for faithfully and courageously serving, but feel the policies of your Administration with respect to the Iraqi conflict have been a grave and costly error in terms of lives lost and changed and with respect to the negative effects on our economy. We believe there were other options which would have achieved the same outcomes with much less cost. When do we bring our troops home from Iraq? When do we declare victory? It seems a rather arbitrary decision, because the "war on terrorism" is a vague and arbitrary concept. When do we admit when we made a mistake and begin the process of healing?

Respectfully, Tom and Beth Hansen

-----Original Message-----

From: RANDY PETERS P6/b(6)

Sent: Sunday, December 18, 2005 9:40 PM

To: Public Comments

Subject: TELEVISED SPEECH

Dear Mr President,

I just saw you on the news and watch part of your speech, as i saw right though your technique to SIDE TRACK the American people again away from the real issues.

and they as follows:

- 1) MISTAKE IN GETTING US INTO IRAQ
- 2) STATUS OF AMERICAN ECONOMY
- 3) YOU GOT CAUGHT SPYING ON AMERICANS WITHOUT COURT'S PERMISSION
- 4) THE LATEST POLL SHOW YOUR POPULARITY THE LOWEST EVER FOR ANY SITTING PRESIDENT.

Shall i go on Mr president? I think not, i must admit i did not vote for you or any president since RONALD REGAN...Now that was a president who knew how to control people and use style to do things and come out smelling like a rose!!!

SINCERELY,

RANDY L PETERS

US CITIZEN// VETERAN

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Subject: NSA pushback
From: "McDonald, Matthew T."
Date: 12/19/05, 1:36 PM
To: "Wallace, Nicolle", "Bartlett, Dan", "McClellan, Scott", "Kavanaugh, Brett M.", "Davis, Michele A."
CC: "Pounder, Joseph S.", "Sherzer, David"

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— Attachments:

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Subject: FW: NSA pushback
From: "Kavanaugh, Brett M."
Date: 12/19/05, 1:48 PM
To: "Kaplan, Joel"

From: McDonald, Matthew T.
Sent: Monday, December 19, 2005 1:36 PM
To: Wallace, Nicolle; Bartlett, Dan; McClellan, Scott; Kavanaugh, Brett M.; Davis, Michele A.
Cc: Pounder, Joseph S.; Sherzer, David
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90.5 KB

Subject: FW: patriot act op-ed
From: "Sherzer, David"
Date: 12/19/05, 2:34 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:48 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: PATRIOT Act – Examples of Previously Unavailable Investigative Tools
From: "Mitnick, John M."
Date: 12/19/05, 3:10 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jul 23 09:59:42 EDT 2019

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Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Orin Kerr ...
From: "Kavanaugh, Brett M."
Date: 12/19/05, 5:43 PM
To: "Kaplan, Joel"

Orin Kerr

Legal Analysis of the NSA Domestic Surveillance Program:

Was the secret NSA surveillance program legal? Was it constitutional? Did it violate federal statutory law? It turns out these are hard questions, but I wanted to try my best to answer them. My answer is pretty tentative, but here it goes: Although it hinges somewhat on technical details we don't know, it seems that the program was probably constitutional but probably violated the federal law known as the Foreign Intelligence Surveillance Act. My answer is extra-cautious for two reasons. First, there is some wiggle room in FISA, depending on technical details we don't know of how the surveillance was done. Second, there is at least a colorable argument -- if, I think in the end, an unpersuasive one -- that the surveillance was authorized by the Authorization to Use Military Force as construed in the Hamdi opinion.

This is a really long post, so let me tell you where I'm going. I'm going to start with the Fourth Amendment; then turn to FISA; next look to the Authorization to Use Military Force; and conclude by looking at claim that the surveillance was justified by the inherent authority of Article II. And before I start, let me be clear that nothing in this post is intended to express or reflect a normative take of whether the surveillance program is a good idea or a bad idea. In other words, I'm just trying to answer what the law is, not say what the law should be. If you think my analysis is wrong, please let me know in the comment section; I'd be delighted to post a correction.

The Fourth Amendment. On the whole, I think there are some pretty decent arguments that this program did not violate the Fourth Amendment under existing precedent. There are a bunch of different arguments here, but let me focus on two: the border search exception and a national security exception. Neither is a slam dunk, by any means, but each are plausible arguments left open by the cases.

The border search exception permits searches at the border of the United States "or its functional equivalent." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985). The idea here is that the United States as a sovereign has a right to inspect stuff entering or exiting the country as a way of protecting its sovereign interests, and that the Fourth Amendment permits such searches. Courts have applied the border search exception in cases of PCs and computer hard drives; if you bring a computer into or out of the United States, the government can search your computer for contraband or other prohibited items at the airport or wherever you are entering or leaving the country. See, e.g., *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (Wilkinson, J.).

As I understand it, all of the monitoring involved in the NSA program involved international calls (and international e-mails). That is, the NSA was intercepting communications in the U.S., but only communications going outside the U.S. or coming from abroad. I'm not aware of any cases applying the border search exception to raw data, as compared to the search of a physical device that stores data, so this is untested ground. At the same time, I don't know of a rationale in the caselaw for treating data differently than

physical storage devices. The case law on the border search exception is phrased in pretty broad language, so it seems at least plausible that a border search exception could apply to monitoring at an ISP or telephone provider as the "functional equivalent of the border," much like airports are the functional equivalent of the border in the case of international airline travel.

The government would have a second argument in case a court doesn't accept the border search exception: the open question of whether there is a national security exception to the Fourth Amendment that permits the government to conduct searches and surveillance for foreign intelligence surveillance. Footnote 23 of [Katz v. United States](#) left this open, and Justice White's concurrence in Katz expanded on this point:

Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

The Supreme Court also left this question open in the so-called "Keith" case, [United States v. United States District Court](#), in 1972. Justice Powell's opinion in the Keith case concluded that there was no national security exception to the Fourth Amendment for evidence collection involving domestic organizations, but expressly held open the possibility that such an exception existed for foreign intelligence collection:

Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

The administration presumably takes the position that the President does have such power in cases involving foreign evidence collection, and that the NSA surveillance is such a case. The Supreme Court has never resolved the question, so it's an open constitutional issue. Nonetheless, between the border search exception and the open possibility of a national security exception, there are pretty decent arguments that the monitoring did not violate the Fourth Amendment. Maybe persuasive, maybe not, but certainly open and fair arguments under the case law.

Foreign Intelligence Surveillance Act. Now let's turn to FISA, a 1978 law that Congress enacted in response to the Keith case. FISA goes beyond the Keith case, including foreign intelligence surveillance in its scope even though it was left open as a constitutional question.

Specifically, 50 U.S.C. 1809 prohibits "electronic surveillance" except as authorized by statutory law: "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute." "Electronic surveillance" is

defined in 50 U.S.C. 1801(f) to mean, in relevant part:

- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States. . . .

A "United States person" is defined in 50 U.S.C. 1801(i) as "a citizen of the United States [or] an alien lawfully admitted for permanent residence." A "wire communication" is defined as a communication that is traveling by a wire; I don't know if "radio communication" is a defined term, but I assume it refers primary to satellite communications.

Putting aside the AUMF and statutory exceptions for now, let's consider whether the NSA surveillance program violates the basic prohibition of 50 U.S.C. 1809 — intentionally conducting electronic surveillance. I think the answer is probably yes. If the surveillance tapped wire communications under 1801(f)(2), the case is pretty clear: the surveillance involved people in the U.S. and surveillance in the U.S., and that's all that is required. If the surveillance involved radio communications (satellite communications, I'm guessing), that's a bit trickier. There is at least a little wiggle room in Section 1801(f)(1). For example, you could say that the border search exception eliminates Fourth Amendment protection, such that there was no reasonable expectation of privacy and therefore there would be no warrant required in an analogous criminal case. In that case, the tapping of the radio communication wouldn't count as "electronic surveillance." I don't think we know the details of how the communications were obtained, so I think it's fair to say that the surveillance probably violated the basic prohibition but it at least arguably depends on some of the technical details we don't know.

Now, on to the exceptions. 50 U.S.C. 1802(a)(1) provides in relevant part:

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--

- (A) the electronic surveillance is solely directed at--
 - (i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or
 - (ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title; [and]

- (B) there is no substantial likelihood that the surveillance will acquire the

contents of any communication to which a United States person is a party.

Does this exception permit the monitoring? Note that (i) and (ii) are both dealing with "foreign power, as defined in (a)(1), (2), or (3) of this title." FISA's definition of "foreign power" appears in 50 U.S.C. 1801:

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.

So as I read the statutes, Congress was trying to give an exception for monitoring foreign governments (a1, a2, a3) but not terrorist groups (a4, a5, a6), so long as no citizens or lawful permanent resident aliens were being monitored. There are interesting questions of how that might have applied to Al Qaeda in Afghanistan, but I don't think we need to reach them. It's my understanding that the program monitored both citizens and non-citizens, so I don't see how the exception is applicable.

(Aside: Remember back in 2003 when a copy of the Administration's "[Domestic Security Enhancement Act](#)" — sometimes dubbed "Patriot II" — was leaked to the press? [Section 501](#) of that Act would have made "providing material support" to a terrorist group an automatic ground for terminating citizenship. This is just a guess, but I wonder if the thinking was that this would make the NSA warrantless monitoring program legal under FISA. An individual who made regular contact with Al Qaeda could be giving them material support, and the individual would then no longer be a United States person and could then be legally subject to monitoring. Just speculation, but it might explain the thinking behind the legislative proposal. Anyway, back to our regularly scheduled programming.)

Authorization to Use Military Force. The next question is whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, justified the monitoring. The authorization states in relevant part:

AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

I assume that the Administration's claim is that the AUMF counts as a "statute" that

authorizes the surveillance: 50 U.S.C. 1809 states that "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute," so if the AUMF authorized the electronic surveillance, then the NSA program didn't violate FISA.

The Supreme Court considered the legal effect of the AUMF in [Hamdi v. Rumsfeld](#). Yaser Hamdi was being held as an enemy combatant, and claimed that his detention violated 18 U.S.C. 4001. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Given Justice Thomas's very broad reading of the AUMF in his dissent, I think the key interpretation is that of Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Justice O'Connor concluded that the the AUMF was "an act of Congress" that authorized Hamdi's detention, such that the detention did not violate 4001(a):

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 317 U. S., at 28. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . .

. . .

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

. . .

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.

. . .

The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are

part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

So does the AUMF authorize the surveillance? As often happens when you're trying to draw guidance from an O'Connor opinion, it's not entirely clear. Under her opinion, the key question is whether the act is "so fundamental and accepted an incident to war" that it falls within the authorization. But that depends on the level of generality you chose to use to define "the act." Is "the act" spying on the enemy? In that case, perhaps it is a fundamental incident to war. Or is "the act" conducting U.S. domestic surveillance of U.S. citizens? In that case, the answer is no, it's not a fundamental incident to war.

In the end, my best sense is that the AUMF doesn't extend to this. I have three reasons. First, O'Connor's opinion says the following about detention for interrogation: "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." It seems to me that surveillance and wiretapping is pretty similar to interrogation: the point of both is getting information about your enemy. Second, it doesn't seem like wiretapping counts as a "use of force." If you read the text of the AUMF, it doesn't seem to me that it authorizes wiretapping. Finally, note that Congress passed the Patriot Act about a month after passing the AUMF; if Congress had intended the AUMF to give the president wide authority to conduct domestic surveillance against Al Qaeda, I don't think they would have spent so much time amending FISA for terrorism investigations. So at bottom, I think the AUMF probably didn't authorize this, although the Hamdi case gives some colorable (if ultimately unpersuasive) arguments that it might.

Article II. The final argument is that Article II of the Constitution gives the President inherent authority to conduct such monitoring. The Administration introduced this theory in a [supplemental brief](#) filed in the FISA Court of Review:

The President Has Inherent Authority to Conduct Warrantless Electronic Surveillance to Protect National Security from Foreign Threats.

In considering the constitutionality of the amended FISA, it is important to understand that FISA is not required by the Constitution. Rather, the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority. Both before and after the enactment of FISA, courts have recognized the President's inherent authority to conduct foreign intelligence surveillance. See, e.g., *Butenko*, 494 F.2d at 608 (grounding exception to warrant requirement in the President's Commander-in-chief and foreign-affairs powers; noting that the country's self-defense needs weigh on the side of reasonableness); *Truong*, 629 F.2d at 914 (citing the President's foreign affairs power as justifying an exception to the warrant requirement); cf. *United States v. United States District Court (Keith)*, 407 U.S. 297, 308 (1972) (reserving the question whether the President's foreign-affairs powers justify exception from warrant requirement).

So the argument, as I understand it, is that Congress has no power to legislate in a way that interferes with the President's Commander-in-Chief power, a judgment made, I suppose, by the President himself.

I have been unable to find any caselaw in support of this argument. Further, the argument has no support from the cases cited in the government's brief. In all three of those cases -- Butenko, Truong, and Keith -- the Courts were talking about whether the President's interest in conducting foreign intelligence monitoring creates an exception to the Warrant Requirement of the Fourth Amendment. In other words, the issue in those case was whether the Constitution bars warrantless surveillance absent Congressional action, not whether Congressional prohibitions in this area cannot bind the Executive branch.

Consider the citation to the Butenko case. Here is the relevant section, from 494 F.2d at 608:

Both executive authority in the foreign affairs area and society's interest in privacy are of significance, and are equally worthy of judicial concern.

. . .

The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.

To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed. But the Fourth Amendment proscribes only 'unreasonable' searches and seizures. And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon Ivanov's Fourth Amendment rights.

As I read this analysis, it is entirely focused on the Fourth Amendment, and specifically whether the President's Commander in Chief power should trigger a relaxed Fourth Amendment standard. That seems quite different from a claim that Article II makes Congressional regulation inoperative. The same goes for the citation to Truong, 629 F.2d at 914. In the course of discussing whether the Courts should require a warrant for foreign intelligence surveillance, the court tried to balance the ability of courts to regulate intelligence surveillance with the strong government's interest:

Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. Just as the separation of powers in Keith forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence

surveillance.

While the Court was recognizing the President's constitutional role, it was in a very specific context: balancing reasonableness in the context of Fourth Amendment law to determine whether the surveillance required a warrant. Again, this doesn't seem to go to whether Congress can impose binding statutory prohibitions beyond the Fourth Amendment.

Conclusion. Anyway, that's my tentative take; I hope it's helpful. It's entirely possible that I goofed the analysis somewhere along the way; FISA, the AUMF, and Article II aren't my area of expertise, so we should consider this post a work in progress. I look forward to comments -- civil and respectful, please.

Subject: RE: Orin Kerr ...
From: "Kaplan, Joel"
Date: 12/19/05, 5:57 PM
To: "Kavanaugh, Brett M."

[who is orin kerr](#)

From: Kavanaugh, Brett M.
Sent: Monday, December 19, 2005 5:43 PM
To: Kaplan, Joel
Subject: Orin Kerr ...

Orin Kerr

Legal Analysis of the NSA Domestic Surveillance Program:

Was the secret NSA surveillance program legal? Was it constitutional? Did it violate federal statutory law? It turns out these are hard questions, but I wanted to try my best to answer them. My answer is pretty tentative, but here it goes: Although it hinges somewhat on technical details we don't know, it seems that the program was probably constitutional but probably violated the federal law known as the Foreign Intelligence Surveillance Act. My answer is extra-cautious for two reasons. First, there is some wiggle room in FISA, depending on technical details we don't know of how the surveillance was done. Second, there is at least a colorable argument -- if, I think in the end, an unpersuasive one -- that the surveillance was authorized by the Authorization to Use Military Force as construed in the Hamdi opinion.

This is a really long post, so let me tell you where I'm going. I'm going to start with the Fourth Amendment; then turn to FISA; next look to the Authorization to Use Military Force; and conclude by looking at claim that the surveillance was justified by the inherent authority of Article II. And before I start, let me be clear that nothing in this post is intended to express or reflect a normative take of whether the surveillance program is a good idea or a bad idea. In other words, I'm just trying to answer what the law is, not say what the law should be. If you think my analysis is wrong, please let me know in the comment section; I'd be delighted to post a correction.

The Fourth Amendment. On the whole, I think there are some pretty decent arguments that this program did not violate the Fourth Amendment under existing precedent. There are a bunch of different arguments here, but let me focus on two: the border search exception and a national security exception. Neither is a slam dunk, by any means, but each are plausible arguments left open by the cases.

The border search exception permits searches at the border of the United States "or its functional equivalent." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985). The idea here is that the United States as a sovereign has a right to inspect stuff entering or exiting the country as a way of protecting its sovereign interests, and that the Fourth Amendment permits such searches. Courts have applied the border search exception in cases of PCs and computer hard drives; if you bring a computer into or out of the United States, the government can search your computer for contraband or other prohibited items at the airport or wherever you are entering or leaving the country. See, e.g., *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (Wilkinson, J.).

As I understand it, all of the monitoring involved in the NSA program involved international calls (and international e-mails). That is, the NSA was intercepting communications in the U.S., but only communications going outside the U.S. or coming from abroad. I'm not aware of any cases applying the border search exception to raw data, as compared to the search of a physical device that stores data, so this is untested ground. At the same time, I don't know of a rationale in the caselaw for treating data differently than physical storage devices. The case law on the border search exception is phrased in pretty broad language, so it seems at least plausible that a border search exception could apply to monitoring at an ISP or telephone provider as the "functional equivalent of the border," much like airports are the functional equivalent of the border in the case of international airline travel.

The government would have a second argument in case a court doesn't accept the border search exception: the open question of whether there is a national security exception to the Fourth Amendment that permits the government to conduct searches and surveillance for foreign intelligence surveillance. Footnote 23 of [Katz v. United States](#) left this open, and Justice White's concurrence in Katz expanded on this point:

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The Supreme Court also left this question open in the so-called "Keith" case, [United States v. United States District Court](#), in 1972. Justice Powell's opinion in the Keith case concluded that there was no national security exception to the Fourth Amendment for evidence collection involving domestic organizations, but expressly held open the possibility that such an exception existed for foreign intelligence collection:

Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

The administration presumably takes the position that the President does have such power in cases involving foreign evidence collection, and that the NSA surveillance is such a case. The Supreme Court has never resolved the question, so it's an open constitutional issue. Nonetheless, between the border search exception and the open possibility of a national security exception, there are pretty decent arguments that the monitoring did not violate the Fourth Amendment. Maybe persuasive, maybe not, but certainly open and fair arguments under the case law.

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- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
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Putting aside the AUMF and statutory exceptions for now, let's consider whether the NSA surveillance program violates the basic prohibition of 50 U.S.C. 1809 — intentionally conducting electronic surveillance. I think the answer is probably yes. If the surveillance tapped wire communications under 1801(f)(2), the case is pretty clear: the surveillance involved people in the U.S. and surveillance in the U.S., and that's all that is required. If the surveillance involved radio communications (satellite communications, I'm guessing), that's a bit trickier. There is at least a little wiggle room in Section 1801(f)(1). For example, you could say that the border search exception eliminates Fourth Amendment protection, such that there was no reasonable expectation of privacy and therefore there would be no warrant required in an analogous criminal case. In that case, the tapping of the radio communication wouldn't count as "electronic surveillance." I don't think we know the details of how the communications were obtained, so I think it's fair to say that the surveillance probably violated the basic prohibition but it at least arguably depends on some of the technical details we don't know.

Now, on to the exceptions. 50 U.S.C. 1802(a)(1) provides in relevant part:

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--

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in section 1801(a)(1), (2), or (3) of this title; or
(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title; [and]

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.

Does this exception permit the monitoring? Note that (i) and (ii) are both dealing with "foreign power, as defined in (a)(1), (2), or (3) of this title." FISA's definition of "foreign power" appears in 50 U.S.C. 1801:

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
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(Aside: Remember back in 2003 when a copy of the Administration's "[Domestic Security Enhancement Act](#)" — sometimes dubbed "Patriot II" — was leaked to the press? [Section 501](#) of that Act would have made "providing material support" to a terrorist group an automatic ground for terminating citizenship. This is just a guess, but I wonder if the thinking was that this would make the NSA warrantless monitoring program legal under FISA. An individual who made regular contact with Al Qaeda could be giving them material support, and the individual would then no longer be a United States person and could then be legally subject to monitoring. Just speculation, but it might explain the thinking behind the legislative proposal. Anyway, back to our regularly scheduled programming.)

Authorization to Use Military Force. The next question is whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, justified the monitoring. The authorization states in relevant part:

AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and

appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

I assume that the Administration's claim is that the AUMF counts as a "statute" that authorizes the surveillance: 50 U.S.C. 1809 states that "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute," so if the AUMF authorized the electronic surveillance, then the NSA program didn't violate FISA.

The Supreme Court considered the legal effect of the AUMF in [Hamdi v. Rumsfeld](#). Yaser Hamdi was being held as an enemy combatant, and claimed that his detention violated 18 U.S.C. 4001. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Given Justice Thomas's very broad reading of the AUMF in his dissent, I think the key interpretation is that of Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Justice O'Connor concluded that the the AUMF was "an act of Congress" that authorized Hamdi's detention, such that the detention did not violate 4001(a):

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

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. . .
In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

. . .
Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our

understanding is based on longstanding law-of-war principles.

. . . .
The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

So does the AUMF authorize the surveillance? As often happens when you're trying to draw guidance from an O'Connor opinion, it's not entirely clear. Under her opinion, the key question is whether the act is "so fundamental and accepted an incident to war" that it falls within the authorization. But that depends on the level of generality you chose to use to define "the act." Is "the act" spying on the enemy? In that case, perhaps it is a fundamental incident to war. Or is "the act" conducting U.S. domestic surveillance of U.S. citizens? In that case, the answer is no, it's not a fundamental incident to war.

In the end, my best sense is that the AUMF doesn't extend to this. I have three reasons. First, O'Connor's opinion says the following about detention for interrogation: "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." It seems to me that surveillance and wiretapping is pretty similar to interrogation: the point of both is getting information about your enemy. Second, it doesn't seem like wiretapping counts as a "use of force." If you read the text of the AUMF, it doesn't seem to me that it authorizes wiretapping. Finally, note that Congress passed the Patriot Act about a month after passing the AUMF; if Congress had intended the AUMF to give the president wide authority to conduct domestic surveillance against Al Qaeda, I don't think they would have spent so much time amending FISA for terrorism investigations. So at bottom, I think the AUMF probably didn't authorize this, although the Hamdi case gives some colorable (if ultimately unpersuasive) arguments that it might.

Article II. The final argument is that Article II of the Constitution gives the President inherent authority to conduct such monitoring. The Administration introduced this theory in a [supplemental brief](#) filed in the FISA Court of Review:

The President Has Inherent Authority to Conduct Warrantless Electronic Surveillance to Protect National Security from Foreign Threats.

In considering the constitutionality of the amended FISA, it is important to understand that FISA is not required by the Constitution. Rather, the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority. Both before and after the enactment of FISA, courts have recognized the President's inherent authority to conduct foreign intelligence surveillance. See, e.g., *Butenko*, 494 F.2d at 608 (grounding exception to warrant requirement in the President's Commander-in-chief and foreign-affairs powers; noting that the country's self-defense needs weigh on the side of reasonableness); *Truong*, 629 F.2d at 914 (citing the President's foreign affairs power as justifying an exception to the warrant requirement); cf. *United States v. United States District Court (Keith)*, 407 U.S. 297, 308 (1972)(reserving the question whether the President's

foreign-affairs powers justify exception from warrant requirement).

So the argument, as I understand it, is that Congress has no power to legislate in a way that interferes with the President's Commander-in-Chief power, a judgment made, I suppose, by the President himself.

I have been unable to find any caselaw in support of this argument. Further, the argument has no support from the cases cited in the government's brief. In all three of those cases -- Butenko, Truong, and Keith -- the Courts were talking about whether the President's interest in conducting foreign intelligence monitoring creates an exception to the Warrant Requirement of the Fourth Amendment. In other words, the issue in those cases was whether the Constitution bars warrantless surveillance absent Congressional action, not whether Congressional prohibitions in this area cannot bind the Executive branch.

Consider the citation to the Butenko case. Here is the relevant section, from 494 F.2d at 608:

Both executive authority in the foreign affairs area and society's interest in privacy are of significance, and are equally worthy of judicial concern.

. . .

The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.

To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed. But the Fourth Amendment proscribes only 'unreasonable' searches and seizures. And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon Ivanov's Fourth Amendment rights.

As I read this analysis, it is entirely focused on the Fourth Amendment, and specifically whether the President's Commander in Chief power should trigger a relaxed Fourth Amendment standard. That seems quite different from a claim that Article II makes Congressional regulation inoperative. The same goes for the citation to Truong, 629 F.2d at 914. In the course of discussing whether the Courts should require a warrant for foreign intelligence surveillance, the court tried to balance the ability of courts to regulate intelligence surveillance with the strong government's interest:

Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. Just as the separation of powers in Keith forced the executive to recognize a judicial role when the President conducts domestic

security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.

While the Court was recognizing the President's constitutional role, it was in a very specific context: balancing reasonableness in the context of Fourth Amendment law to determine whether the surveillance required a warrant. Again, this doesn't seem to go to whether Congress can impose binding statutory prohibitions beyond the Fourth Amendment.

Conclusion. Anyway, that's my tentative take; I hope it's helpful. It's entirely possible that I goofed the analysis somewhere along the way; FISA, the AUMF, and Article II aren't my area of expertise, so we should consider this post a work in progress. I look forward to comments -- civil and respectful, please.

Subject: RE: Orin Kerr ...
From: "Kavanaugh, Brett M."
Date: 12/19/05, 6:00 PM
To: "Kaplan, Joel"

[Pretty well-respected professor who blogs on the Volokh Conspiracy. He clerked for Kennedy a few years ago.](#)

From: Kaplan, Joel
Sent: Monday, December 19, 2005 5:58 PM
To: Kavanaugh, Brett M.
Subject: RE: Orin Kerr ...

[who is orin kerr](#)

From: Kavanaugh, Brett M.
Sent: Monday, December 19, 2005 5:43 PM
To: Kaplan, Joel
Subject: Orin Kerr ...

Orin Kerr

Legal Analysis of the NSA Domestic Surveillance Program:

Was the secret NSA surveillance program legal? Was it constitutional? Did it violate federal statutory law? It turns out these are hard questions, but I wanted to try my best to answer them. My answer is pretty tentative, but here it goes: Although it hinges somewhat on technical details we don't know, it seems that the program was probably constitutional but probably violated the federal law known as the Foreign Intelligence Surveillance Act. My answer is extra-cautious for two reasons. First, there is some wiggle room in FISA, depending on technical details we don't know of how the surveillance was done. Second, there is at least a colorable argument -- if, I think in the end, an unpersuasive one -- that the surveillance was authorized by the Authorization to Use Military Force as construed in the Hamdi opinion.

This is a really long post, so let me tell you where I'm going. I'm going to start with the Fourth Amendment; then turn to FISA; next look to the Authorization to Use Military Force; and conclude by looking at claim that the surveillance was justified by the inherent authority of Article II. And before I start, let me be clear that nothing in this post is intended to express or reflect a normative take of whether the surveillance program is a good idea or a bad idea. In other words, I'm just trying to answer what the law is, not say what the law should be. If you think my analysis is wrong, please let me know in the comment section; I'd be delighted to post a correction.

The Fourth Amendment. On the whole, I think there are some pretty decent arguments that this program did not violate the Fourth Amendment under existing precedent. There are a bunch of different arguments here, but let me focus on two: the border search exception and a national security exception. Neither is a slam dunk, by any means, but each are plausible arguments left open by the cases.

The border search exception permits searches at the border of the United States "or its

functional equivalent." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985). The idea here is that the United States as a sovereign has a right to inspect stuff entering or exiting the country as a way of protecting its sovereign interests, and that the Fourth Amendment permits such searches. Courts have applied the border search exception in cases of PCs and computer hard drives; if you bring a computer into or out of the United States, the government can search your computer for contraband or other prohibited items at the airport or wherever you are entering or leaving the country. See, e.g., *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (Wilkinson, J.).

As I understand it, all of the monitoring involved in the NSA program involved international calls (and international e-mails). That is, the NSA was intercepting communications in the U.S., but only communications going outside the U.S. or coming from abroad. I'm not aware of any cases applying the border search exception to raw data, as compared to the search of a physical device that stores data, so this is untested ground. At the same time, I don't know of a rationale in the caselaw for treating data differently than physical storage devices. The case law on the border search exception is phrased in pretty broad language, so it seems at least plausible that a border search exception could apply to monitoring at an ISP or telephone provider as the "functional equivalent of the border," much like airports are the functional equivalent of the border in the case of international airline travel.

The government would have a second argument in case a court doesn't accept the border search exception: the open question of whether there is a national security exception to the Fourth Amendment that permits the government to conduct searches and surveillance for foreign intelligence surveillance. Footnote 23 of [Katz v. United States](#) left this open, and Justice White's concurrence in *Katz* expanded on this point:

Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

The Supreme Court also left this question open in the so-called "Keith" case, [United States v. United States District Court](#), in 1972. Justice Powell's opinion in the Keith case concluded that there was no national security exception to the Fourth Amendment for evidence collection involving domestic organizations, but expressly held open the possibility that such an exception existed for foreign intelligence collection:

Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

The administration presumably takes the position that the President does have such power

in cases involving foreign evidence collection, and that the NSA surveillance is such a case. The Supreme Court has never resolved the question, so it's an open constitutional issue. Nonetheless, between the border search exception and the open possibility of a national security exception, there are pretty decent arguments that the monitoring did not violate the Fourth Amendment. Maybe persuasive, maybe not, but certainly open and fair arguments under the case law.

Foreign Intelligence Surveillance Act. Now let's turn to FISA, a 1978 law that Congress enacted in response to the Keith case. FISA goes beyond the Keith case, including foreign intelligence surveillance in its scope even though it was left open as a constitutional question.

Specifically, 50 U.S.C. 1809 prohibits "electronic surveillance" except as authorized by statutory law: "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute." "Electronic surveillance" is defined in 50 U.S.C. 1801(f) to mean, in relevant part:

- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States. . . .

A "United States person" is defined in 50 U.S.C. 1801(i) as "a citizen of the United States [or] an alien lawfully admitted for permanent residence." A "wire communication" is defined as a communication that is traveling by a wire; I don't know if "radio communication" is a defined term, but I assume it refers primary to satellite communications.

Putting aside the AUMF and statutory exceptions for now, let's consider whether the NSA surveillance program violates the basic prohibition of 50 U.S.C. 1809 — intentionally conducting electronic surveillance. I think the answer is probably yes. If the surveillance tapped wire communications under 1801(f)(2), the case is pretty clear: the surveillance involved people in the U.S. and surveillance in the U.S., and that's all that is required. If the surveillance involved radio communications (satellite communications, I'm guessing), that's a bit trickier. There is at least a little wiggle room in Section 1801(f)(1). For example, you could say that the border search exception eliminates Fourth Amendment protection, such that there was no reasonable expectation of privacy and therefore there would be no warrant required in an analogous criminal case. In that case, the tapping of the radio communication wouldn't count as "electronic surveillance." I don't think we know the details of how the communications were obtained, so I think it's fair to say that the surveillance probably violated the basic prohibition but it at least arguably depends on some of the technical details we don't know.

Now, on to the exceptions. 50 U.S.C. 1802(a)(1) provides in relevant part:

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--

(A) the electronic surveillance is solely directed at--
(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or
(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title; [and]

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.

Does this exception permit the monitoring? Note that (i) and (ii) are both dealing with "foreign power, as defined in (a)(1), (2), or (3) of this title." FISA's definition of "foreign power" appears in 50 U.S.C. 1801:

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.

So as I read the statutes, Congress was trying to give an exception for monitoring foreign governments (a1, a2, a3) but not terrorist groups (a4, a5, a6), so long as no citizens or lawful permanent resident aliens were being monitored. There are interesting questions of how that might have applied to Al Qaeda in Afghanistan, but I don't think we need to reach them. It's my understanding that the program monitored both citizens and non-citizens, so I don't see how the exception is applicable.

(Aside: Remember back in 2003 when a copy of the Administration's "[Domestic Security Enhancement Act](#)" — sometimes dubbed "Patriot II" — was leaked to the press? [Section 501](#) of that Act would have made "providing material support" to a terrorist group an automatic ground for terminating citizenship. This is just a guess, but I wonder if the thinking was that this would make the NSA warrantless monitoring program legal under FISA. An individual who made regular contact with Al Qaeda could be giving them material support, and the individual would then no longer be a United States person and could then be legally subject to monitoring. Just speculation, but it might explain the thinking behind the

legislative proposal. Anyway, back to our regularly scheduled programming.)

Authorization to Use Military Force. The next question is whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, justified the monitoring. The authorization states in relevant part:

AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

I assume that the Administration's claim is that the AUMF counts as a "statute" that authorizes the surveillance: 50 U.S.C. 1809 states that "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute," so if the AUMF authorized the electronic surveillance, then the NSA program didn't violate FISA.

The Supreme Court considered the legal effect of the AUMF in [Hamdi v. Rumsfeld](#). Yaser Hamdi was being held as an enemy combatant, and claimed that his detention violated 18 U.S.C. 4001. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Given Justice Thomas's very broad reading of the AUMF in his dissent, I think the key interpretation is that of Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Justice O'Connor concluded that the the AUMF was "an act of Congress" that authorized Hamdi's detention, such that the detention did not violate 4001(a):

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 317 U. S., at 28. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . .

. . . .
In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting

the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

...
Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.

...
The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

So does the AUMF authorize the surveillance? As often happens when you're trying to draw guidance from an O'Connor opinion, it's not entirely clear. Under her opinion, the key question is whether the act is "so fundamental and accepted an incident to war" that it falls within the authorization. But that depends on the level of generality you chose to use to define "the act." Is "the act" spying on the enemy? In that case, perhaps it is a fundamental incident to war. Or is "the act" conducting U.S. domestic surveillance of U.S. citizens? In that case, the answer is no, it's not a fundamental incident to war.

In the end, my best sense is that the AUMF doesn't extend to this. I have three reasons. First, O'Connor's opinion says the following about detention for interrogation: "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." It seems to me that surveillance and wiretapping is pretty similar to interrogation: the point of both is getting information about your enemy. Second, it doesn't seem like wiretapping counts as a "use of force." If you read the text of the AUMF, it doesn't seem to me that it authorizes wiretapping. Finally, note that Congress passed the Patriot Act about a month after passing the AUMF; if Congress had intended the AUMF to give the president wide authority to conduct domestic surveillance against Al Qaeda, I don't think they would have spent so much time amending FISA for terrorism investigations. So at bottom, I think the AUMF probably didn't authorize this, although the Hamdi case gives some colorable (if ultimately unpersuasive) arguments that it might.

Article II. The final argument is that Article II of the Constitution gives the President inherent authority to conduct such monitoring. The Administration introduced this theory in a [supplemental brief](#) filed in the FISA Court of Review:

The President Has Inherent Authority to Conduct Warrantless Electronic Surveillance to Protect National Security from Foreign Threats.

In considering the constitutionality of the amended FISA, it is important to understand that FISA is not required by the Constitution. Rather, the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority. Both before

and after the enactment of FISA, courts have recognized the President's inherent authority to conduct foreign intelligence surveillance. See, e.g., *Butenko*, 494 F.2d at 608 (grounding exception to warrant requirement in the President's Commander-in-chief and foreign-affairs powers; noting that the country's self-defense needs weigh on the side of reasonableness); *Truong*, 629 F.2d at 914 (citing the President's foreign affairs power as justifying an exception to the warrant requirement); cf. *United States v. United States District Court (Keith)*, 407 U.S. 297, 308 (1972)(reserving the question whether the President's foreign-affairs powers justify exception from warrant requirement).

So the argument, as I understand it, is that Congress has no power to legislate in a way that inteferes with the President's Commander-in-Chief power, a judgment made, I suppose, by the President himself.

I have been unable to find any caselaw in support of this argument. Further, the argument has no support from the cases cited in the government's brief. In all three of those cases -- *Butenko*, *Truong*, and *Keith* -- the Courts were talking about whether the President's interest in conducting foreign intelligence monitoring creates an exception to the Warrant Requirement of the Fourth Amendment. In other words, the issue in those case was whether the Constitution bars warrantless surveillance absent Congressional action, not whether Congressional prohibitions in this area cannot bind the Executive branch.

Consider the citation to the *Butenko* case. Here is the relevant section, from 494 F.2d at 608:

Both executive authority in the foreign affairs area and society's interest in privacy are of significance, and are equally worthy of judicial concern.

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The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.

To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed. But the Fourth Amendment proscribes only 'unreasonable' searches and seizures. And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon Ivanov's Fourth Amendment rights.

As I read this analysis, it is entirely focused on the Fourth Amendment, and specifically whether the President's Commander in Chief power should trigger a relaxed Fourth Amendment standard. That seems quite different from a claim that Article II makes Congressional regulation inoperative. The same goes for the citation to *Truong*, 629 F.2d at 914. In the course of discussing whether the Courts should require a warant for foreig intelligence surveillance, the court tried to balance the ability of courts to regulate

intelligence surveillance with the strong governmentg interest:

Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.

While the Court was recognizing the President's constitutional role, it was in a very specific context: balancing reasonableness in the context of Fourth Amendment law to determine whether the surveillance required a warrant. Again, this doesn't seem to go to whether Congress can impose binding statutory prohibitions beyond the Fourth Amendment.

Conclusion. Anyway, that's my tentative take; I hope it's helpful. It's entirely possible that I goofed the analysis somewhere along the way; FISA, the AUMF, and Article II aren't my area of expertise, so we should consider this post a work in progress. I look forward to comments -- civil and respectful, please.

Subject: [PATRIOT Act]
From: "Mitnick, John M."
Date: 12/19/05, 6:01 PM
To: "Townsend, Frances F.", "Miers, Harriet"
CC: "Bartlett, Dan", "Wolff, Candida P.", "Kavanaugh, Brett M.", "Wallace, Nicolle", "Rapuano, Kenneth", "Kelley, William K.", "Kirk, Matthew", "Perino, Dana M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:19:30 EDT 2019

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Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Byron White 1967 ...
From: "Kavanaugh, Brett M."
Date: 12/20/05, 10:50 AM
To: "Kaplan, Joel"

MR. JUSTICE WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected [*363] to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement. In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See [Berger v. New York, 388 U.S. 41, 112-118 \(1967\)](#) (WHITE, J., dissenting). **We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.**

Subject: Carter Admin on FISA ...
From: "Kavanaugh, Brett M."
Date: 12/20/05, 11:05 AM
To: "Kaplan, Joel"

Though Congress thought it was reining in the executive with FISA, President Carter never relinquished the claim of inherent power to conduct warrantless wiretapping: "[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that this does not take away the power to the President under the Constitution." Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (testimony of Att'y Gen. Griffin B. Bell) [hereinafter cited as House Hearings on FISA]

From: "Kavanaugh, Brett M."
Date: 12/20/05, 11:18 AM
To: "Kaplan, Joel"

Clinton Claimed Authority to Order No-Warrant Searches
Does anyone remember that?

In a little-remembered debate from 1994, the Clinton administration argued that the president has "inherent authority" to order physical searches — including break-ins at the homes of U.S. citizens — for foreign intelligence purposes without any warrant or permission from any outside body. Even after the administration ultimately agreed with Congress's decision to place the authority to pre-approve such searches in the Foreign Intelligence Surveillance Act (FISA) court, President Clinton still maintained that he had sufficient authority to order such searches on his own.

"The Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes," Deputy Attorney General Jamie Gorelick testified before the Senate Intelligence Committee on July 14, 1994, "and that the President may, as has been done, delegate this authority to the Attorney General."

"It is important to understand," Gorelick continued, "that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the president in carrying out his foreign intelligence responsibilities."

Executive Order 12333, signed by Ronald Reagan in 1981, provides for such warrantless searches directed against "a foreign power or an agent of a foreign power."

Reporting the day after Gorelick's testimony, the *Washington Post's* headline — on page A-19 — read, "Administration Backing No-Warrant Spy Searches." The story began, "The Clinton administration, in a little-noticed facet of the debate on intelligence reforms, is seeking congressional authorization for U.S. spies to continue conducting clandestine searches at foreign embassies in Washington and other cities without a federal court order. The administration's quiet lobbying effort is aimed at modifying draft legislation that would require U.S. counterintelligence officials to get a court order before secretly snooping inside the homes or workplaces of suspected foreign agents or foreign powers."

In her testimony, Gorelick made clear that the president believed he had the power to order warrantless searches for the purpose of gathering intelligence, even if there was no reason to believe that the search might uncover evidence of a crime. "Intelligence is often long range, its exact targets are more difficult to identify, and its focus is less precise," Gorelick said. "Information gathering for policy making and prevention, rather than prosecution, are its primary focus."

The debate over warrantless searches came up after the case of CIA spy Aldrich Ames. Authorities had searched Ames's house without a warrant, and the Justice Department feared that Ames's lawyers would challenge the search in court. Meanwhile, Congress began discussing a measure under which the authorization for break-ins would be handled like

the authorization for wiretaps, that is, by the FISA court. In her testimony, Gorelick signaled that the administration would go along a congressional decision to place such searches under the court — if, as she testified, it "does not restrict the president's ability to collect foreign intelligence necessary for the national security." In the end, Congress placed the searches under the FISA court, but the Clinton administration did not back down from its contention that the president had the authority to act when necessary.

— *Byron York, NR's White House correspondent*

Subject: NSA
From: "Kavanaugh, Brett M."
Date: 12/20/05, 5:00 PM
To: "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:50 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: NSA
From: "Kavanaugh, Brett M."
Date: 12/20/05, 8:25 PM
To: "McClellan, Scott"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:50 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: NSA
From: "McClellan, Scott"
Date: 12/20/05, 8:30 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:51 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: NSA
From: "Kavanaugh, Brett M."
Date: 12/20/05, 8:32 PM
To: "McClellan, Scott"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:52 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

[fyi]

Subject: [fyi]
From: "Kavanaugh, Brett M."
Date: 12/20/05, 9:32 PM
To: "McClellan, Scott"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:18:50 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Carter's AG in hearings on FISA in 1978

From: "Kavanaugh, Brett M."

Date: 12/21/05, 11:37 AM

To: <kr@georgewbush.com>

"[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that this does not take away the power to the President under the Constitution." Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (testimony of Att'y Gen. Griffin B. Bell)

Subject: Byron White 1967 ...
From: "Kavanaugh, Brett M."
Date: 12/21/05, 4:40 PM
To: <kr@georgewbush.com>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:17:52 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

FW: [fyi]

Subject: FW: [fyi]
From: "Kavanaugh, Brett M."
Date: 12/21/05, 6:35 PM
To: "Gottesman, Blake"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:18:26 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: NSA
From: "Kavanaugh, Brett M."
Date: 12/21/05, 7:08 PM
To: "Gottesman, Blake"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:22 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: [Comments]
From: "Kelley, William K."
Date: 12/21/05, 7:29 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:15:43 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: NSA Staffing Comment
From: "Kelley, William K."
Date: 12/21/05, 7:29 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:23 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: NSA Staffing Comment
From: "Kavanaugh, Brett M."
Date: 12/21/05, 7:42 PM
To: "Kelley, William K."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:25 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: NSA Staffing Comment
From: "Kelley, William K."
Date: 12/21/05, 7:47 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:26 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

RE: [fyi]

Subject: RE: [fyi]
From: "Gottesman, Blake"
Date: 12/22/05, 2:08 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:14:42 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,P5,b(6)

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

FW:

Subject: FW:
From: "Kavanaugh, Brett M."
Date: 12/22/05, 3:53 PM
To: "Staff Secretary"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:30 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

From: "Kelley, William K."
Date: 12/22/05, 7:18 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:13:31 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Helpful Hugh Hewitt radio transcript with self-described liberal law professor Cass Sunstein (he's well-known liberal professor) on authority issue ...

From: "Kavanaugh, Brett M."

Date: 12/23/05, 3:04 PM

To: "Bartlett, Dan", "Wallace, Nicolle", "McClellan, Scott"

HH: Now Professor, you're the author of the Con law textbook that many of us use in the classroom. You've written a great deal about this. Is it fair to describe you as a man of the left?

CS: I don't think so. On some issues yes, but I don't consider myself that.

HH: How about a liberal?

CS: That's fine.

HH: Okay. A liberal. That's how I usually call liberals, so we get them on the ideological spectrum. But nevertheless, you wrote a [post](#) which I have linked to at Hughhewitt.com, called [Presidential Wiretapping: Disaggregating the Issues](#), which I think is very useful, and I'd like to walk through it. First, did the authorization for the use of military force from 2001 authorize the president's action with regards to conducting surveillance on foreign powers, including al Qaeda, in contact with their agents in America, Professor?

CS: Well, probably. If the Congress authorizes the president to use force, a pretty natural incident of that is to engage in surveillance. So if there's on the battlefield some communication between Taliban and al Qaeda, the president can monitor that. If al Qaeda calls the United States, the president can probably monitor that, too, as part of waging against al Qaeda.

HH: Very good. Part two of your analysis...If...whether or not the AUMF does, does the Constitution give the president inherent authority to do what he did?

CS: That's less clear, but there's a very strong argument the president does have that authority. All the lower courts that have investigated the issue have so said. So as part of the president's power as executive, there's a strong argument that he can monitor conversations from overseas, especially if they're al Qaeda communications in the aftermath of 9/11. So what I guess I do is put the two arguments together. It's a little technical, but I think pretty important, which is that since the president has a plausible claim that he has inherent authority to do this, that is to monitor communications from threats outside our borders, we should be pretty willing to interpret a Congressional authorization to use force in a way that conforms to the president's possible Constitutional authority. So that is if you put the Constitutional authority together with the statutory authorization, the president's on pretty good ground.

HH: And then I want to jump out of your analysis for a moment, and go to the steel seizure case, and to Justice Jackson's concurrence, because a lot of the analysis is saying the president is acting contrary to Congressional intent, citing some FISA sections, which I think are wrongly read. But nevertheless, if you read the AUMF the way you do, and the Constitution the way it is plausibly read, that would put us in the highest zone of presidential authority, under Justice Jackson's three-part analysis, wouldn't it?

CS: That's right. And just as in the Hamdi case, it's easy to remember the Court said that that was specific authorization to detain our enemies, so too a natural incident of war is the power to engage in surveillance of our enemies. So it would be odd, I think, to understand the authorization not to include the power to engage in surveillance, when al Qaeda is communicating with people who are unfriendly to us.

HH: Now if...would your analysis change if the Congress reconvened, and then passed a specific law saying we did not mean that. Would that...this is for the non-lawyers in our audience...would that in any way affect his inherent Constitutional authority?

CS: No. And then we'd have a huge question, which is whether Congress has the Constitutional power to negate the president's authority to monitor communications from our enemies. And that would be a big and unresolved Constitutional question. It would be unfortunate if the Congress of the United States stopped the president from doing something which Congress already probably is best understood to have allowed the president to do in the authorization to use force.

HH: Now let's move over to the Supreme Court. On Sunday, I posted at my blog, United States V. United States District Court of Eastern Michigan, also known as the Keith Case, because I believe it affirmatively shows that the Supreme Court has not contradicted the president's power here. Do you agree with that analysis?

CS: Yes. That's clearly right. What that Court says is that for domestic surveillance that don't involve foreigners or foreign threats, the president needs a warrant. But now we're onto the last question, which is whether there's a Fourth Amendment requirement of a warrant. And the Supreme Court has never said that in circumstances like this. The lower court seemed to suggest otherwise.

HH: That's why I wanted to come back and do your middle one in the middle, because now we've got the Constitutional issues out on the table. There are some arguments the other way. I want to be fair to people who are arguing, because they haven't been really fair to the president's position. You could make arguments the other way. But by no means does the...in my opinion, do they have remotely as strong a case as the advocates for the Constitutionality of what the president has done. Do you agree with that assessment, Professor?

CS: Well, what I'd say is that the Department of Justice is the president's lawyer, and they have a duty, the lawyers there, to protect the president's Constitutional prerogatives. I actually worked there myself around the same time that Chief Justice Roberts was in the Justice Department, and that's the Department of Justice's job to protect Constitutional prerogatives of the president. But in this case, it's not as if the Department of Justice is stretching badly to protect the president. It's not as in the what I think is the unfortunate torture memo, where the Justice Department really was stretching. Here the Department of Justice is making more than plausible arguments. If you put me to it, is the president right on this? It's very complicated. I think he has...he probably has the better argument. As you say, there are complexities.

HH: What year were you in the OLC, Office of Legal Counsel?

CS: In '81, under Carter and Reagan.

HH: Okay, so you actually had to deal with the use of force issue, surrounding the operation that went badly in the Iranian desert. Were you there at the time?

CS: I was there during some of the legal discussion. That's correct.

HH: You see, that's what I thought. And that would give you a very different view. I came into Justice as a special assistant to Smith doing the FISA work afterwards, and it gives me a different perspective on this. Now let's get to FISA. This is the hardest nut to crack, because we don't know the facts. And why are the facts important here?

CS: Well, if the president is just restricted to al Qaeda, and al Qaeda's friends, then he's on very firm ground under the authorization. If, on the other hand, the president has been engaging in wiretapping of people whose connection to al Qaeda is very uncertain and indirect, then the authorization is less helpful for him.

HH: But the Foreign Intelligence Surveillance Act itself, I often hear...today, Lanny Davis, another one, said the president could have just gone to the FISA court. Why didn't he? And Vicki Toensing and others have been trying to explain they have a probable cause requirement, and they have some other technicalities associated with that process that make it cumbersome. Do you find...

CS: I think there are a couple of things going on there. It's not the most cumbersome thing in the world, but it is something that the president, when national security is on the line, isn't excited about having to go through a procedure where it's conceivable he's going to lose...unlikely, but conceivable. There's another point in the background, really, which if you were there, you know, which is that the president believes here that these are very sensitive Constitutional prerogatives. And this isn't a Republican or Democratic thing. This is something that cuts across political affiliations of the president. And so the notion that in a case as sensitive as this one, he is under a legal responsibility to go through something that may be more time consuming than appears, may be more leaky than appears. Even if he doesn't think it's likely to be leaky, that's something that a president is not likely to think is necessary.

HH: So if we assume, and I do, that FISA is Constitutional, if it puts into place an arguably exclusive means of obtaining warrants for surveillance of al Qaeda and their agents in the United States, does the president's avoidance of that necessarily make him a law breaker? Or does it make the FISA ineffective insofar as it would attempt to restrict the president's power?

CS: Yeah. I guess I'd say there are a couple of possibilities. One is that we should interpret FISA conformably with the president's Constitutional authority. So if FISA is ambiguous, or its applicability is in question, the prudent thing to do, as the first President Bush liked to say, is to interpret it so that FISA doesn't compromise the president's Constitutional power. And that's very reasonable, given the fact that there's an authorization to wage war, and you cannot wage war without engaging in surveillance. If FISA is interpreted as preventing the president from doing what he did here, then the president does have an argument that the FISA so interpreted is unconstitutional. So I don't think any president would relinquish the argument that the Congress lacks the authority to prevent him from acting in a way that protects national security, by engaging in foreign surveillance under the specific circumstances of post-9/11.

HH: Professor Sunstein, have you ever been contacted by mainstream media about this controversy?

CS: A lot. Yeah.

HH: And have you spent a lot of time trying to walk the reporters through the basics?

CS: Yes.

HH: Who's contacted you, for example? The New York Times?

CS: Well, I wouldn't want to name specific ones. It's a little bit of confidentiality there, but some well known ones. Let's just say that.

HH: Let me ask. Have you been quoted in any papers that you've seen?

CS: I don't think so.

HH: Do you consider the quality of the media coverage here to be good, bad, or in between?

CS: Pretty bad, and I think the reason is we're seeing a kind of libertarian panic a little bit, where what seems at first glance...this might be proved wrong...but where what seems at first glance a pretty modest program is being described as a kind of universal wiretapping, and also being described as depending on a wild claim of presidential authority, which the president, to his credit, has not made any such wild claim. The claims are actually fairly modest, and not unconventional. So the problem with what we've seen from the media is treating this as much more peculiar, and much larger than it actually is. As I recall, by the way, I was quoted in the Los Angeles Times, and they did say that in at least one person's view, the authorization to use military force probably was adequate here.

HH: Do you think the media simply does not understand? Or are they being purposefully ill-informed in your view?

CS: You know what I think it is? It's kind of an echo of Watergate. So when the word wiretapping comes out, a lot of people get really nervous and think this is a rerun of Watergate. I also think there are two different ideas going on here. One is skepticism on the part of many members of the media about judgments by President Bush that threaten, in their view, civil liberties. So it's like they see President Bush and civil liberties, and they get a little more reflexively skeptical than maybe the individual issue warrants. So there's that. Plus, there's, I think, a kind of bipartisan...in the American culture, including the media, streak that is very nervous about intruding on telephone calls and e-mails. And that, in many ways, is healthy. But it can create a misunderstanding of a particular situation.

HH: The libertarian panic that you referred to, I actually believe that that probably did prompt a lot of the original egregiously wrong analysis. But now I'm beginning to be concerned that the media is intentionally ignoring the very strong arguments defending what the president did. Do you believe that's taking place?

CS: I don't like accusing anyone of intentionally ignoring anything. So I believe with respect to people, whatever their political views, you should have charity, and assume until it's

proved wrong that they're acting in good faith. It's still early in this, by the way. And I think the tide is turning a little bit in terms of the legal analysis. If it turns out that this goes on for months, and facts don't come out that are worse than the facts we now have, then it looks...then it will look like a continuing panic, which would be worse than what we've seen just in a couple of days.

HH: Have you had a chance yet, Professor Sunstein, to review the [William Moschella memo](#) on the program that was sent today to Senators Rockefeller and Roberts, and Congresspeople Hoekstra and Harman?

CS: Yeah, I've read that.

HH: Did you find it persuasive?

CS: I thought it was good. It was a solid job. I thought there were a couple of things that, you know, these are the president's lawyers, and they're not going to be neutral. I think it was definitely more on than off. The analysis of the Fourth Amendment issue was brisk and conclusory. All that was said was that the Fourth Amendment requires reasonableness, and this is reasonable. Chief Justice Roberts would demand something a little bit better than that, as would any good judge. The analysis of the case you mentioned, that is the United States against United States District Court was...I guess the lawyers were just tendentious. But I don't think it was...I think it was a good, solid analysis. Better than what we've seen, let's just say, from Congress so far.

HH: All right. Now let's talk about how this gets to the courts for review, because I frankly don't see any way for this program to get to the courts for review, unless and until any of the information is used against the suspect, if that suspect is capable of actually finding that out. Do you see judicial review of this occurring in any way?

CS: You're completely right. You have to find someone who has standing to object to this. And so what you'd have to find is an American citizen whose been tapped, or intruded on in a way that results in harm. Now if someone's phone has been tapped, and there's been nothing done with it, there's an argument that there's standing there. But it's very possible this won't be litigated at all.

HH: Let's turn, then, to the person who leaked it to the New York Times. I discussed this with Senator Jon Kyl last hour, Senator Cornyn yesterday. It is clear to me that a federal crime has occurred. Do you agree with that?

CS: I'm not sure. What's the statute that this would violate?

HH: The release of classified documents, and it's in 18USC something. I don't know. It's just that if something's classified, you cannot give it to someone.

CS: And the existence of the program was itself classified?

HH: Yes.

CS: Well, then if so, absolutely.

HH: When you were at Justice, did you get the sense of compartmented information clearances, and all the briefings that went with that?

CS: Sure did.

HH: And were they as adamant in your years as they were in mine about the penalties that would attach to the release of such information?

CS: It was implicit. I mean, no one, when I was there, so far as I know, would even spend a second thinking of leaking classified material. That was the most obvious thing in the world. If you think about doing it, you've thought too much.

HH: And if...are you...

CS: It was a moral requirement, not a...when we were there, we wouldn't leak. It was a moral requirement. It wasn't we were afraid of crime, it was we wouldn't do something that was wrong.

HH: I agree with you on that. And my question is do you think damage to the United States' national interest may have occurred as a result of the leak of this material?

CS: I think it might have. I really hope not, but I think it might have. I mean this is a program which...whose efficacy might well depend on its being secret. That would be...if so, then that would be very, very harmful.

HH: Professor Cass Sunstein, I want to thank you for spending a half hour with us. Very, very interesting conversation. I appreciate as well the [law blog](#), and we'll continue to look forward to reading it. Maybe we can have you back as this unfolds.

CS: My pleasure. I enjoyed it.

HH: Thank you.

End of interview.

Subject: FW: Article you requested
From: "Slaughter, Kristen K."
Date: 1/3/06, 2:05 PM
To: "Kavanaugh, Brett M."

From: Garroway, Melinda A.
Sent: Tuesday, January 03, 2006 2:00 PM
To: Slaughter, Kristen K.
Subject: Article you requested

Kristen

I was able to find it online.

Please let me know if there is anything else I can help you with.

Melinda Garroway
Librarian
OA / Library & Research Services
EEOB 308
x57000

You can also reach the library staff by using the [Ask a Librarian](#) link from the [Virtual Library](#)

— Attachments: —

72 GTLJ 1855.doc

165 KB

August, 1984

72 *Geo. L.J.* 1855

LENGTH: 22607 words

NOTE: The **Extent of Independent Presidential Authority** to Conduct Foreign Intelligence Activities.

NAME: Kent A. Jordan

SUMMARY:

... From the time of Nathan Hale to the current Central Intelligence Agency (CIA) activities in Central America, the United States has engaged in international intrigue. ... Recent events in Central America n5 and recent congressional action n6 have revived the controversy about the balance of executive and legislative power to control America's intelligence policy. ... During the next few months, executive branch officials n24 agreed on the need for a centralized intelligence organization. ... The renewed conflict between the executive and the legislative branches over the conduct of foreign intelligence activities makes this an appropriate time to examine the extent of executive authority to conduct such activities in the face of congressional opposition. ... A. TYPES OF INTELLIGENCE ACTIVITY ... The Act prohibited expenditure of funds for CIA covert action unless the President found the operation necessary for national security and made a timely report describing the operation and its scope to "appropriate committees of Congress. ... These experiences affirm the necessity of a constitutional interpretation giving the Commander in Chief full authority to conduct informational intelligence activities. ... Unlike the broad, unchanging power to conduct foreign informational intelligence activities, the executive power to conduct foreign covert intelligence activities is thus a function of changing world conditions and crises that cannot be adequately assessed in the abstract. ...

TEXT:

[*1855] I. INTRODUCTION: THE POLITICAL VAGARIES OF CONSTITUTIONAL "LAW"

From the time of Nathan Hale n1 to the current Central Intelligence Agency (CIA) activities in Central America, n2 the United States has engaged in international intrigue. Until the last decade, however, public and congressional attention rarely have focused on the government's foreign intelligence activities. n3 In the wake of Vietnam and Watergate, revelations of questionable covert activities radically altered the intelligence community's previously sheltered existence. n4 One issue that emerged from the heated public debate was the extent to which Congress should control America's intelligence activities. Public debate, however, did not focus on the more fundamental questions: to what extent *could* Congress control intelligence activities, and to what extent does the President have constitutional authority to conduct foreign intelligence activities independent of congressional approval. Recent events in Central America n5 and recent congressional action n6 have revived the controversy about the balance of executive and legislative power to control America's intelligence policy.

Most questions of constitutional law arise because of the difficult distinction between law and politics. All laws are political in the sense that they are governmental [*1856] policy choices. Constitutional law is political not simply because it represents policy decisions, but because it allocates the power to make policy decisions within the state. The struggle for such power is most intense between the executive and the legislative branches. In one form or another that division of power has been in dispute since Hamilton and Madison donned their pseudonyms and argued the issue in the press nearly 200 years ago. n7

This note argues that, although the intelligence function is subject to the shared powers of Congress and the President, it is a function which constitutional theory and practice entrust primarily to the President and over which he has significant independent power. To show that precedent favors independent presidential power, the note first reviews the evolution of the intelligence function in American government, focusing primarily on the genesis of the CIA and the

increased congressional interest in intelligence in the mid-1970s. The note describes the various types of intelligence activities. It then discusses the constitutional provisions which authorize Congress to control the intelligence function and gives examples of recent exercises of that authority. Thereafter, it examines the constitutional sources of presidential authority to control the intelligence function. Finally, it compares presidential and congressional power in this area and concludes that sound policy requires executive restraint in exercising independent power and congressional restraint in trying to limit it.

II. GENERAL HISTORICAL BACKGROUND

"The necessity of procuring good intelligence is apparent and need not be further urged - all that remains for me to add, is, that you keep the whole matter as secret as possible." n8 In so writing to one of his officers in 1777, General George Washington frankly acknowledged that good spying wins wars. n9 [*1857] His revolutionary contemporaries likewise understood the importance of successful intelligence work in achieving major diplomatic objectives. n10 Yet, for the first century of the United States' existence, Presidents apparently viewed intelligence work as nothing more than an ad hoc response to international conflicts and their concomitant diplomatic maneuvering. n11 Intelligence work during the first century was not a continuing, structured function of government. n12

The era of ad hoc intelligence work ended in the 1880s with the establishment of permanent intelligence units within the armed services. n13 In 1889, those units became closely linked with the State Department when Congress appropriated funds to send military attaches to serve in United States embassies. n14 Some twenty-five years later, President Wilson furthered State Department control of the intelligence function by making the Department chiefly responsible for setting overall intelligence policy and for coordinating the efforts of other agencies carrying on intelligence activities. n15 Although this arrangement lasted until 1942, n16 the State Department's control began disintegrating much earlier. n17 By the late 1930s, at least eight agencies were gathering foreign intelligence and reporting it directly to the President. n18

In 1940, President Roosevelt took the first step toward centralizing the bureaucratic chaos in the intelligence community by requesting that William J. Donovan, a well-known attorney and World War I hero, visit England to evaluate its political and military situation. n19 Donovan returned convinced of the need to vest in a single agency the authority to conduct intelligence gathering and analysis, espionage, and propaganda efforts for the United States. n20 His [*1858] lobbying led Roosevelt to establish by presidential decree the Office for Strategic Services (OSS). n21

The OSS never fulfilled Donovan's conception of an authoritative centralized intelligence organization. Bureaucratic jealousies kept the OSS from receiving from other agencies the cooperation it needed to function effectively; n22 thus, despite Donovan's efforts to keep the OSS alive, President Truman disbanded it at the close of World War II. n23 Donovan's idea, however, did not die. During the next few months, executive branch officials n24 agreed on the need for a centralized intelligence organization. n25 By an executive order dated January 22, 1946, President Truman established the Central Intelligence Group (CIG) to operate under a National Intelligence Authority comprised of the Secretaries of State, War, and Navy and a personal representative of the President. n26

[*1859] Congress put its imprimatur on the new structure by passing the 1947 National Security Act. n27 Because the main focus of the Act was to unify the various branches of the armed services under a Department of National Defense, executive communications about n28 and congressional debate on n29 the Act concentrated almost entirely on this consolidation of military control. Why the executive and legislative branches believed the CIG should have a statutory base is unclear. n30 Perhaps the President wanted to legitimize his recently modified intelligence structure in the eyes of Congress and thus prevent their questioning it later. The President and his close advisors may have foreseen that intelligence activities in the postwar world expand and that the quantity and concentration of American resources spent on intelligence efforts would rightfully excite congressional interest and incite a demand for an accounting. He may have realized it would be politically expedient in the short term to have Congress ratify the system and practically impossible in the long term to run the system without congressional support.

Unlike the OSS, the National Security Act fulfilled William Donovan's conception of an authoritative centralized intelligence organization. The Act created the CIA and gave it authority to gather and coordinate information from the various intelligence units scattered throughout the Federal bureaucracy. n31 In addition, the Act provided a direct link to the President. n32

The Act directs the CIA to perform five specific functions:

[*1860] (1) to advise the National Security Council (NSC) on matters related to national security;

(2) to make recommendations to the NSC for coordination of intelligence activities of departments and agencies of government;

(3) to correlate and evaluate intelligence and provide for its appropriate dissemination within the government;

(4) to perform for the benefit of existing intelligence agencies such additional services of common concern as the NSC determines can be more efficiently accomplished centrally;

(5) to perform such other functions and duties related intelligence affecting the national security as the NSC may from time to time direct. n33

The CIA has interpreted this statutory authorization as "neither limit[ing] the powers of the President nor restrict[ing] his discretion in the choice of the agency through which he will exercise these powers." n34 In particular, it has broadly construed the directive "to perform such other functions and duties related to intelligence." The CIA has conducted its much-maligned covert actions under the authority of this directive. n35

During the early years of the Cold War n36 the Director of the State Department's Policy Planning Staff, George Kennan, proposed that a State Department unit conduct overt and covert political warfare to counter Soviet tactics [*1861] of global subversion. n37 In June, 1948 the NSC authorized the CIA's Office of Special Projects to undertake covert political, economic, and paramilitary activities. n38

For more than two decades covert operations expanded n39 and were carried out without much public or congressional scrutiny, even during the turbulent years of Vietnam and Watergate. Indirectly, however, Vietnam and Watergate profoundly affected the intelligence function by shifting the balance of national power away from the executive branch and toward Congress. n40 Although earlier, more isolated efforts had been made to give Congress a greater role in intelligence oversight, n41 Congress showed little interest in such a role [*1862] until a combination of events in the early 1970s ignited the media and turned the attentions of the recently aroused legislative branch to the CIA. n42

In late December, 1974, *The New York Times* printed a lengthy front-page article alleging that the CIA had engaged in a massive spying operation against the anti-Vietnam War movement in the U.S. n43 The *Times* added to the story almost daily. n44 The media and Congress urged each other on -- news stories led to congressional outcries which in turn led to further news stories and more outcries. Early in the year, 1975 was already being called the "year of intelligence." n45 By this time both Houses of Congress had created select committees to investigate power abuses in the intelligence establishment.

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Frank Church and known as the Church Committee, produced seventeen volumes of reports and testimony over a sixteen-month period. n46 Although it occasionally disclosed sensational episodes from past CIA conduct, n47 the Church Committee worked largely with [*1863] a cooperative attitude toward executive-branch concerns for the confidentiality of sensitive information. n48 In stark contrast, the House Select Committee on Intelligence, named the Pike Committee after its chairman Otis Pike, warred with the administration from the outset over the availability and classification of information. n49 Eventually, the Pike Committee members and staff leaked sensitive information and were themselves the subjects of a House investigation. n50 Despite differences in efficiency and attitude, the two committees reached much the same conclusion: Congress should establish permanent intelligence oversight committees. n51

Today, such oversight committees have been established n52 and have cooperated with the President in conducting intelligence activities. n53 Recently, some have expressed concern that the committees have been too cooperative n54 and have questioned the scope and effectiveness of congressional oversight. n55 The reported seventeen percent rate of annual increase in the intelligence budget for the past three years n56 and covert support of Nicaraguan *Contras* n57 have aroused congressional opposition and produced the Boland Amendment, a path-breaking piece of legislation. n58 The renewed conflict between the executive [*1864] and the legislative branches over the conduct of foreign intelligence activities makes this an appropriate time to examine the extent of executive authority to conduct such activities in the face of congressional opposition.

III. CONSTITUTIONAL SOURCES OF PRESIDENTIAL AUTHORITY TO CONDUCT FOREIGN INTELLIGENCE ACTIVITIES

To determine the scope of the executive's independent constitutional power, the Supreme Court has ratified a pseudo-algebraic analysis. In *Dames & Moore v. Regan*, n59 the Court referred to Justice Jackson's concurrence in the *Steel Seizure Case* n60 as an approach which "brings together as much combination of analysis and common sense as

there is" on the question of executive authority. n61 Jackson's well-known opinion categorizes executive power in relation to congressional action: if Congress approves, presidential power is at its maximum, "for it includes all that he possesses in his own right plus all that Congress can delegate"; n62 if Congress takes no action to make its will known, the President operates in a twilight zone in which the distribution of authority between executive and legislature is uncertain; n63 if, however, Congress has expressly or by implication indicated its opposition to the President's course, then "[the President's] power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." n64

To estimate the measure of independent authority in the President, then, the following analysis assumes a direct confrontation between the political branches. Congressional authority over intelligence work must therefore be "subtracted" n65 from presidential authority to determine whether anything remains of the latter. After briefly describing the types of intelligence activities, the note then lists relevant congressional powers, examines constitutional sources of presidential authority to conduct foreign intelligence activities, and explains why the President has authority to conduct such activities despite the subtraction of congressional powers.

A. TYPES OF INTELLIGENCE ACTIVITY

"Intelligence," a shorthand term for "strategic intelligence," refers to information about events and circumstances in the world which the authors and [*1865] implementers of a nation's foreign policy use to guide their judgments. n66 Intelligence activities naturally include the gathering and analysis of such information. n67 Intelligence activities, however, are not solely informational; much of what occurs under the rubric of intelligence work is covert action, or so-called "special activities," n68 which the CIA defines as the secret use of either political means or varying degrees of force to influence events abroad. n69 For purposes of analysis, foreign intelligence activities can be categorized n70 as informational or covert. Informational activities consist of gathering information, both openly and by espionage, and the analysis and evaluation of the information gathered. Covert activities, in turn, can be categorized as political and paramilitary. Political activities include the creation and dissemination of propaganda, and the provision of funds and organizational expertise to political groups or individuals. Paramilitary activities involve the provision of tactical instruction about weapons and expertise on their use and the actual participation of agents in hostilities. Each of these activities can be further classified according to whether they are carried out by American agents or by the agents of a surrogate nation.

Not all of these distinctions make a difference in constitutional analysis, as the following discussion should make clear, n71 but one additional variable -- the existence of war or peace between the United States and the country which is the target of the intelligence action -- is essential to analyzing the constitutionality of a President's conduct of foreign intelligence activities. n72 The great weight of constitutional scholarship holds that the President's commander in chief status allows him to take action during war which would be beyond his prerogative during peacetime. n73 Once a constitutionally recognized basis for making war exists, n74 the President has independent authority and perhaps a [*1866] duty to employ the full range of intelligence action against the enemy. Because there is no real issue of the President's independent authority during war, the following discussion assumes, unless otherwise indicated, that the United States is not in a constitutionally authorized war with the nations targeted for covert activities. n75

B. RELEVANT CONGRESSIONAL POWERS AND THEIR ASSERTION

The Constitution authorizes Congress "To provide for the common Defence and general Welfare of the United States," n76 "To declare War," n77 "To make Rules for the Government and Regulation of the land and naval Forces," n78 and "To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States." n79 These powers plus congressional control of the public purse n80 give Congress a significant role in foreign activities. n81

In 1974 Congress passed the Hughes-Ryan Amendment, the first statutory provision regulating foreign intelligence activities. n82 The Act prohibited expenditure of funds for CIA covert action unless the President found the operation necessary for national security and made a timely report describing the operation and its scope to "appropriate committees of Congress." n83

Six years after passing the Hughes-Ryan Amendment, Congress passed the Intelligence Authorization Act for Fiscal Year 1981. n84 The new act

replace[d] the Hughes-Ryan framework with one that is at once more limited and more encompassing -- more limited in that reports to Congress . . . go to only the two intelligence committee; but more encompassing in that [it]

appl[ies] to [covert action] conducted by any agency, not just the CIA, and *prior* notification to Congress . . . [is] [*1867] for the first required by statute. n85

Perhaps the most specific attempt to regulate intelligence work is the Boland Amendment. n86 Passed in November, 1983 as part of appropriations legislation, it sets a cap of \$ 24 million on spending for military and paramilitary activities in Nicaragua during fiscal year 1984. n87

This kind of legislation, which purports to bind the President in his execution of the foreign intelligence function, has not been undisputed. The Carter Administration opposed certain requirements that the Senate Select Committee on Intelligence was considering in 1980, n88 even though the requirements were substantially the same as those in the President's own Executive Order. n89 Then Director of Central Intelligence (DCI), Admiral Stansfield Turner, told the Senate Intelligence Committee "it would be improper to attempt to impose such requirements in the statute. Such statutory requirements would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." n90

[*1868] C. SOURCES OF PRESIDENTIAL AUTHORITY TO UNDERTAKE SPECIFIC INTELLIGENCE ACTIVITIES

That the President has some measure of independent authority over foreign intelligence activities is beyond question. Even in arguing that Congress can prescribe the mode by which the President carries out the foreign intelligence function, n91 the Church Committee acknowledged that, "[i]n view of the President's own constitutional powers, Congress may not deprive the President of [that] function." n92 Those constitutional powers support the President's independent conduct of both informational and covert intelligence activities.

1. Informational Intelligence Activities

Gathering. Three different constitutional powers give the President independent authority to gather information.

(i) The Commander in Chief Power. Because Presidents generally have succeeded in having their actions ratified by Congress, either with broad advance [*1869] grants of power or after-the-fact pronouncements, n93 and because the courts have avoided judging the constitutionality of presidentially ordered military actions, n94 the outer limits of presidential authority under the commander in chief clause n95 have never been fully defined. Initially the clause was considered a minor feature of the Constitution. Hamilton remarked that the power it actually conferred was inferior to that possessed by the governor of New York as commander of that state's militia. n96 In Abraham Lincoln's hands, however, the power came to mean a great deal more than Hamilton ever imagined or acknowledged.

Faced with the southern states' flouting of federal authority and their attacks on federal installations, Lincoln coupled the commander in chief clause with his constitutional injunction to "take care that the laws be faithfully executed" n97 and derived a "war power." n98 During the World Wars, Presidents Wilson and Roosevelt likewise exercised sweeping powers under the commander in chief authority. n99 The eminent constitutional scholar Esward S. Corwin noted that, "if we are to judge from the past, in each successive crisis the constitutional results of earlier crises reappear cumulatively and in magnified form." n100 The result, Corwin said, is that "the constitutional practices of wartime have molded the Constitution to a greater or less extent for peacetime as well. . . ." n101

Corwin's analysis, written in 1957, has proven accurate in the last two decades, though probably not in the way he envisioned. The claims of constitutional power made by Presidents Johnson and Nixon during the Vietnam War n102 have indeed had an impact on constitutional interpretations of the commander in chief power. Their perceived abuse of the commander in chief power n103 has led Congress n104 and commentators n105 to interpret that power far [*1870] more narrowly. The most significant evidence of this reaction is the War Powers Resolution. n106 Although no President has conceded its constitutionality, Ford, Carter, and Reagan all have given token compliance n107 or reasons why they believed an action taken was not within the statute. n108

Despite the challenge of the War Powers Resolution, the President's commander in chief status gives him important responsibilities and independent power in foreign affairs. As commander in chief, he is under a constitutional duty to protect the United States, n109 a duty which he can discharge only if he is fully and timely informed of international events. The lack of a vigilant, professional intelligence service within the government before World War II had left the United States grossly misinformed and unprotected. When Secretary of the Navy Frank Knox received news of Japan's crushing attack on Pearl Harbor, he exclaimed, "My God, this can't be true. This must mean the Philippines." n110 A perception that today the United States is not likely to suffer an attack on her borders does not lessen the President's constitutional duty to be alert to that possibility by monitoring international events. Arguably, the President's com-

mander in chief authority empowers him to protect not only United States borders, but also United States citizens and property abroad. Far more plausible threats to America than invasion are recurrences of such events as the Iranian hostage crisis, n111 the bombing of the Marine headquarters in Beirut, n112 or the United States Embassy bombing in Kuwait. n113 In those incidents, as with Pearl Harbor, a paucity of relevant, accurate information [*1871] contributed to American vulnerability. n114 These experiences affirm the necessity of a constitutional interpretation giving the Commander in Chief full authority to conduct informational intelligence activities.

(ii) The "Foreign Affairs" Power. Even if the President were not charged with the powers and duties of commander in chief, he would still possess sufficient authority to conduct foreign informational intelligence activities because of his status as the sole organ of external relations.

The Constitution mentions no foreign affairs power as such. Unlike their philosophical forebears, n115 the Framers did not see that power as falling naturally within the province of the executive. Although the constitutional convention met in part because the Articles of Confederation had proven unsatisfactory in obtaining nationwide compliance with treaty obligations, n116 apparently many who attended assumed that governance of foreign affairs would continue to be centered in the legislature. n117 The political maneuvering of Alexander Hamilton, who strongly believed in a powerful executive, n118 raised the issue of control of foreign affairs. n119 The only relevant discussion, however, focused on the narrower question of the treaty-making power. n120

Hamilton, however, had another opportunity to work his views into the development of constitutional law. In 1793, upon the outbreak of war between Great Britain and France, President Washington issued a proclamation declaring that the United States intended to pursue a neutral course. n121 When French sympathizers challenged the proclamation as being beyond the President's constitutional authority, Hamilton wrote a pseudonymous defense of Washington's action, n122 arguing that the grant of executive power in the opening clause of Article II is a grant of all powers which are executive in nature and that the direction of foreign policy is such a power. n123

[*1872] The effects of that argument were evident early on. Six years after the letter appeared, John Marshall stood as a Congressman and defended President John Adams' ordering the extradition of an alleged fugitive from British justice. "The President," Marshall said, "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." n124 Although Marshall's intent may be disputed, n125 the phrase has come to mean that the president has principal responsibility for initiating and implementing American foreign policy. n126

Marshall's phrase developed constitutional status largely as a result of Justice George Sutherland's majority opinion in *United States v. Curtiss-Wright Export Corp.* n127 The defendant in that case argued that Congress, in giving the President power to prohibit the export of arms and ammunition, had unconstitutionally delegated its legislative power. n128 The Supreme Court rejected that reasoning and stated, "[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the *very delicate, plenary and exclusive power of the President as* [*1873] *the sole organ of the federal government in the field of international relations.* . . ." n129

Specific constitutional language buttressing this executive primacy provides that "[the President] shall receive Ambassadors and other public Ministers; . . . shall take Care that the Laws be faithfully executed . . . [.] n130 [and] shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . and . . . appoint Ambassadors" n131 The treaty-making power and the duty to faithfully execute the law make it imperative that the executive understand the context in which he or she is dealing. This understanding in turn depends on current, correct information. The ability to obtain such information hinges on the peculiar ability of the executive to act quickly and discreetly. As John Jay wrote in *The Federalist No. 64*:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the senate and still less in that of a large popular assembly. n132

In the last decade, Congress has recovered from its previous near-total subservience to the executive in developing foreign policy. n133 The President, however, is still expected to take the lead in formulating American foreign policy. n134

(iii) The Power to Faithfully Execute the Law. Once a treaty or similar agreement is in effect, the duty to ensure its faithful execution devolves on the President. n135 Just as this duty gives the President the power to fill the interstices of [*1874] domestic statutes, n136 it also authorizes him or her to interpret and implement the policies contained in treaties and international law. n137 To be successful in this task, the President must be informed. Obligations of mutual defense, for example, require the chief executive to be apprised constantly of our allies' security. Similarly, he must ascertain what conditions exist prior to dealing under a conditional trade agreement.

Presidents have, among other dramatic uses, n138 invoked the mandate to execute the laws to suppress piracy, n139 to intern foreign insurgents, n140 and, in connection with the commander in chief power, to send American troops overseas. n141 The already substantially independent power which the "faithfully execute" clause confers is made more independent to the degree that presidents can enter into executive agreements with foreign governments without congressional authorization. n142

These three constitutional powers -- the commander in chief power, the "foreign affairs" power, and the power to execute treaties and other international obligations -- cannot be removed by Congress indirectly any more than they can be removed directly. Because access to information is at the very heart of the President's ability to wield these powers, no amount of congressional action should be able to prevent him from gathering the intelligence he deems necessary for the exercise of these powers. Once intelligence is gathered, however, a question concerning its control arises.

Analysis and Evaluation -- Executive Control of Information. The President's power to retain sensitive information has frequently been pitted against Congress' power to investigate the dealings of the federal government. The constitutional doctrine of executive privilege gives the President an advantage in these contests, n143 and this is a doctrine with historical roots. n144 Hamilton [*1875] wrote perceptively, and, perhaps, prophetically when he asked:

To what purpose separate the executive or judiciary from the legislative, if both the executive and judiciary are so constituted as to be at the absolute devotion of the legislative? . . . The representatives of the people, in a popular assembly, seem sometimes to fancy, that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege, and an outrage to their dignity. n145

The assertion of executive privilege reaches back to the first executive. In 1792, a committee of the House of Representatives inquired into an expedition which had been conducted under the authority of Washington's Secretary of War and requested certain documents from the Secretary. n146 The Secretary notified Washington, who then called a cabinet meeting because, as Jefferson recorded, "he wished that so far as it should become a precedent, [the handling of the congressional request] should be rightly conducted." n147 According to Jefferson, Washington and his cabinet

were of one mind . . . that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public . . . [and] that neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone. n148

A half-century later, President James Polk stated, in refusing to furnish [*1876] Congress with an accounting of payments made for certain intelligence activities:

In time of . . . impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged. n149

The changing world has not changed the need for such secrecy. In 1980, DCI Stansfield Turner told the Senate Select Committee on Intelligence, "[W]e must recognize that rigid statutory requirements requiring full and prior congressional access to intelligence information will have an inhibiting effect upon the willingness of individuals and organizations to cooperate with our country." n150

The Supreme Court addressed the nature and scope of executive privilege in *United States v. Nixon*. n151 Even in rejecting an unqualified presidential right to withhold information from a court conducting a criminal adjudication, n152 the Court nevertheless carefully restricted its holding to situations in which the assertion of privilege was made "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets." n153 The Court did not indicate whether its holding applied to civil cases or to congressional demands for information from the executive. The Court did indicate that even in the context of the criminal adjudication before it, in which the asserted privilege involved "no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discus-

sions," it was "in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." n154

Congress cannot, then, legitimately claim a constitutional right to obtain from the President intelligence information concerning military, diplomatic, or national security secrets. Nor can it claim that the assertion of executive privilege strips the Congress of its rightful role as overseer of the armed forces and public monies of the nation. Congress should be informed as specifically as possible, given the critical nature of intelligence work, of the ways in which American resources are spent. But Congress, in accepting the necessity of selfdefense and the need for credibility with our allies, must accept as constitutionally valid the Executive's independent power to maintain the total secrecy of information which in the Executive's judgment will threaten those national security interests. n155

[*1877] 2. Covert Intelligence Activity

The principal source of the President's power to conduct covert activities is the executive prerogative to act in crisis situations. The President's power to conduct covert activities thus differs fundamentally from his power to conduct informational intelligence activities.

Covert action is a phrase which evokes more emotion than reason. This is, perhaps, because the variety of activities identified by that label are not considered individually; instead, they are lumped with the spectacular failures or perceived abuses of paramilitary covert action and are colored by memories of the Bay of Pigs n156 and visions of exploding bridges n157 or poisoned Marxist leaders. n158 Covert action is not, however, all of a piece. n159 Yet all covert action shares a distinctive feature: it is an extension of force n160 into another sovereign nation. Unlike informational intelligence, covert action is not simply a tool for understanding other nations, it is a tool for *changing* them. Although the Executive's need to understand the world is constant, his need to change the world by force is not. Unlike the broad, unchanging power to conduct foreign informational intelligence activities, the executive power to conduct foreign covert intelligence activities is thus a function of changing world conditions and crises that cannot be adequately assessed in the abstract.

Short of war, differing degrees of international tension and varying orders of American interests will alter the scope of presidential authority. The Supreme Court, in high-sounding dicta, has denied this constitutional reality, n161 while simultaneously embracing it in decisions n162 or avoiding it altogether. n163

[*1878] The founding fathers could not have been unaware of the implications in the phrase "executive power." Their philosophical background was heavily influenced by political theorists n164 who had plainly explicated the essential breadth of that authority. John Locke wrote:

[T]he good of the society requires that several things should be left to the discretion of him that has the executive power.

[T]he [legislature] is . . . too numerous, and so too slow for the dispatch requisite to execution, and because, also, it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public . . . therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe. n165

Locke did not confine this executive prerogative to action in the absence of legislation; he saw it is exercisable even against the prescription of law. n166 Rousseau likewise argued that in cases of threat to the state the legislative will must yield to executive authority. n167 Montesquieu similarly urged that the need for dispatch in administering the affairs of state was best met by vesting executive power in the hands of one subject to only limited restraint by the legislature. n168

[*1879] Sir William Blackstone, who may have influenced the content of Article II of the Constitution more than anyone, n169 explained executive prerogative as "that special pre-eminence, which the [executive] hath over and above all persons, and out of the ordinary of the common law . . ." n170

Building on the ideas set forth by these men, n171 Alexander Hamilton developed a concept of America's Executive which has become widely accepted. n172 He saw the grant of executive power in Article II as a grant of independent, positive power, a prerogative rather than a simple authorization to carry out the legislature's will. n173 Over the years, general acceptance of the Hamiltonian view has brought constitutional legitimacy to the Executive's exercise of extraordinary power in extraordinary circumstances.

American history is replete with examples of crisis government. n174 Among the most notable are Jefferson's purchase of the Louisiana territory, Lincoln's mustering of forces at the onset of the Civil War, n175 and Roosevelt's secret dealings with the Allies prior to the United States' entry into World War II. n176 [*1880] The executives in these examples in fact *had* the power to do what they did, but the constitutional question is whether they usurped that power from the legislature or whether the power rested naturally in their province. Under a restrictive interpretation of executive power, they were all usurpers. This conclusion rightly gives pause. Something is wrong with a constitutional theory that denies power to the only branch able to exercise it. The power cannot be in the legislature because the legislature cannot act in time to meet such threats. The executive, on the other hand, is well situated to deal with crises. Far from being unconstitutional, then, when an executive follows the examples of Jefferson, Lincoln, and Roosevelt, he lawfully is exercising the prerogative with which the executive branch necessarily is vested.

This executive prerogative is the constitutional power n177 which can validate a President's employment of covert action despite congressional opposition. A president must be able to act to safeguard American interests abroad once he becomes aware of a clear threat to those interests. If terrorists threaten to destroy an American military base, or if an anti-American group is fomenting an attack upon an American embassy, the President is empowered to defend American interests. He does not have time to convince 535 legislators of the reality of the threat and the necessity of taking action. If the Soviet fighting in Afghanistan threatens to escalate into war in neighboring nations, thereby further destabilizing the region and threatening the security of United States allies, the President is empowered to prevent the escalation. Faced with the decision of covertly preventing a threat from being realized or of waiting until congressional approval can be obtained and thus potentially risking either super-power confrontation or the breach of security agreements and the collapse of American credibility, the President has within his prerogative the power to act to limit the threat and its possible repercussions.

The shifting limits of this executive prerogative are implied in the catch phrase "crisis government." Congress may legislate a bar on any spending for covert actions in a particular country or region n178 and that law would be constitutionally binding on the President unless he faced a genuine crisis -- a situation which he believed directly threatened the security of American citizens and property. Executive prerogative is a power exercisable in response to exigencies and only to the extent required by exigencies. It is, in other words, a proportional, reactive power. History has vindicated the actions of Jefferson, Lincoln, and Roosevelt because their decisions were rational and proportionate reactions to crises. In hindsight each response appears to have been the very reason threat did not become reality. Presidents who have arguably overstepped [*1881] the bounds of reaction and proportionality, who have *initiated* intrusion into another sovereign country rather than *reacted* to a threat, or who have reacted in a manner disproportionate to a threat, have not found history so kind. n179

An objection to the foregoing reasoning is that if the President controls access to intelligence and he alone determines the existence and magnitude of an exigency, then the limits of reaction and proportionality are illusory -- they are merely figments to be manipulated by the executive for self-justification. This objection overlooks the greatest checks on the abuse of power in our republic: a free, unbiased, and vigorous press n180 and political accountability. Indeed, Justice Potter Stewart recognized:

[The] only effective restraint upon executive policy and power in the area of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. n181

Nothing illustrates the potency of these checks better than the experience of the Nixon presidency. Despite the most sweeping assertions of executive privilege, the most intense efforts in the name of national security to limit the flow of information, and the most passionate public appeals to stop the media's digging at the executive branch, the Nixon Administration was unable to prevent news of abuses of executive prerogative from reaching an stirring the public. n182 Politically motivated domestic spying, n183 the bombing of Cambodia, n184 [*1882] and the vast increase in the proportion of executive agreements to treaties n185 all became matters of public record, as did news of unprecedented executive use of impoundments to frustrate congressionally mandated spending, n186 news of manipulation of tax auditing to harass political "enemies" of the President, n187 and, eventually, news of the President's obstruction of congressional and judicial inquiries into the illegalities of his reelection campaign. n188 The results of Nixon's monumental disregard for the limits of executive power were his humiliating resignation and the confirmation of our constitutional system.

Our system provides that "we elect a King for four years, and give him absolute power within limits, which after all he can interpret for himself." n189 But, as the Nixon presidency dramatically demonstrates, and as other Presidents have come to realize, n190 the elected King may be called to account for his or her interpretation.

IV. CONCLUSION

In arguing that accountability to an informed public is the true constitutional restraint on the exercise of executive prerogative, this note is brought full circle, back to the political vagaries of constitutional law. Protestations that a president has exceeded his constitutional authority seem frequently to spring either from the distaste the protester feels for the executive n191 or from dissatisfaction with the distribution of power the Constitution effects. n192 Although [*1883] they come couched in terms of constitutionality, such protests are actually political and do not aid analysis of power under the Constitution. By its language and in practice, the Constitution entrusts enormous power over foreign intelligence activities to the President, and while it is true that, "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln," n193 the spectre of abuse of delegated power does not refute the need to delegate power. It simply persuades that the delegation must be wisely made.

A wise executive must be sensitive to the tension created in an open and democratic society by the need for secrecy and concentration of power. A President with that quality will exercise the most careful restraint in asserting his independent authority, and will be as open with Congress as possible, consistent with his or her best judgment on national security issues. A wise legislature must appreciate the limits of its authority. Wise legislators recognize that intelligence activities are essential to the national interest and cooperate with the President in providing resources for them. They scrutinize executive expenditures with due respect for the secrecy which necessarily attends intelligence work, recognizing that the President's final accountability is to the electorate and that, ultimately, "[t]he rational and peaceable instrument of reform [is] the suffrage of the people." n194

FOOTNOTES:

n1 Hale, of course, is the American said to have remarked at his Sept. 22, 1776 execution by the British, "I regret that I have but one life to lose for my country." The British arrested Hale for wandering through their encampments on Long Island and gathering valuable intelligence on the British Army. M. MACCLOSKEY, *THE AMERICAN INTELLIGENCE COMMUNITY* 33 (1967). For a brief history of pre-World War II American intelligence activities, see *id.* at 33-46.

n2 *See infra* note 5 (citing magazine and newspaper reports of CIA activities directed against Nicaragua).

n3 Prior to 1973, probably the most notable post-World War II public questioning of American intelligence actions occurred in 1960 and 1961. In 1960 the Soviet Union shot down a U-2 American spy plane piloted by Francis Gary Powers. His trial by the Soviet Union and America's subsequent exchange of a captured KGB agent for him made international news for weeks. Headlines the following year featured the Bay of Pigs fiasco and the CIA's embarrassing leading role. For contrasting viewpoints on these and other CIA activities, see generally V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974), L. PAINE, *THE CIA AT WORK* (1977), and H. ROSITZKE, *THE CIA'S SECRET OPERATIONS* (1977).

During periods of the 19th Century, the conduct of foreign intelligence activities generated fierce debate. *See* R. JEFFREYS-JONES, *AMERICAN ESPIONAGE: FROM SECRET SERVICE TO CIA* 11 (1977). The years between World War II and the mid-1970s, however, were characterized by quiet acceptance of the status quo. *See* R. CLINE, *SECRETS, SPIES AND SCHOLARS: BLUEPRINT OF THE ESSENTIAL CIA* 119-222 (1976) (describing CIA from 1950s to 1974, generally characterized, particularly in 1950s, by "a romantic atmosphere of adventure," a "fabulous" time to be intelligence organization employee).

n4 *See infra* notes 40 to 58 and accompanying text (describing events leading to and scrutiny of intelligence community in mid-1970s).

n5 See e.g., Wash. Post, Apr. 10, 1984, at 1, cols. 3-5 (describing Democratic congressional leaders' reaction to CIA mining of Nicaraguan ports, Nicaragua's lawsuit in International Court of Justice to stop mining, and Reagan Administration's alleged intention to step up covert war against Nicaragua after 1984 presidential election); *America's Secret Warriors*, NEWSWEEK, Oct. 10, 1983, at 39 [hereinafter cited as *Secret Warriors*] (describing CIA covert assistance to Nicaraguan *Contras*, the anti-Sandinista rebels); N.Y. Times, July 25, 1983, at 1, col. 6 (describing plans to expand covert assistance to Nicaraguan *Contras*).

n6 See *infra* notes 82 to 90 and accompanying text (describing congressional attempts to regulate intelligence activity).

n7 See *infra* note 123 and accompanying text (quoting from Hamilton's defense of President Washington's neutrality declaration). For a brief description of the events leading up to, and the reasoning underlying, the series of articles in *The Gazette of the United States* in which Pacificus (Hamilton) and Helvidius (Madison) argued questions of executive power arising from the validity of President Washington's declaration of neutrality in the 1793 French-English war, see E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 178-81 (1957).

n8 Letter from General George Washington to Colonel Elias Kayton (July 26, 1777) quoted in *THE INTELLIGENCE COMMUNITY 3* (T. Fain, K. Plant & R. Milloy eds. 1977) [hereinafter cited as *INTELLIGENCE COMMUNITY*].

n9 Only General Washington's intelligence operatives, however, were privy to this frank acknowledgement. According to one British scholar:

[T]he Revolutionary patriots took special care not to admit the existence of their Commander-in-Chief's intelligence service, not only so as to protect the cover of the agents concerned but also to avoid tarnishing the public image of their cause. It was deemed good propaganda to impute clandestine methods only to the enemy, thus implying that Britain was unscrupulous and had to use underhanded tactics to succeed.

R. JEFFREYS-JONES, *supra* note 3, at 9.

Washington was well aware of the value of good intelligence, having dealt with the difficulties of obtaining it during the French and Indian War in the 1750s. After some experimentation with whites as spies Washington determined that:

Small parties of Indians will more effectively harass the enemy, by keeping them under continual alarms, than any parties of white men can do. For small parties of the latter are not equal to the task, not being nearly so dexterous at skulking as Indians; and large parties will be discovered by their spies early enough to have a superior force opposed to them.

Id. at 8-9.

n10 Benjamin Franklin, for example, served as chief of the Colonies' mission in Paris. In his efforts to persuade France to support the American Revolution, Franklin employed a network of spies in London and was himself spied on by the first double-agent in American history -- his assistant, Dr. Edward Bancroft. M. MACCLOSKEY, *supra* note 1, at 35-36.

n11 See generally H. WRISTON, *EXECUTIVE AGENTS IN AMERICAN FOREIGN POLICY* (1929).

n12 See M. LOWENTHAL, *THE CENTRAL INTELLIGENCE AGENCY: ORGANIZATIONAL HISTORY 2* (1978) (Congressional Research Service Report No. 78-168F) (discussing irregular, haphazard nature of pre-20th century intelligence efforts); H. RANSOM, *THE INTELLIGENCE ESTABLISHMENT 52-53* (1970) (discussing American neglect of intelligence).

n13 M. LOWENTHAL, *supra* note 12, at 2. In 1882, the Navy established an Office of Intelligence. The Army followed suit in 1889 with its Military Information Division. Shortly thereafter, both services established military attache systems connected with their respective intelligence offices. *Id.*

n14 R. JEFFREYS-JONES, *supra* note 3, at 27. The post of military attache was, from its creation, an intelligence assignment. *Id.*

n15 See *id.* at 42-43 (describing consolidation of intelligence power in State Department).

n16 *Id.* at 43.

n17 See *id.* at 163-64 (describing disintegration of State Department control of intelligence). Adolf A. Berle was the titular head of American intelligence during the crucial early years of World War II. Appointed Assistant Secretary of State in 1938, he possessed both the official and political clout necessary to coordinate the efforts of agencies with intelligence responsibilities. Berle, however, had doubts about the legitimacy of covert action and, indeed, about the role America was assuming in world politics. His hesitation cost him the control he should have had and freed the petty fiefdoms of the intelligence community to act independently. *Id.* at 164-65.

n18 *Id.* at 165 (citing C. FORD, *DONOVAN OF O.S.S.* 96-108 (1970)). The agencies were the Military Intelligence Division (by then commonly called "G-2"), the Office of Naval Intelligence, the Federal Bureau of Investigation (FBI), the State Department, the Customs Service, the Secret Service, the Immigration Service, and the Federal Communications System. *Id.*

n19 R. CLINE, *supra* note 3, at 27-28.

n20 SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *FINAL REPORT*, S. REP. No. 755, 94th Cong., 2d Sess., bk. IV, 4-5 (1976) [hereinafter cited as SENATE REPORT].

n21 At Donovan's urging, Roosevelt established the Office of Coordinator of Information and installed Donovan as its head. See Presidential Directive (July 1, 1941) (setting up Office of Coordinator of Information), *reprinted in* R. CLINE, *supra* note 3, at 35. Donovan was to draw on Army, Navy, and State Department resources to collect and analyze information for the President and other senior officials. SENATE REPORT, *supra* note 20, bk. IV, at 4-5. A year later, the fledgling agency was renamed the Office of Strategic Services (OSS) and placed under the direction of the Joint Chiefs of Staff. Military Order issued June 13, 1942, *reprinted in* CLINE, *supra* note 3, at 51.

n22 SENATE REPORT, *supra* note 20, bk. IV, at 5:

From the outset the Military were reluctant to provide OSS with information to enable it to fulfill its research and analysis role. In addition, the military restricted its operations. General Douglas MacArthur excluded OSS from China and the Pacific Theater (although OSS did operate in Southeast Asia). In addition to demanding that OSS be specifically prohibited from conducting domestic espionage, FBI Director J. Edgar Hoover and Nelson Rockefeller, then coordinator of Inter-American Affairs, insisted on maintaining their jurisdiction over Latin America, thereby excluding OSS from that area.

Id.

n23 See EXEC. Order No. 9621, Oct. 1, 1945 (termination of Office of Strategic Services), *reprinted in* R. CLINE, *supra* note 3, at 86.

n24 The Secretary of the Navy, James V. Forrestal, a vocal proponent of a centralized information service, began the political groundwork for revamping the intelligence system. He discussed with relevant agency chiefs ideas about an acceptable new structure for carrying out the intelligence function. SENATE REPORT, *supra* note 20, bk. IV, at 6-7.

n25 *Id.* at 7. The extent of agreement was that the new organization should be responsible to the War, Navy, and State Departments, rather than directly to the President, but because each agency was vying for an advantage in the new system, none could agree on the system itself. *Id.* at 8.

n26 H. RANSOM, *supra* note 12, at 79-80. The Bureau of the Budget played a key role as referee in this final compromise, *Id.*, and produced a report which figured prominently in the development of the compromise organization. See Bureau of the Budget, INTELLIGENCE AND SECURITY ACTIVITIES OF THE GOVERNMENT, REPORT TO THE PRESIDENT (SEPT. 20, 1945), *cited in* H. RANSOM, *supra* note 12, at 79 n.62.

The CIG was something of a "holding company"; it was authorized to undertake intelligence activities which could, in the opinion of the National Intelligence Authority, best be done centrally, but it was charged primarily with coordinating the work of the existing departments. H. RANSOM, *supra* note 12, at 80. The head of the Central Intelligence Group, denominated the Director of Central Intelligence (DCI), was appointed by the President, supervised by the National Intelligence Authority, and advised by an Intelligence Advisory Board. SENATE REPORT, *supra* note 20, bk. IV, at 8-9.

The Central Intelligence Advisory Board was composed of the heads of the military and civilian intelligence agencies, *id.* at 9, and was more an obstruction than a cooperative advisory group. All the intelligence units used it to prevent the CIG from issuing intelligence reports which were contrary to their own policies. R. CLINE, *supra* note 3, at 109. As a result, the first full intelligence report on the USSR took two years to complete. *Id.* at 110; SENATE REPORT, *supra* note 20, bk. IV, at 13. Stymied in its task of producing coordinated intelligence reports, the CIG gradually turned its resources to producing daily intelligence updates for the President. SENATE REPORT, *supra* note 20, bk. IV, at 12; R. CLINE, *supra* note 3, at 110. Nevertheless, Truman seemed pleased with and proud of the new structure, saying years later, "at last, a coordinated method had been worked out, and a practical way had been found for keeping the President informed as to what was known and what was going on." H. TRUMAN, YEARS OF TRIAL AND HOPE 58 (1956).

n27 Ch. 343, 61 Stat. 496 (codified as amended at 50 U.S.C. § § 401-412 (1976 & Supp. V 1981)).

n28 See H. S. TRUMAN, PUBLIC PAPERS: 1947, at 12 (President's annual message to Congress on State of Union); *id.* at 99 n. (quoting memorandum from Secretary of Navy James V. Forrestal and Secretary of War Robert P. Patterson on substance of proposed legislation); *id.* at 101-02 (letter from Truman to President Pro

Tempore of Senate and Speaker of House advising of agreement between Secretaries of War and Navy on unification of armed service departments); *id.* at 153 (letter from Truman to President Pro Tempore of Senate and Speaker of House transmitting draft of National Security Act).

n29 See generally *Hearings on H.R. 2319 (the National Security Act of 1947) Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. (1947) [hereinafter cited as *House Hearings*]; see M. LOWENTHAL, *supra* note 12, at 10 ("The provisions of the National Security Act creating the CIA were much less controversial than those concerning the military.")

Some discussion of the bill's intelligence aspects did take place. Representative J. Caleb Boggs stated, "I think intelligence is one of the most important provisions that this bill carries . . ." *House Hearings, supra*, at 111. He was concerned with whether the Director of Central Intelligence should be a military officer. *Id.* at 111-12.

n30 Indeed, Truman's Secretary of War and Secretary of the Navy discussed the proposed legislative plan in a memo to the President and noted that the Central Intelligence Agency "already exists." H. S. TRUMAN, *supra* note 28, at 99 n.

n31 National Security Act of 1947 § 102(d)(3), 50 U.S.C. § 403(d)(3) (1976 & Supp. V 1981); see R. CLINE, *supra* note 3, at 97 ("The concept was clear that the new CIA was not intended to be a supplicant pleading for information from older agencies, but instead a central and a central evaluator.")

n32 The DCI serves directly under the National Security Council (NSC), a body formed to "more effectively coordinat[e] the policies and functions of the departments and agencies of the Government relating to the national security . . ." National Security Act of 1947 § 101, 50 U.S.C. § 402 (1976). It is comprised of the President, Vice President, Secretary of State, Secretary of Defense, and other officials of the executive branch when appointed "by the President and by and with the advice and consent of the Senate . . ." *Id.* See also R. CLINE, *supra* note 3, at 93-95 (describing lines of authority created by the National Security Act).

n33 National Security Act of 1947 § 102(d), 50 U.S.C. § 403(d) (1976 & Supp. V 1981). Two years after passage of the National Security Act, Congress strengthened the hand of the DCI by approving the Central Intelligence Agency Act, ch. 227, 63 Stat. 208 (1949) (codified as amended at 50 U.S.C. §§ 403a-430j (1976)). Among other things, that Act exempts the agency from any statutory provisions requiring disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed, *id.* § 6, 50 U.S.C. § 403g (1976), and it gives the DCI the extraordinary power to authorize on his personal voucher expenditures from the agency's appropriation. *Id.* § 8, 50 U.S.C. § 403j(b) (1976).

n34 Memorandum on Constitutional and Legal Basis for So-called Covert Activities of Central Intelligence Agency, prepared for then-CIA General Counsel Lawrence Houston (1962) [hereinafter cited as *CIA Memo*], reprinted in J. ORMAN, *PRESIDENTIAL SECRECY AND DECEPTION* 211-17 app. (1980).

n35 See A. JORDAN & W. TAYLOR, *AMERICAN NATIONAL SECURITY* 128-29 (1981) (noting congressional directive to "perform such other functions" and subsequent NSC directives authorizing covert action). "Covert action" as it is used here does not include the clandestine gathering of information. See *infra* text accompanying notes 66 to 71 (defining commonly used intelligence terms).

n36 Credit for coining the term "Cold War" goes to Bernard Baruch, a Wall Street broker who headed the War Industrial Board during American involvement in World War I. On Apr. 16, 1947, in a speech in Columbia, S.C., he declared, "let us not be deceived -- today we are in the midst of a cold war." 2 S. MORRISON, H. COMMAGER & W. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 661 (6th ed. 1969) [hereinafter cited as *GROWTH OF AMERICAN REPUBLIC*].

The wartime alliance between the Soviet Union and the western powers had been one purely of convenience, *id.* at 641, 645, and as soon as post-war negotiations were underway for the stabilization of Europe it became evident the relationship would end in dangerous deadlock. *See id.* at 648 (quoting Stalin's response to Truman's call for free elections in Hungary, Rumania, and Bulgaria: "[A]ny freely elected government in those countries will be an anti-Soviet government, and we cannot allow that.") Soviet intransigence in coming to a final settlement on the reconstitution of Germany, *id.* at 641, 645, the Soviet refusal to withdraw forces from the Iranian province of Azerbaijin, SENATE REPORT, *supra* note 20, bk. IV, at 26, the communist revolution in Greece, *id.*, and the communist coup d'etat in Czechoslovakia, R. CLINE, *supra* note 3, at 98, all led by early 1948 to a conviction at the most senior levels of U.S. government that the global threat of communist totalitarianism required forceful opposition.

n37 SENATE REPORT, *supra* note 20, bk. IV, at 29.

Considering the opprobrium which recently has settled on any use of covert action, one might be surprised that widespread support for using the CIA for clandestine foreign political and paramilitary activities came initially from widely respected government officials. The establishment of the NSC and the CIA coincided approximately with the beginning of the Cold War. Secretary of State George Marshall, Secretary of War Robert Patterson, and Secretary of Defense James Forrestal concurred that the forced expansion of Soviet influence should be met by American covert assistance to any parties willing to resist. R. CLINE, *supra* note 3, at 97-98.

Kennan authored one of the most significant articles ever written on Soviet-American relations. Writing under the pseudonym "X," *GROWTH OF AMERICAN REPUBLIC*, *supra* note 36, at 658, Kennan warned that for some time there could "never be on Moscow's side any sincere assumption of a community of aims between the Soviet Union and powers which are regarded as capitalist." X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 572 (July, 1947). Kennan advocated a strategy of containment which held that Soviet aggression would slow if their excesses contained. *Id.*; R. CLINE, *supra* note 3, at 98.

n38 SENATE REPORT, *supra* note 20, bk. IV, at 29-30. The new unit established by NSC directive 10/2 initially was an organizational oddity. Its director was designated and guided by the Secretary of State and not the DCI. However, in 1951, NSC 10/5 replaced 10/2 as the authoritative pronouncement on covert actions. It changed the OSP to the Office of Policy Coordination (OPC) and placed the DCI in charge of OPC. *Id.* at 32.

n39 The seeds of covert action planted by the NSC directive were not long in germinating and were spurred to particularly spectacular growth by two events in 1950. First, on June 25, the army of the Democratic People's Republic of Korea (North Korea) attacked the Republic of Korea (South Korea) with 100,000 Soviet-supplied and trained troops. 4 *DICTIONARY OF AMERICAN HISTORY* 55 (rev. ed. 1976). As part of the U.S. response to the invasion, the Joint Chiefs of Staff and the State Department put the OPC to work against the North Koreans. SENATE REPORT, *supra* note 20, bk. IV, at 31. The OPC's involvement in Korea helped transform the organization from one capable of conducting only a limited number of ad hoc operations to one with the manpower and budget to support long-term covert actions on a massive scale. *Id.*

Second, in October of 1950 President Truman appointed General Walter Bedell Smith to be Director of Central Intelligence. *Id.* at 11; R. CLINE, *supra* note 3, at 108. Along with the prestige of distinguished service in senior military and diplomatic posts, Smith brought to the Director's office a tough-mindedness that led Winston Churchill to nickname him "the American Bulldog." SENATE REPORT, *supra* note 20, bk. IV, at 11. Smith had the will and the power to bring still recalcitrant factions in the intelligence bureaucracy to heel and to make the CIA the authoritative voice it purported to be on intelligence matters. R. CLINE, *supra* note 3, at 111-12. His leadership inaugurated the intelligence community's halcyon days.

n40 See W. COLBY & P. FORBATH, *HONORABLE MEN: MY LIFE IN THE CIA* 402-03 (1978) [hereinafter cited as *HONORABLE MEN*] ("[S]urely the most important factor in all the forer [over the CIA in mid-1970s] was the radically altered nature of the Congress. . . . This was the post-Watergate Congress, with new and even some old members exultant in the muscle that they used to bring a President down, willing and able to challenge the Executive as well as its own Congressional hierarchy, intense over morality in government, extremely sensitive to press and public pressures.")

n41 As early as 1956, Senator Mike Mansfield was able to push a favorite idea to a vote. Mansfield felt the CIA was inadequately supervised and that Congress was shirking its duty in not addressing the problem. He proposed a joint Intelligence Committee to be modeled after the Joint Committee on Atomic Energy. Congress, however, rejected this proposal. C. CRABB & P. HOLD, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY* 41 (1980) [hereinafter cited as *INVITATION TO STRUGGLE*]. Ten years later, in the aftermath of American military intervention in the Dominican Republic, Senator Eugene McCarthy introduced a resolution authorizing the Senate Foreign Relations Committee to make a full study of the CIA's influence on foreign policy. *Id.* at 144. The resolution died during the petty turf-protecting machinations that followed its introduction. Francis Wilcox, former Chief of Staff of the Senate Foreign Relations Committee, noted: "What basically is involved is . . . personality differences and jealousies." *Id.* at 145.

n42 In 1972, syndicated columnist Jack Anderson published evidence that the International Telephone and Telegraph Company (ITT) in 1970 had tried to persuade the CIA to intervene in Chilean politics to prevent anti-capitalist Salvador Allende from becoming President. This prompted the Senate Foreign Relations Committee to create a subcommittee on Multinational Corporations, which, in the spring of 1972, held hearings on the allegations against ITT. Testimony at the hearings proved that ITT had indeed approached the CIA, but the Nixon administration maintained that American actions in opposition to Allende were entirely aboveboard. Six months later Allende was assassinated in a coup d'etat. The Senate Foreign Relations Committee suspected CIA involvement and conducted closed hearings at which DCI William Colby revealed that the CIA had been covertly active against Allende. Colby nevertheless succeeded in convincing the Committee that the Chileans alone engineered the coup.

In the spring of 1974 Colby was again on Capitol Hill testifying about CIA involvement in Chile, this time in closed meetings before the CIA Subcommittee of the Senate Armed Services Committee. A transcript of his testimony came into the hands of a liberal Democratic Congressman who later wrote outraged letters, demanding full investigations, to the Senate Foreign Relations Committee Chairman and the House Foreign Affairs Committee Chairman. These letters along with the substance of Colby's secret testimony were leaked to the press that fall. The foregoing summary of events is taken from *id.* at 142-52 and *HONORABLE MEN*, *supra* note 40, at 389-424.

Public curiosity was thus piqued and as visions of fresh executive outrages were already materializing before a publicity and power conscious Congress in late December of 1974, the most sensational CIA story to that point hit the papers, the story of domestic spying against anti-Vietnam activists. See *infra* text accompanying notes 43 to 44.

n43 N.Y. Times, Dec. 22, 1974, at 1, col. 8.

n44 See, e.g., N.Y. Times, Dec. 23, 1974, at 1, cols. 6, 7 ("[President] Ford Forbids C.I.A. to Act Illegally in Domestic Field"); *id.* at 1, col. 8 ("[Senator William] Proxmire to Seek Inquiry on C.I.A. Over Role in U.S.: Calls for [former DCI Richard] Helms to Resign as Envoy [to Iran] After Reports of Demestic Dossiers: Protests Widespread: Reaction is Strong among Congress Members and Ex-Intelligence Aides"); N.Y. Times, Dec. 24, 1974, at 1, col. 8 ("President Tells [DCI William] Colby To Speed Report On C.I.A.: Account of Allegations About Domestic Spying Will Go Through Security Panel"); N.Y. Times, Dec. 25, 1974, at 1, col. 8 ("[Former

DCI Richard] Helms Disavows 'Illegal' Spying By the C.I.A. in U.S.: Alleged Domestic Operation Under His Stewardship Is 'Categorically Denied'").

n45 HONORABLE MEN, *supra* note 40, at 391.

n46 The Church Committee published reports from Jan. 1975 through Apr. 1976. INVITATION TO STRUGGLE, *supra* note 41, at 149.

n47 See N.Y. Times, Sept. 7, 1975, IV, at 4, col. 5 ("It has already been established through authoritative published reports and public remarks of several members of the [Church] Committee that the C.I.A. has been involved in assassination plots"); *cf.* HONORABLE MEN, *supra* note 40, at 411 (discussing headlines generated by Church Committee investigations into alleged CIA connections with political assassinations).

n48 See HONORABLE MEN, *supra* note 40, at 404-07 (describing compromise and cooperation achieved between Church Committee and Ford Administration).

n49 See *id.* at 407-09 (describing disarray and internal tension of Pike Committee and adversary stance it assumed toward administration); INVITATION TO STRUGGLE, *supra* note 41, at 150-52 (same).

n50 In a 9-4 vote, the Committee decided to publish its report despite objections from the executive branch that it contained classified material that should be deleted. Before official release, however, a summary of the report appeared in *The New York Times*. An embarrassed House responded with a 246-124 vote prohibiting the release of the report until the President certified that it did not contain information which would adversely affect the work of intelligence agencies. Despite this handslap, less than two weeks later the Committee leaked the entire report, a copy of which *The Village Voice* excerpted at length. The House Committee on Standards of Official Conduct investigated committee members and staff in an unsuccessful effort to discover the source of the leak. INVITATION TO STRUGGLE, *supra* note 41, at 152.

n51 *Id.* at 149-50, 152.

n52 The Senate Select Committee on Intelligence was established by S. Res. 400, 94th Cong., 2d Sess. (1976). The resolution calls for the Committee to "oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation concerning such intelligence activities and programs." *Id.* § 1.

The House of Representatives Permanent Select Committee on Intelligence was established by H. Res. 658, 95th Cong., 1st Sess. (1975). Language of the resolution explaining the purpose of the Committee and its authority is nearly identical to the language quoted from the Senate resolution.

n53 See Goldwater, *Congress and Intelligence Oversight*, WASH. Q. 16, 21 (Summer 1983) (Senator Barry Goldwater, Chairman of Senate Select Committee on Intelligence, stated, "[W]e have begun to restore the trust and confidence between the intelligence community and Congress. We share the goal of getting the best intelligence information possible to serve our national security and protect our freedom.")

n54 See *Peterzell, Can Congress Really Check the CIA*, Wash. Post, Apr. 24, 1983, at C1, col. 1, C4, cols. 1-5 (arguing that "the administration can only waltz through loopholes, violate reporting requirements, and ignore the concerns of intelligence committee members as long as Congress and the intelligence committees allow it to do so.")

n55 See, e.g., N.Y. Times, Oct. 19, 1983, at 24, col. 4 (discussing general disregard among members of Congress for classified information on intelligence activities made available for their review); *Secret Warriors*, *supra* note 5, at 38-45 (cover story on increased covert action under DCI William Casey).

n56 *Secret Warriors*, *supra* note 5, at 38.

n57 See *supra* note 5 (citing newspaper and magazine reports of CIA aid to *Contras*).

n58 The House Intelligence Committee voted in 1983 to cut off all funds for the covert support of Nicaragua's *Contras*. HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H.R. REP. No. 122, 98th Cong., 1st Sess. (1983). After some compromise, the Boland Amendment, which set a \$ 24 million cap on spending for military and paramilitary action against the government of Nicaragua, was placed in appropriations legislation for fiscal year 1984. See *infra* notes 86 to 87 and accompanying text (discussing Boland Amendment).

n59 453 U.S. 654 (1981).

n60 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592 (1952).

n61 *Dames & Moore*, 453 U.S. at 661.

n62 *Youngstown*, 343 U.S. at 635.

n63 *Id.* at 637.

n64 *Id.*

n65 Justice Jackson himself acknowledged that the analytical construct he employed in *Youngstown* was "somewhat oversimplified." 343 U.S. at 635. That oversimplification is epitomized in the word "subtract," which falsely indicates that questions of constitutional power can be determined with mathematical precision. The simple "take-away" concept of subtraction is, nonetheless, usefully and validly employed to determine what is left of presidential authority when Congress opposes a presidential action.

n66 S. KENT, STRATEGIC INTELLIGENCE FOR AMERICAN WORLD POLICY 3 (1965).

n67 SENATE REPORT, *supra* note 20, bk. I, at 31 n.1.

n68 In 1978, President Carter, by executive order, designated covert action "special activities." INVITATION TO STRUGGLE, *supra* note 41, at 147.

n69 *United States Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings before the House Select Comm. on Intelligence*, 94th Cong., 1st Sess. 1730 (1975) (statement of Mitchell Rogovin, Special Counsel to the DCI).

n70 *Cf.* A. JORDAN & W. TAYLOR, *supra* note 35, at 127-37 (describing intelligence function, its forms, and various U.S. intelligence organizations).

n71 *See infra* text accompanying notes 93 to 190 (analyzing sources of and limits on presidential power to undertake foreign intelligence activities).

n72 Other variables may influence how some individuals view the wisdom or morality of an action. For example, the secretiveness of a mission, or the human-rights record of the political groups or individuals receiving covert assistance, may influence one's views. These are relevant to the question of the constitutionality of the action taken by the President, however, only to the degree that they bear on the limits of executive prerogative, described *infra* at notes 164 to 177 and accompanying text. For an interesting discussion of the moral justifications for covert action, see J. ORMAN, *supra* note 34, at 163-210.

The determination of whether, as a legal matter, a state of war exists is a point on which courts have differed. *See infra* note 74.

n73 *Fleming v. Page*, 50 U.S. (9 How.) 602, 614 (1850) ("As commander-in-chief, [the President] is authorized to direct the . . . forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy"); *see, e.g.*, G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 72-73 (1919) ("The Period of deliberation having passed and the people, through their chosen representatives, having determined upon war, vigorous and effective action must ensue . . . Here, singleness of command and concentration of power are vitally essential and so the power to wage war is given to the President as commander-in-chief.")

n74 The required bases for declaring war are unclear. It is clear that Congress does not believe a formal declaration of war is required. *See* S. REP. NO. 797, 90th Cong., 1st Sess. (1967) (The Fulbright Committee's "National Commitments" Report) ("The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the president to initiate . . . general hostilities.") The War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973) does not focus on the formal declaration of war but rather on the circumstances which justify to Congress the commitment of American military forces to combat.

n75 This, of course, leaves open the question of whether congressionally authorized U.S. involvement in a war with some other nation justifies covert activities in that target nation.

n76 U.S. CONST. art. I, § 8.

n77 *Id.*

n78 *Id.*

n79 *Id.*

n80 *Id.*

n81 Not surprisingly, the Church Committee looked to some of these powers in asserting its authority to regulate intelligence work. SENATE REPORT, *supra* note 20, bk. I, at 38. What is remarkable are statements from CIA apologists like Roy Godson which acknowledge "[t]hat the Congress has the authority to examine and seek to improve intelligence as it does any other area of American public policy." E. LEFEVER & R. GODSON, *THE CIA AND THE AMERICAN ETHIC* 19 (1979).

As part of the backlash against the "imperial presidency" in general and American covert action in particular, Congress has vigorously asserted that these powers give Congress authority to regulate foreign intelligence activities. *See supra* notes 40 to 45 and accompanying text (describing intelligence abuses revealed in mid-1970s). *See generally* A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973) (tracing rise and consequences of power concentration in executive).

n82 Foreign Assistance Act of 1974, Pub. L. No. 93-559 § 32, 88 Stat. 1795, 1804 (codified as amended at 22 U.S.C. § 2422 (1982)).

n83 *Id.*

n84 Pub. L. No. 96-450, 94 Stat. 1975 (1980).

n85 *Hearings on S. 2284 Before the Senate Select Intelligence Committee*, 96th Cong., 2d Sess. 70 (1980) [hereinafter cited as *1980 Senate Hearings*] (prepared statement of Deputy Under Secretary of Defense Daniel J. Murphy).

S. 2284 is not the bill which eventually became law. After passing the Senate, it was delivered to the House Committee on Foreign Affairs and the House Permanent Select Committee on Intelligence but was not acted on by those committees. *See* CONG. INDEX 1979-1980, pt. 1, 20,520 (CCH) (tracing progress of S. 2284). The Senate nevertheless included identical language as a provision of S. 2597, which became the Intelligence Authorization Act for Fiscal Year 1981. H.R. REP. NO. 1350, 96th Cong., 2d Sess. 16 (1980).

The Act amended the Hughes-Ryan Amendment to eliminate the reporting requirement therein, and added to title 50 of the U.S. Code a new section 413, requiring reporting to the two congressional intelligence committees. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (codified at 50 U.S.C. § 413 (1976 & Supp. V 1981)).

n86 Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215 § 108, 97 Stat. 1473, 1475 (1983).

n87 *Id.* The CIA had spent \$ 22 million of the \$ 24 million in authorized funds by mid-April of 1984. *Wash. Post*, Apr. 13, 1984, at 1, col. 5. Because of the powerful adverse congressional reaction to CIA mining

of Nicaraguan ports, it was expected that President Reagan's bid for additional funds for covert action in Nicaragua would fail. *Id.* at 1, col. 4.

n88 *See 1980 Senate Hearings, supra* note 85 at 15-19 (prepared statement of DCI Stansfield Turner outlining Carter Administration points of disagreement with S. 2284).

n89 *See id.* at 31, 37 (colloquy of DCI Turner with Senators Birch Bayh and Adlai Stevenson on advance reporting requirements of S. 2284).

n90 *Id.* at 17. After lengthy negotiations with the Carter Administration, S. 2284 was amended to provide for prior notice to be limited in extraordinary circumstances. S. REP. NO. 730, 96th Cong., 2d Sess. 3 (1980). Perhaps included as another element of compromise, the legislative history for the bill explicitly states that, "[t]his requirement of prior notice of [covert] activities does not require committee approval as a condition precedent to their initiation," *id.* at 4, and that the oversight procedures are:

predicated on two principles. The first is respect for the authorities and duties of both the Congress and the executive branch, including the constitutional authorities of each branch. The second is the duty of both branches through mutual consultation to ensure that sensitive information is securely handled so that the interests of the United States are protected.

Both of these principles are to be taken into account as limitations on the obligations imposed by the statute. For example, the statute would not preclude an executive branch assertion of constitutional authority to take actions to defend the nation Moreover, . . . the select committees have worked out procedures and practices under which by agreement certain information is usually not sought by the committees.

H.R. REP. NO. 1350, 96th Cong., 2d sess. 15 (1980).

n91 The committee argued that the early Supreme Court decision *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), gives the Congress power to prescribe a mode for the execution of an executive function. SENATE REPORT, *supra* note 20, bk. I, at 39. By the committee's reading, the Court held that the American seizure of a ship departing a French port was unlawful because Congress had legislated what types of seizures could be made and the President, though commander in chief, was bound to respect the limitation imposed. *Id.*

The committee had to make a painful stretch from *Barreme* to reach the conclusion that Congress has blanket power to dictate how the executive is to act in all circumstances. That the Court's decision rested on the express authority Congress is given by the Constitution, Art. I, § 7, to "make Rules for the Government and Regulation of the land and naval forces," is by far the more logical conclusion.

Congress has enacted legislation purporting to circumscribe the authority of the executive to gather intelligence within the U.S. for national security purposes. The Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801-1811 (Supp. V 1981)). This legislation does not, however, apply to intelligence gathering outside the United States. 50 U.S.C. § 1801(f) (Supp. V 1981). The legislation is based on the same premise as the Church Committee report: that even if the President has inherent power to conduct intelligence action in the interest of national security, the Congress can regulate that power. SENATE COMM. ON THE JUDICIARY, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1977, S. REP. NO. 604, 95th Cong., 1st Sess. 16 (1978). The Act requires prior judicial authorization of electronic surveillance of an agent of a foreign power. Pub. L. No. 95-511, 92 Stat. 1790, 50 U.S.C. § 1805 (Supp. V 1981). For a full discussion of FISA, see Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. ON LEGIS. 119 (1977); Note, *The Constitutionality of the Foreign Intelligence Surveillance Act of 1978*, 16 VAND. J. TRANSNAT'L L. 231 (1983).

The first court to rule on the constitutionality of FISA stated, "When, therefore, the President has, as his primary purpose, the accumulation of foreign intelligence information his Article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain judicial approval before engaging in wiretapping."

United States v. Falvey, 540 F. Supp. 1306, 1311 (E.D.N.Y. 1982). The *Falvey* court upheld the constitutionality of FISA, stating that "while the executive power to conduct foreign affairs exempts the President from the warrant requirement . . . the President is not entirely free of the constraints of the fourth amendment. The search and seizure must still be reasonable." *Id.* at 1312. The court then said FISA incorporated Supreme Court teaching on the handling of national security surveillance and cited *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972). *Id.* *Keith* arose from criminal proceedings against members of a domestic organization who bombed CIA offices in Ann Arbor, Mich. *Keith*, 407 U.S. at 299. The judge in *Falvey* failed to consider the specific disclaimers in *Keith* of any "judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." 407 U.S. at 308, 321-22. The inherent power of the executive to gather intelligence about foreign powers is a constitutional issue the court intentionally avoided, and *Keith* cannot be cited as authority for the constitutionality of FISA's restraint on the President.

n92 SENATE REPORT, *supra* note 20, bk. I, at 39.

n93 See G. GUNTHER, CONSTITUTIONAL LAW 419-21 (10th ed. 1980) (discussing congressional acquiescence in executive exercises of war power during post-World War II period).

n94 See Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 467 (1976) (citing case-or-controversy requirement, standing, ripeness, mootness, and nature of defense and foreign policy as reasons for "relative lack" of judicial decisions on defense and foreign policy).

n95 U.S. CONST., art. II, § 2.

n96 THE FEDERALIST No. 69 (A. Hamilton). Hamilton reasoned that the Governor of New York had at all times the entire command of the militia in his jurisdiction, but the President would only occasionally have command of such a military organization as was called by the legislature into the actual service of the community. *Id.*

n97 U.S. CONST., at II, § 3.

n98 See E. CORWIN, *supra* note 7, at 229.

n99 Historical review of these periods can be found in GROWTH OF AMERICAN REPUBLIC, *supra* note 36, at 377-412, 549-617.

n100 E. CORWIN, *supra* note 7, at 262.

n101 *Id.*

n102 Typical of Johnson's statements of the period is, "We stated [before] and we repeat now, we did not think the [Tonkin Gulf] resolution was necessary to what we did and what we're doing." N.Y. Times, Aug. 19, 1967, G1, at 11, col. 4. Nixon, presented by Congress with a rider on the 1971 Defense Procurement Authorization Act which declared it "the policy of the United States to terminate at the earliest practicable date all military

operations of the United States in Indochina," signed the bill, saying the congressional declaration "does not represent the policies of the Administration [and is] without binding force or effect, [and] my signing of the bill that contains this section . . . will not change the policies I have pursued." A. SCHLESINGER, *supra* note 81, at 194.

n103 See A. SCHLESINGER, *supra* note 81, at 177-207 (chapter entitled "The Presidency Rampant: Vietnam").

n104 See War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1976)) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.") [hereinafter cited as *War Powers Res.*].

n105 See generally Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977); Casper, *supra* note 94; Berger, *War-making by the President*, 121 U. PA. L. REV. 29 (1972).

n106 *War Powers Res.*, *supra* note 104.

n107 President Ford sent the marines to rescue the *Mayaguez* and its crew in 1975. He reported the action to Congress in accordance with § 4 of the War Powers Resolution but stated, "[t]he operation was ordered and conducted pursuant to the President's constitutional executive power and his authority as Commander in Chief. . . ." G. GUNTHER, *supra* note 93, at 416. See generally Faust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774 (1976).

President Reagan's deployment of troops in Lebanon created some serious executive-legislative tension in September of 1983. See Wash. Post, Sept. 9, 1983, at A14, col. 5 ("Congress, President Are Expected to Debate Applicability of 1973 War Powers Resolution"); Wash. Post, Sept. 18, 1983, at C6, col. 1 ("There is a certain amount of heaving about a great constitutional clash . . .") An eventual compromise was reached, Wash. Post, Sept. 21, 1983, at A1, col. 6, but Reagan has not conceded that Congress can limit presidential powers as the resolution purports. *Id.*

n108 President Carter rejected formal urgings by Senators Church and Javits to consult with Congress under the resolution before taking any military action in Iran. Carter did, however, explain that his decision not to consult was based on his belief that the War Powers Resolution did not apply to a humanitarian effort to rescue Americans. G. GUNTHER, *supra* note 93, at 416 n. *.

n109 *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.")

n110 H. RANSOM, *supra* note 12, at 56.

n111 See N.Y. Times, Nov. 5, 1979, at A1, col. 6 (describing storming of United States embassy in Iran by Iranian students after anti-American speeches by Ayatollah Khomeini).

n112 See N.Y. Times, Oct. 24, 1983, § 1, at 1, col. 6 (describing destruction of United States marine headquarters in Beirut by suicide terrorist driving truck loaded with 2,500 tons of TNT).

n113 See N.Y. Times, Dec. 12, 1983, § 1, at 1, Col. 6 (describing State Department report of bombs exploded outside United States embassy in Kuwait).

n114 See Ellsworth & Adelman, *Foolish Intelligence*, FOREIGN POL'Y, Fall 1979, 147, 154 ("Intelligence forecasts for Iran were . . . victims of . . . infighting. . . . [Employees of the CIA's covert action division] swayed the entire intelligence community to report that the Shah's opponents were numerically insignificant and politically impotent"); Bill, *Iran and the Crisis of '78*, 57 FOREIGN AFF. 323, 339 (1978) ("The American diplomatic and intelligence mission in Tehran . . . has had a most undistinguished career for many years"); N.Y. Times, Dec. 11, 1983, § 1 at 1, col. 1 ("Marine intelligence officers in Lebanon were deluged with raw intelligence reports about terrorist threats but were never provided with the expertise required to evaluate them"); cf. N.Y. Times, Dec. 18, 1983, at 20, col. 1 ("The group [responsible for the bombing of the American Embassy in Kuwait] is known to few, but American officials have received intelligence reports that the [attack was] carried out by Shiite Moslem extremists.")

n115 For a description of Blackstone's, Locke's, and Montesquieu's views on the allocation of power to conduct foreign affairs, see E. CORWIN, *supra* note 7, at 416-17.

n116 The first plan put before the convention was that of the Virginia delegation. H. WRISTON, *supra* note 11, at 28. In introducing it, Edmund Randolph made a speech enumerating the problems with the Articles of Confederation, including the lack of congressional power to "cause infractions of treaties or of the law of nations, to be punished." Dissatisfaction with the Articles, however, was not that Congress had too much power, but that it didn't have enough. *Id.* at 29 (citing M. RARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 vol. I, 19 (1911)).

n117 H. WRISTON, *supra* note 11, at 29.

n118 *Id.* at 32.

n119 *Id.* at 33-35.

n120 *Id.*

n121 E. CORWIN, *supra* note 7, at 178-79.

n122 *Id.* See *supra* note 7 (discussing Hamilton-Madison debates in *Gazette*).

n123 E. CORWIN, *supra* note 7, at 178-79. This argument was the impetus for the debate noted *supra* note 7. Hamilton wrote:

The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the executive power shall be vested in a President of the United States of America'. . . .

The general doctrine of our Constitution, then, is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.

Two of these have been already noticed: the participation of the Senate in the appointment of officers, and in the making of treaties. A third remains to be mentioned: the right of the Legislature 'to declare war, and grant letters of marque and reprisal.'

With these exceptions, the executive power of the United States is *completely* lodged in the President.

Quoted in 1 W. GOLDMITH, THE GROWTH OF PRESIDENTIAL POWER 401 (1974) (emphasis added). Hamilton explained:

The legislative department is not the organ of intercourse between the United States and foreign nations. It is charged neither with making nor interpreting treaties. It is therefore not naturally that member of the government which is to pronounce on the existing condition of the nation with regard to foreign powers, or to admonish the citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties.

It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department is to decide the litigation in particular cases. It is indeed charged with the interpretations of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has not concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon. It must, then, of necessity belong to the executive department to exercise the function in question, when a proper case occurs.

Id. at 400.

Hamilton's argument so disturbed Thomas Jefferson that he later wrote Madison, saying, "Nobody answers him and his doctrines are taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in face of the public." E. CORWIN, *supra* note 7, at 180.

n124 E. CORWIN, *supra* note 7, at 177.

n125 Corwin believed "[c]learly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments." *Id.* at 178 (emphasis in original). But Justice Sutherland apparently believed otherwise. See *infra* text accompanying note 129 (quoting Justice Sutherland's majority opinion in *Curtiss-Wright Export Corp.*).

n126 E. CORWIN, *supra* note 7, at 171; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 45 (1972).

n127 299 U.S. 304 (1936).

n128 *Id.* at 308.

n129 *Id.* at 319-20 (emphasis added).

n130 U.S. CONST. art. II, § 3.

n131 *Id.* art. II, § 2.

n132 THE FEDERALIST No. 64, at 422 (J. Jay) (B. Wright ed. 1966).

n133 See J. STENNIS & J. FULBRIGHT, THE ROLE OF CONGRESS IN FOREIGN POLICY 35-36 (1971). Senator Fulbright, in debate with Senator Stennis, stated, "Thirty years of war, cold war, and crisis have propelled the American political system far along the road to an executive despotism, at least in the conduct of foreign relations." *Id.* at 35.

Senator Fulbright played a pivotal role in redressing presidential dominance in foreign affairs. See G. GUNTHER, *supra* note 93, at 416 ("The major early forum for constitutional debates during the growing Vietnam controversy of the late 1960s was the Senate Committee on Foreign Relations under the Chairmanship of Senator J. William Fulbright.") But there is evidence Fulbright may not be happy with the way the power balance has finally settled. In 1979 he wrote, "I confess to increasingly serious misgivings about the ability of the Congress to play a constructive role in our foreign relations." Fulbright, *The Legislator as Educator*, 57 FOREIGN AFF. 719 (1979).

For an authoritative discussion of the resurgence of Congress in the foreign policy area, see Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433 (1977). Sparkman played a key role, first as a member, and then as the chairman, of the Senate Foreign Relations committee.

n134 See Wash. Post, Oct. 30, 1983, at C1, col. 2 ("Is This A Foreign Policy Or a Recipe For Disaster?," discussing dissatisfaction with foreign policy instituted by Reagan Administration).

n135 U.S. CONST. art. II, § 3.

n136 See E. CORWIN, *supra* note 7, at 119 ("executive interpretation of statutes frequently amounts . . . to a species of subordinate legislation.")

n137 See L. HENKIN, *supra* note 126, at 56 ("that such initiatives were contemplated by the 'take care' clause is less-than-obvious, but that the President has such authority is not now questionable"); Oliver, *The United States and the World*, in THE BICENTENNIAL CONFERENCE ON THE CONSTITUTION 235-36 (1980) ("the Constitution of 1789 creates an executive who . . . internationally is the American chief of state (not merely head of government).")

n138 For a list of these uses, see L. HENKIN, *supra* note 126, at 55 n.** & nn.48-51.

n139 Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 192-94 (cited in L. HENKIN, *supra* note 126, at 55 n.49). A frequently cited example of presidential action to suppress piracy is Jefferson's dispatch of armed force against the Barbary Pirates. *But see* L. HENKIN, *supra* note 126, at 55 n.53 (noting that Jefferson had congressional authorization for his action).

n140 See *Ex Parte Toscano*, 208 F. 938 (S.D. Cal. 1913) (defeated Federated Federalist troops in Mexican Civil War held in United States after crossing border for refuge).

n141 See L. HENKIN, *supra* note 126, at 55 n.** (listing occasions on which President has used force in reliance on "faithfully execute" clause).

n142 This power recently has been expanded. See G. GUNTHER, *supra* note 93, at 408-10 (discussing extent of Presidential power to enter into executive agreements).

n143 The definition of executive privilege is not a settled matter. It has been argued to be a power protecting only in-person communications with the President, with the separation of powers doctrine preventing disclosure of lower-level communications in the executive branch. See *United States v. Nixon*, 418 U.S. 683, 705-06 (President Nixon refused to release Watergate tapes based on two legal theories: executive privilege, which protects communications between high government officials, and separation of powers, which insulates President from judicial subpoena). A broader definition places the protection of any executive branch communication under the rubric of executive privilege, with no explicit distinction being made between executive privilege and separation of powers for this purpose. See Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U.L. REV. 231, 249 ("One view of executive privilege is that it is . . . applicable . . . where the executive branch declines to supply information in its possession.") A third and still broader definition frames executive privilege not merely as a defensive power, the power to withhold information, but as an affirmative power, the power to prevent government information which necessarily has been passed outside the government from being revealed beyond the limited degree already disclosed. *Id.* Solicitor General Rex E. Lee gives an example of the government disclosing highly sensitive intelligence to a private contractor whose communications equipment must be used in further intelligence work. *Id.* No matter what one calls it, there is a principle of constitutional law protecting communications in the executive branch.

n144 Professor Raoul Berger, however, has written a number of articles and a book in which he vigorously denounces the constitutionality of the executive privilege. See, e.g., R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Berger, *The Presidential Monopoly of Foreign Relations* 71 MICH. L. REV. 1 (1972); Berger, *Executive Privilege Congressional Inquiry*, 12 UCLA L. REV. 1043 (1965).

Berger is not the only commentator who responded to President Nixon's claims of executive privilege. Professor Arthur M. Schlesinger, Jr. wrote *The Imperial Presidency*, *supra* note 81, a passionate attack on the Johnson and, particularly, the Nixon presidencies. Schlesinger's obvious distress at the growth of presidential power is ironic in light of the significant role he played in glorifying powerful presidents such as Jackson, Roosevelt, and Kennedy. See P. DOLCE & G. SKAU, POWER AND THE PRESIDENCY 269-79 (1976) [hereinafter cited as POWER AND PRESIDENCY] (interview with Professor Schlesinger on growth of presidential power, including discussion of his role as chronicler of strong presidents).

n145 THE FEDERALIST No. 71, at 460 (A. Hamilton) (B. Wright ed. 1966).

n146 A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 29-30 (1974).

n147 1 P. FORD, THE WRITINGS OF THOMAS JEFFERSON 189-90 (1892).

n148 P. FORD, *supra* note 147, at 189-90. On another occasion, Washington refused to turn over to the House information collected in connection with negotiations for the Jay Treaty. W. GOLDSMITH, *supra* note 123, at 416-18.

n149 *Quoted in CIA Memo, supra* note 34, at app. 213.

n150 *1980 Senate Hearings, supra* note 85, at 17.

n151 *418 U.S. 683 (1974)*.

n152 *See id. at 707* ("we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege").

n153 *Id. at 706*.

n154 *Id. at 707*.

n155 *See New York Times Co. v. United States, 403 U.S. 713, 729 (1971)* (Stewart, J., concurring) ("[I]t is the constitutional duty of the Executive . . . through the promulgation and enforcement of executive regulations to protect the confidentiality necessary to carry out its responsibilities in the fields of international affairs and national defense"); C. Oliver, *supra* note 137, at 271-73 (summarizing deliberations of committee of constitutional scholars on question of executive privilege, and noting committee's recognition that "a good deal of confidentiality is necessary not only to protect American Security but also to insure full debate at the lower levels of government.")

n156 *N.Y. Times, Apr. 21, 1961 at 1, col. 7* (discussing anticipated effect on U.S. prestige of botched, American-supported attempt to start counter-revolution in Cuba).

n157 *Cf. Secret Warriors, supra* note 5, at 46 (describing role of green beret combat units in CIA paramilitary actions in Southeast Asia).

n158 *See HONORABLE MEN, supra* note 40, at 410-11 (recounting storm of controversy surrounding alleged CIA involvement in assassination plots against foreign political leaders).

n159 *See supra* text following notes 68 to 69 (describing types of covert action).

n160 "Force," as it is used here, is not necessarily limited to armed force. *See INTELLIGENCE COMMUNITY, supra* note 8, at 669-70 (listing such examples as contributions of money and political advice to third political party serving vital balancing role in mainly two-party system and similar support for individual demonstrating leadership ability and favorable attitude towards Western values).

n161 The Court stated:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or des-

potism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866).

Professor Corwin called this passage an "evident piece of arrant hypocrisy." E. CORWIN, *supra* note 7, at 165.

n162 Whenever possible, the Court is careful to couch its decisions upholding extraordinary presidential actions in terms of implied congressional consent. See *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981) ("[I]mportantly, Congress has not disapproved of the action taken here"); *Haig v. Agee*, 453 U.S. 280, 291 (1981) ("especially . . . in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval"); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("long continued practice known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent . . .")

n163 The Court denied certiorari in a number of cases concerning the constitutionality of presidential action in prosecuting the Vietnam War. See, e.g., *DaCosta v. Laird*, 405 U.S. 979 (1972); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Velvel v. Nixon*, 396 U.S. 1042 (1970); *Holmes v. United States*, 391 U.S. 936 (1968); *McArthur v. Clifford*, 393 U.S. 1002 (1968). In a notable dissent to such denial, Justice Potter Stewart stated, "[This case has] large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case . . ." *Mora v. McNamara*, 389 U.S. 934, 934-35 (1967) (Stewart, J., dissenting).

n164 In his treatise on presidential power, Professor William Goldsmith of Brandeis University stated:

It would be foolish to trace such [extraordinary] growth [in executive power] to the writings of John Locke . . . However, it is significant that this influential British philosopher, so widely read in America, possessed such rare insight into the nature of executive power . . . His writings had great initial influence upon all of the early political thought in this country . . .

W. GOLDSMITH, *supra* note 123, at 39-40.

Another influential political theorist whose ideas permeated the Philadelphia Convention was Baron de Montesquieu. James Madison used Montesquieu's *L'Esprit des Lois* [The Spirit of Laws] as a textbook at Princeton. Madison became so familiar with Montesquieu's work that 20 years later he could quote from it by memory. *Id.* at 49.

The more ancient roots of executive prerogative are found in Plato's STATESMAN, 300A passim, and Cicero's DE LUGIBUS, iii, 3, 8. The latter is the source of the maxim *salus populi suprema lex*, meaning, "the welfare of the people is the supreme law"; quoted in Hurtgen, *The Case for Presidential Prerogative*, 7 TOLEDO L. REV. 59, 60 n.3 (1975).

n165 J. LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY PP159, 160 (35 BRITANNICA GREAT BOOKS SERIES 62 (1952)).

n166 *Id.* at P160.

n167 J. ROUSSEAU, *THE SOCIAL CONTRACT*, bk. IV, ch. 6 (38 BRITANNICA GREAT BOOKS SERIES 433 (1952)).

n168 See MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI, ch. 6 (38 BRITANNICA GREAT BOOKS SERIES 72 (1952)) ("[I]t is not proper that the legislative power should have a right to stay the executive. For as the executive has its natural limits, it is useless to confine it; besides, the executive power is generally employed in momentary operations.")

n169 Blackstone's four-volume *Commentaries on the Laws of England* became a key reference for the delegates to the constitutional convention. W. GOLDSMITH, *supra* note 123, at 55-56. Indeed, Blackstone's biographer estimates that the treatise was of "far greater [influence] in the United States than in England. The *Commentaries* arrived in the colonies at the right psychological moment, they supplied a pressing need which could not be filled by other texts . . ." D. LOCKMILLER, *SIR WILLIAM BLACKSTONE* 182 (1938).

n170 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, ch. VII, 149-50 (Thomas M. Cooley ed. 1884).

n171 See *THE FEDERALIST* No. 70 (A. Hamilton) (citing same historical precedents and reaching same conclusions as authorities cited *supra* notes 166 to 167).

n172 Indeed, Hamilton's views dominated from the first. See Remini, *The Emergence of Political Parties and their Effect on the Presidency*, in *POWER AND PRESIDENCY*, *supra* note 144, at 25-26 (describing Hamilton's dominance in Washington's cabinet); S. KONEFSKY, *JOHN MARSHALL AND ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION* 67 (1964) (same). That Hamilton's views have achieved wide acceptance is evident from the actual growth of presidential power, see generally W. GOLDSMITH, *supra* note 123 (describing growth of presidential power) and by the existence of Supreme Court opinions which echo his views. See *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (constitutional duty of Executive is matter of sovereign prerogative and not matter of law as courts know it); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

n173 The noted constitutional scholar Clinton Rossiter wrote:

Although Hamilton never did conjure up the Jacksonian formula of the President as Tribune of the people, he did supply one of its major ingredients by insisting, in effect, that the executive was better situated than the fact-ridden legislature to identify and express "the public good," and thus be "the representative of the people."

C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 218 (1964).

n174 See generally SENATE SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED POWERS, 93D CONG., 2D SESS., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* (Comm. Print 1974) (authored by H. Relyea) [hereinafter cited as COMM. PRINT].

n175 In the weeks between the fall of Fort Sumter and the assembly of Congress, Lincoln turned the states' militias into a 90-day volunteer army and added 23,000 troops to the regular army and 18,000 troops to the navy. Hurtgen, *supra* note 164, at 67. In addition to these actions, he blockaded Southern ports, directed the advance of unappropriated funds, and suspended the writ of habeas corpus. *Id.* at 66.

n176 Five days before Paris fell to Germany, Roosevelt pledged to "extend to the opponents of force the material resources of this nation." With American military stock already dangerously low and the great majority of American opinion believing that all European allies would fall to Hitler, Roosevelt's unilateral decision to send war material to Britain was dangerous. GROWTH OF AMERICAN REPUBLIC, *supra* note 36, vol. II, at 541. He nevertheless implemented his lend-lease plan, and transferred to Great Britain 50 retired American bases on British territories in the Caribbean. Roosevelt announced it to Congress as "the most important action in reinforcement of our national defense that has been taken since the Louisiana Purchase." COMM. PRINT, *supra* note 174, at 71. A Roosevelt biographer records:

Critics charged that [the President] had flouted the authority of Congress, whose rights in the matter he had previously conceded; that he had acted without taking the people into his confidence; and that he had transgressed international law. At a time when Britain faced annihilation, Roosevelt and his supporters had little patience with animadversions based on Edwardian conventions of international law.

W. LEUCHTENBUGR, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 305-06 (1963).

n177 *See supra* note 172 (quoting Justice Potter Stewart's concurrence in the *Pentagon Papers* case). *But see* Hurtgen, *supra* note 164, at 79 (arguing that prerogative is valid but extra-constitutional).

n178 *See supra* notes 86 to 87 (describing Boland Amendment).

n179 *See infra* note 190 (giving examples of Presidential overreaction and its effects).

n180 There is no inconsistency in asserting that the press generally should be allowed to publish executive branch material which comes into its hands but that Congress can be denied access to executive branch material. The press can no more demand access than Congress can, and the President can no more prevent Congress from using information which comes into its hands than he could prevent the press from doing so.

n181 *New York Times Co. v. United States*, 403 U.S. at 728 (Stewart, J., concurring). In this case the Supreme Court upheld the media's freedom to publish material which the government asserted was dangerous to national security. *Id.* at 714. The freedom is not without limits. Justice Brennan's concurring opinion stated, "there is a single extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *Id.* at 726. In this class, he said, were cases which arise during war and concern troop movements and locations and perhaps peacetime cases in the extraordinary circumstance of information that would set in motion a nuclear holocaust. *Id.* Justice White's concurring opinion stated more ambiguously that "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations But I nevertheless agree that the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication" *Id.* at 731.

With such substantial protection for the press in place, its freedom to inform the citizenry should not be a subject of concern. However, its *ability* to do so is worrisome because of the expanding ability of the government to silence the sources of news on the inner workings of the government. The government may be able, by prior contractual arrangement, to silence its employees. *See Snapp v. United States*, 444 U.S. 507 (1980) (imposing constructive trust on proceeds of former CIA agent's book about CIA activities in Vietnam after breach of fiduciary obligation).

n182 *See generally* C. BERNSTEIN & R. WOODWARD, ALL THE PRESIDENT'S MEN (1974) (describing unfolding in press of events collectively called "Watergate" and resulting effects on Nixon administration).

n183 *See, e.g.*, H. REP. NO. 1305, 93d Cong., 2d Sess. (1974) (Article of Impeachment II (2)) [hereinafter cited as *Impeachment*]; THE CIA & THE SECURITY DEBATE: 1971-1975 at 191 (J. Buncher ed. 1976) (relating Sen. Edmund S. Muskie's protest of FBI surveillance of environmental protection rallies and Nixon Administration responses).

n184 *See* N.Y. Times, May 1, 1973, at 1, col. 1 (Secretary of State William P. Rogers testifying before Senate Foreign Relations Committee asserting Presidential authority to order bombing of Cambodia).

n185 In contrast to the 25 treaties negotiated and the 9 executive agreements concluded in 1930, the Nixon administration in its first four years concluded 71 treaties and 608 executive agreements. M. CUNLIFFE, AMERICAN PRESIDENTS AND THE PRESIDENCY 397-98 (2d ed. 1976). Executive agreements exclude the Senate from policymaking and from access to information. *Id.* at 397.

n186 *See id.* at 398-99 (describing Nixon's use of impoundment to substitute his policies for those voted by Congress).

n187 *Impeachment, supra* note 183, Article II (1).

n188 *See id.* (Article of Impeachment III). *See generally* C. BERNSTEIN & R. WOODWARD, ALL THE PRESIDENT'S MEN (1974).

n189 C. PATTERSON, PRESIDENTIAL GOVERNMENT IN THE UNITED STATES: THE UNWRITTEN CONSTITUTION 70 (1947) (quoting William H. Seward).

n190 Lyndon Johnson decided that the conflict in Vietnam so urgently threatened the security of the United States that he could act on his own constitutional power and without congressional consent to commit our forces to war. *See* A. SCHLESINGER, *supra* note 81, at 182-85 (describing Johnson's interpretation of defensive war). His disproportionate reaction led to his isolation from Congress, his eventual decision not to seek reelection in 1968, and the defeat of his party in that presidential election.

A less dramatic example involved violent mining strikes in the Court d'Alene region of Idaho during President McKinley's administration. The governor of Idaho called for federal assistance and McKinley consented to send troops. COMM. PRINT, *supra* note 174, at 36. But he left the troops in Idaho for several months without ever conducting an investigation as to their use or the need for their presence. As a result, he was roundly condemned in Congress for being subservient to industrial interests. *Id.*

By a prompt response to the Governor's request for troops McKinley was carrying out the national government's constitutional obligation to preserve the States from domestic violence. By permitting the troops to remain for such a long period, without conducting an adequate inquiry . . . the President was neglecting the like obligation to guarantee to every state a republican form of government.

B. RICH, THE PRESIDENTS AND CIVIL DISORDER 119-20 (1941).

n191 *See supra* note 144 (discussing irony of historian responsible for glorifying powerful executive later decrying power of executive).

n192 Professor Louis Henkin has noted that

[I]t is important to distinguish in these controversies between appeals to the Constitution and complaints against it. The claim on Vietnam, properly, was less that the President usurped power than that the Constitution gave him "excessive" power; or, since Congress has authority to check the President, that the constitutional distribution does not work because, in the end, the restraints on the President are not effective. Many were really asking whether, in essential respects, we have a desirable system for conducting foreign affairs.

L. HENKIN, *supra* note 126, at 102.

n193 *Ex parte Milligan*, 71 U.S. (4 Wall) 1, 125 (1866).

n194 Letter from Thomas Jefferson to Spencer Roane, *quoted in* THE JEFFERSON CYCLOPEDIA 841 (J. Foley ed. 1900).

From: "Kavanaugh, Brett M."

Date: 1/4/06, 1:02 AM

To: "Kaplan, Joel"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Jun 24 18:12:24 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: KRN – Alito's record on search and seizure matters comes under scrutiny
From: "Perino, Dana M."
Date: 1/6/06, 8:21 AM
To: "Kavanaugh, Brett M."

If you see any analysis of this on the blogs that's good, could you send it to me? They did it again – selective analysis without a call to us for comment. I am going to call the bureau chief soon.

From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Friday, January 06, 2006 6:50 AM
To: Perino, Dana M.
Subject: KRN - Alito's record on search and seizure matters comes under scrutiny

Alito's record on search and seizure matters comes under scrutiny

By Stephen Henderson and Howard Mintz, Knight Ridder Newspapers

WASHINGTON - As the Bush administration defends its right to eavesdrop on Americans without court permission, a look at Supreme Court nominee Samuel Alito's record on search and seizure matters reveals how few limits he has imposed on the government's power to gather evidence.

A Knight Ridder analysis of more than 300 written opinions by Alito, for example, reveals that he has almost never found a government search unconstitutional and that he has argued to relax warrant requirements and to broaden the kinds of searches that warrants permit.

There are a few exceptional cases in Alito's record, notably a 1998 ruling in which he rejected the search of a black driver's car for a handgun because police practically admitted that race influenced their decision to stop the man. But overall his record in this area has produced near uniform results in favor of government authority.

His work in this area has frequently drawn sharp disagreement from his colleagues on the 3rd Circuit Court of Appeals in Philadelphia, one of whom accused him of approving an "Orwellian" invasion of privacy in one case.

Alito, whose Senate confirmation hearings begin Monday, will likely face pointed questions about his record in this area. Along with his views on the breadth of presidential power, his search and seizure work offers clues as to how he might approach a case challenging the domestic spying program.

In one 2004 case, for example, Alito didn't find fault with an 18-month, round-the-clock surveillance operation that was never approved by a judge.

Charles Hobson, an attorney with the Criminal Justice Legal Foundation, a group that advocates for the rights of crime victims and their families, said Alito's record has to be considered in appropriate context.

Most criminal appeals based on search and seizure challenges fail, he said, because the Fourth Amendment, which limits government searches, is probably "the most pragmatic of all constitutional

amendments."

"Reasonableness is what you have to balance in these cases, and if the remedy for a violation is to exclude evidence that could convict the guilty, the burden is going to be quite high," Hobson said.

"What I would say from his record overall is that he's more appreciative of public safety interests, but he's not out of the mainstream."

One of the cases that illustrates how comfortable Alito can be with government surveillance powers came in the federal criminal investigation of Robert W. Lee Sr., who once headed the International Boxing Federation.

In the late 1990s, the FBI conducted an 18-month undercover probe of Lee that involved round-the-clock audio and video surveillance of his conversations in a hotel suite with Douglas Beavers, an informant. Agents didn't seek a warrant for the surveillance.

Lee argued that evidence from the wiretap was all gathered in violation of right to privacy.

But Alito, writing a majority opinion in February 2004, endorsed the legality of the undercover operation, saying that as long as the material used against Lee was the same as what the informant would have testified to in a courtroom, there was no constitutional problem. Alito also reasoned that Beavers had given consent for the surveillance, even if Lee hadn't, and that was sufficient to waive Lee's privacy rights.

The Supreme Court's precedents agree that warrants aren't needed in some cases where informants consent to surveillance.

"A person has no legitimate expectation of privacy in conversation with a person who consents to the recording of the conversations," Alito wrote.

The decision drew a sharp dissent from Judge Theodore McKee, who was particularly concerned the operation went unchecked by any judicial oversight.

"The limitations of that Orwellian capability were not subject to any court order," he wrote.

Alito also has argued that the scope of warrants should be interpreted broadly, sometimes beyond what the warrant says. In this area of law, the rule has long been: If it's in the warrant it's fair game, if it isn't, it's not.

Still, in one case, Alito deferred to government authorities who conducted a broad search of a wholesale distributor's premises with a warrant that didn't specify what police were looking for or how it tied into the alleged criminal activity. The prohibition against such "general" warrants is the foundation of the constitutional limit on search and seizure. But Alito said the warrant wasn't general but was only "too broad" and therefore legal under a Supreme Court exception to warrant requirements.

A dissent in the case noted that the warrant was "so lacking in particularity that no reasonably well-trained officer could execute it in good faith." It also said Alito's reasoning allowed the high court's

exception to "swallow" the Constitution's rule against general warrants.

In another case, *Doe v. Groody*, Alito said police didn't violate the rights of a mother and her 10-year-old daughter, who were strip-searched during the search of a drug dealer's home even though the mother and child weren't mentioned in the warrant.

Michael Chertoff, now secretary of the Department of Homeland Security and a former 3rd Circuit judge, said in the court's ruling that the search wasn't legal.

The "face of the warrant ... does not grant authority" to search the girl or her mother, he wrote. Citing a recent Supreme Court precedent, Chertoff said police rarely could exceed the bounds of a warrant.

But Alito argued that the recent Supreme Court ruling didn't address the facts in the strip-search case, so it didn't control his decision. He said he shared the majority's "visceral dislike" for the search of a child but added that it is "a sad fact that drug dealers sometimes use children" to do their business.

In another similar case, Alito approved the search of a mother and her children as they approached a relative's house for dinner. Police had a warrant to search the relative and his home; it too didn't include the mother and her children.

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Subject: FW: NATIONAL JOURNAL: Opening Argument – The Case of Alito v. O'Connor
From: "Perino, Dana M."
Date: 1/6/06, 4:50 PM
To: "Kavanaugh, Brett M."

[This gave me a heart attack](#)

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Sent: Friday, January 06, 2006 4:39 PM
To: undisclosed-recipients
Subject: NATIONAL JOURNAL: Opening Argument - The Case of Alito v. O'Connor

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NATIONAL JOURNAL
Stuart Taylor Jr.
01-07-2006

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But amid the debate over Alito's writings and decisions, some of the most telling signs of a right-wing agenda have received too little attention.

Affirmative action. The judge has repeatedly blocked or crippled programs designed to protect blacks against the continuing effects of American apartheid. One decision, which struck down a school board's policy of considering race in layoff decisions, thwarted an effort to keep a few black teachers as role models for black students. A second blocked a similar program to shield recently hired black police officers from layoffs. A third blocked a city from opening opportunities for minority-owned construction companies by striking down its program to channel 30 percent of public works funds to them.

Voting rights. Making it harder for black and Hispanic candidates to overcome white racial-bloc voting, the judge has repeatedly struck down majority-black and majority-Hispanic voting districts because of their supposedly irregular shape. But the judge saw no problem with the gerrymandering of bizarrely shaped districts by Pennsylvania's Republican-controlled Legislature to rig elections against Democrats!

Civil rights and women's rights. Decision after decision has made it harder for victims of racial and gender discrimination to vindicate their rights. One used a narrow reading of Title IX, the federal law banning gender discrimination by federally funded schools and colleges, to block victims from suing unless the federal money went to the particular discriminatory program. A second blocked victims of racial and other discrimination from suing federally funded programs and institutions unless they can prove intent to discriminate -- often an impossible burden. A third barred victims of rape and domestic violence from suing under the federal Violence Against Women Act.

Gay rights. One decision allowed states to prosecute and brand gay people as criminals for enjoying sexual relations, even in the privacy of their own bedrooms. Another supported a homophobic group's discriminatory exclusion of gay boys and men, citing the group's "freedom of association."

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Aaron Baer

Republican National Committee

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From: "Kavanaugh, Brett M."
Date: 1/6/06, 4:51 PM
To: "Perino, Dana M."

[It's clever, although maybe he could have gotten to the punch line a little earlier!!](#)

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Sent: Friday, January 06, 2006 4:51 PM
To: Kavanaugh, Brett M.
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From: "Gerry, Brett C."
Date: 1/15/06, 3:50 PM
To: "Kavanaugh, Brett M.", "Coffin, Shannen W.", "Perino, Dana M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Tue Jun 25 10:59:41 EDT 2019

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Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Re: USA Today Op-ed (Due Monday 4PM)

Subject: Re: USA Today Op-ed (Due Monday 4PM)
From: "Kavanaugh, Brett M."
Date: 1/15/06, 9:32 PM
To: "Gerry, Brett C."

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Additional Information:

Re: USA Today Op-ed (Due Monday 4PM)

Subject: Re: USA Today Op-ed (Due Monday 4PM)
From: "Gerry, Brett C."
Date: 1/15/06, 10:07 PM
To: "Kavanaugh, Brett M."

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Subject: Re: USA Today Op-ed (Due Monday 4PM)
From: "Kavanaugh, Brett M."
Date: 1/15/06, 10:20 PM
To: "Gerry, Brett C."

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Re: USA Today Op-ed (Due Monday 4PM)

Subject: Re: USA Today Op-ed (Due Monday 4PM)

From: "Gerry, Brett C."

Date: 1/15/06, 11:04 PM

To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

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P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: USA Today update
From: "Gerry, Brett C."
Date: 1/16/06, 4:21 PM
To: <Neil.Gorsuch@usdoj.gov>, "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:40 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update

From: "Miers, Harriet"

Date: 1/16/06, 4:30 PM

To: <Neil.Gorsuch@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, <William.Moschella@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>

CC: <John.Elwood@usdoj.gov>, "Addington, David S.", "Gerry, Brett C.", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:40 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: FW: USA Today update
From: "Miers, Harriet"
Date: 1/16/06, 4:31 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:17:05 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update

From: <Neil.Gorsuch@usdoj.gov>

Date: 1/16/06, 4:39 PM

To: "Miers, Harriet", <William.Moschella@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>

CC: <John.Elwood@usdoj.gov>, "Addington, David S.", "Gerry, Brett C.", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:41 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: "Kavanaugh, Brett M."
Date: 1/16/06, 4:49 PM
To: "Miers, Harriet"
CC: "Gerry, Brett C."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:17:30 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: USA Today update

From: "Gerry, Brett C."

Date: 1/16/06, 4:49 PM

To: "Miers, Harriet", <Neil.Gorsuch@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, <William.Moschella@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>

CC: <John.Elwood@usdoj.gov>, "Addington, David S.", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:42 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update

From: "Miers, Harriet"

Date: 1/16/06, 4:51 PM

To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:17:40 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: "Kavanaugh, Brett M."
Date: 1/16/06, 4:55 PM
To: "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:17:54 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: <Neil.Gorsuch@usdoj.gov>
Date: 1/16/06, 4:57 PM
To: <William.Moschella@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, <Brian.RoehrKasse@usdoj.gov>, "Miers, Harriet", "Gerry, Brett C."
CC: <John.Elwood@usdoj.gov>, "Addington, David S.", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:42 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: "Kavanaugh, Brett M."
Date: 1/16/06, 4:58 PM
To: <Neil.Gorsuch@usdoj.gov>
CC: "Gerry, Brett C.", "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:43 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: "Miers, Harriet"
Date: 1/16/06, 5:01 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:18:09 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: USA Today update
From: <Neil.Gorsuch@usdoj.gov>
Date: 1/16/06, 5:04 PM
To: "Kavanaugh, Brett M."
CC: "Gerry, Brett C.", "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:45 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: USA Today update

From: <Tasia.Scolinos@usdoj.gov>

Date: 1/16/06, 5:07 PM

To: <Neil.Gorsuch@usdoj.gov>, <William.Moschella@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, <Brian.RoehrKasse@usdoj.gov>, "Miers, Harriet"

CC: <John.Elwood@usdoj.gov>, "Addington, David S.", "Gerry, Brett C.", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:46 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: FW: USA Today update

From: <Neil.Gorsuch@usdoj.gov>

Date: 1/16/06, 5:08 PM

To: <John.Elwood@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <William.Moschella@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, "Addington, David S.", "Kavanaugh, Brett M.", "Miers, Harriet", "Gerry, Brett C."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:07:47 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)

From: "Kavanaugh, Brett M."

Date: 1/16/06, 5:13 PM

To: "17324305", "West, Christal R.", "Weinstein, Jared B.", "Wolff, Candida P.", "Badger, William D.", "Kirk, Matthew", "17435416", "Haenle, Paul T.", "Naranjo, Brian R.", "Wallace, Nicole", "McClellan, Scott", <kr@rove.com>, "Hughes, Taylor A."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:22:39 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "Wolff, Candida P."
Date: 1/16/06, 5:17 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:22:41 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: USA Today update

From: <Robert.McCallum@usdoj.gov>

Date: 1/16/06, 5:33 PM

To: <Neil.Gorsuch@usdoj.gov>, <John.Elwood@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>, <William.Moschella@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, "Addington, David S.", "Kavanaugh, Brett M.", "Miers, Harriet", "Gerry, Brett C."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:35:22 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "17324305"
Date: 1/16/06, 5:37 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:22:42 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)

From: "Naranjo, Brian R."

Date: 1/16/06, 5:39 PM

To: "Kavanaugh, Brett M.", "17324305", "West, Christal R.", "Weinstein, Jared B.", "Wolff, Candida P.", "Badger, William D.", "Kirk, Matthew", "17435416", "Haenle, Paul T.", "Wallace, Nicole", "McClellan, Scott", <kr@rove.com>, "Hughes, Taylor A."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:22:44 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: USA Today update

From: <Neil.Gorsuch@usdoj.gov>

Date: 1/16/06, 5:40 PM

To: <Robert.McCallum@usdoj.gov>, <John.Elwood@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>, <William.Moschella@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, "Addington, David S.", "Kavanaugh, Brett M.", "Miers, Harriet", "Gerry, Brett C."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:35:25 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "Kavanaugh, Brett M."
Date: 1/16/06, 5:42 PM
To: "Karl Rove" <kr@georgewbush.com>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:36 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "Karl Rove" <kr@georgewbush.com>
Date: 1/16/06, 5:43 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:38 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

cutting 10 words ...

Subject: cutting 10 words ...

From: "Kavanaugh, Brett M."

Date: 1/16/06, 5:47 PM

To: "Miers, Harriet", "Gerry, Brett C.", <Neil.Gorsuch@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:35:26 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "West, Christal R."
Date: 1/16/06, 5:56 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:40 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "Kavanaugh, Brett M."
Date: 1/16/06, 5:59 PM
To: "West, Christal R."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:40 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: USA Today update

From: <Brian.Roehrkasse@usdoj.gov>

Date: 1/16/06, 6:20 PM

To: <Neil.Gorsuch@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <John.Elwood@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <William.Moschella@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, "Addington, David S.", "Gerry, Brett C.", "Miers, Harriet", "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 14:35:28 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: LATEST version of USA Today

From: <Neil.Gorsuch@usdoj.gov>

Date: 1/16/06, 6:59 PM

To: "Gerry, Brett C.", <Kyle.Sampson@usdoj.gov>, <Courtney.Elwood@usdoj.gov>, <Robert.McCallum@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>, <William.Moschella@usdoj.gov>, "Miers, Harriet", "Kavanaugh, Brett M."

CC: <John.Elwood@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 15:27:59 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: LATEST version of USA Today

From: <Robert.McCallum@usdoj.gov>

Date: 1/16/06, 7:05 PM

To: <Neil.Gorsuch@usdoj.gov>, "Gerry, Brett C.", <Kyle.Sampson@usdoj.gov>, <Courtney.Elwood@usdoj.gov>, <Tasia.Scolinos@usdoj.gov>, <Brian.Roehrkasse@usdoj.gov>, <William.Moschella@usdoj.gov>, "Miers, Harriet", "Kavanaugh, Brett M."

CC: <John.Elwood@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Mar 01 15:28:01 EST 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: Draft Robert McCallum response op-ed for USA Today -- need any comments quickly (we are slightly over word limit)
From: "Wallace, Nicolle"
Date: 1/16/06, 7:06 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:41 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: FW: LATEST version of USA Today

From: "Kavanaugh, Brett M."

Date: 1/16/06, 7:16 PM

To: "Miers, Harriet", "Gerry, Brett C.", "Addington, David S.", "Coffin, Shannen W."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon May 01 17:19:59 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: LATEST version of USA Today
From: "Gerry, Brett C."
Date: 1/16/06, 7:32 PM
To: "Kavanaugh, Brett M.", "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:20:15 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: FW: LATEST version of USA Today
From: "Miers, Harriet"
Date: 1/16/06, 7:48 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Jun 25 11:19:42 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: Re: LATEST version of USA Today

From: "Coffin, Shannen W."

Date: 1/16/06, 7:48 PM

To: "Kavanaugh, Brett M.", "Miers, Harriet", "Gerry, Brett C.", "Addington, David S."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon May 01 17:20:39 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: FW: Defense Chapter Edits from Brett Kavanaugh
From: "Hoff, Joanne Cianci"
Date: 1/16/06, 8:21 PM
To: "Kavanaugh, Brett M.", "Sherzer, David"
CC: "Bowab, Joseph W.", "Davitt, Caitlin P.", "Copley, David J.", "Peroff, Kathleen"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Wed Jul 17 16:05:56 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.4

Additional Information:

Subject: RE: LATEST version of USA Today
From: "Kavanaugh, Brett M."
Date: 1/16/06, 8:55 PM
To: "Coffin, Shannen W."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:07:47 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: LATEST version of USA Today
From: "Coffin, Shannen W."
Date: 1/16/06, 8:57 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:08:27 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: RE: LATEST version of USA Today
From: "Kavanaugh, Brett M."
Date: 1/16/06, 9:14 PM
To: "Coffin, Shannen W."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:08:37 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:

Subject: Re: LATEST version of USA Today
From: "Coffin, Shannen W."
Date: 1/16/06, 10:58 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET
Date created: Mon May 01 17:09:09 EDT 2017

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2017-0187-F

Additional Information:
