FISA SECTION 702: AN UNCONSTITUTIONAL INFRINGEMENT OF EXECUTIVE POWER

Robert F. Turner[*]

INTRODUCTION

By way of background (given that what follows may surprise many readers and is at odds with modern conventional wisdom), the author has had an interest in the separation of national security constitutional powers for more than half a century—dating back to his college days, when he heard a presentation by the late Professor Quincy Wright of the University of Chicago on the topic. In 1922, Wright authored a landmark treatise entitled *The Control of American Foreign Relations* that remains among the preeminent works on the subject today.

In 1978, the author followed the debates over enacting the Foreign Intelligence Surveillance Act (FISA) while serving as national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee. He concluded the statute was unconstitutional at the time. Indeed, he views FISA as but one of several such unconstitutional power grabs by Congress in the immediate post-Vietnam era.[1] And, like the 1973 War Powers Resolution,[2] FISA was something of a fraud.[3]

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[*] Professor, University of Virginia. Distinguished Fellow, Associate Director and co-founder of the Center for National Security Law. Former three-term chair of the ABA Standing Committee on Law and National Security, Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board, and Acting Assistant Secretary of State for Legislative Affairs.

[1] Foremost among these was the 1973 War Powers Resolution. *See, e.g.*, ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 107 (1983); ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 121–27 (1991).

[2] In introducing the War Powers Resolution, Senator Jacob Javits declared it was "a bill to end the practice of Presidential war and thus to prevent future Vietnams." David E. Rosenbaum, *Goldwater and Stennis Tell Saigon Not to Balk*, N.Y. TIMES (Jan. 19, 1973). Yet Section 2(c)(2) of the statute recognized the President's right to use armed force abroad pursuant to specific statutory authorization, and on August 7, 1964, Congress had expressly authorized the President to use U.S. armed force to protect South Vietnam, Laos, and Cambodia—the "protocol states" to the 1954 SEATO Treaty—by a statute approved by a combined margin of 99.6 percent of Congress. H.R.J. Res. 1145, 88th Cong. (1964) (enacted). Thus, had the War Powers Resolution been enacted years before America went to war in Indochina, it would not have affected that decision. Indeed, in a 1966 statement on the Senate floor that a formal declaration of war for Vietnam "would be most inadvisable," Senator Javits added: "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy." 112 CONG. REC. 4374 (1966).

[3] In the 1972 *Keith* case, *United States v. U.S. District Court* (*Keith*), 407 U.S. 297 (1972), the Supreme Court held that wiretaps of purely *domestic* national security threats—with no ties to any

As a White House attorney in the early 1980s responsible for overseeing the legality of all U.S. Intelligence Community activities, at the request of the National Security Adviser, the author wrote a 235-page study about the constitutional powers of the President and Congress related to intelligence.[4] He also wrote a 1700-page doctoral dissertation on "National Security and the Constitution" that examined these issues in far greater detail. Obviously, none of this proves his views are correct. But they should at least establish that these are not issues of first impression for him and that his views are the result of decades of serious scholarship and professional experience in both political branches.

Intelligence issues have hit the front pages repeatedly since the 9/11 attacks. Leaks by Bradley Manning and Edward Snowden have been portrayed as proving massive violations of the rights of Americans, as have exposés by *USA Today*,[5] the *New York Times*,[6] and other newspapers.

"foreign power"—required a warrant under the Fourth Amendment. *Id*. at 320. Writing for the 8-0 majority (Justice Rehnquist having recused himself because he worked on the case while in the Justice Department), Justice Powell repeatedly emphasized that the case at hand "involves only the *domestic* aspect of national security," and did not address "issues which may be involved with respect to activities of *foreign powers* or their agents." *Id*. at 321–22 (emphasis added). *See also id.* at 308 ("[T]he 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."). Powell then suggested: "Given these potential distinctions between Title III criminal surveillances and those involving the *domestic* security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III." *Id*. at 322 (emphasis added). During the early debates on what became FISA, congressional critics of the Intelligence Community portrayed the bill as being a response to the Court's suggestion in *Keith* despite the fact that Justice Powell had emphasized that case involved only "domestic" national security threats nearly fifty times in the opinion. *See, e.g.*, *Wiretapping and Electronic Surveillance*: *Hearings on H.R. 1597, H.R. 7773, H.R. 9781, H.R. 9851, H.R. 9973, H.R. 1008, H.R. 10331, H.R. 11629, H.R. 11836, and H.R. 13825 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 255 (1974) (statement of Rep. Bella S. Abzug) ("Following guidelines suggested by the Supreme Court in the *Keith* case . . . [the bill] would require . . . a judicial warrant to authorize surveillance of a *foreign* power or its agents.") (emphasis added). Justice Powell's long-held view that the President has constitutional power to authorize warrantless foreign intelligence surveillance is well documented. *See, e.g.*, Trevor W. Morrison, *The Story of United States v. United States District Court* (*Keith*): *The Surveillance Power* 12–17 (Columbia Pub. Law & Legal Theory Working Papers, Paper No. 08155, 2008), http://lsr.nellco.org/columbia_pllt/08155/. The author can confirm Powell's view continued at least into the 1990s, having discussed the issue with Justice Powell while serving as chair of the ABA Standing Committee on Law and National Security—to which Powell served as a Counselor.

[4] Robert F. Turner, Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities, (1984) https://cnsl.virginia.edu/sites/cnsl.virginia.edu/files/Turner-Cong%2CConstitution%26ForeignAffairs.pdf (unpublished).

[5] *See, e.g.*, Brad Heath, *U.S. Secretly Tracked Billions of Calls for Decades*, USA TODAY (Apr. 7, 2015), https://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/ (last updated Apr. 8, 2015).

[6] *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-with

Despite the absence of clear evidence that these leaks disclosed significant intentional misconduct, Congress has reacted to public pressure—including by the enactment of Section 702 through the FISA Amendments Act of 2008 and 2017. In Section 702 Congress pretends to "authorize" (and constrain) the President's warrantless collection of foreign intelligence information from foreign nationals believed to be located outside the United States. But, as will be discussed, the President already has this power vested in his office by the Constitution, and thus Congress lacks power to "delegate" it or constrain it beyond those limits imposed by the Constitution itself.

No serious scholar or expert familiar with Fourth Amendment jurisprudence would argue that collecting electronic intelligence about foreign nationals outside this country was unconstitutional. The primary argument was that the Section 702 program would inevitably collect incidental information about U.S. persons whose rights would thus be compromised.[7] Critics were not reassured by the reality that Section 702 was enacted by Congress, has been repeatedly upheld as lawful, and is closely supervised by federal courts. It also prohibits any measures that would violate the Fourth Amendment and bars the targeting of foreign nationals abroad for the purpose of acquiring information about U.S. persons—whether inside the United States or abroad.

This Article argues that Section 702 did nothing more than add an unconstitutional provision to an already unconstitutional FISA statute. More specifically, it will argue that FISA and Section 702 violate Article II of the Constitution because they infringe on the President's "executive Power." Part I discusses the views of the Framers of the Constitution on executive power and foreign affairs. It argues that foreign intelligence collection and spying on foreign enemies were always understood to be included within the Nation's "executive Power"—a power expressly vested in the President save for certain expressed and narrowly-construed "exceptions" given to the Senate or Congress. The Framers did not explain this because it was widely understood at the time. Part II discusses the pre-FISA use of executive power to order warrantless wiretaps and to protect national security. Rather than being condemned by courts at the time, this part will show that warrantless foreign intelligence wiretaps were understood to be constitutional. Part III discusses Congress's reaction and how FISA and Section 702 eventually became law. This part also discusses related judicial decisions and concludes that FISA and Section 702 are unconstitutional. Finally, Part IV discusses the negative impacts that FISA

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out-courts.html (last updated Dec. 28, 2005). *Cf.* Robert F. Turner, Commentary, *FISA vs. the Constitution*, WALL ST. J. (Dec. 28, 2005), https://www.wsj.com/articles/SB113573858850532715.

7 *See* Patrick Walsh, *Stepping on (or Over) the Constitution's Line: Evaluating FISA Section 702 in a World of Changing "Reasonableness" Under the Fourth Amendment*, 18 N.Y U. J. LEGIS. & PUB. POL'Y 741, 774–75 (2015).

has had on national security as a matter of public policy. Put simply, congressional encroachments in this area have vindicated the concerns of the Framers of our Constitution and may well have prevented the Intelligence Community from collecting foreign intelligence information that could have prevented the 9/11 attacks.

I. THE FRAMER'S UNDERSTANDING OF EXECUTIVE POWER

Many today assume that congressional oversight of intelligence activities has a long pedigree. After all, Section Five of the National Security Act of 1947 contains a variety of obligations requiring the President to report intelligence matters to Congress.[8] But, in reality, starting in the mid-1970s, those provisions were added as amendments to the 1947 statute. For the first 180-plus years of our history, there was a broad consensus among all three branches that issues involving foreign intelligence collection were the exclusive province of the Executive.

The constitutional basis for this power was the grant of "executive Power" to the President in Article II, Section 1, of the Constitution. Thomas Jefferson, America's first Secretary of Foreign Affairs (later re-designated "Secretary of State") explained the reasoning in an April 1790 memorandum to President Washington:

> The Constitution . . . has declared that "the Executive powers shall be vested in the President," submitting only special articles of it to a negative by the Senate . . . .
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> The *transaction of business with foreign nations is Executive altogether*. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.[9]

Three days later, Washington discussed the issue with Representative James Madison, recording in his diary that Madison agreed with the views of Jefferson and Supreme Court Chief Justice John Jay.[10] Washington noted that Madison agreed that the Senate had "no Constitutional right to interfere"[11] with matters of foreign policy beyond the specific exceptions set forth in the Constitution, such as their ability to withhold consent to completed treaties and diplomatic nominations.

Three years later, Alexander Hamilton—Jefferson's chief rival in Washington's cabinet, and along with Madison and Jay, the third author of

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[8] *See, e.g.*, National Security Act of 1947, as amended through Pub. L. 115-44, 61 Stat. 496 §§ 501–505 (2012).

[9] Thomas Jefferson, *Opinion on Powers of the Senate Respecting Diplomatic Appointments* (Apr. 24, 1790) in 16 PAPERS OF THOMAS JEFFERSON 378–80 (Julian P. Boyd ed., 1961) (first emphasis added).

[10] 4 DIARIES OF GEORGE WASHINGTON 122 (John C. Fitzpatrick ed., 1925).

[11] *Id.*

the Federalist papers—added his own endorsement to Jefferson's interpretation, reasoning that the Senate's involvement in the making of treaties and the power of Congress to "declare war" were "exceptions" to the general grant of "executive Power" to the President, and thus were to be "construed strictly."[12]

Today, for many, this interpretation of "executive Power" may seem strained. But the Framers were remarkably well-read men, raised on the writings of Locke, Montesquieu, and Blackstone—each of whom argued that the control of a nation's external relations was the province of the Executive. Professor Wright described the writings of these men as the "political bibles of the constitutional fathers,"[13] and explained: "[W]hen the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto."[14] More recently, in his 1972 volume *Foreign Affairs and the Constitution*, Columbia Law School Professor Louis Henkin explained: "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[15]

The President's constitutional power to withhold sensitive national security information from Congress was so well settled by the mid-twentieth century that the respected Princeton constitutional scholar Professor Edward Corwin declared: "[I]t is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments."[16] Similarly, in 1953, the Supreme Court, in discussing judicial access to national security secrets in *United States v. Reynolds*,[17] declared that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[18]

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12 15 THE PAPERS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed., 1969).

13 QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 363 (1922).

14 *Id*. at 147.

15 LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

16 EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 211–12 (4th rev. ed., 1957).

17 345 U.S. 1 (1953).

18 *Id*. at 11. Today, some seek to discount *Reynolds* by noting that the Supreme Court in the landmark case *United States v. Nixon*, 418 U.S. 683 (1974), rejected the President's assertion of "executive privilege" seeking to deny documents to the judiciary. However, in *Nixon* the Court repeatedly distinguished the President's "generalized need for confidentiality" there versus presidential claims pertaining to "military, diplomatic, or sensitive national security secrets . . . ." *Id*. at 684. For example, consider this excerpt from the *Nixon* opinion:

> In this case the President . . . does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman*

Some may assume that Americans gave little attention to intelligence matters until the Central Intelligence Agency ("CIA"), National Security Agency ("NSA"), and other modern intelligence organizations were established following World War II. In reality, serious attention to these issues predated the Constitution itself. For example, in 1775 the Second Continental Congress established a Committee of Secret Correspondence—consisting of five members and chaired by Benjamin Franklin—charged with corresponding and conducting other business with the outside world (including running spies).[19] When Silas Deane returned from France in 1776 with news that the French would provide major covert assistance to the American Revolution, the committee unanimously decided that they could not share the wonderful news with anyone else in the Congress. "We find by fatal experience," they explained in a statement signed by all five members, "the Congress consists of too many members to keep secrets."[20]

The importance of keeping secrets was also emphasized by John Jay—who, having served as the Secretary of Foreign Affairs under the Articles of Confederation, was arguably the new nation's most experienced diplomat—in explaining the new Constitution to the American people. Writing in Federalist 64, Jay reasoned:

> 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 [a]ssembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although *the President* must, in forming them, act by the advice and consent of the Senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest*.[21]

S. S. Corp., 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

Id. at 710.

19 *A Look Back. Intelligence and the Committee of Secret Correspondence*, CIA, https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/intelligence-and-the-committee-of-secret-correspondence.html (last updated Apr. 30, 2013, 12:55 PM).

20 Ben Franklin & Robert Morris, *Letter to the Committee of Secret Correspondence* (Oct. 1, 1776), *in* 2 PETER FORCE, AMERICAN ARCHIVES: CONSISTING OF A COLLECTION OF AUTHENTICK RECORDS, STATE PAPERS, DEBATES, AND LETTERS AND OTHER NOTICES OF PUBLICK AFFAIRS, THE WHOLE FORMING A DOCUMENTARY HISTORY OF THE ORIGIN AND PROGRESS OF THE NORTH AMERICAN COLONIES; OF THE CAUSES AND ACCOMPLISHMENT OF THE AMERICAN REVOLUTION; AND OF THE CONSTITUTION OF GOVERNMENT FOR THE UNITED STATES TO THE FINAL RATIFICATION THEREOF 819 (1848–53).

21 THE FEDERALIST No. 64 (emphasis added).

The Federalist papers were the most important source for explaining the meaning of the proposed new Constitution to the people and their elected representatives who would take part in state ratification conventions, as Madison's extensive notes would not be published until nearly fifty years after the Constitution was ratified. Thus, the clear explanation that the Constitution had left the President "able to manage the business of intelligence as prudence may suggest" takes on a special significance. Nothing in the history of the Constitution suggests that Congress was expected to have any substantive role in foreign intelligence matters—and there is overwhelming evidence to the contrary.

Congress also clearly recognized that its members could not be relied upon to keep national security secrets. Indeed, when the First Congress in 1790 appropriated money for foreign intercourse—in language that would be followed for many years—the statute read in part:

> [T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually . . . .[22]

The First Congress has sometimes been referred to as a "second constitutional convention," as many details were left unresolved in Philadelphia with the expectation they would be addressed by the new government. Two dozen of the thirty-nine men who signed the Constitution (more than sixty percent) went on to serve in the Congress.[23]

President Jefferson explained the early congressional practice in an April 1804 communication to Treasury Secretary Albert Gallatin:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[24]

The Judicial Branch has repeatedly recognized the President's special responsibilities in this area. In *Marbury v. Madison*[25]—arguably the most famous Supreme Court opinion in American history—Chief Justice John Marshall clearly refuted the modern contention that every power in a democracy must be checked by another branch:

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22 1 STAT. 129 (1790) (emphasis added).

23 THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 35 (Mark V. Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

24 11 THE WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

25 5 U.S. (1 Cranch) 137 (1803).

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . .
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> [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[26]

Marbury also reminds us of the important principle that "an act of the legislature repugnant to the [C]onstitution, is void."[27]

Even earlier, as a Federalist member of the House of Representatives in 1800, John Marshall declared that the President was "the sole organ of the nation in its external relations," because "[h]e possesses the whole Executive power."[28] This language was quoted with favor by the Supreme Court in the landmark case *United States v. Curtiss-Wright Export Corporation*,[29] where the Court added:

> It is important to bear in mind that we are here dealing [with] . . . the very delicate, plenary and *exclusive* power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[30]

While *Curtiss-Wright* did not address presidential control of intelligence activities, it did discuss the related exclusive presidential power over diplomatic negotiations. "[The President] makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude[,] and Congress itself is powerless to invade it."[31] *Curtiss-Wright* remains to this day the most frequently cited foreign affairs case by the Supreme Court.[32]

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[26] *Id*. at 165–66. Marshall continued by explaining that these unchecked powers related particularly to the President's responsibilities for the nation's foreign affairs: "The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the [D]epartment of [F]oreign [A]ffairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts." *Id*. at 166.

[27] *Id*. at 177.

[28] 6 ANNALS OF CONG. 613–14 (1800).

[29] 299 U.S. 304 (1936).

[30] *Id*. at 319–20 (emphasis added).

[31] *Id*. at 319. In *Barenblatt v. United States*, 360 U.S. 109 (1959), the Supreme Court noted:

> Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. *Id.* at 111–12.

[32] Henkin, *supra* note 15, at 15 (noting Justice Sutherland's majority opinion in *Curtiss-Wright* "was joined by six other Justices, has been cited with approval in later cases, and remains authoritative doctrine.").

In 1818, the legendary Henry Clay remarked on the House floor that expenditures from the President's "secret service" fund "would not be a proper subject for inquiry" by the Congress.[33] This was exclusively the business of the Executive. The point went unchallenged, and indeed others reaffirmed Clay's point.[34] This congressional deference to the Executive regarding intelligence and other aspects of the nation's foreign affairs continued into the second half of the twentieth century.[35]

In 1959, for example—during a speech at Cornell Law School—Senate Foreign Relations Committee Chairman J. William Fulbright explained: "The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs 'which the Constitution does not vest elsewhere in clear terms.'"[36] Note that Fulbright was not merely acknowledging that the President was "communicator-in-chief" with foreign governments, but that he was empowered as well by the Constitution to "formulate" foreign policy—subject, of course, to the Senate's negative over a completed treaty.

Nine years after Fulbright's speech, Congress—in response to the Supreme Court's decision in *Katz v. United States*,[37] holding for the first time that telephone wiretaps implicated Fourth Amendment values and thus required a prior judicial warrant[38]—enacted the nation's first wiretap statute. The Omnibus Safe Streets and Crime Control Act of 1968 expressly recognized the "constitutional power" of the President to engage in warrantless electronic surveillance:

> Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary. . . to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.[39]

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33 15 ANNALS OF CONG. 1466 (1818).

34 *Id*.

35 This is not to deny that there have been heated disputes between presidents and either Congress or the Senate related to foreign affairs over the centuries. But most of these related to areas where Congress or the Senate had clear constitutional responsibilities, such as treaties (e.g., the fight over Senate advice and consent to ratification of the League of Nations Covenant following World War I) and the initiation of major hostilities against a foreign nation (e.g., the Mexican-American War).

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

37 389 U.S. 347 (1967).

38 *Id*. at 359.

39 *See Keith*, 407 U.S. at 302 (quoting the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3)). During a 1976 Senate Judiciary Committee hearing on early versions of FISA, Senator Gaylord Nelson (a key sponsor of the legislation) misrepresented this statute, declaring that it "merely stated that *if* the President had certain constitutional powers, Title III did not disturb them." *Foreign Intelligence Surveillance Act of 1976, Hearings on S. 743, S. 1888 and S. 3197 Before the*

Courts and commentators alike have correctly noted that this language was not a grant of power from the Congress to the President.[40] Indeed, had that been the case, a subsequent Act of Congress could withdraw that delegation and replace it with a regime like FISA. Instead, the 1968 statute was a formal acknowledgement by Congress that the President already had this power—vested in his office directly by the Constitution—and thus implicitly recognizing that no mere statute could deprive the President of that power.[41]

It should be remembered that, unlike Articles II and III of the Constitution, which vest the nation's Executive and Judicial powers in a President and courts, Article I, Section 1 vests in Congress only those Legislative powers "herein granted."[42] Over the decades, courts have tolerated broad expansions of legislative authority beyond the original vision. But, accepting some implicit legislative power to seize control over intelligence activities would be difficult without opening the door for Congress to "direct the conduct of [military] campaigns"[43] and instruct the

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Subcomm. On Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 94th Cong. 74 (1976) [hereinafter FISA Hearings] (emphasis added).

40 *See, e.g.*, *Keith*, 407 U.S. at 303 ("Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose."); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 208 (2004) ("Legislators were careful to note during the passage of Title III that this language neither amounted to an affirmative grant of authority nor limited the President's foreign affair powers.").

41 *See* U.S. CONST. art. V (setting forth procedures for amending the Constitution, which do not include amendment by mere statute). Senator Nelson went on to acknowledge that the President might have "some inherent presidential power to authorize electronic surveillance without prior judicial approval," but argued that Congress could narrow the President's constitutional power by statute. FISA Hearings, *supra* note 39, at 74. Relying on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Nelson reasoned: "From this decision, it can be inferred . . . that the scope of the President's authority in this area will be determined by whether the Congress acts." FISA Hearings, *supra* note 39, at 75. The Senator is not alone in misunderstanding *Youngstown*, which in reality did not even involve the President's legitimate foreign affairs powers. At issue was whether the Commander-in-Chief power permitted the President to seize control of private property (the nation's steel mills) within the United States to prevent a labor strike—in clear violation of the Fifth Amendment's requirement that "due process of law" is required to seize private property. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582. The author explained the underlying error in testimony before the House Judiciary Committee a decade ago. *See Is Congress the Real "Lawbreaker"?: Reconciling FISA with the Constitution*, Prepared Statement of Professor Robert F. Turner before the U.S. House Committee on the Judiciary, Hearing on "Warrantless Surveillance and the Foreign Intelligence Surveillance Act; The Role of Checks and Balances in Protecting Americans' Privacy Rights" (Sept. 5, 2007) 23–28, https://cnsl.virginia.edu/sites/cnsl.virginia.edu/files/Turner-HJC-5Sept07-%28final%29.pdf.

42 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

43 *See, e.g.*, Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 ("Congress cannot direct the conduct of campaigns"). This language from *Ex parte Milligan* was quoted with favor by the majority in *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006).

Supreme Court on how it must decide pending cases.[44] Such interpretations would totally destroy the doctrine of separation of powers.

II. RECOGNITION OF BROAD EXECUTIVE POWER IN WIRETAPPING FOR FOREIGN INTELLIGENCE PURPOSES

As technology advanced during the twentieth century, presidents of both parties authorized warrantless surveillance on national security grounds both at home and abroad—and there was a general consensus that this was a proper exercise of the president's "executive Power" over foreign intercourse.[45] Indeed, when the Supreme Court held in 1967 that wiretaps of telephone conversations raised Fourth Amendment concerns in *Katz*, it expressly excluded national security wiretaps from its holding in a footnote.[46] Five years later, Justice Powell repeatedly emphasized, in footnotes to the *Keith* case, that the Court's holding did not limit warrantless wiretapping authorized by the President for *foreign* intelligence purposes.[47] While one might assume that if the Justices believed that warrantless foreign intelligence wiretaps authorized by the President were clearly constitutional they would have said so, that conflicts with the longstanding principle that the Court is not supposed to give "advisory" opinions—and thus is not to resolve constitutional issues not actually at issue in the pending case.

The theory that the grant of "executive Power" to the President in Article II, Section 1, of the Constitution empowered the President to authorize warrantless wiretaps for foreign intelligence purposes was widely

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44 During numerous debates since the 1970s—including one against Senator Javits in 1984—in which the author argued that the War Powers Resolution was unconstitutional—opponents have begrudgingly acknowledged the merits of the author's case, but argued the same result could be achieved by using "the power of the purse." This thinking is as dangerous as it is misguided. After all, the Supreme Court (and inferior courts as well) must rely upon appropriations to survive—to pay their clerks, print opinions, and the like. But if the appropriations power allows Congress to micromanage military operations and intelligence activities, it is difficult to see why this logic would not allow Congress also to condition judicial appropriations upon the outcome of Court decisions. The author has for decades used as an example a hypothetical "Supreme Court Neutralization Act," which would deny funds to the judiciary unless the Supreme Court overturned *Roe v. Wade* or other controversial cases. In *United States v. Lovett*, 328 U.S. 303, 306–07 (1946), the Court made it clear that the "power of the purse" is not unreviewable and cannot be used to achieve indirectly things that are barred by other parts of the Constitution. *See also* United States v. Klein, 80 (13 Wall.) U.S. 128, 148 (1871) (striking down a legislative attempt to undermine presidential pardons by modifying the jurisdiction of the Court of Claims).

45 *See infra* footnotes 47–52 and accompanying text.

46 *Katz*, 389 U.S. at 358 n.23 (1967) ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

47 *Keith*, 407 U.S. at 322.

embraced at the district and circuit court level both before and after *Keith*. In cases like *United States v. Butenko*,[48] *United States v. Brown*,[49] *United States v. Clay*,[50] and *United States v. Truong*,[51] appellate courts agreed that the President has independent constitutional power to authorize warrantless electronic surveillance for foreign intelligence purposes.

For example, during the Carter Administration, Attorney General Griffin Bell authorized the warrantless wiretapping of telephones and the placement of microphones in the home and office of Truong Dinh Hung—a Vietnamese national who had lived in the United States for more than a decade. As the Fourth Circuit explained, the Carter Administration Justice Department relied upon a "foreign intelligence" exception to the Fourth Amendment's warrant requirement:

> [T]he [Carter Administration] did not seek a warrant for the eavesdropping on Truong's phone conversations or the bugging of his apartment. Instead, it relied upon a "foreign intelligence" exception to the Fourth Amendment's warrant requirement. In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs. . . .
>
> The district court accepted the government's argument that there exists a foreign intelligence exception to the warrant requirement. . . .
>
> We agree with the district court . . . .[52]

Despite Justice Powell's repeated distinction in *Keith* between national security investigations involving purely domestic threats (which require a warrant), and those involving foreign powers and their agents in this country—and the consistent holdings of lower federal courts that the President has independent constitutional power to authorize warrantless surveillance where foreign powers were involved—the Congress in its wisdom passed a *Foreign* Intelligence Surveillance Act.

When Congress enacted FISA in 1978, it established not only a FISA Court (FISC), but also an appellate court known as the FISA Court of Review. In a unanimous 2002 opinion, the Court of Review declared:

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48 494 F.2d 593 (3d Cir. 1967), *cert. denied sub nom.*, Ivanov v. United States, 419 U.S. 881 (1974).

49 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 860 (1974).

As *United States District Court* teaches, in the area of domestic security, the President may not authorize electronic surveillance without some form of prior judicial approval. However, because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in United States v. Clay, that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.

Id. at 426.

50 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

51 629 F.2d 908 (4th Cir. 1980).

52 *Id*. at 912–13.

> The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power*.[53]

And that is the central thesis of this Article.

III. HISTORY OF THE UNCONSTITUTIONAL FISA

As the nation emerged from the divisive and angry debates over the Vietnam War,[54] Congress decided to ignore the constitutional separation of powers and usurp some of the President's constitutional power for itself. In explaining the significance of the FISA bill during a 1976 Senate Judiciary Committee hearing, Senator Gaylord Nelson characterized it as "an agreement between this Congress and this President"[55]—as President Carter had already given it his blessings. And with Carter's support, the unconstitutional bill could be signed in to law. But it would remain essentially a political bargain between Congress and President Carter, as he lacked the legal authority to compromise the constitutional powers of future presidents.

The version of FISA that finally passed the Senate in 1978 was introduced two years earlier by Senator Ted Kennedy, who told the Senate Intelligence Committee: "For the last 5 years I . . . have labored unsuccessfully to place some meaningful statutory restrictions on the so-

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53 In re Sealed Case, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002) (emphasis added). In a June 13, 2017, debate at the University of Virginia School of Law with the author on the constitutionality of FISA, Georgetown Law Professor Laura Donohue—who is among the nation's foremost national security law scholars—sought to dismiss this line of cases by contending all were decided prior to the 1978 enactment of FISA. First of all, that is not factually accurate—as *Truong* was decided in 1980. But, far more importantly, if the courts were correct in their unanimous conclusion that the President does have this power directly from the Constitution, a subsequent inconsistent act of Congress could not alter the Constitution.

54 This is not the occasion for a detailed discussion of the Indochina War. But it is worth noting that most of the arguments used by war critics have subsequently been undermined—in many instances by admissions from Hanoi. For example, one of the most important issues was whether there was "aggression from the north" to which the United States was responding consistent with the collective self-defense provisions of Article 51 of the UN Charter. War critics claimed the State Department was "lying" in its 1966 white paper by that title. But after the war, Hanoi published its official history of the war in which it documented its May 19, 1959, Politburo decision to open the Ho Chi Minh Trail and start sending troops, weapons, and supplies into South Vietnam to overthrow its government by armed force—in flagrant violation of Article 2(4) the UN Charter. VICTORY IN VIETNAM: THE OFFICIAL HISTORY OF THE PEOPLE'S ARMY OF VIETNAM, 1954–1975, 52 (Merle L. Pribbenow trans., 2002).

55 *See* FISA Hearings, *supra* note 39, at 75.

called inherent power of the Executive to engage in such surveillance."[56] Obviously, statutes cannot usurp independent powers vested by the Constitution in the President. So the key language in this sentence is the term "so-called." That raises the question, "so-called" by whom?

The idea that the Constitution left the President able to manage "the business of intelligence" without legislative involvement was clearly expressed in the Federalist papers.[57] And, as the FISA Court of Review noted in 2002, every court to decide the issue held the President has this constitutional power.[58] The unanimous FISA Court of Review "assum[ed]" the President had the authority to conduct warrantless searches to obtain foreign intelligence information, and noted that if that were true then FISA could not constitutionally usurp that constitutional power.[59]

The Supreme Court is not supposed to resolve constitutional issues that are not necessary to decide pending cases.[60] But the fact that in both *Katz* and *Keith* the Court majority expressly excluded warrantless foreign intelligence searches from its holdings is significant. And between 1967 and 1980 no less than five appellate court decisions affirming the President's constitutional power to authorize warrantless foreign intelligence wiretaps were appealed to the Supreme Court, and not once did the Court grant certiorari.[61] While one must be cautious about drawing inferences from a decision by the Court not to grant certiorari, surely if four justices had believed that American presidents might be *violating the Bill of Rights* they would have voted to hear at least one of these cases. When all three branches of government are in accord on the meaning of the Constitution, Senator Kennedy's use of the adjective "so-called" seems highly inappropriate.

One might draw a parallel with the Court's handling of cases involving the far more intrusive warrantless searches of commercial airline passengers and their luggage, without judicial involvement or the slightest individualized suspicion or probable cause to believe that a crime has or is about to be committed. The Supreme Court has, in passing, taken note of the fact that inferior courts were unanimous in upholding the

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56 *Electronic Surveillance Within the United States for Foreign Intelligence Purposes, Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Sen. Select Comm. On Intelligence*, 94th Cong. 5 (1976).

57 THE FEDERALIST No. 64.

58 *See* In re Sealed Case, 310 F.3d at 742.

59 *Id*. *See also* In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (Foreign Int. Surv. Ct. Rev. 2008), in which a different group of FISA Court of Review judges relied upon the Supreme Court's "special needs" cases in unanimously upholding a foreign intelligence exception to the Fourth Amendment's warrant requirement.

60 Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

61 *See, supra* notes 48–51 and accompanying text.

constitutionality of such searches—and even acknowledged that such searches were inherently reasonable given the risk of a plane being hijacked[62]—but it has never actually taken a case challenging warrantless airport searches. That is because all of the lower courts had reached the correct conclusion, and thus there was no need for it to spend time on the issue.

Much of the current confusion about the need for a warrant can be traced to ignorance about the Supreme Court's Fourth Amendment "special needs" jurisprudence. As the Court noted in *National Treasury Employees Union v. Von Raab*[63]:

> [O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to *balance* the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[64]

And the Court has repeatedly recognized that "no governmental interest is more compelling than the security of the Nation."[65]

IV. FISA'S EFFECT ON NATIONAL SECURITY

A few words about the harmful consequences of FISA may be in order. Not only did it violate the Constitution by usurping presidential power, but it also undermined American national security. Indeed, one can argue that, had FISA not been enacted, the 9/11 attacks may not have succeeded.

Most unauthorized disclosures of classified national security information ("leaks") come from within the Executive Branch, but a disproportionate share come from Capitol Hill.[66] The recognition that members of Congress could not keep secrets was at the core of the Framers'

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62 *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989).

63 489 U.S. 656 (1989).

64 *Id.* at 665–66 (emphasis added).

65 *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981).

66 Security clearances on Capitol Hill constitute only a tiny fraction of the 4.3 million clearances issued by the U.S. Government. *See* MICHAEL D. CHRISTENSEN, CONG. RESEARCH SERV., R43216, SECURITY CLEARANCE PROCESS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 5 (2016), https://fas.org/sgp/crs/secrecy/R43216.pdf. If one were to assume that each of the 16,116 staff members in the 115th Congress held a clearance that would constitute about three-tenths of one percent of the total clearances. In reality, in most congressional offices only two or three people have clearances. And thus, to say that "most leaks" come from the Executive Branch does not say very much. *The 115th Congress By the Numbers*, LEGISTORM, https://www.legistorm.com/congress_by_numbers/index/by/senate.html. For several examples of harmful leaks from legislators and committee staff, *see* STEPHEN F. KNOTTS, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 177–79 (1996).

decision to exclude them from "the business of intelligence."[67] Affirming that wisdom, following the enactment of statutes requiring disclosure of America's most sensitive intelligence activities to Congress, leaks became far more frequent.[68]

The FISA statute made it a *felony* for government employees to engage in foreign intelligence electronic surveillance outside the complex procedures established by the 1978 statute.[69] That, quite understandably, had a chilling effect across the board. One of many constraints on obtaining a FISA warrant was that the determination that an individual was an "agent" of a foreign power could not be made "solely upon the basis of activities protected by the [F]irst [A]mendment to the Constitution of the United States."[70] Thus, if a suspected terrorist published an article or delivered a speech confessing to such a role, it presumably could not be used to obtain a warrant. Nor could they obtain a FISA warrant if an individual publicly declared a belief that Allah wanted all infidels violently murdered. The First Amendment protects freedom of religious belief, speech and of the press—and that is a great thing. But the idea that threatening words cannot be used to initiate an investigation into possible criminal activity—especially in the context of trying to prevent a major terrorist attack—is absurd.

The case of Zacarias Moussaoui is instructive. A French citizen, Moussaoui took lessons on how to fly a small aircraft in Norman, Oklahoma in early 2001.[71] Moussaoui then showed up at the Pan Am International Flight Academy outside Minneapolis, Minnesota, with $6,800 in cash seeking training in a Boeing 747 flight simulator.[72] Suspicious flight instructors (whose students normally brought with them cashiers' checks from major airlines) alerted the FBI that Moussaoui might be a terrorist, and he was soon arrested for an immigration violation.[73]

Concerned that he might be planning a terrorist attack, the local FBI office repeatedly sought to obtain a FISA warrant so they could examine the contents of a laptop computer they had seized when they arrested

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67 THE FEDERALIST No. 64 (John Jay).

68 Former Senator Joe Biden once told a reporter that as a member of the Senate Intelligence Committee when he was briefed on a covert activity he believed was "hairbrained" he would threaten to "leak" it if it was not terminated. Bruce Fein, *The Constitution and Covert Action*, 11 HOUS. J. INT'L L. 53, 57 (1988).

69 50 U.S.C. § 1809(a)(1) (2012).

70 *Id.* § 1805.

71 OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS 103, 105 (2004), https://oig.justice.gov/special/s0606/final.pdf [hereinafter I.G. Report].

72 Timothy Dwyer & Jerry Markon, *Flight Instructor Recalls Unease with Moussaoui*, WASH. POST (Mar. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030901143.html.

73 *Id.*

Moussaoui.[74] But Congress had decided the President should not be able to examine laptops of suspected foreign terrorists unless the FBI could first establish that the owner was an "agent of a foreign power"—a narrowly defined term that required that the target "do the bidding of the foreign power."[75] Knowing almost nothing about Moussaoui, that was impossible. It is unclear whether there was anything on Moussaoui's laptop that might have alerted authorities to the pending 9/11 attacks, but that certainly might have been the case.

In 2006, Congress amended FISA to address the "lone wolf" problem of a foreign terrorist who was not an agent of a foreign power. Senator Arlen Spector, Chairman of the Senate Judiciary Committee, introduced legislation that accurately summarized the problem as it existed immediately prior to 9/11:

> For days before September 11, 2001, the Federal Bureau of Investigation suspected that confessed terrorist Zacarias Moussaoui was planning to hijack a commercial plane. The Federal Bureau of Investigation, however, could not meet the requirements to obtain . . . an order under the Foreign Intelligence Surveillance Act of 1978 to search his laptop computer.[76]

Put simply, Congress did not anticipate all of the threats that might confront the nation in the future. Ironically, this concern was a key consideration when the Framers of the Constitution decided to vest the "executive Power" in the President—a point emphasized by Alexander Hamilton in the Federalist papers.[77] In his *Second Treatise on Civil Government*, John Locke explained that circumstances in relations with foreign nations would constantly be changing, and were "much less capable to be directed by antecedent, standing, positive Laws, than [by] the [E]xecutive."[78] Therefore, such matters "must necessarily be left to the prudence and wisdom of those, whose hands [the Executive Power] is in, to be managed for the public good."[79]

Very concerned that Moussaoui's flying lessons might be connected to a major terrorist plot, the FBI contacted intelligence services from friendly countries seeking information tying him to a "foreign power"[80]—a term that included transnational terrorist groups like al-Qaeda.[81] The French provided some information in an effort to be helpful, but it was insufficient to justify

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74 I.G. Report, *supra*, note 70 at 101.

75 *Id*. at 46 (quoting H.R. REP. NO. 95-1283, pt. 1, at 34–35 (1978)).

76 The National Security Surveillance Act, S. 3876, 109th Cong. (2006).

77 THE FEDERALIST No. 66 (Hamilton).

78 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 147 (1764).

79 *Id.*

80 *See* I.G. Report, *supra* note 70, at 151.

81 *Id.* at 45.

a warrant.[82] Despite repeated requests emphasizing the urgency of the situation, the British did not respond for more than two weeks.[83]

Shortly after the 9/11 attacks, the British provided information establishing that Moussaoui had attended an al-Qaeda training camp in Afghanistan[84]—information that if gained earlier might have justified a FISA application. Three years after this event, the Department of Justice Inspector General released a massive report on the Moussaoui affair detailing the events leading up to attack.

In disclosing this event, the report commented: "It is not clear why the information from the British was not provided to the FBI until after September 11," as the request had initially been made both in writing and by phone on August 21, 2001.[85] Having spoken with friends who have worked for foreign intelligence services over many years, the author strongly suspects that the information placing Moussaoui in an al-Qaeda training camp most likely came from a very sensitive source that the British could not afford to have compromised—and America's inability to keep secrets persuaded them to withhold the information initially. Recall, this was precisely the same reason Benjamin Franklin and his colleagues on the Committee of Secret Correspondence decided they could not share information about a French covert operation with others in Congress.[86]

After the 9/11 attacks, President George W. Bush authorized the National Security Agency to engage in more vigorous collection efforts against suspected foreign terrorists[87]—a program that would have been widely recognized as lawful prior to FISA. General Michael Hayden, who served as Director of NSA at the time of the 9/11 attacks, has publicly expressed the view that had the controversial NSA Terrorist Surveillance Program (TSP) been in effect prior to those attacks, "[the United States intelligence community] would have detected some of the 9/11 al Qaeda operatives in the United States, and would have identified them as such."[88] FISA was the primary reason the TSP was not in effect prior to the 9/11 attacks.

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82 *Id.* at 140–41.

83 *Id.* at 151–52.

84 *Id*. at 180.

85 *Id*.

86 Franklin & Morris, *supra* note 20.

87 *See, e.g.*, Susan Page, *Furor Erupts Over NSA's Secret Phone Database*, USA TODAY (May 12, 2006), http://usatoday30.usatoday.com/educate/college/polisci/articles/20060521.htm.

88 Remarks by Lt. Gen. Michael V. Hayden, Nat'l Press Club (Jan. 23, 2006), https://fas.org/irp/news/2006/01/hayden012306.html. Space will not permit a full discussion of the tradecraft shortcomings of the 9/11 terrorists, but it is reasonably clear that had the intelligence agencies identified one or two they would have easily been led to the others unless blocked by FISA. Terrorists shared addresses, phone numbers, credit cards, and in general demonstrated minimal attention to keeping their plans and relationships secret. *See, e.g.*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 168, 277 (2004).

CONCLUSION

Congress has already renewed Section 702 of FISA for six more years.[89] Under present circumstances, the Congress had to have voted "yes" because a failure to renew would have been widely interpreted as a denial of critically important intelligence information that would likely cost countless more American lives.

Because of space constraints, this Article has not focused on the substantive objections some have made to the President's collection of foreign intelligence information involving foreigners outside the United States.

On its face, it is absurd to argue that the President lacks the constitutional power to authorize the warrantless collection of foreign intelligence about foreign nationals abroad—the Supreme Court has never suggested that such individuals are protected by the Fourth Amendment. Indeed, this issue was addressed by the Court in the 1990 case of *United States v. Verdugo-Urquidez*,[90] and decided in the negative.[91] Furthermore, Section 702 expressly prohibits any search that would violate the Fourth Amendment.

One concern is that while engaging in perfectly lawful searches to prevent terrorist attacks, the government might inevitably capture communications between the target of the search and a U.S. person abroad or within the United States. But as the FISA Court of Review observed in the 2008 case *In re Directives*: "It is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful."[92] The Supreme Court has made it clear that communications captured pursuant to a lawful electronic intercept may be admitted into evidence in court against third parties.[93] For example, if a family member of the targeted individual uses the phone and admits to a crime, or if an individual unknown to authorities confesses to criminal misconduct while communicating with the target of a lawful warrant.[94] Once the initial intercept is lawful, any "rights" of third parties become essentially collateral damage.

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89 FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (2017).

90 494 U.S. 259 (1990).

91 *Id.* at 261 ("The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. We hold that it does not.").

92 551 F.3d at 1015.

93 *See* United States v. Kahn, 415 U.S. 143, 157–58 (1974).

94 *See id.* ("We further hold that neither the language of Judge Campbell's order nor that of Title III requires the suppression of legally intercepted conversations to which Irving Kahn was not himself a party.").

Members of Congress take an oath of office to defend the Constitution.[95] It is important, and it should be taken seriously. So, while the initial goal was to reauthorize Section 702, that was ideally but a first step. It is abundantly clear that—as John Jay explained in Federalist 64—the Constitution vests "the business of intelligence" in the President as part of the nation's "executive Power." So, at some point, Members of Congress should consider repealing the entire FISA statute and restore the original constitutional scheme. In the alternative, they have the option of seeking to amend the Constitution to alter the separation of powers in this area.

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95 U.S. CONST. art. VI, cl. 3.