Testimony of

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Wartime Executive Power and the NSA's Surveillance Authority II
Statement of

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Mr. Chairman, distinguished members of the Committee:

My name is Robert A. Levy. I am a senior fellow in constitutional studies at the Cato Institute. Thank you for inviting me to comment on selected aspects of the National Security Agency's warrantless surveillance program.

I. Introduction

President Bush has authorized the NSA to eavesdrop, without obtaining a warrant, on telephone calls, emails, and other communications between U.S. persons in the United States and persons outside of the United States. For understandable reasons, the operational details of the NSA program are secret, as are the details of the executive order that authorized the program. But Attorney General Gonzales has stated that surveillance can be triggered if an executive branch official has reasonable grounds to believe that a communication involves a person "affiliated with al-Qaeda or part of an organization or group that is supportive of al-Qaeda."

The attorney general has declared that the president's authority rests on the post-9/11 Authorization for Use of Military Force [AUMF] and the president's inherent wartime powers under Article II of the U.S. Constitution, which includes authority to gather "signals intelligence" on the enemy.

The NSA program, and its defense by the administration, raise these questions, which I propose to address below: (1) Does NSA warrantless surveillance violate the Fourth Amendment's protection against unreasonable searches? (2) Does the program violate the Foreign Intelligence Surveillance Act [FISA]? (3) Does the AUMF authorize warrantless surveillance by the NSA? (4) Do the president's inherent powers allow him to ignore FISA? (5) What should be done if the executive branch has acted unlawfully?

My conclusions, as elaborated in the following sections, are: First, the president has some latitude under the "executive Power" and "Commander-in-Chief" Clauses of Article II, even lacking explicit congressional approval, to authorize NSA warrantless surveillance without violating the "reasonableness" requirement of the Fourth Amendment. But second, if Congress has expressly prohibited such surveillance (as it has under FISA), then the statute binds the president unless there are grounds to conclude that the statute does not apply. Third, in the case at hand, there are no grounds for such a conclusion -- that is, neither the AUMF nor the president's inherent powers trump the express prohibition in the FISA statute.

My testimony today addresses only the legality of the NSA program, not the policy question whether the program is necessary and desirable from a national security perspective. If the program is both essential and illegal, then the obvious choices are to change the program so that it complies with the law, or change the law so that it authorizes the program.

Nor do I address, other than to mention in this paragraph, three other constitutional arguments that might be advanced in opposition to warrantless surveillance by the NSA. First, in contravention of the First Amendment, the program may deprive innocent persons of the right to engage freely in phone and email speech. Second, the president may have violated his constitutional obligation to "take Care that the Laws be faithfully executed." Among the laws to be faithfully executed is FISA. No doubt, the president has some discretion in enforcing the law, but not leeway to take actions that the law expressly prohibits. Third, in contravention of the Fifth Amendment, the NSA surveillance program may represent a deprivation of liberty without due process. Liberty, as we know from the Supreme Court's recent decision in Lawrence v. Texas, encompasses selected aspects of privacy that are separate from the question whether particular intrusions are reasonable in terms of the Fourth Amendment.

Those concerns are legitimate, but they have not been central to the debate over NSA surveillance, and they are not the focus of the Committee's deliberations or, therefore, of my testimony.

II. Does NSA Warrantless Surveillance Violate the Fourth Amendment?

The president has contended that NSA warrantless surveillance does not offend Fourth Amendment protections against "unreasonable" searches. That contention is correct as far as it goes; but it does not go far enough.

To begin, the Fourth Amendment requires probable cause in order to obtain a warrant, but it does not require a warrant for all searches. There are numerous instances of permissible warrantless searches -- e.g., hot pursuit, evanescent evidence, search incident to arrest, stop and frisk, automobile searches, plain view searches, consent searches, and administrative searches. In fact, federal courts have recognized a border search exception and, within the border search exception, an exception for monitoring certain international postal mail. As for a national security exception for foreign intelligence surveillance, that remains an open issue. The so-called Keith case in 1972 said there would be no exception if a domestic organization were involved; but there might be an exception if a foreign power were involved.

Thus, the administration can credibly argue that it may conduct some types of warrantless surveillance without violating the Fourth Amendment. And because the president's Article II powers are elevated during time of war -- assuming the AUMF to be the functional, if not legal, equivalent of a declaration of war -- his post-9/11 authorization of NSA warrantless surveillance might be justifiable if the Congress had not expressly disapproved.

But the Congress did expressly disapprove, in the FISA statute. Therefore, the president's assertion of a national security exception that encompasses the NSA program misses the point. The proper question is not whether the president has inherent authority to relax the "reasonableness" standard of the Fourth Amendment in order to direct warrantless surveillance, even if not approved by Congress. The answer to that question is "yes, in some cases." But the narrower issue in the NSA case is whether the president, in the face of an express statutory prohibition, can direct that same surveillance. The answer is "no," and I am not aware of any case law to support an argument to the contrary.

Put somewhat differently, Article II establishes that the president has inherent powers, especially during wartime. And those powers might be sufficient to support his authorization of warrantless surveillance, notwithstanding the warrant provisions of the Fourth Amendment. But Article II does not delineate the scope of the president's wartime powers. And because Congress has concurrent authority in this area, an express prohibition by Congress is persuasive when deciding whether the president has overreached.

The distinction between concurrent and exclusive powers is important. For example, the president's "Power to grant Reprieves and Pardons" is exclusive; there is no stated power for Congress to modify it by legislation -- e.g., by declaring certain offenses unpardonable. By contrast, the president's wartime powers are shared with Congress (see

note 16). That suggests the president must comply with duly enacted statutes unless he can show that Congress has exceeded its authority. In this instance, President Bush has made no such showing.

III. Does NSA Warrantless Surveillance Comply with FISA?

Accordingly, even if the administration establishes that NSA warrantless surveillance during wartime is reasonable in the context of the Fourth Amendment, the question remains whether the NSA program violates the express terms of FISA. It does.

The text of FISA is unambiguous: "A person is guilty of an offense if he intentionally engages in electronic surveillance ... except as authorized by statute." That provision covers communications from or to U.S. citizens or permanent resident aliens in the United States. Moreover, the Wiretap Act provides that its procedures and FISA "shall be the exclusive means by which electronic surveillance ... may be conducted."

From the early 1960s until 1973, the NSA, without approval of Congress, used a "watch list" of U.S. citizens and organizations in sorting through intercepted foreign communications. That was known as Project Minaret. From 1945 to 1975, telegraph companies gave the NSA copies of most telegrams sent from the United States to overseas. That was known as Project Shamrock, "probably the largest governmental interception program affecting Americans ever undertaken." Of course, there were also domestic spying abuses by the Federal Bureau of Investigation under J. Edgar Hoover against suspected communists, Black Panthers, civil rights leaders and others. That's why FISA was enacted in 1978. It had a dual purpose: to curb abuses while facilitating domestic surveillance for foreign intelligence purposes.

To be sure, the FISA statute was drafted to deal with peacetime intelligence. But that does not mean the statute can be ignored when applied to the post-9/11 war on terror. First, the FISA text makes no distinction between wartime and peacetime. To conduct surveillance without statutory authorization, in wartime or peacetime, is a crime, punishable by up to five years in prison. Second, in passing FISA, Congress expressly contemplated warrantless surveillance during wartime, but limited them to the first 15 days after war is declared. The statute reads: "Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." Third, FISA warrant requirements and electronic surveillance provisions were amended by the USA PATRIOT Act, which was passed in response to 9/11 and signed by President Bush. If 9/11 triggered "wartime," as the administration has repeatedly and convincingly argued, then the amended FISA is clearly a wartime statute.

Some administration supporters have argued that FISA and the PATRIOT Act provide tools that the president had anyway, except he could not use the acquired evidence in a criminal prosecution. Yet there is no support for the notion that members of Congress, in passing the two statutes, thought they were simply debating the rules of evidence. Moreover, warrant requirements are triggered even if the government declines to prosecute. Imagine police secretly entering a private home without a warrant, installing bugs on phones and tracer software on computers, searching every room and closet, then leaving, never to be heard from again -- no arrest, no indictment, no notice to the target. Clearly, the Fourth Amendment's warrant provisions have been violated, even if the target is unaware and no fruits of the search are used as evidence in a criminal prosecution. A key purpose of the Amendment is to ensure privacy in those situations in which an expectation of privacy is reasonable.

That said, there may be some international satellite or radio communications that do not come under FISA's prohibition because the communicating parties could not reasonably expect privacy. But I know of no court case that has denied there is a reasonable expectation of privacy by U.S. citizens and permanent resident aliens in their phone calls and emails.

Moreover, the Justice Department, in a December 2005 letter to Congress, acknowledged that the president's October 2001 NSA eavesdropping order did not comply with the "procedures" of the FISA statute. The Department offers two justifications -- the first of which I examine next.

IV. Does the AUMF Authorize Warrantless Surveillance by the NSA?

The Justice Department asserts that Congress's post-9/11 AUMF provides the statutory authorization that FISA requires. Under the AUMF, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons" who may have been connected to 9/11. But that cannot reasonably mean the AUMF authorizes warrantless surveillance by the NSA in the face of an express provision in FISA that limits such surveillance to the first 15 days after a declaration of war.

A settled canon of statutory interpretation directs that specific provisions in a statute supersede general provisions -- lex specialis derogat legi generali. When FISA forbids "electronic surveillance without a court order" while the AUMF permits "necessary and appropriate force," it is bizarre to conclude that electronic surveillance without a court order is authorized. In voting for the AUMF, members of Congress surely did not intend to make compliance with FISA optional. In fact, Congress was simultaneously relaxing selected provisions of FISA via the PATRIOT Act. Here's how the Washington Post put it: "Clearheaded members of Congress voting for the [AUMF] certainly understood themselves to be authorizing the capture of al-Qaeda and Taliban fighters. We doubt any members even dreamed they were changing domestic wiretapping rules -- particularly because they were focused on that very issue in passing the USA PATRIOT Act."

Also in the Washington Post, former Senate minority leader Tom Daschle (D-SD) wrote that Congress rejected proposed language from the White House that the broader purpose of the AUMF was to "deter and pre-empt any future acts of terrorism or aggression." And Congress also refused a last-minute administration proposal to change "appropriate force against those nations" to read "appropriate force in the United States and against those nations." Notably, not one of the 518 members of Congress who voted for the AUMF has now come forth to dispute Sen. Daschle's account, or claim that his or her vote was intended to approve NSA warrantless surveillance.

Still, proponents of the NSA surveillance program argue that (a) the intent of members of Congress in signing the AUMF is trumped by the text of the AUMF itself, (b) "necessary and appropriate force," as permitted under the AUMF, surely includes the gathering of battlefield intelligence, and (c) the war on terror, and the events of 9/11 in particular, have expanded the notion of "battlefield" to encompass places in the United States. Those assertions, insofar as they are posited as justification for NSA warrantless surveillance, are mistaken for three principal reasons:

First, communications from the actual battlefield -- e.g., Afghanistan -- or from anywhere else outside the United States, can be monitored without violating FISA as long as the target of the surveillance is not a U.S. person in the United States.

Second, a call from, say, France or the United Kingdom cannot reasonably be construed as battlefield-related unless the term battlefield has no geographic limits. The courts have rejected that idea in comparing the arrests of two U.S. citizens, Yaser Hamdi and Jose Padilla. In Hamdi v. Rumsfeld, federal appellate judge J. Harvie Wilkinson pointedly noted that Yaser Hamdi's battlefield capture was like "apples and oranges" compared to Jose Padilla's arrest in Chicago. And in Padilla v. Rumsfeld, the U.S. Court of Appeals for the Second Circuit rejected the argument that all the world is a battlefield in the war on terror.

Third, if Naples, Italy is part of the battlefield, why not Naples, Florida? The same logic that argues for warrantless surveillance of foreign-to-domestic and domestic-to-foreign communications would permit warrantless surveillance of all-domestic communications as well. Of course, the administration denies the existence of an all-domestic surveillance program, but so too would the administration have denied the NSA's current program but for the leak in the New York Times.

As law professor Richard Epstein has noted: A current battlefield, where there is armed combat, is vastly different from a potential battlefield that could erupt if the enemy were to launch a terrorist act. To argue that we are living in a "war zone" would be news to most Americans jogging in Central Park or watching television in Los Angeles. There is, after all, a distinction to be made between suburban Chicago and suburban Baghdad. Nor did the events of 9/11 transform the United States into a battlefield in the Afghan war -- any more than did the attack on Pearl Harbor or the invasion by eight Nazis in the Ex parte Quirin case transform the United States into a World War II battlefield.

What, then, does the preamble of the AUMF mean when it refers to terrorist acts that "render it both necessary and appropriate that the United States exercise the right to self-defense and to protect U.S. citizens both at home and

abroad" (emphasis added)? Here, too, Professor Epstein has correctly interpreted the text: The AUMF preamble sets out the purpose of the resolution but does not address the legitimacy of means undertaken to carry out that purpose. No one doubts that the president has the right to use force in self-defense to protect citizens at home and abroad. But a preamble containing a broad statement of goals is not an affirmative grant of power to violate the law.

Finally, did the Supreme Court in Hamdi v. Rumsfeld interpret the AUMF so broadly as to buttress the administration's claim that the AUMF justifies the NSA surveillance program? At issue in Hamdi was whether the AUMF satisfied the Non-Detention Act, which required a statute authorizing Hamdi's extended detention. The government insisted that a U.S. citizen could be detained indefinitely, without access to counsel, without a hearing, and without knowing the basis for his detention. The Court plurality agreed that a U.S. citizen could be initially detained under the AUMF. But only "Taliban combatants" ; only with access to counsel ; only after "notice of the factual basis for his classification" ; only after a hearing ; and only if not "indefinite detention for ... interrogation." In other words, the Hamdi Court interpreted the scope of the AUMF narrowly, not broadly. Not even Hamdi's lawyers had argued that the government had to release enemy soldiers captured on the battlefield. Yet each of the government's other contentions were rebuffed by the Court. Indeed, if Hamdi were a victory for the government, why did the Defense Department release him after declaring in court papers that merely allowing Hamdi to meet with counsel would "jeopardize[] compelling national security interests" and "interfere with if not irreparably harm the military's ongoing efforts to gather intelligence."

In summary, the AUMF does not address, much less authorize, warrantless domestic surveillance.

V. Do the President's Inherent War Powers Allow Him to Ignore FISA?

Attorney General Gonzales has a second, more plausible, defense of warrantless surveillance -- namely, Article II of the Constitution states that "The executive Power shall be vested in a President" who "shall be Commander in Chief" of the armed forces. That power, says the attorney general, trumps any contrary statute during time of war.

I respectfully disagree -- which is not to say I believe the president is powerless to order warrantless wartime surveillance. For example, intercepting enemy communications on the battlefield is clearly an incident of his war power. But warrantless surveillance of Americans inside the United States, who may have nothing to do with al-Qaeda, does not qualify as incidental wartime authority. The president's war powers are broad, but not boundless. Indeed, the war powers of Congress, not the president, are those that are constitutionalized with greater specificity.

The question is not whether the president has unilateral executive authority, but rather the extent of that authority. And the key Supreme Court opinion that provides a framework for resolving that question is Justice Robert Jackson's concurrence in Youngstown Sheet & Tube v. Sawyer -- the 1952 case denying President Truman's authority to seize the steel mills. Truman had argued that a labor strike would irreparably damage national security because steel production was essential to the production of war munitions. But during the debate over the 1947 Taft-Hartley Act, Congress had expressly rejected seizure.

Justice Jackson offered the following analysis, which was recently adopted by the Second Circuit in holding that the administration could no longer imprison Jose Padilla: First, when the president acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum." Second, when the president acts in the absence of either a congressional grant or denial of authority, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." But third, where the president takes measures incompatible with the express or implied will of Congress -- such as the NSA program, which violates an express provision of the FISA statute -- "his power is at its lowest."

Even under Youngstown's second category (congressional silence), the president might have inherent wartime authority to interpret the "reasonableness" standard of the Fourth Amendment in a manner that would sanction certain warrantless surveillance. But the NSA program does not fit in Youngstown's second category. It belongs in the third category, in which the president has acted in the face of an express statutory prohibition.

Naturally, if the statutory prohibition is itself unconstitutional, the administration is not only permitted but obligated to ignore it. That's the argument administration supporters have proffered to excuse the NSA's defiance of FISA. To

bolster their case, they cite the only opinion that the FISA Court of Review has ever issued, In re: Sealed Case. There, the appellate panel mentioned several earlier cases that concluded the president has "inherent authority to conduct warrantless searches to obtain foreign intelligence information." The Court of Review then added: "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."

Three responses: First, I do not contend that the president lacks "inherent authority to conduct warrantless searches to obtain foreign intelligence information." He has such authority, but Congress, exercising its own concurrent wartime powers, has limited the scope of that authority by excluding warrantless surveillance intentionally targeted at a U.S. person in the United States. Second, the surveillance in the earlier cases cited by Sealed Case took place pre-FISA, so Congress had not yet laid out the rules. Third, the quote from Sealed Case conveniently stops one sentence short. Here is the very next sentence: "The question before us is the reverse, does FISA amplify the President's power by providing a mechanism that at least approaches a classic warrant and which therefore supports the government's contention that FISA searches are constitutionally reasonable." In resolving that question, the Court of Review did not conclude that FISA "encroach[ed] on the President's constitutional power." Quite the contrary, according to the court, FISA permissibly amplified the president's power. The restrictive provisions in FISA were simply a clarification of his new and expanded authority.

Thus, Sealed Case provides no support for the assertion that FISA unconstitutionally constrains the president's inherent wartime authority. Moreover, such claims leave important questions unanswered. For example: If warrantless domestic surveillance is incidental to the president's inherent powers, so too are sneak-and-peek searches, roving wiretaps, library records searches, and national security letters -- all of which were vigorously debated in deciding whether to reauthorize the PATRIOT Act. Could the president have proceeded with those activities even if they were not authorized by Congress? If so, what was the purpose of the debate? And if not, what makes the NSA program different?

Further, the attorney general asserts that the AUMF and the commander-in-chief power are sufficient to justify the NSA program. He, or his predecessor, made similar claims for military tribunals without congressional authorization, secret CIA prisons, indefinite detention of U.S. citizens, enemy combatant declarations without hearings as required by the Geneva Conventions, and interrogation techniques that may have violated our treaty commitments banning torture. Is any of those activities outside the president's commander-in-chief and AUMF powers? If not, what are the bounds, if any, that constrain the president's unilateral wartime authority?

VI. What Should Be Done to Remedy Unlawful Acts by the Executive Branch?

Having concluded that NSA's warrantless surveillance program is illegal, let me comment briefly on some remedial steps to cure the president's violation of the FISA statute.

At the outset, I reject the proposition that the president, but for his ability to order warrantless surveillance of U.S. persons, would be impotent in the war on terror. First, he has expansive power to conduct surveillance outside the United States. Second, the PATRIOT Act and other statutes have given him broad leeway within the United States. Third, he has considerable, although not plenary, inherent authority under the commander-in-chief power when Congress has approved, or even perhaps when Congress has been silent. But when Congress exercises its own powers and expressly prohibits what the president would like to undertake, the president's power is limited.

Yet, even then, if it's necessary and desirable to monitor the communication of a U.S. person in the United States, then the president could, and should, have sought a FISA warrant. The requirement to obtain a warrant from the FISA court is probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups. That standard is far below the usual criminal-law requirement for probable cause that a crime has been, or is about to be, committed. Almost all FISA requests are granted, and emergency approval for wiretaps can be handled within hours. In fact, the FISA statute allows the government in emergency situations to put a wiretap in place immediately, then seek court approval later, within 72 hours.

Attorney General Gonzales has declared that 72 hours is not enough; it takes longer than that to prepare a warrant application. That is tantamount to arguing that the Justice Department lacks sufficient personnel to handle its

workload, so it's compelled to act illegally to circumvent prescribed procedures. Moreover, the administration has not, to my knowledge, complained about the same 72-hour window that governs domestic-to-domestic communications under FISA. Why is the window too short only when the party on the other end happens to be outside the United States? Indeed, the window was increased from 24 to 72 hours in the Intelligence Authorization Act for Fiscal Year 2002. If the longer period is still inadequate, why hasn't the administration requested another extension from Congress?

In his recent Senate testimony on the NSA program, Attorney General Gonzales outlined the following steps that must be taken before an emergency warrant application is filed. (1) NSA officials identify a legitimate target. (2) NSA lawyers ensure that the application complies with FISA. (3) Justice Department lawyers must agree. (4) The attorney general must agree. (5) The application must be approved by a Cabinet-level officer. (6) It must be approved by a senior official with mass security responsibility, such as the director of the FBI.

FISA itself imposes only three requirements: (1) The attorney general must approve. (2) An official confirmed by the Senate with foreign affairs responsibility must certify that the surveillance has foreign intelligence value. (3) "Minimization procedures" must ensure that surveillance is not overbroad (for example, by preventing retention of information unrelated to national security). Accordingly, the redundancies cited by the attorney general are not necessary to comply with FISA. My colleague at the Cato Institute, Mark Moller, points out that the president "could cull out duplicative layers of lawyer oversight at both NSA and the Department of Justice. He could eliminate multiple sign-offs by senior officials. NSA case officers could initiate the warrant request. An intelligence oversight counsel assigned to specific ongoing investigations could process the warrant within the 72-hour time frame."

Moller concludes that "the president can simply change the procedures and cut the red tape. The president's authority to manage the executive branch is a far more modest assertion of power than an 'inherent' authority to ignore the law."

Admittedly, FISA warrants might not be available for some surveillance operations that the NSA would like to undertake. FISA allows warrants only against foreign powers, including terrorist groups, or their agents. Therefore, a warrant is not available if the intended domestic target is not an "agent," even if he is an al-Qaeda contact (perhaps not aware that his communications have intelligence value). Conceivably, FISA could be amended so that warrants could issue merely upon showing that an individual has had contact with al-Qaeda. That is a policy question, not a legal question, on which I claim no special insight.

But it is important to note that under current law, surveillance of non-agent U.S. persons is even more egregious than warrantless surveillance of agents. The latter could be cured by a warrant; the former could not. In other words, if NSA targets a non-agent U.S. person, the violation of FISA consists not merely of unauthorized surveillance without obtaining a FISA warrant, but of surveillance under circumstances where a FISA warrant would never have been granted.

If the president thought the law should be amended to authorize warrantless surveillance of either agents or non-agents, he had a convenient vehicle for that purpose shortly after 9/11. That's when the PATRIOT Act was passed, substantially enhancing the president's authority under FISA and expanding his ability to conduct foreign intelligence surveillance. The president could have, but did not, seek new authority for the NSA -- authority that he has now decreed, unilaterally, without input from either Congress or the courts.

Maybe Congress would not have approved if asked. Or maybe the courts would have overridden any further loosening of the warrant provisions. But the legal stumbling block for the administration is not just that it failed to get affirmative support for expanded surveillance from Congress and the courts. The bigger predicament is that Congress, without objection from the president, expressly rejected warrantless domestic surveillance and codified that prohibition in the FISA statute, which the president implicitly accepted when he signed the PATRIOT Act.

Because the central problem with the NSA surveillance program is too much unchecked authority in the executive branch, the obvious solution is for the federal legislature or the federal judiciary to intervene. But the courts may decide they cannot play a role: First, the Justice Department will not prosecute; second, surveillance targets who have been secretly monitored are unlikely to know of their victimization; third, potential targets may not be able to

prove sufficient injury; and fourth, aggrieved members of Congress have previously been denied legal standing to sue.

That elevates the need for congressional intervention. But the president has resisted asking Congress to approve NSA domestic surveillance because, among other things, publicity might tip off al-Qaeda. Perhaps his concern is legitimate, but "tipping off terrorists" is an excuse not to debate any counterterrorism statute, including the PATRIOT Act, which was nonetheless debated vigorously. Moreover, the president's rationale assumes that al-Qaeda would be blissfully ignorant of the surveillance but for congressional deliberations.

The administration may be justified in taking measures that in pre-9/11 times could be seen as infringements of civil liberties. After all, the fuzzy text of the Fourth Amendment (unreasonable searches) and the Fifth Amendment (due process) leaves room for exceptions at the margin. But the executive branch cannot, in the face of an express prohibition by Congress, unilaterally set the rules, execute the rules, and eliminate oversight by the other branches.