Testimony of

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CONGRESS, TOO,
MUST "OBEY THE LAW":
Why FISA Must Yield to
The President's Independent
Constitutional Power to Authorize
the Collection of Foreign Intelligence

Prepared statement of
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"There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have [sic] 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."
-- John Jay
Federalist No. 64

EXECUTIVE SUMMARY

Mr. Chairman, I am honored to appear once again before this distinguished committee to address critically important issues of constitutional law related to the separation of national security and war powers. I have prepared a detailed statement of my views on these issues that I would propose to submit for the record. With your permission, I will at this time only briefly summarize some of my reasoning, authority, and conclusions.

I share the view, voiced time and again by members of this Committee during the first round of these hearings on February 6, that America is a "government of laws" and that no one - not even the president - is "above the law." Indeed, my sense is that there is virtually no discord on the issue of whether, during a period of congressionally authorized war, our government should be seeking to intercept communications from members of al Qaeda and related terrorist organizations abroad--perhaps all the more so when someone inside this country is involved in the communication. The sole concern seems to be a belief that the President has violated the "exclusive" language of FISA--and that, even in wartime, the president must "obey the law."

I certainly agree that the highest officials in our land must obey the law. And I would go further, and make the point that not even Congress is "above the law." I would emphasize that not all "laws" are created equal. The supreme law of the land is, first of all, our Constitution. While the Constitution derives its legitimacy from the consent of the governed, and is subject to modification by the people through their elected representatives as provided in Article V; until it is changed through that process--or its meaning is clarified by a decision by the Supreme Court--it binds Congress every bit as much as the president.

With all due respect, Mr. Chairman, it is my view that, in the wake of the Vietnam tragedy, Congress exceeded its proper authority in several instances related to war powers and intelligence. I don't question the sincerity of legislators (or scholars) who believe the Constitution intends for there to be legislative or judicial "checks" on all presidential powers; but having studied this area of constitutional law for three decades I can assure you that was not the understanding of our Founding Fathers. And when Congress seeks to impose "checks"--either in the form of a requirement for legislative approval or by creating a new "court" to oversee the exercise of executive discretion--it violates the law of the Constitution. And the consequences of such lawbreaking to our security can be substantial. As Chief Justice John Marshall observed in perhaps the most famous of all Supreme Court cases, Marbury v. Madison, "an act of the legislature, repugnant to the constitution, is void." And that fundamental principle is but one of two critical messages from Marbury of direct relevance to today's hearing. The other involves the belief that "unchecked" presidential power is incompatible with democratic governance. The Chief Justice wrote: "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. . . . [A]nd whatever 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. [Emphasis added.]" And at the core of this executive discretion, I submit, is the gathering of foreign intelligence during wartime. As John Jay explained in Federalist No. 64, under the new Constitution the President would be left "able to manage the business of intelligence as prudence might suggest."

The men who gathered in Philadelphia in the summer of 1787 to write out Constitution were remarkably well-read individuals, and they had honed their theoretical understanding of the essence of good government through practical experience during the Revolutionary War and the colonial period. They understood and shared John Locke's belief that success in war and foreign affairs required unity of plan, speed and dispatch, and secrecy--all attributes of the Executive rather than the Legislative branch-and, like Locke, they knew from experience that Congress could not be depended upon to keep secrets. Indeed, in 1776, Benjamin Franklin and the other four members of the Committee of Secret Correspondence explained their unanimous decision not to tell their colleagues in the Continental Congress about a sensitive French-American covert operation by writing: "We find by fatal experience that Congress consists of too many members to keep secrets."

When they vested the nation's "executive power" in the president in Article II, Section 1, of the Constitution, they interpreted that term--as it was described by writers like Locke, Blackstone, Montesquieu, and others of their era--as including the management of war, peace, and all relations with the external world.

This is not mere speculation. As I document in my written testimony, George Washington, James Madison, Thomas Jefferson, John Jay, Alexander Hamilton, and John Marshall each made specific reference to the grant of "executive power" in Article II, Section 1, in concluding that the president had the general control over the making and implementation of foreign policy. As Jefferson put it in 1790, "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. . . ."

To be sure, Congress and the Senate were given very important roles in both foreign relations and war. The president has no military to command unless it is first raised and supported by Congress, and he may not spend Treasury funds for any purpose without appropriations. He may not initiate an all-out aggressive war (which, like the power of Congress to grant "letters of marque and reprisal," is now illegal under international law and thus an anachronism) without the approval of both chambers of the Legislature, he may not appoint ambassadors or military officers without Senate consent, and one-third-plus-one of the Senate is empowered to block his ratification of a treaty. Congress also has authority to regulate commerce with foreign nations; to make rules for the government and

regulation of the military; to define and punish offenses against the law of nations (including, presumably, prohibiting torture); and other powers as well. But these were viewed as exceptions taken from the general vesting of "executive power" in the president, and thus were uniformly held to be subject to a narrow construction. And none of them even arguably gives Congress power to usurp the President's "executive" power to collect foreign intelligence even in peacetime.

The need for secrecy was central to the decision to vest not just foreign intelligence but the negotiation of treaties exclusively in the president. As the Supreme Court observed in the landmark 1936 Curtiss-Wright decision, "Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it." (Sadly, since Vietnam, Senators have too often breached this barrier.)

In his prize-winning book, The National Security Constitution, my friend Harold Koh, now Dean of Yale Law School, argues that Curtiss-Wright was essentially modified or overturned as the prevailing American foreign policy paradigm by Justice Jackson's concurring opinion in Youngstown. With all due respect, that interpretation is manifestly in error.

Justice Jackson did not in any way challenge Curtiss-Wright--which, just two years earlier, in Eisentrager, he had cited as authority for the proposition that the president is "exclusively responsible" (my emphasis) for the "conduct of diplomatic and foreign affairs." On the contrary, like Justice Black for the Court majority, in Youngstown Jackson carefully distinguished the seizure of private property within the United States (without the "due process of law" required by the Fifth Amendment) from a case involving external affairs. He noted that the president's "conduct of foreign affairs" was "largely uncontrolled, and often even is unknown," by the other branches, and added: "I should indulge the widest latitude of interpretation to sustain his [the president's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." (My emphasis.)

In a similar manner, there has been a great deal of confusion about the Court's 1972 decision in the Keith case. Like Justices Black and Jackson in Youngstown, Justice Powell repeatedly emphasized that the case before the Court involved solely "internal" threats and "domestic organizations." He noted that in 1968 Congress had recognized that the president had constitutional power to protect the nation "against actual or potential attack or other hostile acts of a foreign power"--adding that "[f]ew would doubt this." And he repeatedly emphasized--which would not have been necessary had he not recognized a constitutional distinction--that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."

Time and again it has been asserted in this debate that the Supreme Court in Keith "invited" Congress to legislate a system of oversight of the President's collection of foreign intelligence. But that is simply not true.

What the unanimous Court said in Keith was, and I quote: "Given those potential distinctions between Title III [of the 1968 Crime Control and Safe Streets Act] criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter [domestic surveillance] which differ from those already prescribed for specified crimes in Title III." (My emphasis.) That case was repeatedly distinguished from one involving the president's constitutional power to collect foreign intelligence, and the Court did not so much as hint that Congress had the slightest power to usurp that presidential authority.

As the Court noted in Curtiss-Wright, the "exclusive power" of the President as "the sole organ of the federal government in the field of international relations" must be "exercised in subordination to the [other] applicable provisions of the Constitution." That includes the provisions of the Fourth Amendment. But it is for the judiciary to draw the line between those powers, and Congress can no more by mere statute curtail the president's independent constitutional power to collect foreign intelligence than it could by legislation narrow the scope of the Fourth Amendment.

As I discuss in my written statement, in 2002 the Foreign Intelligence Surveillance Court of Review--created by Congress in 1978 to oversee the FISA statute--observed that every court to have decided the issue has "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and

concluded: "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." (My emphasis.)

Assuming the facts as set forth in the New York Times, and as confirmed by the President and the Attorney General, are accurate on this program, the President's critics have done a grave disservice to our nation in drawing comparisons with President Nixon's "enemies' list" and suggesting there is something evil about the program. The privacy interests of U.S. Persons in this program are no more violated than are the rights of American citizens who engage in communications with a domestic criminal suspect for whom the government has obtained a judicial warrant. If I communicate in total innocence with a drug lord or organized crime figure who is the subject of a warrant, the police have every right to record every word I say or write and introduce it in court in a criminal prosecution against me or anyone else implicated in lawbreaking by the communication. My privacy interests essentially become "collateral damage" in the legitimate struggle against organized crime or international terrorism. The Intelligence Community follows elaborate "minimization procedures" when communications involving innocent U.S. Persons are inadvertently intercepted. I don't pretend to speak for others, but I find it unimaginable that many rational Americans who are not intentionally assisting foreign terrorists would favor a policy by which NSA would ignore communications between known or suspected al Qaeda operatives abroad and unknown people within this country. They would be asserting that their privacy interests are of greater importance than the right to exist of perhaps tens- or hundreds-of-thousands of their fellow citizens.

In 2001, Time Magazine included as one of its "Persons of the Year" a disgruntled FBI "whistleblower" named Colleen Rowley, who had written a scathing memorandum to Director Louis Freeh denouncing bureaucratic incompetence by FBI lawyers who had refused to even request a FISA warrant she sought to authorize access to Zacharias Moussaoui's laptop computer. In her view, she might have been able to prevent the September 11 attacks with such access. I'm confident that most of you understand what really frustrated Ms. Rowley's efforts. In its effort to constrain the president from the vigorous exercise of his exclusive constitutional power to authorize the collection of foreign intelligence information, Congress had simply not considered the possibility of a "lone wolf" terrorist like Moussaoui. The FBI lawyers she attacked had explained to her that she had failed to come close to meeting the factual predicate established by Congress to obtain a FISA warrant, but she apparently remains clueless to the reality that FBI lawyers were merely "obeying the law" passed by Congress. In 2004, Congress corrected its error by amending FISA--but that was not soon enough to have permitted Ms. Rowley to have possibly prevented the 91/11 attacks.

In a broader sense, the congressional contributions to the success of the 9/11 attacks date back to the sensationalized Church-Pike hearings of 1975, which contributed significantly to the "risk-avoidance" culture in the Intelligence Community and prompted the dramatic decrease in emphasis on HUMINT intelligence collection during the Carter Administration. Former FBI counter-terrorism chief Buck Ravell has noted that, following the 1975 congressional hearings, he could not get a single FBI agent to volunteer for counter-terrorism duty.

Please don't misunderstand me. I don't question the sincerity of most legislators who voted to usurp the president's constitutional power in this area--they didn't have the opportunity to study national security law, and probably didn't understand these issues. And very few members of the current Congress were here three decades ago, so you are certainly not individually responsible for these tragic decisions. But you are here now, and you are in a position to correct the errors of the past and restore the constitutional "rule of law" in this area. And this would in my view be a fruitful area for future congressional inquiry should you wish to identify contributing factors to the successful 2001 attacks.

Mr. Chairman, let me just conclude by strongly endorsing the Committee's belief that all Americans must obey the law--and by observing that FISA is one of several statutes that in my view "broke the law" by usurping powers vested by the American people through the Constitution in the exclusive discretion of the president. This interpretation is consistent with the statements and behavior of the Founding Fathers, historic practice by Congress prior to Vietnam, and a long history of judicial opinions dating back to Marbury v. Madison. I thank you for inviting me to share my views with the Committee, and I remain available to assist you should you or your staff decide to pursue any of the issues I have raised.

At the appropriate time I will be pleased to respond to any questions. Thank you, Mr. Chairman.

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Prepared Statement of
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Mr. Chairman, and members of the Committee. I am honored to again appear before this august body to address an important issue involving the separation of national security powers under our Constitution. For the record, I will emphasize that the views I am expressing here today are of course personal, and they should not be attributed to any entity with which I am or have in the past been affiliated.

I was in Georgia taking part in some debates on this issue when your letter of invitation was faxed to my office, and thus I had to spend most of the weekend putting my thoughts to paper. There may thus be typos and even incomplete footnotes in this version, but the underlying thoughts reflect more than three decades of work on these issues.

I am obviously in the minority among academic commentators on this issue, and I believe an extra burden therefore falls on me to explain why I am so confident that my very able and distinguished colleagues on the other side of the issue are mistaken. Unlike most of them, I have focused the bulk of my scholarship on these issues dating back to the 1970s.

Indeed, in 1983, while serving as Counsel to the President's Intelligence Oversight Board (PIOB) at the White House, I authored a 250-page document concerning the separation of constitutional powers related to the control of intelligence activities. (I have provided a copy of that document to your staff, and it is also available on the web site of the Center for National Security Law.1) A decade later, my 1700-page doctoral dissertation, backed up by more than 3000 footnotes, was written on "National Security and the Constitution" and focused heavily upon intelligence issues.

I also worked on these and related issues as a senior Senate staff member three decades ago, and later as a member of the Senior Executive Service in the Pentagon, the Department of State, and the White House. Indeed, Mr. Chairman, you may recall that we first met when you visited the Department of State in 1984--on behalf of yourself and Senator John Tower--to discuss the possibility of trying to coordinate a "case or controversy" with Secretary of State Shultz so that the Supreme Court might clarify the constitutional issues raised by the War Powers Resolution at a time when the nation was not facing a military crisis abroad. Although nothing came of that effort, I was then and remain today impressed with your thoughtful and non-partisan approach to these important national security issues.

Over the years, I have written several books and numerous articles in this area, and for three terms each I served as chairman of the American Bar Association's Standing
Committee on Law and National Security and the Committee on Legislative-Executive Relations of the ABA Section on International Law and Practice. Throughout most of the
1990s, I served as editor of the ABA National Security Law Report; and I authored the separation of powers chapters in both the 1990 and 2005 editions of the law school casebook, National Security Law -- of which I am also one of the two editors.

I would add one other observation: I take pride that my work in this area has not been partisan. That is to say, I have published articles criticizing Republicans for making false and partisan charges against President Truman during the Korean War, and other articles criticizing Republicans and Democrats alike for betraying President John F. Kennedy's pledge that America would "oppose any foe" for the cause of freedom. I continue to believe that a misguided and horribly misinformed Congress snatched defeat from the jaws of victory in Indochina, leading directly to the slaughter of millions of innocent lives and the consignment to Communist tyranny of tens of millions more. While I think partisanship was a factor in that situation (as I believe it is in the current dispute over warrantless NSA surveillance), there were (and, in the current setting, are) enough Republicans among the critics to refute any speculation that partisanship was the only motive.

I proudly display on the wall of my office a framed memorandum2 I wrote on November 3, 1976, urging my boss, Senator Robert P. Griffin - who at the time was widely viewed as the leading candidate for Senate Minority Leader upon the retirement of Senator Hugh Scott - to reach out to President Carter and try to restore the tradition of bipartisanship once championed by another Michigan senator, Arthur Vandenberg. Like Senator Vandenberg, I believe that politics should "stop at the water's edge." And in 1996, when presidential candidate Bob Dole pushed through a bill to compel President Clinton to move our embassy from Tel Aviv to Jerusalem in the hope of securing more Jewish votes, I wrote a long article in the Legal Times3 attacking the flagrantly unconstitutional action. When I left the State Department in 1985 as acting assistant secretary for legislative affairs, I turned down a very lucrative offer from Gray & Company to become a Washington lobbyist, preferring instead to take a $20,000 pay cut and become a schoolteacher. I've never regretted that decision, because my current position permits me to pursue the truth as I see it - without pressure from clients or special interests.

None of this, obviously, assures that I am correct in any of my judgments. I have therefore sought to explain the basis of my views in some detail in the pages which follow, with appropriate citations to key historical documents and judicial opinions.

Summarized briefly, I believe the President's critics have been focusing on the wrong law. They are certainly correct when they emphasize the importance of the "rule of law" and note that the president is not "above the law" in our system of government. And in my view there has been some alarming "lawbreaking" that has contributed to the current controversy and has weakened our nation in the struggle against international terrorism.

But to me, the primary focus ought not start with a discussion of whether the Authorization for the Use of Military Force (AUMF)--passed by Congress with but a single dissent on September 14, 2001--constituted statutory authorization for warrantless foreign intelligence "wiretaps" (and, obviously, the technology involved here has little to do with attaching alligator clips to telephone terminals), but on the more fundamental question of where the Constitution placed discretion in this area in the first place. For if the people have vested exclusive responsibility for foreign intelligence national security surveillance in the discretion of the Executive, and Congress has attempted to usurp that power not by amending the Constitution but merely by statute, I submit that it is Congress that has broken the law. The remedy, then, is not to further encumber the President's efforts to discover and counter the military plans of our nation's declared enemies, but rather to correct the error and return to the constitutional scheme. Obviously, if members believe that concerns of civil liberties or fair play warrant placing greater restrictions on the power of our Executive to protect this country from foreign terrorists or other enemies, the option will remain to argue that case on the merits and seek appropriate amendments to the Constitution as provided for in Article V.

The Statutory Argument--Did AUMF Authorize Surveillance?

For the record, I believe the Administration's statutory argument more than passes the straight-face test. I think the critics are likely correct when they note that no member of Congress subjectively thought Congress was modifying FISA or specifically authorizing warrantless surveillance when they voted for that joint resolution. But I think it is equally likely that no member believed they were empowering the President to detain American citizens indefinitely merely by declaring them "enemy combatants" contrary to the clear language of 18 U.S.C. § 4002(a)'s prohibition of detention of American citizens without statutory authorization. Yet a majority of the Supreme Court in the Hamdi4 case held that, since detaining enemy combatants is one of the "fundamental incidents of war," the clear statutory prohibition against detaining American citizens (like Yaser Esam Hamdi) without statutory authority was satisfied by the AUMF.

Now it is true that FISA makes specific provision for war,5 authorizing warrantless surveillance for a period of fifteen days - and I'm confident the authors of the statute believed that the role of FISA during wartime could be addressed during that period. But even if FISA made no mention of war, it was subject to being modified expressly or implicitly by subsequent legislation; and if detaining American citizens outside our judicial system is a "fundamental incident to war" implicitly authorized by the AUMF, the case that intercepting communications between foreign enemies and people within this country during wartime was similarly authorized seems far more persuasive. After all, the terrorists who attacked us on September 11, 2001, were inside this country and had been in regular communications with representatives of al Qaeda in other countries. Thus far, since the first of September 2001, more Americans have died as a consequence of enemy actions inside our country than abroad6; so the United States itself is very much a part of the "battlefield" in this struggle. And anyone who fails to understand that intelligence gathering is every bit as

important to winning wars as tanks and warships knows nothing of World War II and clearly has never read Sun Tzu's The Art of War.7

The issue here is broader than simply ascertaining whether the AUMF implicitly authorized the president to detain American citizens as "enemy combatants." By enacting the AUMF, the Congress added its authority to that of the President as Commander in Chief. This places the President's authority at its zenith --in Justice Jackson's first category.8 Obviously, by enacting what is in a constitutional sense a "declaration of war," the Congress has reinforced the President's constitutional authority as Commander in Chief--and in that setting the President's authority to detain enemy combatants has not merely a statutory but a constitutional basis. I'm not certain that even in that setting the Congress could not provide for at least some judicial review of a decision to detain American citizens. But the President's constitutional power to authorize the monitoring of communications involving real or suspected al Qaeda operatives as part of our foreign intelligence collection effort would seem to be far stronger--to the point of being as beyond the reach of a mere statute as is his power to decide upon which hills to deploy our forces or where to deploy a naval battle group on the eve of major combat.

We are unlikely to encounter more than a handful of "Yaser Hamdis" in most wars, and their fate--in terms of whether they are detained in a military POW camp or transferred to the jurisdiction of a federal district court (which might well in some settings make America a lawbreaker in terms of our obligations under the Third Geneva Convention, which prohibits detaining POWs in civil prisons and requires that any trials for war crimes or criminal misconduct in detention be by military tribunals)--is unlikely to affect the outcome of a war. In contrast, congressional interference in the actual conduct of hostilities--be it by usurping the Commander in Chief's constitutional discretion to decide what weapons to use in attacking specific military targets, or by preventing the president from obtaining critical foreign intelligence that might be essential to identify those targets--might well place in unnecessary danger the lives of American forces and could ultimately cause the loss of a war. Particularly in the current conflict, where most of the American casualties to date have been civilians killed within the United States because we failed to discover the enemy's plans, the unconstitutional legislative usurpation of executive power is obviously a very serious matter.

The Constitutional Questions

The courts, of course, are not supposed to resolve constitutional controversies if a case can be disposed of on statutory grounds. But it seems to me that your inquiry ought to focus first on the supreme source of our laws - our Constitution - and that the inquiry should begin at the beginning, looking at the statements and actions of our Founding Fathers. For, if I am correct in my belief that the Constitution gives the president exclusive9 control over "the business of [foreign] intelligence," one need not spend time debating competing principles of legislative interpretation regarding FISA. It is my hope that by starting at the beginning I can demonstrate to you where my distinguished colleagues on the other side of the issue have gone astray.

The Original Understanding About Secrecy and "The Business of Intelligence"

Put simply, the framers of our Constitution understood that Congress could not be trusted to keep secrets. Indeed, as early as 1776, when France agreed to provide covert assistance to the new American Revolution, Benjamin Franklin and the other four members of the Committee of Secret Correspondence agreed unanimously that they could not inform their colleagues in the Continental Congress, explaining: "We find by fatal experience that Congress consists of too many members to keep secrets."10 I won't dwell on this point here, as I testified at some length on this issue a dozen years ago before the House Permanent Select Committee on Intelligence, and that testimony is readily available on the Internet.11

Having served as Secretary of State for Foreign Affairs and later as President of the Continental Congress, and been a key negotiator of the 1782 peace treaty with Great Britain, John Jay was America's most experienced diplomat and had first-hand experience with the problem of congressional "leaks,"12 remarking at on point: Congress never could keep any matter strictly confidential; someone always babbled."13 Jay was offered the position of Secretary of Foreign Affairs (later re-designated "Secretary of State") by President Washington, but preferred instead to serve as America's first Chief Justice - a role he had earlier filled in New York.

There are some today who assume that issues of "secrecy" and the need to protect "sources and methods" of foreign intelligence are relatively modern concerns - perhaps traceable back to the presidencies of Richard Nixon or Ronald Reagan. But, in reality, the Framers were well aware of the difficulty the new nation would have in acquiring foreign intelligence information unless our government could keep secrets. As Jay explained in Federalist No. 64:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. 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.14

Early Congressional Deference to Executive Power

That the First Congress--most of whose members had taken part in either the Philadelphia Convention that wrote the Constitution or their own state's ratification convention--shared this understanding is apparent from a reading of the Annals of Congress and volume one of U.S. Statutes at Large. The president's special responsibilities for matters of war and foreign affairs were apparent from the legislation enacted by Congress creating the various Executive departments of government. While the Secretary of the Treasury was directed to report on demand to Congress, and his annual report was to be made not to the president or the public but to Congress, when it came to the departments responsible for the business of war and foreign affairs a far more deferential tone was taken. Thus, the 1789 statute introduced by Representative James Madison to create the Department of Foreign Affairs was very brief and made no reference to Congress or the Senate. In its essence, it provided:

"Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct."15

As Johns Hopkins scholar Charles Thach observed about this statute in his 1922 classic study on The Creation of the Presidency:

The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the "presidential" departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.16

Despite the clear requirements of Article I, Section 9, of the Constitution, requiring that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," when the First Session of the First Congress appropriated money for foreign affairs it provided:

[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 . . . 17

This boilerplate language was repeated for many years in subsequent statutes. Indeed, the consistent early practice under our Constitution was captured well by President Jefferson in a February 19, 1804, letter 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. . . .

Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations.

The purposes of the appropriation being expressed by the law, in terms as general as the duties are by the Constitution, the application of the money is left as much to the discretion of the Executive, as the performance of the duties . . . . From the origin of the present government to this day . . . . it 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.18

During an 1818 floor debate in the House of Representatives concerning press reports of a diplomatic mission to South America (for which the Senate had confirmed no presidential nominees), the great Henry Clay observed:

There was a contingent fund of $50,000 allowed to the President by law, which he was authorized to expend without rendering to Congress any account of it--it was confided to his discretion, and, if the compensation of the Commissioners had been made from that fund, . . . it would not have been a proper subject for inquiry 19

Rep. John Forsyth added during the debate: "It was true the President might have taken it out of the secret service fund, and no inquiry would have been made about it . . . ."20

Today, such statements may see shocking to Members who have been taught to believe that Congress makes the "laws" and can through them control every aspect of presidential conduct, but that was not the understanding throughout most of our nation's history.

Breaking the Code - The Framers' Understanding of "Executive Power"

Much of our difficulty results from a failure to study history, and to understand that when the Founding Fathers wrote in Article 2, section 1, of the Constitution that the
"executive Power" of the new nation "shall be vested in a President of the United States of America," they understood that they were giving their new leader the general management of the nation's foreign relations.

Some modern commentators would have us believe that Article II, section 1, was not a grant of power at all, but merely a clarification that there would be a unitary rather than a plural executive. But that was not the understanding of the authors of the Federalist Papers, who explained the new Constitution to the people. Alexander Hamilton, for example, was a principle author of Article II, and early in the Convention he slipped a note to Madison outlining his view of what the new constitution ought to provide. He included this language: "The Executive power, with the qualifications hereinafter specified, shall be vested in a President of the United States." Hamilton's early plan also gave the Senate "advice and consent" over treaties and nominations, and gave the President "the direction of war when commenced," but gave the Senate power "to declare war."21

As a member of the First Congress, Madison introduced the bill that established the Department of Foreign Affairs. An issue arose of where the Constitution had placed the power to remove from office the secretary of executive departments. Madison prevailed in that debate by reasoning: "[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department."22 Thus, since the Senate was only joined in the appointment process, removal belonged to the president. In explaining this argument in a letter to a friend, Madison added: "In truth, the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself. And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department."23

In a memorandum to President Washington dated April 24, 1790, Secretary of State Thomas Jefferson reasoned: The Constitution . . . . has declared that "the Executive powers shall be bested in the President," submitting only special articles of it to a negative by the Senate . . . .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. . . .The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to

them . . . .24 It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the "secrets" of the Executive branch.25

Washington shared Jefferson's memorandum with Representative Madison and Chief Justice John Jay, and recorded their reactions in his diary:

Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first--His opinion coincides with Mr. Jay's and Mr. Jefferson's--to wit--that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.26

Three years later, Hamilton wrote in his first Pacificus essay that "[t]he general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." From this, Hamilton concluded that "as the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly--and ought to be extended no further than is essential to their execution."27

For those who might wonder where such interpretations of "executive power" came from, the answer is apparent from a reading of the scholars whose writings most influenced the Framers. In his Second Treatise on Civil Government--described by Jefferson as being "perfect as far as it goes"28 --John Locke coined the term "federative" power to describe the "the management of the security and interest of the publick without, with all those that it may receive benefit or damage from"; but he argued that, of necessity, this power needed to be entrusted to the Executive. He reasoned:

And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.29

In Federalist No. 64, Jay paraphrased Locke's argument when he explained why the new American president would be given important powers that would not be controlled by Congress or the courts:

They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measures. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.30

Even before mentioning the business of executing laws enacted by the legislature, Montesquieu-whom Madison in Federalist No. 47 described as the celebrated authority "who is always consulted and cited" on issues of separation of powers--mentioned the "executive" power "dependent on the law of nations" by which the executive magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."31 The management of foreign intercourse was also seen as "executive" by others who were widely read by the Framers, including Adam Smith32 and William Blackstone--who in the first volume of his Commentaries on the

Laws of England wrote that, "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . ."33

In his 1972 book, Foreign Affairs and the Constitution, Columbia University Law School Professor Lou Henkin remarked: "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."34

This understanding was consistent as well with the views of Professor Quincy Wright--who served as President of both the American Political Science Association and the American Society of International Law--who wrote in his landmark 1922 treatise, The Control of American Foreign Relations: "when 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."35

While it is common today to teach that the Framer's sought to reject strong presidential power, this is not supported by a careful study of history. In 1922, Charles Thach observed in his highly-acclaimed Johns Hopkins Ph.D. dissertation:

State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth. The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.

Madison expressed the general conservative view when he declared on the Convention floor:

Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.36

Some today seem to believe that Congress is the ultimate sovereign authority in the United States, and the president merely an agent entrusted with the task of seeing the will of Congress faithfully executed. But that was certainly not the view of our Founding Fathers. Consider, for example, this note made by Secretary of State Thomas Jefferson following a meeting with French minister Citizen Genet, who had complained that America was not abiding by its obligations under its treaty with France:

He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him the Constitution had made the President the last appeal.37

As a Federalist representative in Congress in 1800, John Marshall observed that under our Constitution the President was "the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power." And paraphrasing the words of Blackstone, the future chief justice added: "In this respect, the President expresses constitutionally the will of the nation . . . ."38

As the nation's chief justice three years later, Marshall wrote in what is widely regarded as the most famous Supreme Court decision of all, Marbury v. Madison, that:

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. . . . [A]nd whatever 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.39

For further evidence that certain presidential powers were not to be "checked" by Congress, we need look only at the most frequently cited of all foreign affairs cases, Unites States v. Curtiss-Wright Export Corp., where the Supreme Court said: Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He 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.40

Speaking for the Court, Justice Sutherland went on to address the issue of executive privilege as it respected documents in the foreign affairs realm:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as 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. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty--a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. In his reply to the request, President Washington said:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. 1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State [sic41], the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.42

Now, in candor, I believe the Court in Curtiss-Wright got the right answer for the wrong reasons. Justice Sutherland focused not upon the expressed grant of "executive Power" to the president, but instead on the idea that the foreign policy power was a natural attribute of sovereignty that attached to the presidency at the time of America's independence from Great Britain. It was not an unreasonable explanation (and Curtiss-Wright remains by far the

most often cited Supreme Court foreign affairs case), but it is clear that the Framers believed they had expressly vested this power in the president through Article II, Section 1's grant of "executive power."

This longstanding deference to presidential discretion in foreign affairs was recognized by both the courts and Congress well into the second half of the twentieth century. In the 1953 case of United States v. Reynolds, the Supreme Court discussed the executive privilege to protect national security secrets, noting that: "Judicial Experience with the privilege which protects military and state secrets has been limited in this country . . . ."

But the Court recognized an absolute privilege for military secrets, explaining:

In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."43

Obviously, intelligence programs designed to intercept communications from our nation's enemies during a period of authorized war are among the most sensitive of
"military secrets."

Four years later, one of the nation's leading constitutional scholars of his era, Professor Edward S. Corwin, wrote in his classic volume, The President: Office and Powers:

So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that he is final judge of what information he shall entrust to the Senate as to our relations with other governments.44

In the 1959 Barenblatt case, the Supreme Court recognized that there are proper limits not only on the power of Congress to control Executive discretion, but even to "inquire" into matters vested by the people in the President: "Congress . . . 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."45

The most important executive privilege case of the twentieth century was certainly United States v. Nixon, when a unanimous Court set the stage for the resignation of President Richard Nixon by denying the President's privilege claim. But, for our purposes, it is important to keep in mind that the Court carefully distinguished that case from one involving a claim of national security executive privilege: "He [Nixon] 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."46 The Court then cited with approval the case of C. & S Air Lines v. Waterman S.S. Corp., which it correctly characterized as "dealing with Presidential authority involving foreign policy considerations," where the Court said in 1948:

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."47

Fear of Congressional Usurpation of Power

The dramatic usurpation of presidential power in the aftermath of the Vietnam controversy was neither unprecedented48 nor unanticipated by those who struggled through the Philadelphia heat in the summer of 1787 to

provide us with a Constitution that could constrain the well-known tendency of legislative bodies to attempt to usurp all government powers to themselves. In Buckley v. Valeo, the Supreme Court observed in 1976: "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."49 And five years before Philadelphia, Thomas Jefferson wrote in his Notes on the State of Virginia of the tendency of state legislatures to usurp the powers of the other branches:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy: and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright.

When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. . . .Searching for the foundations of this proposition, I can find none which may pretend a colour of right or reason, but the defect before developed, that there being no barrier between the legislative, executive, and judiciary departments, the legislature may seize the whole . . . . Our situation is indeed perilous, and I hope my countrymen will be sensible of it, and will apply, at a proper season, the proper remedy; which is a convention to fix the constitution, to amend its defects, to bind up the several branches of government by certain laws, which when they transgress their acts shall become nullities; to render unnecessary an appeal to the people, or in other words a rebellion 50

Congressional Recognition of Exclusive Presidential Power

Mr. Chairman, in my doctoral dissertation, I show that, with very few exceptions throughout our history, Congress and the Senate have acknowledged the president's special constitutional responsibilities for foreign affairs. Indeed, even in the areas of war and treaty making--where Congress and the Senate have constitutional "negatives" over executive business--the Congress has never turned down a presidential request for a declaration of war, and the Senate has rarely refused to consent to the ratification of a treaty. In the areas where the president was given unchecked discretion, prior to the 1970s Congress frequently acknowledged the president's exclusive authority.

Consider, for example, this excerpt from a Senate report published in 1897:

It is to be remembered that effective intervention in foreign affairs sometimes requires the cooperation of other nations, while on the other hand, the expectancy of future intervention sometimes stirs up foreign governments to take preventive measures. Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these facts that the superintendence of foreign affairs was intrusted to the executive and not to the legislative branch of the Government. . . . [O]ur Constitution gave the President power to send and receive ministers...[etc.]. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the President, which the Federal Government itself was to possess--the general control of foreign relations. . . . That this is a great power is true; but it is a power which all great governments should have; and, being executive in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.51

Nine years later, in 1906, a debate occurred on the Senate floor when first-term Senator Augustus Bacon proposed that the Senate demand certain negotiating documents from the executive branch. During this debate, Senator John Coit Spooner--an experienced lawyer with a Ph.D. as well, who sat on the Foreign Relations Committee and was widely regarded as among the finest constitutional lawyers of his time--rose and delivered a lengthy exposition on the Senate's powers under the Constitution, in which he said:

The Senate has nothing to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. . . .From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases--and they are multifarious--of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.

I do not deny the power of the Senate either in legislative session or in executive session--that is a question of propriety--to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. . . . [S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority."52

Senator Henry Cabot Lodge is remembered for his important role in persuading the Senate not to consent to the ratification of the Versailles Treaty following World War I, thus keeping us out of the League of Nations. He was an able Harvard Law School
graduate and a champion of the powers of the Senate. But after Senator Spooner's lengthy 1906 presentation on the treaty power, Senator Lodge rose and remarked on the Senate floor: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . [than] we have heard from the Senator from Wisconsin [Sen. Spooner]."53

Senator Bacon then added that the Senate's claim to the information was based not upon "legal right" but upon "courtesy" between the President and the Senate.54

If you take a look at the original version of the National Security Act of 1947, you will get a sense of the view of Congress at the time. Congress didn't "forget" to make provision for formal congressional oversight of intelligence activities. This was the business of the executive, it required unity of design, secrecy, and speed and dispatch, and Congress understood and appreciated that. And that statute was but a continuation of legislative deference dating back to the very First Congress.

As late as 1959, in his capacity as the new chairman of the Senate Foreign Relations Committee, Senator J. William Fulbright told an audience at Cornell Law School:

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." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved
by his will alone--the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.55

That was not a controversial position at the time. But in the following decade the nation entered a great controversy over Vietnam that nearly tore our nation apart. And in the
heat of that crisis, it is as if we suffered a collective hard drive crash; and everyone forgot about the content of the "executive power" clause. Members of Congress became angry,
and when they read through the Constitution they found no reference to "foreign affairs," "national security," or "intelligence." From there is was not difficult to assume that
presidential primary in the formation and execution of foreign policy--subject to important but narrow "negatives"

vested in Congress or the Senate--had all been a fluke and a result of presidential usurpation. An angry Congress began demanding more control, and a Watergate-weakened President was in no position to resist. When Nixon resigned and Gerald Ford became our president-without even having been elected to the post of Vice President--he courageously voiced opposition to legislative encroachments, but lacked the political power to resist the growing assault. Then came the Carter Administration, elected to office by a public outraged over reports of presidential "lawbreaking," and the assault on the constitutional powers of the executive continued.

The Rights of Americans Are Not Being Violated

Mr. Chairman, there have been various efforts to portray this NSA program as involving "domestic spying," even though the available information (based upon the Attorney General's testimony and the original New York Times story) suggests that every single communication at issue was international in character and focused on a foreign national, located outside this country, who was known or believed to be associated with al Qaeda or another foreign terrorist organization associated with al Qaeda. In this country, law enforcement personnel routinely and constitutionally intercept communications involving U.S. Persons for whom they do not have warrants with great regularity. So long as they have a warrant authorizing the surveillance of one party to a communication, the police may record all parties to the communication and introduce the products of that surveillance into courts of law. That is to say, a warrant to "wiretap" Joe's telephone permits the police to record the voices of Bill and Bob when they telephone Joe in the absence of the slightest probable cause that Bill or Bob are wrongdoers.

The reason these communications are being intercepted by NSA is because of the involvement of al Qaeda operatives, and foreign nationals who are part of the al Qaeda network outside of this country have no Fourth Amendment guarantee against unreasonable search or seizure. (And even if they did, I would note that even Kate Martin, of the Center for National Security Studies [originally set up by Mort Halperin for the ACLU], has acknowledged that "surveillance of communications with al Qaeda . . . is manifestly reasonable."56) And why U.S. Persons who are involved in communications with al Qaeda operatives ought to be entitled to greater protections than totally innocent Americans who engage in communications with American drug dealers or crime figures (for whom the police have a warrant) is not apparent to me.

Not all communications from al Qaeda operatives pertain to terrorism. Perhaps bin Laden himself might purchase a lamp on eBay, and send an e-mail to the totally innocent American seller instructing that it be shipped c/o general delivery, Islamabad, Pakistan, for pickup at bin Laden's convenience. (That communication, of course, would have significant intelligence value. But an al Qaeda operative might contact someone in this country totally unsympathetic to his cause just to convey information that a mutual friend or relative had passed away in Afghanistan.)

All things being equal, we would presumably rather not have NSA monitoring communications unrelated to national security threats. But often that determination cannot be made without an experienced analyst examining the communication, and all things are certainly not equal. If we establish a presumption that NSA must "unplug" its equipment any time al Qaeda includes a U.S. Person--who might well be a Saudi citizen lawfully in this country who is totally committed to bin Laden's cause--we will likely pay a tremendous price for that decision in the form of dead Americans in future terrorist attacks. In anything, listening to al Qaeda operatives when they are communicating with people in this country is more important than when they talk among themselves in the Middle East. And I'm confident most American voters will understand that.

Youngstown and Keith Were "Domestic" Cases and Thus Are Not On Point Here

In his prize-winning book, The National Security Constitution, my friend Harold Koh, now Dean of Yale Law School, argues that Curtiss-Wright was essentially modified or overturned as the prevailing American foreign policy paradigm by Justice Jackson's
concurring opinion in Youngstown. With all due respect, that interpretation is manifestly mistaken. Justice Jackson did not in the slightest way challenge or narrow Curtiss-Wright--which, just two years earlier, in Eisentrager, he had cited as authority for the proposition that the president is "exclusively responsible" (my emphasis) for the "conduct of diplomatic and foreign affairs."57 On the contrary, like Justice Black for the Court majority,58 in Youngstown Jackson carefully distinguished the seizure of private property within the United States (and without the "due process of law," required by the Fifth Amendment) from a case involving external affairs. He noted that the president's "conduct of

foreign affairs" was "largely uncontrolled, and often even is unknown," by the other branches, and added: "I should indulge the widest latitude of interpretation to sustain his [the president's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."59 Time and again, Justice Jackson emphasized "military powers of the Commander in Chief were not to supersede representative government of internal affairs."60

Justice Jackson added that "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."61 Note here, as well, the distinction between a conflict unauthorized by Congress and our current situation, where Congress with but a single dissenting vote enacted two statutes pursuant to the War Powers Resolution specifically authorizing war.

As an aside, one of the many myths about the Korean War, even today, is that President Truman "ignored" Congress and took the nation to war as an "imperial president." In reality, as I have documented at length elsewhere,62 Truman repeatedly met personally with congressional leaders and sought a formal resolution and to address a joint session of Congress. He deferred to the will of Congress after being urged by congressional leaders to "stay away" from Congress and assured he had authority to respond to the North Korean aggression under the Constitution and the UN Charter--and that was fully consistent with the positions taken by both Houses of Congress in 1945 when the UN Charter and UN Participation Acts were being approved.

In Foreign Affairs and the Constitution, Professor Henkin noted:

Youngstown has not been considered a "foreign affairs case". The President claimed to be acting within "the aggregate of his constitutional powers," but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steelstrike threatened important American foreign policy interests.63

Similarly, in Goldwater v. Carter (an unsuccessful challenge by several Senators to President Carter's unilateral termination of the mutual security treaty with Taiwan), Justice Rehnquist--in a concurring opinion joined by Chief Justice Burger, Justice
Stewart, and Justice Stevens--rejected the Petitioners' reliance on Youngstown, reasoning:

The present case differs in several important respects from Youngstown . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In Youngstown, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. . . . Moreover, as in Curtiss-Wright, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."64

In a similar manner, there has been a great deal of confusion about the Court's 1972 decision in the Keith case. Like Justices Black and Jackson in Youngstown, Justice Powell repeatedly emphasized that the case before the Court involved solely "internal" threats and "domestic organizations." He noted that in 1968 Congress had recognized that the president had constitutional power to protect the nation "against actual or potential attack or other hostile acts of a foreign power"--adding that "[f]ew would doubt this."65 And he stressed time and again--which would not have been necessary had he not perceived a constitutional distinction--that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."66

It has been asserted in this debate that the Supreme Court in Keith "invited" Congress to legislate a system of oversight of the President's collection of foreign intelligence. But that is simply not true. What the unanimous Court said in Keith was, and I quote: "Given those potential distinctions between Title III [of the 1968 Crime Control and Safe Streets Act] criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter [domestic surveillance] which differ from those already prescribed for specified crimes in Title III."67 That case was repeatedly distinguished from one involving the president's constitutional power to collect foreign intelligence, and the Court did not so much as hint that Congress had the slightest power to usurp that presidential authority.

Importance of Safeguarding Constitutional Power Against Post-Vietnam War Usurpations

Some question why the President would risk a confrontation with Congress in the midst of a war. If you examine our history of wartime presidents, I don't think you can identify one who tried to work more closely with Congress than the incumbent. Unlike Lincoln, Wilson, and Franklin Roosevelt, when it became apparent that war was being thrust upon us, President Bush went immediately to Congress both to get a (clearly unnecessary, in a constitutional sense68) statutory authorization for war, and to seek a variety of new legal authorities through the U.S.A. PATRIOT Act.

On May 19, 1988, Senators Nunn, Byrd, Warner, Mitchell, and others took part in an important colloquy on the Senate floor in which they criticized some of the harm done by the War Powers Resolution. I commend that exchange to each of you.69 And though I recognize the tremendous importance of national unity during periods of crisis, I have long felt that, in refusing to challenge statutes that attempt to usurp discretion vested directly in the president by our Constitution, our presidents were betraying a trust. As Harvard Law Professor Charles Warren once observed:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his constitution powers becomes in very truth, therefore, defense of popular rights--defense of power which the people granted him. . . . In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.70

History has not been kind to those who led the fight to usurp the president's constitutional powers over foreign affairs, war, and intelligence. To begin with, we now know--and many of us knew at the time71--that on virtually every issue the critics of the Vietnam War were factually mistaken. The State Department was not "lying" when it said the war was a result of "Aggression from the North,"72 and since the end of the war Hanoi had repeatedly published articles admitting that its Politburo made a decision in May 1959 to open the Ho Chi Minh Trail and start sending tens of thousands of armed forces south to "liberate" the Republic of Vietnam. It is also absolutely clear that the critics were wrong when they claimed the "National Liberation Front" was independent from Hanoi. I documented these and many other points more than thirty years ago in my first major book, Vietnamese Communism: Its Origins and Development.

There is also a growing consensus among serious scholars of the war, acknowledged in a recent issue of Foreign Affairs by Yale's very distinguished diplomatic historian John Lewis Gaddis, that America was winning the war by the early 1970s.73 I think it is accurate to say that, in response to angry but horribly misinformed protesters, the Congress betrayed John F. Kennedy's inaugural pledge that we would "oppose any foe" for the cause of freedom, and by passing an unconstitutional statute prohibiting the expenditure of appropriated funds for "combat operations" anywhere in Indochina, Congress "snatched defeat from the jaws of victory." And in the three years after those countries we had pledged to protect in the SEATO Treaty were "liberated" by the Communists, more people were killed than had died in the previous 14 years of war. The Black Book of Communism, published in English by Harvard University Press, estimates that three million people were slaughtered by Communism in Indochina; and the Cambodia Genocide Project at Yale University estimated that the victims included more than twenty percent of the people of Cambodia.

I remember sitting on a couch in the back of the Senate chamber more than three decades ago and listening to confident Senators declare that by cutting off funds Congress could "stop the killing" and promote "human rights" in Indochina. I was in South Vietnam at the end, in April 1975, trying desperately to get permission to go into Cambodia to try to rescue some of the many thousands of orphans. I could not get country clearance, and those innocent children were slaughtered by Pol Pot and his comrades. Two years ago, National Geographic Today featured a story about the "killing fields" of Cambodia, that noted in order to save bullets the Khmer Rouge would often simply pick up small children by their feet and bash them against trees until they were dead. Thanks to congressional lawbreakers who thought they knew better than our presidents what was likely to happen in a far off land, millions of innocent people were slaughtered and tens of millions were consigned to a Stalinist tyranny that even today is ranked among the "worst of the worst" human rights violators in the world by Freedom House.

As you assess the pros and cons of the legislation enacted by Congress in response to the Indochina tragedy, I hope you will consider these aspects of the problem. We continue to hear warnings about learning the "lessons" of

Vietnam, but as someone who spent a great deal of time inside Indochina between 1968 and the final evacuation in 1975, has taught seminars on the war for undergraduate and graduate students at the University of Virginia, and has authored or edited several books on the conflict, I have a sad sense that too many are learning the wrong lessons.74

The Future of FISA and the Chairman's Draft Proposal

In my view (which is at least in part based upon experiences that are now two-dozen years in the past), both the FISA Court and the Office of Intelligence Policy and Review at the Department of Justice deserve very high praise for their extraordinary service to
our nation. And because it does provide a useful check against the possibility of abuse, in most settings I believe the FISA court can make an important contribution. I'm not suggesting that it should be immediately abolished, any more than I would demand that the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence be abolished.

What I think does need to be done is to recognize that in the sensitive area of foreign intelligence collection, the president has unusual and largely unchecked discretion to operate in the manner he believes will best protect the interests of the nation (consistent, of course, with other obligations found in the Constitution). Congress may not by simple statute modify this constitutional scheme, and even if it could it ought not do so. I think that it would be useful for Congress to modify FISA in such a manner that the president's independent constitutional authority in this area is clearly acknowledged, so that everyone involved will understand that in exceptional cases the president has the power to bypass this process. My sense, based upon the testimony of the Attorney
General earlier in the month and his responses to written questions, is that the Administration would be more than willing to work with you to try to come up with a FISA-like bill that would provide for judicial involvement in the overwhelming majority of cases, but would not pretend to deprive the president of important powers vested in his discretion that clearly can not be properly usurped by Congress. And during peacetime, it would not surprise me if virtually every foreign intelligence surveillance within this country were carried out pursuant to warrants issued by the FISA court.

As for the draft bill I have received from the Chairman's staff, there are many parts of it that I find attractive. Time will not permit on such short notice a detailed commentary, but I would make a few general suggestions. For example, in Section 2(9), I would recommend the following changes (marked in bold):

(9) While Attorney General Alberto Gonzales explained that the executive branch reviews the electronic surveillance program of the National Security Agency every 45 days to ensure that the program is not overly broad, it is the belief of Congress that, where in the President's judgment it is consistent with the security of the nation, approval and supervision of electronic surveillance programs should be conducted outside of the executive branch, by the Article III court established under section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803). It is also the belief of Congress that it is appropriate for an Article III court to pass upon the constitutionality of electronic surveillance programs that may implicate the rights of Americans. However, in a foreign intelligence collection setting in which time is of the essence and the Justice Department and Intelligence Community lawyers certify to the president that an operation is fully consistent with the protections of the Fourth Amendment, the Congress recognizes that exceptional circumstances may require the president to act outside the FISA framework. In those settings, the President is urged to report such activities (in sufficient detail to permit an understanding of the program without unnecessarily compromising sensitive sources or methods) to the FISA Court and the appropriate committees of Congress.

In Section 702(e) I would make the following additions (or words to this effect):

"(e) Programs Subject to this Act.--

"(1) IN GENERAL.-- With the exceptions set forth below in § 702(e)(1)(a), All electronic surveillance programs to obtain foreign intelligence information or to protect against international terrorism or clandestine intelligence activities must be
submitted for judicial authorization to the Foreign Intelligence Surveillance Court.

(a) Nothing in this statute is intended to grant the president any authority to engage in warrantless surveillances of U.S. Persons in violation of the Fourth Amendment; but Congress recognizes that the president has independent constitutional power to authorize surveillance of foreign powers or their agents, and nothing in this statute is intended to deny that power to the president.

Again, Mr. Chairman, these are only very rough suggestions. My purpose would be to have Congress recognize that it lacks the power to usurp presidential authority in this area, and to leave the president with some discretion to act for the public good in
extraordinary settings. I'm candidly not certain of the best way to accomplish that end.

Conclusions

In conclusion, Mr. Chairman, I would briefly summarize a few basic points:

First, under our Constitution the president was given some very important discretionary powers that were not intended to be "checked" by Congress or the courts. These included the general management of our foreign affairs, subject to the expressed authority given to the Senate or Congress in this area and other prohibitions embodied in the Constitution. These "exceptions" to the president's general grant of "executive power" were intended to be strictly construed, and none of them were intended to give Congress a right to demand sensitive national security secrets or to permit Congress to usurp the president's exclusive control over military operations, diplomacy, or the gathering of foreign intelligence. But like every constitutional power, the president must exercise his discretionary authority in a manner consistent with the other provisions of the Constitution. Thus, he must not violate the Bill of Rights during peace or war.

The Supreme Court has held that when Congress authorized the President to fight the war on terror in September 2001, it granted him power to engage in such "fundamental incidents to war" as detaining enemy combatants. And that statute thus constituted the necessary statutory authorization to detain American citizens who fit into that category. By this logic, it would seem to follow that Congress has authorized the President to engage in the collection of foreign intelligence information--even when those communications being intercepted involve an American at one end. To the extent this is inconsistent with the FISA framework, we can either conclude that the statute later in time prevails--or, preferably, I think--we can note that FISA could not deprive the President of his exclusive constitutional power to authorize the collection of foreign intelligence to begin with. That is the view of every court that has considered the issue, and it was reaffirmed as recently as 2002 by the Foreign Intelligence Surveillance Court of Review that Congress set up to oversee the FISA process.

There is a lot of misunderstanding and confusion in the public debate on this issue. FISA was not the consequence of an "invitation" from the Supreme Court in the 1972 Keith case, nor is Youngstown the controlling paradigm in cases involving the president's constitutional power to authorize warrantless surveillance of terrorists abroad during periods of authorized war. Both Keith and Youngstown addressed domestic activities unconnected with any "foreign power."

I believe the president's critics are correct about the importance of the "rule of law" and the fact that some government officials have broken the law, but the "law" in question is the Constitution and the culprits are not in the White House but here in Congress.

I won't hold my breath, Mr. Chairman, but I would strongly urge the Congress to conduct a serious and non-partisan inquiry into the congressional "lawbreaking" that occurred during the 1970s, when both Houses of Congress engaged in often highly partisan and in my view clearly unconstitutional usurpations of presidential power. As Locke and Jay anticipated, these usurpations of power have done serious and identifiable harm to our nation. I shall not dwell today on the War Powers Resolution, as I have written two books about that and testified extensively in the past before this and several other committees in both Houses of Congress. I would only note that even former Senate Majority Leader George Mitchell has acknowledged the statute's unconstitutionality, and Senators Sam Nunn and John Warner both have condemned the harm it has done over the
years to our security. In 1994, former Marine Corps Commandant General P.X. Kelley and I co-authored a Washington Post op-ed documenting the responsibility of a highly partisan Senate war powers debate for the October 23, 1983, terrorist attack that killed 241 sleeping Marines and sailors in Beirut. By dividing our country over yet

another false allegation of Presidential "lawbreaking," and assuring our enemies that additional American casualties could prompt further congressional debate, your predecessors virtually placed a bounty on the lives of our forces. And on the eve of the bombing, we intercepted a message between two Islamic terrorist groups that said: "If we kill 15
Marines, the rest will leave."

America is now engaged in a very dangerous war, and my guess is we haven't come close to seeing the worst of it. I had been warning for several years that we were going to be attacked, and I suspect I was one of relatively few people who was not greatly
surprised by the events of 9/11. I have been quite surprised by the effectiveness of our military and others involved in our defense in preventing--thus far--a single new attack on our territory. I don't think our good fortune will continue, but if we don't stop politics at the water's edge our chances of success will fall rapidly.

Our greatest weakness, in the eyes of our adversaries, is our lack of will. Since Vietnam, the opposition party in Congress--whether Republicans or Democrats have occupied the White House--has sought partisan gain when we faced a crisis involving
the possible use of military force. I have already mentioned the tragic loss of 241 Marines in Beirut in 1983, and if you like I'll be happy to talk about many other examples as well. And there is evidence that bin Laden himself was encouraged by the
perception that Americans will divide among themselves and cut and run if threatened with serious military casualties.

In 1973, after being offered a position on the staff of Senator Bob Griffin, I took the occasion to examine some of the writings of the late Senator Arthur Vandenberg. As I'm sure you know, Senator Vandenberg was largely responsible for the success of
bipartisanship in this body in the years following World War II--when he served first as Ranking Republican and then Chairman of the Committee on Foreign Relations. And I would close by calling your attention to a speech Arthur Vandenberg delivered on the
occasion of "Lincoln Day" in Detroit on February 10, 1949, in which the Foreign Relations Committee chairman said:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't
will serve neither their party nor themselves.75

Thank you, Mr. Chairman. That concludes my prepared remarks. I will be pleased to take any questions at the appropriate time.

(Full testimony with notes available at http://www.virginia.edu/cnsl)