

Senator Edward M. Kennedy

Questions for the Record

Hearing on

“Wartime Executive Power and the NSA’s Surveillance Authority II”

Questions for Robert Turner

QUESTION 1:

- **Please expand on your statement that “FISA has done serious harm to this nation”? Please provide specific examples to support your view.**

ANSWER:

In some respects, I am a fan of FISA. And I certainly admire the FISA Court judges and the lawyers in the FBI, NSA, and the Office of Intelligence Policy and Review who work so diligently to make the system work. But as I have tried to explain in my prepared testimony, the Constitution clearly entrusted what John Jay in *Federalist* No. 64 called “the business of intelligence” to the discretion of the President to be managed “as prudence might suggest.” Thus, as the FISA Court of Review noted in 2002, FISA could not “encroach on” the President’s constitutional power to authorize the collection of foreign intelligence information—*especially* during wartime.

It is my view—an opinion that dates back to my years as a Senate staff member more than three decades ago—that the broad congressional assault on the constitutional powers of the President that followed the Vietnam War has done serious harm. Former Marine Corps Commandant P.X. Kelley and I co-authored an op-ed in the *Washington Post* on October 23, 1994, (“Out of Harm’s Way: From Beirut to Haiti, Congress protects Itself Instead of Our Troops”) summarizing how a horribly partisan congressional debate over the War Powers Resolution contributed to the deaths of 241 Marines, sailors, and soldiers eleven years earlier in Beirut. I commend to you as well the colloquy among Senators

Nunn, Warner, Byrd, and Mitchell in the *Congressional Record* of May 19, 1988 (pages 6173-78), where they noted both the constitutional problems with the statute and its harmful effect in undermining our security. For example, Senator Nunn observed that the War Powers Resolution “raises questions about the U.S. staying power in [the] midst of a crisis, thus making it harder for the United States to secure the cooperation of our friends abroad.” Senator George Mitchell reasoned:

[D]ebate over the resolution conveys the appearance of a divided America that lacks resolve and staying power. The resolution severely undercuts the President by encouraging our enemies to simply wait for U.S. law to remove the threat of further American military action.

Into the very situation that requires national steadiness and resolve, the War Powers Resolution introduces doubt and uncertainty. This does not serve our nation.

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.

I discuss this colloquy on pages 161-63 of my 1991 book, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*.

In my prepared testimony I give two specific examples of the harm done by FISA (which is far from the *worst* of the post-Vietnam laws):

- Although *Time* Magazine named FBI whistleblower Colleen Rowley as one of its 2001 “Persons of the Year,” her complaint was without merit. She was understandably outraged that, after her colleagues in the Minneapolis FBI office had identified Zacarias Moussaoui as a potential terrorist, she was unable to get FBI Headquarters in Washington, DC, to even *request* a FISA warrant to examine the contents of his laptop computer. With that access, she believed, the plot might have been foiled and thousands of lives saved. The problem is that the *reason* she was denied a warrant was that, in enacting FISA, Congress (or perhaps your staff, if my recollection is correct that you introduced the FISA bill) failed to consider the possibility of a “lone wolf”

terrorist like Moussaoui. The law permitted surveillance only of “foreign powers” (defined to include foreign terrorist organizations) and their “agents.” Moussaoui was neither employed by al Qaeda nor did he take directions from them, so you made it *unlawful* for the FBI to obtain a FISA warrant in this case—punishable by felony criminal sanctions. And had Ms. Rowley understood the situation, her angry letter presumably would have been addressed to *you* instead of Director Freeh. It was not until late 2004 that FISA was amended to deal with this problem.

Now, I don’t know whether the FBI could have discovered the planned attack, or not, had such a warrant been available, or had the President exercised his constitutional power to authorize the FBI to target Moussaoui as a likely source of foreign intelligence in spite of FISA (but, even had he tried, the criminal sanctions attached to FISA might well have led to refusals to carry out his orders). The fact remains that the statute precluded the issuance of such a warrant, and the FBI lawyers Ms. Rowley was so angry at were merely “obeying the law.” Had Spike Bowman and his tremendously able staff of FBI national security law attorneys elected to risk felony convictions and ignore the requirements of FISA, I am very confident that the attorneys in the Office of Intelligence Policy and Review (OIPR) would have rejected any such application. And had OIPR conspired to break the law, the FISA Court would have turned down the application.

- The second example I give in my prepared testimony is that, prior to the September 2001 Authorization for the Use of Military Force (AUMF) joint resolution, the current intercept program was viewed by at least some lawyers as prohibited by FISA. And by including felony criminal penalties for any government official who violates FISA, Congress obviously intended to impose a “chilling effect” on the gathering of foreign intelligence in this area. You told our intelligence community professionals that, unless they relish going to prison, they should in the event of any doubt disapprove proposed

surveillance of international terrorists or their agents or supporters in this country. And, as I note on page 37-38 of my prepared statement:

Lt. Gen. Michael V. Hayden, currently Deputy Director of National Intelligence and former Director of the National Security Agency, has expressed the view that "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."

Now I have been out of the intelligence business for decades, and I can't second-guess General Hayden on this point. But he has a sterling reputation as a brilliant and very honorable man, and he obviously knows the details of this program and the broader business of intelligence far better than any of us do. So I believe his comments should be taken at face value.

I think there may well be other examples. We know the FBI had briefly focused on two of the 9/11 hijackers when they were living in San Diego in 2000. It would not surprise me to learn that their investigation was constrained out of fear that they might violate the civil liberties of the terrorists. And if we look at FISA in the context of the broader assault on presidential constitutional power and the Intelligence Community—an assault led by the Church and Pike committees—then we might also consider the dramatic decrease in Human Intelligence (HUMINT) resources that began in response to those hearings during the Carter Administration. And, of course, the current public debate over the NSA surveillance program has in my view wrongly convinced much of the American public and probably most of the outside world that our government is controlled by lawbreaking tyrants. I can't imagine that there are not Intelligence Community professionals out there today—perhaps risking their lives for this country—who feel a need to consult with an attorney before carrying out their instructions for fear of being sent to prison as felons if they err in their efforts to prevent the next

major terrorist attack. And some of them might well decide that it is wiser to do as little as possible than to aggressively pursue terrorists and risk offending Congress and going to prison.

QUESTION 2:

- **In response to a question from Senator Feingold, you stated that the President has the authority to order the assassination of United States citizens. Are there any checks outside the Executive Branch that can limit the President's authority in what you describe as the "business of war"?**

ANSWER:

With all due respect, I believe you misunderstood my response to Senator Feingold's question. If my memory is correct, Senator Feingold complained about the secrecy surrounding the NSA surveillance program and asked whether there were any limits on the President's commander in chief power. He indicated he wanted each member of the panel to respond, but then engaged in a series of exchanges with Professor Kmiec—including asking whether the President could authorize the "assassination" of American citizens. When Senator Feingold later said "Professor Turner?," which I interpreted as inquiring whether I wanted to add something to that discussion, I replied "yes sir"—meaning not that I thought the President could authorize "assassination" but rather that I would welcome an opportunity to address the issue—and then I began by noting that secrecy is essential in wartime (I think I noted that President Roosevelt did not inform Congress or the public about the planned D-Day invasion, but that was not because he believed he was doing anything evil or illegal). I noted that many presidential powers during wartime are theoretically subject to abuse and yet still are not subject to "check" by Congress. A rogue President might conceivably instruct the military to shoot down an aircraft on the theory that it was being operated by al Qaeda when in fact he or she simply wished to kill a domestic political opponent who was on the flight. But few intelligence

people would argue that all targeting decisions must be approved by statute to avoid such a risk. And there are enough “checks” within the Executive Branch (NSA now has something like 200 people in the Office of the Inspector General alone) that such flagrant misconduct would quickly become public. Senator Feingold was concerned about his limited time, and interrupted me, at which time I started to address the “assassination” issue but realized my time was up. Because I did not get an opportunity to address the “assassination” issue—and, all the more so if others perceived, as you did, that I had endorsed it—I am grateful to you for raising this issue.

I first focused on the “assassination” issue while working as a Senate staff member during the Church Committee hearings more than 30 years ago. I believe that you and Senator Leahy are the only current members of the Committee who were in the Senate at that time, and I’m confident that you will recall the proposed “Intelligence Community Charter” that was considered to impose a variety of statutory limits on the Intelligence Community—including a prohibition against “assassination.” I remember discussing with my own boss, Senator Griffin, my concern that a situation might conceivably arise in which it would be very much in the interest of the United States and world peace to intentionally kill a particularly horrible tyrant—such as if we could have killed Adolf Hitler in 1939 and perhaps spared the 30 million deaths in World War II. (As you may recall, the lengthy Church Committee report on assassination was unable to identify a *single* person who had ever been “assassinated” by the CIA, and acknowledged that both DCIs Richard Helms and William Colby had on their own initiatives issued internal directives prohibiting any direct or indirect CIA involvement in “assassination.”)

Fifteen years later, I helped start the modern “assassination” debate when I wrote the lead article in the October 7, 1990, *Washington Post* Outlook Section under the heading, “Killing Saddam: Would It Be a Crime?” I drew a distinction between the intentional killing of a foreign leader who was engaged in a massive act of international aggression as an act of individual or collective self-defense, and the unprivileged “murder” of such a person. Most definitions of “assassination” include the word “murder.” They tend to focus either on the target (“the murder of a politically important figure”) or the technique

("murder by stealth, murder by treachery or by lying in wait"), but the common element is that the killings are unprivileged acts of *murder*. So I believe it is important to draw a sharp distinction between "assassination" (which is barred by Executive Order 12333 and ought not be engaged in) and the use of lethal force against tyrants and aggressors as an act of self-defense as recognized by Article 51 of the UN Charter.

The issue can be confusing when force is used against a prominent figure whose killing might in other circumstances be thought of as "assassination." Thus, if a prominent political figure broke into someone's home and began shooting family members, and the homeowner shot and killed him with her deer rifle, she would not be guilty of "assassinating" a political leader because her act was a justified act of self-defense. While once there was a rule in international law that it was unlawful to kill the enemy's leader, even in the days when launching an aggressive war was considered a sovereign prerogative of kings the leading publicists of the law of nations ridiculed the rule. In 1588, Alberico Gentili wrote in *The Law of War* that "our worthy leaders consult for their own interests" in making this rule, "for if they should come into the hands of the enemy, they would no longer have to fear for their own lives" And in an era where aggressive war is now a crime for which even heads of state may be put to death under the Nuremburg principles, it makes absolutely no sense to accept a legal rule that says tyrants like Saddam Hussein and Osama bin Laden must receive the special protections normally reserved during wartime for Red Cross or hospital workers.

So the short answer to Senator Feingold's question is "*No*, the President may *not* order the assassination [murder] of an American citizen pursuant to his commander in chief power or any other constitutional authority." But I think it is important to clarify that answer. I believe the President *does* have the authority to order the intentional, non-judicial killing of enemy leaders and combatants during wartime, and that applies not just in situations like the present when Congress has expressly authorized the President to use force, but even in situations of *de facto* war. Thus, on October 26, 1998, I published an op-ed in *USA Today* entitled "In self-defense, U.S. has right to kill terrorist bin Laden." I expanded my views on this issue at a 2002 conference at the University of Richmond

School of Law, and they were later published in volume 37 of the *University of Richmond Law Review* in March 2003 under the title “It’s Not Really ‘Assassination’: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites.”

Indeed, I would go further and suggest that in certain extreme settings the President has the right to order the intentional killing of Americans. Imagine, for a moment, the consequences of a contrary rule. If the President may not authorize the intentional killing of enemy combatants who happen to also be American citizens, then since we know that some members of al Qaeda and the Taliban have American citizenship, presumably we must instruct our soldiers to hold their fire until a federal judge can hear evidence, establish the nationality of each individual enemy, and authorize the targeting of the enemy. While one might argue that the situation on the “battlefield” is different and soldiers may certainly shoot back when fired upon, the situation is not that clean. First of all, in war enemy combatants may be lawfully engaged even when sleeping at night in their barracks. War involves more than merely “shooting back” when fired upon. More important, the concept of the “battlefield” has lost much of its traditional meaning—as our enemies have demonstrated that they hope to make American cities a major part of the battlefield and huge numbers of American citizens the target in this struggle. Indeed, as I noted in my prepared statement, it appears that, thus far, more Americans may have died on the American “battlefields” of September 11, 2001, than in Iraq and Afghanistan combined.

While we all have a strong preference for judicial sanction before human life is taken, the realities of warfare make that undesirable in many cases. Indeed, this principle goes beyond the scope of war. Every police officer in America is empowered to use lethal force against wrongdoers when, in the officer’s judgment, such force is necessary to preserve either the officer’s own life or the lives of innocent civilians. We train both military and police sharpshooters to “take out” wrongdoers without the slightest prior judicial review in settings where reliable nonviolent means of dispute resolution are deemed impractical, such as in many hostage situations.

By entrusting such decisions to individual police officers or their local commanders, we obviously increase the risks that an injustice will be done. Requiring that the police (or military) marshal their facts and evidence and seek the sanction of a federal judge would probably prevent a few miscarriages of justice. We are all aware of situations in which officers misperceived an existing situation and resorted to lethal force when it later became clear that they had the wrong suspect or the suspect was reaching in his pocket for a cigarette rather than a handgun. But imagine how many policemen and innocent citizens would die if we imposed a delay of days or even hours to involve a judge after the officers on the scene has concluded that the bank robber or terrorist is about to start shooting hostages? This need for “speed and dispatch” was discussed repeatedly during the Philadelphia Convention and the various state ratification conventions in explaining why the President *had* to be given these tremendously broad powers.

Obviously, when dealing with U.S. Persons inside this country, as a *policy* matter I believe there should be a strong presumption in favor of trying to apprehend them and try them rather than kill them. But the *Hamdi* Court relied upon *Quirin* in holding that U.S. citizens who join up with our enemies and plan or carry out hostilities against the United States or its forces may be treated as enemy combatants (e.g., they may be detained without trial until the end of hostilities), and I think that would apply as well to intentionally targeting them here or abroad.

Does that increase the risks that Americans will be killed without clear justification? I think it does. Giving the President the power to authorize a lieutenant or sergeant to employ lethal force during war increases the risk that innocent people—perhaps including U.S. citizens in an area of active hostilities—will be killed. And in every war, totally innocent people become “collateral damage” because they are in the wrong place and the wrong time, or because of bad intelligence, equipment failure, or human error. This is not desirable, but it is the lesser evil. Because if we require our soldiers to hold their fire until they are absolutely *certain* that no civilians are at risk, we will pay a large price in the form of dead American soldiers.

One might go further and note that the President has the constitutional authority to order the intentional killing of totally innocent American citizens in an extreme and exceptional case. For example, if we learned that bin Laden and his top 20 lieutenants were flying in a chartered aircraft (perhaps pretending to be traveling as businessmen to a sales convention), and they would be landing in a country that would not cooperate with the United States in the war on terror, a prudent and wise President might well order our military to shoot down the aircraft over international waters—even if we knew that the pilot, a member of the crew, or another passenger was a totally innocent American. Bringing the case closer to home, it is my understanding (from press accounts) that on September 11, 2001, orders were given to shoot down United Airlines Flight 93 (a Boeing 757 carrying 40 passengers and crew members and seven terrorists) because the terrorists were thought to be planning to crash it into the White House, Capitol Building, or similar high-value target in the Washington, DC, area. In war, difficult judgment calls have to be made expeditiously. Anyone who would contend that the President may *never* authorize the non-judicial taking of an American life will presumably be willing to explain why it is preferable to permit a foreign terrorist to crash a hijacked commercial airliner into the Capitol Building—perhaps killing hundreds of legislators, staff, and visitors—rather than shoot down the plane and kill 40 or 50 innocent Americans.

I hope I have been responsive to your questions. If not, please let me know and I will be pleased to elaborate further.

Prof. Turner's Answers to
Questions from
Senator Charles E. Schumer

1. Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved US citizens to be able to challenge the NSA program in court. Specifically, he said:

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a "terrorist" under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

ANSWER:

I believe Chief Justice John Marshall answered this question in *Marbury v. Madison* when he wrote: "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." That is to say, many decisions involving the conduct of armed conflict are entrusted entirely to the discretion of the President and were not intended to be "checked" either by Congress or the judiciary. At the core of these political powers vested in the President would be the negotiation of treaties and the collection of foreign intelligence information—both of which depend greatly for their success on secrecy, speed, and dispatch.

Obviously, in exercising his political powers the President must comply with the other provisions of the Constitution. So were a President to abuse his foreign intelligence collection power in such a manner as to violate a person's Fourth Amendment rights, and then seek to prosecute that person relying on evidence obtained through an unreasonable search or seizure, the defendant could presumably raise a Fourth Amendment challenge in seeking to exclude the evidence.

The Congress does have certain broad “checks” that can impede the President’s ability even to collect foreign intelligence information. Thus, it could lawfully refuse to raise any military forces and could refuse to appropriate any money for the military or the Intelligence Community. But Congress may no more properly use “conditions” on appropriations legislation to provide that no funds may be spent unless the President surrenders his constitutional powers—be it by requiring that he nominate an individual dictated by the Speaker of the House to be Secretary of Defense, or that he agree not to employ more than 100 soldiers on a particular hill after 7:00 PM during an authorized military campaign—that it may condition appropriations for the Supreme Court by withholding all funds in an otherwise valid appropriations act if the Court struck down as unconstitutional one or more specified acts of Congress.

Indeed, since our hearing took place the Supreme Court has reaffirmed the importance of the doctrine of “unconstitutional conditions,” noting in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, that the Court has long recognized that there are limits on “Congress’ ability to place conditions on the receipt of funds.” Referring to an amendment denying funds to universities that refused to permit military recruiting on campus, the unanimous Court explained earlier this month: ‘Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.’”

[*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 74 U.S.L.W. 4159 (U.S. Mar. 6, 2006).]

And by this same logic, Congress may not constitutionally condition appropriations for co-equal branches of our government upon the requirement that they surrender discretion vested in them by the Constitution.

I note on pages 27 and 28 of my prepared statement that the Founding Fathers feared that Congress might try to usurp the powers vested in the discretion of the other branches of government, and in my forthcoming trilogy on *National Security and the Constitution* I provide a number of historical examples to demonstrate that legislators have long acknowledged these limits. Consider this brief excerpt from volume two of that series:

EXCERPT from the unpublished draft of 2 Robert F. Turner, *National Security and the Constitution*, being revised for publication by Carolina Academic Press:

**Senator Borah and Congressional Controls on
the Commander-in-Chief (1922, 1928)**

Senator William Borah of Idaho served as a member of the Senate Committee on Foreign Relations for nearly thirty years and was its chairman for six. He was in addition

a respected constitutional lawyer. His views on the power of Congress to control the President's power as Commander-in-Chief are therefore worthy of careful attention.

On December 27, 1922, Senator Borah participated in an interesting colloquy on the Senate floor with Senator James Reed of Missouri:

MR. REED of Missouri. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?

Mr. BORAH. I do.

Mr. REED of Missouri. So do I Would it not be easier to bring the troops home than it would be to have the proposed [disarmament] conference?

Mr. BORAH. You can not bring them home, nor can I.

Mr. REED of Missouri. We could make the President do it.

Mr. BORAH. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.

Mr. REED of Missouri. I wish to change my statement. We can not make him bring them home . . . , but I think if there were a resolution passed asking the President to bring the troops home, where they belong, the President would recognize that request from Congress.

[64 CONG. REC. 993 (1922).]

An even more illuminating exchange occurred six years later, during consideration of a naval appropriations bill, when the Foreign Relations Committee chairman had this exchange with Senator John Blaine, a newly elected member from Wisconsin:

Mr. BORAH. Mr. President, the Constitution of the United States has delegated certain powers to the President; it has delegated certain powers to Congress and certain powers to the judiciary. Congress can not exercise judicial powers or take them away from the courts. Congress can not exercise executive power specifically granted or take it away from the President. The President's powers are defined by the Constitution. Whatever power belongs to the President by virtue of constitutional provisions, Congress can not take away from him. In other words, Congress can not take away from the President the power to command

the Army and the Navy of the United States. . . . Those are powers delegated to the President by the Constitution of the United States, and the Congress is bound by the terms of the Constitution.

Mr. BLAINE. Another question. All that the Senator has said in a general way is sound constitutional law, but before there can be any action on the part of any Government unit requiring the expenditure of funds that are in the Public Treasury, or that may be placed in the Public Treasury, Congress must first act and make an appropriation for every essential purpose. That money so appropriated can be used for no other purpose than that designated by Congress, and there is no power that can coerce Congress into making an appropriation. Therefore, Congress's power over matters respecting the making of war unlawfully, beyond the power of the President outside of the Constitution or within the Constitution, or conducting hostilities in the nature of the war during peace time, can be limited and regulated under the power of Congress to appropriate money.

Mr. BORAH. Of course, I do not disagree with the proposition that if Congress does not create an army, or does not provide for an army, or create a navy, the President can not exercise his control or command over an army or navy which does not exist. But once an army is created, once a navy is in existence, the right to command belongs to the President, and the Congress can not take the power away from him.

After some additional discussion involving other participants, Senator Blaine returned again to his contention that Congress could control the President's conduct as Commander-in-Chief by using its power over the purse:

Mr. BLAINE. Mr. President, just one other question of the distinguished Senator from Idaho [Senator Borah]. I know that ordinarily he does not hedge. I want to press him just once more to give us the value of his training as a constitutional lawyer. I repeat, assuming that Congress has created an army and has created a navy, after that is all done, then may Congress not limit the uses to which money may be put by the President as Commander in Chief in the operation and in the command of the Army and Navy?

The Senator has said that, of course, if we do not create an army and navy, then there is nothing over which the President has command. But we have an Army and a Navy. *Can not Congress limit, by legislation, under its appropriation acts, the purpose of which money may be used by the President as Commander in Chief of the Army and Navy?*

Mr. BORAH. I do not know what the Senator means by "purposes for which it may be used." Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it.

But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.

Shortly thereafter, in response to another question, Senator Borah said:

[I]f the Army is in existence, if the Navy is in existence, if it is subject to command, he may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury. What the result would be in the future as to appropriations would be another thing. I do not challenge the proposition that by refusing to appropriate, the President may be affected in the exercise of his power to command. The Congress might also refuse to appropriate for the Supreme Court for marshals, but why speculate about fanciful things?

Finally, this exchange occurred between Senator Borah and Senator Henrik Shipstead, a first-term Senator from Minnesota:

Mr. SHIPSTEAD. I agree with the Senator in that and I do not want to take away from the President the power to use the troops to protect American life and property.

Mr. BORAH. The Senator could not take it away from the President even if he wanted to do so. It is a power which belongs to him. We can not take it away from him.

[69 CONG. REC. 6759-60 (1928).]

[End Excerpt]

Senator Schumer, having focused much of my professional scholarship over the past three decades on the separation of national security constitutional powers—including writing a 1700-page Doctor of Juridical Science (SJD) dissertation on the issue—it is my very strong conclusion that the modern view (expressed during our hearing by Dean Koh and my old friend Bruce Fein) that Congress may control constitutional discretion vested in the President by the Constitution by the use of conditional appropriations threatens the heart of our Constitution. For, if Congress may usurp presidential control over troop deployments and foreign intelligence collection, there is no chance that the Supreme Court can maintain its independence from a usurping Congress. Why could not a simple majority of congressional conservatives, for example, simply include a “condition” on the next appropriations for the Supreme Court declaring that no funds in that or any other bill may be expended by the Court until the Court overturns *Roe v. Wade*? Why could not a rogue Congress (and I think that term appropriately can be applied to the congresses that

followed the Civil War and the war in Vietnam) simply eliminate judicial review altogether by including a condition denying all funds to the Court if it held *any* statute to be unconstitutional? You might call it the “Supreme Court Neutralization Act of 2006.” After all, unlike the commander in chief power, there is nothing in the Constitution that expressly vests in the judiciary the power to strike down enactments of the legislature—and, indeed, President Jefferson was outraged when Chief Justice Marshall asserted such a power in *Marbury*.

During World War II, Chairman Martin Dies of the House Committee on Un-American Activities persuaded his colleagues to insert a condition on an essential war appropriations measure declaring that no funds could be used to pay the salaries of thirty-nine named government employees he and his HUAC colleagues had concluded were Communists. The President could not afford to veto the bill without jeopardizing the success of military operations and the lives of American forces, so the proviso became law. And when it was challenged in the Supreme Court, the House sent its counsel into the Court to argue that the “power of the purse” was a plenary power that could not be reviewed, and thus the dispute was a “political question” that the Court could not properly address. The Court’s holding is instructive:

In view of the facts just set out we cannot agree . . . with counsel for Congress . . . that Section 304 is a mere appropriation measure, and that since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

We hold that the purpose of Section 304 was . . . permanently to bar them [the 39 named individuals] from government service, and that the issue of whether it is constitutional is justiciable. . . . What is involved here is a Congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, ‘... a limited constitution ... (is) one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.’ Federalist Paper No. 78. . . .

We hold that Section 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed.’

[*United States v. Lovett*, 328 U.S. 303, 313-15 (1946).]

And so, with all due respect, Senator, I would submit that those in Congress who are concerned about civil liberties (which I assume includes an overwhelming majority if not all members) must protect the separation of powers established by the Constitution even when they don't approve of the way other branches are exercising the powers committed to their discretion. I certainly share the frustration of most of you over the "torture" issue, and had either of us been the Commander in Chief we might well have done things differently. But we are not. And unless and until we are entrusted with that awesome responsibility by the people, we are free to voice our dissent over the way in which our President exercises the discretionary powers entrusted by the people to his care; but an actual assault on the powers of the President is an assault upon the Constitution itself. And once Congress decides it is permissible for the legislature to "condition" appropriations to usurp presidential discretion, it creates precedents for future congressional majorities to impose their will on minorities without regard for such "inconveniences" as the Bill of Rights.

2. **In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?**

ANSWER:

Those who rely upon the approval rate data from the FISA court to draw the conclusion that it is merely a "rubber stamp" for the Intelligence Community do a grave disservice to both the court and to the late Mary Lawton, a truly extraordinary public servant who set up and ran the Office of Intelligence Policy and Review in the Department of Justice until her death in 1993. The *reason* few applications are rejected is that Mary—and the lawyers she trained who have run that office since her death—did an *outstanding* job of making certain that no application that did not clearly satisfy the statutory predicate for a warrant was ever submitted to the court.

Another distinguished public servant who has contributed to this process has been M.E. "Spike" Bowman, who set up the national security law division of the office of general counsel at the FBI and ran it until last year. An exceptionally able retired Navy JAG captain (who previously served as NSA Assistant General Counsel), Spike Bowman is dedicated to assisting the Bureau in the accomplishment of its national security missions in full compliance with the law. I would add that it is my sense that the judges who have been assigned to sit on the Foreign Intelligence Surveillance Court (and the FISA Court of Review) have as well been able and hard-working public servants.

I have been out of government for far too many years to pretend that I understand the current technologies and have a handle on all of the problems associated with using FISA

in the operation currently being criticized. From the facts as set forth by the Attorney General and Lt. Gen. Hayden, it seems clear to me that this program does not even arguably violate anyone's Fourth Amendment rights. (In a February 24 exchange with me in the pages of *The CQ Researcher*, Center for National Security Studies Director Kate Martin conceded that monitoring communications between al Qaeda and Americans "is manifestly reasonable.") And in the absence of a constitutional problem, as all of the courts have agreed, the President has independent constitutional authority to collect foreign intelligence. And as the FISA Court of Review (and President Carter's Attorney General Griffin Bell) observed, Congress could not take away that constitutional power by a mere statute like FISA.

I don't pretend to have a full explanation of why this program was conducted outside the FISA system (and, as a constitutional matter, that is irrelevant, as it is entirely the President's choice), but I strongly suspect that the need for "speed and dispatch"—an issue repeatedly discussed in the Philadelphia Convention and the state ratification conventions—was a major consideration. Keep in mind that obtaining a FISA warrant is a time-consuming process. Once an NSA professional makes a determination that a channel of communications needs to be monitored, he or she must get approval from NSA lawyers in the office of the general counsel. If they concur, then the request is submitted with accompanying paperwork to the Office of Intelligence Oversight and Review at the Justice Department. There it is staffed anew, and if approved it must then go to the desk of the Attorney General (who has other responsibilities that demand his attention). If he approves, then the National Security Adviser or another senior national security official must also sign off. By then the average file is perhaps an inch thick, and it gets in line to be considered by the FISA Court. I am told the FISA judges have been working long hours and weekends, but if the system is to be anything more than a rubber stamp they cannot simply push these applications through without reviewing them. And while all of this is taking place, our enemies are actively at work—perhaps planning the next attack on New York City.

Complaining about the delay associated with trying to conduct the Revolutionary War under the watchful eye of the Continental Congress, General George Washington wrote in May 1780:

[A] plan must be concerted to bring out the resources of the Country with vigor and decision; this I think you will agree with me cannot be effected if the measures to be taken should depend on the slow deliberations of a body so large as Congress admitting the best disposition in every member to promote the object in view.

This first-hand experience with the evils of trying to fight a war effectively while having to "phone home" regularly for permission from Congress—along with the influence of the theoretical writings of brilliant scholars like John Locke—helped the Framers of our Constitution decide, as Jay put it, to leave "the business of intelligence" to be managed by the President "as prudence might suggest." Indeed, the Continental Congress ultimately invested General Washington with almost dictatorial powers so that he could

win the war. Throughout our history since then, legislators have often been frustrated over perceived weaknesses in the President's conduct of war. (During World War I, Congress briefly flirted with the idea of creating a committee of successful businessmen to whom the efficient management of the conflict would be delegated.) But, fortunately, there have usually been wiser and more senior members around to make the point that (to again quote John Marshall in *Marbury*): "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."

I would add but another point. We know that al Qaeda operatives are trained to exploit our moral values and our legal system as a tactic of struggle in this conflict. In 2000, the British intercepted an al Qaeda training manual during a raid that expressly stated that if taken to court al Qaeda operatives are to allege that they have been "tortured." And even if Congress had the constitutional power to insert federal district court judges between our soldiers and the enemy it ought not do so. In such an event, presumably, there would be even greater concern to make certain that soldiers were not shooting at people who had not been established "beyond reasonable doubt" to be enemy combatants than to merely guard against listening to the conversations of suspected terrorists.

One reason al Qaeda has not managed to carry out a single major attack inside this country since September 11, 2001 is the hard work of the men and women who make up our military, our police, and our intelligence services. Much of their work is done in secrecy, to avoid tipping off our enemies to what we know and what we are planning. We owe them all a tremendous debt of gratitude and our support. But in the wake of Vietnam, Congress passed a number of criminal statutes designed to punish government employees who violate the "rights" of suspected enemies. FISA includes criminal and civil penalties, but it is far from the only example. And my expectation is that al Qaeda operatives are going to start bringing lawsuits against some of our best and brightest public servants—not Senators or Representatives (you are largely protected by the Speech or Debate Clause)—but soldiers and police and FBI officials at every level. Because our enemies know that they don't have to actually "win" such a suit in order to score a victory. If they can force our most effective defenders to have to focus their energies on protecting their homes and life savings from a large court judgment, and perhaps even drive them into bankruptcy from the legal costs of even a successful defense in such a lawsuit, they know the effort will reach beyond punishing the named defendant. For as other government employees watch as the most able and effective public servants are crushed by the financial burden of defending themselves in such a lawsuit, the chilling effect will be palpable. Indeed, one likely consequence will be our smarter soldiers, intelligence operatives, and public officials within the military and intelligence communities will conclude that their personal welfare would be better served by finding a new way to earn a living.

I understand that we need to deter war crimes and abuses of civil liberties. This can be done. You have already enacted a variety of legislation that can be used to hold such people accountable—perhaps including serious prison time or even capital punishment. The issue I am raising is whether it is in the public interest to empower suspected foreign

terrorists and enemy combatants—people who may be doing everything within their power to kill tens of thousands of our fellow citizens—to use our courts as a weapon to weaken or destroy the brave young men and women who go into harm's way on our behalf. I predict that we are going to see these suits, and they are going to add yet another chilling effect to the harm done by the Church and Pike committees more than three decades ago.

Don't misunderstand me. If there is clear evidence that an American government employee—be it a cabinet member, an Army private, or an intelligence professional at NSA or in the FBI or CIA—has knowingly and intentionally violated the rights of a suspected terrorist, I'm not against holding that person accountable through our criminal justice system. But the initiative for such proceedings ought to be in the hands of government officials and prosecutors, not foreign terrorists. And if Congress in its wisdom concludes that a suspected terrorist whose rights were violated ought to receive millions of dollars in compensation, then pass a private bill. Don't impose the burden of paying such judgments upon individual soldiers or intelligence officers, or soon you may find that only fools will be willing to accept such positions.

3. **Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?**

ANSWER:

I don't have the factual or technical expertise to answer this question, but I do feel competent to address the more fundamental constitutional issue of whether Congress has the power to impose a "requirement" that the President communicate information to Congress about sensitive intelligence programs. And until about the time of the Vietnam War, all three branches of our government agreed that the answer was an emphatic "NO."

If you will look at pages 15-28 of my prepared testimony, you will find a fair amount of historical material to reinforce this point. If you would like more examples, just let me know. These are tremendously important issues, and I would like to be as helpful to you as I can.

Your question reminds me very much of the debate I took part in a dozen years ago over a proposal to make public the aggregate budget of the Intelligence Community. I argued that this was properly a decision for the President, not Congress, to make; and noted that none of us is likely to have the expertise to answer the question with any confidence. You can find my prepared statement to the House Permanent Select Committee on Intelligence online at http://www.fas.org/irp/congress/1994_hr/turner.htm.

I was told by HPSCI staff at the time that my testimony had persuaded the Committee not to pursue the proposed legislation to compel such disclosure. (I don't know if it is true that my testimony was important, but the legislation was not pursued.) As a general principle, I would submit that we don't want our country's enemies to know any more than is absolutely necessary about our intelligence programs. And there is no way to keep the American people informed of these issues without sharing that information with our enemies, who have agents who regularly follow our media. Announcing, for example, that in a certain year there had been a major increase or decrease in the Intelligence Community budget (or in applications submitted to the FISA Court) would likely be of little interest to the average American. But it might be of tremendous interest to our enemies, because it may help confirm reports they may have received from other sources about new technologies or major cutbacks in our surveillance or counter-intelligence programs. Let's say that in a given year we decide as a cost-cutting measure to deactivate and not replace an expensive space-based surveillance system that is manpower intensive. Cuban DGI agents pass the word to Iran that Americans will no longer be spending two billion dollars each year monitoring activities at third-tier military installations in that country because we have concluded they are no longer pursuing development there of biological weapons, and then Congress issues a report revealing a two billion dollar cut in the NRO budget. That could be vitally important information that could lead to a dramatic increase in Iranian WMD programs at the sites no longer being monitored.

An example concerning FISA might also be envisioned. What if the People's Republic of China were to attempt to discreetly double the number of its intelligence agents operating within the United States through an expanded university exchange program? By tracking the activity of the FISA court and learning there had been a significant increase in applications at the time the new covert agents arrived at their new universities, Beijing might well realize that we had an agent inside the office that was running this program—leading perhaps to the agent's death or the feeding of disinformation through the agent that would undermine our intelligence capabilities.

I'm not objecting to the making of reports to Congress on the number of FISA requests that are made or approved. I'm not in a position to balance the public good that might be served by such disclosures against the potential harm of providing such information to our enemies. But as a national security lawyer who has spent decades specializing in issues of separation of constitutional powers, I can tell you that this is the *President's* decision to make. And even if Congress had the power to compel such disclosure, it would be irresponsible to exercise it over the objections of the President.

I would respectfully submit as well that—on the basis of what has been said thus far—you have mischaracterized the NSA operation in calling it a "domestic surveillance program." To date I have seen no serious evidence that the program involves any warrantless surveillance of communications that both originate and terminate within the United States. On the contrary, both the December 16 *New York Times* article that broke the story and the presentation by General Hayden at the National Press Club on January 23, asserted that the monitored communications were all between known or suspected al

Qaeda members (or members of groups known to be associated with al Qaeda) outside this country and people within the United States. No one would seriously contend that an aircraft that either took off or landed in a foreign country was a "domestic" flight, and by the same logic it appears that all of the communications intercepted in this program were "international" in character.

Finally, Senator Schumer, I would urge you to consider carefully how actively involved you want our courts to be in overseeing the conduct of military operations -- be they attacks on enemy troop emplacements or the gathering of intelligence to locate targets for attack. Historically, the courts have recognized this to be an area where they lack the competency to second-guess the Commander in Chief and where judicial interference might well cause unforeseen and incalculable harm. Thus, on pages 27-28 of my prepared statement, I quote the Supreme Court in *United States v. Reynolds* as saying that the Court should not inquire into matters that involve "military secrets." And in *United States v. Nixon*, the 1974 Watergate executive privilege case, the Court carefully distinguished the president's qualified privilege in that case from the strong executive privilege regarding military and diplomatic secrets. In so doing, the Court quoted with approval the following language from the 1948 case of *C. & S Air Lines v. Waterman S.S. Corp.*: "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."

Although there are now hundreds of people within the executive branch charged with overseeing the legality of intelligence operations, if Congress and the courts are not given access to all of the secrets there is at least some risk that civil liberties will be compromised. And that is unfortunate. But I believe that risk must be balanced against the far greater risk that the lives of our soldiers and intelligence operatives who have been sent into harm's way on our behalf will be endangered, and the success of military operations compromised, if Congress departs from the way America has fought wars for the past 230 years. If you empower our nation's enemies (and al Qaeda could easily establish a house organ and credential its operatives in this country as "journalists") to interfere with the collection of foreign intelligence information and perhaps other military operations during wartime, even if the net effect is primarily to divert the men and women we rely upon to defend our nation from their assigned duties so they can return to America and testify in court, the consequences could be disastrous. And imagine for a moment the implications for operational success and troop safety if every federal district judge is empowered to order a halt to a challenged intelligence activity or military operation until a hearing could be held -- a power to be exercised at whim without any knowledge of the broader picture.

Legitimate foreign intelligence surveillance programs are extremely unlikely to run afoul of the Fourth Amendment, as "reasonableness" is determined by balancing the privacy interest at stake against the governmental interest, and the Supreme Court observed in *Haig v. Agee* and several other cases that "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." The real threat is that a president might decide to abuse his or her constitutional powers, such as

by directing the NSA to monitor all of your or Senator Kennedy's communications. In the first place, under the modern system the possibility that such an order could be carried out without a single person blowing the whistle -- either to Congress or the media -- is infinitesimal. And if we really had a rogue president, monitoring conversations might be the least of our concerns, as he might equally abuse his power over our armed forces to order the use of lethal force against his political enemies.

The nature of war is that success requires secrecy, unity of design, and speed and dispatch. None of these attributes are compatible with a process by which the Commander in Chief must share his operational plans and get approval from either Congress or the courts. Because we don't require proof beyond reasonable doubt before targets may be engaged in the battlefield, it is probably true that collateral damage increases. And in addition to the deaths of totally innocent noncombatants-either because they happened to be in the wrong place at the wrong time, or because bad intelligence or human error led to the bombs falling on the wrong target-there may well be "collateral damage" in the form of human rights violations, with NSA inadvertently monitoring a totally innocent communication between Americans by mistake. We have minimization procedures to deal with such situations, and, in the big picture, accidentally intercepting e-mail or phone conversations between totally innocent Americans does not approach some of the other inevitable tragic human consequences of fighting a war. And for Congress to conclude that the privacy interests of private citizens is the supreme value in wartime, and is to be protected irrespective of the costs involved-such as the Americans who might die in the next catastrophic terrorist attack in New York City, and the lives of our soldiers and intelligence operatives abroad--would in my view constitute both a violation of the oath of office each member takes to support the Constitution and a horribly shortsighted policy blunder.