AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Congressional Research Service, **Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information** (2006)[1]

The precursor to the Congressional Research Service (CRS) was formed in 1914, and the modern CRS was formed and dramatically expanded by Congress in 1970 during the Nixon administration. CRS is an agency within the Library of Congress charged with providing policy analysis and legislative assistance to Congress. CRS analysts routinely provide legal memos, reports, advice, and testimony for members of Congress, their staff, and congressional committees on legal and constitutional issues.

When the second Bush administration's efforts to collect intelligence information using electronic data mining techniques through the National Security Agency became public, two attorneys in the American Law Division of the CRS produced a memo analyzing the legality of the presidential policy under the Constitution and the Foreign Intelligence Surveillance Act of 1978 (FISA). This early analysis was critical of the administration's policy and was widely cited in both congressional and public debates over the NSA activities.

The CRS is designed to serve Congress as a whole. Would CRS be more or less effective if it adopted a more partisan tone? Why would Congress need an agency like the CRS when it has congressional committee staff and interest groups to provide members with constitutional arguments?

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Foreign intelligence collection is not among Congress's powers enumerated in Article I of the Constitution, nor is it expressly mentioned in Article II as a responsibility of the President. Yet it is difficult to imagine that the Framers intended to reserve foreign intelligence collection to the states or to deny the authority to the federal government altogether. It is more likely that the power to collect intelligence resides somewhere within the domain of foreign affairs and war powers, both of which areas are inhabited to some degree by the President together with the Congress.

The *Steel Seizure Case* (1952) is frequently cited as providing a framework for the courts to decide the extent of the President's authority, particularly in matters involving national security. . . .

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A review of the history of intelligence collection and its regulation by Congress suggests that the two political branches have never quite achieved a meeting of the minds regarding their respective powers. Presidents have long contended tha thte ability to conduct surveillance for intelligence purposes is a purely executive function, and have tended to make broad assertions of authority while resisting efforts on the part of Congress or the courts to impose restrictions. Congress has asserted itself with respect to domestic surveillance, but has largely left matters involving overseas surveillance to executive self-regulation, subject to congressional oversight and willingness to provide funds.

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In *Katz v. United States* (1967), the Court held for the first time that the protections of the Fourth Amendment extend to circumstances involving electronic surveillance of oral communications without physical intrusion. . . . The *Katz* Court noted that its holding did not extend to cases involving national security, and Congress did not then attempt to regulate national security surveillance. . . .

Several years later, the Supreme Court addressed electronic surveillance for domestic intelligence purposes. In *United States v. United States District Court* (1972), . . . the Court expressed no opinion as to

[1] Excerpt taken from Congressional Research Service, *Memorandum on Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* (January 5, 2006).

"the issues which may be involved with respect to activities of foreign powers or their agents," but invited Congress to establish statutory guidelines. Thus, at least insofar as domestic surveillance is concerned, the Court has recognized that Congress has a role in establishing rules in matters that touch on national security.

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The Foreign Intelligence Surveillance Act (FISA) provides a framework for the use of "electronic surveillance," as defined in the Act, and other investigative methods to acquire foreign intelligence information. In pertinent part, FISA provides a means by which the government can obtain approval to conduct electronic surveillance of a foreign power or its agents without first meeting the more stringent standard in Title III [of the Omnibus Crime Control Act of 1968] that applies to criminal investigations. . . .

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. . . [The House and Senate] conferees acknowledge that the U.S. Supreme Court, as the final arbiter of constitutional power, might reach a different conclusion. The Court has yet to rule on this matter.

The passage of FISA and the inclusion of such exclusivity language reflects Congress's view of its authority to cabin the President's use of any inherent constitutional authority with respect to warrantless surveillance to gather foreign intelligence. The Senate Judiciary Committee articulated its view with respect to congressional power to tailor the President's use of an inherent constitutional power:

> The basis for this legislation is the understanding . . . that even if the President has an "inherent" constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.

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. . . . May *any* statutory prohibition arguably touching on national security that applies "unless otherwise authorized by statute" be set aside based on the Authorization for the Use of Military Force [passed after September 11th]? Presidential asserts of wartime powers have faltered for lack of express congressional approval, especially where civil liberties are implicated. A less expansive interpretation of the AUMF might dictate that "necessary and appropriate force" must be read, if possible, to conform to the Constitution and Congress's understanding of what activity constitutes a use of force as opposed to an exercise of authority within the domestic sphere.

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Whether such electronic surveillances are contemplated by the term "all necessary and appropriate force" as authorized by the AUMF turns on whether they are . . . an essential element of waging war. Even assuming that the President's role as Commander in Chief of the Armed Forces is implicated in the field of electronic surveillance for the collection of foreign intelligence information within the United States, it should be accepted as a foregone conclusion that Congress has no role to play. By including the emergency authorization for electronic surveillance without a court order for fifteen days following a declaration of war, Congress clearly seems to have contemplated that FISA would continue to operate during war, although such conditions might necessitate amendments. . . .

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. . . . To the extent that the NSA activity is not permitted by some reading of Title III or FISA, it may represent an exercise of presidential power at its lowest ebb, in which case exclusive presidential control is sustainable only by "disabling Congress from acting upon the subject." While courts have generally accepted that the President has the power to conduct domestic electronic surveillance within the United States inside the constraints of the Fourth Amendment, no court has held squarely that the Constitution disables the Congress from endeavoring to set limits on that power. To the contrary, the Supreme Court has stated that Congress does indeed have the power to regulate domestic surveillance, and has not ruled the extent to which Congress can act with respect to electronic surveillance to collect foreign intelligence information. . . .