



AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

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Department of Justice, Paper on National Security Agency Activities (2006)¹

Shortly after the attacks of September 11, 2001, President George W. Bush authorized the National Security Agency (NSA) to intercept international communications in and out of the United States of people linked to al Qaeda or other terrorist organizations. The NSA is the primary branch of the intelligence agencies that engages in electronic surveillance and code-breaking, but its normal sphere of operation is limited to communications outside the United States. Given that there was particular concern after September 11 that terrorists and their allies inside the United States were coordinating with and taking directives from leaders abroad, the program was designed to intercept and disrupt the planning of terrorist operations inside the United States. The program was disclosed to congressional leaders in both political parties and to the judges of the Foreign Intelligence Surveillance Court, which would normally grant warrants for such surveillance. Although there were some concerns expressed about the program, it went forward and was not made public more broadly until it was exposed in media reports in fall 2005.

One legal obstacle to the program was the Foreign Intelligence Surveillance Act (FISA), which was adopted in 1978 after extensive post-Vietnam and post-Watergate debates over the proper scope and authority of covert and intelligence gathering activities by the federal government. The U.S. Supreme Court had held that the Fourth Amendment could protect against electronic surveillance by the government, but had refrained from deciding the scope of the president's constitutional power to authorize surveillance, either inside or outside the United States, of foreign powers for the purposes of protecting national security. FISA provided a legal framework for electronic surveillance and other searches for foreign intelligence. FISA authorized the president to conduct warrantless surveillance of communications among foreign powers or in areas under the control of foreign powers, and it provided procedures for obtaining an order from the Foreign Intelligence Surveillance Court for national security surveillance in other circumstances (e.g., communications between a foreign power and an American citizen in the United States). But what the scope of FISA might be when it came into conflict with inherent presidential powers or during wartime were left uncertain. The Bush administration came to believe, however, that the FISA procedures were too restrictive and technologically antiquated to respond adequately to the problems posed by al Qaeda, and the administration credited it with exposing terrorist plots in both the United States and Britain.

The program was initially supported by a classified opinion from the Office of Legal Counsel, but when the program was publicly revealed the administration produced new opinions suitable for public release.

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As Congress expressly recognized in the AUMF [Authorization for Use of Military Force], "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces, and authority over the conduct of the Nation's foreign affairs. As the Supreme Court has explained, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Export Corp.* (1936). In this way, the Constitution grants President inherent power to protect the Nation from foreign attack, see, e.g., *The Prize Cases* (1863), and to protect national security information, see, e.g., *Department of the Navy v. Egan* (1988).

¹ Excerpt from U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006.



To carry out these responsibilities, the President must have authority to gather information necessary for the execution of his office. The Founders, after all, intended the federal Government to be clothed with all the authority necessary to protect the Nation. *See, e.g., The Federalist* No. 23; id. No. 41. . . . Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation's foreign affairs. *See, e.g., The Federalist* No. 70. . . . Thus, it has long been recognized that the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns. *See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp.* (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 be published to the world."); *Curtiss-Wright*, at 320 ("He has confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."); *Totten v. United States* (1876) (President "was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy").

In reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes. Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. . . . Indeed, while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that "the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution.*" . . .

The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. . . .

In *United States v. United States District Court* (1972) (the "*Keith*" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly domestic threats to security – such as domestic political violence and other crimes. But the Court in the *Keith* case made clear that it was not addressing the President's authority to conduct foreign intelligence surveillance without a warrant and that it was expressly reserving that question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." . . . After *Keith*, each of the three court of appeals that have squarely considered the question have concluded – expressly taking the Supreme Court's decision into account – that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. . . .²

....
The present circumstances that support recognition of the President's inherent constitutional authority to conduct the NSA activities are considerably stronger than were the circumstances at issue in the earlier courts of appeals case that recognized this power. . . . The courts in these cases . . . had no occasion even to consider the fundamental authority of the President, as Commander in Chief, to gather intelligence in the context of an ongoing armed conflict in which the United States already had suffered massive civilian casualties and in which the intelligence gathering efforts at issue were specifically designed to thwart further armed attacks. Indeed, the intelligence gathering is particularly important in the current conflict, in which the enemy attacks largely through clandestine activities and which, as Congress recognized, "pose[s] an unusual and extraordinary threat," AUMF preamble.

Among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans

² *Keith* made clear that one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. . . . Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents. [footnote repositioned from the original by eds.]



abroad, *see, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g., The Prize Cases*. *See generally Ex Parte Quirin* (1942) (recognizing that the President has authority under the Constitution “to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war,” including “important incident[s] to the conduct of war,” such as “the adoption of measures by the military command . . . to repel and defeat the enemy.”). . . . Indeed, “in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson). In exercising his constitutional powers, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation’s enemies in a time of armed conflict.

In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President’s constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its allies. The broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force. The history of the President’s use of warrantless surveillance during armed conflicts demonstrates that the NSA surveillance described by the President is a fundamental incident of the use of military force that is necessarily included in the AUMF.

. . . .
Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of the Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President’s exercise of his constitutionally assigned duties as Commander in Chief. Constitutional avoidance principles require interpreting FISA, at least in the context of the military conflict authorized by the AUMF, to avoid these questions, if “fairly possible.” Even if Congress intended FISA to use the full extent of its constitutional authority to “occupy the field” of “electronic surveillance,” as FISA used that term, during peacetime, the legislative history indicates that Congress had not reached a definitive conclusion about its regulation during wartime. . . .

. . . .
There are certainly constitutional limits on Congress’s ability to interfere with the President’s power to conduct foreign intelligence searches, consistent with the Constitution, within the United States. . . . [I]ntelligence gathering is at the heart of executive functions. Since the time of the Founding it has been recognized that matters requiring secrecy – and intelligence in particular – are quintessentially executive functions. . . .

. . . .
. . . . The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the “President alone” is “constitutionally invested with the entire charge of hostile operations.” . . . As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not “interfere[] with the command of the forces and the conduct of the campaigns. That power and duty belong to the President as commander-in-chief.” *Ex parte Milligan* (1866) (emphasis added).

The Executive Branch uniformly has construed the Commander in Chief and foreign affairs powers to grant the President authority that is beyond the ability of Congress to regulate. In 1860, Attorney General Black concluded that an act of Congress, if intended to constrain the President’s discretion in assigning duties to an officer in the army, would be unconstitutional. . . .³

³ Executive practice recognizes, consistent with the Constitution, some congressional control over the Executive’s decisions concerning the Armed Forces. . . . But such examples have not involved congressional attempts to regulate the actual conduct of a military campaign For example, just before World War II, Attorney General Robert Jackson concluded that the Neutrality Act prohibited President Roosevelt from selling certain armed naval vessels and sending them to Great Britain . . . Jackson’s apparent conclusion that Congress could control the President’s ability to transfer war material does not imply acceptance of direct congressional regulation of the Commander in Chief’s control of the means and methods of engaging the enemy in conflict. . . . Similarly, in *Youngstown Sheet & Tube*



Supreme Court precedent does not support claims of congressional authority over core military decisions during armed conflicts. . . .

For the Court [in *Youngstown Sheet & Tube Co. v. Sawyer* (1952)], the connection between the seizure and the core Commander in Chief function of commanding the Armed Forces was too attenuated. The Court pointed out that the case did not involve authority over “day-to-day fighting in a theater of war.” Instead, it involved a dramatic extension of the President’s authority over military operations to exercise control over an industry that was vital to producing equipment needed overseas. . . .

Moreover, President Truman’s action extended the President’s authority into a field that the Constitution predominantly assigns to Congress. See *id.* at 588 (discussing Congress’s commerce power . . .); see also *id.* at 643 (explaining that Congress is given express authority to “raise and support Armies” . . .). Thus, *Youngstown* involved an assertion of executive power that only stretched far beyond the President’s core Commander in Chief functions, but that did so by intruding into areas where Congress has been given an express, and apparently dominant, role by the Constitution.

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. . . . [I]t is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress. Moreover, the theme that appeared most strongly in Justice Jackson’s concurrence in *Youngstown* – the fear of presidential bootstrapping – does not apply in this context. Whereas President Truman had used his inherent constitutional authority to commit U.S. troops, here Congress expressly provided the President sweeping authority to use “all necessary and appropriate force” to protect the Nation from further attack. . . .

Finally, *Youngstown* cannot be read to suggest that the President’s authority for engaging the enemy is less extensive inside the United States than abroad. To the contrary, the extent of the President’s Commander in chief authority necessarily depends on where the enemy is found and where the battle is waged. In World War II, for example, the Supreme Court recognized that the President’s authority as Commander in Chief, as supplemented by Congress, included the power to capture and try agents of the enemy in the United States, even if they never had “entered the theatre or zone of active military operations.” *Quirin*, at 38. In the present conflict, unlike the Korean War, the battlefield was brought to the United States in the most literal way, and the United States continues to face a threat of further attacks on its soil. . . .

The second serious constitutional question is whether the particular restrictions imposed by FISA would impermissibly hamper the President’s exercise of his constitutionally assigned duties as Commander in Chief. The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA.⁴ Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President’s most solemn constitutional obligation – to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not “fairly possible,” FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. . . .

Co. v. Sawyer, the Truman administration readily conceded that, if Congress had prohibited the seizure of the steel mills by statute, Congress’s action would have been controlling. . . . This concession implies nothing concerning congressional control over the methods of engaging the enemy.

Likewise, the fact that the Executive Branch, has, at times, sought congressional ratification after taking unilateral action in a wartime emergency does not reflect a concession that the Executive lacks authority in this area. . . . A decision to seek congressional approval can be prompted by many motivations, including a desire for political support. . . .

⁴ In order to avoid further compromising vital national security activities, a full explanation of the basis for the President’s determination cannot be given in an unclassified document.



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The Fourth Amendment prohibits “unreasonable search and seizures” and directs that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The touchstone for review of government action under the Fourth Amendment is whether the search is “reasonable.” See, e.g., *Vernonia School District v. Acton* (1995).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of “special needs, beyond the normal need for law enforcement” where the Fourth Amendment’s touchstone of reasonableness can be satisfied without resort to a warrant. *Vernonia*, at 653. The Executive Branch has long maintained that collecting foreign intelligence is far removed from the ordinary criminal law enforcement action to which the warrant requirement is particularly suited. . . . The object of foreign intelligence collection is securing information necessary to protect national security In foreign intelligence investigations, moreover, the targets of surveillance often are agents of foreign powers . . . who may be specially trained in concealing their activities and whose activities may be particularly difficult to detect. The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation.

. . . . Under the standard balancing of interests analysis used for gauging reasonableness, the NSA activities are consistent with the Fourth Amendment.

With respect to the individual privacy interests at stake, there can be no doubt that, as a general matter, interception of telephone communications implicates a significant privacy interest of the individual whose conversation is intercepted. . . .

On the other side of the scale, the Government’s interest in engaging in the NSA activities is the most compelling interest possible – securing the Nation from foreign attack in the midst of an armed conflict. . . .

The Government’s overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting one-end foreign communications where there is “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda. . . .

Of course, because the magnitude of the Government’s interest here depends in part upon the threat posed by al Qaeda, it might be possible for the weight that interest carries in the balance to change over time. It is thus significant for the reasonableness of the NSA activities that the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days. . . .

Finally, as part of the balancing of interests to evaluate Fourth Amendment reasonableness, it is significant that the NSA activities are limited to intercepting international communications where there is a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. . . .