

## THE TERRORIST SURVEILLANCE PROGRAM AND THE CONSTITUTION

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### INTRODUCTION

In response to the September 11 attacks, President Bush created the Terrorist Surveillance Program (“TSP”), which authorized the National Security Agency (“NSA”) to intercept phone calls and emails traveling into and out of the United States.<sup>1</sup> One of the parties to the communication had to be someone suspected of being a member of al Qaeda.<sup>2</sup> This surveillance took place outside the framework of the Foreign Intelligence Surveillance Act, or FISA, which since 1978 has regulated the interception of communications entering or leaving the United States.<sup>3</sup> FISA requires the Justice Department to seek a warrant from a special Article III court, the Foreign Intelligence Surveillance Court (“FISC”), to conduct electronic surveillance within the United States for national security purposes.<sup>4</sup>

The legality of the TSP has sparked great controversy. Academic and political critics claim that it violates FISA and represents an unconstitutional expansion of presidential power.<sup>5</sup> The Bush administration argues that the program is fully legal and has produced valuable information allowing the government to prevent terrorist attacks on the United States.<sup>6</sup> As of this

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<sup>1</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also Press Release, Press Briefing by Attorney General Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> [hereinafter “December 2005 Briefing”].

<sup>2</sup> See Risen & Lichtblau, *supra* note 1; December 2005 Briefing, *supra* note 1.

<sup>3</sup> Foreign Intelligence Surveillance Act of 1978 (“FISA”), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of U.S.C.), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT ACT”) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

<sup>4</sup> See FISA § 1822.

<sup>5</sup> See, e.g., Will, *infra* note 15; Epstein, *infra* note 26.

<sup>6</sup> December 2005 Briefing, *supra* note 1.

writing, a federal district court in Michigan issued an opinion enjoining the program, but the U.S. Court of Appeals for the Sixth Circuit has stayed the order, allowing the TSP to continue operating for the time being.<sup>7</sup> Proposals in the past Congress would have consolidated legal challenges in the FISC—which would have issued an authoritative decision on the constitutionality of the program—or mandated review by the Supreme Court upon appeal.<sup>8</sup>

This Essay argues that the TSP represents a valid exercise of the President’s Commander-in-Chief authority to gather intelligence during wartime. Part I argues that critics of the program misunderstand the separation of powers between the President and Congress in wartime. Part II traces the confusion to a failure to properly understand the differences between war and crime, and a difficulty in understanding the new challenges presented by a networked, dynamic enemy such as al Qaeda. Part III explains that because the United States is at war with al Qaeda, the President possesses the constitutional authority as Commander-in-Chief to engage in warrantless surveillance of enemy activity, even communications entering or leaving the United States, to successfully prosecute the war.

## I. CRITICS OF THE TSP: A FUNDAMENTAL MISUNDERSTANDING OF CONSTITUTIONAL POWERS

When *The New York Times* revealed the existence of the NSA program in December 2005,<sup>9</sup> a firestorm of controversy broke out. Some Democratic Congressmen suggested impeaching President Bush for violating federal law and the Constitution, a view shared by

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<sup>7</sup> *Am. Civil Liberties Union v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 438 F. Supp. 2d 754, 782 (E.D. Mich.), *stayed pending appeal*, 467 F.3d 590, 591 (6th Cir. 2006).

<sup>8</sup> Compare National Security Surveillance Act of 2006, S. 3876, 109th Cong. (2d Sess. 2006) (vesting adjudicatory power in the FISC, with possible grant to certiorari to the Supreme Court), with Foreign Intelligence Surveillance Oversight and Resource Enhancement Act of 2006, S. 4051, 109th Cong. (2d Sess. 2006) (authorizing mandatory Supreme Court review upon appeal by a party).

<sup>9</sup> See Risen & Lichtblau, *supra* note 1; see also December 2005 Briefing, *supra* note 1.

several liberal commentators.<sup>10</sup> A group of law professors and the Congressional Research Service argued that the President had broken the law by acting outside the federal wiretapping statutes.<sup>11</sup> In March of 2006, Senator Russell Feingold even introduced a motion in the Senate to censure President Bush for approving an illegal program “to spy on Americans, on American soil.”<sup>12</sup> Feingold claimed that the NSA program was “right in the strike zone of what the founding fathers thought about when they talked about high crimes and misdemeanors,” referring to the standard for impeachment.<sup>13</sup> Feingold, it should be added, was the only Senator to vote against the Patriot Act in 2001.<sup>14</sup>

Fire rained down not only from the left, but also from the right. Well-known conservative columnist George Will wrote in the *Washington Post* that the Bush administration had created a new danger, arguing:

[B]ecause the president [sic] is commander in chief, he is the ‘sole organ for the nation in foreign affairs.’ That non sequitur is refuted by the Constitution’s plain language, which empowers Congress to ratify treaties, declare war, fund and regulate military forces, and make laws ‘necessary and proper’ for the execution of all presidential powers. Those powers do not include

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<sup>10</sup> Jonathan Last, *Impeach Bush Now (!)(?) : It’s Not as Outlandish as it May Seem*, PHILADELPHIA INQUIRER, Mar. 19, 2006, at D1, available at [http://www.philly.com/mlid/inquirer/news/special\\_packages/sunday\\_review/14131676.htm](http://www.philly.com/mlid/inquirer/news/special_packages/sunday_review/14131676.htm).

<sup>11</sup> A letter to Congress from law professors and former government officials, many of them longtime critics of the Bush administration’s war on terrorism or opponents of presidential war powers, concluded that there is no “plausible legal defense” of the NSA program, and that President Bush should have sought an amendment to the Patriot Act to allow it. They argued that “the President simply cannot violate criminal laws behind closed doors because he deems them obsolete or impracticable.” Letter from Beth Nolan et al., to the Members of the United States Congress, (Feb. 9, 2006), <http://www.nybooks.com/articles/18650>. A similar conclusion is reached by the Congressional Research Service. See Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Congressional Research Service, to various congressional clients (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

<sup>12</sup> Sen. Russ Feingold, United States Senator, Statement on the President’s Warrantless Wiretapping Program (Feb. 7, 2006), <http://feingold.senate.gov/~feingold/statements/06/02/20060207.html> (discussing S. Res. 398, 109th Cong. (2006)) [hereinafter Wiretap Press Briefing].

<sup>13</sup> Sen. Russ Feingold, United States Senator, Statement on His Resolution To Censure President Bush (Mar. 16, 2006), <http://feingold.senate.gov/~feingold/statements/06/03/2006316.html>; cf. U.S. CONST. art. II, § 4.

<sup>14</sup> U.S. Senate Roll Call Votes 107th Congress—1st Session, Vote Summary On Passage of the Bill H.R. 3162, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=1&vote=00313](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313) (last visited Nov. 19, 2006); see also Shailagh Murray, *Senate Maverick’s Motion Stirs Angry Debate*, WASH. POST, Mar. 15, 2006.

deciding that a law—FISA, for example—is somehow exempted from the presidential duty to ‘take care that the laws be faithfully executed.’<sup>15</sup>

Will and other critics fail to understand the leading role in foreign affairs that the Constitution grants the President.

First, the statement that the President is the “sole organ for the nation in foreign affairs” was not manufactured by the Bush administration, but in fact derives from *United States v. Curtiss-Wright Export Corp.*, a well-known 1936 Supreme Court case that recognized the President’s control over diplomacy and setting foreign policy.<sup>16</sup> Congress as a whole does not ratify treaties.<sup>17</sup> Rather, the Senate participates in advising and consenting to treaties in its executive capacity (treaties are discussed in the Constitution’s Article II, where the presidency is established), but only after the President has negotiated and signed the treaty.<sup>18</sup> The President can even choose not to send a negotiated treaty to the Senate, or may refuse to “make” a treaty after the Senate has approved it.<sup>19</sup> So the treaty power is not the Congress’s but the President’s.<sup>20</sup>

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<sup>15</sup> George F. Will, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27 (emphasis omitted) (citing U.S. CONST. art. I, §§ 8, 10; U.S. CONST. art. II, § 3; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502003.html>.

<sup>16</sup> *Curtiss-Wright Export Corp.*, 299 U.S. at 320 (positing the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

<sup>17</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>18</sup> *Id.* (The President “shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

<sup>19</sup> See *id.* See Cong. Research Serv., 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 12 (Comm. Print 2001) (“After the Senate gives its advice and consent to a treaty, the Senate sends it to the President. He resumes control and decides whether to take further action to complete the treaty.”) (hereinafter “*Treaties and Other International Agreements*”); see also John K. Setear, *The President’s Rational Choice of a Preratification Pathway*, 31 J. LEGAL STUD. 5 (2002) (examining the President’s broad power, largely unchecked by Congress or the courts, to decide the procedure by which a treaty or congressional-executive agreement is ratified); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

<sup>20</sup> See *id.* *Treaties and Other International Agreements*, *supra* note 19, at 12 (“The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force . . .”).

Next, the Constitution's Necessary and Proper Clause gives Congress the power to implement the other powers of the government.<sup>21</sup> It does not, however, allow Congress to change the separation of powers in its favor by reducing the powers of the President. Finally, the President has the duty to "take Care that the Laws be faithfully executed."<sup>22</sup> But because the Constitution is the highest form of federal law, the President cannot enforce acts of Congress which are unconstitutional.<sup>23</sup> Will seems to imagine the Commander-in-Chief Clause<sup>24</sup> as being substantively empty—implying that its sole function is to execute the war policies of Congress.<sup>25</sup> What Will and other critics neglect is the President's war power independent of Congress.

In the *Wall Street Journal*, Richard Epstein, perhaps the nation's leading libertarian legal scholar, also argued that Congress has the upper hand in setting war policy.<sup>26</sup> He believes that Congress's constitutional powers to declare war, to make rules regulating the armed forces, and to fund the military signify that it could even prohibit the military from using live ammunition in combat.<sup>27</sup> Even so, Epstein does have a broader view of the Commander-in-Chief Clause than Will. Epstein's suggestions guarantee civilian control over the military and prevent Congress from issuing orders or evading the chain of command.<sup>28</sup> "The precise detailed enumeration of powers and responsibilities in Article II just do not confer on the president [sic] a roving commission over foreign and military affairs. He is a coordinate player, not a dominant one."<sup>29</sup>

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<sup>21</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>22</sup> U.S. CONST. art. II, § 3.

<sup>23</sup> See U.S. CONST. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (striking down an act of Congress as unconstitutional).

<sup>24</sup> U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

<sup>25</sup> See Will, *supra* note 15.

<sup>26</sup> Richard A. Epstein, *Executive Power on Steroids*, WALL ST. J., Feb. 13, 2006, at A16, available at [http://www.cato.org/pub\\_display.php?pub\\_id=5557](http://www.cato.org/pub_display.php?pub_id=5557).

<sup>27</sup> *Id.*

<sup>28</sup> Compare *id.* (reasoning that the Constitution grants coordinate powers to the President and Congress), with Will, *supra* note 15 (arguing that the constitutional power to ratify treaties, declare war, and fund and regulate the armed forces generally gives Congress significant power to constrain the President's actions in matters of foreign affairs).

<sup>29</sup> Epstein, *supra* note 26.

At best, he would allow the President to interpret, but not override, Congress's decisions when confronting a new situation unanticipated by the rules.<sup>30</sup>

Epstein's arguments are both more nuanced and rooted more in the constitutional text than Will's, but they are no more convincing. Scholars historically have understood the Commander-in-Chief Clause to be more than just a designation of the President as the top of the military chain of command.<sup>31</sup> The framing generation would have understood a Commander-in-Chief as having authority to determine when to resort to military hostilities and how to conduct them.<sup>32</sup> Article II of the Constitution also vests the President with "the executive power,"<sup>33</sup> which, in Justice Scalia's words, "does not mean *some* of the executive power, but *all* of the executive power."<sup>34</sup> Political theorists at the time of the framing considered foreign affairs and national security as quintessentially executive in nature,<sup>35</sup> and our Constitution creates an executive branch that can act with unity, speed, and secrecy to carry out those functions effectively.<sup>36</sup> Congress no doubt has important powers, such as the power to issue rules to regulate and govern the military, which gives it the sole authority to set the rules of military

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<sup>30</sup> *See id.*

<sup>31</sup> *See* John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

<sup>32</sup> As Hamilton wrote in *The Federalist*, "[e]nergy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . ." THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This point applies to the war context directly. Hamilton wrote: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Future Supreme Court Justice James Iredell argued that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 1836); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1485 (1833) (in military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power").

<sup>33</sup> U.S. CONST. art. II, § 1.

<sup>34</sup> *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

<sup>35</sup> *See* JOHN YOO, THE POWERS OF WAR AND PEACE 30-45 (2005).

<sup>36</sup> *See id.* at 30-45, 141-42; *infra* text accompanying notes 217- 220.

discipline and order.<sup>37</sup> But the Constitution nowhere vests in Congress any explicit authority to initiate national security policy, nor gives it an outright veto over executive decisions in the area.<sup>38</sup>

More broadly, these critics misunderstand the Constitution's allocation of war-making powers between the executive and legislative branches. The Constitution vests in the President the authority and the responsibility to prevent future attacks against the United States,<sup>39</sup> a power re-affirmed by Congress in the wake of the September 11 attacks in the Authorization for Use of Military Force ("AUMF").<sup>40</sup> For much of the history of the nation, Presidents and Congresses have understood that the executive branch's constitutional authority includes the power to begin military hostilities abroad.<sup>41</sup> During the last two centuries, neither have acted under the belief that the Constitution requires a declaration of war before the U.S. can engage in military hostilities abroad. Although this nation has used force abroad more than 100 times, it has formally declared war in only five conflicts against a total of eleven countries: the War of 1812, the Mexican-American War, the Spanish-American War, and World Wars I and II.<sup>42</sup> Without

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<sup>37</sup> See U.S. CONST. art. I, § 8, cl. 14.

<sup>38</sup> Epstein argues that the Commander-in-Chief is not textually a "power," but just a position. Epstein, *supra* note 26. But the lack of the word "power" there does not seem significant. Other authorities enjoyed by the President, such as the power to nominate and then appoint federal officials with the advice and consent of the Congress, do not use the word "power" either. See U.S. CONST. art. II, § 2, cl. 2. But the authority to appoint individuals is not a position, but indeed a right of the President, and an important one at that. The Treaty Clause, by contrast, does designate the President as having a "power," *id.*, but the role of the President in both appointments and treaties are virtually identical. It does not seem as if there is anything significant in the latter's grant of a "power" and the former's silence on the matter.

<sup>39</sup> See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ."); sources cited *supra* note 31 (interpreting the historical meaning of the Commander-in-Chief clause).

<sup>40</sup> Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. In the AUMF, Congress resolved: "[t]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* § 2.

<sup>41</sup> YOO, *supra* note 35, at 155-60.

<sup>42</sup> See generally John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793 (2004) (arguing that Congressional preapproval of the use of force abroad is not mandatory and evaluating American uses of force with and without formal declarations of war).

declarations of war or any other congressional authorization, Presidents have sent troops to oppose the Russian Revolution, intervene in Mexico, fight Chinese Communists in Korea, remove Manuel Noriega from power in Panama, and prevent human rights disasters in the Balkans.<sup>43</sup> Other conflicts, such as both Persian Gulf Wars, received “authorization” from Congress but not declarations of war.<sup>44</sup>

Critics of this long-standing practice of presidential initiative in war appeal to an original understanding of the Constitution.<sup>45</sup> But the text and structure of the Constitution, as well as its application over the last two centuries, confirm that the President can begin military hostilities without the approval of Congress. The Constitution does not establish a strict war-making process because the framers understood that war would require the speed,<sup>46</sup> decisiveness and secrecy that only the presidency could bring. “Energy in the executive,” Alexander Hamilton argued in the Federalist Papers, “is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . . .”<sup>47</sup> Indeed, according to Hamilton, “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>48</sup> The Constitution does not create a legalistic process of making war, but rather gives to the President and Congress different powers that they can use in the political process to either cooperate or compete for primacy in policy.<sup>49</sup> To exercise that power effectively, the President must have the ability to engage in electronic surveillance that gathers intelligence on the activities of the enemy.

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<sup>43</sup> *See id.*

<sup>44</sup> Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

<sup>45</sup> *See infra* notes 205-208 .

<sup>46</sup> *See supra* notes 37-38 and accompanying text.

<sup>47</sup> THE FEDERALIST NO. 70, *supra* note 32.

<sup>48</sup> THE FEDERALIST NO. 74, *supra* note 32.

<sup>49</sup> YOO, *supra* note 35 at 152-55.

## II. THE TRADITIONAL LEGAL FRAMEWORK FAILS TO ACCOUNT FOR A NETWORKED, DYNAMIC ENEMY LIKE AL QAEDA

No one—even the critics—seems to doubt that the information gained from the NSA program has led to the successful prevention of al Qaeda plots against the United States.<sup>50</sup> According to General Michael Hayden, President Bush’s nominee to head the CIA and leader of the NSA during much of the program’s existence, “[t]his program has been successful in detecting and preventing attacks inside the United States.”<sup>51</sup> When pressed by reporters whether it had succeeded where no other method would have, he said, “I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.”<sup>52</sup> Attorney General Alberto Gonzales informed the press that the NSA program was perhaps the most classified program in the U.S. government, and that it had helped obtain information that had prevented attacks within the United States.<sup>53</sup> The main criticism has not been that the program is ineffective, but that it violates the Constitution and cannot be undertaken, no matter how successful or necessary to protect the public.<sup>54</sup>

Any legal work on the surveillance program conducted by the Office of Legal Counsel remains classified, but after the leak of the program’s existence, the Department of Justice released a white paper about it.<sup>55</sup> But the crucial question remains unanswered: Why, as a matter

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<sup>50</sup> See, e.g., Risen & Lichtblau, *supra* note 1 (describing use of information obtained via wiretap to arrest suspect who plotted to destroy the Brooklyn Bridge).

<sup>51</sup> December 2005 Briefing, *supra* note 1.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *supra* notes 11-13, 15 and accompanying text.

<sup>55</sup> U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter NSA SUPPORTING AUTHORITIES].

of policy, would the Bush administration operate outside FISA,<sup>56</sup> especially after going to great lengths to pass the Patriot Act?

The Patriot Act made valuable improvements in our intelligence laws, but its true purpose was to update the outmoded law enforcement approach to national security that prevailed before 9/11.<sup>57</sup> The Patriot Act does not create or regulate the war power itself. Just as in the criminal justice system, where the police must have probable cause to believe that someone is involved in criminal activity before a warrant will issue,<sup>58</sup> the Patriot Act assumes that the government already has enough information to believe that a target is the “agent of a foreign power” before it even asks for a warrant.<sup>59</sup> FISA operates from the assumption that foreign intelligence agents are working for a hostile nation-state, and that it is relatively simple to determine who those agents might be.<sup>60</sup> Historically, surveillance targets were usually foreign embassy officials who were thought to be intelligence officers; the goal was to build as large a file on their activities and contacts as possible.<sup>61</sup> FISA’s drafters had in mind, as a typical case, a Soviet KGB agent posing as a diplomat, conducting espionage.<sup>62</sup>

A. *Information Is the Key, but Current Laws Are Retrospective and Prospective Programs Are Met With Criticism*

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<sup>56</sup> See sources cited *supra* notes 11-13, 15.

<sup>57</sup> See JOHN YOO, WAR BY OTHER MEANS 70-98 (2006) (describing the background and the significance of the USA Patriot Act).

<sup>58</sup> U.S. CONST. amend. IV.

<sup>59</sup> USA PATRIOT ACT § 207 (codified at 50 U.S.C. §§ 1805, 1824 (2000 & Supp. IV 2004)).

<sup>60</sup> See S. REP. NO. 95-604(I) (1977), at 20-22, reprinted in 1978 U.S.C.C.A.N. 3904, 3921-23.

<sup>61</sup> See Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 808-12 (1989).

<sup>62</sup> See S. REP. NO. 95-604(I), at 20-22, reprinted in 1978 U.S.C.C.A.N. at 3921-23.

Al Qaeda, our current enemy, poses a very different challenge.<sup>63</sup> We do not have a list of diplomats to work from or an embassy to watch, as was the dominant paradigm in the Cold War. An intelligence search conducted today, as Judge Richard Posner has described it, “is a search for a needle in a haystack.”<sup>64</sup> Rather than focus on foreign agents who are already known, counter-terrorism agencies must search for clues among millions of potentially innocent connections, communications, and links. “The intelligence services,” Posner writes, “must cast a wide net with a fine mesh to catch the clues that may enable the next attack to be prevented.”<sup>65</sup> Our best information about al Qaeda will be scattered and tough to gather, and our agents must be able to follow many leads quickly and move fast on hunches and educated guesses.

Members of the al Qaeda network can be detected, with good intelligence work or luck, by examining phone and e-mail communications, as well as evidence of joint travel, shared assets, common histories or families, meetings, and so on.<sup>66</sup> As the time for an attack nears, “chatter” on this network will increase as al Qaeda operatives communicate to coordinate plans, move and position assets, and conduct target reconnaissance.<sup>67</sup> When our intelligence agents successfully locate or capture an al Qaeda member, they must be able to move quickly to connect new information to other operatives before news of the capture causes these operatives to disappear. It is more important to chase them down quickly inside the United States than outside.

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<sup>63</sup> For information on al Qaeda, the terrorist group behind the September 11, 2001 attacks led by Osama bin Laden, see NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 47, 59-70 (2004) [hereinafter 9/11 COMMISSION REPORT], available at [www.9-11commission.gov/report/911Report.pdf](http://www.9-11commission.gov/report/911Report.pdf); see also YONAH ALEXANDER & MICHAEL S. SWETNAM, USAMA BIN LADEN’S AL QAIDA: PROFILE OF A TERRORIST NETWORK (2001).

<sup>64</sup> Richard A. Posner, *A New Surveillance Act*, Op-Ed., WALL ST. J., Feb. 15, 2006, at A16 [hereinafter *A New Surveillance Act*]. See generally RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS (2005).

<sup>65</sup> *A New Surveillance Act*, *supra* note 64.

<sup>66</sup> See 9/11 COMMISSION REPORT, *supra* note 63, at 361-98; *id.* at 227 n.68 (noting that the United Arab Emirates was able to track Marwan al Shehhi, one of the future 9/11 hijackers when he contacted his family).

<sup>67</sup> See *id.* at 263-65.

Incredibly, critics want to place bureaucratic impediments precisely at this juncture,<sup>68</sup> where the danger to America is greatest.

Take the example of the 9/11 hijackers. Since the attack, links suggested by commercially available data have shown ties between every single one of the al Qaeda plotters and Khalid al Mihdhar and Nawar al Hazmi, the two hijackers known to the CIA in the summer of 2001 to have been in the country.<sup>69</sup> Mihdhar and Hazmi had rented apartments in their own name and were listed in the San Diego phone book.<sup>70</sup> Both Mohammad Atta, the leader of the 9/11 al Qaeda cell, and Marwan al-Shehi, who piloted one of planes into the World Trade Center, had lived with them.<sup>71</sup> Hijacker Majed Moqed used the same frequent flier number as Hazmi. Five hijackers used the same phone number as Atta when booking their flights.<sup>72</sup> The remaining hijackers shared addresses or phone numbers with Ahmed Alghamdi, a hijacker who was in the United States in violation of his visa at the time.<sup>73</sup>

Our intelligence agents, in fact, had strong leads that could conceivably have led them to all the hijackers before 9/11 had they located some of the operatives through intercepted communications.<sup>74</sup> CIA agents identified Mihdhar as a likely al Qaeda operative because he was spotted at a meeting in Kuala Lumpur and was mentioned in Middle East intercepts as part of an al Qaeda “cadre.”<sup>75</sup> Hazmi too was known as a likely al Qaeda member.<sup>76</sup> In each case there was potentially sufficient evidence for a criminal arrest on either immigration charges or because of

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<sup>68</sup> See, e.g., sources cited *supra* notes 11-13, 15.

<sup>69</sup> Heather Mac Donald, *What We Don't Know Can Hurt Us*, CITY J., Spring 2004, at 14, 18, available at [http://www.city-journal.org/html/14\\_2\\_what\\_we\\_dont\\_know.html](http://www.city-journal.org/html/14_2_what_we_dont_know.html).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> 9/11 COMMISSION REPORT, *supra* note 63, at 158, 181.

<sup>76</sup> See *id.* at 158-59, 181-82.

links to the *U.S.S. Cole* bombing.<sup>77</sup> According to the 9/11 Commission Report, however, intelligence officials lacked the tools to find the men once they were inside the United States.<sup>78</sup> Had our intelligence services been able to immediately track the hijackers' cell phone calls and emails, it is possible that enough of the hijacking team could have been rounded up to avert 9/11, or at the very least, to prevent Mihdar and Hamzi from boarding American Airlines Flight 77, which they flew into the Pentagon.<sup>79</sup> Our task is much more difficult today, because we might not have even this slender information in hand when the next al Qaeda plot moves toward execution.

As we have waged the Afghanistan and Iraq wars, we have captured al Qaeda leaders as well as their laptops, cell phones, financial documents, and the other signs of modern high-tech life. Subsequent interrogations and investigations have uncovered information on dozens or hundreds of e-mail addresses, telephones, bank and credit account numbers, and residential and office addresses used by their network.<sup>80</sup> To exploit this wealth of information, our intelligence services must follow leads as fast as possible, before the network of al Qaeda operatives can migrate to a new leader. An e-mail lead can disappear as fast as it takes someone to open a new e-mail account. Our agents need to move even faster.

1. The Probable Cause Limitations of FISA

FISA, and the law enforcement mentality it embodies, creates several problems. FISA requires "probable cause" to believe that someone is an agent of a foreign power before one can get a warrant to collect phone calls and e-mails.<sup>81</sup> Suppose an al Qaeda leader has a cell phone

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<sup>77</sup> *Id.* at 272.

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* For an illustration of the the shortcomings of this approach, which prevented the FBI from examining Zacarias Moussaoui's laptop in August 2001, see *id.* at 273-76.

<sup>80</sup> *See, e.g.,* 9/11 COMMISSION REPORT, *supra* note 63, at 382 (detailing how the capture or death of several al Qaeda financial facilitators has caused disruptions to the organization's ability to finance operations).

<sup>81</sup> 50 U.S.C. § 1805(a)(3) (2000).

with 100 numbers in its memory, 10 of which are in the United States. Surveillance of those 10 would normally require a warrant issued pursuant to FISA. Would a FISA judge find probable cause to think the users of those 10 numbers are “agents of a foreign power,” in other words that their listing in the cell phone memory reasonably suggested that they were members of al Qaeda too? Probably not, because it is unlikely that our intelligence agencies would immediately know who answered the phone when the captured al Qaeda leader called the number, and a FISA Court would probably require such evidence. The same is true of the leader’s e-mail, except it would not be immediately obvious what addresses are held by U.S. residents, making probable cause even more difficult to establish.

In this world of rapidly shifting e-mail addresses, multiple cell phone numbers, and internet communications, FISA imposes slow and cumbersome procedures on our intelligence and law enforcement officers.<sup>82</sup> These laborious checks are based on the assumption that we still remain within the criminal justice system, and are looking backward in order to conduct prosecutions of those who have perpetrated crimes or infiltrated the government, rather than operating within the national security system, which looks forward in order to prevent deadly surprise attacks on the American people.<sup>83</sup> FISA requires a lengthy review process, in which special FBI and DOJ lawyers prepare an extensive package of facts and law to present to the Federal Intelligence Surveillance Court (“FISC”).<sup>84</sup> The Attorney General must personally sign the application, and another high-ranking national security officer, such as the President’s

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<sup>82</sup> See Cinquegrana, *supra* note 61, at 825, reasoning in 1989 that:

FISA also must keep pace with the continuing explosion in communications technologies available both to law enforcement agencies and potential surveillance targets. FISA was drafted to take account of experience and technology developed between 1968 and 1978, but the decade since its passage has witnessed substantial technological changes that could require amendments to FISA in order to extend its privacy protections and to facilitate legitimate government interests that might otherwise be frustrated.

<sup>83</sup> See YOO, *supra* note 57, at 71-74, 79-80 (noting that an artificial “Wall” in place for decades between information gathered for intelligence and information gathered for law enforcement purposes hindered the government’s ability to piece together intelligence which could have stopped the 9/11 attacks).

<sup>84</sup> See 50 U.S.C. § 1804 (2000) (current version at 50 U.S.C.A. § 1804 (West 2006)).

National Security Advisor or the Director of the FBI, must certify that the information sought is for foreign intelligence.<sup>85</sup> It takes time and a great deal of work to prepare the warrant applications, which can run 100 pages long. While there is an emergency procedure that allows the Attorney General to approve a wiretap for 72 hours without a court order, it can only be used if there is no time to obtain an order from the FISC, and the Attorney General determines that the wiretap satisfies FISA's other requirements.<sup>86</sup> Thus, the Attorney General could not use the emergency procedure if the probable cause standard was not met.<sup>87</sup>

## 2. The Potential Utility of Data Mining

Living within FISA's law enforcement framework will hamper efforts to take advantage of what is known as data mining. Data mining refers to the practice of using powerful supercomputers and advanced algorithms to analyze vast amounts of information for patterns of behavior.<sup>88</sup> In the United States, corporations employ data mining techniques to market products, like credit cards and magazine subscriptions, and to identify likely buyers based on their income level, geographic location, and purchasing and travel histories—as well as to detect fraud.<sup>89</sup> Similarly, financial companies analyze various patterns of behavior to discover suspicious activity that might suggest someone has stolen a credit card or account number.<sup>90</sup> Government data mining theoretically could compile information from government, public, and commercial databases to allow investigators to search for patterns of behavior that might correlate with terrorist activity. Airline security uses a simple variant of this approach when it identifies

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<sup>85</sup> 50 U.S.C. § 1804(a).

<sup>86</sup> 50 U.S.C. § 1805(f) (2000) (current version at 50 U.S.C. § 1805(f) (Supp. IV 2004)).

<sup>87</sup> *See id.*

<sup>88</sup> Open Directory—Data Mining Definition, [http://dmoz.org/Computers/Software/Databases/Data\\_Mining/desc.html](http://dmoz.org/Computers/Software/Databases/Data_Mining/desc.html) (last visited Dec. 24, 2006). For more detailed information on data mining, see generally Open Directory Project—Data Mining Database, [http://dmoz.org/Computers/Software/Databases/Data\\_Mining/](http://dmoz.org/Computers/Software/Databases/Data_Mining/) (last visited Dec. 24, 2006).

<sup>89</sup> *A Golden Vein*, *ECONOMIST*, June 10, 2004, at 23, *available at* 2004 WLNR 6533278.

<sup>90</sup> *Id.*

passengers for extra security screening—a foreign citizen buying a one-way, full-fare ticket, in cash, on the day of the flight would likely trigger a second look from airline security personnel.<sup>91</sup>

Data mining is the best hope for an innovative counter-terrorism strategy to detect and prevent future al Qaeda attacks. Rather than hope an agent will one day penetrate al Qaeda's inner circles—a dubious possibility—or that we will successfully seal our vast borders from terrorists, data mining would allow us to see patterns of activity that reveal the al Qaeda network's activity before it can attack.<sup>92</sup> Computerized pattern analysis could quickly reveal whether anyone linked to al Qaeda made large purchases of chemicals or equipment that could be used for explosives or chemical weapons. We could learn whether they traveled regularly to certain cities, and we could discover where they stayed and who they called in those cities.

As civil libertarians complain, almost all transactions of this nature—calling, emailing, spending money, traveling—are innocent.<sup>93</sup> We engage in them every day. That is exactly why al Qaeda has trained its operatives to use them as tools to conceal their plots.<sup>94</sup> Al Qaeda's leaders understand the difficulty in analyzing billions of transactions and interactions every day to detect their cells, and they realize that western societies impose legal obstacles on government access to such information.<sup>95</sup> Civil libertarian critics don't seem to have noticed that our government already employs modest forms of data mining to track down criminals and terrorists. In response to drug cartels and organized crime, our government has used simple data mining to track and

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<sup>91</sup> See 9/11 COMMISSION REPORT, *supra* note 63, at 392.

<sup>92</sup> Sealing our borders, even if it were possible, would not prevent all attacks because Al Qaeda does not merely target places within the United States, but also flights entering the United States, as in the case of the “shoe bomber” Richard Reid, as well as American and Western symbols abroad. See, e.g., *Three Decades of Terror*, FIN. TIMES, Feb. 7, 2003, <http://www.ft.com/cms/s/e5470480-d0d5-11d8-9597-0003ba5a9905.html>. Al Qaeda's ability to mastermind operations from far away only underscores the need to track down al Qaeda wherever it may operate. See 9/11 COMMISSION REPORT, *supra* note 63, at 365-67.

<sup>93</sup> See *infra* note 104 and accompanying text.

<sup>94</sup> See 9/11 COMMISSION REPORT, *supra* note 63, at 157-58, 167.

<sup>95</sup> *Id.* at 169.

analyze money flows for years.<sup>96</sup> Banks and financial institutions provide records of financial transactions to the Department of the Treasury, which searches the patterns for money laundering activity.<sup>97</sup> While the great majority of the transactions are legal, the information can piece together proof of criminal links after a conspiracy has been stopped, or it can help indicate suspicious activity that demands further investigation.<sup>98</sup> Analyzing money flows has also proven to be an important tool in detecting and breaking up terrorist networks.<sup>99</sup> If civil libertarians are right, consumers would also have an absolute right to privacy over their banking transactions and our government would lose this valuable, commonsense tool to combat crime, as well as terrorism. Two examples illustrate this point: (1) the NSA's use of phone records and (2) the Total Information Awareness program.

The civil libertarian overreaction can be seen in the outcry in the wake of the May 2006 revelation that the NSA sought call information from phone companies without a warrant.<sup>100</sup> Apparently the NSA obtained billing information on millions of phone calls within the United States, the same information used by telephone companies for billing and marketing purposes.<sup>101</sup> According to USA Today, the data had been stripped of names and addresses, but still contained the phone numbers of the calls.<sup>102</sup> President Bush addressed the country to say that he had ordered the government to do everything it could to prevent a future attack while also protecting Americans' privacy. "Al Qaeda is our enemy, and we want to know their plans," he said, without

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<sup>96</sup> Anita Ramasastry, *Lost in Translation? Data Mining, National Security, and the "Adverse Inference" Problem*, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 768-69 & n.32 (2006).

<sup>97</sup> See the Financial Crimes Enforcement Network, <http://www.fincen.gov> (last visited Dec. 24, 2006), which administers the Bank Secrecy Act, 31 U.S.C. §§ 5311-5330 (2000) (current version at 31 U.S.C. §§ 5311-5330 (2000 & Supp. IV 2004))

<sup>98</sup> See About the Financial Crimes Enforcement Network, <http://www.fincen.gov/YEreport/aboutFincen.html> (last visited Dec. 24, 2006).

<sup>99</sup> See Ramasastry, *supra* note 96, at 768-69; Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

<sup>100</sup> See Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at 1A, available at [http://www.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

confirming the program's existence.<sup>103</sup> Senator Leahy expressed outrage, suggesting that the government was watching every American for terrorist ties. "Are you telling me tens of millions of Americans are involved with al Qaeda?" he railed at a hearing the day after the USA Today story.<sup>104</sup> Harold Koh, Dean of the Yale Law School, called the disclosure "quite shocking" and said the courts would never have approved it.<sup>105</sup> House Democrats have repeatedly called for a special prosecutor to investigate.<sup>106</sup> Newspaper columnists predicted that "phone calls are just the start" of a massive government program to collect all data on all Americans for analysis.<sup>107</sup>

These privacy concerns are exaggerated. The Supreme Court has found that such information does not receive Fourth Amendment protection because the consumer has already voluntarily turned over the information to a third party.<sup>108</sup> It is not covered by FISA because no electronic interception or surveillance of the calls has occurred.<sup>109</sup> Meanwhile, the data is potentially of enormous use in frustrating al Qaeda plots. If our agents are pointed to members of an al Qaeda sleeper cell by a U.S. phone number found in a captured al Qaeda leader's cell phone, call pattern analysis would allow the NSA to determine the extent of the network and its activities.<sup>110</sup> It could track the sleeper cell as it periodically changed phone numbers.<sup>111</sup> This could give a quick, initial database-generated glimpse of the possible size and activity level of the cell in an environment where time is of the essence.

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<sup>103</sup> President George W. Bush, President's Radio Address (May 13, 2006), <http://www.whitehouse.gov/news/releases/2006/05/20060513.html>.

<sup>104</sup> Susan Page, *NSA Secret Database Report Triggers Fierce Debate in Washington*, USA TODAY, May 11, 2006, at 1A, available at [http://www.usatoday.com/news/washington/2006-05-11-nsa-reax\\_x.htm](http://www.usatoday.com/news/washington/2006-05-11-nsa-reax_x.htm).

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., Rep. Jerrold Nadler (D-NY), Letter to the Editor, *Oversight on Wiretapping*, N.Y. TIMES, Aug. 25, 2006, at A20, available at 2006 WLNR 14725599.

<sup>107</sup> Simson L. Garfinkel, *Big Brother Alert: Phone Calls Are Just the Start*, WASH. POST, May 14, 2006, at B2, available at 2006 WLNR 8320400.

<sup>108</sup> *Smith v. Maryland*, 442 U.S. 735, 743-46 (1979); *United States v. Miller*, 425 U.S. 435, 442-43 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2000).

<sup>109</sup> 50 U.S.C.A. § 1801(f) (defining "electronic surveillance" as acquisition of information "by a surveillance device").

<sup>110</sup> See Cauley, *supra* note 100.

<sup>111</sup> See *id.*

Through all the outrage, the limited nature of the data provided was downplayed—only the billing data was provided, devoid of information that could identify an individual.<sup>112</sup> Critics ramped up feverishly to use the confirmation hearings for General Hayden, whom President Bush nominated to head the CIA, as a platform to accuse the government of invasion of privacy.<sup>113</sup> Members of the Senate Intelligence Committee, who had earlier been briefed on the program, asked Hayden some tough questions,<sup>114</sup> but recommended him to the Senate, which confirmed him before the month was out.<sup>115</sup> For once, common sense held out.

Another example of libertarian overreaction is to the ill-fated and ill-named Total Information Awareness (“TIA”) program proposed in 2002 by the Defense Advanced Research Projects Agency (“DARPA”) under Admiral John Poindexter.<sup>116</sup> TIA proposed the use of supercomputers to data mine both government and commercial databases to spot potential terrorist activity.<sup>117</sup> Civil libertarians, both of the left and the right, engaged in a scare campaign against TIA—representing it as a big brother attempt to spy on Americans without any checks.<sup>118</sup> William Safire in the *New York Times* raised the alarm with the claim that the Defense Department would create “computer dossiers on 300 million Americans” and that Poindexter wanted to “snoop on every public and private act of every American.”<sup>119</sup> An outpouring of

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<sup>112</sup> *Id.*

<sup>113</sup> Bill Nichols & John Diamond, *Controversy Shadows Hayden Confirmation*, USA TODAY, May 12, 2006, at 10A, available at [http://www.usatoday.com/news/washington/2006-05-11-hayden-confirmation\\_x.htm](http://www.usatoday.com/news/washington/2006-05-11-hayden-confirmation_x.htm).

<sup>114</sup> See *Confirmation Hearing of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the Senate Select Committee on Intelligence*, 109th Cong. (2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051800823.html>.

<sup>115</sup> Charles Babington, *Hayden Confirmed as Spy Chief*, WASH. POST, May 27, 2006, at A2.

<sup>116</sup> See Jonathan Levin, *Total Preparedness*, NAT’L REV., Feb. 13, 2003, <http://www.nationalreview.com/comment/comment-levin021303.asp>. Admiral Poindexter had resigned from his job as national security advisor under President Reagan during the Iran-contra affair. See Biography of Admiral John M. Poindexter, <http://www.computerbytesman.com/tia/poindexterbio.htm> (last visited Dec. 24, 2006).

<sup>117</sup> See Mac Donald, *supra* note 69.

<sup>118</sup> See, e.g., Page, *supra* note 104.

<sup>119</sup> William Safire, *You Are a Suspect*, N.Y. TIMES, Nov. 14, 2002, at A35.

misinformed criticism led Poindexter to resign and Congress to cut off funding for TIA before any research, which would have included a full analysis of privacy concerns, had begun.<sup>120</sup>

It seems that critics are mostly interested in blindly limiting the powers of the government, even as it fights a tough war. They presume the American government to be acting in bad faith, and so all of its activities must be treated with the highest possible level of suspicion. Meanwhile, data mining technology and databases are exploding in the private sector.<sup>121</sup> It would be ironic if al Qaeda and private individuals were permitted greater legal access to new data technology than our own government, especially in wartime.

Overreaction and plain scare tactics killed TIA, a potentially valuable tool to counter al Qaeda's offensive within the United States.<sup>122</sup> It made little sense to cut off TIA at the research and development stage out of sheer anti-government paranoia. There was no chance to see what computer technology could even do, no discussion of whether adequate safeguards for privacy could be installed, and no opportunity to evaluate whether data mining would yield leads on terrorist activity that would be worth any costs to privacy. No analysis could be done on the legal issues.

Perhaps worst of all, we could never explore the ways that computers could be used to *protect* privacy. Data mining scans many perfectly innocent transactions and activities, but this in itself does not make the search illegal; even searches of homes and businesses or wiretaps with warrants will encounter many items or communications that are not linked to criminal activity.<sup>123</sup>

The understandable concern is that much innocent activity will come under scrutiny by data

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<sup>120</sup> Drew Clark, *Privacy Advocates Turn Tide In Homeland Security Debate*, CONGRESS DAILY, Sept. 15, 2003, 2003 WLNR 13647856.

<sup>121</sup> See *supra* notes 88-91 and accompanying text.

<sup>122</sup> See Clark, *supra* note 120.

<sup>123</sup> Cf. RICHARD A. POSNER, NOT A SUICIDE PACT 100-01 (2006) (discussing the need for an attenuated probable cause requirement in the national security context, because "intelligence officers will often not have a good idea . . . what they are looking for").

mining, unless controlled in some way by a warrant requirement.<sup>124</sup> But if computers are doing the primary scanning, privacy might not be implicated because no human eyes would ever have seen the data.<sup>125</sup> Only when the computer programs highlight individuals who fit parameters that reasonably suggest further study for terrorist links—say a young man who has traveled from Ohio to Pakistan several times, has taken flight lessons in the U.S., has received large deposits of cash wired into his account from abroad, and has purchased equipment that could be used for bomb-making—would a human intelligence officer view the records.<sup>126</sup>

At this point it is important to emphasize that no one is being declared guilty of anything—all that might be done at this point is to seek more information, deploy more resources, or seek a warrant.<sup>127</sup> It would be foolhardy to prevent our intelligence and law enforcement officers from studying patterns of private behavior to stop future attacks. Police routinely rely on the study of patterns, analyzing the “m.o.” of past crimes, or patterns of criminal activity in certain neighborhoods at different times, in order to try to predict future crimes.<sup>128</sup> Computerization, though no panacea, could reasonably protect privacy by preventing human eyes from ever seeing the irrelevant records of innocent activity.<sup>129</sup>

B. *Pursuing Alternatives to FISA’s Shortcomings Is Both Sound and Constitutionally Proper*

The previous discussion underscores the real problem with FISA, and even the Patriot Act. The laws depend on individualized suspicion—that searches and wiretaps must target a specific individual already believed to be involved in criminal activity.<sup>130</sup> But catching al Qaeda members who have no previous criminal record in the United States and who are undeterred by

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<sup>124</sup> See Page, *supra* note 104.

<sup>125</sup> See POSNER, *supra* note 123, at 97-100.

<sup>126</sup> See *id.* at 97.

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<sup>128</sup> Mac Donald, *supra* note 69, at 20.

<sup>129</sup> POSNER, *supra* note 123, at 97.

<sup>130</sup> See *supra* notes 58-60 and accompanying text.

the possibility of criminal sanctions requires more than that. We have to devote surveillance resources where there is a reasonable chance that terrorists will appear, or communicate, even if we do not know their specific identities. What if we knew that there was a fifty percent chance that terrorists would use a certain communications pipeline, like e-mails using a popular Pakistani website, but that most of the communications on that channel would not be linked to terrorism? A FISA-based approach would prevent computers from searching through that channel for the keywords or names that might suggest terrorist communications, because we would have no specific al Qaeda suspects, and thus no probable cause.<sup>131</sup> Rather than individualized suspicion, searching for terrorists will depend on playing the probabilities, just as with roadblocks or airport screenings. The private owner of a website has detailed access to that information every day to exploit for his own commercial purposes, such as selling lists of names to spammers, or gathering market data on individuals or groups. Is the government's effort to find violent terrorists a less legitimate use of such data?

Individualized suspicion dictates the focus of law enforcement, but war demands that our armed forces defend the country with a broader perspective. Armies do not meet a "probable cause" requirement when they attack a position or fire on enemy troops or intercept enemy communications on a frequency. The purpose of the criminal justice system is to hold a specific person responsible for a discrete crime that has already happened. By contrast, the purpose of intelligence is to guide actions, such as killing or capturing members of the enemy, that prevent future harm to the nation from a foreign threat.

#### 1. FISA's Framework Speaks to Prosecuting Criminal Acts, Not Preventing Attacks

FISA should be regarded as a safe harbor that allows the fruits of an authorized search to be used for prosecution. Using FISA sacrifices speed and breadth of information in favor of

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<sup>131</sup> See 50 U.S.C. §§ 1805, 1824 (2000 & Supp. IV 2004).

individualized suspicion, but it provides a path for using evidence in a civilian criminal prosecution. If the President chooses to rely on his constitutional authority alone to conduct warrantless searches, then he should only use the information for military purposes. As General Hayden said in his press conference, the primary objective of the NSA program is to “detect and prevent” possible al Qaeda attacks on the United States, whether another attack like September 11, or a bomb in apartment buildings, bridges, transportation hubs such as airports, or a nuclear, biological, or chemical attack.<sup>132</sup> These are not hypotheticals; they are all plots by al Qaeda and its followers, some of which our intelligence and law enforcement agencies have already stopped.<sup>133</sup> A President will want to use such information to deploy our military, intelligence, and law enforcement personnel to stop an attack. The price to pay for the speed and action necessary to prevent an attack (i.e., killing or detaining an operative) may be to lose the chance for a future criminal prosecution, leaving the government with only the option of holding an operative as an enemy combatant—a price well worth paying.

This framework gives the President the ability to choose the best method to protect the United States, whether through the military or by reliance on law enforcement. It also means that warrantless surveillance will not be introduced into the criminal justice system, so long as the judiciary enforces the legal versus military distinction. President Bush could go some way toward alleviating concern about the NSA program by publicly declaring that no evidence collected from the program would ever be used in any criminal case.

Gathering intelligence has long been understood as a legitimate aspect of conducting war; indeed, it is critical to the successful use of force.<sup>134</sup> Our military cannot attack or defend to good

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<sup>132</sup> December 2005 Briefing, *supra* note 1; *see also* Risen & Lichtblau, *supra* note 1.

<sup>133</sup> *See* Risen & Lichtblau, *supra* note 1.

<sup>134</sup> In the 1907 Hague Regulations, one of the first treaties on the laws of war, the leading military powers agreed that “the employment of measures necessary for obtaining information about the enemy and the country is

effect unless it knows where to aim. America has a long history of conducting intelligence operations to obtain information on the enemy. General Washington used spies extensively during the Revolutionary War, and as President he established a secret fund for spying that existed until the creation of the CIA.<sup>135</sup> President Lincoln personally hired spies during the Civil War, a practice which the Supreme Court upheld.<sup>136</sup> In both World Wars I and II, Presidents ordered the interception of electronic communications leaving the United States.<sup>137</sup> Some of America's greatest wartime intelligence successes have involved SIGINT, most notably the breaking of Japanese diplomatic and naval codes during World War II, which allowed the U.S. Navy to anticipate the attack on Midway Island.<sup>138</sup> SIGINT is even more important in this war than in those of the last century. Al Qaeda continues to launch a variety of efforts to attack the United States, including acquiring and deploying weapons of mass destruction.<sup>139</sup> The primary way to stop those attacks is to locate and stop al Qaeda operatives who have infiltrated the United States. One way to find them is to intercept their electronic communications entering or leaving the country.

## 2. Opting For Intelligence Gathering, Instead of Prosecutions, Comports with the Fourth Amendment's Reasonableness Requirement

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considered permissible." The Laws and Customs of War on Land (Hague IV) art. 24, Oct. 18, 1907, 1 Bevans 247, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>; MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 325 (1959). Interception of electronic communications is known as SIGINT, or signals intelligence, as opposed to HUMINT, or human intelligence. See National Security Agency, Signals Intelligence, <http://www.nsa.gov/sigint> (last visited Dec. 25, 2006). Writers on the laws of war have recognized that interception of an enemy's communications is a legitimate tool of war. According to one recognized authority, nations at war can gather intelligence using air and ground reconnaissance and observation, "interception of enemy messages, wireless and other," capturing documents, and interrogating prisoners. GREENSPAN, *supra* note 134, at 326.

<sup>135</sup> See *Halperin v. CIA*, 629 F.2d 144, 157-58 (D.C. Cir. 1980).

<sup>136</sup> *Totten v. United States*, 92 U.S. 105, 105-07 (1875).

<sup>137</sup> Exec. Order No. 2604 (Apr. 28, 1917) (World War I order); Exec. Order No. 8985, 6 Fed. Reg. 6625 (Dec. 19, 1941) (World War II order).

<sup>138</sup> CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY* 124-25 (1995).

<sup>139</sup> See 9/11 COMMISSION REPORT, *supra* note 63, at 1-14, 190, 381.

In the hours and days after 9/11, members of the government thought that al Qaeda would try to crash other airliners or use a weapon of mass destruction in a major east coast city, probably Washington, D.C.<sup>140</sup> Combat air patrols began flying above New York and Washington.<sup>141</sup> While at first strange, it soon became routine to leave the Justice Department building for lunch and to see F-15s and F-16s circling above. Suppose a plane was hijacked and would not respond to air traffic controllers. It would be reasonable for our anti-terrorism personnel to intercept any radio or cell phone calls to or from the airliner, in order to discover the hijackers' intentions, what was happening on the plane, and ultimately whether it would be necessary for the fighters to shoot down the plane.

Under the civil libertarian approach to privacy, the government could not monitor the suspected hijackers' phone or radio calls unless they received a judicial warrant first—the calls, after all, are electronic communications within the United States.<sup>142</sup> A warrant would be difficult to obtain, however, because it is unlikely that we would know the identities of all the hijackers, who might be U.S. citizens or permanent resident aliens.<sup>143</sup> But because we would be in a state of war, our military could intercept the communications of the plane to ascertain if it posed a threat, and target the enemy if necessary—without a judicial warrant, because the purpose would not be for criminal prosecution, but rather to prevent an attack. This comports far better with the principle of *reasonableness* that sits at the heart of the Fourth Amendment.<sup>144</sup> Defense against an attack on the United States or investigation of an active plot certainly would fall within the

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<sup>140</sup> See Jack Sullivan, *Attack on America; Probe Fans Out Across U.S.; Investigators Fear New Means of Terror*, BOSTON HERALD, Sept. 17, 2001, at 9, available at 2001 WLNR 647965.

<sup>141</sup> Andrea Stone, *Military Now a Presence on Home Front*, USA TODAY, Sept. 17, 2001, at 5A.

<sup>142</sup> See Nolan et al., *supra* note 11.

<sup>143</sup> See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.*”) (emphasis added).

<sup>144</sup> See *id.* (upholding the right of the people against “*unreasonable* searches and seizures”) (emphasis added); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

important governmental interests, independent of law enforcement, which justify warrantless searches under the Fourth Amendment.

When law enforcement undertakes a search to discover evidence of criminal wrongdoing, reasonableness generally requires a judicial warrant.<sup>145</sup> But when the government's conduct is not focused wholly on law enforcement, a warrant may not be necessary. For instance, a warrantless search can be constitutional ““when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.””<sup>146</sup> In this context, the Court asks whether, under the totality of the circumstances, the ““importance of the governmental interests”” outweighs the ““nature and quality of the intrusion on the individual's Fourth Amendment interests.””<sup>147</sup> If so, the government's search is reasonable under the Fourth Amendment.<sup>148</sup>

### III. THE PRESIDENT HAS CONSTITUTIONAL AUTHORITY TO CONDUCT FOREIGN INTELLIGENCE WITHOUT A WARRANT

As Commander-in-Chief, the President has the constitutional authority and the responsibility to wage war in response to a direct attack against the United States.<sup>149</sup> During World War II, for instance, the Supreme Court recognized that once war has begun, the President's authority as Commander-in-Chief and Chief Executive affords him access to the

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<sup>145</sup> See 79 C.J.S. SEARCHES § 56 (2006).

<sup>146</sup> *Vernonia School Dist.*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The Court has found warrantless searches such as random employee drug testing, drunk driving checkpoints, and temporary stops to search for weapons to be consistent with the Fourth Amendment. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (automobile searches); *Vernonia Sch. Dist.*, 515 U.S. 646 (drug testing of athletes); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver checkpoints); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing railroad personnel); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing federal Customs employees); *United States v. Place*, 462 U.S. 696 (1983) (baggage “sniff test”); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and search).

<sup>147</sup> *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Place*, 462 U.S. at 703).

<sup>148</sup> *Id.*

<sup>149</sup> See *supra* notes 39-49 and accompanying text.

tools necessary to effectively wage war.<sup>150</sup> The President has the power “to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war,” and to issue military commands using the powers to conduct war “to repel and defeat the enemy.”<sup>151</sup> In the wake of the September 11 attacks, even Congress agreed that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States . . . .”<sup>152</sup> This statement recognizes the President’s authority to use force, and any powers necessary and proper to that end, to respond to al Qaeda. The shift of power to the executive branch in wartime is not just an inference from the constitutional text and structure, but a lesson of history. In the Civil War, for example, President Lincoln raised an army, withdrew money from the treasury, and launched a blockade on his own authority in response to the Confederate attack on Fort Sumter—moves that Congress and the Supreme Court later approved.<sup>153</sup>

Even legal scholars who argue against this historical practice concede that once the United States has been attacked, the President can respond with force on his own.<sup>154</sup> The ability to collect intelligence is intrinsic to the use of military force.<sup>155</sup> It is inconceivable that the Constitution would vest in the President the power of Commander-in-Chief and Chief Executive, give him the responsibility to protect the nation from attack,<sup>156</sup> but then disable him by preventing him from gathering the intelligence needed to use the military most effectively. Evidence of the Framers’ original understanding of the Constitution is that the government

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<sup>150</sup> See *Ex Parte Quirin*, 317 U.S. 1, 26-29 (1942).

<sup>151</sup> *Id.* at 28.

<sup>152</sup> AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>153</sup> See *The Prize Cases*, 67 U.S. (2 Black) 635, 640-41, 669-70 (1863).

<sup>154</sup> See, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* 11 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990). *But see* YOO, *supra* note 35, at 143-60.

<sup>155</sup> See *supra* notes 134-**Error! Bookmark not defined.** and accompanying text.

<sup>156</sup> See discussion *supra* Part I.

would have every available tool to meet a foreign danger.<sup>157</sup> As the Supreme Court declared after World War II, this “grant of war power includes all that is necessary and proper for carrying these powers into execution.”<sup>158</sup> Collecting covert intelligence is clearly part of this authority.

A. *The Constitution and the Case Law Support the Power of to Gather Intelligence*

Some of the Framers of the Constitution believed that the President needed to manage intelligence because only he could keep secrets.<sup>159</sup> Several Supreme Court cases have recognized that the President’s role as the sole organ of the nation in foreign relations and as Commander-in-Chief must include the power to collect intelligence.<sup>160</sup> These authorities agree that intelligence rests with the President because the office’s structure allows the President to act with unity, secrecy, and speed.<sup>161</sup>

Presidents have long ordered electronic surveillance without any judicial or congressional participation. More than a year before the Pearl Harbor attacks, but with war clearly looming with the Axis powers, President Franklin Roosevelt authorized the FBI to intercept any communications, whether wholly inside the country or international, of persons “suspected of subversive activities against the Government of the United States, including suspected spies.”<sup>162</sup> FDR was concerned that “fifth columns”—those people believed to be loyalists who

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<sup>157</sup> As James Madison wrote in *The Federalist*, “security against foreign danger is one of the primitive objects of civil society.” Therefore, the “powers requisite for attaining it must be effectually confided to the federal councils.” FEDERALIST NO. 41, at 269 (James Madison) (Jacob E. Cooke ed. 1961).

<sup>158</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950).

<sup>159</sup> THE FEDERALIST NO. 64, at 435 (John Jay) (Jacob E. Cooke ed. 1961).

<sup>160</sup> *See, e.g., Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-21 (1936). In a post-Civil War case, recently re-affirmed, the Court ruled that President Lincoln had the constitutional authority to engage in espionage. *Totten v. United States*, 92 U.S. 105 (1876). The 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.” *Id.* at 106. On *Totten*’s continuing vitality, see *Tenet v. Doe*, 544 U.S. 1, 8-11 (2005).

<sup>161</sup> *Curtiss-Wright*, 299 U.S. at 319.

<sup>162</sup> Memorandum from Franklin D. Roosevelt, President of the United States, to Tom C. Clark, United States Attorney General (May 21, 1940), *reprinted in* *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 444 F.2d 651 app. at 669-70 (6th Cir. 1971).

clandestinely undermine the nation—could wreak havoc on the war effort.<sup>163</sup> “It is too late to do anything about it after sabotage, assassinations and ‘fifth column’ activities are completed,” FDR wrote in his order.<sup>164</sup> FDR ordered the surveillance even though a Supreme Court decision and a federal statute at the time prohibited electronic surveillance without a warrant.<sup>165</sup> FDR continued to authorize the interception of electronic communications even after Congress rejected proposals for wiretapping for national security reasons.<sup>166</sup>

Until FISA, Presidents continued to monitor the communications of national security threats on their own authority, even in peacetime.<sup>167</sup> If Presidents in time of peace could order surveillance of spies and terrorists, as President Roosevelt did in 1940, or as Presidents from Truman through Carter did during the Cold War, then executive authority is all the more certain now, after the events of September 11. This is a view held by the Justice Departments in several recent administrations. The Clinton Justice Department, for example, held a similar view of the executive branch’s authority to conduct surveillance outside the FISA framework.<sup>168</sup>

Courts have never opposed a President’s authority to engage in warrantless electronic surveillance to protect national security. When the Supreme Court first considered this question in 1972, it held that the Fourth Amendment required a judicial warrant if a President wanted to conduct surveillance of a purely domestic group, but it refused to address surveillance of foreign

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 670.

<sup>165</sup> See *Nardone v. United States*, 302 U.S. 379 (1937) (interpreting Section 605 of the Federal Communications Act of 1934 to prohibit the interception of telephone calls).

<sup>166</sup> See ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68-69 (2003).

<sup>167</sup> *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 15 (1978) (Statement of Griffin Bell, Att’y Gen. of the United States).

<sup>168</sup> Most notably, Clinton Deputy Attorney General Jamie Gorelick testified before Congress that the Justice Department could carry out physical searches for foreign intelligence purposes, even though FISA at the time did not provide for them. *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103rd Cong. 56-73 (1994). Clinton’s OLC issued a legal opinion that the President could order the sharing of electronic surveillance gathered through criminal wiretaps between the Justice Department and intelligence agencies, even though this was prohibited by statute. *Sharing Title III Electronic Surveillance Material with the Intelligence Community* (Oct. 17, 2000), <http://www.usdoj.gov/olc/titleIIIfinal.htm>.

threats to national security.<sup>169</sup> In the years since, every federal appeals court to address the question, including the FISA Appeals Court, has “held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.”<sup>170</sup> The FISA Appeals Court did not even feel that it was worth much discussion. It took the President’s power to do so “for granted,” and observed that “FISA could not encroach on the President’s constitutional power.”<sup>171</sup>

In *United States v. Truong Dinh Hung*, for example, the Fourth Circuit observed that “the needs of the Executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, ‘unduly frustrate,’ the President in carrying out his foreign affairs responsibilities.”<sup>172</sup> Several reasons led the Fourth Circuit to find that the warrant requirement did not apply to searches for foreign intelligence information:

(1) A warrant requirement . . . would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations[;] (2) the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance . . . [f]ew, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the ‘probable cause’ to demonstrate that the government in fact needs to recover that information from one particular source[;] and (3) the executive branch . . . is also constitutionally designated as the pre-eminent authority in foreign affairs.<sup>173</sup>

To summarize, the Fourth Circuit held that the government was relieved of the warrant requirement when the surveillance involves both a foreign power and a foreign intelligence motive.<sup>174</sup> First, warrants are not required when the object of the search or surveillance is a foreign power, its agents, or its collaborators since such cases are “most likely to call into play

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<sup>169</sup> *United States v. U.S. Dist. Court for the E. Dist. of Mich*, 407 U.S. 297, 320-22 (1972).

<sup>170</sup> *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (footnote omitted).

<sup>171</sup> *Id.*

<sup>172</sup> 629 F.2d 908, 913 (4th Cir. 1980).

<sup>173</sup> *Id.* at 913-14.

<sup>174</sup> *Id.* at 914-15.

difficult and subtle judgments about foreign and military affairs.”<sup>175</sup> Second, “when the surveillance is conducted ‘primarily’ for foreign intelligence reasons,” warrants are unnecessary for two reasons: (1) “once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination[;]” and (2) “individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”<sup>176</sup> Several other circuits have employed a similar logic, and no federal appeals courts have taken a different view.<sup>177</sup> The factors favoring warrantless searches for national security reasons are compelling under the current circumstances created by the war on terrorism. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order—to defend the nation from direct attack. “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”<sup>178</sup>

Congress also implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States.<sup>179</sup> Congress’s September 18, 2001 Authorization for Use of Military Force (“AUMF”) is sweeping; it has no limitation on time or place—the only directive is that the President pursues terrorists, such as al Qaeda.<sup>180</sup> Although the President did not need, as a constitutional matter, Congress’s permission to pursue and attack al Qaeda after the attacks on New York City and the Pentagon,<sup>181</sup> AUMF’s passage shows that the President and Congress fully agreed that military action would be appropriate. Congress’s support for the

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<sup>175</sup> *Id.* at 915.

<sup>176</sup> *Id.*

<sup>177</sup> *See* *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973); *United States v. Clay*, 430 F.2d 165, 171-72 (5th Cir. 1970), *rev’d on other grounds*, 403 U.S. 698 (1971).

<sup>178</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

<sup>179</sup> *See* AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>180</sup> *See id.* § 2.

<sup>181</sup> *See supra* Part I.

President cannot just be limited to the right to use force, but to all the necessary subcomponents that permit effective military action.<sup>182</sup> Congress's approval of the killing and capture of al Qaeda must obviously include the tools to locate them in the first place.

B. *A Policy Analysis Affirms the Need for the NSA Surveillance Program*

Critics have argued that the NSA's electronic surveillance is illegal because the AUMF didn't explicitly mention wiretapping or surveillance.<sup>183</sup> Of course it doesn't mention detentions, either, which the Supreme Court later upheld as authorized by Congress, in spite of a law on the books known as the Anti-Detention Act.<sup>184</sup> Critics essentially argue that Congress must enact a grocery list of specific powers and otherwise the President cannot fight a war. For instance, FISA prohibits electronic surveillance within the United States without congressional permission.<sup>185</sup> However, in the AUMF, Congress authorized the President "to use all necessary and appropriate force . . . [against those] he determines" were involved with the 9/11 attacks, or those who aid, support, or harbor those involved.<sup>186</sup> Individuals who are communicating with suspected al Qaeda operatives after 9/11 are likely to fall within the scope of the AUMF. The power to use force impliedly *includes* the power to use surveillance and intelligence to find the targets.<sup>187</sup> According to the critics, Congress authorized the President to pull the trigger, but also ordered him to wear a blindfold.

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<sup>182</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2092 (2005).

<sup>183</sup> See Nolan et al., *supra* note 11 and sources cited therein.

<sup>184</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion). Although a plurality opinion, five Justices agreed on this point because Justice Thomas, in dissent, also concluded that the President had the constitutional authority to detain enemy combatants, based on Congress' authorization in the AUMF. *Id.* at 587 (Thomas, J., dissenting). The Anti-Detention Act, c. 645, 62 Stat. 847 (1948) (codified as amended at 18 U.S.C. § 4001 (2000)), was passed in response to the detention of Japanese-Americans in World War II and prohibits the detention of American citizens without authorization by Congress. The Center for Constitutional Rights, Docket: *Hamdi v. Rumsfeld*, [http://www.ccr-ny.org/v2/gac/legal\\_article.asp?ObjID=SFG3oUP6Vx&Content=93](http://www.ccr-ny.org/v2/gac/legal_article.asp?ObjID=SFG3oUP6Vx&Content=93) (last visited Dec. 26, 2006). The Supreme Court thus acknowledged in *Hamdi* that the AUMF suffices for this authorization. *Hamdi*, 542 U.S. at 518.

<sup>185</sup> 50 U.S.C. § 1809(a) (2000).

<sup>186</sup> AUMF, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

<sup>187</sup> See *supra* notes 154-158 and accompanying text.

Obviously, Congress cannot legislate in anticipation of every circumstance that may arise in the future. That is one of the reasons, along with the executive branch's advantages in expertise and structural organization, why Congress delegates authority. Those who consider themselves legal progressives generally support the administrative state and vigorously defend broad grants of authority from Congress to the agencies of the executive branch.<sup>188</sup> Agencies such as the Federal Communications Commission or the Environmental Protection Agency exercise powers over broad sectors of the economy under the incredibly vague and broad congressional mandate that they regulate in the "public interest."<sup>189</sup> These agencies make decisions with enormous effects, such as which parts of the radio spectrum to sell,<sup>190</sup> or how much pollution to allow into the air,<sup>191</sup> all with little explicit guidance or thought from Congress.

Yet, when Congress delegates broad authority to the President to defend the nation from attack, critics demand that Congress list every power it wishes to authorize.<sup>192</sup> While the threats to individual liberty may be greater in this setting, it makes little sense to place Congress under a heavier burden to describe every conceivable future contingency that might arise when we are fighting a war, perhaps the most unpredictable and certainly most dangerous of human endeavors. Rather, we would expect and want Congress to delegate power to that branch, the

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<sup>188</sup> See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

<sup>189</sup> See Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 151 (2000)) (establishing the FCC); National Environmental Policy Act, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 (2000)) (establishing the Council on Environmental Quality, the precursor to the EPA); see also Federal Communications Commission, About the FCC, <http://www.fcc.gov/aboutus.html> (last visited Dec. 26, 2006); U.S. Environmental Protection Agency: About EPA, <http://www.epa.gov/epahome/aboutepa.htm> (last visited Dec. 26, 2006). Such broad delegations were recently upheld in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001).

<sup>190</sup> See Federal Communications Commission, Radio Spectrum Chart FAQ's, <http://www.fcc.gov/oet/faqs/freqchart.html> (last visited Dec. 26, 2006).

<sup>191</sup> See U.S. Environmental Protection Agency, Air Topic Bank, <http://www.epa.gov/ebtpages/air.html> (last visited Dec. 26, 2006).

<sup>192</sup> See, e.g., Louis Fisher, *Lost Constitutional Moorings*, 81 IND. L. J. 1199 (2006); see also Will, *supra* note 15 ("Congress, remembering what is happening today, might stipulate all the statutes and constitutional understandings that it does not intend the act to repeal or supersede.").

Executive, which is best able to act with speed to combat threats to our national security.<sup>193</sup> War is too difficult to plan for with fixed, antecedent legislative rules, and war also is better run by the executive, which is structurally designed to take quick, decisive action. If the AUMF authorized the President to detain and kill the enemy,<sup>194</sup> the ability to search for them is necessarily included.

C. *History Confirms the Appropriateness of a Swift Wartime Executive*

Prominent Senators, including Patrick Leahy, Edward Kennedy, and Harry Reid, as well as organizations such as the ACLU, not only claim the NSA surveillance program violates FISA, but they charge that it shows that President Bush believes he is “above the law.”<sup>195</sup> FISA, it might be argued, differs from the Anti-Detention Act because it is more comprehensive and also covers wartime. Even accepting, for the moment, the claim that the NSA program and FISA are in conflict, this does not make the program unconstitutional. Everyone would prefer that the President and Congress agree on war policy; it was one of the reasons the Bush administration sought the AUMF in the first place.<sup>196</sup> Our nation will wage war more effectively if the Executive and Legislature are unified in their purpose.

Conflict between the branches of government, however, is commonplace in our history. The President and Congress have pursued conflicting war policies in many, indeed most, wars. Congress passed the Neutrality Acts, before World War II, in a largely futile effort to restrain

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<sup>193</sup> See sources cited *supra* note 32.

<sup>194</sup> See *supra* note 186 and accompanying text.

<sup>195</sup> Charlie Savage, *Three Democrats Slam President Over Defying Statutes*, BOSTON GLOBE, May 2, 2006, at A2; American Civil Liberties Union, *ACLU Sues to Stop Illegal Spying on Americans, Saying President is not Above the Law* (Jan. 17, 2006), <http://www.aclu.org/safefree/nsaspying/23486prs20060117.html>.

<sup>196</sup> See President Signs Authorization for Use of Military Force Bill, Sept. 18, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html> (“[The AUMF] recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States.”).

FDR from assisting the allies.<sup>197</sup> Vietnam, the Iran-contra affair, and Kosovo are just the most recent examples of wars in which Congress tried to frustrate or micromanage executive war policy.<sup>198</sup>

The Constitution not only anticipated this struggle—it was written to ensure it. Our Framers did not give the President or the Congress complete control over war, foreign policy, or national security, but instead designed each branch differently, and gave them different powers that could be used to cooperate or fight. The President is the Commander-in-Chief and Chief Executive,<sup>199</sup> while Congress has the power over funding,<sup>200</sup> legislation,<sup>201</sup> the creation and discipline of the military,<sup>202</sup> and the power to “declare war.”<sup>203</sup> National security is dramatically unlike other government powers, such as passing a statute, appointing a judge, or making a treaty, where the Constitution sets out a precise, step-by-step process for the roles of the different branches of government.<sup>204</sup> Thus, we should not find surprising the ongoing partisan conflict over terrorism policy after 9/11; it is the Framers’ design made manifest.

## 1. The Framers’ Vision of the Executive Wartime Power

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<sup>197</sup> See Neutrality Act of 1935, ch. 837, 49 Stat. 1081; Neutrality Act of 1937, ch. 146, 50 Stat. 121; Neutrality Act of 1939, ch. 2, 54 Stat. 4 (codified at 22 U.S.C. §§ 441, 444-45, 447-51, 453-57 (2000)).

<sup>198</sup> See generally John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

<sup>199</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>200</sup> U.S. CONST. art. I, § 8, cl. 1, 12.

<sup>201</sup> U.S. CONST. art. I, § 1.

<sup>202</sup> U.S. CONST. art. I, § 8, cl. 11-15.

<sup>203</sup> U.S. CONST. art. I, § 8, cl. 11. The power to “declare” war is not the same as the power to “make” war. When defining Congress’s war powers, the Framers deliberately struck the word “make” from a draft of the Constitution in favor of “declare.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911). Madison and Elbridge Gerry of Massachusetts moved for this alteration so as to “leav[e] to the Executive the power to repel sudden attacks.” *Id.* at 318. While subsequent debate does not reveal a uniform understanding of the Declare War Clause, the alteration reflects an intention to prohibit Congress from encroaching on the executive power to conduct war. James Madison, pressed during the Virginia ratifying convention with the charge that the President’s powers could lead to a military dictatorship, argued that Congress’s control over funding would provide a sufficient check to the executive’s powers, declaring: “The sword is in the hands of the British king. The purse in the hands of the Parliament. It is so in America as far as any analogy can exist.” 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (Madison speech of June 14, 1788) (hereinafter “Madison Speech of 1788”).

<sup>204</sup> Cf. U.S. CONST. art. I, § 7 (passing a statute); U.S. CONST. art. II, § 2, cl. 2 (making a treaty and appointing judges).

Critics of the NSA program appeal to the Constitution as it works in peacetime, when Congress authorizes a policy and the President carries it out.<sup>205</sup> Critics imagine that the Constitution requires the President to check back with Congress on every strategy and tactic in the war on terrorism.<sup>206</sup> The NSA program is thus illegal, they say, because President Bush neglected to obtain yet another amendment to FISA approving it.<sup>207</sup> It is true that Congress offers more transparency and perhaps greater accountability to the public.<sup>208</sup> But it should also be clear that, over time, the Presidency has gained the leading role in war and national security because of its superior ability to take the initiative in response to emergencies.<sup>209</sup>

War's unpredictability makes unique demands for decisive and often secret action. John Locke first observed that a constitution ought to give the foreign affairs power to the executive because foreign threats are "much less capable to be directed by antecedent, standing, positive [l]aws" and the executive can act to protect the "security and interest of the public . . . ."<sup>210</sup> Legislatures are too slow and its members too numerous to respond effectively to unforeseen situations.<sup>211</sup> "Many things there are, which the [l]aw can by no means provide for; and those must necessarily be left to the discretion of him that has the [e]xecutive power in his hands, to be ordered by him as the public good and advantage shall require."<sup>212</sup>

The Framers well understood this principle. They rejected extreme republicanism, which concentrated power in the legislature, and created an executive with its own independent powers

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<sup>205</sup> See Nolan et al., *supra* note 11.

<sup>206</sup> See *id.*

<sup>207</sup> *Id.*; see also Wiretap Press Briefing, *supra* note 12.

<sup>208</sup> See, e.g., Neal Kinkopf, *The Statutory Commander in Chief*, 81 IND. L. J. 1169, 1195 (2006) ("Congress is constitutionally designed to introduce openness to governmental decision making. This openness, along with other aspects of Congress's structure, enhances public accountability and participation in the process of government decision making.") (footnotes omitted).

<sup>209</sup> See *supra* notes **Error! Bookmark not defined.**-49, 159-161 and accompanying text.

<sup>210</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 365-66 (Peter Laslett ed., Cambridge University Press 1988).

<sup>211</sup> See *id.* at 374-75.

<sup>212</sup> *Id.*

to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws.<sup>213</sup> The power to protect the nation, Hamilton wrote in the *Federalist Papers*, “ought to exist without limitation,” because “it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”<sup>214</sup> It would be foolhardy to limit the constitutional power to protect the nation from foreign threats: “[t]he circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”<sup>215</sup>

The Framers located the responsibility to respond to emergency and war in the Presidency because of its ability to act with unity, speed, and secrecy.<sup>216</sup> In the *Federalist Papers*, Hamilton observed that “[d]ecision, activity, secrecy, and dispatch will generally characterise [sic] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.”<sup>217</sup> “Energy in the executive,” said Hamilton, “is essential to the protection of the community against foreign attacks.”<sup>218</sup> Wartime, that most unpredictable and dangerous of human endeavors, therefore ought to be managed by the President.<sup>219</sup> “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>220</sup>

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<sup>213</sup> See discussion *supra* Part I.

<sup>214</sup> THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961).

<sup>215</sup> *Id.*

<sup>216</sup> See *supra* notes **Error! Bookmark not defined.**-49, 159-161 and accompanying text.

<sup>217</sup> *Id.*

<sup>218</sup> THE FEDERALIST NO. 70, *supra* note 32, at 472.

<sup>219</sup> THE FEDERALIST NO. 74, *supra* note 32, at 500.

<sup>220</sup> *Id.* at 471. James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that “[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person.” Debate in the North Carolina Ratifying Convention, in 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (2d ed. Ayer Company, Publishers, Inc. 1987); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1485, at 341 (1833) (arguing that in

## 2. Executive Wartime Power in Practice

If ever there were an emergency that Congress could not prepare for, it was the war brought upon the United States on 9/11. FISA was a law written with Soviet spies working out of their embassy in Washington, D.C. in mind.<sup>221</sup> No one then anticipated war with an international terrorist organization wielding the destructive power of a nation. The Presidency was the institution of government best able to respond quickly to the 9/11 attacks and to take measures to defeat al Qaeda's further efforts. While the certainty and openness of a congressional act would certainly be desirable, the success of the NSA surveillance program depends on secrecy and agility, two characteristics Congress as an institution lacks.

But, critics respond, Congress foresaw that war might increase demands for domestic wiretapping, and still prohibited the President from using electronic surveillance without its permission.<sup>222</sup> Why shouldn't Congress's view here, as in any other domestic question, prevail? It is simply not the case that the President must carry out every law enacted by Congress.<sup>223</sup> The Constitution is the supreme law of the land, and neither an act of Congress nor an act of the President can supersede it.<sup>224</sup> If Congress passes an unconstitutional act, such as a law ordering the imprisonment of those who criticize the government, the President must give force to the higher law, that of the Constitution.<sup>225</sup> Jefferson did just that in 1798 when the Alien and

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military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.").

<sup>221</sup> Cinquegrana, *supra* note 61, at 793-94 (1989) (describing the role of spying from the Soviet embassy in the origins of FISA).

<sup>222</sup> *See supra* notes 11-13 and accompanying text.

<sup>223</sup> *See, e.g.*, Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1239 (2005) ("The President is not bound by unconstitutional laws, and it is routine constitutional doctrine that laws purporting to take away the constitutional powers of the President are themselves unconstitutional.").

<sup>224</sup> *See supra* note 23.

<sup>225</sup> *See supra* note 23.

Sedition Acts were passed during an undeclared naval war with France.<sup>226</sup> He took the position that he, “believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the Constitution.”<sup>227</sup> That does not mean that the President is “above the law,”<sup>228</sup> it only means that the Constitution is above the Congress, and the President. FISA might be unconstitutional if it were read to forbid the President from gathering information necessary to prevent attacks on the United States in wartime.<sup>229</sup>

If the critics were right, and Presidents are duty bound to obey any and all acts of Congress, even those involving the Commander-in-Chief power, Congress could have ordered FDR not to attempt an amphibious landing in France in World War II, Truman to attack China during the Korean War, or JFK to invade Cuba in 1962. But Presidents such as Jefferson, Jackson, Lincoln, and FDR believed that they had the right to take action, following their interpretation of the Constitution rather than the views of Congress or the Supreme Court, especially in their role as Commander-in-Chief.<sup>230</sup>

Decades of American constitutional practice reject the notion of an omnipotent Congress. While Congress has the sole power to declare war, neither Presidents nor Congresses have acted

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<sup>226</sup> See Letter from Thomas Jefferson, President of the United States, to Mrs. John Adams (Sept. 11, 1804), available at <http://yamaguchi.netfirms.com/jefferson/1804.html>.

<sup>227</sup> *Id.* President Andrew Jackson expressed the same view in 1832, vetoing a bill that he regarded as unconstitutional even though the Supreme Court had upheld it as constitutional. “It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision,” he wrote. Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 582 (James D. Richardson ed., 1897). Abraham Lincoln, in the aftermath of the *Dred Scot* case, famously announced in his first inaugural that thenceforth, he would not follow the rule that a slave would not be free once in northern territory, though he chose to obey the Supreme Court’s order in the *Dred Scot* case itself. See First Inaugural Address of Abraham Lincoln (Mar. 4, 1861), <http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln1.htm>. Additionally, President Franklin Roosevelt evaded Congress’s Neutrality Acts and provided aid and comfort to the allies before Pearl Harbor. See Franklin D. Roosevelt Presidential Museum and Library, Franklin D. Roosevelt: 32nd President of the United States, <http://www.fdrlibrary.marist.edu/fdrbio.html> (last visited Dec. 1, 2006).

<sup>228</sup> Cf. sources cited *supra* note 195.

<sup>229</sup> NSA SUPPORTING AUTHORITIES, *supra* note 55, at 3.

<sup>230</sup> See *supra* notes 41-44 and accompanying text.

under the belief that a declaration of war must come before military hostilities abroad.<sup>231</sup> Without declarations of war or any other congressional authorization, Presidents have sent troops into hostilities abroad many times.<sup>232</sup> Other conflicts, such as both Persian Gulf Wars, received “authorization” from Congress but not declarations of war.<sup>233</sup>

Both the President and Congress generally agree that the legislature should not interfere in the executive branch’s strategic and tactical decisions.<sup>234</sup> Congress’s powers ought to be at their height at the decision to start a war, before troops have been committed and treasure or blood spent. Congress attempted to prevent Presidents from using force abroad, in the Nixon-era War Powers Resolution (yet another “reform” gone awry), by prohibiting the insertion of troops into hostile environments abroad for more than 60 days without legislative approval.<sup>235</sup> The Resolution has been a dead letter that has not prevented Presidents from using force abroad.<sup>236</sup> Presidents and Congresses alike have realized that the War Powers Resolution made little practical sense, and instead represented congressional overreaching into presidential expertise and constitutional authority in foreign affairs.<sup>237</sup>

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<sup>231</sup> See *supra* note 203.

<sup>232</sup> See *supra* notes 41- 44 and accompanying text.

<sup>233</sup> See sources cited *supra* note 44. For representative works arguing that Congress has sole control over when to begin wars, see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-11 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 203 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80-84 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 29 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990). My argument in response can be found in YOO, *supra* note 35, at 143-81.

<sup>234</sup> Cf. Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 *IND. L.J.* 1319, 1321 (2006) (“Many scholars clearly believe that the President has some exclusive CINC power because they admit that Congress cannot regulate tactical decisions involving the retreat and advance of soldiers.”).

<sup>235</sup> See War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (2000).

<sup>236</sup> See, e.g., John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 *COLUM. L. REV.* 1379, 1381 (1988).

<sup>237</sup> See *id.* at 1380-81.

Presidential leadership has always included control over the goals and means of military campaigns.<sup>238</sup> As the Supreme Court has observed, the President has the authority “to employ [the armed forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy.”<sup>239</sup> President Lincoln did not seek a law from Congress over whether to defend Washington, D.C.; President Roosevelt did not ask Congress whether he should make the war in Europe a priority over the war in the Pacific; President Truman did not seek legislative permission to drop nuclear bombs on Japan. Many of the wars fought since World War II, ranging from Korea to Panama to Kosovo, never received congressional authorization.<sup>240</sup> Obviously Presidents should not ignore congressional leaders. A wise President will consult with Congress at the right time. But the Constitution does not force the President to get a letter from Congress every time he makes an important decision about wartime strategy or tactics.<sup>241</sup>

Nor is the Congress defenseless. It has ample powers to block wartime initiatives.<sup>242</sup> It has total control over funding and the size and equipment of the military.<sup>243</sup> If it does not like a war or a strategy, it can cut off funds, reduce the size of units, or refuse to provide material for it. War would be impossible without Congress’s cooperation, or at least its acquiescence. This is increasingly true in the age of modern warfare, which requires material, high-technology weapons systems, and massive armed forces dependent upon constant congressional budgetary support.

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<sup>238</sup> Cf. Bradley & Goldsmith, *supra* note 182, at 2092 (“[I]n various nineteenth- and twentieth-century decisions upholding the validity of presidential actions during war, various members of the Supreme Court suggested, usually in dicta or dissents, that in the absence of express congressional restriction, the only limitations on presidential power during wartime were the laws of war.”)

<sup>239</sup> Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

<sup>240</sup> See *supra* notes 41-44 and accompanying text.

<sup>241</sup> See *United States v. Smith*, 27 F. Cas. 1192, 1199 (C.C.D.N.Y. 1806) (“Congress have [sic] the power of declaring war; and when that is done, the president is to act under it, and may authorize any military or hostile measure against the enemy.”)

<sup>242</sup> See U.S. CONST. art. I, § 8, cl. 11.

<sup>243</sup> See U.S. CONST. art. I, § 8, cl. 12-13.

Critics claim that Congress ought to have the upper hand in war to prevent military adventurism, to check war fever, and to guarantee political consensus.<sup>244</sup> This sounds plausible, but it neglects the benefits of executive action during time of foreign threat, and downplays Congress's faults, such as delay, inflexibility, and lack of secrecy. World War II clearly demonstrated that presidential initiative has been critical to the protection of American national security. When Europe plunged into war, Congress enacted a series of Neutrality Acts designed to keep the United States out of the conflict.<sup>245</sup> In 1940 and 1941, FDR recognized that America's security would be threatened by German control of Europe, and he and his advisers gradually attempted to bring the United States to the assistance of Great Britain and the Soviet Union.<sup>246</sup> FDR stretched his authority to cooperate closely with Great Britain in protecting convoys in the North Atlantic, and providing the British with 50 "obsolete" destroyers, among other things. American pressure on Japan to withdraw from China helped trigger the Pacific War, without which American entry into World War II might have been delayed by at least another year, if not longer.<sup>247</sup> Knowing what we now know, most would agree that America's earlier entry into World War II would have greatly benefited the United States and the world.

The Cold War is another example where consistent presidential leadership proved better for our national security than relying on Congress for leadership. Through their proxies, and often in secret, the United States and the communist bloc fought throughout the world. Congress

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<sup>244</sup> See *supra* notes 11-13 and accompanying text.

<sup>245</sup> Neutrality Act of 1935, ch. 837, 49 Stat. 1081; Neutrality Act of 1937, ch. 146, 50 Stat. 121; Neutrality Act of 1939, ch. 2, 54 Stat. 4 (codified at 22 U.S.C. §§ 441, 444-45, 447-51, 453-57 (2000)).

<sup>246</sup> For a standard historical source on the period see generally ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945 (1979); ROBERT DIVINE, ROOSEVELT AND WORLD WAR II (1969); WARREN F. KIMBALL, THE JUGGLER: FRANKLIN ROOSEVELT AS WARTIME STATESMAN (1991); FREDERICK W. MARKS III, WIND OVER SAND: THE DIPLOMACY OF FRANKLIN ROOSEVELT (1988); GADDIS SMITH, AMERICAN DIPLOMACY DURING THE SECOND WORLD WAR (1965).

<sup>247</sup> Marc Trachtenberg, *The Bush Strategy in Historical Perspective*, in NUCLEAR TRANSFORMATION: THE NEW U.S. NUCLEAR DOCTRINE (James Wirtz & Jeffrey Larsen eds., 2005).

only authorized the Vietnam War.<sup>248</sup> America and its allies fought Soviet proxies in Korea, Vietnam, and Nicaragua, the Soviet Union fought against American-backed forces in Afghanistan, and the two very nearly came into direct conflict during the Cuban Missile Crisis (JFK, by the way, did not ask Congress for permission to throw a blockade around Cuba).<sup>249</sup> After Vietnam, Congress tried to prevent presidential action by passing the War Powers Resolution.<sup>250</sup> Presidents have ignored the resolution and never acknowledged its legality. Congress has never tried to enforce it.<sup>251</sup> Generally, we prevailed in Vietnam through the steady presidential application of the strategy of containment, supported by congressional funding of the necessary military forces, but not through congressional decisions on when and where to wage war.<sup>252</sup>

D. *The Executive, Not Congress, is Best Structured to Respond to al Qaeda*

Critics also ignore how poor Congress's independent judgment can be on national security matters. Congress led us into two "bad" wars, the 1798 quasi-war with France and the War of 1812. And Congressional approval does not always bring consensus. The Vietnam War, one of the wars initially supported by Congress, did not meet with a consensus over the long term but instead provoked some of the most divisive politics in American history.<sup>253</sup> It is also difficult to claim that the congressional authorizations to use force in Iraq, either in 1991 or

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<sup>248</sup> See Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964).

<sup>249</sup> See Yoo, *supra* note 42, at 803-04; John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba (Oct. 22, 1962), *reprinted in* PUBLIC PAPERS OF PRESIDENT KENNEDY 1962, at 806.

<sup>250</sup> War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (2000).

<sup>251</sup> See *supra* notes 235-237 and accompanying text.

<sup>252</sup> This history is recounted in JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL REAPPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR (rev. ed. 2005); JOHN LEWIS GADDIS, WE NOW KNOW: RETHINKING COLD WAR HISTORY (1997).

<sup>253</sup> Cf. Robin Toner & Jim Rutenberg, *Partisan Divide on Iraq Exceeds Split on Vietnam*, N.Y. TIMES, July 30, 2006, <http://www.nytimes.com/2006/07/30/washington/30war.html?ex=1311912000&en=c6a6066ff004210e&ei=5088&partner=rssnyt&emc=rss>.

2002,<sup>254</sup> reflected a deep consensus over the merits of the wars there. Indeed, the 1991 authorization barely survived the Senate, and the 2002 authorization received significant negative votes and has become a deeply divisive issue in national politics.<sup>255</sup>

Legislative deliberation can breed consensus in the best of cases, but it also can stand in the way of speed and decisiveness. Terrorist attacks are more difficult to detect and prevent than those posed by conventional armed forces and nations, and WMDs allow terrorists to inflict devastation that once only could have been achievable by a nation-state.<sup>256</sup> To defend itself from this threat, the United States will have to use force earlier and more often than at the time when nations generated the primary threats. In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the President needs the flexibility to act quickly. By acting earlier, perhaps before WMD components have been fully assembled or before an al Qaeda operative has left for the United States, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force.

Critics of the NSA program want to overturn American historical practice in favor of a new and untested theory about the wartime powers of the President and Congress.<sup>257</sup> We should encourage innovation and creativity in our intelligence and military—and the NSA program is precisely that—to confront the unprecedented challenges of al Qaeda. For too long, our system retarded aggressive measures to pre-empt terrorist attacks.<sup>258</sup> But seeking to give Congress the dominant hand in setting wartime policy would render our tactics against al Qaeda less, rather than more effective. It would slow down decisions, make sensitive policies and intelligence

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<sup>254</sup> See sources cited *supra* note 44.

<sup>255</sup> See Senate Approves Iraq War Resolution, <http://archives.cnn.com/2002/ALLPOLITICS/10/11/iraq.us> (last visited Dec. 27, 2006).

<sup>256</sup> 9/11 COMMISSION REPORT, *supra* note 63, at 361-62.

<sup>257</sup> See *supra* notes 11-13 and accompanying text.

<sup>258</sup> See 9/11 COMMISSION REPORT, *supra* note 63, at 399-419.

public, and encourage risk aversion rather than risk taking. It ignores the reality of the al Qaeda challenge to require the President to seek, every time he wants to make an important policy change, congressional permission first.

1. Congress and the Courts Have Checks to Balance Presidential Power

Claims that the NSA program violates the Constitution appeal not to a concern about law, but rather to a concern about politics. They express the worry that if the President is waging a war, and war has slipped into the United States itself, we will centralize too much power in the President over our domestic affairs.<sup>259</sup> The NSA program, however, does not signal that we live under a dictator, or that the separation of powers has failed, the exaggerated claims of civil libertarians notwithstanding.

Instead, the other branches of government have powerful and important tools to limit the President should his efforts to defeat terrorism slip into domestic oppression. Congress has total control over funding and significant powers of oversight.<sup>260</sup> It could do away with the NSA as a whole. The Constitution does not require that Congress create an NSA or any intelligence agency. It need not engage in anything as drastic as doing away with the NSA, of course. Congress could easily eliminate the surveillance program itself simply by cutting off all funds for it. It could also link approval of administration policies in related areas to agreement on changes to the NSA program. Congress could refuse to confirm cabinet members, subcabinet members, or military intelligence officers unless it prevails over the NSA. It could hold extensive hearings that bring to light the NSA's past operations, backed up by the power of subpoena, and require

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<sup>259</sup> See, e.g., Wiretap Press Briefing, *supra* note 12.

<sup>260</sup> U.S. CONST. art. I, § 8. The Framers clearly intended to replicate the British model of the executive which was in both theory and practice hemmed in by the Parliamentary power of the purse. Pressed during the Virginia ratifying convention with the charge that the President's powers could lead to a military dictatorship, James Madison argued that Congress's control over funding would be enough of a check to control the executive. Madison Speech of 1788, *supra* note 203.

NSA officials to appear and be held to account. It could even enact a civil cause of action that would allow those who have been wiretapped by the NSA to sue for damages, with the funds coming out of the NSA's budget. So far, Congress has not taken any of these steps, and in fact passed up an obvious chance when it confirmed General Hayden to head the CIA.<sup>261</sup> We should not mistake congressional silence for opposition to the President's terrorism policies.<sup>262</sup>

Courts can exercise their own check on presidential power, although one that is not as comprehensive as Congress's. Any effort to prosecute an al Qaeda member or a terrorism suspect within the United States will require the cooperation of the federal courts.<sup>263</sup> If federal judges believe that the NSA's activities are unconstitutional, they can refuse to admit into evidence any information discovered by warrantless surveillance.<sup>264</sup> The NSA's activities should remain in the field of war, in order to prevent a direct attack, rather than to promote the objects of the law enforcement system. Federal courts can police this distinction simply by refusing to admit any NSA-related evidence at criminal trials.

## 2. The Executive Can Operate These Programs in a Way that Reassures the Other Branches of Government and the Public

The President can structure the NSA program to enhance public confidence that its fruits will not be used for political or law enforcement goals. While he has the constitutional authority to carry out the searches in secret,<sup>265</sup> it may be to the nation's advantage for the President to create a consultation process among the relevant cabinet officials, and then between the

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<sup>261</sup> See *supra* text accompanying notes 113-115.

<sup>262</sup> "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," the Supreme Court has said. "Such failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (quoting *Haig v. Agee*, 453 U.S., 280, 291 (1981)).

<sup>263</sup> On the difficulties of pursuing a criminal prosecution in a federal court against Zacarias Moussaoui, an admitted member of al Qaeda intent on making a mockery of the justice system, see YOO, *supra* note 57, at 210-27.

<sup>264</sup> Cf. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1-45 (1997).

<sup>265</sup> See discussion *supra* Part III.A.

executive and legislative branches. This would give the public more confidence that the NSA was not being used to carry out political vendettas. By his own account, President Bush had already put into place a primitive version of this before December 2005: each time he approved the NSA program, he asked the cabinet officers responsible for defense and intelligence whether they believed it was necessary or not, and he submitted the operation to the review of White House and Justice Department lawyers.<sup>266</sup> An expanded version of this could mirror, or simply adopt, the National Security Council structure, but without the legions of staff. The NSC already includes the Vice President, the National Security Adviser, the Secretaries of State and Defense, and the head of the intelligence community, among others, and it is responsible for approving all covert actions before they are sent to the President for approval.<sup>267</sup> Operation of the NSA program could come under the NSC's purview, although perhaps with restrictions on staff involvement to prevent leaks of sensitive information.

Presidents could also reach out to Congress along the lines of the current system for covert action. Under the National Security Act, the executive branch notifies the House and Senate Intelligence committees of presidentially-approved covert actions.<sup>268</sup> These committees have strong relationships with the intelligence community and hold extensive, classified oversight hearings over the nation's covert action programs and other classified intelligence systems.<sup>269</sup> Again, the Bush administration made initial steps toward such a system with the NSA program by briefing what is known as the "Gang of Eight"—the Senate majority and minority leader, the House speaker and minority leader, and the chair and ranking minority member of the

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<sup>266</sup> President George W. Bush, President's Radio Address (Dec. 17, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

<sup>267</sup> National Security Act of 1947, ch. 343, 61 Stat. 496 (establishing the National Security Council), *amended by* National Security Act Amendments of 1949, ch. 412, 63 Stat. 578 (codified at 50 U.S.C. §§ 401-42 (2000 & Supp. IV 2004)); *see also* <http://www.whitehouse.gov/nsc/> (last visited Dec. 27, 2006).

<sup>268</sup> 50 U.S.C. § 413(a) (2000 & Supp. IV 2004).

<sup>269</sup> *See* <http://intelligence.senate.gov/index.html> (last visited Jan. 12, 2007); <http://intelligence.house.gov/> (last visited Jan. 12, 2007).

Senate and House intelligence committees.<sup>270</sup> To improve public confidence in electronic surveillance of al Qaeda communications with individuals in the United States, intelligence officials could provide routine briefings to an expanded group of House and Senate leaders on the extent of NSA surveillance, its particular targets, and what intelligence of value it has produced. The group should be kept small, and probably would have to exclude staff, to prevent crucial secrets from leaking, an endemic problem in Washington and one that is especially dangerous in war.

#### CONCLUSION

The Constitution creates a presidency whose function is to act forcefully and independently to repel serious threats to the nation. Instead of specifying a legalistic process to begin war, the framers wisely created a fluid political process in which legislators would use their funding, legislative, and political power to balance presidential initiative.<sup>271</sup> As we confront terrorism, potentially armed with weapons of mass destruction, we should look skeptically at claims that radical changes in the way we make war would solve our problems, even those stemming from poor judgment, unforeseen circumstances, and bad luck. The worst thing we could do when confronted by a capable, shadowy enemy like al Qaeda would be to change our government to make it harder to develop innovative policies like the NSA surveillance program.

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<sup>270</sup> Scott Shane, *Report Questions Legality of Briefings on Surveillance*, N.Y. TIMES, Jan. 19, 2006, at A19 (noting that the “Gang of Eight” had received briefings about the NSA warrantless surveillance program).

<sup>271</sup> See discussion *supra* Part I.