

2007

**Congress Has the Power to Enforce the Bill of Rights Against the Federal Government: Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal**

Wilson R. Huhn, *University of Akron School of Law*

CONGRESS HAS THE POWER TO ENFORCE THE BILL OF RIGHTS AGAINST THE FEDERAL GOVERNMENT; THEREFORE FISA IS CONSTITUTIONAL AND THE PRESIDENT’S TERRORIST SURVEILLANCE PROGRAM IS ILLEGAL

Wilson R. Huhn\*

*Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.<sup>1</sup>*  
Justice Anthony Kennedy

TABLE OF CONTENTS

INTRODUCTION	2
I. CONGRESS HAS THE POWER TO ENFORCE THE BILL OF RIGHTS AGAINST THE ACTIONS OF THE FEDERAL GOVERNMENT	4
A. <i>Textual, Judicial and Historical Support for the Proposition that Congress Has the Power to Enforce the Bill of Rights</i>	5
B. <i>Examples of Federal Laws Enforcing the Bill of Rights Against the Federal Government</i>	11
1. <i>Laws Protecting Civil Rights Generally Against Federal Infringement</i>	12
2. <i>Laws Protecting Specific Constitutional Rights Against Federal Infringement</i>	14
3. <i>The Religious Freedom Restoration Act</i>	17
II. FISA WAS ADOPTED TO PROTECT FOURTH AMENDMENT RIGHTS	24
III. THE TERRORIST SURVEILLANCE PROGRAM IS ILLEGAL UNDER FISA	29
IV. FISA IS CONSTITUTIONAL UNDER THE DOCTRINE OF SEPARATION OF POWERS	34
A. <i>The President’s Theory of the “Unitary Executive” and the Ruling of the Supreme Court in Youngstown Sheet &amp; Tube Co. v. Sawyer</i>	35
B. <i>The Centrality of Eavesdropping to the Functions of the Executive and Legislative Branches</i>	44
C. <i>Justice Anthony Kennedy’s Theory that the Purpose of the Doctrine of Separation of Powers Is to Protect Liberty</i>	47

---

\* B.A. Yale University, 1972; J.D. Cornell Law School, 1977; C. Blake McDowell, Jr., Professor of Law, University of Akron School of Law. I wish to thank Dean Richard Aynes, Associate Dean Elizabeth Reilly, and Professors Tracy Thomas, Jane Moriarty, William Rich, and Brant Lee for their valuable suggestions, assistance, and support. This research was funded in part with a summer fellowship from the University of Akron School of Law.

<sup>1</sup> Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see notes \_\_\_-\_\_ *infra* and accompanying text (setting forth Justice Kennedy’s analysis of the purpose of the doctrine of Separation of Powers).

### ABSTRACT

The principal point of this article is that Congress has plenary authority to enforce the Bill of Rights against the federal government. Although this precept is a fundamental one, neither the Supreme Court nor legal scholars have articulated this point in clear, simple, and direct terms. The Supreme Court does not have a monopoly on the Bill of Rights. Congress, too, has constitutional authority to interpret our rights, and to enforce or enlarge them as against the actions of the federal government.

Congress exercised its power to protect the constitutional rights of American citizens when it enacted FISA, the federal law that requires the government to obtain a warrant from a special court before engaging in electronic eavesdropping for the purpose of obtaining foreign intelligence. In spite of this law, the National Security Agency has conducted a program of warrantless surveillance, called the Terrorist Surveillance Program.

The Attorney General has made a nuanced and unique argument in support of the Terrorist Surveillance Program. He suggests that wiretapping for foreign intelligence is more central to the role of the President than it is to the role of Congress, and that therefore FISA, the federal statute which requires the President to obtain warrants, is unconstitutional. In response to this argument, the article contends that Congress has the power to enforce the Bill of Rights against the federal government, and that FISA therefore *does* represent an exercise by Congress of one of its core functions – to protect the rights of American citizens.

The Attorney General also contends that FISA was amended by the Authorization for Use of Military Force (adopted September 18, 2001). This point has been addressed by other legal scholars, and drawing upon their work this article identifies six principal reasons why the AUMF cannot be construed as repealing or suspending the warrant requirements of FISA.

Finally, the Attorney General argues that FISA is unconstitutional under a broad reading of executive power called the theory of the “unitary executive.” This article contends that this theory was rejected by the four great justices of the Roosevelt Court, Hugo Black, William Douglas, Felix Frankfurter, and Robert Jackson, in the case of *Youngstown Sheet & Tube v. Sawyer*. Justice Jackson, in particular, eloquently argued that the President is subject to the Rule of Law. This article also suggests that the opinion of Anthony Kennedy in *Clinton v. New York* is relevant. In that case Justice Kennedy made “individual liberty” the centerpiece of Separation of Powers analysis. The article concludes that both the Rule of Law and individual liberty are served by upholding the constitutionality of FISA.

### INTRODUCTION

Shortly after the September 11, 2001 terrorist attacks on the United States, President George W. Bush ordered the National Security Agency (NSA) to undertake a secret program (called the “Terrorist Surveillance Program”) of wiretapping the international telephone calls and email messages of Americans without obtaining warrants.<sup>2</sup> This program continued for over four years,<sup>3</sup> during which time it was in apparent violation of a federal law, the Foreign Intelligence Surveillance Act (FISA).<sup>4</sup> The Attorney General, Alberto R. Gonzales, has released a memorandum arguing that the TSP is lawful under FISA, and in the alternative, that FISA is unconstitutional because it invades the inherent constitutional authority of the President.<sup>5</sup> A number of legal scholars have written responses concluding that FISA is constitutional and that the TSP is illegal,<sup>6</sup> but several of these scholars have assumed that Congress derives its authority to

---

<sup>2</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1 (disclosing the existence of the wiretapping program); *A.C.L.U. v. N.S.A.*, 438 F. Supp. 734, 764-765 (E.D. Mich. 2006) (Taylor, J.). The district court made the following findings:

It is undisputed that Defendants have publicly admitted to the following: (1) the TSP exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.

*Id.* at 764-765; see also Press Conference of the President, December 19, 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> (in which the President admitted the existence of the Terrorist Surveillance Program, and stated, “I’ve reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for so long as our nation is -- for so long as the nation faces the continuing threat of an enemy that wants to kill American citizens.”).

<sup>3</sup> See Editorials: “Never Mind” on Spying, Jan. 19, 2007 L.A. Times 26 (stating, “As a federal appeals court prepared to hear arguments on the legality of the program, Atty. Gen. Alberto R. Gonzales told the Senate Judiciary Committee that the administration has determined that it can obtain court orders for surveillance with the ‘speed and agility’ necessary to detect terrorist conspiracies. ‘Accordingly,’ Gonzales deadpanned, ‘under these circumstances, the president has determined not to reauthorize the Terrorist Surveillance Program when the current [presidential] authorization expires.’”).

<sup>4</sup> 50 U.S.C. § 1801 *et seq.*; see notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>5</sup> See generally Alberto R. Gonzales, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, available at <http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf>; reprinted at 81 Ind. L.J. 1374 (2006) (hereinafter “Gonzales Memorandum”); see notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>6</sup> See Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M. Sullivan, Laurence H. Tribe, Martin Lederman, Philip Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S. Sessions, and William Van Alstyne, *On NSA Spying: A Letter to Congress*, 23 The New York Review of Books No. 2, February 9, 2006, (hereinafter “*Letter to Congress*”), available at <http://www.nybooks.com/articles/18650> and reprinted at 81 IND. L.J. 1415 (2006); Fletcher N. Baldwin, Jr., and Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program; Exit the Rule of Law*, 17 U. Fla. J.L. & Pub. Pol’y 429 (2006); John Cary Sims, *What NSA Is Doing ... And Why It’s Illegal*, 33 Hastings L.Q. 105 (2006); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1194 (2006); Katherine Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517 (2006); Elizabeth B. Bazan and Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Congressional Research Service, January 5, 2006, available at [http://www.eff.org/Privacy/Surveillance/NSA/nsa\\_research\\_memo.pdf](http://www.eff.org/Privacy/Surveillance/NSA/nsa_research_memo.pdf); Tara M. Sugiyama and Marisa Perry, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. Mich. J.L. Reform 149 (2006); Brian R. Decker, “*The War of Information*”: *The*

enact FISA primarily from the Commerce Clause and its power to make laws regulating the military.<sup>7</sup> I argue that, in addition to these powers, Congress has the authority under the Necessary and Proper Clause to enforce the Bill of Rights against the actions of the federal government, and that FISA is best understood as a measure that is designed to ensure that the federal government is obedient to the Fourth Amendment.<sup>8</sup> This theory strengthens the position that FISA is constitutional under the doctrine of Separation of Powers.<sup>9</sup>

Part I of this article seeks to establish the proposition that Congress has the authority under the Constitution to enforce the Bill of Rights.<sup>10</sup> Part II shows that FISA was adopted to protect the Fourth Amendment rights of Americans.<sup>11</sup> Part III describes the NSA Terrorist Surveillance Program and explains how it violates the warrant provisions of FISA.<sup>12</sup> Part IV lays out the President’s arguments contending that FISA is unconstitutional because it violates the doctrine of Separation of Powers, and explains how the theory of Congressional authority to enforce the Bill of Rights supports the proposition that FISA is constitutional.<sup>13</sup>

## I. CONGRESS HAS THE POWER TO ENFORCE THE BILL OF RIGHTS AGAINST THE ACTIONS OF THE FEDERAL GOVERNMENT

It is axiomatic that Congress has substantial authority to enforce the provisions of the 14<sup>th</sup> Amendment against the States.<sup>14</sup> This power is grounded in Section 5 of the 14<sup>th</sup> Amendment, which states:

---

*Foreign Intelligence Surveillance Act, Hamdan v. Rumsfeld, and the President’s Warrantless Wiretapping Program*, 9 U. Pa. J. Const. L. 291 (2006).

<sup>7</sup> See U.S. Const., art. I, sec. 8, cl. 3 (“The Congress shall have power ... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”); *id.* at cl. 14 (“The Congress shall have power ... to make rules for the government and regulation of the land and naval forces.”); Sims, note \_\_ *supra*, at 135 (stating “Congress unquestionably has broad powers that are applicable, since it can regulate the interstate and foreign communications industry under the commerce clause, and also regulate the military.”); Wong, note \_\_ *supra*, at 531 (stating that the Constitution “authorizes Congress to raise, support, and make laws applying to the armed forces.”); *Letter to Congress*, note \_\_ *supra*, at 1369 (referring to Congress’ power to regulate the military in another context, and stating, “Congress plainly has authority to regulate domestic wiretapping by federal agencies under its Article I powers.”);

<sup>8</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>9</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>10</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>11</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>12</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>13</sup> See notes \_\_-\_\_ *infra* and accompanying text.

<sup>14</sup> See *Ex Parte Virginia*, 100 U.S. 339, 345-346 (1879) (Strong, J.) (upholding constitutionality of federal law protecting the rights of blacks to serve on juries). Speaking of Section 5 of the 14<sup>th</sup> Amendment, Justice Strong stated:

It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Congress shall have power, by appropriate legislation, to enforce the provisions of this article.<sup>15</sup>

The central point of this paper is that Congress also has the power to enforce the Bill of Rights against the federal government. This theory is amply supported by the text of the Constitution and by longstanding American constitutional tradition. It is the *best* explanation of the source of legislative power for many federal civil rights laws, and for some of these laws, it is the *only* explanation that makes sense.

*A. Textual, Judicial and Historical Support for the Proposition that Congress Has the Power to Enforce the Bill of Rights*

The “vesting clause” of Article I differs from the vesting clauses of Article II and Article III in one significant respect. While the President is vested with “the executive power”<sup>16</sup> and the federal courts are granted “the judicial power,”<sup>17</sup> the Congress is invested with “the legislative powers *herein granted*.”<sup>18</sup> Accordingly, when Congress acts, it must necessarily act pursuant to one of its enumerated powers. Many of Congress’ powers are contained in Article I, Section 8 of the Constitution, including the

---

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. *Id.* at 345-346 (Strong, J.). *See also* *City of Boerne v. Flores*, 521 U.S. 507, 519-520 (1997) (Kennedy, J.) (setting limits on the power of Congress to enforce the provisions of the 14<sup>th</sup> Amendment). Justice Kennedy stated:

Congress' power under § 5, however, extends only to "enforc [ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

*Id.* at 519-520 (Kennedy, J.) (citation omitted).

<sup>15</sup> U.S. CONST., amend. 14, sec. 5.

<sup>16</sup> U.S. CONST., art. II, sec. 1.

<sup>17</sup> U.S. CONST., art. III, sec. 1.

<sup>18</sup> U.S. CONST., art. I, sec. 1 (emphasis added).

power to tax and spend,<sup>19</sup> the power to regulate interstate and foreign commerce,<sup>20</sup> the power over the law of naturalization,<sup>21</sup> the power over bankruptcy laws,<sup>22</sup> the power to coin money,<sup>23</sup> the power to establish post offices,<sup>24</sup> the power to grant patents and copyrights,<sup>25</sup> the power to establish the lower federal courts,<sup>26</sup> the power to write law governing piracy, felonies on the high seas, and crimes against the law of nations,<sup>27</sup> the power to write law for the District of Columbia,<sup>28</sup> and a number of powers dealing with the military.<sup>29</sup> Other powers are scattered throughout the Constitution, such as the power to regulate federal elections,<sup>30</sup> the power to ratify treaties<sup>31</sup> the power to confirm the appointment of judges and executive branch officers,<sup>32</sup> the power to impeach a President and other officers of the United States,<sup>33</sup> the power to admit new states,<sup>34</sup> the power to regulate or dispose of property owned by the United States,<sup>35</sup> and the power to propose amendments to the Constitution.<sup>36</sup> Several constitutional amendments, including the 16<sup>th</sup>, 20<sup>th</sup>, and the 25<sup>th</sup>, grant additional powers to Congress,<sup>37</sup> while a number of others, including the 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, and 26<sup>th</sup> Amendments, expressly provide that the Congress has the power to enforce them.<sup>38</sup>

No provision of the Constitution expressly states that Congress has the power to enforce the Bill of Rights. The Bill of Rights does not have an “Enforcement Clause”

---

<sup>19</sup> See U.S. CONST., art. I, sec. 8, cl. 1.

<sup>20</sup> See U.S. CONST., art. I, sec. 8, cl. 3.

<sup>21</sup> See U.S. CONST., art. I, sec. 8, cl. 4.

<sup>22</sup> See *id.*

<sup>23</sup> See U.S. CONST., art. I, sec. 8, cl. 5.

<sup>24</sup> See U.S. CONST., art. I, sec. 8, cl. 8.

<sup>25</sup> See U.S. CONST., art. I, sec. 8, cl. 9.

<sup>26</sup> See U.S. CONST., art. I, sec. 8, cl. 10.

<sup>27</sup> See U.S. CONST., art. I, sec. 8, cl. 11.

<sup>28</sup> See U.S. CONST., art. I, sec. 8, cl. 17.

<sup>29</sup> See U.S. CONST., art. I, sec. 8, cl. 12-16.

<sup>30</sup> See U.S. CONST., art. I, sec. 4, cl. 1.

<sup>31</sup> See U.S. CONST., art. II, sec. 2, cl. 2.

<sup>32</sup> See *id.*

<sup>33</sup> See U.S. CONST., art. I, sec. 2, cl. 5 (granting House “the sole power of impeachment”); art. I, sec. 3, cl. 6 (granting Senate “the sole power to try all impeachments); art. II, sec. 4 (identifying which officials are subject to impeachment and establishing grounds for impeachment).

<sup>34</sup> See U.S. CONST., art. IV, sec. 3, cl. 1.

<sup>35</sup> See U.S. CONST., art. IV, sec. 3, cl. 2.

<sup>36</sup> See U.S. CONST., art. V.

<sup>37</sup> See U.S. CONST., amend. 16 (granting Congress the power to impose an income tax); amend. 20, sec. 3 (authorizing Congress to establish law of Presidential succession); amend. 25 (authorizing Congress to determine the persons who have the power to declare that the President is unable to discharge his or her official duties).

<sup>38</sup> See U.S. CONST., amend. 13, sec. 2 (granting Congress the power to enforce the prohibition on slavery); amend. 14, sec. 5 (power to protect fundamental rights against encroachment by the States); amend. 15, sec. 2 (power to prohibit racial discrimination by state or federal government affecting the right to vote); amend. 19 (power to prohibit gender discrimination by state or federal government affecting the right to vote); amend. 23 (power to determine how the District of Columbia shall appoint members of the Electoral College); amend. 26 (power prohibit discrimination by state or federal government affecting the right of persons over the age of 18 to vote).

parallel to Section 5 of the 14<sup>th</sup> Amendment.<sup>39</sup> However, the second portion of the Necessary and Proper Clause does give Congress the authority to adopt laws generally governing the conduct of the federal government. Congress' authority in this regard is *not* limited to the exercise of its enumerated powers, but rather constitutes plenary authority over *any and all* powers that are vested by the Constitution in the national government. The Necessary and Proper Clause states:

The Congress shall have power ... to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.*<sup>40</sup>

One might argue that the italicized portion of the Necessary and Proper Clause vests Congress with the discretion to legislate with respect to the *powers* that the Constitution bestows upon the federal government, but that it does not grant Congress the authority to legislate with respect to individual *rights* such as those contained within the Bill of Rights. This would be an error, however. The Bill of Rights is, above all, a set of limitations upon the *power* of the federal government. This was the understanding of Chief Justice John Marshall, who was not only the leading architect of the constitutional structure of the national government,<sup>41</sup> but who was also a “framer” by virtue of his service at the Virginia ratifying convention.<sup>42</sup> In *Barron v. Baltimore*,<sup>43</sup> Marshall described the Bill of Rights as a limitation on the “power” of the federal government. He stated:

The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government ....<sup>44</sup>

---

<sup>39</sup> See U.S. CONST., amend. 14, sec. 5 (stating, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

<sup>40</sup> U.S. CONST., art. I, sec. 8, cl. 18 (emphasis added).

<sup>41</sup> See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 32 (1995) (referring to Marshall as “the Great Chief Justice who, more than any one person, has left his imprint upon the development of our constitutional law.”).

<sup>42</sup> See Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall’s Judicial Statesmanship*, 37 *John Marshall L. Rev.* 391, 407 fn. 83 (2004) (stating, “Addressing the delegates at the Virginia Ratifying Convention of 1788, John Marshall noted the supremacy of the Constitution over state and federal laws that conflicted with its provisions.”).

<sup>43</sup> 32 U.S. 243 (1833) (ruling that the Bill of Rights is applicable against the federal government, and not the States).

<sup>44</sup> *Id.* at 247 (Marshall, C.J.).

*Barron* concerned the applicability of the Fifth Amendment to the action of a State,<sup>45</sup> and it did not involve the constitutionality of any federal statute. However, Marshall’s characterization of the Fifth Amendment as a limitation on the “power” of the federal government lends weight to the proposition that the Necessary and Proper Clause, which confers upon Congress with the authority to “make all laws necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the government of the United States” should be understood as conferring upon Congress the authority to ensure that the federal government – including “any department or officer thereof” – is obedient to the limitations on governmental power that are prescribed in the Bill of Rights.

If one ignores the second portion of the Necessary and Proper Clause – if one were to assume that that clause only vests Congress with the authority to enforce the “foregoing” enumerated powers – then one might reasonably conclude that the Necessary and Proper Clause does *not* authorize Congress to enforce the Bill of Rights. For example, in 1866 Senator Jacob Howard of Michigan, in reporting the Fourteenth Amendment to the Senate, gave the Clause a narrow reading and ascribed a narrow purpose to it, concluding that under that provision Congress did *not* have the power to enforce the Bill of Rights, at least as against the states.<sup>46</sup> He proposed that the Fourteenth Amendment would cure this defect in the Constitution, stating, “Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.”<sup>47</sup>

This was a matter of crucial concern to the members of the Thirty-Ninth Congress, which served immediately after the Civil War, and to the members of the subsequent Reconstruction Congresses, who believed that it was incumbent upon

---

<sup>45</sup> See *id.* (Marshall, C.J.) (noting that the petitioner had sued the State on the ground that it had violated his right to just compensation under the 5<sup>th</sup> Amendment.).

<sup>46</sup> See C. Globe 39<sup>th</sup> Cong., 1<sup>st</sup> sess. 2765-2766 (May 23, 1866) (remarks of Senator Howard). Senator Howard stated:

Now sir, there *is* no power given in the Constitution to enforce and carry out any of these guarantees [of the Bill of Rights]. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that “the Congress shall have power to enforce by appropriate legislation the provisions of this article.” Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

*Id.* at 2765-2766.

<sup>47</sup> *Id.* at 2766.

Congress to protect citizens in the exercise of their fundamental rights.<sup>48</sup> In fact, the necessity that Congress should have and should exercise this power was a bedrock assumption that lay at the core of their political philosophy, and it drove them to write the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments,<sup>49</sup> as well as a host of civil rights laws.<sup>50</sup> The Republican Party of that time – the party that Lincoln had led – was committed to the proposition that while the citizen owes a duty of allegiance to the government, the government in return owes a duty of protection to the citizen.<sup>51</sup> “Allegiance and protection are reciprocal rights,”<sup>52</sup> said Senator Lyman Trumball, the floor manager for the Civil Rights Act of 1866.<sup>53</sup> Congressman John Bingham, the principal author of the 14<sup>th</sup> Amendment,<sup>54</sup> attributed this idea to Daniel Webster,<sup>55</sup> while Senator George Edmunds traced it to Magna Carta.<sup>56</sup>

---

<sup>48</sup> See DANIEL A. FARBER AND SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION, 302-305 (stating, “Natural law and law-of-nations thinkers had stressed the idea that citizens owe allegiance to their government in exchange for the government’s grant of protection to them,” and citing and quoting remarks of members of Congress who agreed with this principle); Rebecca E. Zietlow, Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship, 36 AKRON L. REV. 717, 740 (2003) (stating, “This theory of citizenship reflected the “social compact” theory of John Locke, that people submit to the authority of the government in return for its protection.”); Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. PITT. L. REV. 1, 40 (2000) (referring to the “familiar Republican linkage between allegiance and protection.”); Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 Pepp. L. Rev. 63, 75-84 (1984) (discussing linkage between allegiance and protection, and tracing this idea to the philosophy of John Locke).

<sup>49</sup> See U.S. Const., amend 13 (proposed by Congress in 1865, abolishing slavery); amend. 14 (proposed by Congress in 1866, making all persons born or naturalized in the United States citizens, and prohibiting the States from interfering with fundamental rights); amend. 15 (proposed by Congress in 1869, guaranteeing the right to vote regardless of race).

<sup>50</sup> See W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 How. L.J. 1, 37 (stating, “In the first decade after the Civil War, Congress proposed and obtained passage of constitutional amendments and statutes providing civil liberty and equality for blacks.”); *id.* at 37-44 (describing civil rights laws adopted by the Reconstruction Congress, including the creation of the Freedman’s Bureau, the Civil Rights Act of 1866, the Force Act of 1870, the Ku Klux Klan Act of 1871, and the Civil Rights Act of 1875).

<sup>51</sup> See note \_\_ *supra*.

<sup>52</sup> See CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1757 (1866). Senator Trumball said:

How is it that every person born in these United States owes allegiance to the Government? Everything that he is or has, his property and his life, may be taken by the Government of the United States in its defense ... and can it be that ... we have got a government which is all-powerful to command the obedience of the citizen, but which has no power to afford him protection? Is that all that this boasted American citizenship amounts to? ... Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This government, which would go to war to protect its meanest ... inhabitant in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.

*Id.*

<sup>53</sup> See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 103 (1990) (referring to Trumball as floor manager for the Civil Rights Act of 1866).

<sup>54</sup> See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 58 (1993) (referring to Bingham as “the principal author of Section One of the Fourteenth Amendment”).

<sup>55</sup> See Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., H.p. 85 (March 31, 1871); reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE

These same Republicans were determined to exercise this power to protect the newly-freed slaves from those who wished to oppress them and return them to a state of virtual slavery and second-class citizenship.<sup>57</sup> In adopting the civil rights laws of the Reconstruction period, the leaders of Congress pointed to the fact that before the Civil War Congress had enacted laws to protect the constitutional rights of *slaveholders*, and that the Supreme Court had upheld the exercise of this power in cases such as *Ableman v. Booth*,<sup>58</sup> in which the Court upheld the Fugitive Slave Law “in all of its provisions.”<sup>59</sup>

Constitutional historian Robert Kaczorowski observes that the framers of the 14<sup>th</sup> Amendment perceived that there was an intimate relation between the Declaration of Independence and the Constitution of the United States, in that the Declaration recognized fundamental rights which were incorporated into the Constitution, and that the Constitution “imposed a duty on Congress to enforce the fundamental rights they recognized and secured as rights of United States citizens.”<sup>60</sup> This view of the Reconstruction Congress is consistent with Lincoln’s political philosophy, which placed the eternal truths of the Declaration of Independence at the core of American law. Over and over again, Lincoln emphasized that our understanding of the Constitution at any

---

13TH, 14TH, AND 15TH AMENDMENTS 511 (Alfred Avins ed., 1967) [hereinafter AVINS] (John Bingham quoting Daniel Webster as having said, “The maintenance of the Constitution does not depend on the plighted faith of the States as States to support it . . . It relies on individual duty and obligation. . . . On the other hand, the Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights and interests.”).

<sup>56</sup> CONG. GLOBE, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., April 14, 1871, S.p. 697; AVINS, at 563 (remarks of Senator Edmunds).

<sup>57</sup> See note \_\_ *supra* and accompanying text.

<sup>58</sup> 62 U.S. 506 (1858) (upholding the Fugitive Slave Law of 1850); Robert J. Kaczorowski, *Congress’ Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARVARD J. ON LEGIS. 187, 200 (stating, “The Republican leaders and supporters of the Civil Rights Act of 1866 insisted that Congress possessed as much constitutional authority to protect and enforce human rights and equality as it had exercised to protect and enforce the property right in slaves.”)

<sup>59</sup> See *id.* at 526 (Strong, J.).

<sup>60</sup> *Id.* at 203. Professor Kaczorowski states:

The framers’ theory of plenary constitutional delegation was also premised on their assumption that equality and the natural rights of life, liberty, and property and rights incident thereto proclaimed in the Declaration of Independence constituted the fundamental rights of all Americans. The framers and supporters insisted that the Constitution recognizes and secures these rights in various provisions, primarily the Thirteenth Amendment, but also in others such as the Privileges and Immunities Clause of Article IV, the Bill of Rights, and the Fifth Amendment’s explicit guarantee of life, liberty, and property. They applied to these constitutional provisions the *McCulloch* and *Prigg* theories of broad constitutional delegation of implied congressional power and insisted that these provisions delegated to Congress plenary power to enforce and protect the fundamental rights of all Americans, and that they authorized Congress to enact civil and criminal remedies and a federal enforcement structure to ensure that all Americans are secure in their civil rights. The framers also argued that the principles of the Declaration of Independence, and the social contract that these principles betokened, were incorporated into the Constitution through these provisions and that the Declaration of Independence and the Constitution imposed a duty on Congress to enforce the fundamental rights they recognized and secured as rights of United States citizens.

*Id.*

particular point in time is but an imperfect realization of the principles of the Declaration,<sup>61</sup> which for Lincoln expressed an ideal that is to be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”<sup>62</sup> In short, government exists – our Nation exists – so that freedom can be preserved and protected.<sup>63</sup> In light of this principle, in the words of Senator Lyman Trumbull, it “cannot be” that Congress lacks the authority to adopt legislation protecting citizens in their fundamental rights.<sup>64</sup>

In the modern era, in the case of *Griffin v. Breckinridge*,<sup>65</sup> the Supreme Court embraced the proposition that Congress has the power to protect our fundamental rights. In that case, a group of African-Americans, residents of Tennessee, were hauled from their car by a group of whites in the State of Mississippi and threatened and beaten because the whites mistakenly believed the blacks to be civil rights workers.<sup>66</sup> The plaintiffs sued the defendants for damages under 42 U.S.C. § 1985(3), a Reconstruction era civil rights law which imposes liability upon combinations of two or more persons who interfere with any person from “exercising any right or privilege of a citizen of the United States.”<sup>67</sup> The lower courts had dismissed the complaint because the defendants were private individuals, and the assault was not “state action,”<sup>68</sup> but the Supreme Court

---

<sup>61</sup> See ABRAHAM LINCOLN, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 168-169 (Roy P. Basler, 1953) (hereinafter COLLECTED WORKS) (characterizing the words of the Declaration of Independence promising “liberty to all” as “the apple of gold,” and the Constitution as “the picture of silver, subsequently framed around it”). Available online from a website maintained by the Abraham Lincoln Association, at <http://www.hti.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;type=simple;rgn=div1;q1=apple;view=text;subview=detail;sort=occur;idno=lincoln4;node=lincoln4%3A264>.

<sup>62</sup> 2 COLLECTED WORKS 405-406, available online at <http://www.hti.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;type=simple;rgn=div1;q1=one%20hard%20nut;view=text;subview=detail;sort=occur;idno=lincoln2;node=lincoln2%3A438>.

<sup>63</sup> See 7 COLLECTED WORKS \_\_\_, (Gettysburg Address, referring to the United States as “conceived in liberty, and dedicated to the proposition that all men are created equal,” and stating that the Civil War had been fought “so that government of the people, by the people, for the people, shall not perish from the earth.”), available online at

<sup>64</sup> See note \_\_\_ *supra*.

<sup>65</sup> 403 U.S. 88 (1971) (reversing the dismissal of the plaintiffs’ complaint for damages under 42 U.S.C. 1985(3)).

<sup>66</sup> See *id.* at 90-91

<sup>67</sup> 42 U.S.C. 1985(3). The statute provides:

‘If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws (and) in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.’

<sup>68</sup> See *Griffin*, 403 U.S., at 92.

reinstated the plaintiffs' claim on the ground that "state action" was not a required element of this particular claim under Section 1985(3).<sup>69</sup> In the course of its opinion the Court declared that Congress has broad powers to defend constitutional rights against invasion. The Court stated:

Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. The 'right to pass freely from state to state' has been explicitly recognized as 'among the rights and privileges of national citizenship.' That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation.<sup>70</sup>

*Griffin* does not, on its facts, stand for the proposition that Congress has the power to enforce the Bill of Rights against the federal government. However, the above-quoted language from *Griffin* establishes unequivocally that Congress *does* have this power. The Bill of Rights undoubtedly comprises "rights of national citizenship" which are effective against the national government. In *Griffin* the Court stated that Congress has the power to protect these rights "by appropriate legislation."

Congress has exercised its power to protect against infringements of constitutional right by the federal government in many contexts. A number of these laws are discussed in the following portion of this article.

## *B. Examples of Federal Laws Enforcing the Bill of Rights Against the Federal Government*

Congress has adopted a number of laws that require departments and officers of the federal government to obey the Bill of Rights. Some of these statutes protect our civil rights in general terms against invasion by *any* persons or by persons acting "under color of law."<sup>71</sup> Other laws establish general standards of procedural fairness or equal protection that must be observed by agencies of the federal government.<sup>72</sup> Yet other statutes protect rights created by specific provisions of the Bill of Rights against infringement by the federal government.<sup>73</sup> All of these laws are practical evidence of the fact that the Congress has the power to enforce the Bill of Rights against the federal government.

### *1. Laws Protecting Civil Rights Generally Against Federal Infringement*

---

<sup>69</sup> See *id.* at 101 (stating, "It is thus evident that all indicators--text, companion provisions, and legislative history--point unwaveringly to § 1985(3)'s coverage of private conspiracies.").

<sup>70</sup> *Id.* at 105-106.

<sup>71</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>72</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>73</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

During the era of Reconstruction Congress made it a crime for any person acting “under color of any law” to infringe another person’s constitutional rights.<sup>74</sup> This law, codified at 18 U.S.C. § 242, has been construed to apply to all governmental officials, federal or state. Interpreting this law in *Screws v. United States*,<sup>75</sup> Justice William O. Douglas stated: “He who acts under ‘color’ of law may be a federal officer or a state officer. He may act under ‘color’ of federal law or of state law.”<sup>76</sup> In 1980, in *United States v. Otherson*, the United States Court of Appeals for the 9<sup>th</sup> Circuit cited this language from *Screws* and upheld the convictions of two United States Border Patrol agents under Section 242 for assaulting aliens who had illegally entered the United States.<sup>77</sup>

The obvious purpose of Section 242 is to prevent government officials from violating people’s constitutional rights. In *Screws* Justice Douglas quoted Senator Lyman Trumbull, chair of the Judiciary Committee which reported the original civil rights bill from which Section 242 was derived, as stating that the purpose of the bill was “protect all persons in the United States in their civil rights ....”<sup>78</sup>

There is no civil counterpart to Section 242. The civil rights statute codified at 42 U.S.C. § 1983 creates a civil remedy for violations of constitutional rights performed by any person under color of *state* law,<sup>79</sup> and the Supreme Court has ruled that Section 1983

---

<sup>74</sup> See 18 U.S.C. § 242. See *Screws v. United States*, 325 U.S. 91, 98-100 (1945) (Douglas, J.) (describing the drafting and origin of this law during the Reconstruction period). The law states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242.

<sup>75</sup> 325 U.S. 91, 107 (1945) (Douglas, J.) (reversing the defendant’s conviction under Section 242 on the ground that the trial court should have instructed the jury that “To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right.”); see also *United States v. Lanier*, 520 U.S. 259 (1997) (ruling that defendants may be found guilty under Section 242 only where the unlawfulness of the defendant’s conduct is apparent in light of pre-existing law).

<sup>76</sup> *Id.* at 108 (Douglas, J.).

<sup>77</sup> See *U.S. v. Otherson*, 637 F.2d 1276, 1278 (9<sup>th</sup> Cir. 1980), cert. den. 454 U.S. 840 (1981); see *id.* at 1279 (stating, “Appellants have thus advanced no persuasive reason for confining the application of section 242 to actions under color of state law, and we decline their invitation to do so.”).

<sup>78</sup> *Id.* at 98 (Douglas, J.), quoting Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 211.

<sup>79</sup> See 42 U.S. § 1983, which provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

does *not* apply to the actions of officers of the federal government.<sup>80</sup> There is no federal statute corresponding to Section 1983 that imposes civil liability directly upon *federal* officers. In the absence of such a federal statute, the Supreme Court ruled in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>81</sup> that the Constitution of the United States, by creating rights that are enforceable against the federal government, also implies the existence of remedies for those rights, and that accordingly persons who are aggrieved by the federal government in the exercise of their constitutional rights may maintain an action against the government to redress those grievances.<sup>82</sup> The Court implied in *Bivens*, however, that Congress would have the authority to enact a statute recognizing and regulating constitutional claims against federal officers,<sup>83</sup> and because of the inadequacies of the *Bivens*' remedies,<sup>84</sup> many persons have called for the adoption of such a law.<sup>85</sup> Furthermore, although Congress has not explicitly enacted legislation authorizing civil suits against federal officers based generally upon constitutional claims,

---

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

<sup>80</sup> See *District of Columbia v. Carter*, 409 U.S. 418, 424-425 (1973). The Court stated:

Like the Amendment upon which it based, § 1983 is of only limited scope. The statute deals only with those deprivations of rights that are accomplished under the color of the law of 'any State or Territory.' It does not reach purely private conduct and, with the exception of the Territories, actions of the Federal Government and its officers are at least facially exempt from its proscriptions.

*Id.* at 424-425 (footnotes omitted).

<sup>81</sup> 403 U.S. 388 (1971) (ruling that petitioner had an implied cause of action under the Fourth Amendment against federal officers who allegedly conducted an illegal search and arrest, without warrant or probable cause).

<sup>82</sup> See *id.* at (Brennan, J.). Justice Brennan stated:

[T]he Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is ... well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.

*Id.* at 396 (Brennan, J.) (citation omitted).

<sup>83</sup> See *id.* (Brennan, J.) (implying that a federal statute *could have* "provid[ed] for a general right to sue for such invasion."); *id.* at 397 (Brennan, J.) (stating, "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.").

<sup>84</sup> See, e.g., Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 472 (describing limitations on *Bivens* actions, and stating, "Although the Court has declined to expressly overturn *Bivens*, its steadfast refusal over more than two decades to extend the doctrine into new contexts has reduced the cause of action to a mere shadow of its former self ...") (footnote omitted); *id.* at 475 (stating, "*Bivens* is indeed an unfulfilled promise.").

<sup>85</sup> See, e.g., Michael B. Hedrick, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 Geo. Wash. L. Rev. 1055 (2003) (stating, "Numerous bipartisan efforts to replace the *Bivens* action with a statutory cause of action have failed ...").

it has conferred jurisdiction upon the federal courts to hear claims against the federal government based upon constitutional violations.<sup>86</sup>

## 2. *Laws Protecting Specific Constitutional Rights Against Federal Infringement*

A number of federal laws prohibit agencies or officers of the federal government from infringing particular constitutional rights.

In his State of the Union Address of January 14, 1963, President John F. Kennedy stated: “The right to competent counsel must be assured every man accused of crime in a Federal court regardless of his means.”<sup>87</sup> President Kennedy and Attorney General Robert F. Kennedy submitted proposed legislation to Congress that would guarantee the right to counsel.<sup>88</sup> In response, the Congress enacted the Criminal Justice Act of 1964,<sup>89</sup> which provided for the appointment of counsel for indigent defendants in federal court.<sup>90</sup> Congress amended the law in 1970,<sup>91</sup> partly in order to conform the Act to recent Supreme Court decisions which had extended the right to counsel,<sup>92</sup> and partly to grant *new* rights to counsel consistent with Congress’ understanding of the requirements of the Bill of Rights.<sup>93</sup> The 1970 amendments to the Act extended the right to counsel to persons facing revocation of parole, even though the Supreme Court at that time had not

---

<sup>86</sup> See 28 U.S.C. § 1346(a)(2) (granting the district courts jurisdiction, concurrent with the Court of Claims, over a “civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress ....”).

<sup>87</sup> Report of the House Judiciary Committee, H.R. Rep. 88-864, 1964 U.S.C.C.A.N. 2991.

<sup>88</sup> See *id.* (describing the submission of the proposed legislation).

<sup>89</sup> Pub. L. 88-455, Aug. 20, 1964, 78 Stat. 552, codified at 18 U.S.C. 3006A.

<sup>90</sup> See 18 U.S.C. 3006A (providing, “Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation ....”).

<sup>91</sup> Pub.L. 91-447, October 14, 1970, 84 Stat. 916, codified at 18 U.S.C. 3006A.

<sup>92</sup> See Report of the House Judiciary Committee, H.R. Rep. 91-1546, 1970 U.S.C.C.A.N. 3982, 3987 (stating that the amendment “will bring the law into conformity with recent decisions of the Supreme Court which require counsel for arrested persons ...”) (citations omitted).

<sup>93</sup> See *id.* at 3987-3988. The Committee stated:

Secton 1(A)(3) requires that each plan provide for the appointment of counsel, pursuant to the provisions of Section 1(G), for individuals financially unable to secure adequate representation who are subject to revocation of parole, who are material witnesses in custody, or who are seeking collateral relief. Inasmuch as these proceedings have traditionally been regarded as technically civil in nature rather than criminal, no right to appointed counsel has as yet been recognized under the Sixth Amendment. The distinction between civil and criminal matters, however, has become increasingly obscure where deprivation of personal liberty is involved. See *In re Gault*, 387 U.S. 1 (1967), and *Johnson v. Avery*, 393 U.S. 483 (1969). The proceedings listed in subsection 1(A)(3) and 1(G) are intimately related to the criminal process. Counsel has often been appointed to represent persons in such proceedings, but compensation has not been available. under the 1964 Act. The Committee believes that compensation should be available under the Act whenever a judge determines that counsel must be appointed to safeguard the interest of justice.

*Id.* at 3987-3988.

found that the Constitution required this.<sup>94</sup> Although the Criminal Justice Act may be accurately characterized as an exercise of Congress' power under the Spending Clause, it finds additional support as an expression of Congress' determination to enforce and protect the Sixth Amendment right to counsel.<sup>95</sup>

In 1975 Congress enacted another statute protecting a right that is guaranteed under the Sixth Amendment: the right to a speedy trial.<sup>96</sup> Unlike the Criminal Justice Act, the Speedy Trial Act<sup>97</sup> is not a spending measure, but as in the case of the Criminal Justice Act, Congress stated that it was acting for the purpose of preserving the rights of criminal defendants under the Sixth Amendment.<sup>98</sup> Moreover, as with the Criminal Justice Act, in the Speedy Trial Act Congress consciously extended statutory protection beyond constitutional norms, setting specific time limits within which the government must bring a defendant to trial, a task that the Supreme Court had failed to undertake.<sup>99</sup>

Another federal civil rights law prohibits "an officer or other person charged with any duty in the selection or summoning of jurors" from excluding or failing to summon

---

<sup>94</sup> See *id.*; see also *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (not reaching the question of whether counsel must be provided in parole revocation hearings); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (counsel must be provided in probation revocation hearings in appropriate cases).

<sup>95</sup> See U.S. CONST., amend. 6 (stating that "In all criminal proceedings, the accused shall the enjoy the right ... to have the assistance of counsel for his defence.").

<sup>96</sup> See U.S. CONST., amend. 6 (stating that "the accused shall enjoy the right to a speedy and public trial ....").

<sup>97</sup> 18 U.S.C. § 3161 *et seq.*, Public Law 93-619, January 3, 1975, 88 Stat. 2076.

<sup>98</sup> See H.R. Report 93-1508, 1974 U.S.C.C.A.N. 7401, 7404-7405. The House Judiciary Committee made the following findings in support of this bill:

The Committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right. Thus far, neither the decisions of the Supreme Court nor the implementation of Rule 50(b) of the Federal Rules of Criminal Procedure, concerning plans for achieving the prompt disposition of criminal cases, provides the courts with adequate guidance on this question.

The Supreme Court has held that the right to a speedy trial is relative and depends upon a number of factors. A delay of one year in some instances has been interpreted as *prima facie* evidence of a denial of the right. However, in others, a delay of up to eighteen years has been held not to violate the Sixth Amendment. In its 1972 decision, *Barker v. Wingo*, 407 U.S. 514, the Court stressed four factors in determining whether the right to a speedy trial had been denied to a defendant: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The task of balancing these factors and arriving at a conclusion which is fair in all cases is a difficult task. It provides no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay.

With respect to providing specified time periods in which a defendant must be brought to trial, the Court in *Barker* admitted that such a ruling would have the virtue of clarifying when the right is infringed and of simplifying the courts' application of it. However, the Court said:

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. *Id.* at 523.

*Id.* at 7404-7405.

<sup>99</sup> See *id.*

any citizen for jury duty on account of their race.<sup>100</sup> This law protects both the right of citizens to serve on juries without regard to race, and the right of litigants and criminal defendants to a fair trial. These rights are both grounded in the Bill of Rights. The right to a jury is contained in the Sixth and the Seventh Amendments,<sup>101</sup> while the right to be free from invidious racial discrimination at the hands of the federal government is now understood to arise from the “equal protection component” of the Due Process Clause of the Fifth Amendment.<sup>102</sup>

Another federal law that is based in part upon Congress’ power to enforce the Bill of Rights is the foundation statute governing administrative process – the federal Administrative Procedure Act (APA), which is codified at 5 U.S.C. § 551 *et seq.*<sup>103</sup> When the House Judiciary Committee reported the APA to the floor of Congress in 1946, it characterized the law as “an outline of minimum essential rights and procedures” that must be observed by agencies of the federal government.<sup>104</sup> Section 554 provides that administrative agencies must give persons timely notice of “the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted,”<sup>105</sup> while Section 556 prescribes that “A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>106</sup> These are elementary requirements of Due Process.<sup>107</sup>

---

<sup>100</sup> See 18 U.S.C. § 243, which states:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.

<sup>101</sup> See U.S. CONST., amend. 6 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...”); amend. 7 (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...”).

<sup>102</sup> See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (Warren, C.J.) (stating, “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”) (footnote omitted).

<sup>103</sup> 5 U.S.C. § 551 *et seq.*

<sup>104</sup> See H. Rep. No. 1980, May 3 1946, 1946 U.S.C.C.A.N. 1195, 1205.

<sup>105</sup> 5 U.S.C. § 554(b).

<sup>106</sup> 5 U.S.C. § 556(d).

<sup>107</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970) (Brennan, J.) (setting forth fundamental principles of procedural due process in proceedings before an administrative agency). Justice Brennan stated:

“The fundamental requisite of due process of law is the opportunity to be heard.” The hearing must be “at a meaningful time and in a meaningful manner.” In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Another federal law – the Religious Freedom Restoration Act (RFRA)<sup>108</sup> – exemplifies the power of Congress to enforce the First Amendment against the federal government. This law and the constitutional litigation surrounding it is the subject of the following portion of this article.

### 3. *The Religious Freedom Restoration Act*

The Religious Freedom Restoration Act was enacted in 1993 in reaction to the decision of the Supreme Court in *Employment Division v. Smith*,<sup>109</sup> which had limited the scope of religious freedom under the Fourteenth Amendment.<sup>110</sup> In essence, RFRA represented an attempt to legislatively overturn the ruling of the Supreme Court in *Smith*, and to expand the meaning of the Free Exercise Clause as applied to the States.<sup>111</sup> In this respect, the law was a failure – the Supreme Court held that Congress lacked the authority to enact this measure as applied to *State* governments.<sup>112</sup> Congress then amended the law to clarify that it is binding only upon departments and officers of the federal government.<sup>113</sup> In 2006 in the case of *Gonzales v. O Centro Espirito Beneficente Uniao Do Vegetal*,<sup>114</sup> the Supreme Court, without identifying the basis of Congress’ power to enact the law, upheld RFRA as applied to an agency of the federal government.<sup>115</sup> The only conclusion that may be drawn from this result is that Congress has the power to enforce the Bill of Rights against the federal government, and that its power in this regard is greater than its power to enforce the 14<sup>th</sup> Amendment against the States. This back-and-forth battle between Congress and the Supreme Court over religious liberty is described in more detail below.

Prior to 1990, the Supreme Court had ruled that laws that impose a substantial burden on a person’s right to the free exercise of religion were presumptively invalid, and would be upheld as constitutional only if they could be justified under a heightened standard of review.<sup>116</sup> In 1990, in *Employment Division v. Smith*,<sup>117</sup> the Supreme Court

---

*Id.* at 267-268 (Brennan, J.) (citations omitted).

<sup>108</sup> 42 U.S.C. 2000bb *et seq.*

<sup>109</sup> 494 U.S. 872 (1990) (upholding denial of unemployment compensation benefits to persons who were fired for ingesting peyote in accordance with ceremony of Native American Church).

<sup>110</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>111</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>112</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>113</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>114</sup> 546 U.S. 418 (2006) (upholding constitutionality of RFRA and ruling that United States had failed to prove that it had a compelling interest in prosecuting persons for violation of the Controlled Substances Act for using *hoasca*, a hallucinogenic, in religious ceremonies).

<sup>115</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>116</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963) (striking down decision of state agency denying unemployment compensation to person who refused to work on Saturdays for religious reasons); *id.* at 406 (Brennan, J.) (stating, “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.’”); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down compulsory attendance law as applied to Amish children who have graduated from the eighth grade) *id.* at 215 (Burger, C.J.) (stating, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

modified the doctrine that had been established in those previous cases and held that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”<sup>118</sup> In evaluating the constitutionality of generally applicable laws under the Free Exercise Clause, the Supreme Court replaced the “strict scrutiny test” with the much looser “rational basis” standard.<sup>119</sup>

Congress struck back in 1993 by enacting the Religious Freedom Restoration Act,<sup>120</sup> which reinstated the strict scrutiny test whenever any governmental entity, state or federal, takes action that substantially burdens the free exercise of religion.<sup>121</sup> The text of the Act states that the purpose of the law is to protect the First Amendment right to Free Exercise of Religion. The statute provides:

The purposes of this Act are--

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>122</sup>

---

<sup>117</sup> 494 U.S. 872 (1990) (upholding denial of unemployment compensation benefits to persons who were fired for ingesting peyote in accordance with ceremony of Native American Church).

<sup>118</sup> *Id.* at 886 (Scalia, J.); *see id.* at 882-889 (Scalia, J.) (rejecting the “compelling state interest” test in evaluating the constitutionality of laws of general applicability that impose substantial burdens on free exercise of religion).

<sup>119</sup> *See* Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Laws of General Applicability*, 66 Mo. L. Rev. 9, 20 (2001) (stating, “Considering *Smith* and *Babalu Aye* together, the Court’s position in Free Exercise Clause cases is clear. The level of judicial scrutiny – strict scrutiny or rational basis – is determined by whether or not the challenged law is a neutral law of general applicability.”).

<sup>120</sup> 42 U.S.C. 2000bb *et seq.*

<sup>121</sup> *See* Section 2000bb-1, which provides:

(a) In general. Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

<sup>122</sup> 42 U.S.C. § 2000bb(b). *See also* S. Rep. 103-111, at 2 (1993), 1993 U.S.C.C.A.N. 1892, 1893 (footnote omitted). The Committee stated that RFRA:

responds to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest.

The Senate Judiciary Committee suggested that the source of Congress' power to enact RFRA was Section 5 of the 14<sup>th</sup> Amendment, but it also indicated that the real source of authority was Congress' power to enforce the Free Exercise Clause of the First Amendment. The Committee stated:

[C]ongressional power under section 5 to enforce the 14th amendment includes congressional power to enforce the free exercise clause. Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause – to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion-it falls squarely within Congress' section 5 enforcement power.<sup>123</sup>

The House Judiciary Committee not only cited Section 5 of the 14<sup>th</sup> Amendment as authority for Congress to enact RFRA, but also the Necessary and Proper Clause, as granting Congress the power "to provide statutory protection for a constitutional value."<sup>124</sup>

Four years later, in *City of Boerne v. Flores*,<sup>125</sup> the Court ruled that Congress' attempt to legislatively overrule its decision in *Smith* was invalid, at least as applied to the actions of a municipality.<sup>126</sup> The Court held that Congress lacked authority, under Section 5 of the 14<sup>th</sup> Amendment, to impose the strict scrutiny standard for religious liberty upon the States, because this remedy was not congruent with and proportionate to any violations of the people's right to Free Exercise of Religion, as applicable against the States through the Fourteenth Amendment.<sup>127</sup>

Accordingly, *City of Boerne* stands for proposition that RFRA is unconstitutional as applied to the States. But in the year 2000 the Congress amended RFRA to make clear that the statute applied only to the federal government,<sup>128</sup> and there remained the question

---

<sup>123</sup> *Id.* at 14, 1993 U.S.C.C.A.N., at 1094 (footnote omitted).

<sup>124</sup> See H.R. Rep. No. 103-88, at 17 (1993). The Committee Report states:

Finally, the Committee believes that Congress has the constitutional authority to enact [RFRA]. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value....

<sup>125</sup> 521 U.S. 507 (1997) (finding that Congress lacked authority to enact RFRA under Section 5 of the 14<sup>th</sup> Amendment, and that accordingly the law could not constitutionally be applied against State authorities).

<sup>126</sup> See *id.* at 536 (Kennedy, J.) (stating, "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

<sup>127</sup> See *id.* at 508 (Kennedy, J.) (stating, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

<sup>128</sup> See Public Law 106-274, § 7(a), Sep. 22, 2000, 114 Stat. 806, codified at 42 U.S.C. 2000bb-2, which now provides:

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

of whether RFRA was constitutional as applied to the federal government.<sup>129</sup> The great majority of the lower federal courts that considered the question eventually came to the conclusion that RFRA was constitutional as applied to the federal government.<sup>130</sup>

In upholding the application of RFRA against the federal government, the lower federal courts necessarily held that RFRA expands the right to free exercise of religion beyond what the Supreme Court has ruled necessary under its interpretation of the First Amendment in *Smith*. For example, in 1998, in the case of *In re Young*,<sup>131</sup> the Eighth Circuit Court of Appeals ruled that Congress does have the power to extend protection for constitutional rights beyond the constitutional minimum prescribed by the Supreme Court, observing that, “Congress has often provided statutory protection of individual liberties that exceed the Supreme Court’s interpretation of constitutional protection.”<sup>132</sup> A number of other lower federal courts have agreed with this ruling.<sup>133</sup>

There are two principal ways of describing why Congress has the power, under the Necessary and Proper Clause, to make RFRA applicable against the federal government.<sup>134</sup> First, RFRA may be considered to be a law that amends other federal laws, and as such, when Congress adopted RFRA it was exercising the same power that it

---

(2) the term “covered entity” means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States ....

<sup>129</sup> See Robert E. Destro, “By What Right?”: *Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters “Touching Religion”*, 29 IND. L. REV. 1, 91 (1995) (arguing that Congress has the authority to enact RFRA with respect to actions of the federal government, and stating, “As long as congressional action does not amount to a law ‘respecting an establishment of religion,’ it is for Congress to define how solicitous of religious freedom the executive branch shall be as it goes about the task of seeing that the laws ‘be faithfully executed.’”).

<sup>130</sup> See, e.g., *Hankins v. Lyght*, 441 F.3d 96 (2006) (upholding RFRA as a defense to a private cause of action brought under a federal statute); *O’Bryan v. Bureau of Prisons*, 349 F. 3d 399, 400-401 (7<sup>th</sup> Cir. 2003) (upholding RFRA against the federal government); *Guam v. Guerrero*, 290 F.3d 1072, 1073 (9<sup>th</sup> Cir. 2002) (same); *Kikumura v. Hurley*, 242 F.3d 950, 958 (10<sup>th</sup> Cir. 2001) (same, but noting that defendants had cited “an unpublished Tenth Circuit case and a handful of federal district court cases in which *Flores* was interpreted to render RFRA unconstitutional not only in its application to the states but also in its application to the federal government....”); *Henderson v. Kennedy*, 265 F. 3d. 1072, 1073 (D.C. Cir. 2001) (upholding RFRA against the federal government); *In re Young*, 141 F.2d 854 (8<sup>th</sup> Cir. 1998) (same).

<sup>131</sup> 141 F.3d 854 (1998) (holding that RFRA was applicable to the federal government).

<sup>132</sup> *Id.* at 860. The Circuit Court cited the following examples of federal laws that expanded protection for constitutional rights:

See, e.g., Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and providing journalists with greater protection against searches and seizures); National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, 10 U.S.C. § 774 (reacting to *Goldman v. Weinberger*, 475 U.S. 503 (1986), and providing that members of military were entitled to wear religious headgear); cf. *Pregnancy Discrimination Act*, 42 U.S.C. § 2000e(k) (reacting to *Geduldig v. Aiello*, 417 U.S. 484 (1974), and equating employment discrimination based on pregnancy with employment discrimination based on gender).

*Id.* at 860.

<sup>133</sup> See *Hankins v. Lyght*, 441 F.3d 96, 107 (2d Cir. 2006) (*quoting* and following language from *In re Young*); *Guam v. Guerrero*, 290 F.3d 1210, 1220 fn. 16 (9<sup>th</sup> Cir. 2002) (same); *Kikumura v. Hurley*, 242 F.3d 950, 959 (10<sup>th</sup> Cir. 2001).

<sup>134</sup> See *JAMA v. U.S.I.N.S.*, 343 F.Supp. 338, 368 fn. 17 (2004) (discussing various theories of Congressional authority for enacting RFRA).

exercised when it enacted the original law.<sup>135</sup> It could be argued, for example, that RFRA is constitutional as applied to a federal agency regulating business solely because the Commerce Clause grants Congress the power to create the agency in the first place, or that RFRA may properly govern the actions of federal agency that disburses benefits because Congress has the power to create benefits programs under the Spending Clause. Under this theory, Congress' authority to enact RFRA derives from its authority to enact the underlying law that is affected by RFRA.

The second line of reasoning that could be used to support the constitutionality of "federal RFRA" rests upon the precept that is the principal point of this paper, that the Necessary and Proper Clause gives Congress the power to enforce the Bill of Rights, and that RFRA is a straightforward exercise of this power.<sup>136</sup>

In *Hankins v. Lyght*,<sup>137</sup> the Second Circuit Court of Appeals cited both reasons in support of its ruling that RFRA modified the requirements of the federal Age Discrimination in Employment Act (ADEA). The court stated:

It is obvious to us that because Congress had the power to enact the ADEA, it also had the power to amend that statute by passing the RFRA. The RFRA was authorized by the Necessary and Proper Clause because its purpose – to protect First Amendment rights as interpreted by the Congress, *see* S. Rep. No. 103-111, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 – was permissible.<sup>138</sup>

One reason to reject the notion that RFRA is premised solely upon Congress' power under the Commerce Clause or the Spending Clause is that this would conflate the Religious Freedom Restoration Act with the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>139</sup> which Congress enacted in the year 2000 in another attempt to overrule the result in *City of Boerne*.<sup>140</sup> Unlike RFRA, the RLUIPA is an explicit exercise of Congress' power under the Commerce Clause and the Spending Clause,<sup>141</sup> and by the terms of that statute it applies only to those entities and activities which are regulable under those constitutional provisions.<sup>142</sup> In contrast, RFRA, as presently

---

<sup>135</sup> *See, e.g.*, *In re Young*, 141 F.3d 854, 861 (1998) (stating, "We conclude that RFRA is an appropriate means by Congress to modify the United States bankruptcy laws.").

<sup>136</sup> *See* notes \_\_\_-\_\_\_ *supra* and accompanying text.

<sup>137</sup> 441 F.3d 96 (2006) (upholding RFRA as defense to cause of action under ADEA).

<sup>138</sup> *Id.* at 106.

<sup>139</sup> 42 U.S.C. § 2000cc *et. seq.*

<sup>140</sup> *See id.* at § 2000cc(a) (requiring land use regulations that substantially effect Free Exercise rights to pass strict scrutiny test); § 2000cc-1(a) (requiring any government action that affects the Free Exercise rights of institutionalized persons to pass the strict scrutiny test).

<sup>141</sup> *See* *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (Ginsburg, J.) (stating that RFRA "notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds," but that in enacting RLUIPA Congress was "invoking federal authority under the Spending and Commerce Clauses.").

<sup>142</sup> *See* 42 U.S.C. § 2000cc(b), which provides:

This subsection applies in any case in which – (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that

written, is applicable against the federal government only, and it constitutes an exercise of Congress' power under the Necessary and Proper Clause.<sup>143</sup> In the 2005 case of *Cutter v. Wilkinson*<sup>144</sup> the Supreme Court upheld the constitutionality of the RLUIPA against an Establishment Clause challenge,<sup>145</sup> but it expressly noted that the Court had not yet ruled upon the constitutionality of RFRA as amended.<sup>146</sup>

Would the Supreme Court uphold RFRA against the federal government, and if so, upon what grounds would it base Congressional power to enact the law? One year after *Cutter v. Wilkinson* and nine years after its decision in *City of Boerne* where it had declared RFRA unconstitutional as against the States, in the case of *Gonzales v. O Centro Espirito Beneficente Uniao Do Vegetal*,<sup>147</sup> the Supreme Court held that Congress *does* have the authority to make RFRA applicable against the actions of the federal government, although the Court did not identify the precise source of Congress' power to enact this law.<sup>148</sup>

In the *O Centro* case a small religious sect with roots in the Amazon rainforest brought suit to enjoin the United States Attorney General from enforcing the Controlled Substances Act<sup>149</sup> against the use of *hoasca*, a hallucinogenic tea which members of the sect drank as a sacrament.<sup>150</sup> The sect asserted that prosecution under the federal drug laws could not lawfully be applied to ban the ingestion of *hoasca* because the federal government did not have a "compelling governmental interest" that would outweigh the sect's right to free exercise of religion, as required by the Religious Freedom Restoration Act.<sup>151</sup>

---

substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

*See also* 42 U.S.C. § 2000cc-1(b), which provides:

This section applies in any case in which – (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

<sup>143</sup> *See* notes \_\_, \_\_ *supra* and accompanying text.

<sup>144</sup> 544 U.S. 709 (2005) (upholding RLUIPA as against federal prison officials).

<sup>145</sup> *See id.* at 725 (Ginsberg, J.) (upholding RLUIPA against a facial challenge under the Establishment Clause).

<sup>146</sup> *See id.* at 715 fn. 2 (Ginsberg, J.) (stating, "RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter.") (citations omitted).

<sup>147</sup> 546 U.S. 418 (2006) (upholding constitutionality of RFRA and ruling that United States had failed to prove that it had a compelling interest in prosecuting persons for violation of the Controlled Substances Act for using *hoasca*, a hallucinogenic, in religious ceremonies).

<sup>148</sup> *See* notes \_\_-\_\_ *infra* and accompanying text.

<sup>149</sup> 21 U.S.C. 801 *et seq.*

<sup>150</sup> *See O Centro*, 546 U.S., at \_\_ (Roberts, C.J.) (setting forth facts of the case).

<sup>151</sup> *See id.* (Roberts, C.J.)

In a unanimous opinion authored by Chief Justice Roberts the Supreme Court ruled in favor of the *O Centro* church, finding that the government of the United States had failed to prove that there was a compelling reason to prosecute the sacramental use of *hoasca*.<sup>152</sup> The Chief Justice observed in a footnote that the Court had decided in *Smith* that RFRA was unconstitutional as applied to the States, but he did not explain why this law was constitutional as applied to the federal government.<sup>153</sup> However, at the close of his opinion for the Court, Chief Justice Roberts indicated that in this context the Court would defer to the will of Congress, expressed in RFRA, regarding the importance of religious exercise. The Court stated:

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "stri[k]e sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(2), (5).

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. See *Smith*, 494 U.S., at 885-890. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.<sup>154</sup>

What is striking about the foregoing passage from *O Centro* is that the Supreme Court implicitly acknowledged that Congress, in the name of protecting religious liberty, has the authority to prohibit the federal government from enforcing a law that the Court itself would not have found to be in violation of the First Amendment. In other words, Congress has the power to *expand* our protections under the Bill of Rights, at least as against invasion by the federal government. This is contrary to the ruling of the Court in

---

<sup>152</sup> See *id.* at \_\_, \_\_ (Roberts, C.J.) (finding no compelling governmental interest to criminalize the sacramental use of *hoasca* in the enforcement of the Controlled Substances Act or the enforcement of the United Nations Convention on Psychotropic Substances).

<sup>153</sup> See *id.* at \_\_ fn. 1 (Roberts, C.J.) (stating, "As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.").

<sup>154</sup> *Id.* at \_\_ (Roberts, C.J.).

*Smith*, where it held that Congress could *not* legislatively adopt a “strict scrutiny test” in order to insulate Americans from *State* laws affecting fundamental freedoms.<sup>155</sup>

In summary, an examination of the foregoing authorities leads to the following conclusions. First, the Necessary and Proper Clause vests Congress with plenary authority to enforce the Bill of Rights against the federal government. Second, Congress’ authority to enforce the Bill of Rights against the federal government is broader than its power to enforce the Bill of Rights against the States, in that Congress has discretion to expand the scope of our freedoms beyond those which the Court has recognized in prohibiting the federal government from infringing upon our fundamental rights.

With those principles in mind, the following portion of this article contends that Congress enacted FISA for the purpose of protecting our freedom under the Fourth Amendment.

## II. FISA WAS ADOPTED TO PROTECT FOURTH AMENDMENT RIGHTS

Legal scholars have suggested that Congress derives its authority to enact FISA from the Commerce Clause or from its power to regulate the military.<sup>156</sup> While I agree that these specific provisions of Article I, Section 8, afford a sufficient basis for the enactment of FISA, I propose that Congress also had authority to enact this law because Congress has the power to enforce the Bill of Rights against the federal government.

In 1968 the nation faced two problems involving electronic eavesdropping. First, although the Supreme Court had ruled in *Berger v. New York*<sup>157</sup> and *Katz v. United States*<sup>158</sup> that electronic eavesdropping by state and federal officers was subject to the requirements of the Fourth Amendment,<sup>159</sup> there existed no uniform statutory procedure for the government to obtain warrants to conduct surveillance.<sup>160</sup> Second, eavesdropping by private parties, including industrial espionage, was becoming a widespread problem.<sup>161</sup> Congress responded by enacting the Omnibus Crime Control and Safe

---

<sup>155</sup> See notes \_\_\_-\_\_ *supra* and accompanying text.

<sup>156</sup> See note \_\_ *supra* and accompanying text.

<sup>157</sup> 388 U.S. 41 (1967) (striking down state’s procedures for obtaining warrant for wiretap for being inadequate under the 4<sup>th</sup> Amendment).

<sup>158</sup> 389 U.S. 347 (1967) (finding 4<sup>th</sup> Amendment violation in warrantless wiretap on public telephone).

<sup>159</sup> See U.S. Const., amend. 4, which provides:

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.

<sup>160</sup> See Report of the Senate Judiciary Committee, S. Rep. No. 90-1097, 1968 U.S.C.C.A.N. 2112, 2153 (stating, “Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.”).

<sup>161</sup> See *id.*; *id.* at 2154. The Committee stated:

The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-

Streets Act of 1968.<sup>162</sup> Title III of the Omnibus Act established procedures that the government must follow in order to obtain warrants for wiretapping phones and intercepting oral communications,<sup>163</sup> and it outlawed all interception that is conducted without either consent or pursuant to a warrant lawfully obtained.<sup>164</sup> In provisions which are codified at 18 U.S.C. §§ 2511 and 2520, the Congress imposed criminal and civil penalties on persons who unlawfully intercept wire or oral communications.<sup>165</sup>

The Senate Judiciary Committee Report for the Omnibus Bill discussed the primary Supreme Court precedent in detail,<sup>166</sup> and concluded that “this proposed legislation conforms to the constitutional standards set out in *Berger v. New York* and *Katz v. United States*.”<sup>167</sup> In describing the jurisdiction of Congress to enact this legislation, the Committee noted that, as to subsection (a) which prohibits the interception of both wire and communications, “Congress has plenary power under the commerce clause to prohibit all interception of such communications.”<sup>168</sup> Congress considered, however, that this simple and straightforward provision might have been challenged by private individuals who intercepted oral communications, because oral communications are not necessarily part of interstate or even intrastate commerce, and so the interception of these communications might not be justified under the Commerce clause unless special circumstances exist.<sup>169</sup> Accordingly, Congress wrote subparagraph (b) to address this possible defect in the law, by identifying specific circumstances under which it would be illegal for any person to intercept oral communications.<sup>170</sup> These circumstances included situations where the device used was linked in any way to the interstate or foreign network of wire communications, where the listening device used radio frequencies or interfered with radio transmissions, where the device had moved through the mail or in interstate commerce, where the interception took place on or against the premises of any business whose operations affected interstate commerce, or if the interception occurred in Washington, D.C., Puerto Rico, or any of the territories or possessions of the United States.<sup>171</sup>

---

labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

*Id.* at 2154.

<sup>162</sup> Pub. L. 90-351, June 19, 1968, 82 Stat. 197, codified at 18 U.S.C. § 2510 *et seq.*

<sup>163</sup> *See* 18 U.S.C. § 2516 (entitled “Authorization for interception of wire, oral, or electronic communication”); § 2518 (entitled “Procedure for interception of wire, oral, or electronic communication”).

<sup>164</sup> *See* 18 U.S.C. § 2511 (entitled “Interception and disclosure wire, oral, or electronic communication prohibited”).

<sup>165</sup> *See id.*; § 2520 (entitled “Recovery of civil damages authorized”).

<sup>166</sup> S. Rep. No. 1097, note \_\_ *supra*, at 2161-2163

<sup>167</sup> *Id.* at 2113 (citations omitted).

<sup>168</sup> *Id.* at 2180.

<sup>169</sup> *See id.* at 2180-2181 (describing the provisions of subparagraph (b) and explaining why it was adopted).

<sup>170</sup> *See id.*; note \_\_ *infra* and accompanying text.

<sup>171</sup> *See id.* (describing the provisions of subparagraph (b)).

In explaining why it wrote subsection (b) prohibiting interception of oral communications when subsection (a) prohibits the interception of *both* wire and oral communications, the Committee explained that this was necessary in order to give Congress the power to regulate the activities of *private* parties, but it suggested that subsection (b) was not necessary to rein in the conduct of *government* agents. The Committee stated:

The right here at stake – the right to privacy – is a right arising under certain provisions of the Bill of Rights and the due process clause of the 14<sup>th</sup> amendment. Although the broad prohibitions of subparagraph (a) could, for example, be constitutionally applied to the unlawful interception of oral communications by persons acting under color of State or Federal law, see *Katzenbach v. Morgan*, 86 S.Ct. 1717, 384 U.S. 641 (1966), the application of the paragraph to other circumstances could in some cases lead to a constitutional challenge that can be avoided by a clear statutory specification of an alternative constitutional basis for the prohibition.<sup>172</sup>

In short, when Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, it relied upon the Commerce Clause to regulate the activities of private parties, but as to persons acting “under color of State or Federal law,” Congress believed that it had an independent source of authority for regulating the interception of oral or wire communications.

As originally enacted, Title III of the Omnibus Crime Control Act did not attempt to regulate government eavesdropping conducted for the purpose of protecting the national security. The 1968 Act stated that the law should not:

be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.<sup>173</sup>

In 1978 Congress amended Title III by repealing the foregoing language and in its place it enacted a new law, the Foreign Intelligence Surveillance Act (FISA),<sup>174</sup> which required the government to obtain an order from a special court before conducting electronic surveillance on American citizens or lawful resident aliens.<sup>175</sup> Title III was

---

<sup>172</sup> *Id.*

<sup>173</sup> 18 U.S.C. § 2511(3), *repealed* by Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783.

<sup>174</sup> Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783, codified at 50 U.S.C. § 1801 *et seq.*

<sup>175</sup> *See* 50 U.S.C. § 1804 (requiring government to submit proof of probable cause to a special court in order to obtain a warrant to conduct electronic surveillance for the purpose of gathering foreign intelligence); § 1805 (requiring the special court to find the existence of probable cause to support issuance of a warrant); § 1809 (imposing criminal sanctions upon persons who conduct electronic surveillance in violation of the law); § 1810 (imposing civil liability for same).

also amended by adding a provision stating that Title III and the newly-enacted FISA were the “exclusive means” for allowing the government to conduct such surveillance.<sup>176</sup>

Why was the law changed in 1978? Between 1968 and 1978 came the notorious administration of President Richard M. Nixon, with its multiple scandals involving grievous abuses of Presidential power.<sup>177</sup> FISA was adopted and Title III was amended in reaction to widespread eavesdropping abuses conducted by the Nixon administration in the name of national security.<sup>178</sup> In particular, three Senate Reports set forth the justification for the adoption of FISA.

In 1976, the Senate Select Committee to Study Governmental Operations (the “Church Committee”) issued its final report describing the abuses of this period.<sup>179</sup> In the words of one scholar, the Church Committee “found that government agents often had violated both Title III and the Fourth Amendment rights of many citizens by conducting intelligence surveillance without any legitimate basis or suspicion of criminal activity, much less connection with foreign powers.”<sup>180</sup> The Church Committee proposed that Congress should “turn its attention to legislating restraints upon intelligence activities which may endanger the constitutional rights of Americans.”<sup>181</sup>

---

<sup>176</sup> See 18 U.S.C. 2511(2)(f) (providing, “procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.”).

<sup>177</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>178</sup> See Sugiyama, et al., note \_\_\_ *supra*, at 153 (stating, “Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA) principally in response to covert intelligence gathering activities conducted during the Nixon administration.”) (footnote omitted); Dianne Carraway Piette and Jesselyn Raddack, *Piercing the “Historical Mists”: The People and Events Behind the Passage of FISA and the Creation of the “Wall”*, 17 *Stanford L. & Pol’y Rev.* 437, 441-442 (2006). The authors suggest that FISA was enacted in response to several factors:

Watergate and the decades of abuse by the executive branch documented in the comprehensive 1976 Church Committee Report, with its shocking revelations of surveillance programs targeting American citizens such as “COINTELPRO,” combined with the threat of civil and criminal liability against individuals in the government and the telephone company, had a chilling effect on warrantless electronic wiretaps.

*Id.* (footnotes omitted).

<sup>179</sup> See 2 Final Report of the Senate Select Comm. To Study Governmental Operations with Respect to Intelligence Activities: Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755 (1976) (hereinafter “Church Committee Report”); Nicholas C. Dranias, *The Patriot Act of 2001 Versus the 1976 Church Committee Report: An Unavoidable Clash of Fundamental Policy Judgments*, 17-Mar. CBA Rec. 28 (Feb./Mar. 2003). The author states:

On April 26, 1976, the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate issued its Final Report concerning Intelligence Activities and the Rights of Americans. Based on extensive documentary evidence and testimony, this report has since become known as the “Church Committee Report.”

*Id.* at 28.

<sup>180</sup> Nola K. Breglio, *Note: Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 *Yale L.J.* 179, 186 (2003), citing Church Committee Report, note \_\_\_ *supra*, at 165 (1976).

<sup>181</sup> Church Committee Report, note \_\_\_ *supra*, at 289, quoted by Breglio, note \_\_\_ *supra*, at 186.

In 1977, the Senate Judiciary Committee specifically identified *warrantless* surveillance as a threat to constitutional rights:

Also formidable — although incalculable — is the “chilling effect” which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens’ understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.<sup>182</sup>

In 1978, the Senate Select Committee on Intelligence stated that the bill before Congress, which would become FISA,

embodies a legislative judgment that court orders and other procedural safeguards are necessary to ensure that electronic surveillance by the U.S. government within this country conforms to the fundamental principles of the Fourth Amendment.<sup>183</sup>

Acting upon these reports, Congress enacted FISA in 1978, and it is abundantly clear that FISA was intended to protect the Fourth Amendment rights of American citizens and lawfully resident aliens against encroachment by agents of the federal government acting under the shield of “national security.” Furthermore, as the legislative history of Title III demonstrates, Congress was aware that it had the authority under the Commerce Clause to prohibit eavesdropping by private parties, but that in enacting legislation controlling the actions of agents of the State and Federal governments, the Commerce Clause is an alternative and not a necessary source of Congressional power.<sup>184</sup>

### III. THE TERRORIST SURVEILLANCE PROGRAM IS ILLEGAL UNDER FISA

---

<sup>182</sup> S. Rep. No. 95-604(I), Nov. 15, 1977, 1978 U.S.C.C.A.N. 3904, 3909, cited by Bazan and Elsea, note 5 *supra*, at 13. Another problem that the Judiciary Committee noted was that the courts had adopted conflicting standards for distinguishing between lawful and unlawful eavesdropping. The Senate Committee stated:

The vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated.

<sup>183</sup> Senate Select Committee on Intelligence, Foreign Intelligence Surveillance Act of 1978, S. Rep. No. 95-701, March 14, 1978, 1978 U.S.C.C.A.N. 3973, 3983).

<sup>184</sup> See notes \_\_\_ - \_\_\_ *supra* and accompanying text.

After the existence of the warrantless Terrorist Surveillance Program was revealed in 2005,<sup>185</sup> Alberto Gonzales, the Attorney General of the United States, published a memorandum asserting that the program was lawful under FISA, and in the alternative that if it is not lawful under FISA, then FISA is unconstitutional under the doctrine of Separation of Powers.<sup>186</sup> A number of legal scholars have analyzed the Attorney General's arguments and found them to be unpersuasive.<sup>187</sup> This portion of the article draws upon that research in responding to the Attorney General's statutory defense of the President's Terrorist Surveillance Program. Part IV of this article addresses the constitutional questions.

Attorney General Alberto Gonzales contends that the President's warrantless Terrorist Surveillance Program does not violate FISA because, he suggests, the requirements of FISA have been amended or overridden by Congress' enactment of the Authorization for Use of Military Force.<sup>188</sup> He also contends that this interpretation of FISA is required because it is the only interpretation of that statute which would avoid constitutional difficulties.<sup>189</sup> Neither the text nor the history of FISA and other relevant federal laws support the Attorney General's arguments.

The Attorney General's argument that the Terrorist Surveillance Program does not violate FISA is based upon a single phrase contained in the provision of FISA that imposes criminal liability upon public officials who conduct illegal eavesdropping. This provision states:

A person is guilty of an offense if he intentionally ... engages in electronic surveillance under color of law except *as authorized by statute* ....<sup>190</sup>

---

<sup>185</sup> See Risen and Lichtblau, note \_\_\_ *supra* (revealing the existence of the TSP); Sugiyama, et al., note 5 *supra*, at 149 (calling the disclosure of the program a "fire alarm"); *id.* at 158 (stating, "In response to the disclosure by the media of the NSA domestic surveillance program, the Bush administration built an impenetrable wall around the executive branch. Although congressional Democrats and various interest groups attempted to pierce this wall, the majority of Republicans bolstered the executive branch and stymied these oversight efforts.").

<sup>186</sup> See *Gonzales Memorandum*, note 4 *supra*, 81 Ind. L.J. 1383-1409 (contending that FISA should be interpreted as having been amended by the AUMF); *id.* at 1376, stating that if FISA were interpreted as prohibiting the President's Terrorist Surveillance Program, "FISA would be unconstitutional as applied to this narrow context."; *id.* (stating, "FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the Branches."); see also Wong, note 5 *supra*, at 520 (stating, "First the administration claims that by passing the AUMF, Congress authorized a broad range of presidential actions relating to the deterrence and prevention of terrorist acts, of which the terrorist surveillance program is an "indispensable aspect." Second, it claims that even in the absence of congressional authorization, the Commander-in-Chief Clause in Article II of the Constitution confers the power to approve the type of warrantless surveillance conducted under the terrorist surveillance program.").

<sup>187</sup> See generally authorities cited in note 5 *supra*.

<sup>188</sup> See *Gonzales Memorandum*, note 4 *supra*, at 1383-1401 (contending AUMF by its terms amended FISA); Pub. L. 107-40, Sept. 18, 2001, 15 Stat. 224 (Authorization for Use of Military Force).

<sup>189</sup> See *Gonzales Memorandum*, note 4 *supra*, 81 Ind. L.J., at 1401-1409 (invoking canon of constitutional avoidance).

<sup>190</sup> 50 U.S.C. § 1809(a) (emphasis added).

The Attorney General takes the position that the phrase “except as authorized by statute” indicates that the requirements of FISA may be modified or repealed by a subsequent statute,<sup>191</sup> and he argues that the AUMF had this effect, essentially repealing FISA’s prohibition on warrantless eavesdropping in the context of the War on Terror.<sup>192</sup>

The AUMF was enacted on September 18, 2001, precisely one week after the terrorist attacks of September 11, 2001.<sup>193</sup> This Resolution states:

[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.<sup>194</sup>

In opposition to the President’s position and the Attorney General’s arguments, a number of legal scholars have concluded that the NSA Terrorist Surveillance Program is illegal under FISA.<sup>195</sup> Specifically, these scholars conclude that it is not reasonable to read the AUMF as an implicit modification or repeal of FISA.<sup>196</sup> There are at least six reasons that support of this conclusion.

First, the language of FISA and the Omnibus Crime Control Act is clear and unambiguous, as was the intent of Congress in the enactment of each law. When FISA was adopted, Congress repealed a provision that exempted surveillance conducted in the name of “national security” from the scope of the Omnibus Crime Control Act, and Congress replaced it with language providing that the warrant procedures of Title III and FISA were the “exclusive means” for the government to conduct lawful interception of communications.<sup>197</sup> Both plain meaning and clear legislative intent militate against the

---

<sup>191</sup> See *Gonzales Memorandum*, note 4 *supra*, at 20-21 (stating, “In enacting FISA, therefore, Congress contemplated the possibility that the President might be permitted to conduct electronic surveillance pursuant to a later-enacted statute that did not incorporate all of the procedural requirements set forth in FISA or that did not expressly amend FISA itself.”).

<sup>192</sup> See *id.*, at 1383-1409 (contending that FISA should be interpreted as having been amended by the AUMF).

<sup>193</sup> Pub. L. 107-40, Sept. 18, 2001, 15 Stat. 224 (Authorization for Use of Military Force).

<sup>194</sup> *Id.*, § 2(a).

<sup>195</sup> See, e.g., Sims, note 5 *supra*, at 106 (stating that “the conclusion that [the Terrorist Surveillance Program] violates the law as it stands is unavoidable.”); *Letter to Congress*, note 5 *supra*, at 1364 (stating, “the Justice Department’s defense of what it concedes was secret and warrantless electronic surveillance of persons within the United States fails to identify any plausible legal authority for such surveillance.”).

<sup>196</sup> See Sims, note 5 *supra*, at 140 (stating that “The AUMF cannot plausibly be taken to have provided statutory authorization for warrantless interceptions under these circumstances.”); *Letter to Congress*, note 5 *supra*, at 1365 (stating, “Congress did not implicitly authorize the NSA domestic spying program in the AUMF, and in fact expressly prohibited it in FISA.”); Bazan and Elsea, note 5 *supra*, at 43 (stating, “the history of Congress’s active involvement in regulating electronic surveillance within the United States leaves little room for arguing that Congress has accepted by acquiescence the NSA operations here at issue.”); *id.* at 44 (stating, “it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here under discussion.”).

<sup>197</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

President's position that the general language of the AUMF implicitly repeals the specific language of Title III and FISA.<sup>198</sup>

Second, the language and the legislative history of the AUMF do not support the proposition that it covers surveillance of the conversations of Americans. The resolution authorizes the use of "force," and the plain meaning of the term "force" does not include wiretapping of American citizens.<sup>199</sup> Nor does case law militate in favor of an expansive definition of the term "force." In *Hamdi v. Rumsfeld*,<sup>200</sup> the Supreme Court ruled said that the AUMF necessarily authorizes the detention of combatants captured on the battlefield for the duration of the conflict, but that it would not authorize the indefinite detention of prisoners.<sup>201</sup> Two years later, in *Hamdan v. Rumsfeld*,<sup>202</sup> the Court ruled that the AUMF did not authorize the President to subject prisoners to war crimes trials that did not conform the requirements of Article 21 of the Uniform Code of Military Justice.<sup>203</sup> Furthermore, when the AUMF was debated and adopted, there was no mention of FISA on the floor of Congress.<sup>204</sup> To the contrary, the President sought to add language that would have authorized him to use all necessary force "in the United States," and Congress rejected this proposal.<sup>205</sup>

Third, since Congress adopted the AUMF in 2001, the Congress amended FISA in several respects when it enacted and reauthorized the Patriot Act.<sup>206</sup> Although

---

<sup>198</sup> See, e.g., *Letter to Congress*, note 5 *supra*, at 1365 (stating, "Specific and 'carefully drawn' statutes prevail over general statutes where there is a conflict.>").

<sup>199</sup> See, e.g., Bazan and Elsea, note 5 *supra*, at 35-36 (analyzing meaning of the term "force"); *Letter to Congress*, note 5 *supra*, at 1365 (stating, "the DOJ's argument rests on an unstated general 'implication' from the AUMF that directly contradicts *express* and *specific* language in FISA.>").

<sup>200</sup> 542 U.S. 507 (2004) (ruling that detainees held at Guantanamo Bay were entitled to a hearing to determine whether or not they are "enemy combatants.>").

<sup>201</sup> See *id.* at 521 (O'Connor, J.) (stating, "Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."); *id.* at 536 (O'Connor, J.) (stating, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.>").

<sup>202</sup> \_\_\_ U.S. \_\_\_ (2006) (ruling that war crimes trials of detainees must conform to requirements of the Uniform Code of Military Justice).

<sup>203</sup> See *id.* at \_\_\_ (Stevens, J.) (stating, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.>").

<sup>204</sup> See Sims, note 5 *supra*, at 132 (stating, "at no time in the legislative process that led to the AUMF was there the slightest hint that the operation of FISA would in any way be affected.>").

<sup>205</sup> See Morrison, note 5 *supra*, at 1255. Professor Morrison states:

Just before the Senate voted on the AUMF, the White House reportedly sought to insert the words "in the United States and" into the resolution, so that it would authorize the President to "use all necessary and appropriate force in the United States and against those nations, organizations, or persons" responsible for the September 11 attacks. But the Senate leadership refused, apparently on the grounds that it did not want to grant the President expansive powers within the United States.

*Id.* at 1255 (footnotes omitted).

<sup>206</sup> See, e.g. Sims, note 5 *supra*, at 132 (stating that FISA "has been explicitly amended five times since 9/11 ...."); Sugiyama and Perry, note 5 *supra*, at 155. The authors state:

Congress has made a number of significant changes to FISA since 2001, it has retained the requirement that the government must obtain a warrant from the FISA court before “United States persons” may be targeted for surveillance. This legislative history is strong evidence that Congress did not intend for the AUMF to repeal the warrant requirements of FISA.<sup>207</sup>

Fourth, canons of construction such as the doctrine of “constitutional avoidance” are rules of inference that may be invoked only to resolve ambiguities in a statute – they may not be used to create substantive exceptions to statutes which are clear on their face.<sup>208</sup> Accordingly, the doctrine of “constitutional avoidance” is not applicable in this setting.<sup>209</sup>

Fifth, FISA contains at least two exceptions which allow the President to respond to emergencies.<sup>210</sup> It provides for 15-day suspension of the law following a Congressional declaration of war.<sup>211</sup> Even if the AUMF could be construed as a “declaration of war,” at most this would mean that the President would not have had to seek warrants from the FISA court for 15 days following the adoption of the AUMF.<sup>212</sup> In light of this provision it cannot reasonably be maintained that FISA was permanently

---

In response to the terrorist attacks, President Bush signed Public Law 107-56, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) on October 26, 2001. The Act includes several significant amendments to FISA. First, the amendments approve searches where criminal prosecution of individuals is the primary purpose of the search, so long as a significant intelligence purpose remains. These amendments represent a fundamental shift in focus from FISA as a tool for surveillance to FISA as a tool for law enforcement. The government, therefore, need no longer cloak its prosecutorial interests in the guise of foreign intelligence; the bar for initiating surveillance is much lower. Second, the Act increases the number of judges on the FISA court from seven to eleven. Third, the Act expands FISA's coverage with respect to certain data gathering devices and business records. Finally, the Act also amends FISA to include a private right of action for private citizens who are illegally monitored.

*Id.* at 155 (footnotes omitted); *see generally* Viet D. Dinh and Wendy J. Keefer, *FISA and the Patriot Act: A Look Back and a Look Forward*, 35 Geo. L.J. Ann. Crim. Proc. iii (2006) (describing how numerous provisions of the Patriot Act have amended FISA).

<sup>207</sup> *See, e.g.*, Bazan and Elsea, note 5 *supra*, at 37, (stating, “The fact that Congress amended FISA subsequent to September 11, 2001, in order to maximize its effectiveness against the terrorist threat further bolsters the notion that FISA is intended to remain fully applicable.”).

<sup>208</sup> *See* WILSON R. HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* \_\_ (2002); Bazan and Elsea, note 5 *supra*, at 41 (stating that principles of statutory construction “are only to be applied where there is a genuine ambiguity or conflict between two statutes.”); Morrison, note 5 *supra*, at 1194 (stating, “the avoidance canon applies only in circumstances of statutory ambiguity.”).

<sup>209</sup> *See* Morrison, note 5 *supra*, at 1250-1258 (analyzing and rejecting the President’s “constitutional avoidance” defense); *id.* at 1258 (stating, “timely and appropriate notice to Congress is a critical predicate of the constitutional enforcement theory of avoidance. In the absence of such notice, the Justice Department’s avoidance-based defense of the NSA program simply cannot get off the ground.”).

<sup>210</sup> *See* Bazan and Elsea, note 5 *supra*, at 23-27 (describing three of FISA’s exceptions to the warrant requirement).

<sup>211</sup> *See* 50 U.S.C. § 1811.

<sup>212</sup> *See* Bazan and Elsea, note 5 *supra*, at 26 (stating, “This provision does not appear to apply to the AUMF, as that does not constitute a congressional declaration of war.”).

superceded by the AUMF.<sup>213</sup> FISA also contains a 72-hour grace period allowing the government to conduct surveillance in situations where it is not feasible to obtain a warrant.<sup>214</sup> This is additional proof that Congress anticipated the need to suspend the warrant requirement in emergency situations, and that it deliberately decided not to permanently suspend FISA in time of war.

Sixth, in light of the fact that the President conducted the Terrorist Surveillance Program in secret, it cannot be maintained that the Congress implicitly approved of the President's action. Only a few select members of Congress were informed of the existence of the program, and they were bound to secrecy.<sup>215</sup> Neither the American people nor their elected representatives were conscious of the President's orders and the government's actions. In fact, in the spring of 2004 President George W. Bush lied to the American people, stating:

Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.<sup>216</sup>

It is not possible to infer from Congress' inaction that it intended to ratify the lawfulness of the warrantless surveillance program.<sup>217</sup>

The plain and unambiguous language of FISA and Title III of the Omnibus Crime Act as well as the unmistakable evidence of the Congress' intent lead to but one conclusion: the President's warrantless eavesdropping program is in violation of federal law. Those persons who have ordered, approved, or conducted this surveillance may be guilty of committing felonies in violation of FISA.<sup>218</sup>

In defense of the Terrorist Surveillance Program, the President contends that FISA is unconstitutional under the doctrine of Separation of Powers because it interferes

---

<sup>213</sup> See *id.* at 37 (stating, "The inclusion of this exception strongly suggests that Congress intended for FISA to apply even during wartime, unless Congress were to pass new legislation.").

<sup>214</sup> See 50 U.S.C. § 1805(f).

<sup>215</sup> See Morrison, note 5 *supra*, at 1258 (stating, "very few members of Congress knew of its existence."); see generally Sugiyama and Perry, note 5 *supra* (describing and analyzing Congressional oversight of the NSA surveillance program).

<sup>216</sup> See 4/20/04 White House Press Releases and Documents, *Remarks by the President in a Conversation on the USA Patriot Act* (from a speech given in Buffalo, New York, on April 20, 2004).

<sup>217</sup> See Morrison, note 5 *supra*, at 1258. The author states:

[T]imely and appropriate notice to Congress is a critical predicate of the constitutional enforcement theory of avoidance. In the absence of such notice, the Justice Department's avoidance-based defense of the NSA program simply cannot get off the ground.

<sup>218</sup> See 50 U.S.C. § 1809 (making it a federal offense for any person, acting "under color of law," to intercept communications in violation of FISA).

with the power of the President to protect this nation from hostile powers.<sup>219</sup> That issue is addressed in the following and final portion of this article.

#### IV. FISA IS CONSTITUTIONAL UNDER THE DOCTRINE OF SEPARATION OF POWERS

The President presents two arguments under the doctrine of Separation of Powers to justify his claim that FISA is unconstitutional and that the TSP is therefore legal. First, he contends that he has inherent authority, under the Constitution, to conduct warrantless foreign intelligence surveillance,<sup>220</sup> because “Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces . . . and authority over the conduct of the Nation’s foreign affairs.”<sup>221</sup> The President is, in effect, invoking the theory of the “unitary executive,” which is premised upon a broad reading of the Executive power.<sup>222</sup> The President’s understanding of the theory of the “unitary executive” is that he has discretion to perform the duties of his office largely free from the control of the other branches of government, at least with respect to any matter connected to foreign affairs.<sup>223</sup> In effect, the President is arguing not simply for a “unified executive,” but for a “unified government,” which is completely at odds with the concept of Separation of Powers.

This broad reading of the “executive power,” both generally and in the context of warrantless surveillance during wartime, is refuted by the decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>224</sup> In that case the four great justices from that period – Hugo Black, William Douglas, Felix Frankfurter, and Robert Jackson, each of whom had been appointed by President Franklin Delano Roosevelt<sup>225</sup> – all authored

---

<sup>219</sup> See note \_\_ *supra* and accompanying text.

<sup>220</sup> See *Gonzales Memorandum*, note 4 *supra*, at 1379 (stating, “The President has inherent constitutional authority to conduct warrantless foreign intelligence surveillance.”).

<sup>221</sup> *Id.*

<sup>222</sup> See generally, Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the First Half Century*, 47 Case W. Res. L. Rev. 1451 (1997) (setting forth theory of the “unitary executive” and the actions of Presidents during the relevant period of American history); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the Second Half Century*, 26 Harv. J.L. & Pub. Pol’y 667 (2003) (same); Christopher S. Yoo and Steven G. Calabresi, *The Unitary Executive During the Third Half Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004) (hereinafter *Third Half Century*) (same); Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601(2005) (hereinafter *Modern Era*) (same).

<sup>223</sup> See Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 U.C.L.A. L. Rev. 309, 311-312 (2006) (stating, “some have argued that in matters of foreign affairs, the president possesses inherent, perhaps even extraconstitutional, powers. Recent expansive assertions of implied executive authority by the present administration against the backdrop of national security considerations have also added a particularly combustible fuel to the controversy.”) (footnote omitted).

<sup>224</sup> 343 U.S. 579 (1952); see Sims, note 5 *supra*, at 134 (stating, “The celebrated *Steel Seizure Case* is the precedent most nearly on point, and it offers no support at all for the proposition that FISA is unconstitutional.”).

<sup>225</sup> See generally WILLIAM DOMNARSKI, *THE GREAT JUSTICES 1941-1954: BLACK, DOUGLAS, FRANKFURTER, & JACKSON IN CHAMBERS* (2006) (describing the interaction and the achievements of these four justices).

opinions standing for the proposition that the President must be obedient to the Rule of Law, even in time of war.<sup>226</sup>

The President's second argument is more subtle. He suggests that Separation of Powers struggles must take into account the centrality and importance of the powers being exercised by each branch.<sup>227</sup> Essentially, he contends that the conduct of foreign surveillance is more important and more central to the duties of the President as Commander-in-Chief than it is to the power of Congress to regulate interstate and foreign commerce.<sup>228</sup> This argument is rebutted by the central point of this article – that Congress has the power to enact legislation in protection of the Bill of Rights, and that Congress exercised this power when it adopted FISA.<sup>229</sup>

The President's two arguments under the doctrine of Separation of Powers and the responses to those claims are the subjects, respectively, of Part A and Part B below. Part C discusses Justice Anthony Kennedy's theory of the relation between the doctrine of Separation of Powers and the liberty of the individual.

*A. The President's Theory of the "Unitary Executive" and the Ruling of the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer*

President George W. Bush has, at every opportunity, promoted an extreme version of the theory of the "unitary executive."<sup>230</sup>

This term "unitary executive" is derived from the decision of the framers of the Constitution to vest the executive power in a single person instead of a committee,<sup>231</sup> and

---

<sup>226</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>227</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>228</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>229</sup> See notes \_\_\_-\_\_\_ *infra* and accompanying text.

<sup>230</sup> See Yoo, Calabresi, and Colangelo, *Modern Era*, note \_\_\_ *supra*, at 729-730. The authors state:

Support for the unitariness of the executive branch does not necessarily require supporting the broad claims of inherent executive authority advanced by the Bush Administration. Even Justice Antonin Scalia, whose dissent in *Morrison v. Olson* remains one of the definitive statements in support of the unitary executive, took the view[in *Hamdi v. Rumsfeld*] that citizens detained as enemy combatants must be either charged with treason or be released, absent a congressional act suspending the right to habeas corpus.

...

The fact the Bush Administration has made such extraordinary claims of presidential power – claims that go way beyond a claim of control over the removal and law execution powers defended in this Article – shows that there has been no acquiescence in any diminution in presidential power during the Administration of George W. Bush. The fact that at times Bush may have pushed an overly vigorous view of presidential power that expanded far beyond the logical boundaries of the unitary executive implicitly confirms his determination to defend the prerogatives of the executive branch.

*Id.* at 729-730.

<sup>231</sup> See FARBER, *et al.*, note \_\_\_ *supra*, at 110-112, 115-117 (describing debate at the Constitutional Convention regarding the number of persons who would lead the Executive Branch); Alexander Hamilton, *The Federalist No. 70*, available online at [http://thomas.loc.gov/home/histdox/fed\\_70-2.html](http://thomas.loc.gov/home/histdox/fed_70-2.html), stating,

the proponents of this theory have traditionally criticized any attempt by Congress to control the exercise of executive power by limiting the power of the President to appoint or remove members of the executive branch.<sup>232</sup> In particular, the adherents to the theory of the unitary executive have opposed two decisions of the Supreme Court that upheld limitations on the President's appointment and removal powers.<sup>233</sup> In *Humphrey's Executor v. United States*<sup>234</sup> the Supreme Court upheld a provision of federal law that prevented the President from removing a Federal Trade Commissioner "at will," by providing that a Trade Commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."<sup>235</sup> This decision cleared the way for the creation of "independent agencies" within the Executive Branch, including the National Labor Relations Board, the Federal Reserve Board, and the Securities and Exchange Commission.<sup>236</sup> The other decision that supporters of the theory of the unitary executive consider to be incorrect is *Morrison v. Olson*,<sup>237</sup> in which the Court upheld the Independent Counsel Act, which permitted the appointment of prosecutors who were not under the direct control of the Attorney General.<sup>238</sup>

However, the administration of President George W. Bush has eclipsed this traditional understanding of the theory of the unitary executive.<sup>239</sup> Elements within the administration, as well as the President himself, have made claims which are far in excess of those which supporters of the theory have previously advanced.<sup>240</sup> Members of the Justice Department have produced memoranda supporting the inherent power of the President to detain suspected terrorists, to torture them during interrogation, to try them for war crimes, and even to invade other countries without Congressional

---

"Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature.").

<sup>232</sup> See note 187 *supra*.

<sup>233</sup> See Yoo and Calabresi, *Third Half Century*, note \_\_ *supra*, at 88 (stating, "*Humphrey's Executor* was a shocking and poorly reasoned" decision); Yoo, Calabresi, and Colangelo, *Modern Era*, note \_\_ *supra*, at 730 (characterizing the dissent of Justice Antonin Scalia in *Morrison v. Olson* as "one of the definitive statements in support of the unitary executive.").

<sup>234</sup> See *id.*

<sup>235</sup> 295 U.S. 602 (1935) (upholding provision of Federal Trade Commission Act providing that Trade Commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

<sup>236</sup> *Id.* at 870; see *id.* at 632 (stating, "as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.").

<sup>237</sup> *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 Admin. L. Rev. 429 (2006) (stating, "Ever since the Supreme Court held in *Humphrey's Executor v. United States* that at least certain 'good cause' statutory limitations on the President's power to remove a member of the FTC were constitutional, agencies such as the FTC and the FCC have been considered in at least some good measure, as a matter of law and established practice, 'free from executive control.'").

<sup>238</sup> 487 U.S. 654 (1988) (upholding Independent Counsel Act against challenge on ground that law invaded the powers of the President as head of the Executive Branch).

<sup>239</sup> See *id.* at 696-697 (finding Independent Counsel Act to be constitutional).

<sup>240</sup> See note \_\_ *supra* and accompanying text.

<sup>241</sup> See *id.*

authorization.<sup>241</sup> In addition, the President has invoked the doctrine of the unitary executive in many signing statements, in which he argued that the theory of the unitary executive as authorizing him to disregard the laws that he was signing.<sup>242</sup>

The principal authority opposing the concept of the “unitary executive” is contained in the opinions of several justices who comprised the majority of the Supreme Court in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>243</sup> In that case the Supreme Court unequivocally declared that the President must obey the law even during wartime.

The *Youngstown* case may be briefly summarized. During the Korean War, the United Steelworkers threatened to go on strike, so President Harry Truman issued an Executive Order directing the Secretary of Commerce to take possession of the Nation’s steel mills to keep the mills running.<sup>244</sup> Five years earlier the Congress had considered a bill that would have authorized the President to take this type of action, but Congress had

---

<sup>241</sup> See Van Alstine, note \_\_ *supra*, at 312 fn. 8 (identifying a number of administration memoranda invoking the “inherent” powers of the President); John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and the Nations Supporting Them*, September 25, 2001 (concluding that “the President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.”); John C. Yoo, Letter to Alberto R. Gonzales, August 1, 2002, available online at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>, (concluding that interrogation methods used on captured al Qaeda operatives would not violate the Convention on Torture nor would they result in possible prosecution before the International Criminal Court.); Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, August 1, 2002 (construing federal laws that outlaw cruel and inhuman treatment of prisoners, the author defines “severe pain” as requiring an intensity equivalent to death or organ failure, and concluding that “under the circumstances of the current war against al Quada and its allies, application of Section 2340A [the federal law outlawing torture] to interrogations undertaken pursuant to the President’s Commander-in-Chief power may be unconstitutional. Finally, even if an interrogation might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.”).

<sup>242</sup> See Charlie Savage, *ABA Urges Halt to “Signing Statements”: Presses Protection of Checks and Balances*, Boston Globe A2, August 9, 2006 (stating, “Among the laws Bush has challenged are a torture ban, oversight provisions in the USA Patriot Act, restrictions against using US soldiers to fight Colombian rebels, whistleblower protections for executive branch employees, safeguards against political interference in federally funded scientific research, and numerous other statutory restrictions or requirements on his powers.”); Note: *Context-Sensitive Deference to Presidential Signing Statements*, 120 Harv. L. Rev. 597, 601 (2006) (proposing that signing statements should be considered by courts when interpreting statutes, but noting, “A similarly pervasive but more controversial purpose of signing statements is to express the President’s position that a particular provision or application of a bill is unconstitutional and therefore will not be enforced by the executive branch.”); Emma V. Broomfield, *A Failed Attempt to Circumvent the International Law on Torture: The Insignificance of Presidential Signing Statements*, 75 Geo. Wash. L. Rev. 105, 110 (2006). The author stated:

President Bush signed the Detainee Treatment Act into law on December 30, 2005. But President Bush qualified his signature with a statement providing that the executive branch would construe the CIDT provision in accordance with “the constitutional authority of the President to supervise the unitary executive branch” and with the commander-in-chief power, effectively stipulating that he could violate the ban when he judged it necessary for the protection of national security.

*Id.* at 110 (footnotes omitted).

<sup>243</sup> 343 U.S. 579 (1952) (striking down President Truman’s Executive Orders seizing the steel industry).

<sup>244</sup> See *id.* at 583 (Black, J.).

refused to enact the law.<sup>245</sup> President Truman reported his action of seizing the steel mills to Congress and invited Congress to respond, but Congress took no action.<sup>246</sup> The owners of the steel mills challenged the validity of the President's order, and President argued that he had the authority as Chief Executive and as Commander-in-Chief to seize the mills in support of the war effort.<sup>247</sup> The Supreme Court ruled against the President.<sup>248</sup> The majority opinion was written by Justice Hugo Black.

Justice Black commenced his analysis of the Separation of Powers aspect of the case with the observation that "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."<sup>249</sup> President Truman did not contend that Congress had enacted any laws that gave him the power to seize the steel industry, but rather he argued that the seizure was an exercise of the President's constitutional authority to defend the nation during time of war.<sup>250</sup> Writing for the Court, Justice Black concluded that no provision of the Constitution gave the President to seize the nation's assets under these circumstances, and that the seizure was therefore illegal.<sup>251</sup>

Looking to the text of the Constitution, Justice Black ruled that the language of both Article I and Article II of the Constitution were in opposition to the President's assertion of power.<sup>252</sup> Justice Black rejected the contention that the President, as Commander-in-Chief, had the authority to seize the nation's steel industry, stating:

Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of

---

<sup>245</sup> See *id.* at 586 (Black, J.). Justice Black stated:

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.

<sup>246</sup> See *Youngstown*, 343 U.S., at 583 (Black, J.) (stating, "The next morning the President sent a message to Congress reporting his action. Cong.Rec., April 9, 1952, p. 3962. Twelve days later he sent a second message. Cong.Rec., April 21, 1952, p. 4192. Congress has taken no action.").

<sup>247</sup> See *id.* at 587 (Black, J.). Justice Black stated:

It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "the executive Power shall be vested in a President \* \* \*"; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

*Id.* at 587 (Black, J.).

<sup>248</sup> See *id.* at 587 (Black, J.) (stating, "this seizure order cannot stand.").

<sup>249</sup> *Id.* at 585 (Black, J.).

<sup>250</sup> See *id.* at 585-586 (Black, J.); note \_\_ *supra*.

<sup>251</sup> See *id.* at 587-588 (Black, J.) (considering and rejecting the President's assertion of constitutional authority to seize the steel industry); *id.* at 587 (Black, J.) (stating, "this seizure order cannot stand.").

<sup>252</sup> See *id.* at 587-588 (Black, J.).

private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.<sup>253</sup>

Justice Black observed that the Constitution grants Congress the power to make law,<sup>254</sup> and that the Necessary and Proper Clause invests Congress with the power “to make all laws necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>255</sup> He also cited the provision of Article II of the Constitution which, in emphatic terms, imposes a duty upon the President to enforce the law, providing that the President “shall take care that the laws be faithfully executed,”<sup>256</sup> and concluded that this provision “refutes the idea that [the President] is to be a lawmaker.”<sup>257</sup> Justice Black reasoned that Congress, not the President, had the power to deal with the crisis facing the nation:

The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.<sup>258</sup>

Justice Douglas and Justice Frankfurter joined Justice Black’s opinion for the majority,<sup>259</sup> and in separate concurring opinions they both expressed the idea that a system of government that incorporates the doctrine of Separation of Powers might not be the most *efficient* form of government, but that it is necessary to preserve freedom.<sup>260</sup>

---

<sup>253</sup> *Id.* at 587 (Black, J.).

<sup>254</sup> *See id.* at 588 (Black, J.) (citing U.S. CONST., art. I, sec. 1); *id.* at 589 (stating, “The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.”).

<sup>255</sup> *See id.* at 587-588 (Black, J.), *quoting* U.S. CONST., art. I, sec. 1, and art. 1, sec. 8, cl. 18.

<sup>256</sup> *See id.* at 587 (Black, J.) (referring to U.S. CONST., art. II, sec. 3).

<sup>257</sup> *Id.* at 587 (Black, J.).

<sup>258</sup> *Id.* at 588 (Black, J.).

<sup>259</sup> *See id.* at 589 (Frankfurter, J., concurring) (stating, “Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than any appear from what Mr. Justice Black has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case.”); *id.* at 629 (Douglas, J., concurring).

<sup>260</sup> *See id.* at 633 (Douglas, J., concurring) (stating, “We pay a price for our system of checks and balances.”); *id.* at 629 (Douglas, J., concurring) (stating, “The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power,” *quoting* *Myers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting); *id.* at 613 (Frankfurter, J., concurring). Justice Frankfurter stated:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any

The separate concurring opinion of Justice Robert H. Jackson in *Youngstown Sheet & Tube* has come to be viewed as the leading statement of the theory of Separation of Powers.<sup>261</sup> Earlier in his career Justice Jackson had frequently scaled heights of eloquence,<sup>262</sup> but the opinion in *Youngstown*, written two years before his death, is, in my opinion, his masterpiece. A few excerpts from Jackson's opinion illustrate why it has achieved such influence. Justice Jackson wrote:

There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.<sup>263</sup>

\*\*\*

The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed ...." That authority must be matched against words of the Fifth Amendment that "No person shall be ... deprived of life, liberty, or property, without due process of law ...." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.<sup>264</sup>

\*\*\*

---

event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

*Id.* at 613 (Frankfurter, J., concurring).

<sup>261</sup> See, e.g., *A.C.L.U. v. N.S.A.*, 438 F.Supp.2d 754, 777 (2006) (stating, "Justice Jackson's concurring opinion in that case has become historic."); Jeffrey Rudd, *Restructuring America's Government to Create Sustainable Development*, 30 Will. & Mary Envtl. L. & Pol'y Rev. 371, 399-400 (2006) (stating, "Justice Jackson's concurrence in *Youngstown* presents a classic analysis of the constitutional limits of presidential powers and his opinion's significance extends well beyond national security issues," and characterizing it as "one of Jackson's great contributions to American government ....") (footnote omitted); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 Ind. L. Rev. 535 (1996) (stating that Justice Jackson's concurring opinion "overshadowed Justice Black's more circumscribed opinion for the Court ....").

<sup>262</sup> See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.) (stating, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."); JEFFREY D. HOCKETT, *NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON* 241 (1996) ("Early in his judicial career, Jackson distinguished himself through the eloquence and force of his prose."); DOMNARSKI, at 41 (stating, "Jackson's was a muscular, concrete, tactile prose that in its purest expressions startles the reader with its vigor, edge, and essence.").

<sup>263</sup> See *Youngstown*, 343 U.S., at 633-634 (Jackson, J., concurring).

<sup>264</sup> *Id.* at 646 (Jackson, J., concurring) (footnote omitted).

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.<sup>265</sup>

\*\*\*

The essence of our free Government is “leave to live by no man's leave, underneath the law” – to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.<sup>266</sup>

The core of Jackson’s analysis, and in my opinion his most enduring legacy, is the “tripartite approach” that he developed towards Separation of Powers problems. Jackson identified three situations where the power of the President might be challenged. When Congress has approved or acquiesced in the action of the President, the President’s power “is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate.”<sup>267</sup> When Congress has remained silent while the President has taken action, it may “enable, if not invite, measures on independent presidential responsibility.”<sup>268</sup> Finally, “when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>269</sup> Justice Jackson found that President Truman’s seizure of the steel industry was contrary to the will of Congress, and that it could be

---

<sup>265</sup> *Id.* at 649-650 (Jackson, J., concurring).

<sup>266</sup> *Id.* at 654-655 (Jackson, J., concurring) (footnote omitted).

<sup>267</sup> *Id.* at 635 (Jackson, J., concurring) (footnote omitted).

<sup>268</sup> *Id.* at 637 (Jackson, J., concurring).

<sup>269</sup> *Id.* (Jackson, J., concurring).

justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress.<sup>270</sup>

The *Steel Seizure* case governs the dispute over the Terrorist Surveillance Program. In fact, President Bush is on even weaker ground than President Truman was in his assertion of inherent constitutional authority. In *Youngstown*, the Supreme Court inferred that Congress had withheld authority from the President to seize industrial property because Congress had declined to enact a statute which would have conferred this power.<sup>271</sup> In the present case, Congress has enacted a law which not only prohibits wiretapping without a warrant, but which makes this conduct a serious federal crime.<sup>272</sup> Furthermore, in *Youngstown*, President Truman reported his action to Congress and invited it to act.<sup>273</sup> In the present case, President Bush concealed the program of electronic surveillance, and declined to exercise his constitutional authority to propose authorizing legislation.<sup>274</sup> Accordingly, it is even clearer than it was in *Youngstown* that this matter is governed by Justice Jackson's "third grouping," and that the President's power is at its "lowest ebb."<sup>275</sup> Following Jackson's analysis the surveillance program would be constitutional only if this matter were "beyond control by Congress."<sup>276</sup> Just as it had the power to regulate the steel industry, under the Commerce Clause Congress unquestionably has power to regulate the communications industry.<sup>277</sup> Accordingly, it cannot be said that electronic eavesdropping is "beyond control by Congress."<sup>278</sup> Under Justice Jackson's analysis, FISA is constitutional, and the President's warrantless eavesdropping program is illegal.

Another parallel between the *Steel Seizure Case* and the dispute over the Terrorist Surveillance Program is that the President's actions infringe upon fundamental rights. The seizure of the steel industry constituted a possible deprivation of property without due process of law,<sup>279</sup> while the warrantless interception of confidential communications affects the right to privacy protected by the Fourth Amendment.<sup>280</sup> In neither case was the President authorized by Congress to infringe upon protected rights.

---

<sup>270</sup> *Id.* at 640 (Jackson, J., concurring).

<sup>271</sup> See note \_\_\_ *supra* and accompanying text.

<sup>272</sup> See note \_\_\_ *supra* and accompanying text.

<sup>273</sup> See note \_\_\_ *supra* and accompanying text.

<sup>274</sup> See note \_\_\_ *supra* and accompanying text.

<sup>275</sup> See note \_\_\_ *supra* and accompanying text.

<sup>276</sup> See note \_\_\_ *supra* and accompanying text.

<sup>277</sup> See note \_\_\_ *supra* and accompanying text.

<sup>278</sup> See note \_\_\_ *supra* and accompanying text.

<sup>279</sup> See note \_\_\_ *supra* and accompanying text (quoting Justice Jackson's reference to the 5<sup>th</sup> Amendment in *Youngstown*).

<sup>280</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

In support of his extreme version of the theory of the “unitary executive,” President Bush cites language from a decision predating *Youngstown Sheet & Tube* that broadly characterizes the President as “the sole organ of the nation in its external relations.”<sup>281</sup> That case is *United States v. Curtiss-Wright Export Corporation*.<sup>282</sup> However, an examination of the facts in that case, and close attention to the language of the Court’s opinion, unequivocally indicates that the case does not stand for the proposition that the President has the authority to disregard or disobey federal laws when, in his opinion, it is appropriate to do so in defense of the nation.

First of all, the facts in *Curtiss-Wright* did not involve a President acting in *opposition* to a congressional enactment, but rather it was a case where the Congress had specifically *delegated* power to the President. In 1934 Congress adopted a Joint Resolution giving the President the authority to determine whether or not it would contribute to peace to prohibit the sale of weapons to the combatants in a conflict in South America, and if he were to make this determination, then it would become a federal offense to sell or deliver weapons to the region.<sup>283</sup> The issue in *Curtiss-Wright* was not, as in the case of the Terrorist Surveillance Program, whether the President has the authority to override a congressional directive, but rather the issue was whether it violated the Constitution for Congress to delegate power to the President to declare certain conduct to be a crime.<sup>284</sup>

Furthermore, the language in *Curtiss-Wright* referring to the President as “sole organ” of the United States in international relations cannot reasonably be interpreted as conferring upon the President the power to violate federal law relating to wiretaps. It is apparent from the entire passage in *Curtiss-Wright* that the Supreme Court was speaking of the role of the President as our representative to other nations. The entire passage from which the “sole organ” language appears is as follows:

[t]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

---

<sup>281</sup> *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936) (upholding Congressional resolution granting the President the authority to declare gunrunning to certain countries to be a federal crime).

<sup>282</sup> *Id.*

<sup>283</sup> *See id.* at 311-312 (Sutherland, J.) (quoting the Joint Resolution).

<sup>284</sup> *See id.* at 315 (Sutherland, J.) (stating, “appellees urge that Congress abdicated its essential functions and delegated them to the Executive.”).

“The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”<sup>285</sup>

The holding of the Court in the *Curtiss-Wright* case stands for the proposition that Congress may, if it chooses, delegate certain powers to the President in the field of foreign affairs that it could not grant to him domestically, and the *obiter dictum* of the opinion stating that the President is the “sole organ of the nation in its external relations” merely confirms that the President is the chief ambassador of the nation – its voice and its negotiator – with other nations. This case does not grant the President any power to disregard federal law.

In summary, the theory of the “unitary executive” may legitimately call into question decisions of the Supreme Court that allow Congress to interfere with the power of the President to appoint or remove members of the executive branch,<sup>286</sup> but this theory cannot be distorted into a principle that allows the President to violate the law. The very description of the office of the Presidency as the “chief executive” and the nature of the power that is vested in the President – the “executive power” – refute the pretensions of the current President to extralegal power. The “executive power” is the power to *execute* the law. It is not the power to *violate* the law.

#### B. *The Centrality of Eavesdropping to the Functions of the Executive and Legislative Branches*

As noted above, the President makes another argument under the doctrine of Separation of Powers which is more subtle than the theory of the “unitary executive” and which offers an ingenious way around Justice Jackson’s tripartite analysis of Separation of Powers cases.

The President’s argument is very simple. He contends that the activity that is in question in this case – wiretapping in defense of the national security – is central to the powers and duties that the Constitution vests in the office of the Presidency, and that Congress’ regulation of this same activity is peripheral, at best, to the powers and duties that the Constitution vests in Congress. Accordingly, FISA is unconstitutional under the doctrine of Separation of Powers.

---

<sup>285</sup> *Id.* at 319 (Sutherland, J.).

<sup>286</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

In defense of the Terrorist Surveillance Program, Attorney General Gonzales contends that the defense of this nation and the concomitant collection of foreign intelligence is a core executive function, while at the same time he implies that the enactment of FISA is *not* the performance of a core Congressional function.<sup>287</sup> The Attorney General stated,

*Youngstown* involved an assertion of executive power that not only stretched far beyond the President's core Commander in Chief functions, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. As explained above, it is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress.<sup>288</sup>

Essentially, the President and the Attorney General contend that the subject which is under discussion is at the core of Presidential power, while at the periphery of Congressional power.

The central purpose of this article is to address this argument. Part I of this article argues that Congress has the power to enforce the Bill of Rights against the federal government,<sup>289</sup> while Part II contends that Congress exercised this power when it enacted FISA.<sup>290</sup> Like the regulation of business that Congress undertakes pursuant to the Commerce Clause, the protection of rights is a "core function" of the Congress. The enactment of FISA is central to Congress' role as a defender of the Bill of Rights. Congress was constitutionally authorized to adopt FISA not merely by the Commerce Clause, but also by its plenary power to enforce the Bill of Rights against infringement by the federal government. In my opinion this effectively rebuts the Attorney General's argument regarding "centrality," and it lends considerable strength to the proposition that FISA does not violate the Separation of Powers.

Nor does it make any difference, insofar as the power of Congress is concerned, whether or not the Terrorist Surveillance Program violates the Fourth Amendment. In August of 2006, in the case *American Civil Liberties Union v. National Security*

---

<sup>287</sup> See *Gonzales Memorandum*, note 4 *supra*, at 1406-1407 (distinguishing the seizure of the steel mills in *Youngstown* from the warrantless wiretapping by the NSA on the basis of its relation to executive and legislative functions).

<sup>288</sup> *Id.*

<sup>289</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

<sup>290</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

Agency,<sup>291</sup> the Federal District Court for the Eastern District Court of Michigan found that the President’s warrantless eavesdropping program violates the First and Fourth Amendments to the Constitution.<sup>292</sup> I agree with the conclusion of the district court, but even if the decision is wrong – even if the Supreme Court were to find that the Terrorist Surveillance Program does *not*, in and of itself, violate the Fourth Amendment – Congress had the authority to enact FISA because under the Necessary and Proper Clause Congress has discretion to enlarge the protection of the Bill of Rights against encroachment by federal agencies and officers.<sup>293</sup> When Congress enacts laws that are prohibitory upon the States pursuant to its power under Section 5 of the 14<sup>th</sup> Amendment, they must enact laws that are “congruent with” and “proportionate to” the underlying rights that they are protecting, but no such limitation is placed upon Congress when it acts pursuant to its power under the Necessary and Proper Clause.<sup>294</sup> The ruling of the Supreme Court in *O Centro* upholding RFRA as applied to the federal government, discussed above, is proof of this proposition.<sup>295</sup>

Not only is Congress exercising a “core function” when it prohibits warrantless eavesdropping in the United States, but the President’s argument that eavesdropping in the United States is intimately related to his war powers is also open to question. Is domestically-collected intelligence really more closely connected to the war effort than steel production is? The National Security Agency and the Federal Bureau of Investigation are civilian, not military agencies, and these agencies are without any doubt subject to the control of Congress. It is not at all clear that the President is acting as a military leader when he directs the conduct of those agencies. In addition, even if electronic eavesdropping in the United States is considered to be military activity, the President does not have a monopoly on the “war powers.”<sup>296</sup> Congress is entrusted by the Constitution with vast powers over the military as well, including the express power “to make rules for the government and regulation of the land and naval forces.”<sup>297</sup>

---

<sup>291</sup> 438 F. Supp. 734 (2006) (finding the Terrorist Surveillance Program to be unconstitutional).

<sup>292</sup> *See id.* at 773-776 (discussing 1<sup>st</sup> and 4<sup>th</sup> Amendment issues).

<sup>293</sup> *See notes \_\_\_-\_\_ supra* and accompanying text.

<sup>294</sup> *See notes \_\_\_-\_\_ supra* and accompanying text.

<sup>295</sup> *See notes \_\_\_-\_\_ supra* and accompanying text.

<sup>296</sup> *Youngstown*, 343 U.S., at 643-644 (Jackson, J., concurring). Justice Jackson stated:

There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. He has no monopoly of ‘war powers,’ whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the “Government and Regulation of land and naval forces,” by which it may to some unknown extent impinge upon even command functions.

*Id.* at 643-644 (Jackson, J., concurring).

<sup>297</sup> U.S. CONST., art. I, sec. 8, cl. 15. *See also Youngstown*, 343 U.S., 643 (Jackson, J., concurring).

Justice Jackson stated:

Assuming that we are in a war de facto, whether it is or is not a war de jure, does that empower the Commander-in-Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power “to raise and support Armies” and “to provide and maintain a Navy.” This certainly lays upon Congress primary responsibility for supplying the armed forces.

*Id.* at 643 (Jackson, J., concurring).

In summary, Congress adopted FISA to protect the privacy of Americans and lawfully resident aliens in the United States. This is a core function of Congress. Electronic surveillance in the United States is no more central to the powers of the President than it is to the powers of Congress.

*C. Justice Anthony Kennedy's Theory that the Purpose of the Doctrine of Separation of Powers Is to Protect Liberty*

Justice Anthony Kennedy has suggested that the ultimate purpose of the doctrine of Separation of Powers is to preserve and enhance individual liberty. He advanced and defended this idea in his concurring opinion in *Clinton v. New York*,<sup>298</sup> where the Court struck down the federal Line Item Veto Act on the ground that it violated the doctrine of Separation of Powers.<sup>299</sup>

The majority in *Clinton* ruled that the Line Item Veto Act violated the Constitution because it granted the President a role in making of laws that the text of the Constitution did not allow and that the framers would not have permitted.<sup>300</sup> Justice Breyer dissented and would have upheld the Line Item Veto Act because its provisions did not “violate the liberties of individual citizens.”<sup>301</sup> Justice Kennedy wrote separately, he said, “to respond to my colleague Justice Breyer, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree.”<sup>302</sup> Justice Kennedy stated that dispute over the constitutionality of the Line Item Veto Act was not simply a question regarding the division of power between the Executive and Legislation branches, but rather that “liberty is ... at risk.”<sup>303</sup> He said,

Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

---

<sup>298</sup> 525 U.S. 417 (1998) (striking down the Line Item Veto Act as unconstitutional under the doctrine of Separation of Powers).

<sup>299</sup> *See id.* at 448 (Stevens, J.) (stating, “our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution.”).

<sup>300</sup> *See id.* at 447 (Stevens, J.). Justice Stevens stated:

the only issue we address concerns the “finely wrought” procedure commanded by the Constitution. ... Thus, because we conclude that the Act’s cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court’s alternative holding that the Act “impermissibly disrupts the balance of powers among the three branches of government.”

*Id.* at 447 (Stevens, J.) (citation omitted).

<sup>301</sup> *Id.* at 496-497 (Breyer, J., dissenting).

<sup>302</sup> *Id.* at 449 (Kennedy, J., concurring).

<sup>303</sup> *Id.* at 449-450 (Kennedy, J., concurring). Justice Kennedy stated:

To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.” *The Federalist No. 47*. So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. *The Federalist No. 84*. It was at Madison's insistence that the First Congress enacted the Bill of Rights. It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance. See Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1132 (1991).<sup>304</sup>

For Justice Kennedy, the reason that the Line Item Veto Act was unconstitutional was because it placed too much power in the hands of the President. He stated:

By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.<sup>305</sup>

How much more is liberty at stake in the conflict over the legality of the Terrorist Surveillance Program? Unlike *Clinton v. New York*, we deal not with Congressional authorization of action by the Executive Branch, but rather with Congressional prohibition of action by the Executive Branch. Even more importantly, unlike *Clinton v. New York*, we deal not with the public enactment or annulment of appropriations of public funds, but rather with the secret invasion of privacy of every citizen or lawful resident of the United States.

For Justice Robert Jackson, the essential meaning of the doctrine of Separation of Powers is that our government must submit to the Rule of Law.<sup>306</sup> For Justice Anthony Kennedy, the central purpose of the doctrine of Separation of Powers is to promote individual liberty.<sup>307</sup> In this case, both principles are served by declaring FISA to be constitutional.

## CONCLUSION

The principal point of this article is that Congress has plenary authority to enforce the Bill of Rights against the federal government. Although this precept is a fundamental one, neither the Supreme Court nor legal scholars have articulated this point in clear,

---

*Id.* at 449-450 (Kennedy, J., concurring).

<sup>304</sup> *Id.* at 450 (Kennedy, J., concurring).

<sup>305</sup> *Id.* at 452 (Kennedy, J., concurring).

<sup>306</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

<sup>307</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

simple, and direct terms. Accordingly, I thought it necessary and appropriate to do so. The Supreme Court does not have a monopoly on the Bill of Rights. Congress, too, has constitutional authority to interpret our rights, and to enforce or enlarge them as against the actions of the federal government.

I have written this article because I believe that our nation is fast approaching a constitutional crisis – yet another crisis over the responsibility of the President to obey the law. And this crisis differs from those under previous administrations in that the lawbreaking that has occurred is not simply that of a few individuals acting out of selfish or political motives, but rather involves thousands or tens of thousands of loyal Americans who believed that they were carrying out the lawful orders of the elected leader of their country. Officials and employees of the National Security Agency as well as other agencies have engaged in official acts of lawbreaking, encouraged by a Department of Justice that has issued memoranda arguing that what was clearly *unlawful* was instead lawful and justified.<sup>308</sup>

In the case of the matter addressed by this article, Americans were unlawfully spied upon by members of the National Security Agency. The criminal and civil liability of the people who ordered, approved, and carried out this illegal program of electronic eavesdropping has yet to be determined, but it is potentially devastating, both to the individuals involved and to the national interest. The same is true of other persons and other agencies who have may have kidnapped, detained, and tortured persons in violation of American statutes and treaty obligations.<sup>309</sup>

Lincoln warned, in his first significant public address, that the danger to America comes not from without – we can never be successfully invaded or conquered by a foreign army – but from within, and he identified the danger as disobedience to the Rule of Law.<sup>310</sup> Thurgood Marshall, in his oral argument to the Supreme Court in *Cooper v. Aaron*, the Little Rock desegregation case, made the same point, telling the Court that he was not worried about the black children in Little Rock, but rather it was the white children he was concerned for, “who are told as young people that the way to get your rights is to violate the law.”<sup>311</sup> He said that he did not know “of any more horrible destruction of the principle of citizenship” than this.<sup>312</sup> In Lincoln’s time, as well as

---

<sup>308</sup> See note \_\_ *supra* and accompanying text.

<sup>309</sup> See, e.g., Tracy Wilkinson and Maria de Cristofaro, *Italy Indicts CIA Agents in Kidnapping*, February 17, 2007 Los Angeles Times 1; Mark Landler, *CIA Agents’ Arrest Sought by Germany: Warrant Issued in Citizen’s Abduction Is Challenge to U.S. Rendition Program*, February 1, 2007, International Herald Tribune 1; 18 U.S.C. 2441 (prohibiting war crimes); 18 U.S.C. 2340A (prohibiting torture); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, effective Nov. 20, 1994, Treaty Doc. 100-20.

<sup>310</sup> See generally, *Speech to the Young Men’s Lyceum*, 1 COLLECTED WORKS 109, <http://www.hti.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;type=simple;rgn=div1;q1=drink;view=text;subview=detail;sort=occur;idno=lincoln1;node=lincoln1%3A130>.

<sup>311</sup> PETER IRONS, MAY IT PLEASE THE COURT: TRANSCRIPTS OF 23 LIVE RECORDINGS OF LANDMARK CASES AS ARGUED BEFORE THE SUPREME COURT 254 (1953) (quoting Attorney Thurgood Marshall in the case of *Cooper v. Aaron*, 358 U.S. 1 (1958)).

<sup>312</sup> *Id.*

Marshall's, it was "mob rule" that threatened our continued existence as a nation. Today it is official lawbreaking.

The framers cloaked the President with "the executive power," and the President is called the "Chief Executive" of our nation for a reason. That which the President "executes" is the *law*. The Constitution does not give the President the power to *violate* the law. Instead, the Constitution imposes upon the President the solemn duty to *uphold* the law, to "*faithfully execute the law.*"

International terrorism is a significant threat to *individuals* who may fall victim to these senseless acts of violence, but America, as a *nation*, faces little danger from these fanatics. Compared to us, with our military and industrial strength, our economic productivity, our intellectual and technological output, our legal and political institutions, and our cultural influence, the terrorist organizations are insignificant. While certainly dangerous and deadly, they pose no serious threat to our continued existence as a free and independent nation.

But I fear for our nation if it becomes accepted doctrine that officials of the American government are free to violate the law – that persons can be spied upon, or detained, or tortured, and that Congress and the courts can do nothing about it.<sup>313</sup>

The surest protection for our nation is a Congress that is willing to exercise its power to enforce the Bill of Rights – to write law that binds the executive branch and that is enforceable in the courts.

By enacting FISA Congress exercised its constitutional authority to preserve and protect the liberty of every American. The doctrine of Separation of Powers must not be employed to allow the Executive Branch to invade that liberty and to invalidate legislation that is intended to enforce the Bill of Rights. Instead, the doctrine of Separation of Powers stands for the principle that the President must obey the law even during time of war. FISA is constitutional, and the Terrorist Surveillance Program is illegal.

---

<sup>313</sup> See Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 Ind. L.J. 1145, 1167 (2006) (stating, "even in the gravest national circumstances, the Constitution does not preauthorize the President, his subordinates, or anyone else, to torture someone in U.S. custody using either a rationale of self-defense or a defense of necessity. In short, as lawyers and citizens, we should resist the claim that a War on Terror permits the commander in chief's power to be expanded into a wanton power to act as torturer in chief.").