



Statement by Louis Fisher
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appearing before the
House Committee on the Judiciary

“Constitutional Limitations on Domestic Surveillance”

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Mr. Chairman, thank you for inviting me to testify on the constitutional limitations that apply to domestic surveillance. The committee provides an important public service in exploring the issues raised by the “Terrorist Surveillance Program” (TSP), authorized by the administration after 9/11 and conducted by the National Security Agency (NSA). I begin by summarizing what happened in the 1960s and 1970s with domestic surveillance. Two basic points. First: intelligence agencies were willing to violate the Constitution, including the First and Fourth Amendments. Second: federal courts rejected the theory that the President has “inherent” constitutional authority to engage in warrantless domestic surveillance.

I. Lessons of Domestic Surveillance

Illegal eavesdropping by the executive branch surfaced as a prominent issue in the 1960s and 1970s, after it was publicly disclosed that U.S. intelligence agencies had been monitoring the domestic activities of Americans. In 1967, when the U.S. Army wanted the NSA to eavesdrop on American citizens and domestic groups, the agency agreed to carry out the assignment.¹ NSA began to put together a list of names of opponents of the Vietnam War. Adding names to a domestic “watch list” led to the creation of MINARET: a tracking system that allowed the agency to follow individuals and organizations involved in the antiwar movement.² NSA thus began using its surveillance powers to violate the First and Fourth Amendments. From mid-1969 to early 1970, the White House directed the FBI to install without warrants 17 wiretaps to eavesdrop on government officials and reporters.³ Newspaper stories in 1974 revealed that CIA had been extensively involved in illegal domestic surveillance, infiltrating dissident groups in the country and collecting close to 10,000 files on American citizens. CIA Director William Colby later acknowledged the existence of this program while testifying before a Senate committee.⁴

The Huston Plan

On June 5, 1970, President Richard M. Nixon met with the heads of several intelligence agencies, including the NSA, to initiate a program designed to monitor what the administration considered to be radical individuals and groups in the United States. Joining others at the meeting was Tom Charles Huston, a young aide working in the White House. He drafted a 43-page, top secret memorandum that became known as the Huston Plan. Huston put the matter bluntly to President Nixon: “Use of this technique is clearly illegal; it amounts to burglary.”⁵ His plan, which Nixon approved, directed the

¹ James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency* 428 (2002 ed.).

² *Id.* at 428-29; James Bamford, *The Puzzle Palace* 323-24 (1983 ed.).

³ Richard E. Morgan, *Domestic Intelligence: Monitoring Dissent in America* 6 (1980).

⁴ Kathryn S. Olmsted, *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI* 11-12, 35 (1996).

⁵ Keith W. Olson, *Watergate: The Presidential Scandal That Shook America* 16 (2003); Fred Emery, *Watergate* 25 (1995 ed.); Loch K. Johnson, *America’s Secret Power: The CIA in a Democratic Society* 133-56 (1989).

NSA to use its technological capacity to intercept – without judicial warrant – the domestic communication of U.S. citizens using international phone calls or telegrams.⁶

Under pressure from FBI Director J. Edgar Hoover and Attorney General John Mitchell, Nixon withdrew the Huston Plan.⁷ Placed in a White House safe, Huston's blueprint became public in 1973 after Congress investigated the Watergate affair and uncovered documentary evidence that Nixon had ordered the NSA to illegally monitor American citizens.⁸ To conduct its surveillance operations under such programs as SHAMROCK (in operation from August 1945 to May 1975), NSA entered into agreements with U.S. companies, including Western Union and RCA Global. U.S. citizens, expecting that their telegrams would be handled with the utmost privacy, learned that American companies had been turning over the telegrams to the NSA.⁹

Judicial Reaction

A 1972 decision by the Supreme Court involved the government's use of warrantless electronic surveillance to prevent what the government feared was an attempt by domestic organizations to attack and subvert the existing structure of government. As the Court framed the issue, it needed to balance both to "the Government's right to protect itself from unlawful subversion and attack" and "the citizen's right to be secure in his privacy against unreasonable Government intrusion."¹⁰

In district court, defendants prosecuted by the government requested all records of warrantless surveillance directed at them and asked for a hearing to determine whether any of the evidence used to indict them was tainted by illegal actions. The district court held that the warrantless electronic surveillance was not justified on the ground that certain domestic organizations were engaged in subverting the government, and that the government had to make full disclosure to the defendants of illegally monitored conversations. It ordered an evidentiary hearing to determine taint.¹¹ The court did not accept the government's argument that the Attorney General, "as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security."¹² The court expressly rejected the claim of "inherent" presidential power.¹³ The President was "still subject to the constitutional limitations imposed upon him by the Fourth Amendment."¹⁴

⁶ Bamford, *Body of Secrets*, at 430.

⁷ Emery, *Watergate*, at 26-27.

⁸ Bamford, *Body of Secrets*, at 431-32.

⁹ *Id.* at 438-39; Morgan, *Domestic Intelligence*, at 75-76. For further details on domestic surveillance during the 1960s and 1970s, see recent testimony by Frederick A. O. Schwarz, Jr., "Ensuring Executive Branch Accountability," before the Subcommittee on Commercial and Administration Law of the House Committee on the Judiciary, March 29, 2007, at 4, 10-11.

¹⁰ *United States v. United States District Court*, 407 U.S. 297, 299 (1972).

¹¹ *United States v. Sinclair*, 321 F.Supp. 1074 (E.D. Mich. 1971).

¹² *Id.* at 1076.

¹³ *Id.* at 1077.

¹⁴ *Id.* at 1078 (citing District Judge Ferguson in *United States v. Smith*, 321 F.Supp. 424, 425 (C.D. Cal. 1971)).

The district court's decision was affirmed by the Sixth Circuit, which examined the government's claim that the power at issue in the case "is the inherent power of the President to safeguard the security of the nation."¹⁵ The Sixth Circuit found that argument unpersuasive, in part because the Fourth Amendment "was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III."¹⁶ The Constitution was adopted "to provide a check upon 'sovereign' power," relying on three coordinate branches of government "to require sharing in the administration of that awesome power."¹⁷ The Sixth Circuit further noted: "It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign."¹⁸

A unanimous ruling by the Supreme Court affirmed the Sixth Circuit. Inherent in the concept of a warrant issued under the Fourth Amendment "is its issuance by a 'neutral and detached magistrate.'"¹⁹ Fourth Amendment freedoms "cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."²⁰ Executive officers charged with investigative and prosecutorial duties "should not be sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."²¹

The government advised the Court that the domestic surveillances at issue in this case were directed primarily at collecting and maintaining intelligence about subversive forces, rather than an effort to gather evidence for criminal prosecution. Moreover, the government insisted that courts lacked the knowledge and expertise to determine whether domestic surveillance was needed to protect national security.²² To the Court, those arguments did not justify departure from Fourth Amendment standards.²³

Finally, the Court held that Section 2511(3), enacted as part of the Omnibus Crime Control Act of 1968, merely disclaimed congressional intent to define presidential powers in matters affecting national security and did not grant authority to conduct warrantless national security surveillance.²⁴ The Fourth Amendment required prior judicial approval for the type of domestic security surveillance involved in this case. The Court carefully avoided the question of surveillance over foreign powers, whether within or outside the country.²⁵

¹⁵ *United States v. United States Dist. Ct. for E. D. of Mich.*, 444 F.2d 651, 658 (6th Cir. 1971).

¹⁶ *Id.* at 665.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *United States v. United States District Court*, 407 U.S. at 316.

²⁰ *Id.* at 316-17.

²¹ *Id.* at 317.

²² *Id.* at 318-19.

²³ *Id.* at 320.

²⁴ *Id.* at 302-08.

²⁵ *Id.* at 302-08.

Congressional Action

The Court's decision in 1972 put pressure on Congress to develop statutory guidelines. In part, Congress responded by setting up the Church and Pike Committees to study the scope of executive branch illegality and propose a system of effective legislative and judicial checks. From those hearings and reports came the creation of new intelligence committees in the House and the Senate to closely monitor the agencies, followed by the landmark Foreign Intelligence Surveillance Act (FISA) of 1978. In congressional hearings, Attorney General Edward H. Levi testified in support of legislation that would require "independent review at a critical point by a detached and neutral magistrate."²⁶ FISA established a special court, the Foreign Intelligence Surveillance Court (FISC), to assure a judicial check on executive activities and established a Court of Review to hear appeals by the government from FISC denials of applications to engage in electronic surveillance. Moreover, it clearly stated that the procedures of FISA for electronic surveillance within the United States for foreign intelligence purposes "shall be the exclusive means" of conducting such surveillance.

At today's hearing we face issues that were studied extensively and carefully in the 1970s and supposedly remedied by legislation. Once again Congress is in the position of insisting that federal agencies adhere to the rule of law, respect constitutional and statutory limits, and protect fundamental rights of individual privacy and civil liberties.

The balance of my statement focuses on three points: (1) the legal justifications offered by the administration for the TSP; (2) the lack of access by the Judiciary Committees to briefings on the TSP conducted by the executive branch and to records and documents withheld from them; and (3) observations about the implications of the TSP for congressional control, the rule of law, and individual rights and liberties.

II. The Administration's Legal Defense

On January 19, 2006, the Office of Legal Counsel (OLC) in the Justice Department released a 42-page white paper justifying the legality of the TSP.²⁷ It offered two principal arguments, one statutory, the other constitutional. The first interpreted the Authorization for Use of Military Force (AUMF), enacted after 9/11. The second explored the President's authorities under Article II of the Constitution, with special emphasis on the availability of "inherent" powers.

²⁶ "Electronic Surveillance Within the United States for Foreign Intelligence Purposes," hearings before the Subcommittee on Intelligence and the Rights of Americans of the Senate Committee on Intelligence, 94th Cong., 2d Sess. 76 (1976).

²⁷ "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," Office of Legal Counsel, U.S. Department of Justice, January 19, 2006 (hereafter "OLC Study").

The AUMF

OLC argued that in passing the AUMF “Congress by statute has confirmed and supplemented the President’s recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland.”²⁸ The statute authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks” of September 11 in order to prevent “any future acts of international terrorism against the United States.”²⁹ To OLC, history “conclusively demonstrates that warrantless communications targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF.”³⁰

“All necessary and appropriate force” does not mean whatever the President decides to do, particularly when a selected instrument of force conflicts with statutory law. In FISA, Congress established a set of procedures to be “exclusive” for domestic surveillance. If Congress after 9/11 wanted to modify those procedures and permit the President to engage in national security surveillance without a judicial check, it knows how to amend a statute. Either it brings up the bill in whole to debate changes, with all Members of Congress aware of what they are doing, or adopts a free-standing amendment with FISA clearly and specifically in mind, such as debating language that states: “notwithstanding the provision in Title II, Section 201(b), Subsection (f), of the Foreign Intelligence Surveillance Act, the President is hereafter authorized to engage in the following warrantless surveillance.” In floor debate, lawmakers must expressly know that the bill language under consideration covers warrantless surveillance and that the judicial check in FISA is to be waived.

Amendments to statutory law must be explicit and evident, with clear understanding by all lawmakers as to what is at stake. Amendments are not made by implication, with Members unaware of what they are voting on. There is no basis for finding in the debate of the AUMF that Members of Congress understood that they were setting FISA to the side to allow the President warrantless surveillance over domestic matters. It is quite true, as OLC said, that FISA “also contemplates that Congress may authorize such surveillance by a statute other than FISA.”³¹ Congress is always at liberty to adopt a future statute that modifies an earlier statute. But when it acts it does so expressly and consciously, in full light of the changes made and their significance, not by vague implications. OLC would have Congress legislate in the dark. It is my impression that the administration no longer seriously argues that the AUMF is legal justification for

²⁸ Id. at 2.

²⁹ 115 Stat. 224 (2001).

³⁰ OLC Study at 2.

³¹ Id. For further analysis of the AUMF regarding the TSP, see “Statement of the Constitution Project’s Liberty and Security Initiative” (The Constitution Project, Jan. 5, 2006).

the TSP, and that it relies essentially on some form of “inherent” powers under Article II (or perhaps even outside the Constitution).

Inherent Powers

OLC argued that NSA’s activities under what became known as the TSP “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.”³² Let me unpack each of these key words: well-recognized, inherent, Commander in Chief, and “sole organ.”

1. Well-recognized? Federal courts have made many observations about the President’s powers in foreign affairs and his duty to gather intelligence for national security. Language appears at times in the decisions; just as frequently remarks are made in dicta that is extraneous to the issue before the court. Some rulings encourage a broad reading of presidential power; others are much more restrictive. The record is quite mixed and does not reflect the existence of any settled, “well-recognized” position in the federal judiciary.

The same indefinite position applies to Members of Congress. Some are persuaded of independent and inherent presidential power in foreign affairs; others flatly reject legal doctrines that assert such a sweep of executive authority. There is no “well-recognized” view in Congress regarding the claim that OLC makes. In FISA, in fact, Congress expressly left no room for inherent and independent power by the President to conduct warrantless surveillance.

Similarly, the academic community has never developed a “well-recognized” position on the President’s inherent constitutional authority as Commander in Chief to conduct warrantless surveillance. Existing studies demonstrate a wide variety of opinions and judgments.³³

2. Inherent? Any claim of “inherent” power for the President must be approached with extreme caution and wariness. First, it is only a claim or an assertion, not fact. Second, it has a self-serving motivation, for it comes from the branch claiming the authority. Third, the word has an indefinite and undefinable quality that leaves the door open to illegal, unconstitutional, and extra-constitutional powers. Fourth, there should be heightened concern because the claim of “inherent” authority has been used in recent years to justify military commissions, torture memos, indefinite detention of U.S. citizens designated as “enemy combatants,” extraordinary rendition, and the TSP. To

³² OLC Study at 1.

³³ E.g., see the March 2007 Special Issue of *Presidential Studies Quarterly*, which is devoted to inherent presidential power (37 Pres. Stud. Q. 1 (2007)); *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (The Constitution Project, 2005); David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (1996); and Gary M. Stern and Morton Halperin, eds., *The U.S. Constitution and the Power to Go to War* (1994).

appreciate the dangers of “inherent” power, compare three words we use to determine the source of constitution power: *express*, *implied*, and *inherent*.

The first two words preserve and protect constitutional government. Express powers are there in black and white. They can be seen in print and analyzed, usually accompanied by extensive meaning from history and framers’ intent. Implied also has a definite quality, because an implied power must be reasonably drawn from an existing express power. For example, the President has an express power to see that the laws are faithfully executed. If a Cabinet official prevents the discharge of a law, the President has an implied power to remove the individual pursuant to his constitutional duty to assure compliance with the law. From the express power to legislate, Congress has an implied power to investigate, issue subpoenas, and hold executive officials in contempt. Express and implied powers are consistent with a constitutional system of limited government.

The same cannot be said of “inherent.” The word is defined in some dictionaries as an “authority possessed without its being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers.”³⁴ If not in the Constitution, either by express or implied powers, what is the source of authority? In other definitions, “inherent” may be a power that “inheres” in an office or position, or something that is “intrinsic” or “belonging by nature.”³⁵ Those concepts are highly ambiguous. The purpose of a constitution is to specify and confine government powers to protect rights and liberties reserved to individuals. That objective is undermined by claims of open-ended authorities (such as “inherent”) that are not easily defined or circumscribed. Vague words invite political abuse and endanger individual liberties. In the context of this hearing, claims of “inherent” presidential power directly threaten the prerogatives of Congress. Anything that weakens congressional power weakens democracy and popular sovereignty. The claim of inherent presidential power moves the nation from one of limited powers to boundless and ill-defined executive authority. Such assertions do substantial damage to the doctrine of separation of powers and the crucial system of checks and balances.

3. Commander in Chief? It is analytically meaningless to merely cite three words from Article II as though the case for presidential power is self-evident and needs no further argument. One has to explain what those words mean. Closer scrutiny eliminates any notion of plenary power for the President as Commander in Chief. First, the President is Commander in Chief “of the Militia of the several States, when called into the actual Service of the United States.” As is clear from Article I, Congress does the calling. Second, the President is Commander in Chief of the Army and Navy of the United States,” but as Article I again demonstrates, Congress has ample authorities to raise and support armies and navies, to make rules for the regulation of the land and naval forces, and to provide for organizing, arming, and disciplining the militia. The

³⁴ Louis Fisher, “Invoking Inherent Powers: A Primer,” 37 Pres. Stud. Q. 1, 2 (2007).

³⁵ Id.

appropriations power of Congress is broadly available to direct and limit military operations.³⁶

Third, the Constitution does not empower the President as Commander in Chief to initiate and continue wars. Those powers existed for English kings and in the writings of William Blackstone, but the framers deliberately rejected that form of government.³⁷ Fourth, the President is Commander in Chief for unity of command, but the President's authority to bring unity of purpose in military command does not deprive Congress of its own independent constitutional duty to monitor war and decide whether to restrict or terminate military operations. Fifth, the President is Commander in Chief to preserve civilian supremacy over the military. As explained by Attorney General Edward Bates in 1861, whatever soldier leads U.S. armies "he is subject to the orders of the *civil magistrate*, and he and his army are always 'subordinate to the civil power.'"³⁸ Congress is an essential part of that civil power. Just as military officers are subject to the direction and command of the President, so is the President subject to the direction and command of Members of Congress as representatives of the sovereign people.

4. "Sole Organ"? In the history of American constitutional doctrines, there is probably nothing as shallow, empty, and misleading as the OLC claim that the President as "sole organ" in foreign affairs is granted some type of exclusive, plenary power. The phrase comes from a speech by Cong. John Marshall in 1800, when he said that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."³⁹ In his decades of distinguished federal service, as Secretary of State, Member of the House, and Chief Justice of the Supreme Court, Marshall at no time advocated an independent, inherent, or exclusive power of the President over external affairs. The purpose of his speech in 1800 was merely to state that President John Adams had a constitutional duty under the Take Care Clause to see that an extradition treaty with Britain was faithfully carried out. That was all. The context of his speech makes it clear that he was speaking of presidential power to execute *the policy of Congress*, whether expressed in statute or treaty. Marshall never implied any authority of the President to act independent of statutes or treaties, much less in opposition to them. For example, Chief Justice Marshall ruled in 1804 that when a presidential proclamation in time of war conflicts with a statute passed by Congress, the statute prevails.⁴⁰

What OLC does is to take Marshall's speech not as it was given, and not as it was meant, but as it was misinterpreted and distorted by Justice Sutherland in *United States v. Curtiss-Wright* (1936).⁴¹ How did Sutherland misuse the speech? First, the case *had nothing to do with presidential power*. It had to do with the *power of Congress* to delegate certain discretionary authority in the field of international affairs. In exercising

³⁶ Charles Tiefer, "Can Appropriations Riders Speed Our Exit from Iraq?," 42 *Stan. J. Int'l L.* 291 (2006).

³⁷ Louis Fisher, testimony before the Senate Committee on the Judiciary, hearings on "Exercising Congress's Constitutional Power to End a War," January 30, 2007, at 1-4.

³⁸ 10 *Op. Att'y Gen.* 74,789 (1861) (emphasis in original).

³⁹ 10 *Annals of Cong.* 613 (1800).

⁴⁰ *Little v. Barreme*, 2 Cr. (6 U.S.) 170, 179 (1804).

⁴¹ OLC Study at 1, 6-7, 14, 30

authority given to him in 1934 to impose an arms embargo in South America, President Franklin D. Roosevelt relied solely on statutory – not inherent – authority.⁴² Second, Sutherland’s misuse of Marshall’s speech appears in dicta, not in the decision. Third, the dicta is bad dicta, as has been pointed out repeatedly in scholarly studies. Sutherland promoted misconceptions not only about Marshall’s speech but also about the concept of sovereignty, inherent presidential power, extra-constitutional powers, the distinction between internal and external affairs, and the competing powers of Congress.⁴³ To the extent that *Curtiss-Wright* suggests that foreign affairs are outside the Constitution and not subject to congressional control, the Supreme Court has not followed it.

III. Briefings and Consultation

After 9/11 and the initiation of the TSP, the administration gave regular briefings about the surveillance program to the “Gang of Eight” and to the chief judge of the FISA court. The Gang of Eight includes the leadership of each house and the chair and ranking member of each Intelligence Committee. Lawmakers who were briefed were directed by executive officials not to take notes or share what they heard with colleagues or with their staff. Not being part of the Gang of Eight, the Judiciary Committee chairmen and ranking members were not briefed as part of this process. Several issues emerge.

First, it is constructive for the executive branch to brief and consult Members of Congress *provided that the program is legal, constitutional, and in harmony with statutory law*. Briefing Members about an illegal program does not make it legal. It would be as though executive officials briefed the chair and ranking member of the two Appropriations Committees that funds had been withdrawn from the Treasury without an appropriation. With or without the briefing, the action would be unconstitutional.

Second, was the Gang of Eight the proper procedure to follow? My understanding of the Gang of Eight is that it was established as a means of informing the congressional leadership and the top levels of the Intelligence Committees about a pending *covert action* (50 U.S.C. Section 413b(c)(2)), which is an activity “to influence political, economic, or military conditions abroad” (50 U.S.C. Section 413b(e)). In my judgment, the Gang of Eight was not the right procedure to brief members about the TSP, which has nothing to do with destabilizing or altering a foreign country.

Third, what duty falls on a member of the Gang of Eight in being briefed about a program that waives FISA and dispenses with independent judicial checks? Are they bound by some vow of secrecy insisted on by the executive officials doing the briefing? No. Members of Congress who receive confidential briefings from executive officials belong to a separate branch with separate institutional responsibilities, including the duty to assure that the executive branch complies with the law. After being briefed, lawmakers may reach out to colleagues, top staff, and to the leadership of the Judiciary

⁴² 48 Stat. 1745 (1934).

⁴³ Louis Fisher, “Presidential Inherent Power: The ‘Sole Organ’ Doctrine,” 37 Pres. Stud. Q. 139 (2007). For more detailed analysis, see Louis Fisher, “The ‘Sole Organ’ Doctrine,” The Law Library of Congress, August 2006.

Committees to receive their legal and constitutional analysis. Members of Congress take an oath to the Constitution, not to the President. They have a special obligation to protect the powers of their institution.

Fourth, what duty falls on a chief judge of the FISA Court after being briefed about a program that waives FISA and dispenses with independent judicial checks? The primary duty of the chief judge is not to remain silent but to inform the other ten judges on the Court. They must then decide what to do, because it is their duty to see that the law is obeyed, including the judicial check that Congress placed in FISA.

Fifth, the Judiciary Committees (at least the chairmen and ranking members) needed to be informed about the TSP because of their jurisdiction over FISA. Generally speaking, the Intelligence Committees will focus more on policy and programmatic issues, while the Judiciary Committees will place greater emphasis on legal and constitutional issues and the integrity of FISA.

IV. What Does “Legal” Mean Today?

NSA’s surveillance program raises elementary questions about the constitutional duty of Congress to make law. In the *Steel Seizure Case* of 1952, Justice Robert Jackson eloquently summarized our constitutional principles: “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.”⁴⁴ Simple words but so profound. The Executive is under the law, not above it. The law is made by Congress.

The TSP represents a direct challenge to our system and form of government. Under the guise of “inherent” power, the executive branch claims the right to ignore statutory law in order to give preference to executive-made law, all done in secret. Other countries have adopted this approach, at great cost to democratic institutions and individual rights.

Independent Executive Law?

On December 17, 2005, after the *New York Times* published the story about the NSA eavesdropping program, President Bush in a radio address acknowledged that he had authorized the agency to conduct the surveillance, “consistent with U.S. law and the Constitution.”⁴⁵ In subsequent statements, as President Bush continued to refer to “U.S. law” or “authority,” it appeared that he meant law created solely within the executive branch, even if contrary to a law passed by Congress. He underscored his independent Article II constitutional powers: “The authorization I gave the National Security Agency after Sept. 11 helped address that problem [of combating terrorism] in a way that is fully consistent with my constitutional responsibilities and authorities.”⁴⁶ He said he had

⁴⁴ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 655 (1952).

⁴⁵ “Bush on the Patriot Act and Eavesdropping,” *New York Times*, Dec. 18, 2005, at 30.

⁴⁶ *Id.*

“reauthorized this program more than 30 times since the Sept. 11 attacks.”⁴⁷ Similarly, on December 19 Attorney General Alberto Gonzales stated that “the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.”⁴⁸

Michael V. Hayden appeared before the Senate Intelligence Committee on May 18, 2006, to testify on his nomination to be CIA Director. Previously he had served as NSA Director at the time the TSP was initiated. At the hearing, he defended the legality of the program on constitutional, not statutory, grounds. In recalling his service at NSA after 9/11, he told the committee that when he talked to NSA lawyers “they were very comfortable with the Article II arguments and the president’s inherent authorities.”⁴⁹ When they came to him and discussed the lawfulness of the program, “our discussion anchored itself on Article II.”⁵⁰ The attorneys “came back with a real comfort level that this was within the president’s authority [under Article II].”⁵¹

This legal advice was not put in writing and Hayden “did not ask for it.” Instead, “they talked to me about Article II.”⁵² What could the talk have been about? The President as Commander in Chief? What other words in Article II would have clarified the legal analysis and produced a comfort level? Apparently the NSA General Counsel was not asked to prepare a legal memo defending the TSP. No paper trail. No accountability. Just informal talks. We all know that hallway discussions about legal and constitutional issues are not likely to look as persuasive or as sound when put on paper and submitted to peers for their independent assessment.

During the hearing, Hayden repeatedly claimed that the NSA program was legal and that in taking charge of the CIA the agency “will obey the laws of the United States and will respond to our treaty obligations.”⁵³ Given what he said throughout the hearing, what did he mean by “law”? A policy drawn solely from within the executive branch, depending on someone’s interpretation of Article II? That appears to be what he meant. After 9/11, while at NSA, he said he “had two lawful programs in front of me, one authorized by the president [the TSP], the other one would have been conducted under FISA as currently crafted and implemented.”⁵⁴ In other words, he had two choices: one authorized by the President, the second authorized by Congress. He selected the former. He told one Senator: “I did not believe – still don’t believe – that I was acting unlawfully.

⁴⁷ David E. Sanger, “In Address, Bush Says He Ordered Domestic Spying,” *New York Times*, Dec. 18, 2005, at 30.

⁴⁸ Press briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, at 2. Available from <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>

⁴⁹ Hearing of the Senate Select Committee on Intelligence on the Nomination of General Michael V. Hayden to be Director of the Central Intelligence Agency, May 18, 2006, transcript, at 35.

⁵⁰ *Id.*

⁵¹ *Id.* at 69.

⁵² *Id.*

⁵³ *Id.* at 74.

⁵⁴ *Id.* at 88.

I was acting under a lawful authorization.”⁵⁵ He meant a presidential directive issued under Article II, even if in violation of the exclusive policy set forth in FISA.

Hearing him insist that he was acting legally in implementing the NSA program, a Senator said: “I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war.” Hayden replied: “Yes, sir, commander in chief powers.”⁵⁶ Hayden seemed to clearly imply that he was willing to overstep statutory law in order to carry out presidential law. After 9/11, CIA Director George Tenet asked whether NSA could “do more” to combat terrorism with surveillance. Hayden answered: “not within current law.”⁵⁷ In short, it appears that the administration knowingly and consciously decided to act against statutory policy. It knew that the NSA eavesdropping program it decided to conduct was illegal under FISA but decided to go ahead, banking on Article II powers.

At one point in the hearings, Hayden referred to the legal and political embarrassments of NSA during the Nixon administration, when it conducted warrantless eavesdropping against domestic groups. In discussing what should be done after 9/11, he told one group: “Look, I’ve got a workforce out there that remembers the mid-1970s.” He asked the Senate committee to forgive him for using “a poor sports metaphor,” but he advised the group in this manner: “since about 1975, this agency’s had a permanent one-ball, two-strike count against it, and we don’t take many close pitches.”⁵⁸ TSP was a close pitch. If Congress learns more about the program, we may learn if NSA hit or missed.

Continued Reliance on Article II

In January 2007, after several setbacks in the federal district courts on the TSP, the administration announced it would no longer skirt the FISA Court but would instead seek approval from it, as required by statute. Exactly what “orders” the FISA Court issued is unclear, because they have not yet been released to Congress. The announcement seemed to promise compliance with FISA, but there is insufficient information to know what the new policy is or how permanent it is.

Was the administration now relying solely on statutory authority or had it kept in reserve its Article II, inherent power arguments? Had the administration merely offered a temporary accommodation while keeping the door open to Article II claims? At oral argument on January 31, 2007 before the Sixth Circuit, regarding one of the TSP cases, one of the judges asked the government: “You could opt out at any time, couldn’t you?” The Deputy Solicitor General acknowledged the possibility.⁵⁹

⁵⁵ Id. at 138.

⁵⁶ Id. at 144

⁵⁷ Id. at 68.

⁵⁸ Id. at 61.

⁵⁹ Adam Liptak, “Judges Weigh Arguments in U.S. Eavesdropping Case,” *New York Times*, Feb. 1, 2007, at A11.

At a May 1, 2007 hearing before the Senate Intelligence Committee, the administration seemed to promote Article II. Michael McConnell, the Director of National Intelligence, signaled that the administration might not be able to keep its pledge to seek approval from the FISA Court. When asked by Senator Russ Feingold whether the administration would no longer sidestep the FISA Court, McConnell replied: “Sir, the president’s authority under Article II is in the Constitution. So if the president chose to exercise Article II authority, that would be the president’s choice.” McConnell wanted to highlight that “Article II is Article II, so in a different circumstance, I can’t speak for the president what he might decide.”⁶⁰

We’re back to basics: Who makes law in the national government? If Congress passes a law through the procedures specified in Article I, is the President obliged under Article II to “take Care that the Laws be faithfully executed”? Alternatively, is the President at liberty to craft – in secret – an executive-made law that supplants and overrides statutory law? These hearings will help Congress and the public take part in an all important debate on what constitutes “the rule of law” in America. It has been our foreign policy to support and encourage the rule of law abroad. Shall we also have it here at home?

⁶⁰ James Risen, “Administration Pulls Back on Surveillance Agreement,” New York Times, May 3, 2007, at A16.

Biosketch

Louis Fisher is a specialist in constitutional law with the Law Library of the Library of Congress, after working for the Congressional Research Service from 1970 to March 6, 2006. During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught at a number of universities and law schools.

His books include *President and Congress* (1972), *Presidential Spending Power* (1975), *The Constitution Between Friends* (1978), *The Politics of Shared Power* (4th ed. 1998), *Constitutional Conflicts Between Congress and the President* (4th ed. 1997), *Constitutional Dialogues* (1988), *American Constitutional Law* (with David Gray Adler, 7th ed. 2007), *Presidential War Power* (2d ed. 2004), *Political Dynamics of Constitutional Law* (with Neal Devins, 4th ed. 2006), *Congressional Abdication on War and Spending* (2000), *Religious Liberty in America* (2002), *Nazi Saboteurs on Trial* (2003; 2d ed. 2005), *The Politics of Executive Privilege* (2004), *The Democratic Constitution* (with Neal Devins, 2004), *Military Tribunals and Presidential Power* (2005), and *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006). With Leonard W. Levy, he edited the four-volume *Encyclopedia of the American Presidency* (1994), which received the Dartmouth Medal from the American Library Association. He has twice won the Louis Brownlow Book Award (for *Presidential Spending Power* and *Constitutional Dialogues*) and in 2006 he received the Neustadt Book Award for *Military Tribunals and Presidential Power*.

Dr. Fisher has been invited to testify before Congress on such issues as war powers, CIA whistleblowing, covert spending, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying.

He has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, the International Bar Association, and the Library of Congress in helping other countries draft new constitutions. He is the author of more than 350 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. Fisher filed four amicus briefs in military tribunal cases (Padilla and Hamdan) and an amicus brief in a case brought by the Center for Constitutional Rights regarding NSA eavesdropping. He has been invited to speak in Albania, Australia, Belgium, Bulgaria, Canada, China, the Czech Republic, England, France, Germany, Greece, Israel, Japan, Macedonia, Malaysia, Mexico, the Netherlands, Oman, the Philippines, Poland, Romania, Russia, Slovenia, South Korea, Taiwan, Ukraine, and the United Arab Emirates.