



CHAPMAN UNIVERSITY

PROFESSOR JOHN C. EASTMAN
SCHOOL OF LAW

January 27, 2006

The Honorable James Sensenbrenner, Jr.
Chairman, Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner:

I appreciate your committee's interest in my views as a constitutional law scholar regarding the legality of the President's authority to conduct surveillance of communications between suspected al Qaeda operatives/supporters abroad and individuals, including citizens, residing in the United States. I specialize in the principles of the American founding and how those principles were given effect through the structural provisions of the Constitution. The current controversy over the President's surveillance program, like the controversies over the Boland Amendment in the 1980s, the War Powers Act in the 1970s, and countless other statutory efforts by Congress to limit the President's executive powers, force us to give serious consideration to the Founder's constitutional design. In particular, I think it is important to assess the strength of the competing arguments that have been brought to the Committee's attention by the Congressional Research Service ("CRS")¹ and the Department of Justice ("DOJ")² with respect to whether the President's actions "violated" the Foreign Intelligence Surveillance Act ("FISA")³ and, if so, whether the FISA, so interpreted, would be an unconstitutional intrusion upon powers that the Constitution confers directly upon the President.

It is perhaps no surprise that the CRS report sides with congressional power, while the DOJ report sides with the President. CRS rightly touts itself as the policy arm of the Congress, and it is answerable to Congress for its work. Similarly, the Department of Justice is an executive Department, answerable to the President; indeed, Article II of the Constitution specifically authorizes the President to require the opinion, in writing, of the principal officer of each executive department. While both entities have well-deserved reputations for generally providing unbiased assessments to their superiors, we would be remiss not to notice where their institutional allegiances

¹ Elizabeth B. Bazan and Jennifer K. Elsea, Congressional Research Memorandum, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information" (Jan. 5, 2006) ("CRS Report").

² U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" (Jan. 19, 2006) ("DOJ Report").

³ 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002).

lie. As Chief Justice (and former President) Taft noted eighty years ago in *Myers v. United States*, 272 U.S. 52 (1926), “[e]ach head of a department is and must be the President’s alter ego in the matters of that department where the president is required by law to exercise authority.” The Supreme Court has recently recognized, even more forcefully, that the same is true for agents of the Legislature: “In constitutional terms, [Congress’s] removal powers over the Comptroller General’s office dictate that he will be *subservient* to Congress.” *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (emphasis added). What was true of the Comptroller General in *Bowsher* is equally true of the Congressional Research Service, which is statutorily designated as an “agent” of Congress and its committees. 2 U.S.C. § 166(d)(1)(C). Although the CRS is legally obliged to conduct its work “without partisan bias,” *id.* § 166(d), there is no similar prohibition on institutional bias, and CRS is clearly a creature of Congress, “discharging its responsibilities to Congress,” “rendering to Congress the most effective and efficient service,” and “responding most expeditiously, effectively, and efficiently to the special needs of Congress.” *Id.* § 166(b)(1)(A-C). The CRS report itself acknowledges that it was prepared in response to requests from “more than one congressional client,” CRS Report, p.1, footer (emphasis added), and that role as advocate for its congressional clients is made amply clear throughout the report, which defends Congress’s efforts through FISA to “put[] to rest the notion that Congress recognizes an inherent Presidential power to conduct” foreign intelligence surveillance within the United States, *id.* at 17; *see also, e.g., id.* at 22 (“As to methods of acquisition [of electronic surveillance as defined in FISA], Congress has declared that [FISA], not any claimed presidential power, controls”); *id.* at 27 (“The statutory language in FISA and the legislative history . . . reflect the Congress’s stated intention to circumscribe any claim of inherent presidential authority to conduct electronic surveillance . . . to collect foreign intelligence information”); *id.* at 29 (“The passage of FISA . . . reflects Congress’s view of its authority to cabin the President’s use of any inherent constitutional authority”).⁴

However much some members of Congress might prefer the conclusions reached in the CRS Report to those reached by the DOJ, therefore, protecting as they do congressional prerogatives at the expense of the Executive, a truly neutral assessment of the contending constitutional positions is in order. It is my considered judgment that the DOJ’s conclusions are much better grounded in constitutional text, precedent, history, and the political theory espoused by our nation’s Founders than those reached by the authors of the CRS Report.

The argument that existing precedent supports the President’s position is particularly compelling. The two landmark cases that mark the poles of Supreme Court precedent addressing the interplay between the Executive and the Congress on matters of foreign policy and war are *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In *Youngstown*, the Supreme Court rebuffed President Truman’s efforts to seize the nation’s steel mills in order to secure the ready supply of steel for the military conflict then underway in Korea, and there is language in the case favorable to proponents of congressional power. In *Curtiss-Wright*, on the other hand, the Supreme Court articulated a very

⁴ Pre-FISA, of course, the Congress was more respectful of the President’s constitutional authority, expressly recognizing the “constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack . . . , [and] to obtain foreign intelligence information deemed essential to the security of the United States. . . .” 82 Stat. 214, formerly codified at 18 U.S.C. § 2511(3).

broad theory of presidential power in the foreign-policy arena which remains valid to this day, acknowledging that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 299 U.S., at 319 (international quotation marks and citations omitted).

Not surprisingly, given its institutional affiliation, the CRS Report begins its analysis with the *Youngstown* case (and particularly with Justice Jackson’s concurring opinion in that case), bolstered by a pro-Congress interpretive gloss placed on the case by a district court decision in *United States v. Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990), *aff’d and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). Yet the CRS Report fails to give adequate play to what it calls the “nuances” of Justice Jackson’s important concurring opinion in the case, treating the case as much more solicitous of congressional power than it actually is.

Justice Jackson famously described a three-tiered system for assessing the separation of powers issues that lie at the intersection of presidential and congressional power. Obviously, the President’s authority is at its peak when he acts both pursuant to his own authority under the Constitution and by virtue of additional statutory authority given to him by Congress—Justice Jackson’s Category 1. Less strong, but no less certain, is when the President acts by virtue of his own constitutional powers, in the face of congressional silence—Category 2. Finally, Justice Jackson even conceded that, at times, the President could act pursuant to his Article II constitutional powers despite an explicit act of Congress to the contrary—Category 3. Congress cannot pass a law that curtails powers the President has directly from the Constitution itself. The problem for Truman, according to Justice Jackson, was not that he exceeded statutory authority, but that his constitutional war powers did not, *under the circumstances*, permit him to trump the mechanisms of the relevant congressional statute. Congress had not authorized the war, and the nation’s steel mills were too far removed from the “theater of war” to fall under the President’s power as Commander-in-Chief.

Contrary to the conclusions drawn by the CRS, a careful review of the *Youngstown* holding in general, and of Justice Jackson’s concurring opinion in particular, yields several important distinctions that vindicate President Bush’s latest actions in the war against terrorism. First, Congress has authorized the use of force in terms broad enough to permit the President’s actions. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (“AUMF”). The Supreme Court has already held in the *Hamdi* case that the statute was broad enough to give the President authority to detain U.S. citizens as enemy combatants even though such detentions were not explicitly authorized (and but for the AUMF would be prohibited by another statute, 18 U.S.C. § 4001(a)); surely it is therefore broad enough to serve as authority for the much lesser intrusion on personal liberty at issue with surveillance of international calls made to or received from our enemies. As such, the President’s actions at issue here fall into Justice Jackson’s first category, in which the President’s power is at its zenith; the DOJ Report’s analysis on this point is much more persuasive than the CRS Report’s analysis.

Second, as September 11 made very clear, the United States *is* a “theater of war,” and the full panoply of presidential powers in time of war comes into play—his power as Commander-in-Chief;

his power as the nation's top executive; and his inherent power as the organ of U.S. sovereignty on the world stage. This is more than simply a "point of view" that "might be argued," as the CRS Report states. CRS Report at 37. The agents of our stateless, terrorist enemies are here on U.S. soil, aiming to strike at our infrastructure, our citizens, and our very way of life at every possible opportunity. Thus, even if the AUMF was not sufficient to sustain the President's executive order, and even if FISA is read as an attempt by Congress to circumscribe the President's own constitutional powers, Justice Jackson recognized that in such a conflict, Congress could not by statute restrict powers that the President has directly from Article II of the Constitution. Congress itself recognized this in the AUMF, when it noted that "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States" AUMF, Preamble, PL 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added).

But whether or not the CRS Report misreads Justice Jackson's concurring opinion from *Youngstown*, what I find most troubling about the CRS analysis is that it does not grapple with the *Curtiss-Wright* case at all, citing it only once, deep in a footnote, and then only in a parenthetical quotation from a lower court decision. CRS Report, at 31 n. 104 (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980)). Any neutral assessment of the important separation of powers questions at issue here warranted a thorough consideration of *Curtiss-Wright* and the theory of presidential power it recognized (as well as the even more long-standing precedent on which the decision in *Curtiss-Wright* relied, including *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)), yet none is to be found in the CRS Report. Instead, every indulgence in favor of congressional authority that can even weakly be drawn from existing judicial opinions is drawn, and every recognition by the courts of inherent executive power is downplayed or ignored. Nowhere is this more manifest than in the CRS Report's discussion of the FISA Court of Review's decision in *In re Sealed Case*, 310 F.3d 717 (U.S. Foreign Intell. Surveillance Ct. Rev. 2002), which expressly stated: "We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence information], and, assuming that is so, *FISA could not encroach on the President's constitutional power.*" (emphasis added). Instead of acknowledging the import of this unbelievably clear statement, the CRS Report begrudgingly finds in it only "some support" for the President's position, and even then finds the scope of the support "to be a matter with respect to which there are differing views." CRS Report at 33.⁵

⁵ A similarly egregious example of the CRS Report's skewed analysis comes with its discussion of the Fourth Circuit's decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3275 (Oct. 25, 2005) (No. 05-533), interpreting the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), as recognizing that the President had authority to detain as enemy combatants even U.S. citizens captured on American soil. The CRS Report notes that the decision "could be read as an expansion of the [President's] detention authority to encompass persons arrested in the United States, far from any battlefield," but then contends, without citation, that the Fourth Circuit's decision "was based on an understanding that the petitioner had taken up arms against American forces in Afghanistan prior to traveling to the United States with the intent of carrying out acts of terrorism." CRS Report at 34 n. 114 (emphasis added). From this, the CRS Report concludes that "[w]hether *Hamdi* would also extend to a person detained as an enemy combatant based wholly on activity carried out within the United States has not been addressed by any court." *Id.* To say that this is a stretch of Judge Luttig's opinion in *Padilla* is an understatement.

The DOJ Report, in contrast, fully grapples with the competing cases and provides a well-reasoned analysis for its proposition that the cases clearly support the inherent constitutional authority of a President to conduct surveillance of communications from or to enemies of the United States and their supporters in time of war. Almost by default, then, the DOJ Report makes the stronger case, but even where the CRS Report does take up the debate by way of its discussion of lower court decisions, the CRS Report's authors are hard-pressed to find in the existing precedent support for the proposition that the President does not have inherent authority to conduct the surveillances at issue here. The best they can muster is that "*it might be argued* that the President's asserted inherent authority to engage warrantless electronic surveillance was . . . limited" by Congress's adoption of FISA, and that the reliance by the FISA Court of Review in *In re Sealed Case* on pre-FISA cases "as a basis for its assumption of the continued vitality of the President's inherent constitutional authority to authorize warrantless electronic surveillance for the purpose of gathering foreign intelligence information *might be viewed as somewhat* undercutting the persuasive force of the Court of Review's statement." CRS Report, at 32 (emphasis added). This is a classic wiggle by lawyers trying to reach the conclusion favored by their clients in the face of precedent that is squarely against them.

Curtiss-Wright provides powerful support for the President's position. In that case, adopting the views expressed by John Marshall while serving in Congress prior to his appointment as Secretary of State and ultimately as Chief Justice of the United States, the Supreme Court recognized that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 299 U.S., at 319 (citing *Annals*, 6th Cong., col. 613 (Mar. 7, 1800) (statement of Rep. Marshall)). As "sole organ" in the foreign affairs arena, the President has inherent constitutional authority—indeed, the constitutional duty, *see* U.S. Const. art. IV, § 4; *The Prize Cases*, 67 U.S. (2 Black) 635, 638 (1863)—to conduct surveillance of communications with enemies of the United States and people he reasonable believes to be working with them, in order to prevent attacks against the United States. Were FISA to be interpreted in such a fashion as to restrict the President's power in this arena, it may well be unconstitutional—something that the FISA drafters themselves recognized. *See* H.R. Conf. Rep. No. 95-1720, at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. Congress cannot by mere statute restrict powers that the President holds directly from the Constitution itself. John Marshall's 1800 statement to Congress dealt with an attempt by Congress to circumscribe the President's powers in the negotiation of treaties, much like the interpretations of the FISA statute being pushed by some in Congress is an attempt to circumscribe the President's power to conduct foreign intelligence surveillance, yet the Supreme Court in *Curtiss-Wright* was manifestly clear that Congress had no authority to intrude upon the President's constitutional powers in the foreign arena: "Into the field of negotiation [of treaties] the Senate cannot intrude; and Congress itself is powerless to invade it." *Curtiss-Wright*, 299 U.S., at 319. The reason for the Court's statement is particularly germane to the present controversy: "[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. *Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.*" *Id.*, at 320 (emphasis added).

It should be noted that this Administration is not the first to make such claims. Indeed, as the DOJ Report correctly notes, similar arguments have been advanced, successfully, by every

administration since electronic surveillance technology was developed. The notion that Congress cannot by mere statute truncate powers the President holds directly from the Constitution is a common feature of executive branch communications with the Congress. Two examples from the DOJ Report are particularly revealing: Griffin Bell, President Jimmy Carter's Attorney General, testified during debate in Congress over the adoption of FISA that, although FISA did not recognize any inherent power of the President, it "does not take away the power [of] the President under the Constitution." DOJ Report at 8 (citing Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (Statement of Attorney General Bell)). President Clinton's Deputy Attorney General, Jamie Gorelick, made a similar point while testifying before Congress when amendments to FISA were being considered: "[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . ." DOJ Report at 8 (citing "Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. On Intelligence, 103d Cong. 2d Sess. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick)).

Granted, some in Congress may think this analysis affords too much power to the President; but their beef is with the drafters of our Constitution, not with the current President who, following the example of a good number of his predecessors, has determined it necessary to exercise the full extent of his constitutional powers in order to defend our nation against attack. Our nation's Founders created a "unitary executive" (that is, an executive branch headed by a single person rather than a committee, who is responsible for the actions of the entire executive branch and accountable to the people), strong enough to respond to whatever threatened the security of our nation and people, with "secrecy and dispatch" if necessary. And it made the Executive largely independent of the Legislature, particularly in the foreign policy arena. As the Supreme Court noted in *Bowsher*, "unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people." 478 U.S., at 722; *see also id.*, at 727 ("The dangers of congressional usurpation of Executive Branch functions have long been recognized. '[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches'" (citing *Buckley v. Valeo*, 424 U.S. 1, 129 (1976))).

While it may be tempting to some in Congress to follow the conclusions reached by the CRS Report rather than the much better reasoned and more thoroughly-documented conclusions drawn by the Department of Justice, they would do so at the expense of the constitutional design bequeathed to us by our Founders, a design which has worked magnificently well in protecting both our nation's security and our individual liberties for over two centuries. Under the Constitution, confirmed by two centuries of historical practice and ratified by Supreme Court precedent, the President clearly has the authority to conduct surveillance of enemy communications in time of war and of the communications to and from those he reasonably believes are affiliated with our enemies. Moreover, it should go without saying that such activities are a fundamental incident of war, particularly in a war such as this where the battle for intelligence is not only the front line but in

many respects the most significant front in the war. The Authorization for the Use of Military Force, therefore, must be viewed as lending Congress's own support to the constitutional powers directly conferred on the President by Article II. Some may wish to question the wisdom of the President's surveillance activities—I happen to think the necessity of them will be borne out in the fullness of time—but we should not confuse such a dispute over tactics and policy with the present dispute over the constitutional authority of the President to undertake them.

Sincerely,

A handwritten signature in black ink, appearing to read "Eastman", written in a cursive style.

John C. Eastman
Professor of Law and
Director, The Claremont Institute
Center for Constitutional Jurisprudence