

## ANSWERING THE CRITICS OF THE LEGAL CASE FOR THE WAR ON TERROR

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A policy argument often advanced by critics of the Bush Administration's legal policies with respect to the War on Terror is that civil liberties today are being unnecessarily sacrificed on the altar of public safety.<sup>1</sup> This claim usually has two dimensions. The first is that the pre-September-11 balance between liberty and public safety was just right and that any effort to tilt it toward the order side of the ledger is unnecessary or inappropriate.<sup>2</sup> This claim is mystifying. In principle, I trust we all agree that liberty and public safety are balanced differently in peacetime than in wartime.<sup>3</sup> It would follow then, that if the peacetime, pre-September-11 balance were sufficient for handling the exigencies of today, then that balance was way off, too harsh, and not sufficiently protective of individual liberty. Indeed, after the decades of the Warren and Burger Courts' veritable rights revolution, to argue that the pre-September-11 balance was not liberal enough is, to put it mildly, not credible. There is, of course, the notion, advanced by some critics, that this is not a real war, but here again, the facts do not support it.

The second dimension is the assertion that, whatever the government is seeking, be it data mining, information on airline

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1. See Nadine Strossen, *Preserving Safety and Freedom Post 9-11*, 3 J. INST. JUST. & INT'L STUD. 1 (2003).

2. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

3. For an excellent discussion of this issue, analyzing the conduct of pre-September-11 wartime administrations in U.S. history, see WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

passengers traveling to the United States, or intercepts of telephone conversations and related activity, it would not really enhance our security, but would merely swamp the government with vast amounts of useless data.<sup>4</sup> Indeed, government is not very good at analyzing and integrating data, but we have to take the government as it is: clumsy and relatively inefficient. Yet, just as the inherent inefficiencies in defense procurement and waste and mismanagement in the Defense Department are not particularly good reasons for refusing to spend money on a first-class military establishment, the same is true for the rest of the government.

Furthermore, there is often serious historical blindness involved. Some people claim that the Bush Administration is asserting and exerting unprecedented powers.<sup>5</sup> Yet, these critics rarely acknowledge a broad array of aberrant actions by the U.S. government throughout American history, including the passage of the Alien and Sedition Acts,<sup>6</sup> the Palmer Raids,<sup>7</sup> the internment of Japanese-Americans during World War II,<sup>8</sup> President Lincoln's tendency to jail his political opponents without according them the benefit of habeas corpus,<sup>9</sup> and President Wilson's orders to the Postmaster General not to deliver newspapers and magazines that were critical of the war effort.<sup>10</sup> With the exception of the Palmer Raids, all of the practices listed above are flatly unconstitutional and cannot be countenanced even in wartime. Indeed, any serious historian looking at the behavior of the past American wartime Presidents—Lincoln,

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4. See Arshad Mohammed & Sara Kehaulani Goo, *Government Increasingly Turning to Data Mining*, WASH. POST, June 15, 2006, at D3.

5. See Elizabeth Drew, *Power Grab*, N.Y. REV. BOOKS, June 22, 2006, at 10.

6. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2006)); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); Alien Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155.

7. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 220–26 (2004).

8. See *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Authorizing the Secretary of War to Prescribe Military Areas*, 7 Fed. Reg. 1407 (Feb. 25, 1942).

9. See *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

10. See Sedition Act of 1918, ch. 75, 65 Pub. L. No. 150, 40 Stat. 553 (1918) (repealed 1920); Espionage Act of 1917, ch. 30, 65 Pub. L. No. 24, 40 Stat. 217 (1917) (upheld 1948); *Abrams v. United States*, 250 U.S. 616, 624 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

Wilson, and Roosevelt—would conclude that they employed far more aggressive and anti-libertarian measures than the Bush Administration. Yet, regrettably, this is not exactly the view expressed by the critics today.<sup>11</sup>

This historical amnesia aside, we also have a problem of legal and constitutional misperceptions. The common perception of the media, the academy, and the pundits is that the Bush Administration was operating within the context of the imperial presidency paradigm, stretching the executive power to its limits, and threatening liberty in the process.<sup>12</sup> This is, to put it gently, a myth. It is fueled, at least in part, by misrepresentations of what Administration officials have argued about executive power, misstating the Bush Administration's theoretical understandings and, much more, their practical applications. Consider the notion, oft-advanced by critics, that, for the first time in American history, the Administration had claimed "dispensing powers"—the ability of a President to ignore existing statutes.<sup>13</sup> In reality, the notion that the President has both the right, and indeed the duty, to disobey unconstitutional laws, is neither unique to the Bush Administration nor even particularly controversial. Indeed, probably the best and most erudite Office of Legal Council memorandum written on this subject, "Presidential Authority to Decline to Execute Unconstitutional Statutes,"<sup>14</sup> was authored on November 2, 1994, by Walter Dellinger, then President Clinton's Assistant Attorney General for the Office of Legal Counsel. Nobody in the Bush Administration has ever argued for a general "dispensing power," that is to say, the power to set aside statutes that the President simply does not like.

Far from seeing an imperial executive, instead, we witnessed an unprecedented assault by Congress to cabin the ex-

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11. See, e.g., Drew, *supra* note 5, at 10.

12. See Editorial, *The Imperial Presidency at Work*, N.Y. TIMES, Jan. 15, 2006, at WK 11.

13. See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1; Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22; AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE: RECOMMENDATION (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

14. Memorandum from Walter Dellinger, Ass't Att'y Gen. for the Office of Legal Counsel, to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm>.

ecutive branch's ability to exercise its Article II powers relating to foreign affairs and national defense, including such matters as the proper interpretation of the United States's international law obligations, the right to use force preemptively without securing the UN Security Council's blessing first,<sup>15</sup> the handling and interrogation of captured enemy combatants,<sup>16</sup> and the NSA wiretapping controversy.

The post-September-11 national catharsis appeared to have restored, at least for a time, a political and interbranch consensus regarding the President's authority to take vigorous action against the terrorist entities that attacked us and against the states that support them. Unfortunately, within a relatively short time, a new and even more dangerous assault on presidential foreign affairs prerogatives has taken shape. Whereas in the 1970s and '80s Congress primarily sought to buttress its power vis-à-vis the executive, insisting on measures such as more disclosure, more reporting, and more opportunities for Congress to have its say,<sup>17</sup> in the post-September-11 environment, the congressional attitude seems to be that it is the federal judiciary that must become involved in second-guessing and micromanaging the executive's foreign policy decisions.<sup>18</sup>

This is the position of a large number of members of Congress, particularly in the Senate, with respect to key aspects of

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15. This matter was heatedly debated in the months leading up to the Iraq war. *See, e.g.*, Statement of Senator Carl Levin (D-MI), Final Passage of Lieberman Amendment (Oct. 11, 2002), available at <http://levin.senate.gov/newsroom/release.cfm?id=210045>.

16. This issue was capped by the passage of the McCain-Graham Amendment. *See* 151 CONG. REC. S11,062 (daily ed. Oct. 5, 2005) (text of McCain Amendment); 151 CONG. REC. S11,114 (daily ed. Oct. 5, 2005) (Senate voting results for McCain Amendment (90-9)).

17. These tendencies are reflected in key pieces of foreign-policy-related legislation such as the War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (2000), Hughes-Ryan Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, and various laws governing the dispensation of foreign aid and military assistance and requiring the executive branch to certify that the recipients comply with certain human rights standards. *See, e.g.*, Lawrence J. Block & David B. Rivkin, Jr., *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J.L. & PUB. POL'Y 303, 305 (1989).

18. *See Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary, 109th Cong.* (2006) (statement of Sen. Russ Feingold, Member, S. Comm. on the Judiciary), available at <http://judiciary.senate.gov/hearings/testimony.cfm?id=1986>; *id.* (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary).

foreign affairs such as the power to interpret and apply American international law obligations, whether treaty-based or derived from custom, the handling of captured enemy combatants and authorized interrogation techniques, intelligence-gathering, and the conduct of diplomacy.<sup>19</sup> Indeed, even those instances in which the President has acted in ways that would have satisfied the 1970s proponents of congressional powers—for example, in obtaining congressional authorization to use force against both al Qaeda and the Taliban in Afghanistan as well as in Iraq, or by fully briefing the relevant members of the congressional intelligence committees and the House and Senate leadership about the warrantless surveillance of suspected al Qaeda members—have proven insufficient for today’s critics.

One of the best examples of these new, post-September-11, anti-presidential efforts is the claim by certain congressional Democrats and Republicans that the September 2001 Authorization for Use of Military Force, despite its extremely broad language—“the President is authorized to use all necessary and appropriate force”<sup>20</sup>—nevertheless did not contemplate the gathering of electronic intelligence about the enemy.<sup>21</sup> I am convinced that, as a matter of law, this argument does not hold water. Legal issues aside, however, at the more fundamental level, congressional unwillingness to stay bound by the letter and spirit of their previous actions destroys the most compelling policy rationale frequently advanced by congressional advocates in the past: namely, that, if the President solicits and receives Congress’s support at the front end of some major, protracted foreign policy venture, Congress will stay with the President through thick and thin.

Ironically, the hairsplitting efforts by congressional critics undercut Congress’s own powers. This is because, unlike the President, who can proceed in a nuanced and case-specific manner, the only way in which Congress can legislate is through the use of general standards. If members of Congress take the position that anything short of a very narrow and very

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19. *See id.*

20. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

21. *See* 152 CONG. REC. S28–30 (daily ed. Jan. 20, 2006) (proposing a Senate resolution declaring that the Authorization for Use of Military Force did not authorize warrantless domestic surveillance of United States citizens).

specific authorization to do each and every specific aspect of war-fighting is no authorization at all, they are devaluing their own authorizations and rendering themselves irrelevant, as well as trenching upon the President's constitutional authority as Commander-in-Chief.

Congressional efforts to avoid accountability and responsibility for their own decisions certainly validate the Framers' belief that Congress is ill-suited for most foreign-policy-related ventures.<sup>22</sup> There is, of course, another branch of government even less well-suited for the planning and execution of American foreign policy—the judiciary.<sup>23</sup>

The courts lack the expertise and information necessary to engage in successful foreign policy-making. The judiciary is also the least cohesive branch, because, at any given point in time, various trial and appellate level courts adopt inconsistent decisions on different issues and the Supreme Court reviews only a very small percentage of lower court cases, and, even when it does, it often has real trouble in successfully imposing discipline on the lower courts. Moreover, the very nature of judicial power compels the courts to deal with issues one case at a time, and prevents them from taking a comprehensive or holistic look at any particular problem. Last, but not least, the courts, by design, are the least accountable (in the democratic sense) branch of government. It is not at all clear why the critics of the Bush Administration view federal judges as being inherently more liberty-conscious than the politically accountable executive branch officials.

To buttress this point about the judiciary, I will conclude by looking briefly at the FISA-NSA warrantless wiretapping controversy. By any objective measure, the FISA experiment, commenced in 1978, of injecting unelected federal judges into the prototypically political arena of foreign intelligence collection has had a very checkered history.<sup>24</sup> The judiciary has often

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22. See THE FEDERALIST NO. 75, at 450–51 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

23. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 31 (2007) (“[T]here is no general reason to think that judges can do better than government at balancing security and liberty during emergencies. Constitutional rules do no good, and some harm, if they block government’s attempts to adjust the balance as threats wax and wane.”).

24. See, e.g., William Funk, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma—A History*, 11 LEWIS & CLARK L. REV. 1099 (2007).

performed ably and honorably, but it cannot be denied that there have also been monumental blunders and excesses.<sup>25</sup> Further, it is clear that judges have instinctively gone the extra mile, and more, to do what they *personally* regarded as justice for the investigative subjects before them—even at the expense of public safety.<sup>26</sup> This may be understandable, and even appropriate, in the context of the criminal justice system, where processes are geared, and judges thus impelled, toward the protection of the individual and his liberties. The antithesis, however, is true in the field of foreign affairs, where the collective security of the nation is paramount.

A couple of other points about the NSA surveillance issue are worth making, insofar as they are instructive about the broader propositions of this Essay. In the beginning of this debate about surveillance, shortly after the NSA's al Qaeda surveillance program was leaked to the *New York Times*, critics of the Administration professed to be concerned only about the legal framework.<sup>27</sup> Stated differently, there was a seeming consensus about the program's policy parameters, namely, that the government ought to be able to listen in on all conversations between al Qaeda operatives overseas and the entire range of their interlocutors in the United States. Indeed, members of Congress, while criticizing the President, invariably opined that they wanted to listen in on as much of al-Qaeda-related traffic as did the Administration.<sup>28</sup> Unfortunately, this turned out to be an illusion, which was exposed as Congress began to consider how to revise FISA.

By now, a number of critics have advanced policy arguments, designed to buttress the proposition that it is neither essential nor even desirable to listen in on all al-Qaeda-related conversations. For example, Harvard Professor Phillip Heymann, in a

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25. See, e.g., OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION PRIOR TO THE SEPTEMBER 11 ATTACKS ch. 2.III.B.1 (2004), available at <http://www.usdoj.gov/oig/special/0506/index.htm>.

26. See, e.g., *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (FISA Ct. 2002).

27. See Interview with Rep. Jane Harman, Comm. on Homeland Sec., Chair of the Intelligence Subcomm., on Fox News Sunday (Jan. 8, 2006), available at <http://www.foxnews.com/story/0,2933,181012,00.html>.

28. See *id.*

*New Republic* exchange with Judge Richard Posner,<sup>29</sup> argued that it is not important to protect the executive's ability to listen in on all al-Qaeda-related conversations, claiming that casting an excessively wide surveillance net is not particularly useful and that there are other, more elegant and less liberty-threatening ways—for example, recruiting informers—to thwart al Qaeda attacks. Meanwhile, the ACLU's Nadine Strossen, in a debate with me at the New York Law School, also expressed a distinct preference for such things as giving FBI and NSA better computers, interpreters, and analysts, and a disinclination towards giving them broader surveillance powers.<sup>30</sup>

The reason this policy division has emerged is very simple. The critics insist that all instances of NSA surveillance must be blessed by the FISA court judges and realize that this can be done only with a relatively narrow portion of the overall al-Qaeda-related communications, namely, the ones where the government has probable cause to believe that overseas-based al Qaeda operatives are interacting with their U.S.-based agents.<sup>31</sup> The willingness of critics to abandon any effort to monitor a broad range of potentially useful al Qaeda communications so soon after the events of September 11, in the face of the continuing al Qaeda efforts to launch new attacks against the United States, and allegedly to protect our civil liberties more effectively, is nothing short of stunning.

More generally, as the Framers well understood, only the executive can wield the aspects of governmental power that necessarily entail the exercise of discretion.<sup>32</sup> This point has been made by a number of renowned political philosophers, including Professor Harvey Mansfield in his brilliant book on the nature of

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29. See Richard Posner & Phillip Heymann, *Tap Dancing: A TNR Online Debate*, NEW REPUBLIC ONLINE, Jan. 31, 2006, Feb. 2, 2006, Feb. 5, 2006, <http://www.law.harvard.edu/programs/criminal-justice/posner-heyman-debate.pdf>.

30. Curious George Taps the Phones: Lives, Liberty and the Law Five Years after 9/11, Symposium Panel at New York Law School (Mar. 14, 2006) (transcript on file with Author).

31. Ironically, the notion that judicial engagement is a constitutionally necessary condition of the executive branch's intelligence gathering activities is decisively rejected by a recent decision by the FISA appeals court. See *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, No. 08-01, 2008 WL 5501436 (FISA Ct. Rev. Aug. 22, 2008).

32. See, e.g., Alexander Hamilton, *Pacificus*, No. 1, June 29, 1793, reprinted in 4 THE FOUNDERS' CONSTITUTION 63-66 (Philip B. Kurland & Ralph Lerner eds., 2000).

executive power, *Taming the Prince*.<sup>33</sup> The way to prevent abuses in the course of exercising this discretionary executive power is through political accountability; it is emphatically *not* by having either the judiciary or Congress participate in the discretionary decision making.<sup>34</sup> It is extremely unfortunate that there is a growing body of opinion that is hostile to the very notion of a discretionary exercise of power by the executive and, further, that views it as inherently unconstitutional and inimical to civil liberty. This argument is both ahistorical and stands the Constitution on its head—although the totality of the executive powers and actions is meant to be checked and balanced by the other two branches, the notion that every single executive activity, particularly in the national security area, has to be checked either by Congress or by the judiciary is absurd.

To ensure their security, the American people elect a President—the only political official, other than the Vice President, elected by all of them. The President is accountable to them, and hence institutionally geared to promote their security above all other considerations. In the prosecution of war and, within it the determination of which enemy communications merit monitoring, the American people are entitled to have ultimate decisions made by the President, just as the Framers intended. This is simply not a role that the courts are constitutionally permitted to play.

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33. HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* (1989).

34. *See, e.g., id.* at xvi.