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David D. Cole

Ruth Wedgwood

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NSA WIRETAPPING CONTROVERSY *

A Debate between Professor David D. Cole and Professor Ruth Wedgwood

Moderators:

Associate Dean Hiram Chodosh, Associate Dean for Academic Affairs and Joseph C. Hostetler–Baker & Hostetler Professor of Law, Case Western Reserve University School of Law; Dean-Designate, S.J. Quinney College of Law, University of Utah.

Professor Michael P. Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law, 2005 Nobel Peace Prize nominee,

Professor Amos Guiora, Professor of Law and Director, Institute for Global Security Law and Policy, Case Western Reserve University School of Law, Lt. Col. (Ret.) Israel Defense Forces, Judge Advocate General's Corps,

Professor Jessie Hill, Assistant Professor and Assistant Director, Institute for Global Security Law and Policy, Case Western Reserve University School of Law,

Professor Jonathan Adler, Associate Professor and Associate Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law, and

Professor Raymond Ku, Professor of Law and Associate Director, Center for Law, Technology, and the Arts

Participants:

Professor David D. Cole, Professor of Law, Georgetown University Law Center.

Professor Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy; Director of the International Law and Organization

* Mock Congressional Hearing Sponsored by the Frederick K. Cox International Law Center and the Institute for Global Security Law and Policy on Thursday, February 9, 2006.

Program, Johns Hopkins University Paul H. Nitze School of Advanced International Studies, Washington, D.C.

PROFESSOR MICHAEL SCHARF:

We are about to begin this very innovative Mock Congressional Hearing. We will be simulating the U.S. Senate Judiciary Committee, a committee that just met earlier this week on Monday and heard testimony from Attorney General Alberto Gonzales on this very issue. Surprisingly, the Attorney General refused and the committee did not require that he be sworn in; a very extraordinary circumstance. That testimony was fairly one-sided; there were not other witnesses; it was fairly short.

So today we are going to see what the real testimony would have been like had we had a balanced approach and a more in-depth examination of the issue. This actually foreshadows other Senate hearings that are likely to come in the next five or six weeks. So I think the world is sort of tuned in to Cleveland, Ohio today to see what happens.

Well, I will be playing the Chairman of the Senate Judiciary Committee, Arlen Specter. To my right will be Senator Ray Ku, a professor from Case who specializes in cyber-crime and other things dealing with the Internet and Fourth Amendment rights and he is from the great State of Ohio. To his right is Senator Jesse Hill representing the State of New York; Professor Hill was an ACLU litigator in New York City before she came here. She will bring interesting insights from that point of view. You have already met Senator Hiram Chodosh. I'll put you out in California. And at the far end is Senator John Adler. Professor Adler is a constitutional law professor here. He is nationally known for his work in constitutional issues and he will be representing the State of Pennsylvania. And the person I just skipped over, I did so on purpose, he is co-sponsoring this event. It is Senator Amos Guiora from the State of Michigan. And he is going to introduce the two expert panelists that we have brought from Washington D.C. to make this a really exciting and interesting event.

PROFESSOR AMOS GUIORA:

Thank you, Senator Scharf. I will begin with Professor Ruth Wedgwood. It is an honor to have you with us today. She is a very distinguished professor at the Advanced International Studies program at Johns Hopkins. I have had the pleasure of appearing on a panel with her. Thank you for joining us.

Her co-debater is Professor David Cole from Georgetown University. Professor Cole has been called by the journalist, Anthony Lewis, "one of the great liberal voices in America today." Professor Cole, it is also a pleasure to have you with us today.

PROFESSOR SCHARF:

Now the ground rules for this Senate hearing are as follows: We will begin with a fifteen minute presentation from Professor Cole, followed by a fifteen minute presentation from Professor Wedgwood. Then each of the senators in the order in which we are seated will grill the expert witnesses and we have five minutes total for our questions and answers.

Without further ado, let's begin the hearing with the presentation of Professor David Cole.

PROFESSOR DAVID COLE:

Thank you, Mr. Chairman.

Now, let me make a few opening remarks about how this is different from a real Congressional Hearing; for those of you who have not spent as much time in Washington as I have. The first way in which this is different from a real Congressional Hearing is that the senators are actually all present. At most hearings, at least the ones that I have testified at, by the time I testified in the event, there might be one senator left, otherwise its staff members that you talk to. So I am grateful to have you all here.

The second way in which this is different is that we are now ten minutes into the program and you are actually hearing from the witnesses. In a usual Senate hearing you first, have opening statements by each of the senators which is the most important part of the hearing where they get to pontificate for ten minutes or so, so that they get their sound bytes in and the witnesses are merely a prop for the senators. So this is, I would say, an improved version of the Senate Committee Hearing.

Let me begin by saying what this debate is not about, or what this hearing is not about. I think it is not about ultimately the question of whether the President should be listening in on phone calls by Al-Qaeda and members of supporting or affiliate organizations. It is not, I think, about the issues of privacy and Fourth Amendment, for the most part, for a couple of reasons. One, we do not know the scope of this program at this point and so it is hard to make judgments about whether its scope violates or entrenches upon Fourth Amendment privacy concerns.

Two, most Americans and probably most Senators agree that we should be listening in when Al-Qaeda calls. So there is not any dispute about that. In addition, the Foreign Intelligence Surveillance Act,¹ the statute that is at issue here, does not prohibit the government from listening in

¹ Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1829 (2000).

on any call made by a member of Al-Qaeda from outside the United States. As long as the surveillance is targeted at the Al-Qaeda member outside the United States and the information is acquired through a tap outside the United States, there is no law that limits the President in any way, shape or form from collecting that information. So it is a red herring when the defenders of this program say, well, we should be listening in to members of Al-Qaeda. That is not what the debate is about.

So, what is the debate about? The debate is about whether we should be doing that pursuant to the law or whether we should be doing pursuant to Executive fiat, under an understanding of the Constitution that allows the President to order that Federal statutes be violated in secret. Now, is it a debate about the command, or scope of the commander-in-chief power? It is a debate about separation of powers and checks and balances. That is what is ultimately at issue here.

So let me set the stage, briefly, by describing the Foreign Intelligence Surveillance Act,² what it does and what it does not do, and then turn to the two asserted basis, both, I think, fundamentally flawed for the asserted legality of this program.

The Foreign Intelligence Surveillance Act was enacted in the late 1970s after a committee, a special committee of Congress called the Church Committee, revealed massive, widespread violations of American's rights by surveillance conducted by the National Security Agency and by other agencies on thousands and thousands of innocent Americans.

The response was to say, let's regulate the gathering of foreign intelligence information. We regulate it by passing a law enacted by Congress signed by the President which permits foreign intelligence electronic surveillance for national security purposes but requires, that in most cases, the President must go to a court and make a showing that there is a justified basis for gathering that electronic surveillance, namely, probable cause and that the individual targeted, if he is a U.S. person within the United States, is an agent of a foreign power or a terrorist organization. You do not have to show a crime. You do not have to show probable cause of criminal activity, just probable cause that the person is connected to the terrorist organization.

Congress sought to make clear that this was the way to do it. They provided in 18 U.S.C. Section 2511,³ that this is the exclusive means by which electronic surveillance may be conducted. They went further in Section 1809 of the Foreign Intelligence Surveillance Act⁴ and said it is a crime to conduct foreign intelligence beyond the scope—to collect electronic surveillance beyond the scope of this exclusive means. And, this is the most

² *Id.*

³ 18 U.S.C. § 2511 (2000).

⁴ 50 U.S.C. § 1809 (2000).

important point; they specifically addressed the question of authorization during war time. Under Section 1811 of the Foreign Intelligence Surveillance Act⁵ they provide that when Congress declares war, the President shall have fifteen days to conduct warrantless wiretapping. And the ideal was—and they specifically set this forth in the ledger, if the President needs more authority to conduct warrantless wiretapping, he could come to us and ask for it and we can amend FISA to give him that authority, but fifteen days and no longer, if he does not come to us and ask for further authority.

Now, in this instance, the President decided in the face of that statute—the statute says that this is the only way to do it. It is a crime to do it any other way and if you want broader authority, come to us and seek an amendment to FISA. The President decided not to come to Congress, not to seek an amendment to FISA, instead, to order, in secret, the conduct that is criminal on its face go forward.

What is the administration's defense of the program? They have two. The first one is frivolous. The second one is extremely dangerous.

The first one is that Congress, somehow and without saying so, in authorizing the use of military force against Al-Qaeda on September 14, 2001, somehow implicitly overrode FISA and gave the President unlimited authority to conduct warrantless wiretapping of Americans. That argument is frivolous, I suggest, because when you put the authorization to use the military force, which says not one word about warrantless wiretapping, up along side Section 1811,⁶ the provision I referred to earlier, its title, Authorization During Wartime, it is clear that the authorization to use military force cannot provide the authority the government suggests that it does. Why? Because if Congress says that even when we declare war, a more serious and grave step than authorizing the use of military force, you get fifteen days and no longer. How can it be that when they enact an authorization to use the military and do not declare war you somehow now get unlimited authority to conduct warrantless wiretapping?

In addition, when Alberto Gonzales was asked, why we did not go to Congress and ask specifically for this authority, he said, well, we talked to some members of the Congress about doing that and they said it would be difficult if not impossible to get it. And so, he did not go. And he later sought to backtrack and said, what I really meant is that it would be difficult, but not impossible, to without compromising the program. But the critical point here is that they thought about going to Congress and asking for it and decided not to. How can you argue, on the one hand, we did not go to Congress and ask for it because we were concerned that we could not

⁵ 50 U.S.C. § 1811 (2000).

⁶ *Id.*

get it? But on the other hand, Congress gave it to us without ever having said so. That is the frivolous argument.

The dangerous argument is the back-up argument the administration relies upon and that is the Commander-in-Chief authority. And here the argument is that FISA is unconstitutional to the extent that it restricts the President, as Commander-in-Chief, in gathering signal intelligence on Al-Qaeda. And the reason for that is that the Commander-in-Chief authority, the government argues, the President argues, gives the President uncheckable authority to choose the means and methods of engaging the enemy. Those are the Justice Department's words, the means and the methods of engaging the enemy. And the claim is anything that falls within that paradigm, means and methods of engaging the enemy, cannot be restricted by statute. And therefore, to the extent that the Foreign Intelligence Surveillance Act says, you cannot wiretap Americans in the United States without justification, without going to court because that interferes, in the President's mind, with engaging the enemy is unconstitutional.

Now, to me this is a resurrection of the Nixon doctrine. Richard Nixon famously argued, in defending a situation in which he authorized illegal warrantless wiretapping of Americans during the Vietnam war. He argued if the President does it that means it is not illegal. Now, President Nixon learned that is not the American doctrine; that was President Nixon's doctrine. That was part of the Articles of Impeachment. He, ultimately, was the forced to resign. President Bush has, essentially, resurrected the Nixon doctrine with one modification. He says that if the President does it and says the magic words, "Commander-in-Chief" it is not illegal.

Now, what is wrong with this argument? First, let me say, this is not the first time the government—the President—made this argument. The Justice Department made this argument regarding enemy combatants. And three justices dissented, but they said we just read the statute differently but Congress certainly could, if it wanted to, extend these limitations to the President. Similarly, the court in the *Hamdi v. Rumsfeld*⁷ case involving the U.S. citizen enemy combatant rejected similar arguments that constitutionally, the courts could not review the factual basis for the President's designation of the U.S. citizen as an enemy combatant.

The Supreme Court in the *Youngstown Sheet & Tube v. Sawyer*⁸ case in 1952 rejected the same claim when President Truman made it to justify the seizure of the steel mills. The Supreme Court in 1804 rejected the same claim in the *Little v. Berreme*⁹ case, in which the President asserted that he could order that ships coming from France be seized when Congress

⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹ *Little v. Berreme*, 6 U.S. 170 (1804).

had only authorized that ships going to France be seized. In fact, no case, no case has upheld the startlingly broad assertion of authority that is at the bottom of President Bush's order in this case.

But then, again, I suppose, what are a few negative Supreme Court decisions when, in your view, it is the President, not the Supreme Court who has the power to say what the law is.

Thank you very much.

PROFESSOR RUTH WEDGWOOD:

It is a pleasure to be here and to meet my good friend, David Cole, again on another issue. We are, I think, just for clarity doing some degree a mock hearing. So we do not necessarily believe everything we say. But we must state, as intelligent human beings, the most colorful arguments. I will not believe most of what I say. And there is a proviso that says this is an issue where we are all working through the problems and the quickseties of it that it is going to take a while for the country and probably any good-faith person to come to a final moment of resolution of the bottom line.

Let me bring to your attention several things that David has, perhaps, elected to emphasize. Partly, this is a problem we have to approach in a rush-among fashion, which end of the elephant do you start with? But the difference now from 1978, when I, shortly thereafter had the pleasure of meeting the Carter Justice Department, is that there are problems we did not ever suppose that we would face. Americans clearly have very, very high expectations of privacy. That is why, as a lass, I worked on FBI guidelines with Judge Webster and Attorney General Griffin Bell. Americans want to know that they are safe in their homes and they have the rich, autonomous, private life that nobody can intrude on.

But at the same time in 1978, we were not thinking about anything like Al-Qaeda, a cyber entity that began to mimic the powers of a nation state in a situation where deterrence has failed. The second strike capability that kept the U.S. safe in the Cold War, where if the Soviets attacked us, they knew we could retaliate against Moscow or military targets near Moscow and, therefore, thank goodness, nuclear weapons were never, in fact, used. And everybody had a great sense of caution about them.

[Al Qaeda is] a different enemy in the sense that it is not an organized nation-state. We do not know its address. You do not know who its players are. You are not watching the front door of the Soviet embassy in a way that you can identify everybody who is likely to be a Soviet agent. You really face a very different kind of circumstance. An adversary that does not, itself, follow the rules of war; which attacks civilians deliberately; which all of us would agree is a form of terrorism and a kind of war crime—and really a technological change. We are old enough, but we date ourselves, to not have always had handheld computers or laptop or desk

computers. And the kind of capacity, dare one would call it, agility that an adversary may have, you could really use electronics in a fulsome way is something that really was not contemplated in 1978.

Now, what is wrong with FISA? FISA was, in fact, a very, very good-faith attempt to capture what was thought to be needed by the Executive at that time and place. It followed a period when, in fact, there had been abuses. No one wants to go back to the period of using foreign intelligent powers or domestic intelligent powers for political purposes, whether it is LBJ or President Nixon. The White House incumbents were often too easily tempted to make use of their powers for purposes that were not worthy.

FISA does a couple of things. It tries to capture what you might need, tactically and strategically, against your adversaries. It uses the probable cause standard, which you are familiar with from criminal law. But it is not probable cause to believe that a crime is about to be committed, probable cause to believe you are an adversary. Nobody, even in criminal law classes, could quite capture what probable cause means. Is it fifty percent; is it thirty-three percent? It is certainly not one percent. And that may begin to give you a sense of the conceivable problems that were posed in regards to catastrophic harm by unidentified adversaries. A one percent chance that somebody might be intending to explode or hide a radiological bomb or nuclear devise. You do not get to multiply the percent times the harm when you are determining the nature of probable cause. Yet FISA uses just that standard for probable cause. It is hard to meet.

David has never had the pleasure of working as a prosecutor. The problem that prosecutors find the first day on the job is that if you need probable cause to get probable cause, how do you get probable cause? Probable cause does not grow on trees. You have to know a lot about a person before you can generate probable cause that you need to get a wiretap. And you sometimes do it in ways that will escape the attention of the Supreme Court whether it is gathering garbage on the curb or talking to their friends who give you voluntary interviews. But there are cases where you cannot go forward because probable cause is a significant threshold requirement. And it really is not much more than a hunch, intuition, a belief, or even a well-founded belief, but that one that only buys us say two, five or ten percent probability. Now again, of the situation of wartime, even low probabilities of catastrophic harm might seem to you to be unacceptable.

FISA protects several classes of people and to think about how these would work under practical terms. It covers any kind of intentional targeting of a known U.S. person if the communication comes from abroad or goes abroad. A U.S. person is a citizen or permanent resident alien. It also protects any interception of a communication of any person in the U.S. if the acquisition occurs in the territorial U.S. So, say, if you had two people who snuck in over the Mexican border, illegal aliens that have only been here for twenty-four hours, and they are communicating within the territory

of the U.S., nonetheless, FISA would plug in. And it also covers any kind of physical intrusion, sort of either a black bag job or room bug that is in the U.S.

Now, let me give you a couple instances where I think this creates problems. And we do not know for sure, but what we do know, we do not know much more now than we did a week ago, about what the government says this particular program was about. But let me give you one example that goes beyond what has been stated in the hearings that were troubling. This has to do with a skipping stone. You might well want to follow a communication with Al-Qaeda, sent from abroad, from Afghanistan to Chicago and follow it to Cleveland and then to New York and then to Miami. You might want to know, simply by the frequency and the periodicity of who is calling whom, what might be the likely network, or spiderweb of people who are associated with Al-Qaeda.

But under FISA, if you apply FISA strictly speaking, you could not follow that skein any farther than the first communication from Afghanistan to Detroit. And the question would be, does the President, if he is acting in good faith—it is your President, the guy you vote for next time, President Clinton, part two, whoever. Would you want to allow that president, whom you like, whom you trust, to follow that spiderweb skein? Or would you want to simply be limited by the statutory provision of probable cause and take your chances on the consequential damages?

You are going to have situations where communications that formerly were not covered are newly covered because we now have a different technology where they are now using broadband technology, fiber optics where the acquisition will technically be in the U.S. whereas, 25 years ago the method of communication and therefore the acquisition point would have been outside the U.S. Because the technological change, with no change in the personality of the actors things will not fall under FISA that formerly did not.

Now the case that Attorney General Gonzales was talking about in his later descriptions, were phone calls where one member of the conversation is associated with Al-Qaeda and one end of the conversation is abroad, either calling or receiving.

In regard to communications that deal with border boundaries, think back to the original idea of what the Fourth Amendment would protect. The Fourth Amendment was meant to credit and cherish reasonable expectations of privacy. When you go across a border, your bags are searched. Of course, you are searched at the airport. When your packages are sent in or out they can be searched. If you are looking at what kind of expectation of privacy you have, the fact that it involves foreign territory may be very, very pertinent to the sense of whether there was a constitutional violation or not.

Now, one complaint that is made is if you have any quarrel with the techniques or technical details of the FISA act, go to Congress and ask them

to change it. That may well be a possible means. It is also true, however, as LBJ taught us, as he said in counsel with Martin Luther King, legislative moments are very hard to come by. The times that are any way near the election cycle, people get into very polarized positions. People cannot be seen talking to each other. So, you not only have the problem that a legislative change might, in fact, reveal details of the program, but it may well be that because of the, if you will, ambition of political parties to save issues for elections that they may not be prepared to address it yet.

And one example that actually comes from the 1970s an old civil liberties intelligence hand told me this story. It was known in the mid 1970s that the government from time to time would engage in several black bag jobs, physical searches of people thought to be foreign agents. And yet, that was not added to the FISA act when it was passed in 1978. And one account is that some people thought that if it was put in the statute it would happen too often. Therefore, leave it on the simple justification of Executive power, hoping that that would induce the kind of caution. That was a critique from the left. They did not want it, I am told, in the statute because they thought it would be used too frequently. And yet, they knew the problem. Congress was not willing to address it further at that point.

Now, you all are law students so you have come across the phrase, "occupation of the field". Have you ever heard that funny phrase? Well, Congress passes a statute. Should you suppose they mean it as the exclusive method of doing something, whether it is federal versus state or Congressional versus Executive, occupation of the field? I do think that when you look at a statute, one that changes circumstances in particular, you have to entertain the idea of a dynamic occupation of the field. It could be that in 1978, Congress meant the FISA statute to be the only way of getting a foreign intelligence wiretap. But the question you ought to ask is, would Congress have meant that if they knew the changes that they would face vis-à-vis technology, the kind of adversary, the kind of use of the Internet? And that is a much harder question to answer, I think.

We have had dynamic interpretations of many, many statutes. We have had dynamic interpretations of the Constitution. The Air Force is not unconstitutional, even though it was not mentioned in Article 1, Section 8 of the enumerated powers of Congress, because we have reasoned that Congress would have wanted to have an Air Force, if they had known Leonardo's dream of flying would ever have come to pass. So we read it into the Constitution. And the same thing is true of theories of occupation of the field.

The other question you might ask yourself is kind of a functional question. What would you have a court to do, if, in fact, the way to determine if somebody is an associate of Al-Qaeda is to look at the most recent, updated, dynamically gathered data that you have on how Al-Qaeda members tend to act; how do they make their phone calls? Are they using a

switchboard in Kandahar? Has it moved to Yemen? Has it moved to Mongolia? Has it moved to Somalia? How many phone calls do you have to have before you know something is a switchboard? That can get you very deep into the trade-craft of intelligence.

Now in the case of criminal law, we have courts and judges as the gatekeepers in almost all circumstances because they do criminal law for a living. But judges in general, even FISA judges, do not do intelligence in quite the intense way that the courts take care of criminal law enforcement.

Let me just note two other things, if you will. David would have you believe that theories of robust Executive power are peculiar to a particular president. That is simply not true. Read the famous *Truong*¹⁰ case from 1980. The *Truong* case is otherwise famous for saying that, before certain changes, a FISA wire had to have, as its primary purpose, the acquisition of foreign intelligence and could not have an ambiguous double purpose of criminal law enforcement and intelligence.

But in *Truong* the court also said the following: “the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and competently for foreign intelligence and surveillance.”¹¹ The needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform war requirement would unduly frustrate the President in carrying out his foreign affairs responsibility.

More importantly, the Executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. The courts are unschooled in diplomacy in military affairs, a mastery of which would be essential to passing on an Executive Branch request.

And you might also look at an Office of Legal Counsel (“OLC”) opinion, the OLC, from the year 2000 when President Clinton was still in office. This had to do with whether the President could ever demand that criminal law enforcement authorities turn over to him information that was gathered in a criminal wiretap, even though, ordinarily, time of free criminal wire taps were kept secret. The OLC opinion, written by Randolph D. Moss, from the Office of Intelligence Policy and Review, said the following:

The Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs Where the President’s authority concerning national security or foreign relations is in tension with a statutory rather than the constitutional rule, the statute cannot displace the President’s constitutional authority and

¹⁰ United States v. Hung, 629 F.2d 908 (4th Cir. 1980).

¹¹ *Id.* at 914.

should be read to be “subject to an implied exception in deference to such presidential powers.” We believe that if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.¹²

One point about the authorization to use military force that David has failed to mention, it shows we are in war. And in a war, the President can, not only capture people who are enemy combatants, he ought to be able to overhear them. And this has nothing to do with a counter-intelligence problem or broader theories of intrusion. If you are fighting a war and on an American battlefield, you do need some signal intelligence capability and a court is not necessarily the place to conduct that in the volume or with the speed that you need to be effective in thwarting a real-time attack that can have truly catastrophic consequences for innocent civilians.

Thank you.

PROFESSOR SCHARF:

Okay. Now we will begin the questioning. Again, each senator has five minutes for questions and answers. We have a timekeeper there and we will scrupulously keep to that timekeeper.

Let me begin with a question for Professor Cole and beginning with the assumption that the FISA statute allows for unwarranted wiretapping, if it is authorized by Congress. You had mentioned the Supreme Court case of *Hamdi v. Rumsfeld*¹³ and in that case the Supreme Court recently ruled that the post 9/11 authorization to use military force had authorized the President to detain a U.S. citizen in the United States because, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”¹⁴

So, five Supreme Court justices concluded that the post 9/11 authorization statute, “clearly and unmistakably authorize[s]” the fundamental incidence of waging war.¹⁵ My question to you, Professor Cole, is why

¹² Memorandum from Randolph D. Moss, Assistant Attorney Gen., U.S. Dep’t of Justice to the Counsel Office of Intelligence Policy and Review, Sharing Title III Electronic Surveillance Material With the Intelligence Community (Oct. 17, 2000), available at <http://www.usdoj.gov/olc/titleIIIfinal.htm> [hereinafter Moss Memorandum] (citing Dep’t of the Navy v. Egan, 484 U.S. 518 (1988) and *Rainbow Navigation, Inc. v. Dep’t of the Navy*, 783 F.3d 1072 (D.C. Cir. 1986)).

¹³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁴ *Id.* at 519.

¹⁵ *Id.*

wouldn't communications intelligence targeted at the enemy be a fundamental incidence of the use of military force?

PROFESSOR COLE:

I think it is but, I think, here is the difference. In *Hamdi*, the court was faced with an authorization to use military force, and no competing, specific, congressional directive on the question of detaining American citizens as enemy combatants during wartime.

In this context, the court would be faced with the same authorization to use military force which says nothing about wiretapping. But here, unlike with respect to detention, you would have a specific directive from Congress that says, this is the authority we are going to grant during wartime, and it is fifteen days and no longer. I would posit that had there been a statute on the books that said, when war is declared the President can detain American citizens as enemy combatants, but only for fifteen days. And if he needs greater authority he should come to us and ask us to amend the statute.

There is no way that the Supreme Court would have read the broad and unspecific authorization to use military force to somehow override that very specific statute. The rule is that a specific statute governs over a general statute in every circumstance. The situation with respect to detention was there was no specific statute governing wartime detention of American citizens as enemy combatants. Here, there is a specific statute and, I think, that makes this an entirely different situation.

PROFESSOR SCHARF:

All right, I will then move to the next of our congressional panel and that is Senator Ku.

PROFESSOR RAYMOND KU:

Thank you, Mr. Chairman. Thank you both for being here and testifying before us.

Professor Cole, I would like to start with you and ask a question that, I think, many of us are curious about. It goes along the lines of, even if one does believe that what the President has done here has violated both provisions of FISA and, therefore, run into constitutional concerns over the separation of powers doctrine, as well as, potentially violate the Fourth Amendment as in probable cause and warrant requirement, required by the Fourth Amendment, what is the remedy here? We are not talking about an exclusionary rule solution in which the evidence that is gathered here will be excluded in the trial of these individuals, nor are we not necessarily talk-

ing about a civil action under Section 1983¹⁶ for damages in most of these instances. So what can Congress and what can the American people expect in terms of a remedy for this problem?

PROFESSOR COLE:

I think that is a great question. My view is that what is important is that at the end of the day we restore the notion of checks and balances that we had before the Bush Administration came to power. And that is ultimately what is most critical here. The way in which the checks and balances are restored is less critical. So, for example, one way in which checks and balances could be restored is a censure of the President for violating a criminal statute and ordering the criminal statute be violated in secret. I do not think that without knowing anything more, impeachment is appropriate or prosecution is appropriate, but censure, I think, would be appropriate. It would be a way for Congress to assert the importance of checks and balances.

Another way of responding might be to cut off funds for this program if Congress determines that the kind of surveillance that is being conducted should not be conducted. And if it determines that some narrower form of surveillance, but broader than FISA, is appropriate then it should amend FISA to authorize that. But I think the important point is that Congress must assert its prerogative here, just as it did a month ago in the McCain amendment¹⁷ when it learned that the President had ordered, in secret, that the Torture Convention¹⁸ be interpreted in such a way that he could impose cruel, inhuman and degrading treatment on anyone who did not have a U.S. passport. Congress responded by making it absolutely clear that he could not exploit that loophole. And the President, despite threatening to veto it, despite sending the Vice President to try to get an exception, was forced, ultimately, to sign the bill against his will. That, I think, restored some notion of Congressional rule.

PROFESSOR WEDGWOOD:

Mr. Chairman, since we are both sitting here at the witness table, can we reply to each other?

¹⁶ 42 U.S.C. § 1983 (2000).

¹⁷ Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, H.R. Res. 1268, 109th Cong. § 6057(a)(1) (2005), *available at* http://www.phrusa.org/research/torture/mccain_text.html.

¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

PROFESSOR SCHARF:

I think the chairman will exercise his prerogative and allow you to have a minute of rebuttal.

PROFESSOR WEDGWOOD:

Not rebuttal, but rather to mur, I suppose. Dismissal is irrelevant if you know. David, Mr. Cole, my worthy adversary, has conceded in his opening remarks that the interception of any communication to or from a person who is a member of, or associated with Al-Qaeda is constitutional, and it is consistent with FISA, at least, the evidentiary standard of FISA. So the only complaint seems to be that this was done, not because it was—not that this was a wrongful search in and of itself, but that the President did not go to the FISA board. He is not saying that this kind of search violates the Fourth Amendment. He is simply saying that you had to go to Judge Kotelly or someone else on the FISA court and ask for the warrant.

So, I would find it most peculiar that David would want to shut down the program or censure the President, or cut off the funding when it is just the kind of search he thinks in substance is permissible and, frankly, surely necessary for national defense.

PROFESSOR COLE:

If I could respond briefly, that is playing with words because, I feel, no one would accept an argument from a police officer, well, I actually had probable cause. So, the fact that I searched the house without getting a warrant means that it is constitutional because I would have gotten a warrant if I had gone—

PROFESSOR WEDGWOOD:

You do not have to get a warrant if it is not practical to get a warrant.

PROFESSOR SCHARF:

Here, here. Let's have order in the Congress.

PROFESSOR COLE:

That is not a defense to the violation, number one. Number two, we do not know the scope of this program. But if the scope of this program were simply listening in abroad on Al-Qaeda members' calls, the President

would not have had to make the frivolous and dangerous arguments that he has made and the only arguments he has made, which interestingly, Ruth has not defended here today, because he could have simply said, the Foreign Intelligence Surveillance Act does not cover this and so, I am authorized to do it. There would have been no controversy had that been the scope of the program.

So, by definition, even though they have not told us what it is, the very fact that they feel compelled to make this broad assertion of unchecked Executive power and to make this ridiculous argument that Congress somehow gave them, without saying something, that it specifically denied them in Section 1811,¹⁹ suggests that they are doing more than simply listening to members of Al-Qaeda.

PROFESSOR WEDGWOOD:

Am I permitted

PROFESSOR SCHARF:

I think we need to move on to the next Senator, who is the Honorable Jessie Hill and the Chair gives you the floor.

PROFESSOR JESSIE HILL:

My question is for Professor Wedgwood. So as I understand much of your testimony today you are suggesting that FISA is essentially, in many respects, out of date. The conditions in 1978 do not match the conditions that we are facing today and that the President, therefore, might need to exercise his powers to, essentially, as Professor Cole just suggested, ignore or overstep FISA. And of course, the natural responses is, you mentioned would be, well, why doesn't Congress simply amend FISA if it is out of date and as I understand your response to that, it is well, that's hard, essentially. And again, that this is wartime and that the President needs to act. I am wondering whether there is any authority or any Supreme Court case, in particular, where the Executive power to act in the face of explicit congressional disapproval has been upheld and, particularly, as Professor Cole pointed out, in the face of a criminal prohibition.

¹⁹ 50 U.S.C. § 1811 (2000).

PROFESSOR WEDGWOOD:

Well, the Clinton Administration itself, again, hued closely to the view that the President has authority to not follow statutes that he, in good-faith, believes to be unconstitutional and that one President does not preclude another President in that view simply because he signed a statute. But I think, again, you do not have to go there is my point because a reasonable construction of what Congress meant in 1978 was not to preclude every other contingency of changed technology, changed adversary. You have to read Congress's intention, reasonably.

Secondly, the problem with seeking a one-time Congressional fix is that statutes are extremely public. They have to be public. What the Federalist Papers do teach you about the need for dispatch secrecy and the Executive is partly because of the absence of our favorite phrase of acoustic separation. You cannot announce it to the public or the Congress when the adversary is listening as well. So, if Congress was to try to specify what algorithm would be sufficient to conclude that somebody is associated with al-Qaeda, clearly, you would not want al-Qaeda to know that or they would wear a different color tie or they would make fewer phone calls to al-Qaeda headquarters. They would find ways of engineering around whatever was your factually specific predicate.

And the idea of giving this to simply judges is that it is true that the FISA court has, over time, recruited a number of judges who were interested in intelligence and gained some expertise in it. What we have is an adversary who really is like quicksilver. Agile does not begin to describe the capacity for camouflage; vetting communications in an Internet image. The method of characterizing how you know somebody is a member of al-Qaeda is quite difficult to capture in any wartime circumstance.

And thirdly, I will quarrel on principle with the idea that it has to be criminal probable cause because if you were to require a 30 or 40 or 50 percent probability that somebody is associated with al-Qaeda before you could tap them, that means a 5 to 10 to 15 to 20 percent bad guy, who is intending extraordinarily harmful measures that will effect thousands of people, would be beyond your cannon. And in wartime, that would be a heck of a way to operate as a commander-in-chief.

PROFESSOR HILL:

And if I could just follow on that and tying it, perhaps, back to this question of remedies, should the information that is gathered in these wire-taps be able to be used to support applications to the FISA court and/or to be used in criminal cases and if so, is that undermining, in any way, Congress's intent?

PROFESSOR WEDGWOOD:

Well so far, they have not been. The Bush Administration has represented to the FISA court that it is not using any kind of off-FISA method of obtaining information in order to put together FISA probable cause. If it were, there has been a big debate again about the wall is the criminal versus intelligence. Much chagrin a lot of chagrin, if you will, on a number of sides, but the chagrin that the inability to integrate everything you know to collect the dots so you can connect them was deeply burdensome in the attempt to safeguard the Fourth Amendment. And the maintenance of the walls at the moment, are very bad, not simply in Berlin but in Washington, because it is hard enough to keep up with a quicksilver adversary and the inability to integrate criminal intelligence collection methods has been a real detriment in the past.

So one would have to think very carefully, through that problem. If you do not want to, obviously, have methods used as an evasion to the Fourth Amendment standards that would otherwise apply if you were really going after a coke dealer, you do not want to be using your FISA taps or non-FISA intelligence taps. But the problem of segregating purpose is also a difficult one.

PROFESSOR HILL:

Thank you.

PROFESSOR SCHARF:

Senator Guiora, the floor is now yours.

PROFESSOR GUIORA:

Thank you, Mr. Chairman.

Professor Wedgwood, we've been down the road of an unfettered Executive many times in American history and each time has been an utter failure. The FISA amendment allows for a fifteen-day warrantless period. In many ways, it strikes me that what you are suggesting is allowing the Executive, once again, this unfettered power. The question is whether, in the context of separation of power, is that something we can truly live with, particularly in this very tenuous age that we are all living in?

PROFESSOR WEDGWOOD:

Well, I think it may depend, in part, on the kind of issue you are speaking of being that Presidents, going way back, had aides that they later came to regret—actions they have come to regret.

In the regard to privacy this does not have to do with the physical integrity of the body. It does not have to do with torture or cruel, inhuman and degrading treatment. It is not an entitlement that is even mentioned in the International Covenant on Civil and Political Rights.²⁰ You look at state practice. Many, many European countries have utterly unregulated intelligence intrusions. We are unusual in the extreme in having this kind of statutory regulation of intelligence surveillance.

So I do think that when you are thinking about the dangers of abuse versus the importance of avoiding other kinds of abuses like the abuse of losing 10,000 or 100,000 citizens, that the kind of value that is at stake has something to do with the issue. There are other ways as John, arguably, instructed us of providing checks and balances, whether you have a very robust press, the fourth branch of government. When people are troubled by something it usually comes to light. But I do not think that you can treat this—if my friend David Cole is critical of the unitary theory of the executive, I would be equally troubled by the unitary theory of the counter-executive. You have to take it issue by issue and the practical circumstances that you are faced with. And in wartime, and this is in every good sense of the harm, of the danger of catastrophic harm in wartime. In that circumstance, the idea that Franklin Roosevelt would have let a federal judge tell him who to target or that even Congress could tell you who to target, would be dismissed. The Commander-in-Chief authority does mean something. Even state governors, as we know from Article 1, Section 10,²¹ have war powers when there is imminent harm that does not admit a delay. So, I just do not think you can go back to the founding of the republic and dismiss the real practical concerns that are here by citing opinions, pro or con, of Woodrow Wilson, and/or Abraham Lincoln's suspension of habeas corpus. I would not mix my apples and my oranges in this.

And finally, you do not have to subscribe to the unitary theory of Executive power if, suppose, that in some circumstances, the Executive does have inherent power.

PROFESSOR SCHARF:

A follow-up?

²⁰ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

²¹ U.S. CONST. art. 1, § 10.

PROFESSOR GUIORA:

I do. To Professor Cole. When you think about balancing in the context of the situation we are in, how do you see the balance between, if you will, the courts and the presidency?

PROFESSOR COLE:

I think that the approach that Justice Jackson put forward in the *Youngstown Sheet & Tube*²² case, which has been seen as the guiding approach to the separation of powers since that time, by a majority of the court, is the appropriate way to look at this question and that is if the President acts with the support of Congress, he is acting at his highest level of authority and he can go forward. If the President acts where Congress has been silent, then you are in a twilight zone and, generally, the President, with the ability to engage in *judicia*, is going to be upheld. But where the President acts in contravention of specific statutory dictates, he is acting at his lowest ebb and he can only take action contrary to Congress if Congress has no power to regulate the subject.

So how does that apply here? Well, Ruth referred to the *Truong*²³ case and very broad statements in the *Truong* case about the President's inherent power to conduct electronic surveillance, but she did not point out is when the *Truong* case was decided, it was talking about the President's authority before FISA was enacted. Before FISA was enacted, there was a statute that specifically recognized that the President has inherent power to conduct foreign intelligence electronic surveillance. So Congress had approved of the President's engaging in warrantless electronic surveillance, he was at his highest ebb, therefore, and the court, understandably, said that that would be constitutional.

When FISA was enacted, Congress repealed that provision and instead said, now we are setting the rules here. This is the only way to do it and it is a crime to do it in any other way. Ruth suggests, well, that is what they said in 1978 but times have changed. Maybe they do not need it anymore. Well, that argument, I think, ignores the fact that Congress has amended FISA five times, including in 2001 in the Patriot Act,²⁴ including in 2004, and never took out this directive that it is exclusive means. So, then the question is Congress—does Congress have power to regulate the subject

²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²³ *United States v. Hung*, 629 F.2d 908 (4th Cir. 1980).

²⁴ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272, 350-53 (2001).

of electronic surveillance of Americans at home? I think the answer to that is clearly yes under the Congress Clause, under the foreign Congress Clause, with respect to the NSA, under its power to issue rules and regulations governing the Army and Navy, as the NSA is part of the military, and, therefore, Congress, clearly, has authority to act here.

Now, it may well be that there some residual power that the Commander-in-Chief has that Congress could not override. I think, for example, if Congress sought to put the authority to run the war in some other official, outside the chain of command, that would violate the Commander-in-Chief authority. But the notion that Congress can not limit electronic surveillance, warrantless wiretapping of Americans at home simply because the President is fighting a war, I think, is a radical notion and one that is not supported by a single case—you do not have to go back to the original premise—from the time of the founding of the Republic to today holds the President cannot violate a criminal statute, even when exercising Commander-in-Chief power. And, as I said in my opening remarks, the two most recent Supreme Court decisions on point, *Hamdi*²⁵ and *Rasul*,²⁶ both squarely rejected that notion in the context of detention, which, if anything, is a fundamental incident of a war power is the detention of an enemy combatant and yet, the Court said, Congress can act to limit the President's power and the courts can act to review the President's exercising of it.

PROFESSOR WEDGWOOD:

If I may, Mr. Chairman, my unfounded prerogative—

PROFESSOR SCHARF:

Very briefly.

PROFESSOR WEDGWOOD:

Number one, FISA covers much more than Americans at home. Anybody, anybody who is territorially in the U.S. The twentieth, the twenty hijackers, the nineteen hijackers in the U.S. were covered by FISA, which means that you may have combatants here who are foreign nationality, foreign domicile who have the benefit of being protected by the FISA Court.

Clearly, there are some marks of Executive power that could not be trampled on by the Congress. If the Congress had said in World War II, that when FDR was targeting a Nazi submarine because they were concerned

²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²⁶ *Rasul v. Bush*, 542 U.S. 466 (2004).

about the possibility of damage to whaling, the future of the whale population in the North Atlantic, that you have to go to a court and have the court evaluate the predicate for knowing it was a Nazi submarine versus a whale, surely, that would be seen as an invasion of the Commander-in-Chief power, even though Congress has a valid interest in sustaining the whale population.

So David has to admit that, in some circumstances, the Commander-in-Chief power, not only has implications vis-à-vis Congress's power but the inappropriate use of our cardinal three courts, you should think about the limits of Article 3, as well as the limits of Article 2.

PROFESSOR SCHARF:

Senator Chodosh, you now have the floor.

ASSOCIATE DEAN CHODOSH:

Let's say that we concede that FISA is outdated and that legislative moments are few and far between, but let's also think that we are currently in a legislative moment in the wake of this controversy. Professor Wedgwood, what would you suggest be the primary amendments to FISA to make it work more effectively? And then Professor Cole, if you could comment on those suggestions and see which ones you would be willing to accept.

PROFESSOR WEDGWOOD:

That is a hard question because, again—

ASSOCIATE DEAN CHODOSH:

That is why I posed it.

PROFESSOR WEDGWOOD:

It is awfully hard because all what has been said by the administration is that there was one program, which consists of phone calls to or from persons associated with Al-Qaeda. And I think you will have a very long debate in the Congress to figure out how you characterize the necessary predicate. There are a whole vocabulary and issues of search, search and seizures counter to criminal law, where you have probable cause, we have reasonable suspicion, we think about "Terry Stops", but we never had to even think about this before the circumstance of, truly, catastrophic harm.

So, I think you would have to reopen and have a very long debate about probability versus harm with a one percent chance of a million people's death and sufficient as predicate. One percent chance this is Al-Qaeda, a million people; this would not be an easy debate.

The second problem is that to make it fit, what could be necessary iteration of some search procedures might require many legislative moments.

Third problem, I have never known a senator's staff to leak anything but to the senator. But the rule in Washington is the true one. If you tell more than a dozen people, it's in *The Washington Post* the next day. It just happens. And the difficulty in getting a tightly fitted statute, quite apart from what may be important constitutional principles of the President's inherent power to, is that to tightly fit the statute to the operation would involve persuading, and, therefore, telling, a great many senators what the program is and its operational details.

Senator Specter has suggested having the FISA Court be the one. Go tell FISA and they will give you some kind of a group warrant or an open-ended John Doe warrant to go and do likewise and the following kinds of searches that have you go back to them. That is probably outside the Article 3 power of a judge. This is not the limit we thought of warrants in the past.

So, I think that if there is going to be a legislative compromise, one of the likeliest ways of that is to have a reporting requirement, either to the big eight or to some kind of highly compartmentalized way the intelligence committees—it is what the ultimate compromise was on the Lindsey Graham amendment on interrogation procedures.

But I think part of the problem with the net, part of the problem with my pension plan stocks, my tech stocks, is that it is extremely hard to anticipate how electronic communications are going to evolve, even within a month-to-month circumstance. So to try to fit this to a dynamically changing technology, which extra-territorial, is going to be exceedingly difficult. Even the proper name Al-Qaeda is difficult. Terrorist groups morph. You can get around it with associates of Al-Qaeda, but what if we have another group that was a national group but was also thought to be interested in the same kind of catastrophic harm? Would you think of a proper name on the statute or would simply say try to frame it in terms of the kind of activities of terms of harm?

So it may well be—There is a book—no one reads his book anymore. It is a great book, I recommend it—Charles McIlwain *Constitutionalism: Ancient and Modern*.²⁷ He makes the distinction between governments and the jurisdictionality and governance; that congresses or parliaments tend

²⁷ CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1940).

to legislate in regard to things that admit of long-term solutions. Whereas the Executive or, in case of the royal power, it is the thought of this being what you need when it is, again, a kind of a dynamic circumstance where you cannot anticipate, in advance, the iterations and permutations of both things.

PROFESSOR COLE:

If I could respond. First of all, the notion that we face a truly catastrophic threat today, but did not in 1978 when we faced the world's second most powerful superpower which had thousands of nuclear missiles trained on every one of our cities, we did not face a catastrophic threat then? Sure, we faced a catastrophic threat then probably a greater threat than we face with respect to Al-Qaeda today, but certainly not a categorically different and, therefore, requiring an entirely different rubric.

Secondly, when I listen to what Ruth said in response, I understood her to be making two proposals, a reporting requirement; FISA already has one. It requires the reporting every year to the intelligence committee of the number of taps, the nature of the taps, the outcome of the taps and the like.

Third, she said we should not use names for terrorist organizations. What if we have terrorist organizations that morph? FISA does not use names. FISA defines a terrorist organization as a group of two or more people who engage in terrorism, which is very, very broadly defined. So that is not a problem under the current law. So the two proposals that Ruth has made are unnecessary because one is already in the law and the other is basically Ruth's misunderstanding of the law.

Let me talk about what FISA permits because I think that helps you understand what we might need in terms of changes. It permits any electronic surveillance that is collected abroad and targeted people abroad without regard to warrants, without regard to probable cause, without regard to any standard whatsoever. So right now, the NSA can listen in on every phone call of every person coming out of Afghanistan, Pakistan, Iraq, etc.; FISA does not even touch that.

Secondly, when and only when information is acquired in the United States or you target an American person within the United States, then FISA kicks in. Then, it allows you to listen in on anyone who is a member of a terrorist organization. You just have to show that the person's a member. Shouldn't you have to show that? Ruth, in her opening remarks said maybe probable cause is too high a standard. What is interesting to me is that the administration said that the standard they are employing under this program is probable cause. So they, apparently, the people who know the facts, who have made the decision about what national security requires, has said probable cause is okay by us. We just do not want to have to make the showing to a judge. But if you have to make the showing of probable

cause and you have to satisfy that objective criteria, what is the problem with showing it to a judge, unless, in fact, what you are doing is saying that you are applying probable cause when, in fact, you are not?

Now I think there could well be arguments that we might want to reduce the level of suspicion that is appropriate when someone is thought to be connected with the enemy during wartime. But again, the proper way to do that is ask for FISA to be amended. There was a legislative moment. It was called the Patriot Act, which the President asked for lots of changes to FISA in the Patriot Act. He got them but because he thought he could not get this one he decided to ignore the Patriot Act and violated criminal statute. That is not the way democracy works.

PROFESSOR WEDGWOOD:

A real quick repose to what is a point just so no one walks away from the cold war quite so easily. On the issue of catastrophic harm. The Cold War mutually assured destructive capabilities, a haunting phrase from Dr. Strangelove. The Soviets knew we would strike back if they struck us. Deterrence worked and we knew who the adversary was. There is no return address with regard to Al-Qaeda. And therefore, you have to anticipate things before they happen, which is an extraordinarily difficult task.

PROFESSOR SCHARF:

Senator Adler has the final question of the day.

PROFESSOR JONATHAN ADLER:

Thank you, Senator Scharf. Professor Cole, earlier, a few moments ago, you said there may well be portions of the Executive's Commander-in-Chief power that are beyond the scope of Congress's direct regulation. Is there any doubt that, in fact, there is such a core of the Commander-in-Chief power and could you give us some idea of what that core might be if it does not include surveillance of potential enemies?

PROFESSOR COLE:

As I said, I think all the clause says is that the President shall act as Commander-in-Chief, as the role of Commander-in-Chief, pursuant to a war that Congress has authorized, governing an army whose rules and regulations Congress sets, not the President, using whatever army Congress gives him. So it seems to me that the clear structural framework of the Constitution was we do not want to give the President a lot of power as Commander-in-Chief. But we do want to have a unitary source of authority for fighting

the war. So, as I suggested earlier, if Congress violated that principle, by putting someone else in charge or putting someone in charge of some aspect of the war which is not subject to the Commander-in-Chief oversight, than that might well be a violation, just as *Voucher v. Sinar*, taking away execution of the laws and giving it to somebody who was answerable to Congress, was a violation of separation of powers.

It seems to me that there are certain kinds of micromanaging of the battlefield tactics that might well be seen as within the core. But I do not think that issue is ever going to arrive because I do not think Congress would ever seek to regulate that. I think you could imagine in certain situations that Ruth believes are within the core. I do not think warrantless wire-tapping of Americans, without Congressional authority or judicial approval, is one of them.

PROFESSOR ADLER:

We have already heard several mentions, Professor Cole, the 2000 Moss memorandum²⁸ that said the President's authority of national security and intelligence would enable the President to violate Title III of the Omnibus Crime Control and Safe Streets Act,²⁹ pursuant to that authority. Was the Clinton Administration wrong in that memorandum?

PROFESSOR COLE:

I think that is a very a different situation. What you are really talking about there, what was at issue there was the grand jury secrecy provision, which says that you are not allowed to disclose information that you obtained through the course of a grand jury investigation and it is a crime to do so. The argument of the Clinton Administration, at least as I understand it, was that for two reasons it does not really make sense to apply this to the present.

The first is that the President is responsible for prosecuting the laws. He is ultimately responsible. So when his prosecutor happens to be in there, in the grand jury room, doing the investigation, he is the President. He is the alter ego of the President. So sharing that information with the President is not a violation of the statute and it should not be understood to be a violation statute. There is no indication that Congress intended the statute to prohibit that kind communication. What it was designed to prohibit was public communication of the secret goings-on of a grand jury. So this is a

²⁸ Moss Memorandum, *supra* note 12.

²⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

statute that could be properly interpreted not to apply to that kind of communication, at least, when you are talking about a national security concern that is the President's constitutional duty to respond to it.

The difference here, of course, is that there is no argument, in fact, the administration has not even suggested, given the arguments that they have made, you think that they might make this argument, they have not even made this argument, it is so ludicrous. There is no argument that FISA is not intended to prohibit warrantless wiretapping of Americans for foreign intelligence purpose during war beyond the first fifteen days of the conflict because Congress made it very clear this was about regulating the president's wiretapping. They specifically addressed the question of warrantless wiretapping during wartime. They specifically put a limit on it and they made it a crime. That is very different from the grand jury provision, which I think, could be reasonably understood not to prohibit the President's alter ego from sharing with the President, the information that is at issue when national security is involved.

PROFESSOR ADLER:

Really briefly, I have the memorandum. It says that Title III cannot, constitutionally, be applied to preclude such disclosure. Is not that an argument that, in fact, the law would be unconstitutional, in so far as it prevented the President from exercising his authority in this way and is that not the argument that, I think, Senator Roberts has made against FISA?

PROFESSOR COLE:

Yes, that is the argument, but essentially, is a very, very different context when you are talking about a general statute which there is no evidence that it was intended to preclude the president from talking to his inferior about the information. The inferior was acting on the President's authority in prosecuting where there is every bit of evidence to indicate this statute was designed to directly regulate the President's authority and, I think, under the Jackson analysis, the President's action is at his lowest ebb. I do not think the President's action was at its lowest ebb in U.S. History before.

