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## Article

# “Macro-Transparency” as Structural Directive: A Look at the NSA Surveillance Controversy

Heidi Kitrosser<sup>†</sup>

In December 2005, the New York Times broke a shocking story. For roughly four years, the National Security Agency (NSA) had run a secret surveillance program in which it spied without warrants on thousands of calls made between the United States and foreign nations.<sup>1</sup> It soon was revealed that the Bush administration had authorized the program through secret executive order in 2002.<sup>2</sup> Critics charged that the administration was violating the law by circumventing the requirements outlined in the Foreign Intelligence Surveillance Act (FISA).<sup>3</sup> The administration defended the program’s legality<sup>4</sup> and expressed fury at the public disclosure of the program’s

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1. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also JAMES RISEN, STATE OF WAR 43–44 (2006); Eric Lichtblau & James Risen, *Eavesdropping Effort Began Soon After Sept. 11 Attacks*, N.Y. TIMES, Dec. 18, 2005, at A44; David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at A1.

2. See RISEN, *supra* note 1, at 44; Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Congressional Research Service 2 (Jan. 5, 2006), <http://www.fas.org/sgp/crs/intel/m010506.pdf> (addressing presidential authority to conduct warrantless electronic surveillance to gather foreign intelligence information).

3. See, e.g., RISEN, *supra* note 1, at 44–59; Bazan & Elsea, *supra* note 2, at 42–44; Tom Daschle, Op-Ed., *Power We Didn’t Grant*, WASH. POST, Dec. 23, 2005, at A21; George F. Will, Editorial, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27.

4. See Memorandum from Alberto R. Gonzales, Attorney Gen., to William H. Frist, Majority Leader, U.S. Senate (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter

existence.<sup>5</sup> A common point in the administration's defensive and offensive positions is that the program's very existence needed to be kept secret.<sup>6</sup> The administration's offensive position is that the program's existence should never have been leaked and that any leakers may be prosecuted.<sup>7</sup> The administration's defensive position is that the program and its secrecy were national security necessities and that existing statutes, not to mention Article II of the Constitution, should be read as authorizing the program and its secrecy.<sup>8</sup>

This umpteenth call for national security secrecy by the Bush administration<sup>9</sup> gets the Constitution's approach to information control dangerously wrong. This Article focuses on this mistake's manifestation in the administration's defense of the program and its secrecy.<sup>10</sup> The administration's defense suggests a false choice between complete secrecy and complete openness. It also suggests a parallel false choice between near-complete presidential discretion and an ineffective national security system. Additionally, the administration's defense wrongly assumes that the Constitution poses these choices.

These errors stem from two fundamental problems in the administration's reading of the Constitution. First, the administration dramatically overreads the President's discretion to act, in the name of national security, in contravention of specific statutory mandates. It overlooks, in short, the Constitution's careful balance of powers between the legislative and ex-

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DOJ WHITE PAPER].

5. See Bruce Ackerman, *The Secrets They Keep*, SLATE, Dec. 20, 2005, <http://www.slate.com/id/2132811>; Editorial, *On the Subject of Leaks*, N.Y. TIMES, Jan. 4, 2006, at A14; Sanger, *supra* note 1.

6. See, e.g., DOJ WHITE PAPER, *supra* note 4, at 40-41.

7. See Ackerman, *supra* note 5; Editorial, *supra* note 5; Sanger, *supra* note 1; see also Bob Herbert, *Do You Know What They Know?*, N.Y. TIMES, Feb. 6, 2006, at A23; Gabriel Schoenfeld, *Has the "New York Times" Violated the Espionage Act?*, COMMENTARY, Mar. 2006, <http://www.commentarymagazine.com/cm/main/viewArticle.aip?article=com.commentarymagazine.content.Article::10136>; Scott Shane, *Leak of Classified Information Prompts Inquiry*, N.Y. TIMES, July 29, 2006, at A10; Scott Sherman, *Chilling the Press*, THE NATION, July 17, 2006, <http://www.thenation.com/doc/20060717/sherman>.

8. See sources cited *supra* note 7.

9. For a general discussion of rampant secrecy in the Bush administration, see Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

10. While this mistake also manifests itself in the administration's call for leak prosecutions, that topic is beyond this Article's scope. For such a discussion, see Heidi Kitrosser, *Classified Information Leaks and Free Speech* (2007) (unpublished manuscript), <http://www.ssrn.com/abstract=958099>.

ecutive branches. Second, the administration misconstrues the relationship between this balance and information control. An important reason for this balance's very existence, as evidenced by constitutional history, text, and structure, is to reconcile the democratic virtues of government transparency with the occasional need for government secrecy. The Constitution reconciles these factors by effectively mandating what this Article calls "macro-transparency" in governing, while leaving room for "micro-secrecy." The macro-transparency directive is that law execution must be traceable to publicly created and publicly known laws, even if those laws allow their execution to occur in secret (that is, even if they allow micro-secrecy). This point raises many questions of application, including how narrow legislation must be to be sufficiently transparent, whether legislative oversight of law execution may itself occur in secret and whether there are emergency exceptions to the general rule of micro-secrecy. For introductory purposes, though, what is important is to understand the general directive of macro-transparency and its accompanying allowance of micro-secrecy.

The administration's first error—its overreading of presidential discretion to ignore specific statutory mandates—has been noted by many critics of the NSA program.<sup>11</sup> While the program's secrecy also has been criticized,<sup>12</sup> the connection between that secrecy and the administration's first, more basic error, has not been considered in much depth.<sup>13</sup> Thus, the tension between the relatively transparent legislative process and the need for secrecy has not been meaningfully explored. Nor has the constitutional balance between macro and micro-secrecy and its ability to resolve this tension been identified. These points are very important. Without them, the arguments that the Constitution provides for some presidential secrecy and that near-complete secrecy was called for in this case are not fully answered. Furthermore, it is important more gener-

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11. See RISEN, *supra* note 1, at 44–59; Bazan & Elsea, *supra* note 2, at 42–44; Daschle, *supra* note 3; Will, *supra* note 3; see also John Cary Sims, *What the NSA is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 105–40 (2006); Memorandum from David Kris, Assoc. Attorney Gen., U.S. Dep't of Justice (Jan. 25, 2006), <http://balkan.blogspot.com/kris.fisa.pdf>.

12. See, e.g., Ackerman, *supra* note 5; Daniel J. Solove, *How Much Government Secrecy Is Really Necessary?*, Dec. 17, 2005, <http://concurringopinions.com/archives/2005/12>.

13. See Heidi Kitrosser, *Presidential Secrecy and the NSA Spying Controversy*, JURIST, Feb. 27, 2006, <http://jurist.law.pitt.edu/forumy/2006/02/presidential-secrecy-and-nsa-spying.php>.

ally to understand the Constitution's macro-transparency directive and its connection to the legislature/executive relationship. As I have explained elsewhere, the failure to perceive this directive lends itself to a troubling over-reliance on executive branch discretion to operate in secret.<sup>14</sup> Without an understanding of this directive, such discretion is seen as the only alternative to unchecked openness. The practical results of such misunderstanding range from the dramatic overclassification of information with few checks on the same, to the invocation of executive privilege as a talisman to keep information from Congress and the public.<sup>15</sup>

This Article explores the Constitution's macro-transparency directive and its connection to the legislature/executive relationship, using two NSA surveillance controversies, one past and one present, as analytical foci. Part I explains the textual, structural and historical basis for the Constitution's macro-transparency directive. Part II discusses the NSA surveillance controversies of the 1970s and congressional reaction thereto, including the creation of FISA and accompanying oversight provisions. Part II explains that these episodes shed much light on the wisdom of the macro-transparency directive and on the importance of vigilance by Congress and the public to ensure the directive's preservation. Part III discusses the current NSA controversy and the administration's defense of its post-9/11 NSA program. Part III cites the many constitutional errors in the administration's defense of the program and their common bases in the misuse of the concept of national security secrecy and in the overlooking of the macro-transparency directive. This Article concludes by discussing congressional reactions since the press revealed the post-9/11 program's existence, and what these reactions tell us about the value—and the limitations—of the macro-transparency directive.

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14. See Kitrosser, *supra* note 9, at 510–36.

15. See *id.*

## I. THE CONSTITUTION'S MACRO-TRANSPARENCY DIRECTIVE

### A. THE RELATIONSHIP BETWEEN LEGISLATIVE AND EXECUTIVE POWERS

This Subpart outlines the respective macro-policy and micro-implementation/execution roles of the legislature and executive. It does so for two reasons. First, although aspects of the relationship are obvious, we live in an era that has bred vast claims for unchecked presidential power.<sup>16</sup> As such, it is important to detail the legislature's function relative to that of the executive. It is particularly important to explain why national security-related governance exists, like other matters, within this general framework. Second, the macro-/micro-framework is a useful way to conceptualize the legislature/executive relationship. For one thing, the framework helps us to identify the common qualities of the legislature/executive relationship in military and non-military contexts. Most important for our purposes, understanding the macro-/micro-framework lends itself to an understanding of the parallel framework with respect to government information control.

It is useful to begin with an understanding of the general purpose that underscores the relationship between macro-policymaking legislature and micro-implementing executive. As a matter of logical inference from text and structure, the purpose appears to be to balance the liberty-enhancing features of the legislature with the energy and efficacy-enhancing features of the executive. The legislature's features, including its numerical breadth and its formal, dialogic, dual-chamber and dual-branch processes<sup>17</sup> seem directed at enhancing liberty by restraining hasty, ill-considered, secretive government action.<sup>18</sup> The executive's features, including a single President and his broad directives to execute the law and to command military forces,<sup>19</sup> seem designed to ensure an executive who can safely and urgently carry out the policies of the legislature.<sup>20</sup> These

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16. See, e.g., Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006, at 44–55; Jeffrey Rosen, *The Power of One*, NEW REPUBLIC, July 24, 2006, at 8–10.

17. See U.S. CONST. art. I, § 7, cl. 2.

18. See Adrian Vermuele, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 387 (2005).

19. See U.S. CONST. art. II, § 1, cl. 1; *id.* §§ 2–3.

20. See Gerhard Caspers, *The American Constitutional Traditions of*

combined features thus seem designed to ensure the country's capacity to protect itself and otherwise to act quickly and efficiently when necessary, and to guarantee deliberation and transparency in crafting the larger framework within which such actions occur.

These logical inferences are bolstered by history. James Madison, writing as Publius, identified a key challenge of the Constitution's drafting to be "combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form."<sup>21</sup> Alexander Hamilton took up this challenge in assessing the executive branch in particular. He rhetorically asked Federalist Paper readers whether the executive branch balances "all the requisites to energy" against "the requisites to safety, in the republican sense—a due dependence on the people, a due responsibility."<sup>22</sup> He concluded that this balance is achieved largely through legislative checking.<sup>23</sup>

#### 1. Legislation, Excluding Military Activities

The Constitution plainly establishes a framework wherein the legislature sets the nation's policy on a macro level.<sup>24</sup> Execution, and thus the relative micro-detail work of implementing the legislative big picture, falls to the executive branch.<sup>25</sup> Article I, Section 8 lays out the legislature's policymaking domain.<sup>26</sup> Among the legislature's most important powers are its abilities to raise funds through taxation and borrowing, to coin money and set its value and to "provide for the . . . general Welfare" through spending.<sup>27</sup> Article I, Section 9 makes clear that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>28</sup> These provisions mark an attempt to ensure that the executive, while spending and enforcing revenue-raising measures with energy and efficiency,

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*Shared and Separated Powers: An Essay in Separation of Powers*, 30 WM. & MARY L. REV. 211, 234–41 (1989).

21. THE FEDERALIST NO. 37, at 194 (James Madison) (Clinton Rossiter ed., 1961).

22. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 21, at 431–32.

23. *Id.*

24. *See* U.S. CONST. art. I, § 8.

25. *See id.* art. II, § 2.

26. *See id.* art. I, § 8, cl. 1–18.

27. *See id.* art. I, § 8, cl. 1.

28. *Id.* art. I, § 9, cl. 7.

does so within a policy framework created through the protective, dialogic and transparent realm of legislative process.<sup>29</sup> The concern to balance liberty against energy and efficiency is reflected more broadly throughout the complementary legislative and executive powers accorded respectively by Articles I and II. This includes, of course, Congress's ability to regulate matters including foreign and interstate commerce,<sup>30</sup> and its ability to legislate on that which is "necessary and proper" to effectuating its enumerated powers and those of the executive and judicial branches.<sup>31</sup> The resulting legislation constitutes the statutory law that the executive is to execute.<sup>32</sup>

One complication that demonstrates the general nature of the legislature/executive relationship and its intended protectiveness is the problem of delegation. Delegation, or the non-delegation doctrine, raises the question of just how broad "macro-policy" can be before it ceases to give the executive the mere power to execute its terms and instead delegates legislative power.<sup>33</sup> Today, the non-delegation doctrine lacks much doctrinal bite, although it has influence as a "shadow" doctrine.<sup>34</sup> The very need for such a doctrine demonstrates the practical complications in demanding that the executive refrain from legislating.<sup>35</sup> Nonetheless, the doctrine's existence and its acknowledged purpose reflect the intended nature of the legislature/executive relationship and the goals underlying such intent. Furthermore, the ability of the legislature to craft both very broad and very narrow legislation is a virtue in a substantial sense. Such ability reflects the tremendous flexibility of the macro-policymaking, or legislative, process. The legislature can accord the President tremendous discretion where that appears necessary, including the discretion to carry out legislative directives in secret.<sup>36</sup> But among the legislature's tools to check

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29. See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1342 (Cambridge, Brown, Shattuck, and Co. 1833).

30. See U.S. CONST. art. I, § 8, cl. 3.

31. See *id.* art. I, § 8, cl. 18.

32. See *id.* art. II, § 3.

33. See *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Field v. Clark*, 143 U.S. 649, 693-94 (1892).

34. See Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 442-43 (1989).

35. See, e.g., *Mistretta*, 488 U.S. at 372 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

36. See, e.g., Kitrosser, *supra* note 9, at 528-30 (discussing the legislature's ability to prescribe the boundaries of presidential secrecy).



the abuses of such discretion is the ability to pass narrower statutory directives, whether in anticipation of or in response to such abuse. Indeed, the practical reality that it is hard to police non-delegation requirements and that broad legislative directives to the executive are common makes it all the more urgent to restrain blatant executive disregard for those clear legislative limitations that do exist.

## 2. Military Activities

Two contrasting theories make the military context a particularly important one in which to examine the constitutional dynamic between legislature and executive. This Article argues, on the one hand, that while the need and apparent intent to provide for robust presidential micro-powers is particularly acute in the military realm, so is the need and apparent intent to provide robust legislative macro-constraints. On the other hand, theories of unchecked presidential prerogative in wartime have been deeply influential within the Bush administration,<sup>37</sup> and have gained some ground within the academy as well.<sup>38</sup> Given this background, it is particularly important to outline the ways in which the Constitution demands checks and balances in the realm of military affairs. It is worth reiterating the organizing principle of these checks and balances: while the President seems indeed to have heightened micro-powers in this realm, so does the legislature have enhanced macro-powers. Combined, these features translate the complementary benefits of energy and liberty to the realm of military action.

Military checks and balances are apparent in the text and structure of Articles I and II of the Constitution. Textually, the President's heightened micro-powers are embodied by his twin directives to execute the law, including military related legislation, and to serve as commander in chief of the armed forces.<sup>39</sup> Structurally, the qualities of the presidential office equip the

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37. See ARTHUR M. SCHLESINGER, JR., WAR AND THE AMERICAN PRESIDENCY 59–67 (2004); Linda Greenhouse, *Detention Cases Before Supreme Court Will Test Limits of Presidential Power*, N.Y. TIMES, Apr. 18, 2004, at A20; Mayer, *supra* note 16, at 44–55; Rosen, *supra* note 16, at 8–10.

38. See, e.g., Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond* 3 (Pub. Law & Legal Theory, Working Paper No. 134, 2006), available at <http://www.ssrn.com/abstract=922406> (citing such theories within academia).

39. See U.S. CONST. art. II, § 2, cl. 1; *id.* § 3.

President to quickly execute defensive and offensive actions.<sup>40</sup> This fact, combined with the textual provisions cited above and the more general provision vesting "the executive Power"<sup>41</sup> in the President, suggest robust presidential duties and prerogatives in the realm of military activity. Yet the analysis cannot stop there. Article I makes clear that the President is not unchecked within this realm.<sup>42</sup> While his powers may be more robust within this realm, so too are the powers accorded the legislature to create and control the macro-framework within which the President operates. Among Congress's military powers are its powers to declare war,<sup>43</sup> to "make Rules concerning Captures on Land and Water,"<sup>44</sup> "to raise and support Armies,"<sup>45</sup> "to provide and maintain a Navy,"<sup>46</sup> "to make Rules for the Government and Regulation of land and naval Forces,"<sup>47</sup> "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"<sup>48</sup> and to "provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."<sup>49</sup>

Indeed, the Supreme Court recently relied on Congress's copious checking functions over presidential wartime power in *Hamdan v. Rumsfeld*, where a majority of the Court concluded that the President lacked the power to employ executive-created military commissions.<sup>50</sup> The conclusion was based partly on the view that Congress had directed the use of other adjudicative forums under circumstances like those at issue.<sup>51</sup> A concurrence by Justice Breyer, joined by Justices Kennedy, Souter and Ginsburg, summed up that conclusion's grounding in constitutional checks and balances: "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check' . . . Where, as here, no emergency prevents consultation with Congress, judicial insistence upon

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40. See *supra* notes 19–20 and accompanying text.

41. U.S. CONST. art. II, § 1, cl. 1.

42. See *id.* art. I, § 8, cl. 15–16.

43. *Id.* art. I, § 8, cl. 11.

44. *Id.*

45. *Id.* art. I, § 8, cl. 12.

46. *Id.* art. I, § 8, cl. 13.

47. *Id.* art. I, § 8, cl. 14.

48. *Id.* art. I, § 8, cl. 15.

49. *Id.* art. I, § 8, cl. 16.

50. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2756–57 (2006).

51. See *id.* at 2759, 2772–75, 2786–96.

that consultation does not weaken our Nation's ability to deal with danger."<sup>52</sup>

Justice Breyer's suggestion that only an emergency might justify the circumvention of a statutory mandate is echoed by the majority at points.<sup>53</sup> This proposition reflects yet another more complicated aspect of the macro-/micro-relationship between legislature and executive. Because only the executive is structurally equipped to respond to immediate, unanticipated threats,<sup>54</sup> it stands to reason that the executive and commander-in-chief roles include the power to respond to such threats absent, or in rare cases contrary to, statutory authority. Such rare circumstances are those in which the legislative process cannot be activated in time to respond to a major, imminent threat and in which the executive's vigor and dispatch therefore must fill the power void.<sup>55</sup> The key here, however, is to understand how crucial it is that such responses be rare and temporally limited to what the immediate emergency requires.<sup>56</sup> Once the immediate emergency passes, the transparency, dialogue and other protections of the legislative process must be invoked to legitimize any continuing activities that fall outside existing statutory mandates.<sup>57</sup> This enables the executive to properly maintain its micro-execution role. It may step in to fill temporary power voids necessary to preserve the status quo when emergencies present themselves. However, should it go beyond these restrictions to secretly run programs that fall outside of these situational and temporal limitations

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52. *Id.* at 2799 (Breyer, J., concurring) (citation omitted).

53. *See id.* at 2773-74; *cf. id.* at 2790 ("[A]ny departure must be tailored to the exigency that necessitates it.").

54. *See* U.S. CONST. art. II, §§ 1-3; *see also* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 21, at 424 (referring to single-headed presidency's unique capacity for "[d]ecision, activity, secrecy, and dispatch").

55. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part) ("[I]n a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people . . .").

56. *Cf. id.* ("[A]n emergency power of necessity must at least be limited by the emergency."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47 (1952) (Jackson, J., concurring) (describing the danger and historical abuse of the concept of emergency powers).

57. *Cf. Laura S. Fitzgerald, Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 774-77 (1997) (making the interesting argument that the *Youngstown* Court should have positively valued the fact that the President, shortly after ordering seizure of the steel mills, invited Congress's public approval or disapproval of his action).

and outside existing statutory authorizations, it crosses a line to usurp legislative powers. More importantly, it threatens the liberty that such a line is meant to protect.

This reading of the situationally and temporally limited realm in which executive power may transcend statutory limitations parallels the historical understanding that the President, while dependent on Congress to declare war, nonetheless has the power to repel sudden attacks.<sup>58</sup> Indeed, the Constitution's drafters altered Congress's Article I war power from the power to "make war" to "the power to declare war" after it was urged that the President have the power to repel sudden attacks.<sup>59</sup> At the same time, it was argued in both the drafting and ratification processes that, beyond such temporally limited emergencies, the President must and would remain subject to any congressional restraints.<sup>60</sup>

Finally, while it has been argued that the President unilaterally may engage in hostilities greater than the repelling of sudden attacks,<sup>61</sup> even such arguments accept a framework of legislative control over any presidentially initiated actions, including Congress's ability to stop such hostilities entirely by withholding funding.<sup>62</sup> Taken on their own terms, then, such arguments assume public and congressional knowledge and ultimate control of hostilities. Thus, even from the vantage point of such arguments, the President fills a micro-role in plugging temporarily and situationally limited gaps that are checkable by Congress when time and circumstances make such checking feasible.

#### B. THE LEGISLATURE, THE PRESIDENT, AND THEIR RESPECTIVE RELATIONSHIPS TO INFORMATION CONTROL

The general relationship between the macro-policymaking legislature and the micro-implementing executive, then, reflects a desire to balance needs for liberty and wisdom against needs for energy and efficiency. An important subset of this relationship is the relationship between legislature and executive with respect to information control. The legislative process is designed largely as a transparent one to protect the people

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58. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 8 (2d ed., rev. 2004); JOHN YOO, *THE POWERS OF WAR AND PEACE* 96–100 (2005).

59. See FISHER, *supra* note 58, at 8; YOO, *supra* note 58, at 96–100.

60. See FISHER, *supra* note 58, at 8–10.

61. See YOO, *supra* note 58, at 96–100, 104–05.

62. See *id.* at 22, 139–42.

against the tyrannical potential of secret government.<sup>63</sup> The presidential office, on the other hand, is designed in significant part to facilitate presidential secrecy.<sup>64</sup> The Constitution thus embodies a “macro-transparency” directive insofar as it generally requires transparency in the macro-policymaking, or legislative process. Accompanying this directive is an allowance of “micro-secrecy,” permitting presidential implementation sometimes to occur in secret. The justifications for this relationship also are a subset of the justifications for the general macro-/micro-relationship between legislature and executive. The secret implementation of macro-policy directives by the executive can have obvious benefits for national security and for energy and efficiency more generally. Yet the openness of the process through which the governing macro-directives are formulated guards against the threats to liberty and wisdom that secrecy breeds.

This conclusion follows logically when one juxtaposes the relatively transparent nature of the legislative process and the President’s structural capacity for secrecy against the macro-/micro-relationship between legislature and executive generally. As for the generally transparent nature of the legislative process, I have catalogued elsewhere the various elements of inter-branch and intra-branch dialogue and transparency of the process, citing “a general expectation of deliberation and relative openness in the proceedings of the House and the Senate.”<sup>65</sup> This expectation is exemplified partly by the requirement in Article I, Section 5, Clause 3 that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same.”<sup>66</sup> Although the clause allows Congress to exempt “such [p]arts as may in their Judgment require Secrecy,”<sup>67</sup> this allowance notably is framed as an exception to a general openness norm. This fact, combined with the many-membered and dialogic nature of the legislature indicates an expectation that instances of legislative secrecy will be rare and will be sufficiently well known as to generate internal and external pressures in response to them.<sup>68</sup> The general expectation of congressional openness is bolstered also by historical expect-

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63. See *infra* notes 65–71 and accompanying text.

64. See *infra* text accompanying note 72.

65. Kitrosser, *supra* note 9, at 518.

66. *Id.* at 521 (citing U.S. CONST. art. I, § 5, cl. 3).

67. *Id.*

68. See *id.* at 522–24.

tations that congressional proceedings would be open and that the secrecy allowance would be applied very narrowly.<sup>69</sup> The constitutional protection of legislators against punishment for "Speech or Debate" also highlights the intrinsically dialogic legislative process that occurs within this presumptively public setting and the importance placed on such dialogue.<sup>70</sup> And Article I, Section 7 outlines the open, dialogic process of legislating:

the Constitution requires that a majority of the House of Representatives and of the Senate approve a bill. . . . Furthermore, once each chamber approves a bill, the bill must be shared with the President who concurs and signs the legislation or who, if he disagrees, not only must return the legislation to the chamber in which it originated but must do so "with his Objections." The relationship of this requirement to the process' public nature is particularly clear in light of the mandate that the relevant chamber "enter the Objections at large on their Journal." Furthermore, the President's objections ultimately must be shared with both congressional chambers and the bill becomes law only if two-thirds of each chamber, again against a presumptive backdrop of dialogue and relative openness, approves it. In a final nod to the process' public nature, "the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively."<sup>71</sup>

In contrast to the presumptively transparent legislative process, the presidency is designed in significant part to facilitate secret activity. As a structural matter, this is apparent from the fact that the President consists of a single person, who naturally is better equipped to keep a secret than a large group of people. This also is apparent structurally from the relative dearth of formal constitutional requirements as to how the President is to go about executing the law or serving as commander in chief. And history supports the notion that a major advantage of the single-headed presidency was understood to be the President's ability to operate in secret.<sup>72</sup>

It follows logically that a major advantage sought by the macro-/micro-relationship between legislature and executive is a balanced approach to information control. The executive exists as a weapon that can be unleashed to engage in secret ac-

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69. *See id.* at 520–27.

70. *See* U.S. CONST. art. I, § 6, cl. 1; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 35–37 (1948) (discussing the significance of the Speech and Debate Clause).

71. Kitrosser, *supra* note 9, at 518–19 (citations omitted). For more discussion of the open and dialogic nature of the legislative process, see Fitzgerald, *supra* note 57, at 761–67.

72. *See* Kitrosser, *supra* note 9, at 524–26.

tivity. Yet the macro-transparency of the legislative process that fuels and checks the President's micro-activities helps prevent presidential secrecy from turning against the people.

History supports this reading of Articles I and II. Indeed, in looking to founding era statements, it is striking to see how arguments about the information control advantages of the legislature/executive relationship parallel arguments about the general advantages of that relationship. In Federalist 26, for example, Alexander Hamilton spoke against objections to the government's power to provide for an army.<sup>73</sup> Hamilton explained that the lodging of this power in the legislative process and the limitation on the legislature's authorizing funds for more than two years at a time alleviate most of the cited dangers.<sup>74</sup> Hamilton drew partly on the general protections of the legislative process, particularly insofar as legislators "are not at liberty to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence."<sup>75</sup> Hamilton especially emphasized the protections of the legislature's dialogic, transparent features and of these features coming into play every two years with respect to military authorizations.<sup>76</sup> He noted that the legislature must, every two years, "deliberate" about military funds and "declare their sense of the matter by a formal vote in the face of their constituents."<sup>77</sup> "As often as the question comes forward," he argued, "the public attention will be roused . . . by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it."<sup>78</sup>

Alexander Hamilton also juxtaposed the advantages of presidential secrecy with the checking and sunlight-shedding role of the Congress.<sup>79</sup> It is important to recognize this feature of Hamilton's ratification era arguments. Hamilton's extolling of a single President's capacity for secrecy<sup>80</sup> often is cited to

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73. See THE FEDERALIST NO. 26 (James Madison), *supra* note 21, at 171.

74. See *id.*

75. *Id.*

76. See *id.*

77. *Id.*

78. *Id.* at 172.

79. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 21, at 423-25.

80. See *id.*

support a broad presidential discretion to keep secrets.<sup>81</sup> Yet a careful reading of Hamilton's pre ratification statements reveals an emphasis on balancing executive secrecy, vigor and efficiency against tools for shedding light on and checking executive abuses.<sup>82</sup> For example, in the same Federalist Paper in which Hamilton concludes that legislative checking adds "safety" to executive "energy," he discusses the light-generating impact of the Senate's role in the nomination process.<sup>83</sup> Echoing Madison's arguments about the transparency of legislative military appropriations,<sup>84</sup> Hamilton explains: "[A]s there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment . . . would naturally become matters of notoriety, and the public would be at no loss to determine what part had been performed by the different actors."<sup>85</sup> Both Hamilton and John Jay make similar points about the Senate's role in the treaty process. It is in the context of discussing treaties that Jay, like Hamilton, famously touts secrecy as a virtue of the single-headed Presidency. Like Hamilton, however, Jay combines this point with the benefits of a single President's ultimate transparency for legislative and popular checking agents. As I have noted elsewhere:

After referring approvingly to the President's capacity for secrecy in the treaty negotiation context, Jay dismisses concerns about corruption, deeming it improbable "that the President and two thirds of the Senate will ever be capable of such unworthy conduct." Jay further reassures that "in such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations." Finally, should all other safeguards fail, Jay explains that "motive to good behavior is amply afforded by the article on the subject of impeachments." Jay's references to Senatorial, bi-cameral (through impeachment) and international oversight assume a capacity on the part of those with oversight power to uncover information relating to possible Presidential corruption in the treaty-making process. Furthermore, insofar as Jay connects Senatorial and Presidential incentives for good behavior with the possibility of public rebuke, citing concerns about "honor," "reputations" and "disgrace," Jay assumes that an investigating and punishing Congress can make damaging information public and that this possibility

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81. See, e.g., MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 24–25 (2002).

82. See Kitrosser, *supra* note 9, at 506, 511 (explaining this reading of Federalist No. 70).

83. See *supra* notes 22–23 and accompanying text.

84. See *supra* notes 75–78 and accompanying text.

85. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 21, at 461.



will incentivize good behavior. This is consistent with [an observation by Alexander Hamilton] . . . that the Senate will not hesitate to shift public blame to the President for problems in the making of treaties.<sup>86</sup>

### C. THE MACRO-TRANSPARENCY DIRECTIVE AND JUSTICE JACKSON'S POWER ZONES

This Subpart connects the theoretical principles of Subparts A and B to Justice Jackson's well-known analysis from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>87</sup> This Subpart does so for two reasons. First, the three power zones named by Justice Jackson<sup>88</sup> constitute useful shorthand to describe the events that will be discussed in Part II. Second, the Jackson analysis is one of the most well-known tools for conceptualizing the relationship between presidential power and congressional power.<sup>89</sup> Indeed, this analysis has been cited often by participants and commentators in the recent surveillance controversies.<sup>90</sup> Yet as with separation of powers analysis generally, the relationship between this analysis and information control rarely is explored. The relationship of separated powers with information control and with the NSA controversies thus may be better understood if the discussion in Subparts A and B is translated into the language of the Jackson analysis.

In *Youngstown*, Justice Jackson described three basic zones of presidential power.<sup>91</sup> Presidential power is "at its maximum" in zone one.<sup>92</sup> In this first zone, "the President acts pursuant to an express or implied authorization of Congress."<sup>93</sup> In zone two, presidential power is at an uncertain, intermediate level.<sup>94</sup> In this second zone, "the President acts in absence of either a congressional grant or denial of authority."<sup>95</sup> Here, the President:

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86. Kitrosser, *supra* note 9, at 525–26 (citations omitted).

87. 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

88. *Id.* at 635–38 (Jackson, J., concurring) (describing three major zones in which presidential power can operate).

89. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring); FISHER, *supra* note 58, at 116–17.

90. See DOJ WHITE PAPER, *supra* note 4, at 11, 19–20, 28; Bazan & Elsea, *supra* note 2, at 5–6.

91. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

92. *Id.* at 635.

93. *Id.*

94. See *id.* at 637.

95. *Id.*

can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>96</sup>

In zone three the President's "power is at its lowest ebb."<sup>97</sup> In this third zone, he "takes measures incompatible with the express or implied will of Congress."<sup>98</sup> He thus "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>99</sup>

The first zone is the simplest from the perspective of the macro-transparency directive. The President's authority is at his highest in this zone because his actions are legitimized by statutory authority, which itself is legitimized partly by the relative transparency of the legislative process. Hence, even where micro-secrecy characterizes aspects of the President's implementation, the macro-framework under which he operates itself is transparent. The second zone raises the possibility of inherent presidential powers or presidential powers pursuant to very broad, ambiguous statutory authority, while the third zone raises the possibility of presidential powers that are both inherent and that trump contrary statutory authority. Actions in the respective zones indeed have progressively less presumptive legitimacy. The absence of a relatively clear, authorizing statutory process means the absence of legislative macro-transparency. And in the third zone, not only is such process absent but in its place is a macro-transparent process offering false assurance to the public and to other branches that the relevant activity will not take place. As suggested in Part B, however, there are three major points of flexibility by which zone two and even zone three actions sometimes are legitimate. First, inherent powers may be activated in a true emergency, although such power must be very carefully constrained if it is not to swallow the rules of checks and balances.<sup>100</sup> Indeed, if such power is restrained so that regular political processes are activated as soon as possible, then the

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See supra* note 55 and accompanying text.

macro-/micro-framework is never truly violated.<sup>101</sup> Rather, the executive remains in a micro/implementation role insofar as he acts unilaterally only to fill a temporary, emergency gap in government infrastructure. Second, the possibility and frequency of broad legislation leaves substantial room for executive discretion and for secrecy in the use of such discretion.<sup>102</sup> Technically, such actions could be said to occur within zone one but the line between zones one and two is fine where statutory authority is broad or ambiguous.<sup>103</sup> Again, given the dangers posed by executive discretion and secrecy, it is crucial that the executive branch adhere to any clear legislative limitations and to legislative oversight. The legislature's macro-framework and its transparency thus continue to perform at least a shadow role, facilitating the exposure of executive branch activity or placing other checks on the executive branch. Third, there may be other inherent powers that can be invoked without, or in rare instances contrary to, statutory authorization, at least where a situation that might itself be activated by legislation justifies such power.<sup>104</sup> For example, where Congress authorizes the use of military force, presidential powers to execute that authorization and to command the military may encompass a range of implementation activities not contemplated by the authorization's language or history. Such a situation is very similar to, and may overlap with, the second point of flexibility just noted and hence with both zones one and two. And such situations could fall within zone three as well. The latter may occur, for example, where inherent powers are activated by a use of force authorization but where more specific statutes limit activities that otherwise would fall within such powers. Zone three actions are particularly dangerous because they not only lack a macro-transparent authorization but they occur in the wake of macro-transparent authorization falsely assuring the people and other branches that the relevant actions will not occur. This is a major reason for the strong presumptive illegitimacy of zone three actions. Legislative oversight serves a particularly important function in these cases, helping to

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101. See *supra* note 56 and accompanying text.

102. For discussion of the non-delegation doctrine, see *supra* notes 33–35 and accompanying text.

103. See Sunstein, *supra* note 38, at 4 (discussing the statutory interpretation problem posed but unanswered by the Jacksonian power zones).

104. See *supra* notes 55–56 and accompanying text.

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determine whether laws have been violated and if so what consequences should follow.

## II. NSA SURVEILLANCE BEFORE 9/11 AND THE MACRO-TRANSPARENCY DIRECTIVE

Past and present NSA surveillance controversies are uniquely apt subjects to view through the lens of the preceding analysis. The very topic of surveillance raises the tension between the need for government secrecy, as surveillance by its nature must be conducted covertly, and the dangers of government secrecy, as covert surveillance is rife with the potential for abuse. The history that led to FISA demonstrates both the executive branch’s capacity for secrecy and efficacy and the risk that this capacity will be used tyrannically. As Senator Frank Church warned at Senate hearings to investigate intelligence gathering abuses (“The Church Hearings”), “[t]he danger lies in the ability of the NSA to turn its awesome technology against domestic communications . . . . [T]he NSA could be turned inward and used against our own people.”<sup>105</sup>

This Part discusses some of the history leading to FISA as well as aspects of FISA and related legislation. This history and resulting legislation have much to tell us about the constitutional principles described in Part I. And new light can be shed on the history and legislation themselves by viewing them through the lens of these constitutional principles.

### A. FISA AND THE HEARINGS AND EVENTS THAT PRECEDED IT

In the mid-1970s, a Senate Committee—often called the “Church Committee” for its chairman Frank Church—was charged to “conduct an investigation and study of governmental operations with respect to intelligence activities and of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government.”<sup>106</sup> This Subpart provides some background on the Committee’s findings as to the behavior engaged in by the intelligence agen-

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105. *5 Hearings Before S. Select Comm. to Study Governmental Operations With Respect to Intelligence Activities: National Sec. Agency and Fourth Amendment Rights*, 94th Cong. 2–3 (1976) [hereinafter *Church NSA Hearings*].

106. S. Res. 21, 94th Cong. § 1 (1975), *quoted in* FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: BOOK II, at v (1976) [hereinafter *CHURCH REPORT*].

cies generally and the NSA in particular. It also discusses the oversight process of the hearings and some of the hearings' major legislative fruits, including FISA. Finally, the Subpart explores the relationship between these events and the macro-transparency directive.<sup>107</sup>

### 1. Intelligence Agency Behavior

The Church Committee's work focused predominantly on five agencies: the FBI, the CIA, the NSA, the national intelligence components of the Defense Department (other than the NSA) and the National Security Council and its component parts.<sup>108</sup> The Committee found that the agencies had engaged in decades-long secret monitoring of American citizens.<sup>109</sup> Such monitoring took various forms, ranging from the opening of first class mail, to electronic surveillance and even to infiltration of groups.<sup>110</sup> Agency monitoring was dramatically overbroad, reaching thousands of American citizens and often triggered by citizens' associations with civil rights groups, peace organizations or other advocacy groups.<sup>111</sup> The Committee deemed such overbreadth a natural outgrowth of intelligence activities' "tendency . . . to expand beyond their initial scope,"<sup>112</sup> a tendency that "runs through every aspect of [the Committee's] investigative findings."<sup>113</sup> The Committee thus identified "a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners,' sweeping in information about lawful activities of American citizens."<sup>114</sup> The Committee was careful to emphasize that its findings "cannot [be] dismiss[ed] . . . as isolated

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107. A House Committee chaired by Otis Pike and a presidential commission chaired by Nelson Rockefeller engaged in similar studies around the same time. See DENIS MCDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 9 (June 2006) [hereinafter CAP REPORT]. The Church Committee's reports are widely considered the most comprehensive and influential of the studies. For simplicity's sake, this Article focuses on the Church Committee's hearings and findings.

108. See CHURCH REPORT, *supra* note 106, at vii.

109. See *id.* at 5–10.

110. See *id.* at 5.

111. See *id.*

112. *Id.* at 4.

113. *Id.*

114. *Id.* at 3–4.

acts."<sup>115</sup> Rather, the cited behaviors "have occurred repeatedly throughout administrations of both political parties going back four decades."<sup>116</sup>

The Committee's findings about the NSA exemplify these broader patterns. The NSA was created in 1952 by Executive Order "to conduct 'signals intelligence,' including the interception and analysis of messages transmitted by electronic means."<sup>117</sup> The NSA Director testified that the agency's mission "is directed to foreign intelligence obtained from foreign electrical communications"<sup>118</sup> and that the NSA interprets "'foreign communications' to include communication where one terminal is outside the United States."<sup>119</sup> Despite the agency's internal limitation against purely domestic surveillance, the Committee found that the "distinction between 'foreign' and 'domestic' intelligence" clearly eroded over time in the NSA's operations.<sup>120</sup> From 1964 to 1976, for example, the NSA "monitored international communications of Americans involved in domestic dissent."<sup>121</sup> Like the FBI, the CIA and military intelligence agencies, the NSA was assigned to investigate "'racial matters,' the 'New Left,' 'student agitation,' and alleged 'foreign influence' on the antiwar movement."<sup>122</sup> While citing the intelligence community's general tendencies toward abuse and overreaching, the Church Committee expressed special concerns about these tendencies in conjunction with the NSA's vast technological capacity.<sup>123</sup>

## 2. Factors Facilitating the Behavior

How and why could such widespread abuses have occurred for so long? The Church Committee's primary answer was that the "checks and balances designed by the Framers of the Constitution to assure accountability have not been applied."<sup>124</sup>

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115. *Id.* at 289.

116. *Id.* at vii, 289.

117. *Id.* at 104.

118. *Id.* (quoting *Church NSA Hearings*, *supra* note 105, at 6).

119. *Id.* at vii; *see also Church NSA Hearings*, *supra* note 105, at 24–25.

120. CHURCH REPORT, *supra* note 106, at 104.

121. *Id.* at 69.

122. *Id.* at 70; *see also id.* at 96.

123. *See supra* text accompanying note 105; *see also* CHURCH REPORT, *supra* note 106, at 36–38.

124. CHURCH REPORT, *supra* note 106, at 289.

Some important elements of this conclusion include the following:

1. Human beings naturally abuse power.<sup>125</sup> A major manifestation of this fact is the tendency of government officials to stretch dramatically the concept of “national security” to justify intrusive government operations.<sup>126</sup> The Constitution’s Framers established checks against such natural tendencies, recognizing that we must oblige government not only to “control the governed,” but to “control itself.”<sup>127</sup> Those checks for years have been ignored in the context of intelligence operations.<sup>128</sup>

2. The Constitution’s checks and balances were ignored most blatantly and systematically in Congress’s failure to provide a detailed, comprehensive statutory framework governing foreign intelligence activity.<sup>129</sup>

3. Statutory checks that did exist were bypassed by the intelligence agencies.<sup>130</sup>

4. The relevant operations were held in vast secrecy within the intelligence community.<sup>131</sup> In some instances, secrets even were kept from higher-ups in the executive branch, and secrecy from Congress and from the public was the operative norm.<sup>132</sup> Secrecy amounted not only to omission, but often to downright deception.<sup>133</sup> The Commission effectively drew a distinction between macro-secrecy and micro-secrecy, deeming it very troubling that intelligence agencies resorted to the former.<sup>134</sup> To this effect, the Committee stated, “Abuse thrives on secrecy. Obviously, public disclosure of matters such as the names of intelligence agents or the technological details of collection methods is inappropriate. But *in the field of intelligence, secrecy has*

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125. See, e.g., *id.* at 291, 293 n.3 (quoting THE FEDERALIST NO. 51 (James Madison)).

126. See *id.* at 3–4, 104, 205, 289.

127. *Id.* at 293 n.3 (quoting THE FEDERALIST NO. 51 (James Madison)); see also *id.* at iii (“[O]ur experience as a nation has taught us that we must place our trust in laws, not solely in men.”).

128. *Id.* at iii, 289–90.

129. *Id.* at 165, 169–70; see *id.* at 186–87, 308; see also *Church NSA Hearings*, *supra* note 105, at 35–36, 38, 42, 62–63 (exploring the lack of guidance of and restrictions on intelligence-gathering activities).

130. CHURCH REPORT, *supra* note 106, at 139, 190; see also *Church NSA Hearings*, *supra* note 105, at 57–59 (detailing the legal and constitutional problems with the NSA’s SHAMROCK message-collection program).

131. CHURCH REPORT, *supra* note 106, at 146, 292.

132. *Id.* at 146, 152, 292.

133. *Id.* at 16–17, 146.

134. See *id.* at 292.

been extended to inhibit review of the basic programs and practices themselves."<sup>135</sup>

5. Congress failed to provide effective oversight, bolstering the intelligence community's ability to shield other branches and the public from knowledge as to the basic nature and existence of programs.<sup>136</sup>

6. The foregoing factors—the absence of much governing legislation, violations of existing legislation, secrecy, and lack of oversight—stemmed partly from the pervasive view on the part of the governing branches and the public “that the control of intelligence activities [is] the exclusive prerogative of the Chief Executive and his surrogates.”<sup>137</sup>

### 3. Information Disclosure During the Hearings

A major means through which the legislature can provide transparency is through oversight, particularly hearings in which executive branch testimony and documents are sought. As Woodrow Wilson observed, Congress's “informing function” may be more important than its legislative function.<sup>138</sup> The Supreme Court, citing Wilson's point, noted Congress's power “to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government.”<sup>139</sup> In this realm, too, the choice need not be between complete secrecy and complete openness. That is, withholding information from Congress entirely is not the only alternative to full public disclosure. Rather, the Constitution again provides for macro-frameworks through which Congress can formulate processes to decide when and how to request, receive and publicize executive branch information. One such macro-framework is the legislative process.<sup>140</sup> Congress can pass and has passed statutes empowering it or others to receive information from the executive branch.<sup>141</sup> These statutes often impose procedural restrictions on the means through or extent to which information can be ob-

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135. *Id.* (emphasis added).

136. *Id.* at 6, 14–15; *see id.* at 290.

137. *Id.* at 292.

138. *See* *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (New York, Houghton Mifflin 1885)).

139. *Id.*

140. U.S. CONST. art. 1, § 7.

141. *See* Kitrosser, *supra* note 9, at 496–500.



tained.<sup>142</sup> One statute, for example, requires a legislative chamber to vote before a contempt charge can be brought against an uncooperative witness.<sup>143</sup> A second macro-framework is the rulemaking process of each congressional chamber. The Constitution leaves it to “Each House [to] determine the Rules of its Proceedings.”<sup>144</sup> This encompasses rules on information-gathering.<sup>145</sup>

The Church hearings themselves were, of course, a form of oversight. A few aspects of the hearings stand out in this respect. First, the Committee was quite successful in accessing national security information of a scope and nature that past Congresses had not sought or obtained.<sup>146</sup> Indeed, historian Loch K. Johnson has labeled the era from 1947, when the National Security Act was passed and the intelligence community was formally established,<sup>147</sup> until 1974 the “Era of Trust.”<sup>148</sup> Johnson relays an anecdote to illustrate the state of oversight in the Era of Trust: “then-CIA Director James Schlesinger recalled . . . Senate Armed Services Committee Chairman John Stennis (D-Miss.) telling him in 1973, ‘Just go ahead and do it, but I don’t want to know!’”<sup>149</sup> By the Church Committee’s formation in 1974, Congress was stunned and then emboldened after learning, “primarily from press accounts,” “of a series of botched and ill-advised covert actions at home and abroad.”<sup>150</sup> This set the stage for the Committee’s substantial mandate<sup>151</sup> and for an atmosphere in which it had the political capital to

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142. See, e.g., 2 U.S.C. §§ 192, 194 (2000).

143. Kitrosser, *supra* note 9, at 536 n.218 (citing 2 U.S.C. §§ 192, 194).

144. U.S. CONST. art. I, § 5, cl. 2.

145. See, e.g., FREDERICK M. KAISER, CONG. RESEARCH SERV., PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 1–6 (2005) (discussing rules created and considered by each house with respect to gathering and protecting classified information).

146. See, e.g., *Church NSA Hearings*, *supra* note 105, at 1–3, 41, 62 (comparing the NSA information sought and obtained by the Church Committee to that sought and obtained in earlier Congresses); see also CHURCH REPORT, *supra* note 106, at 6, 152 (noting the past concealment of information from Congress).

147. See CAP REPORT, *supra* note 107, at 6.

148. *Id.* at 9 (citing LOCH K. JOHNSON, GOVERNING IN THE ABSENCE OF ANGELS: ON THE PRACTICE OF INTELLIGENCE ACCOUNTABILITY IN THE UNITED STATES 12 (2003), [http://www.dcaf.ch/legal\\_wg/ev\\_oslo\\_030919\\_johnson.pdf](http://www.dcaf.ch/legal_wg/ev_oslo_030919_johnson.pdf)).

149. *Id.* at 9 (citing Johnson, *supra* note 148, at 13).

150. *Id.*

151. See *supra* text accompanying note 106.

seek and obtain access to top levels of the intelligence community.<sup>152</sup>

The Church Committee had important decisions to make not only as to the information that it should seek, but as to the information that it should make public. In some cases, the Committee met privately to determine whether to hold certain hearings or discuss certain information in public.<sup>153</sup> The Committee decided, for example, to take the public testimony of NSA officials for the first time in history.<sup>154</sup> Chairman Church noted the following at the start of that hearing:

The Committee has elected to hold public hearings on the NSA only after the most careful consideration . . . . To make sure this committee does not interfere with ongoing intelligence activities, we have had to be exceedingly careful, for the techniques of the NSA are of the most sensitive and fragile character. We have prepared ourselves exhaustively; we have circumscribed the area of inquiry to include only those which represent abuses of power; and we have planned the format for today's hearings with great care, so as not to venture beyond our stated objectives.

. . . .

Our staff has conducted an intensive 5-month investigation of NSA, and has been provided access to required Agency files and personnel. NSA has been cooperative with the committee, and a relationship of mutual trust has been developed. Committee members have received several briefings in executive session on the activities of the Agency, including a week of testimony from the most knowledgeable individuals, in an effort to determine what might be made public without damaging its effectiveness. Among others, we have met with the Directors of the NSA and the CIA, as well as the Secretary of Defense. Finally, once the decision was made to hold public hearings on the NSA, the committee worked diligently with the Agency to draw legitimate boundaries for the public discussion that would preserve

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152. See *supra* note 146 (citing references in the Church NSA Hearings and in the Church Report regarding relatively meager access by past Congresses to information obtained by the Church Committee); see also, e.g., Anthony Lewis, *Executive Privilege May Be an Issue Again*, N.Y. TIMES, Mar. 23, 1975, at 184 ("Political will is inevitably related to public opinion, and there the omens rather point toward revived Congressional firmness. Vietnam and Watergate drastically reduced public belief in the reasons given for executive secrecy."). But see Nicholas M. Horrock, *How Deeply Should the C.I.A. Be Looked Into?*, N.Y. TIMES, June 22, 1975, at 182 ("A substantial portion of the public believes that too much information on the [CIA] has already come out. These critics say that every new publicized detail serves to weaken national security and unnecessarily expose intelligence operations to foreign governments.").

153. See, e.g., *Church NSA Hearings*, *supra* note 105, at 1-3, 5, 46-50, 51-52, 57-58.

154. See *id.* at 1.

the technical secrets of NSA, and also allow a thorough airing of Agency practices affecting American citizens.

In short, the committee has proceeded cautiously. We are keenly aware of the sensitivity of the NSA, and wish to maintain its important role in our defense system. Still, we recognize our responsibility to the American people to conduct a thorough and objective investigation of each of the intelligence services. We would be derelict in our duties if we were to exempt NSA from public accountability.<sup>155</sup>

The existence of intra-Committee debate on the matter of publicity was clear. Committee members Senators Tower and Goldwater dissented openly to the hearings' public nature.<sup>156</sup> Senator Hart indicated that he originally had been opposed to public hearings but that he had changed his position in light of the information gleaned by the Committee about NSA abuses and about the hiding of those abuses from Congress and the public "for nearly [thirty] years."<sup>157</sup>

#### 4. The Hearings' Legislative Fruits

##### *a. FISA*

A major fruit of the hearings was the eventual passage of FISA.<sup>158</sup> This Subsection notes some major aspects of FISA that relate to electronic surveillance.<sup>159</sup>

First, FISA's drafters sought to establish clear, publicly known directives for foreign intelligence gathering. Among other things, FISA governs electronic surveillance of communications to or from a U.S. citizen or legal alien who is in the United States.<sup>160</sup> It also governs electronic surveillance of communications "to or from *any* person . . . within the United States without the consent of at least one party" to the commu-

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155. *Id.* at 1–2.

156. *See id.* at 38, 39, 41, 50, 61, 63.

157. *Id.* at 62.

158. *See* RISEN, *supra* note 1, at 42; Bazan & Elsea, *supra* note 2, at 12.

159. FISA's provisions govern "electronic surveillance, physical searches, installation and use pen registers/trap and trace devices, and orders to disclose tangible items." 50 U.S.C. §§ 1801–61 (2000); GINA STEVENS & CHARLES DOYLE, CONG. RESEARCH SERV., PRIVACY: AN OVERVIEW OF FEDERAL STATUTES GOVERNING WIRETAPPING AND ELECTRONIC EAVESDROPPING, at 37 (2003).

160. *See* 50 U.S.C. § 1801(f)(1) (2000) (providing that electronic surveillance includes communications sent or intended to be received by a "known United States person who is in the United States"); 50 U.S.C. § 1801(i) (2000) (defining "United States person" to include U.S. citizens and legal aliens).

nication.<sup>161</sup> FISA requires, with a few exceptions,<sup>162</sup> that such surveillance be conducted pursuant to a warrant.<sup>163</sup> Warrant requests, which must be authorized by the Attorney General, are made to the Foreign Intelligence Surveillance Court.<sup>164</sup> The Court is "comprised of eleven federal court judges designated by the Chief Justice to sit on the Court for a single seven year term."<sup>165</sup> Among other things, the application must specify why the person targeted for surveillance "is believed to be a foreign power or the agent of a foreign power,"<sup>166</sup> a category that includes those "engaged in international terrorism or activities in preparation therefor[e]."<sup>167</sup> The application also must summarize the procedures that will be followed to minimize the acquisition and use of information concerning United States citizens or legal aliens.<sup>168</sup> Additionally, the application must include certification by a senior advisor to the President that "a *significant* purpose of interception is to secure foreign intelligence information"<sup>169</sup> and that the information cannot reasonably be obtained through other means.<sup>170</sup> The application process is conducted in a highly secretive manner.<sup>171</sup> FISA court judges issue *ex parte* warrants for surveillance "upon a finding that the application requirements have been met and that there is probable cause to believe that the target is a foreign power or the agent of a foreign power."<sup>172</sup>

Second, FISA provides for two emergency exceptions to the warrant requirement for electronic surveillance.<sup>173</sup> First, the

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161. Bazan & Elsea, *supra* note 2, at 21 (emphasis added) (citing 50 U.S.C. § 1801(f)(2) (2000) (explaining that electronic surveillance includes communications sent or received by "a person in the United States, without the consent of any party thereto")).

162. *See infra* notes 173–77 and accompanying text.

163. *See* RISEN, *supra* note 1, at 42; STEVENS & DOYLE, *supra* note 159, at 37.

164. STEVENS & DOYLE, *supra* note 159, at 55.

165. *Id.* (citing 50 U.S.C. § 1803(a)–(b), (d) (2000)).

166. *Id.* at 56.

167. *Id.* at 56 n.144 (citing 50 U.S.C. § 1801(a)–(b) (2000)).

168. *Id.* at 57 & n.145.

169. *Id.* at 58 & n.146 (explaining that the Patriot Act altered the requirement from certification that foreign intelligence gathering is "the purpose" of interception to certification that foreign intelligence gathering is "a significant purpose" of interception).

170. *Id.* at 58.

171. *Id.* at 54.

172. *Id.* at 58 & n.148 (citing 50 U.S.C. § 1805(a) (2000)).

173. FISA also provides a third exception that is less relevant for the pur-

Attorney General is authorized to permit electronic surveillance prior to obtaining a warrant “if the Attorney General determines that emergency conditions make it impossible to obtain [a warrant] with due diligence before the surveillance is begun.”<sup>174</sup> In such cases, “[t]he Attorney General or his designee must immediately inform a FISA judge and submit a proper application to that judge as soon as practicable, but not more than 72 hours” after the surveillance is authorized.<sup>175</sup> As with FISA surveillance generally, procedures to minimize the acquisition and use of information concerning United States citizens or legal aliens must be followed.<sup>176</sup> A second exception permits the Attorney General “to conduct electronic surveillance without a court order for fifteen calendar days following a declaration of war by Congress.”<sup>177</sup>

Third, it is noteworthy that FISA has been amended explicitly on many occasions,<sup>178</sup> including through the USA Patriot Act of 2001<sup>179</sup> and through seven other amending acts passed after September 11, 2001.<sup>180</sup> Among other things, the Patriot Act authorized the use of “[r]oving wiretaps” under FISA,<sup>181</sup> increased the permitted duration of FISA wiretaps,<sup>182</sup> increased the number of FISA court judges from seven to eleven,<sup>183</sup> and authorized surveillance under FISA where foreign intelligence

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poses of this Article. That exception “permits the Attorney General to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that the electronic surveillance is solely directed at . . . foreign powers or on property or premises under the open and exclusive control of a foreign power [not including international terrorist organizations] where ‘there is no substantial likelihood that the surveillance will acquire’” communications involving U.S. citizens or legal aliens. Bazan & Elsea, *supra* note 2, at 25–26 (citing 50 U.S.C. § 1802 (2000)).

174. *Id.* at 26 (citing 50 U.S.C. § 1805(f) (2000)).

175. *Id.*

176. *Id.*

177. *Id.* (citing 50 U.S.C. § 1811 (2000)).

178. CONG. RESEARCH SERV., AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) (2006) [hereinafter FISA AMENDMENTS REPORT] (listing amendments since 1994).

179. *See id.* at 11–18 (listing changes made to FISA by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001)).

180. *Id.* at 8–29.

181. *Id.* at 11 (citing Patriot Act § 206).

182. *Id.* at 11–12 (citing Patriot Act § 207).

183. *Id.* at 12 (citing Patriot Act § 208).

gathering is a “significant purpose,” as opposed to the sole purpose, of surveillance.<sup>184</sup>

*b. Congressional Oversight Rules*

As reflected in the Church Committee’s conclusions,<sup>185</sup> the Committee’s hearings and related revelations of the era “convinced many Senators and Representatives that Congress had been too lax in carrying out its oversight responsibilities.”<sup>186</sup> With this realization came the end of Congress’s “era of trust”<sup>187</sup> and the promulgation of some provisions—including statutes and internal congressional rules—to facilitate congressional oversight and information.<sup>188</sup> Aspects of these provisions have been supplemented and amended over the years.<sup>189</sup> The intelligence community’s current statutory disclosure responsibilities include:

1. The President is to keep the congressional intelligence committees “‘fully and currently informed’ of U.S. intelligence activities, including any ‘significant anticipated intelligence activity.’”<sup>190</sup>

2. The Director of National Intelligence (DNI) and the intelligence agency heads similarly must “‘keep the intelligence committees fully and currently informed of all intelligence activities’ . . .” including through written reports on “‘significant anticipated intelligence activity.’”<sup>191</sup>

3. In carrying out his or her informing duties, the DNI must “show ‘due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelli-

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184. *Id.* at 16 (citing Patriot Act § 218); *see also supra* note 169.

185. *See supra* note 136 and accompanying text.

186. CAP REPORT, *supra* note 107, at 11.

187. *See supra* text accompanying notes 148–49.

188. *See* CAP REPORT, *supra* note 107, at 11–12; L. BRITT SNIDER, CENT. INTELLIGENCE AGENCY, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 6, 8 (1997).

189. *See* ALFRED CUMMING, CONG. RESEARCH SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTIONS 2–6 (2006); SNIDER, *supra* note 188, at 9–13.

190. CUMMING, *supra* note 189, at 2 (quoting Atomic Energy Act of 1946, Pub. L. No. 663, § 15, 60 Stat. 755 (1946) (amended 1956) and S. Rep. No 102-85, at 32 (1991)).

191. *Id.* at 4 (quoting National Security Act of 1947, 50 U.S.C. § 413(a) (1947)).

gence sources and methods or other exceptionally sensitive matters.”<sup>192</sup>

4. The President may limit prior notice of actions to the congressional group commonly known as the “Gang of Eight”—meaning “the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate”<sup>193</sup>—under very limited circumstances. Specifically, the President may limit disclosure regarding covert actions where the President determines that limited notice is “essential . . . to meet extraordinary circumstances. . . ’ affecting U.S. vital interests.”<sup>194</sup> “Covert action” is distinct from “intelligence activit[y].”<sup>195</sup> The former is defined by statute to mean “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”<sup>196</sup> There also is a “possibl[e]” exception for limiting notification to the “Gang of Eight” where “necessary to protect intelligence sources and methods.”<sup>197</sup>

##### 5. Macro-Transparency Based Reflections

The history and adoption of FISA and related oversight measures do much to vindicate the perceptions and visions of the Constitution’s Framers. The years of abuse that prompted the Church hearings and FISA demonstrate the intuitive insight that human beings are no “angels,”<sup>198</sup> that they have a natural tendency to abuse power,<sup>199</sup> and that this tendency can flourish particularly well in an office equipped for secrecy and vigor.<sup>200</sup> Happily, however, the corrective potential of separated

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192. *Id.*

193. CAP REPORT, *supra* note 107, at 22.

194. CUMMING, *supra* note 189, at 5–6.

195. *Id.* at 3.

196. *Id.* at 3 n.8 (quoting the National Security Act of 1947, 50 U.S.C. § 413(b) (1947)).

197. *Id.* at 4.

198. See THE FEDERALIST NO. 51 (James Madison), *supra* note 21, at 322.

199. *Id.*

200. See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION 70 (Max Farrand ed., 1911) (citing the statements of James Wilson to suggest that the executive should possess secrecy, vigor, and dispatch, and citing James Madison to say that he agrees with Wilson but notes the risk of “elective Monarchies”); 2 *id.* at 81 (“[The executive] will be more open to caresses [and] intrigues than the

powers and their relationship to information control was demonstrated by the eventual exposure of these abuses by the press and by Congress's responses. Among other things, Congress effectuated further information discovery and crafted legal curbs on future abuses. Congress did this in a manner that took advantage of the virtues of both macro-transparency and micro-secrecy: macro-transparency through the hearings and through subsequent legislation, and micro-secrecy in the executive opacity provided for in FISA and in the oversight mechanisms by which the Committee agreed to shield from the public some of the information that it learned. The capturing of macro-transparency's and micro-secrecy's advantages is reflected also in the fact that decisions to shield information apparently were made after discussion and with public acknowledgment of the same.

The following is a more detailed breakdown of the insights about macro-transparency and micro-secrecy that can be gleaned from the history and adoption of FISA and related oversight measures:

1. The pre-FISA abuses demonstrate the importance of legislative macro-transparency that shapes executive activity. At least some of the pre-FISA activity apparently occurred within zone two or even zone one of Justice Jackson's categories, given the Church Committee's observation about the absence of much specific constraining legislation.<sup>201</sup> This observation most intuitively leads, as the Committee concluded, to the view that clear, macro-transparent legislative standards should be formulated to constrain the executive, even if those standards themselves leave room for executive micro-secrecy.<sup>202</sup>

2. The pre-FISA abuses also demonstrate the importance of congressional oversight of ongoing executive activity. First, oversight is necessary to ensure that existing statutory constraints are being followed and to facilitate the continued use of the macro-transparent legislative process to make further statutory changes as needed. Indeed, the Committee discovered the violation of some existing statutory constraints, or, in Justice Jackson's terms, zone three activity.<sup>203</sup> Second, oversight is necessary to review zone one and zone two activity. Even if no legal violations exist, sufficient policy problems may exist in

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Senate.") (quoting Oliver Elseworth).

201. See *supra* note 129 and accompanying text.

202. See *supra* note 129 and accompanying text.

203. See *supra* note 130 and accompanying text.



the execution of statutory directives to suggest the importance of new measures. This may be particularly important with respect to very broad statutory directives. Third, oversight is necessary to discern the existence of possible constitutional violations, regardless of whether statutory violations exist. The Committee repeatedly noted their concern that NSA activity ran afoul of the Fourth Amendment.<sup>204</sup> The Committee also cited the importance of transparency to create awareness of, and the potential to redress, such violations.<sup>205</sup>

3. FISA exemplifies the ability of legislation to capture the advantages of legislative macro-transparency and formality, and executive branch micro-secrecy and discretion. For one thing, FISA's core warrant requirement itself combines transparent macro-directives with leeway for the executive to effectuate such directives in relative secrecy.<sup>206</sup> FISA also seeks to ensure enough regular information flow to Congress to enable meaningful oversight without compromising the secrecy of individual warrant processes. FISA requires, for example, annual reporting on the number of applications sought and granted.<sup>207</sup> FISA's emergency exceptions also seek to capture through statute the emergency response function of the executive valued in constitutional history and structure.<sup>208</sup> The limits on these emergency exceptions, however, can help to prevent the filling of emergency power gaps from morphing into regular, secret rule by executive discretion.<sup>209</sup>

4. The separate statutory oversight measures enacted in the wake of the scandals further exemplify tools to facilitate the inter-branch information flow necessary to make the macro-legislative and micro-execution scheme workable.<sup>210</sup> The ongoing informing responsibility imposed by these statutes<sup>211</sup> on the intelligence community is particularly important in that subset of Jacksonian zone one where very broad legislative directives exist, and in Jacksonian zone two, where no legislative direc-

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204. See CHURCH REPORT, *supra* note 106, at 14, 137, 139, 190–91, 290–91.

205. See *supra* notes 131–35 and accompanying text; see also *Church NSA Hearings*, *supra* note 105, at 46–52; CHURCH REPORT, *supra* note 106, at 2–3.

206. See *supra* notes 163–72 and accompanying text.

207. See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: AN OVERVIEW OF THE STATUTORY FRAMEWORK AND RECENT JUDICIAL DECISION 32 (2005).

208. See *supra* notes 173–77 and accompanying text.

209. See *supra* notes 173–77 and accompanying text.

210. See *supra* notes 190–97 and accompanying text.

211. See *supra* notes 190–91 and accompanying text.

tives exist. In such realms, Congress may not know which questions to ask or which information to request to conduct effective oversight unless the executive branch regularly provides Congress with basic information. And, the "Gang of Eight" provision cited earlier<sup>212</sup> reflects the fact that Congress, through legislation and through its constitutional ability to create intra-chamber procedural rules, has countless mechanisms available to it to strike a balance between complete secrecy and complete openness. Limiting the "Gang of Eight" provision to only certain covert actions<sup>213</sup> also indicates Congress's awareness of the potential abuse of exceptions to a general informing responsibility. Finally, as noted earlier, Congress has other, more general information-gathering statutes and intra-chamber rules at its disposal.<sup>214</sup> As the Church hearings reflect, for example, Senate committees privately may discuss and vote on whether to take testimony behind closed doors or whether to take it publicly, and the public may be made privy at least to the fact and topic of this discussion.<sup>215</sup>

### III. POST-9/11 DEVELOPMENTS: LESSONS UNLEARNED AND POSSIBLY RELEARNED

#### A. THE NSA'S POST-9/11 ACTIONS AND THE ADMINISTRATION'S RESPONSE TO THE LEAKED INFORMATION

In December of 2005, the New York Times broke the story that the Bush administration, since shortly after 9/11, had secretly authorized the NSA to spy on telephone calls where one party to the call was outside of the United States.<sup>216</sup> Members of the administration, including President Bush and Attorney General Gonzales, have publicly confirmed the existence of the program.<sup>217</sup> Furthermore, the administration has defended the

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212. See *supra* notes 193–97 and accompanying text.

213. See *supra* note 194 and accompanying text.

214. See *supra* notes 141–45 and accompanying text.

215. See *supra* note 153 and accompanying text.

216. See Risen & Lichtblau, *supra* note 1; Sanger, *supra* note 1.

217. See *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 764–65 (E.D. Mich. 2006) ("It is undisputed that [the] Defendants have publicly admitted . . . [that] the [surveillance program] exists."); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 993 (N.D. Cal 2006) (discussing government admissions and concluding that "the government has disclosed the general contours of the 'terrorist surveillance program'"); see also, e.g., DOJ WHITE PAPER, *supra* note 4, at 1; Sanger, *supra* note 1; Press Release, Press Briefing by Attorney Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy

program vigorously through public legal memoranda, in congressional hearings, and in the press.<sup>218</sup> Despite its defenses, which are discussed below, the administration has never seriously claimed that the program complies with FISA's warrant requirements. Indeed, the administration could not make this argument in light of its admission that the program permits warrantless telephone surveillance of U.S. citizens and legal aliens so long as one party to the call is overseas. Such permission, of course, runs directly counter to FISA's terms prohibiting warrantless surveillance of any call to which a U.S. citizen or legal alien in the United States is a party. Nor is there any claim that the NSA program falls under one of FISA's emergency exceptions, as the program is not limited either to seventy-two-hour intervals of warrantless spying or to a fifteen-day period following a congressional declaration of war.<sup>219</sup>

The administration's main legal defense comprises two arguments. First, the administration argues that it need not have complied with FISA because FISA's requirements were supplanted by the 2001 Authorization for Use of Military Force (AUMF) enacted in the wake of the September 11th attacks. Second, the administration argues that, even if the AUMF does not directly authorize the NSA program, the Constitution inherently empowers the President to create such a program. And while the administration often avoids saying it definitively, it repeatedly indicates that any legislation that conflicts with such inherent power probably is unconstitutional.<sup>220</sup>

As for the first argument, the AUMF was enacted three days after September 11, 2001. It authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>221</sup>

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Dir. for Nat. Intelligence (Dec. 19, 2005) [hereinafter Gonzales-Hayden Briefing], <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

218. See, e.g., *Wartime Executive Power and National Security Agency's Surveillance Authority: Hearing Before Comm. on Judiciary*, 109th Cong. 11 (2006), available at <http://fas.org/irp/congress/2006-hr/nsasurv.pdf> [hereinafter *Gonzales Transcript*]; DOJ WHITE PAPER, *supra* note 4; Sanger, *supra* note 1; Gonzales-Hayden Briefing, *supra* note 217.

219. See *supra* notes 176-77 and accompanying text (citing these statutory exceptions).

220. See discussion *infra* Part III.B.

221. S.J. Res. 23, 107th Cong. § 2(a) (2001).

The administration argues that this authorization encompasses the NSA surveillance program as necessary, incident to determining who was involved in the attacks and to using force against such persons.<sup>222</sup> The administration further argues that FISA's language provides for supplementation by other statutes by prohibiting "intentionally 'engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*'"<sup>223</sup> According to the administration, AUMF constitutes an authorizing statute, effectively superseding FISA's provisions with respect to the post-9/11 NSA activities.<sup>224</sup>

Although the AUMF argument is couched as statutory in nature, it rests in substantial part on constitutional interpretation—specifically, on a very broad reading of presidential power under Article II. This fact is manifested most obviously in the administration's constitutional avoidance argument, whereby it argues that any statutory ambiguity should be resolved in the administration's favor to avoid the risk of "infring[ing] on the President's Commander-in-Chief powers."<sup>225</sup> The administration deems such powers at their height with respect to "matters requiring secrecy—and intelligence in particular."<sup>226</sup> This vision of Article II also underscores the administration's reading of the AUMF more generally. In explaining its view that "the AUMF is a 'statute' authorizing surveillance outside the confines of FISA,"<sup>227</sup> the administration cites "the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack" and attributes the decision largely to "the fact that the Executive can act quickly, decisively, and flexibly as needed."<sup>228</sup> The administration elaborates that, "[i]n emergency situations, Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force. That is precisely what Congress did when it passed the AUMF on September 14,

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222. See DOJ WHITE PAPER, *supra* note 4, at 10–17; *Gonzales Transcript*, *supra* note 218, at 13–15.

223. DOJ WHITE PAPER, *supra* note 4, at 20 (citing 28 U.S.C. § 109 (2000)) (emphasis added by the DOJ); see also *Gonzales Transcript*, *supra* note 218, at 13.

224. See DOJ WHITE PAPER, *supra* note 4, at 23–28; *Gonzales Transcript*, *supra* note 218, at 47.

225. DOJ WHITE PAPER, *supra* note 4, at 29.

226. *Id.* at 30.

227. *Id.* at 28.

228. *Id.* at 25.

2001—just three days after the deadly attacks on America.”<sup>229</sup> Given the respective constitutional roles of the President and Congress, then, a broadly worded force authorization passed during a national emergency implicitly amends statutes that the President deems to constrain his use of the incidents of force.

This theory is most directly invoked in the administration’s constitutional argument. The two-part argument is that: (1) the NSA program is legitimate even if the AUMF does not authorize it because Article II of the Constitution gives the President the inherent power to create such programs, particularly in times of crisis;<sup>230</sup> and (2) If FISA conflicts with such inherent powers, then FISA is unconstitutional because it interferes unduly with Article II of the Constitution.<sup>231</sup> The administration has only rarely made the second point definitively.<sup>232</sup> Instead, it repeatedly has stated that FISA *likely* would be deemed unconstitutional if the issue were forced.<sup>233</sup> Yet despite the administration’s attempt to obscure its reliance on the second point,<sup>234</sup> it must prevail on this point should its statutory argument fail. If the AUMF is not deemed to amend FISA, then FISA constitutes the controlling statutory authority. There is no serious dispute that the administration authorized warrantless surveillance of telephone calls governed by FISA’s warrant requirements.<sup>235</sup> Thus, if forced to rely on its constitutional point, the administration must prevail not only on the notion that the President’s inherent powers authorize the NSA program, but

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229. *Id.*

230. *Id.* at 6–10; *Gonzales Transcript*, *supra* note 218, at 21–23.

231. DOJ WHITE PAPER, *supra* note 4, at 3.

232. *Id.* (“[I]f this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context.”).

233. *Id.* (stating that if the issue of FISA’s constitutionality regarding this subject were forced, it “would be called into very serious doubt”); *Gonzales Transcript*, *supra* note 218, at 61 (responding, when asked about the constitutionality of a surveillance program that violates a statute: “I haven’t done the detailed work that obviously these kinds of questions require. These are tough questions. But I believe that the President does have the authority under the Constitution”); *cf. id.* at 33 (stating that whether the President may authorize warrantless surveillance in the wake of contrary legislation is a “much harder question” than that of inherent power absent conflicting legislation); *id.* at 85 (“I believe that . . . there would be some serious constitutional questions there. But I am not prepared at this juncture to say absolutely that if the AUMF argument does not work here, that FISA is unconstitutional as applied.”).

234. *See supra* note 233 and accompanying text.

235. *See supra* note 217 and accompanying text.

on the notion that FISA is unconstitutional to the extent that it interferes with the program.

The constitutional theory on which the administration relies to make these points is the same theory that it uses to bolster its reading of the AUMF. Again, the administration emphasizes the Framers' creation of a President designed to act quickly, efficiently and secretly.<sup>236</sup> The administration explains that the presidential office was designed in this way so that the President can protect the nation effectively, and that the President has inherent authority to do so through surveillance and other means.<sup>237</sup> Congress is deemed to tread on dangerous constitutional ground when it restricts such powers.<sup>238</sup>

#### B. THE ADMINISTRATION'S MISTAKES ABOUT SECRECY AND SEPARATED POWERS

The administration's legal errors are wide-ranging. But one claim stands out as a linchpin to which various tenuous arguments are tethered: That is, the administration's core secrecy claim—the notion that national security required that the surveillance program's very existence be secret, that requesting congressional approval of the program would have let the proverbial cat out of the bag, and that it is the President's right and responsibility to keep secrets under such circumstances. From this follows the administration's claim that the AUMF encompasses the power to engage in surveillance that deviates from FISA's directives where the President deems such secret policy necessary. It also follows, according to the administration, that Article II empowers the President to so act and that this constitutional license trumps FISA's statutory provisions.

Indeed, we see the administration's reliance on the secrecy point in the pieces of its argument cited above. Recall that the administration, in defending the NSA program, deemed the President's commander-in-chief power at its apex in "matters requiring secrecy—and intelligence in particular."<sup>239</sup> Recall also the administration's emphasis on the President's special capacity for secrecy.<sup>240</sup> Furthermore, when testifying before Congress, Attorney General Gonzales was quick to "clarify" that

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236. See DOJ WHITE PAPER, *supra* note 4, at 7, 25.

237. See *id.* at 9–10, 25; *Gonzales Transcript*, *supra* note 218, at 12, 21–23.

238. See DOJ WHITE PAPER, *supra* note 4, at 3, 28–36; *Gonzales Transcript*, *supra* note 218, at 60.

239. See *supra* note 226 and accompanying text.

240. See *supra* note 236 and accompanying text.

the administration avoided seeking congressional approval because of the secrecy imperative, after he had used language suggesting that such approval was not sought because it would be politically difficult to obtain it.<sup>241</sup>

The administration's arguments badly misconstrue the relationship between secrecy and separated powers. The remainder of this Subpart outlines the administration's major missteps in this regard. As noted above, the administration largely blends its statutory and constitutional arguments. That is, the administration relies on an extremely broad reading of the President's Article II power to build and maintain entire programs in secret. It uses this reading both as an independent argument about constitutional power and to justify very broad interpretations of any statutory authorizations to the President. Given the administration's approach, this Subpart's responsive points for the most part do not distinguish between the administration's statutory and constitutional arguments. Where such distinction is not made, it is because the responsive points at issue engage both the administration's broad reading of Article II and its companion conclusion that the AUMF empowers the President to circumvent statutory obligations—including FISA—that the President deems obstructive of his ability to use force.

#### 1. Conflating Macro-Secrecy and Micro-Secrecy

The administration's arguments conflate macro-secrecy and micro-secrecy. That is, it assumes, with very little explanation, that the need to conduct surveillance in secret necessarily means that the program permitting such surveillance itself must be secret. Bruce Ackerman made this point shortly after the NSA program came to light, deeming President Bush's claimed secrecy needs to be grounded in:

a simple confusion between creating the spying program and implementing it: Once the NSA begins spying on particular Americans, leaks about the details might well endanger national security. But this point is irrelevant with respect to this key question: Why didn't he let us know he was creating the new spying initiative in the first place?<sup>242</sup>

This problem has overlapping practical and legal elements. On a practical level, it is difficult to imagine why knowledge of the precise legal framework for conducting covert surveillance

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241. See *Gonzales Transcript*, *supra* note 218, at 14.

242. See Ackerman, *supra* note 5.

would advantage terrorists who already know that they can be spied on covertly. To the very limited extent that the Bush administration has deigned to engage this question, their answer seems to be that such knowledge reminds "the enemy" of what it already knows but might have forgotten. This "logic" is reflected in testimony by Attorney General Gonzales before the Senate Judiciary Committee:

I think, based on my experience, it is true. You would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget, and you're amazed at some of the communications that exist. And so, but when you keep sticking it . . . in their face that we are involved in some kind of surveillance, even if it is unclear in these stories, it can't help but make a difference, I think.<sup>243</sup>

This substantial practical problem with the administration's secrecy argument is underscored by a deeper problem of constitutional law. The Constitution's Framers were hardly oblivious to the risks posed by a dangerous world. As Jason Mazzone writes:

With more than two centuries of national government behind us, it is easy to forget that in the early years following the Revolutionary War, it was far from certain that the American experiment in independence would ultimately succeed. Eighteenth-century America was a precarious setting. Although they had defeated the British, Americans remained preoccupied with the notion that there were forces conspiring against their freedom. These fears were not the reflection of unfounded paranoia. As Gordon Wood notes, "The Federalists were . . . not mistaken in their sense of the fragility of the United States. It was the largest republic since ancient Rome, and as such it was continually in danger of falling apart."

. . . .

In addition to external attacks, violence might erupt from within. Sleeper cells might seem a new evil, but eighteenth-century Americans took for granted that foreign sympathizers were living among them, biding their time for the right moment to strike or to stir up trouble . . .<sup>244</sup>

Mindful of the many dangers posed to national security, to liberty and to wisdom, the Framers struck the balance embodied by separation of powers generally and the macro-transparency directive in particular. That is, the Framers designed a Constitution generally requiring openness and deliberation in the crafting of policy. At the nation's disposal, how-

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243. *Gonzales Transcript*, *supra* note 218, at 107.

244. Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 37-38 (2005).



ever, would be a powerful executive capable of implementing such policy in secret. For the President to run a secret program for years and then to defend it with a barely explained assurance that openness would have been too dangerous to employ, makes a mockery of the Framers' design.

## 2. Conflating Zone Two and Zone Three Actions

The administration also tends to conflate Jacksonian zone two actions and Jacksonian zone three actions.<sup>245</sup> The administration frequently emphasizes that it has inherent power to conduct surveillance absent congressional approval.<sup>246</sup> Assuming such zone two power, however, it is not at all clear that this would translate to zone three power should the power be used in the face of contrary legislation such as FISA. As noted earlier, the administration deemphasizes the zone three question, at times stating that a zone three action likely would be constitutional and at times avoiding that question entirely and focusing on its zone two arguments.<sup>247</sup> However, the administration cannot avoid the zone three question should they not prevail on the point that the AUMF overrides FISA's requirements.<sup>248</sup> If FISA's requirements apply, then the administration's actions are legal only if FISA is unconstitutional to the extent that it overrides the President's power to operate the NSA program.<sup>249</sup>

What is most important is that the administration's conflating of zone two and zone three actions obscures the significance of the distinction for separated powers generally and for the macro-transparency directive in particular. As noted earlier, zone two actions are less presumptively legitimate than zone one actions because the former are not the product of the legislative process with its deliberation and transparency based protections. At the same time, there are important constitutional advantages to zone two actions that give them much greater presumptive legitimacy than zone three actions. First, zone two actions simply do not stray as far as do zone three ac-

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245. See *supra* Part I.C (discussing the Jacksonian power zones).

246. See *supra* notes 230–37 and accompanying text.

247. See *supra* notes 232–33 and accompanying text.

248. See *supra* notes 234–35 and accompanying text.

249. See Posting of Marty Lederman to Balkanization, <http://balkin.blogspot.com> (July 23, 2006, 21:20 EST) (pointing out that it is a mistake to conflate inherent power with the power to act in the face of a conflicting statute, and that Senator Specter makes this mistake in emphasizing the administration's inherent power to conduct surveillance in Arlen Specter, Op-Ed., *Surveillance We Can Live With*, WASH. POST, July 24, 2006, at A19).

tions from the macro-transparency directive. While zone two actions are not flagged publicly by legislation (or, in the case of the grey space between zone one and zone two,<sup>250</sup> they are flagged only by an extremely broad legislative delegation under which countless executive decisions could fall), they also do not occur in the face of public, legislative reassurance that they will not occur. This has important implications for public knowledge and for the legislature's ability to perform its oversight and legislative responsibilities. A common lament about the NSA's secret post-9/11 activities, for example, is that Congress focused publicly on balancing civil liberties and national security through post-9/11 amendments to FISA, while the administration secretly and unilaterally granted itself additional exemptions from FISA.<sup>251</sup>

Second, Congress obviously knows how to refrain from passing legislation or to leave legislation so broad as to create a zone two situation or a grey space between zone two and zone one (in which legislation is so broad as to encompass a wide range of conceivable executive actions). Congress thus has the tools to permit precisely the degree of presidential discretion that the administration indicates it wished to have with respect to surveillance. Indeed, such discretion existed, in large part, prior to the Church hearings and to FISA's creation. When Congress chooses to alter or eliminate such discretion, the public, legislative process through which such alteration occurs, along with any dialogue or oversight that accompanied or preceded that process, substantially bolsters the legitimacy of this choice. Such transparency, dialogue and investigation are hallmarks of the legislative structure and structurally are far less likely to be present where the President chooses to ignore such legislative imperatives.

### 3. Overlooking Congressional Authority to Manage Information Dissemination

The Bush administration also has operated under the view

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250. See *supra* notes 102–03 and accompanying text.

251. See Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5 ("Before the program's existence was revealed, several administration officials also emphasized in testimony and public statements that the NSA was prohibited from engaging in domestic surveillance—even as the agency was clearly doing so under the authority of Bush's secret order that established the program."); see also, e.g., Carol D. Leonnig, *Gonzales is Challenged on Wiretaps*, WASH. POST, Jan. 31, 2006, at A7.

that it has the discretion to pick and choose which members of Congress, if any, shall be notified of its intelligence programs and that it further may prescribe the terms under which those members shall be briefed. The administration apparently waited for a substantial time period after the NSA program began to notify congresspersons of its existence.<sup>252</sup> After that time period, it did not notify Congress or even the congressional intelligence committees as a whole, but rather notified the congressional “Gang of Eight”<sup>253</sup> comprised of “the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.”<sup>254</sup> Reports from some “Gang of Eight” members indicate that they were notified only under strict non-disclosure conditions.<sup>255</sup> Among other things, they were not permitted to consult with or to share any of the information that they learned with their staff or with other members of Congress.<sup>256</sup>

The problems with the Bush administration’s approach to congressional disclosure are multi-fold. First, on a practical level, it is impossible to have effective congressional oversight when information is conveyed only to a handful of congresspersons on the condition that they not repeat it. Second, and more fundamentally, the executive branch once again ignored the fact that it is constrained by Congress’s macro-directives, including with respect to information-sharing. Indeed, congressional information-sharing directives serve constitutional transparency values on two levels—first, in their general legitimacy as macro-transparent rules, and second, in their management of information between executive, legislature and the public. In this case, the administration ignored its statutory responsibility to keep the congressional intelligence committees

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252. See CAP REPORT, *supra* note 107, at 20.

253. *Id.*; see also, e.g., Suzanne Spaulding, *Power Play, Did Bush Roll Past the Legal Signs?*, WASH. POST, Dec. 25, 2005, at B1.

254. See *supra* note 193 and accompanying text.

255. For accounts of the “Gang of Eight” hearings, see CUMMING, *supra* note 189, at 7; Eggen & Pincus, *supra* note 251; Spencer S. Hsu & Walter Pincus, *Goss Says Leaks Have Hurt CIA’s Work, Urges Probe*, WASH. POST, Feb. 3, 2006; Eric Lichtblau & David E. Sanger, *Administration Cites War Vote in Spying Case*, N.Y. TIMES, Dec. 20, 2005, at A1; Nancy Pelosi, Op-Ed., *The Gap in Intelligence Oversight*, WASH. POST, Jan. 15, 2006, at B7.

256. See CUMMING, *supra* note 189, at 7; Lichtblau & Sanger, *supra* note 255, at A1.

"fully and currently informed" of intelligence activities.<sup>257</sup> Third, the executive branch also sweeps too broadly in its unilateral determination that disclosure on statutory terms—in this case, disclosure to the intelligence committees—would have been too dangerous to undertake. As noted above, the administration's only proffered argument for keeping the program's very existence secret is laughable (literally so, as the transcript that records the justification records simultaneous laughter).<sup>258</sup> More important, it is not for the executive branch to make this unilateral determination in the face of a conflicting statutory mandate. Rather, it is for Congress, through statutory terms and through its Constitutional power to make rules for its proceedings, to set the macro-framework under which information disclosure, including any negotiations between executive and legislature on that score, can take place. Indeed, current rules provide mechanisms by which committees to which classified information is disclosed can determine whether the public interest will be served by declassifying and disclosing the information.<sup>259</sup> Such determinations also took place during the Church hearings.<sup>260</sup> Openness can, of course, pose dangers. But so can secrecy, as our recent intelligence disasters and countless other historical missteps attest.<sup>261</sup> The Framers struck a balance by leaving it to Congress to establish macro-transparent rules, including rules as to information disclosure. The executive is left to implement the rules, sometimes in secret, and sometimes through give-and-take with Congress.

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257. See *supra* notes 190–91 and accompanying text. The NSA program did not fit any of the exceptions that would justify notifying only the "Gang of Eight." Plainly, the program did not meet the careful statutory definition of a covert action. See *supra* notes 194–96 and accompanying text. Nor did the program's very existence meet the "source and methods" exception for full notification. See *supra* note 197 and accompanying text. Indeed, the only source or method arguably protected by non-disclosure to Congress is the "method" of operating a program in contravention of statutory directives. Such an exception would not only swallow the rule, it would make an utter mockery of it.

258. See *supra* note 243 and accompanying text.

259. See CAP REPORT, *supra* note 107, at 27 (noting, however, that such rules "have never been utilized," and that "the threat of going public" thus "is not realistic").

260. See *Church NSA Hearings*, *supra* note 105, at 51–52, 57–58.

261. See Kitrosser, *supra* note 9, at 510–27 (citing analyses of current and historical intelligence failures caused by secrecy).

#### 4. Abusing the Concept of “Emergency” and the Relationship of Such Abuse to Secrecy and Separated Powers

The administration’s arguments also stretch the concept of emergency presidential power to the breaking point. The President’s speed and vigor is intended in part to enable him or her to respond to immediate emergencies. In rare cases, an emergency may justify even the circumvention of statutory mandates. However, the concept of emergency must be rare and temporally limited. “Once the immediate emergency passes, the transparency, dialogue and other protections of the legislative process must be invoked to legitimize any continuing activities that fall outside of existing statutory mandates.”<sup>262</sup> Otherwise, the concept of “emergency” action is indistinguishable from long-term secretive, even deceptive rule by executive fiat, justified by the bare fact that we live in a dangerous world. In conducting a secret program for roughly four years before it was discovered through press leaks and in offering no plausible justification for such long-term secrecy, the administration engaged in precisely such deceptive, unilateral rule.

The administration also bypassed FISA’s emergency provisions enabling seventy-two-hour, emergency warrantless surveillance<sup>263</sup> or warrantless surveillance for fifteen days following a declaration of war.<sup>264</sup> The administration has suggested that these exceptions were insufficient to meet its needs in the wake of 9/11.<sup>265</sup> This, however, is a policy argument that the Constitution demands be put to the test of the macro-transparent legislative process, even if the result of that process is to authorize secretive implementation.

### CONCLUSION

The Constitution’s Framers placed much faith in the people of this country to govern themselves. Yet they also understood the vast human capacity to abuse power. Their resulting constitutional design provided for multiple separated and overlapping powers so that “ambition [might] counteract ambi-

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262. See *supra* note 57 and accompanying text.

263. See *supra* note 176 and accompanying text.

264. See *supra* note 177 and accompanying text. The discussion of this exception assumes, for the sake of argument, that the AUMF constitutes a declaration of war. This is not an entirely uncontroversial proposition. See Bazan & Elsea, *supra* note 2, at 26–27.

265. See generally *Gonzales Transcript*, *supra* note 218.

tion,"<sup>266</sup> with abuses in one part of government likely to be caught by another part or exposed by the press. As James Madison wrote, "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions" through structural checks and balances.<sup>267</sup> A requisite element of this protective structure is macro-transparency. Thus, while the executors of federal policies—namely the President and the executive branch—may be authorized or inherently empowered to conduct particular activities in secret, they remain subject to checking through transparent statutory directives and to congressional oversight that itself is governed by macro-transparent information control rules. This macro-transparency directive is dynamic in effect. Congressional oversight, for example, may reveal one secret that can lead to the stripping away of additional layers of secret activity. And illegal conduct may be revealed and may lead to judicial activities that are themselves revelatory in nature.

The Framers' brilliant design can go a long way toward saving us from ourselves. A watchful press, for example, might shame a sleeping Congress into assessing executive corruption, which might in turn activate judicial processes and corrective, macro-transparent legislative measures. To some extent this is the story, as of late September 2006, of the post-9/11 NSA surveillance controversy. While a fearful public, press and Congress remained largely idle in the years after 9/11, The New York Times finally revealed the NSA program's existence after sitting on the story for over a year. And this sparked some measure of public and congressional outrage in the months that followed, with some congressional hearings held, some legislative proposals offered and some judicial relief sought.

But the story of the recent NSA surveillance controversy is also a story about our system's ultimate reliance on the people. When all is said and done, the people simply must care enough about statutory and constitutional evasions for exposure to fuel and sustain government's checking mechanisms. It remains to be seen whether the people and their representatives will rise to this challenge with respect to the surveillance controversy. While some congressional hearings indeed have been held, oth-

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266. THE FEDERALIST NO. 51 (James Madison), *supra* note 21, at 322.

267. *Id.*

ers have been avoided or substantially curtailed.<sup>268</sup> And in the hearings that have been held, witnesses' claims to be not at liberty to answer particular inquiries often have prevailed without question.<sup>269</sup> Furthermore, while responsive legislation has not been passed as of mid-November 2006, there remains a chance at this point that legislation largely authorizing the program will pass the lame-duck, Republican-dominated Congress.<sup>270</sup>

Our constitutional system's ultimate dependence on the people is well reflected in Learned Hand's famous admonition that "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it."<sup>271</sup> But there is another way that liberty can die. Liberty can die when systemic mechanisms meant to protect it break down beyond repair. The latter death has been threatened, since 9/11, by the NSA program and by similar acts of executive aggrandizement. It says much about our system's structural strength that transparency eventually prevailed and that public, legislative and judicial reactions followed. Whether those reactions sustain themselves, and what form they take over time, will tell us much about whether liberty prevails in our hearts.

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268. See *The Death of the Intelligence Panel*, N.Y. TIMES, Mar. 9, 2006, at A22; Walter Pincus, *Senate Panel Blocks Eavesdropping Probe*, WASH. POST, Mar. 8, 2006, at A1; Patrick Radden Keefe, *Orwell Would Be Proud*, SLATE, Mar. 9, 2006, <http://www.slate.com/id/2137796/>.

269. See, e.g., *An Ever Expanding Secret*, N.Y. TIMES, May 12, 2006, at A32 (mentioning that Attorney General Gonzales declined to comment on certain matters before the Judiciary Committee).

270. In light of the 2006 elections that returned a Democratic majority to both houses of Congress, it is unclear whether such legislation will pass. See *Gonzales Attacks Ruling Against Domestic Spying*, AP, Nov. 18, 2006, available at [http://www.jonesreport.com/articles/181106\\_gonzales\\_attacks\\_ruling.html](http://www.jonesreport.com/articles/181106_gonzales_attacks_ruling.html).

271. See Bartleby.com, <http://www.bartleby.com/73/1059.html> (quoting Learned Hand, *The Spirit of American Liberty*, Speech at the "I Am an American Day" Ceremony at Central Park, New York, N.Y. (May 21, 1944)).