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Marshall, Marbury, and Mr. Byrd: America Unchecked and Imbalanced (Reviewing Losing America by Senator Robert C. Bryd)

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MARSHALL, MARBURY, AND MR. BYRD: AMERICA UNCHECKED AND IMBALANCED (REVIEWING *LOSING AMERICA* BY SENATOR ROBERT C. BYRD)

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I. INTRODUCTION

A good place to begin is with the recent revelation regarding the Bush administration. In December 2005, *The New York Times* reported that President Bush had authorized the National Security Agency (NSA) to secretly electronically eavesdrop on certain domestic conversations of United States citizens without first obtaining a court order,[1] contrary to the Foreign Intelligence Surveillance Act (FISA) of 1978.[2] In other words, the executive department evidently was violating the law. Although Bush defended the practice as necessary to combat the War on Terror, done with congressional approval,[3] and authorized by his Article II powers, the argument is specious and exemplifies the arrogance of his administration. In fact, warrantless wiretapping in foreign intelligence cases due to expediency is unnecessary; an "unforced error" as one commentator called it.[4] First, FISA allows emergency surveillance for up to 72

1 David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005 at 1.

2 50 U.S.C. § 1801 (2005).

3 *See* S.J. Res. 23, 107th Cong. (2001) (authorizing the use of force after the Sept. 11, 2001, attacks).

4 *This Week with George Stephanopolous* (ABC television broadcast Dec. 18, 2005) (comment by George Will).

hours without a warrant.[5] Second, the statute requires only a showing of probable cause that foreign intelligence information is being sought, not probable cause that a crime has been committed as in the case of a conventional warrant.[6] Third, the FISA court, the special court established by the Act to review warrants requests, has turned down only a handful among thousands of applications.[7] To circumvent the legislation set up for the purpose reveals at least a belief in the irrelevance of Congress, if not contempt for the Article I body.

This is the gist of Senator Robert C. Byrd's polemical *Losing America* aimed not only at the Bush administration, but also at the United States Senate for its complacency in the face of the onslaught. The Constitution of the United States somewhat imperfectly set up a system of checks and balances to avoid the concentration of power in the hands of any one branch of government, a system that Chief Justice John Marshall helped to refine in his 1803 decision in *Marbury v. Madison*.[8]

Marbury actually involved a clash between the executive branch, newly-elected President Thomas Jefferson, and the legislative branch, the Congress under former President John Adams. As students of history and constitutional law will recall, after losing the Presidency and control of Congress in the election of 1800, the lame duck Federalists tried to retain power by stacking the judiciary in the Circuit Courts Act and the Organic Act, both passed in February 1801, shortly before Jefferson was inaugurated. William Marbury became immersed in the battle when Jefferson instructed his new Secretary of State, James Madison, not to deliver his yet undelivered commission as justice of the peace of the District of Columbia. When Marbury filed his action for a writ of mandamus in the United States Supreme Court, requesting the Court to order Madison to deliver his commission, Chief Justice Marshall got his chance to enter the separation of powers debate. While ruling against Marbury procedurally (Marshall held unconstitutional the statute granting the Court original mandamus jurisdiction) and avoiding a constitutional confrontation with Jefferson, Marshall assumed the power of final judicial review over both acts of the executive branch and Congress. The system of checks and balances had been completed. The rest of the country's political history has been largely dominated by a power struggle between the branches, sometimes involving the judicial branch[9] and often arbitrated by the judiciary.[10]

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5 50 U.S.C. § 1805(f) (1978).

6 50 U.S.C. § 1805(a)(3) (1978).

7 Anita Ramasastry, *Why the Foreign Intelligence Surveillance Act Court Was Right to Rebuke the Justice Department*, FindLaw, Sep. 4, 2002, http://writ.news.findlaw.com/Ramasastry/20020904.html.

8 5 U.S. (I Cranch) 137 (1803).

9 *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Lockerty v. Phillips, 319 U.S. 182 (1943); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Felker v. Turpin, 518 U.S. 651 (1996); Johnson v. Robison, 415 U.S. 361 (1974); Oestereich v. Selective Serv. System Local Bd. No. 14, 393 U.S. 233 (1968) (dealing with congressional power to restrict the jurisdiction of the federal

It is the breakdown of checks and balances that Mr. Byrd laments, a failure based both on his distaste for the inexperienced yet arrogant presidency of George W. Bush, and a cowed and cowardly United States Senate in the aftermath of September 11, 2001.

Byrd describes the presidential phenomenon this way:

> But 9/11, that terrible day, provided a way to salvage what was fast becoming a themeless, floundering presidency. Here was an event that blurred the spectacle of a rising deficit and a flagging economy and substituted a powerful theme and focus for Bush's presidency. The horrendous loss of life; the shock, trauma, and fear among the American people; the surge of patriotism; and the sense of common danger: all of these quickly catapulted this rather inarticulate, directionless man—who had come to his august position after a national election that was a virtual tie, and a strange decision by the United States Supreme Court regarding how votes were counted in a state governed by the candidate's brother—to a level of power granted to few men in all of history.[11]

Byrd is not much kinder with his colleagues in the Senate. Speaking in regard to the Senate's passage of the war resolution on Iraq, which he refers to as "a despicable grant of authority," Byrd writes:

> Never in my half century of congressional service had the United States Senate proved unworthy of its great name. What would the framers have thought? In this terrible show of weakness, the Senate left an indelible stain upon its own escutcheon.

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courts). Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) (power of Congress to vest Article III judicial power in non-Article III bodies). United States v. Nixon, 418 U.S. 683 (1974) (executive privilege from court orders).

[10] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential seizure of steel mills unconstitutional); INS v. Chadha, 462 U.S. 919 (1983) (invalidating congressional veto of Executive deportation decisions); Bowsher v. Synar, 478 U.S. 714 (1986) (executive functions cannot be imposed on Comptroller General, an officer removable by Congress); Clinton v. New York, 524 U.S. 417 (1998) (Line Item Veto Act violates Bicameralism and Presentment Clauses).

[11] SENATOR ROBERT C. BYRD, LOSING AMERICA, 20 (W.W. Norton & Co., Inc. 2004) (Hereinafter cited as LOSING AMERICA).

> Having revered the Senate during my service for more than forty years, I was never pained so much.[12]

Senator Byrd focuses on two principal areas in his lament of the loss of congressional authority—the power to declare war and provide for the common defense, and the power over appropriations, i.e, the power of the sword and the purse. Also, throughout his critique in the shift in power from Congress to the executive branch, he is troubled by the secrecy and insulation surrounding the White House.

II. POWER OVER APPROPRIATIONS

Regarding the purse, Byrd is clearly upset. The United States Constitution provides in Article I, Section 8 that, "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . ."[13] and Section 9 of that same Article provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of the public Money shall be published from time to time."[14] As Byrd points out, this control of appropriations given to Congress was intended by the framers as a check on executive power.

Following five weeks of acrimony contesting the election of 2004, George W. Bush took office on a spirit of cooperation and talk of bipartisanship, claiming to be a "uniter and not a divider." Regardless, his administration almost immediately ramrodded through Congress a massive $2 trillion dollar tax cut bill mostly benefitting the wealthy that turned a hard-won $2.5 trillion dollar surplus handed over by President Clinton into a $400 billion dollar deficit by 2004.[15] As Senator Byrd emphasizes, this entire process took place without a Budget Committee report and with no markup in the Budget Committee, which meant that there was no opportunity to offer amendments by either side.[16] The massive cuts then were rammed through Congress by a procedure known as "reconciliation" which imposes very tight time limits on debate and amendments.[17] Additionally, Byrd writes:

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12 *Id.* at 176.

13 U.S. CONST. art. I, § 8, cl. 1.

14 U.S. CONST. art. I, § 9, cl. 7.

15 LOSING AMERICA at 27-28; Jonathan Weisman, *The Tax Cut Pendulum and the Pit*, WASHINGTON POST, Oct. 8, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A/6134.2004Oct7.html.

16 LOSING AMERICA at 29.

17 *Id.* at 32.

> Even worse, the tax cuts held an enormous lie—deliberately disguising their true size and effect on the budget by backloading them. Over 72 percent of the revenue losses from the tax cuts were set to occur between fiscal years 2007 and 2011, when George W. Bush would be well off the political stage. Those who calculate such matters tell us that some $344 billion per year in tax givebacks will be in place by 2011. Also in place will be deficits in the Social Security trust fund and the Medicare trust fund—right around that 2010-15 time period. One has to marvel at the utter recklessness of the Bush agenda.[18]

Thus, what Byrd is telling us is that Congress not only abdicated its responsibility over fiscal policy, but also sacrificed its ability, and obligation, to make responsible appropriations decisions in the future—to the tune of $2 trillion dollars. This massive loss of money comes at a time when baby boomers will start to retire at the beginning of the next decade, and there will be huge demands on, and deficits in, Social Security and Medicare; a "train wreck" as Byrd describes it.

In addition to benefitting the wealthy, it is plausible to assume that the tax cuts were designed to starve government and, with new deficits, to concomitantly require cuts in benefit programs. This is exactly what is happening now. Not only could a lot of good things been done with that money—including AIDS and cancer research—there would have been no need to cut benefit programs for the poorer members of our society. The Bush tax cuts and budgets are nothing less than a transfer of wealth; a not so subtle effort to dismantle the New Deal.

To this financial morass must be added the cost of the war in Iraq and the unexpected need for hurricane relief. Congress appropriated $357 billion from 2002 through the end of 2005 for the wars in Afghanistan and Iraq and related security issues, and it has been estimated that the cost to the U.S. economy over the next decade could be anywhere for $657 billion to $2 trillion dollars for the Iraq war alone.[19] As Byrd sees it, all this paints a picture of both a reckless administration and an irresponsible handling by Congress of its power of the purse (and the sword).

Senator Byrd is also highly critical of other efforts of the Bush administration to intrude on appropriations authority. He cites two examples: requests for unallocated funds and transfer authority—the right to transfer funds between allocations provided by Congress. After 9/11, the President requested "such sums as may be necessary to respond to the terrorist attacks on the United States

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[18] *Id.* at 28.

[19] Kevin G. Hall, *Final cost of Iraq war could reach $2 trillion,* CHARLESTON GAZETTE, Jan. 14, 2006, at 6A.

that occurred on September 11, 2001."[20] In Byrd's words, "[n]o amounts or purposes were mentioned and no reporting or notification requirements listed."[21] This request was rejected, but Congress later did provide $20 billion in a $40 billion supplemental spending bill that could be allocated by the President after "consultation" with the House and Senate Appropriations Committees. The President spent the $20 billion, but Byrd says "the consultation process was, at best, perfunctory." In fiscal years 2003 and 2004, the Bush budgets requested the authority to transfer 5 percent of all appropriations (as much as $38 billion) among various appropriations accounts. Again this was rejected, but again Congress nevertheless provided $2 billion in transfer authority in the April 2003, supplemental military spending bill for Iraq and $3 billion in transfer funds in the November 2003, supplemental for Iraq. Congress also provided a $15.7 billion transfer account in something called the Iraq Freedom Fund. Byrd rails:

> I have never seen anything like it in my fifty-two years in the House and the Senate. The Bush team never tires in its drive to usurp congressional control of spending. Take military spending. Wrapped in "patriotism" and platitudes, a Rumsfeldian arrogance driven by a White House dominated by superhawks virtually sneers at the legislative branch. In fact, Congress can usually be counted on to rubber-stamp nearly any proposal for spending labeled "defense."[22]

Byrd's criticism of congressional abdication of power is not reserved for Congress during the Bush administration. Byrd has consistently been a harsh critic of the line item veto, which would allow a President to sign an appropriations bill into law and then strike out any parts of that same law. Although the line item veto is defended as a means of controlling pork barrel legislation and controlling the deficit, Senator Byrd sees it as a naked grab for power by the executive. As he explains, the line item veto does not give the President that much power over federal spending because it applied to only one-third of the federal budget. Mandatory programs and entitlements, where most of the growth occurs, were not subject to the "line out" authority. Byrd believes the real reason why Presidents since Ronald Reagan have clamored for this veto is to control Congress—to trade threatened cancellation of benefits to various congressional districts in exchange for a vote on a bill, program, or nomination favored by the President. For example, "Senator Byrd, if you want my support for locating the FBI fingerprint center in West Virginia, I need your vote on my

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20 LOSING AMERICA at 63.

21 *Id.*

22 *Id.* at 64-65.

Supreme Court nominee." He shudders to think of the line item veto in the hands of Lyndon Johnson.[23]

When the Senate passed the Line Item Veto Act in 1995 (which Byrd says "represented a gross self-mutilation of its power over the purse"[24]) Byrd led five other members of Congress in filing suit the day after it went into effect to challenge its constitutionality. When this suit originally reached the Supreme Court, it was dismissed for lack of standing, the Court concluding that the members of Congress had not suffered sufficient personal injury.[25] Nonetheless, when President Clinton exercised the new authority to cancel a provision of the Balanced Budget Act of 1997, affecting health care debt in New York, and two provisions of the Taxpayer Relief Act of 1997, affecting potato growers, the affected parties (who clearly had standing) filed suit again challenging the line item veto, and the Supreme Court eventually declared it a violation of the Bicameralism and Presentment Clauses of the Constitution.[26] Byrd thanks the Court for preserving checks and balances and saving Congress from themselves. We shall see.

III. THE WAR POWERS

There is even more consternation over Congress' sacrifice of its war powers after September 11. Senator Byrd initially praises President Bush's response to the attack, saying, "[w]ho can forget the stirring images of our young President standing among firefighters and Port Authority workers in the rubble and soot that had been the trade towers? He spoke to them from his heart, using a bullhorn to be heard. He rallied a nation, using defiant words to tamp down the fear. Even as we mourned, our hearts were lifted up."[27] Although Byrd also thinks Bush was right to attack the Al Qaeda camps in Afghanistan, he bristles early at the cowboy "Wanted: Dead or Alive," "good vs. evil," "us and them," "you're either with us or against us" rhetoric. He does not view it as the stuff of statecraft.

Noteworthy at this stage on the War on Terror is that after 9/11 Bush initially wanted unlimited power to engage in preemptive strikes against nations harboring terrorists. The Bush administration wanted language that would have allowed the President to use the armed forces to "to deter and prevent any future acts of terrorism and aggression against the United States."[28] Byrd opines, "This would have amounted to an unlimited grant of authority to the White House to attack any country it wished to attack as long as some suspicion had

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23 *Id.* at 42.

24 *Id.* at 41.

25 *See* Raines v. Byrd, 521 U.S. 811 (1997).

26 *See* Clinton v. New York, 524 U.S. 417 (1998).

27 LOSING AMERICA at 83.

28 *Id.* at 87.

arisen of future aggression or there was some connection to terrorism which might be aimed at the United States."[29] Though the Senate grant of authority to the President in S.J. Res. 23 was much narrower, speaking in the past tense, Bush's signing statement said the resolution recognizes "the authority of the president under the Constitution to take action to deter and prevent acts of terrorism against the United States."[30] This language was much broader than that in the resolution. Bush was clearly asserting the right to act preemptively.

The next alarm comes in Bush's State of the Union address on January 29, 2002. This included the infamous reference to the "axis of evil," a thinly veiled threat to attack Iraq, Iran, and North Korea before they become a threat to the United States. This shortly was followed by the release in September 2002 of the Bush administration's National Security Strategy (NSS), a 33-page document completely revamping U.S. foreign and military policy. The document featured preemption to deal with states harboring terrorists or trying to produce weapons of mass destruction, an emphasis on the maintenance and use of U.S. military might to deal with international problems, and unilateralism. This should have come as no surprise. A group called the Project for a New American Century in early 1998 had urged President Clinton to remove Saddam Hussein from power. Of the eighteen people who signed that letter, eleven held posts in the Bush administration when the Iraq War began - Elliot Abrams, Richard L. Armitage, John Bolton, Paul Dobriansky, Zalmay Khalilzad, Richard Perle, Peter W. Rodman, Donald Rumsfeld, William Schneider Jr., Paul Wolfowitz, and Robert Zoellick,[31] many now-familiar names.

Other than preemption, the other principal aspect of Bush foreign and military policy, as stated in the 2002 NSS report and identified by Senator Byrd, is unilateralism, a policy which broke with a long history of American diplomacy. Byrd cites as recent examples foreign policy under Presidents Kennedy, Clinton, and George H.W. Bush. From *Losing America*:

> What further alarmed me about the Bush saber-rattling was a pronounced tendency among the Bushies toward unilateralism that bode ill for the expansive military adventures so dear to the neoconservative heart. In December of 2001, President Bush had announced his intention to withdraw from the Anti-Ballistic Missile Treaty, arguing that tests on the missile defense system were unduly constrained. The 1972 Biological Weapons Convention, a ratified multilateral treaty which prohibits countries from developing biological weapons, had been derailed by the Bush administration's refusal to negotiate on a draft protocol. The State Department had postponed discussions until 2006.

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29 *Id.*

30 *Id.* at 88.

31 *Id.* at 147.

> One reason cited for delaying the draft protocol was a fear that verification inspections in the United States might force pharmaceutical companies to reveal trade secrets. Further, the International Criminal Court, a signed but not ratified multilateral treaty creating a permanent United Nations tribunal to try individuals on war crimes or crimes against humanity, faced opposition by the Bush administration because it might have an impact on legal protections for military personnel overseas. The Bushies even opposed a multilateral treaty to standardize export controls aimed at trafficking in small arms like pistols, machine guns, grenades, and mortars; unbelievably, the White House trotted out the excuse that these efforts were aimed at undermining the Constitution's Second Amendment. The Bush administration has made virtually no attempt to improve the Kyoto Protocol after Bush announced opposition to it on March 13, 2001. As for global warming, this administration not only eschews multilateral efforts, it virtually ignores the phenomenon.[32]

Most pronounced here is the administration's attitude toward the U.N. Since the organization was founded in 1945, each new president has promptly appointed an ambassador to represent the United States in the U.N., usually announcing the nominees for secretary of state and U.N. ambassador at the same time. Bush waited six weeks after making Colin Powell secretary of state before nominating John Negroponte to represent the United States in the U.N. Along with other acts of unilateralism, this slight caused the United States the diplomatic embarrassment of losing its seat on the U.N. Human Rights Commission, which it did not regain until 2002. Byrd says "the Bush administration treats the U.N. as an unnecessary encumbrance. Outright hostility to the organization runs right through many highly placed Bush officials...."[33] He then cites as an example John Bolton, then the undersecretary of state for arms control and international security affairs (and now U.S. Ambassador to the United Nations) as saying, "If the U.N. secretariat in New York lost ten stories it wouldn't make a bit of difference."[34] Not much more needs to be said. In fact, it is surprising that the Bush administration paid as much attention to the U.N. before the "coalition of the willing" invaded Iraq without the U.N.'s blessing. The fact that U.N. nuclear arms inspectors were involved and some deference was given to a more cautious Colin Powell probably offers the explanation.

All of this, of course, leads up to what Byrd opposed and vigorously criticizes—the surrender to the President by Congress of its power to declare

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32 *Id.* at 168.

33 *Id.* at 126.

34 *Id.*

war. He describes a Senate in a frenzy to avoid being labeled unpatriotic with an attitude toward the Iraq war resolution of "get[ting] the vote behind us." As Senator Byrd notes there are seven clauses in Article I, Section 8 of the Constitution which vest war powers in Congress. The document was specifically designed that way as a check to prevent a president from waging war on his own. Ignoring the lessons of the 1964 Gulf of Tonkin resolution, which led to the war in Vietnam, the Senate gave Bush a "blank check" to use U.S. military power as he pleased if it could be connected to Iraq. The resolving portion of H.J. Resolution 114, which became Public Law 107-243 on October 16, 2002, provided in Section 3:

> (a) Authorization – The President is authorized to use the armed forces of the United States as he determines to be necessary and appropriate in order to—
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> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.[35]

Unlike the Tonkin Gulf Resolution, this one had no sunset provision. And, unlike many less important bills, the Senate spent less than a week debating whether to give this war power to the President. Only twenty-three Senators voted against what Byrd calls "this despicable grant of authority." Byrd writes,

> With these words and for the foreseeable future, we were giving Bush sole discretion to employ the full military might of the United States whenever he pleased—to attack Iraq or any other country he could connect to the "threat" posed by Iraq. This was a "blank check" as to the use of military power.
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> It amounted to a complete evisceration of the congressional prerogative to declare war, and an outrageous abdication of responsibility to hand such unfettered discretion to this callow and reckless president. Never in my view, had America been led by such a dangerous head of state—who believed in preemptive war as a way to deal with global terrorism, who preferred unilateralism to international cooperation, who saw little use in consultation or public debate, and whose inner circle of advisors basically viewed Congress with contempt.[36]

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35 *Id.* at 167.

36 *Id.* at 167-68.

Byrd again, after speaking of congressional powers to declare war,

> Yet the power of Congress to declare war—as envisioned by the framers and outlined in the Constitution—now lies in a tepid or dormant state. Timid legislators, aggressive presidents, and an unmindful and unfocused American public have paved the way for that which the framers of the Constitution obviously and carefully tried to avoid: presidential initiation of wars.[37]

As the Senator suggests in *Losing America*, and as we now know, Congress relinquished its power to declare war based on a bunch of what he calls "truth-twistings:" Iraq's tie to Osama bin Laden and Al Qaeda, evidence of weapons of mass destruction in Iraq, and Iraq's threat of developing nuclear weapons. The final third of the book deals with the War in Iraq, and how it was sold to the American public and Congress, Byrd noting that Bob Woodward's book, *Bush at War*,[38] reveals that Bush planned his attack on Iraq in December 2001. He concludes with a plea for Congress "to curtail the open-ended authority it so blindly gave to this dangerous president in October of 2002. The awesome power to commit this nation to war must be taken back from the hands of a single individual—the President of the United States—and returned to the people's representatives in Congress as the framers intended. No president must ever again be granted such license with our troops or our treasure."[39] In one of the eight speeches from the Senate floor which are included at the end, Byrd states:

> As I watched the president's fighter jet swoop down onto the deck of the aircraft carrier *Abraham Lincoln*, I could not help but contrast the reported simple dignity of President Lincoln at Gettysburg with the flamboyant showmanship of President Bush aboard the USS *Abraham Lincoln*.[40]

IV. SECRECY

Another aspect of the Bush administration which the Senator laments is secrecy, which undermines Congress' oversight role. He cites many examples. "[I]n October 2001, the White House issued a memorandum stating that all intelligence briefings would henceforth be conducted by six members of the cabinet (FBI and CIA directors, the secretaries of defense, state, and treasury, and the attorney general) and be made available only to eight members of Congress

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37 *Id.* at 168.

38 BOB WOODWARD, BUSH AT WAR (Simon & Schuster 2002).

39 LOSING AMERICA at 214.

40 *Id.* at 251.

(the House and Senate party leadership and Intelligence Committees)."[41] When members of Congress rebelled at this, it was dropped. Also, the Justice Department has consistently withheld specifically requested information about governmental action under the Patriot Act, and members of Congress find it difficult to obtain classified information even when it is part of their committee duties. In October 2001, the attorney general issued a memorandum instructing agencies to limit public access to information under the Freedom of Information Act. In November 2001, Bush signed an executive order, which Byrd calls "sweeping and lawless," limiting indefinitely public access to presidential papers, apparently in direct contravention of the Presidential Records Act of 1978, which makes presidential papers available to the public twelve years after the president leaves office. Senator Byrd also notes that the White House consistently censors reports and intelligence briefings. More troubling, after the September 11th attacks, the White House has run a "shadow government," outside the White House on two East Coast locations, to assume command in the case of a national emergency. This shadow government consists of only one branch, the executive.

V. CONCLUSION

One particular example of secrecy catches Byrd's eye—Vice President Dick Cheney's National Energy Policy Development Group (NEPDG). Some members of Congress had asked the General Accounting Office (GAO) to look at the process the NEPDG used to develop national energy policy. Although Comptroller General of the GAO, David Walker, made a rather innocuous request, asking only for disclosure of the participants, dates, subjects, and locations of the meetings, and the costs incurred, the Vice President claimed that the GAO lacked authority to examine the records of the NEPDG, forcing Walker and the GAO to go to court to obtain the records, but the case was dismissed for lack of standing. Nevertheless, two groups from opposite ideological poles—Judicial Watch, a conservative watchdog group, and the Sierra Club—filed lawsuits to obtain the records under the federal Freedom of Information Act. The suits were combined and the plaintiffs prevailed before the District Court[42] and a panel of the D.C. Circuit Court of Appeals.[43]

This is where the separation of powers/checks-and-balances debate takes on a new twist, and again raises the specter of Chief Justice Marshall. In a couple of places in *Losing America*, Senator Byrd praises the courts and hopes they will continue to save Congress from itself as it sacrifices power to the president. Specifically, and as indicated earlier, he mentions the line item veto debate and thanks the United States Supreme Court for saving congressional

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41 *Id.* at 68-69.

42 Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20 (D.D.C. 2002).

43 *In re* Cheney, 334 F.3d 1096 (D.C. Cir. 2003).

power in *Clinton v. New York*.[44] When discussing the executive's detention of enemy-combatants, Byrd again hopes the courts will step in to prevent an arrogant assertion of presidential power. His wishes to some extent were fulfilled in *Hamdi v. Rumsfeld*,[45] holding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for the detention before a neutral decisionmaker,"[46] and *Rasul v. Bush*,[47] holding that federal judges have jurisdiction to consider habeas petitions from Guantanamo detainees who argue they are being held unlawfully.[48] The Court also recently heard oral argument on the issue of whether the administration could try the detainees in military tribunals.[49]

Looking at the larger picture, however, the Supreme Court has not saved Congress from its separation of powers battle with the Bush administration. Reverting to the lawsuit challenging the secrecy of Vice President Cheney's National Energy Policy Development Group, the Supreme Court eventually ruled against the plaintiff's freedom of information act request,[50] reversing the lower courts, in a case where Justice Antonin Scalia refused to recuse himself after going on a duck hunting trip with Cheney. And, of course, so all is not forgotten, the Supreme Court gave us the Bush administration in the first place in the strangely reasoned case of *Bush v. Gore*.[51] Congress will have to protect itself. Byrd thinks they are losing the battle, sometimes with self-inflicted wounds.

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44 524 U.S. 417 (1998).

45 542 U.S. 507 (2004).

46 *Id.* at 508.

47 542 U.S. 466 (2004).

48 *See also,* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (dismissing on jurisdictional grounds the extended detention of an American citizen).

49 Hamdan v. Rumsfeld, No. 04-702 (D.D.C. January 18, 2005).

50 Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367 (2004).

51 531 U.S. 98 (2000).