

LISTENING TO THE ENEMY: THE PRESIDENT'S POWER TO CONDUCT SURVEILLANCE OF ENEMY COMMUNICATIONS DURING TIME OF WAR

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Ever since the New York Times published classified information in December 2005¹ about the efforts by the National Security Agency to intercept enemy communications to or from sources in the United States (as authorized by the President in his capacity as Commander-In-Chief), there has been a great hew and cry about the President's "illegal" conduct. Calls of impeachment have even been heard, both in the media² and in the halls of Congress.³ The Congressional Research Service (CRS) weighed in at the request of members of Congress,⁴ concluding that "it might be argued" that the President had

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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 1. "Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without court-approved warrants ordinarily required for domestic spying."

2. See, e.g., Elizabeth Holtzman, *The Impeachment of George W. Bush*, THE NATION, Jan. 30, 2006, at 1. "People have begun to speak of impeaching President George W. Bush—not in hushed whispers but openly, in newspapers, on the Internet, in ordinary conversations and even in Congress."

3. See, e.g., H. Res. 635, 109th Cong. (2005). "The resolution created a select committee to investigate the Administration's intent to go to war before congressional authorization, manipulation of pre-war intelligence, encouraging and countenancing torture, retaliating against critics, and to make recommendations regarding grounds for possible impeachment."

4. Elizabeth B. Bazan & Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, CONG. RES. SERVICE, Jan. 5, 2006, at 32 [hereinafter "CRS Report"]. "Where the Congress has exercised its constitutional authority in the areas of foreign affairs and thereby has withdrawn electronic surveillance, as defined by FISA, from the 'zone of twilight,' between Executive and Legislative constitutional authorities, it might be argued that the President's asserted inherent authority to engage in warrantless electronic surveillance was thereby limited."

violated the Foreign Intelligence Surveillance Act (FISA),⁵ a statute adopted by Congress in the late 1970s. In stark contrast, the President, backed by a lengthy legal analysis by the Department of Justice, defended both the legality and the necessity of the NSA surveillance program to the overall war against terrorism.⁶

The current controversy over the President's surveillance program, like the controversies over the Boland Amendment in the 1980s, the War Powers Act in the 1970s, and countless other statutory efforts by Congress to limit the President's executive powers, force us to give serious consideration to the Founders' constitutional design. In particular, it is important to assess the strength of the competing analyses provided by the Congressional Research Service and the Department of Justice with respect to whether the President's actions "violated" FISA and, if so, whether the FISA, so interpreted, would be an unconstitutional intrusion upon powers that the Constitution confers directly upon the President.

It is perhaps no surprise that the CRS report sided with congressional power, while the DOJ report sides with the President. CRS rightly touts itself as the policy arm of the Congress, and it is answerable to Congress for its work. Similarly, the Department of Justice is an executive Department, answerable to the President; indeed, Article II of the Constitution specifically authorizes the President to require the opinion, in writing, of the principal officer of each executive department.⁷ While both entities have well-deserved reputations for generally providing unbiased assessments to their superiors, we would be remiss not to notice where their institutional allegiances lie. As Chief Justice (and former President) Taft noted eighty years ago in *Myers v. United States*,⁸ "[e]ach head of a department is and must be the President's alter ego in the matters of that department where the president is required by law to exercise authority." The Supreme Court recently recognized in *Bowsher v. Synar*, even more forcefully, that the same is true for agents of the Legislature: "In constitutional terms, [Congress's] removal powers over the Comptroller General's office dictate that he will be *subservient* to Congress."⁹ What was true of the Comptroller General in *Bowsher* is equally true of the Congressional Research Service, which is statutorily designated as an "agent" of Congress and

5. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1862 (2006).

6. U.S. DEPARTMENT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (Jan. 19. 2006) [hereinafter "DOJ Report"]. "The NSA activities are lawful and consistent with civil liberties . . . [they] are supported by the President's well-recognized inherent constitutional authority as commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States."

7. U.S. CONST. art II, § 2, cl. 1.

8. *Myers v. United States*, 272 U.S. 52, 133 (1926).

9. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (emphasis added).

its committees.¹⁰ Although the CRS is legally obliged to conduct its work “without partisan bias,”¹¹ there is no similar prohibition on institutional bias, and CRS is clearly a creature of Congress, “discharging its responsibilities to Congress,” “rendering to Congress the most effective and efficient service,” and “responding most expeditiously, effectively, and efficiently to the special needs of Congress.”¹² The CRS report itself acknowledges that it was prepared in response to requests from “more than one congressional *client*”¹³—and that role as advocate for its congressional clients is made amply clear throughout the report—which defends Congress’s efforts through FISA to “put to rest the notion that Congress recognizes an inherent Presidential power to conduct” foreign intelligence surveillance within the United States.¹⁴

However much some members of Congress might prefer the conclusions reached in the CRS Report to those reached by the DOJ, protecting as they do congressional prerogatives at the expense of the Executive, the DOJ’s conclusions are much better grounded in constitutional text, precedent, history, and the political theory espoused by our nation’s Founders than those reached by the authors of the CRS Report.

The argument that existing precedent supports the President’s position is particularly compelling. The two landmark cases that mark the poles of Supreme Court precedent addressing the interplay between the Executive and the Congress on matters of foreign policy and war are *Youngstown Sheet and Tube Co. v. Sawyer*,¹⁵ and *United States v. Curtiss-Wright Export Corp.*¹⁶ In *Youngstown*, the Supreme Court rebuffed President Truman’s efforts to seize the nation’s steel mills in order to secure the ready supply of steel for the military conflict then underway in Korea, and there is language in the case favorable to proponents of congressional power.¹⁷ In *Curtiss-Wright*, on the other hand, the Supreme Court articulated a very broad theory of presidential power in the foreign-policy arena which remains valid to this day, acknowledging that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹⁸

Not surprisingly, given its institutional affiliation, the CRS Report begins its analysis with the *Youngstown* case (and particularly with Justice Jackson’s

10. 2 U.S.C. § 166(d)(1)(C).

11. *Id.* at § 166(d).

12. *Id.* at § 166(b)(1)(A–C).

13. CRS Report, *supra* note 4, at 1 (emphasis added).

14. *Id.* at 17 (citing S. REP. NO. 95-604(I), at 64 (1972)).

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

16. *U.S. v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

17. *Youngstown*, 343 U.S. at 1223.

18. *Curtiss-Wright*, 299 U.S. at 319 (citations omitted).

concurring opinion in that case), bolstered by a pro-Congress interpretive gloss placed on the case by a district court decision in *United States v. Andonian*.¹⁹ Yet the CRS Report fails to give adequate play to what it calls the “nuances” of Justice Jackson’s important concurring opinion in the case,²⁰ treating the case as much more solicitous of congressional power than it actually is.

Justice Jackson famously described a three-tiered system for assessing the separation of powers issues that lie at the intersection of presidential and congressional power.²¹ Obviously, the President’s authority is at its peak when he acts both pursuant to his own authority under the Constitution and by virtue of additional statutory authority given to him by Congress—Justice Jackson’s Category one.²² Less strong, but no less certain, is when the President acts by virtue of his own constitutional powers in the face of congressional silence—Category two.²³ Finally, Justice Jackson even conceded that, at times, the President could act pursuant to his Article II constitutional powers despite an explicit act of Congress to the contrary—Category three.²⁴ Congress cannot pass a law that curtails Presidential powers which come directly from the Constitution itself.²⁵ The problem for Truman, according to Justice Jackson, was not that he exceeded statutory authority, but that his constitutional war powers did not, *under the circumstances*, permit him to trump the mechanisms of the relevant congressional statute.²⁶ Congress had not authorized the war, and the nation’s steel mills were too far removed from the “theater of war” to fall under the President’s power as Commander-in-Chief.²⁷

Contrary to the conclusions drawn by the CRS, a careful review of the *Youngstown* holding in general, and of Justice Jackson’s concurring opinion in particular, yields several important distinctions that vindicate President Bush’s latest actions in the war against terrorism. First, in the Authorization for Use of Military Force (AUMF) that it adopted a week after the terrorist attacks on September 11, 2001, Congress *did* authorize the use of force in terms broad enough to permit the President’s actions.²⁸ In *Hamdi v. Rumsfeld*,²⁹ the

19. *United States v. Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990), *aff’d and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

20. *Youngstown*, 343 U.S. at 634–39.

21. *Id.* at 635–37.

22. *Id.* at 635.

23. *Id.* at 637.

24. *Id.* at 637.

25. *See generally* U.S. CONST. art. II.

26. *Youngstown*, 343 U.S. at 634–39.

27. *Id.* at 587.

28. Authorization for Use of Military Force, Pub. L. No. 107–40 § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) [hereinafter “AUMF”]. “The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the

Supreme Court held that the AUMF statute was broad enough to give the President authority to detain U.S. citizens as enemy combatants even though such detentions were not explicitly authorized (and but for the AUMF would be prohibited by another statute, 18 U.S.C. § 4001(a)); surely it is therefore broad enough to serve as authority for the much lesser intrusion on personal liberty at issue with surveillance of international calls made to or received from our enemies. As such, the President's actions at issue here fall into Justice Jackson's first category, in which the President's power is at its zenith; the DOJ Report's analysis on this point is much more persuasive than the CRS Report's analysis.

Second, as September 11 made very clear, the United States *is* a "theater of war," and the full panoply of presidential powers in time of war comes into play—his power as Commander-in-Chief; his power as the nation's top executive; and his inherent power as the organ of U.S. sovereignty on the world stage. This is more than simply a "point of view" that "*might* be argued," as the CRS Report states.³⁰ The agents of our stateless, terrorist enemies are here on U.S. soil, aiming to strike at our infrastructure, our citizens, and our very way of life at every possible opportunity. Thus, even if the AUMF was not sufficient to sustain the President's executive order, and even if FISA is read as an attempt by Congress to circumscribe the President's own constitutional powers, Justice Jackson recognized that in such a conflict, Congress could not by statute restrict powers that the President has directly from Article II of the Constitution. Congress itself recognized this in the AUMF, when it noted that "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States. . . ."³¹ The AUMF preamble reflects the view of Congress itself prior to the adoption of FISA, when it expressly recognized the "constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack . . . [and] to obtain foreign intelligence information deemed essential to the security of the United States. . . ."³²

But whether or not the CRS Report misreads Justice Jackson's concurring opinion from *Youngstown*, most troubling about the CRS analysis is that it does not grapple with the *Curtiss-Wright* case at all, citing it only once, deep in a footnote, and then only in a parenthetical quotation from a lower court

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."

29. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

30. CRS Report, *supra* note 4, at 37.

31. AUMF, Preamble, PL 107–40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added).

32. 82 Stat. 214, *formerly codified as* 18 U.S.C. § 2511(3).

decision.³³ Any neutral assessment of the important separation of powers questions at issue here warranted a thorough consideration of *Curtiss-Wright* and the theory of presidential power it recognized (as well as the even more long-standing precedent on which the decision in *Curtiss-Wright* relied, including *The Prize Cases*³⁴), yet none is to be found in the CRS Report. Instead, every indulgence in favor of congressional authority that can even weakly be drawn from existing judicial opinions is drawn, and every recognition by the courts of inherent executive power is downplayed or ignored.

Nowhere is the CRS' slant toward Congress more manifest than in the Report's discussion of the FISA Court of Review's decision in *In re Sealed Case*, which expressly stated: "We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence information], and, assuming that is so, *FISA could not encroach on the President's constitutional power.*"³⁵ Instead of acknowledging the import of this unbelievably clear statement, the CRS Report begrudgingly finds in it only "some support" for the President's position, and even then finds the scope of the support "to be a matter with respect to which there are differing views."³⁶

The DOJ Report, in contrast, fully grapples with the competing cases and provides a well-reasoned analysis for its proposition that the cases clearly support the inherent constitutional authority of a President to conduct surveillance of communications from or to enemies of the United States and their supporters in time of war.³⁷ Almost by default, then, the DOJ Report makes the stronger case, but even where the CRS Report does take up the debate by way of its discussion of lower court decisions, the CRS Report's authors are hard-pressed to find in the existing precedent support for the proposition that the President does not have inherent authority to conduct the surveillances at issue here. The best they can muster is that "*it might be argued that the President's asserted inherent authority to engage warrantless electronic surveillance was . . . limited*"³⁸ by Congress's adoption of FISA, and that the reliance by the FISA Court of Review in *In re Sealed Case* on pre-FISA cases "as a basis for its assumption of the continued vitality of the President's inherent constitutional authority to authorize warrantless electronic surveillance for the purpose of gathering foreign intelligence information *might be viewed as somewhat* undercutting the persuasive force of the Court of Review's

33. CRS Report, *supra* note 4, at 31 n. 104 (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980)).

34. *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

35. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (emphasis added).

36. CRS Report, *supra* note 4, at 33.

37. DOJ Report, *supra* note 6, at 8.

38. CRS Report, *supra* note 4, at 32 (emphasis added).

statement.”³⁹ This is a classic wiggle by lawyers trying to reach the conclusion favored by their clients in the face of precedent that is squarely against them.

Curtiss-Wright provides powerful support for the President’s position. In that case, adopting the views expressed by John Marshall while serving in Congress prior to his appointment as Secretary of State and ultimately as Chief Justice of the United States, the Supreme Court recognized that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁴⁰ As “sole organ” in the foreign affairs arena, the President has inherent constitutional authority—indeed, the constitutional duty—to conduct surveillance of communications with enemies of the United States and people he reasonably believes to be working with them, in order to prevent attacks against the United States.⁴¹ Were FISA to be interpreted in such a fashion as to restrict the President’s power in this arena, it may well be unconstitutional—something that the FISA drafters themselves recognized.⁴² Congress cannot by mere statute restrict powers that the President holds directly from the Constitution itself. John Marshall’s 1800 statement to Congress dealt with an attempt by Congress to circumscribe the President’s powers in the negotiation of treaties,⁴³ much like the interpretation of the FISA statute being pushed by some in Congress is an attempt to circumscribe the President’s power to conduct foreign intelligence surveillance. Yet the Supreme Court in *Curtiss-Wright* was manifestly clear that Congress had no authority to intrude upon the President’s constitutional powers in the foreign arena: “Into the field of negotiation [of treaties] the Senate cannot intrude; and Congress itself is powerless to invade it.”⁴⁴

It should be noted that this Administration is not the first to make such claims. Indeed, as the DOJ Report correctly notes, similar arguments have been advanced, successfully, by every administration since electronic surveillance technology was developed. The notion that Congress cannot by mere statute truncate powers the President holds directly from the Constitution is a common feature of executive branch communications with the Congress. Two examples

39. *Id.* (emphasis added).

40. *Curtiss-Wright*, 299 U.S. at 319 (citations omitted).

41. See U.S. Const. art. IV, § 4. “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” *Prize Cases*, 67 U.S. at 638.

42. See H.R. Conf. Rep. No. 95-1720, at 35, reprinted in 1978 U.S.C.C.A.N. 4048, 4064. “The establishment by this Act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court. The intent of the conferees is to apply the standard set forth in Justice Jackson’s concurring opinion in the steel seizure case.” (citing 343 U.S. 579).

43. 6 ANNALS CONG. 613 (Mar. 7, 1800).

44. *Curtiss-Wright*, 299 U.S. at 319.

from the DOJ Report are particularly revealing: First, Griffin Bell, President Jimmy Carter's Attorney General, testified during debate in Congress over the adoption of FISA that, although FISA did not recognize any inherent power of the President, it "does not take away the power [of] the President under the Constitution."⁴⁵ Second, President Clinton's Deputy Attorney General, Jamie Gorelick, made a similar point while testifying before Congress when amendments to FISA were being considered in 1994: "[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes"⁴⁶

Granted, some in Congress may think this analysis affords too much power to the President, but their beef is with the drafters of our Constitution, not with the current President who, following the example of a good number of his predecessors, has determined it necessary to exercise the full extent of his constitutional powers in order to defend our nation against attack. Our nation's Founders created a "unitary executive" (that is, an executive branch headed by a single person rather than a committee, who is responsible for the actions of the entire executive branch and accountable primarily and directly to the people, not to Congress), strong enough to protect "the community against foreign attacks," with "secrecy" and "dispatch" if necessary.⁴⁷ And it made the Executive largely independent of the Legislature, particularly in the foreign policy arena. As the Supreme Court noted in *Bowsher*, "unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people."⁴⁸ Indeed, the Court in *Bowsher* correctly recognized that the real concern of the Founders was with Legislative usurpation of Executive power, not the other way around. "The dangers of congressional usurpation of Executive Branch functions have long been recognized," it noted, adding that "[t]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."⁴⁹

45. DOJ Report, *supra* note 6, at 8 (citing *Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence*, 95th Cong., 2d Sess. 15 (1978) (Statement of Attorney General Bell)).

46. DOJ Report, *supra* note 6, at 8 (citing *Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. On Intelligence*, 103d Cong. 2d Sess. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick)).

47. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton).

48. *Bowsher*, 478 U.S. at 722.

49. *Id.* at 727 (citing *Buckley v. Valeo*, 424 U.S. 1, 129 (1976)).

Thus, while some in Congress may be tempted to follow the conclusions reached by the CRS Report rather than the much better reasoned and more thoroughly-documented conclusions drawn by the Department of Justice, they would do so at the expense of the constitutional design bequeathed to us by our Founders, a design which has worked magnificently well in protecting both our nation's security and our individual liberties for over two centuries. Under the Constitution, confirmed by two centuries of historical practice and ratified by Supreme Court precedent, the President clearly has the authority to conduct surveillance of enemy communications in time of war and of the communications to and from those he reasonably believes are affiliated with our enemies. Moreover, it should go without saying that such activities are a fundamental incident of war, particularly in a war such as this where the battle for intelligence is not only the front line but in many respects the most significant front in the war. The Authorization for the Use of Military Force, therefore, must be viewed as lending Congress's own support to the constitutional powers directly conferred on the President by Article II. Some may wish to question the wisdom of the President's surveillance activities—I happen to think the necessity of them will be borne out in the fullness of time—but we should not confuse such a dispute over tactics and policy with the present dispute over the constitutional authority of the President to undertake them.

* * *

That conclusion puts the New York Times disclosure of the NSA's classified surveillance program into stark relief.⁵⁰ No one contests that classified information was illegally provided to the Times and then subsequently published by it. And to my knowledge, no one seriously contends that the individuals who leaked the information are not subject to prosecution for violating the Espionage Act⁵¹ (or even subject to prosecution for treason if it could be proved that their intent in leaking the classified information was to undermine our war effort and thereby give aid and comfort to the enemy).⁵²

Even those who would seek to bestow on the leaker the protected status of "whistle-blower" surely will acknowledge that the whistle-blower statute requires that the allegedly illegal activities be reported internally, through a certain specified administrative route, rather than shouted to the world from the front pages of our nation's major newspapers.⁵³ Otherwise, the whistle-blower statute would permit every government employee to be a classified information

50. See generally Risen & Lichtblau, *supra* note 1.

51. 18 U.S.C. § 793 et seq. See also *United States v. Morison*, 604 F. Supp. 655 (D.C. Md.), appeal dismissed, 774 F.2d 1156 (4th Cir. 1985).

52. See generally U.S. Const. Art. III, § 3, cl. 1; *Tomoya Kawakita v. United States*, 343 U.S. 717 (1952); *Cramer v. United States*, 325 U.S. 1 (1945).

53. See *Intelligence Community Whistleblower Protection Act of 1998*, 50 U.S.C. § 403q (1998).

law unto himself, determining what should or should not be secret. The devastating consequences to our national security, and also to individual privacy, of such a flawed interpretation should be manifest.

But what of the liability of the New York Times itself? Is it equally subject to the prohibitions of the Espionage Act? In May 2006, Bill Keller, Executive Editor of the New York Times, published an important letter to the editors of the Wall Street Journal challenging the notion “that when presidents declare that secrecy is in the national interest, reporters should take that at face value.”⁵⁴ Implicit in his rejection of that proposition is the view that reporters generally, and perhaps the editors of the New York Times in particular, are free to ignore the laws regarding publication of classified information when, *in their view*, the benefit to the public from gaining access to the information would outweigh any harm that might flow from its disclosure.⁵⁵ Keller elaborated:

[P]residents are entitled to a respectful and attentive hearing, particularly when they make claims based on the safety of the country. In the case of the eavesdropping story, President Bush and other figures in his administration were given abundant opportunities to explain why they felt our information should not be published. We considered the evidence presented to us, agonized over it, delayed publication because of it. In the end, their case did not stand up to the evidence our reporters amassed, and we judged that the responsible course was to publish what we knew and let readers assess it themselves.⁵⁶

This is truly an extraordinary claim, that somehow the New York Times is entitled to weigh evidence and determine for itself whether to publish classified information—in other words, that the New York Times is above the law and can publish whatever classified information it sees fit, with impunity.

Section 798 of the Espionage Act makes no such exception, of course. Its text is unambiguous: “Whoever knowingly and willfully . . . publishes . . . any classified information . . . concerning the communication activities of the United States Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”⁵⁷ Subsection (b) of the Act defines “communication intelligence” as “all procedures and methods used in the interception of communications and the obtaining of information from such communications

54. Bill Keller, *Striking a Balance: The New York Times Executive Editor on Leaks and Partisanship*, THE WALL STREET JOURNAL, May 2, 2006, editorial page, at 1.

55. *Id.*

56. *Id.* at 2.

57. 18 U.S.C. § 798(a)(3) (2006).

by other than the intended recipient.”⁵⁸ In the cloak and dagger world of intelligence gathering, this statutory prohibition is a model of clarity—it is illegal to publish classified information about our intelligence-gathering efforts and capabilities.

Keller and other defenders of his claimed exemption from this legal mandate point to the Pentagon Papers case, *New York Times Co. v. United States*,⁵⁹ as support for the proposition that the media’s publication of classified intelligence communications information is protected by the First Amendment. There are two fundamental flaws with that contention.⁶⁰ First, the Pentagon Papers case dealt only with a request for an injunction, or prior restraint, on publication—the quintessential restriction on the freedom of the press in mind of those who drafted and ratified the Bill of Rights.⁶¹ But five Justices in that case (Chief Justice Burger and Justices White, Stewart, Harlan, and Blackmun), recognized what our nation’s founders also understood—a prohibition on prior restraints does not eliminate liability for post-publication prosecution for abuses of the freedom.⁶² Justice White, for example, joined by Justice Stewart, specifically noted in his concurring opinion that “a responsible press may choose never to publish the more sensitive materials” “because of the hazards of criminal sanctions.”⁶³ Justice Harlan, joined by Chief Justice Burger and Justice Blackmun, would have required full briefing and consideration of whether an injunction was proper in light of the “doctrine against enjoining conduct in violation of criminal statutes.”⁶⁴ James Wilson made this same point during the Pennsylvania ratifying convention in December 1787:

I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is,

58. *Id.*

59. *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) [hereinafter “Pentagon Papers Case”].

60. There is also a third, more minor flaw, in reliance on the Pentagon Papers case. The information that the government sought to enjoin the *New York Times* and *Washington Post* from publishing was governed by Section 793(e) of the Espionage Act, 18 U.S.C. § 793(e), not Section 798, which applies to the intelligence communications information at issue here. As Justice Douglas noted in his concurring opinion, Section 793(e) barred only the “communication” of classified information relating to the national defense, unlike Section 798, which bars both the publication and communication of signals communication information, demonstrating (at least for Justice Douglas) “that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.” *Id.*, at 721 (Douglas, J., concurring).

61. *Pentagon Papers Case*, 403 U.S. at 733.

62. *Id.*

63. *Id.*

64. *Id.* at 755.

that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.⁶⁵

The second fundamental flaw in relying on the Pentagon Papers case is that the Court's *per curiam* opinion described a prior restraint on speech as "bearing a heavy presumption against its constitutional validity," but it was not an irrebuttable presumption for a majority of the Court. The classified information at issue in the case did not involve ongoing tactical intelligence-gathering operations such as those disclosed by the New York Times, and all but the most absolutist of First Amendment justices⁶⁶ and scholars have recognized, quite rightly, that the freedom of the press does not extend to publication of such things as troop movements. Justice White, for example, joined by Justice Stewart, expressly noted that he was not contending "that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations," only that the government had not met "the very heavy burden that it must meet to warrant an injunction against publication."⁶⁷ Chief Justice Burger noted in his dissenting opinion that there are exceptions to the First Amendment, and that "[c]onceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures."⁶⁸ Justice Harlan, joined by the Chief Justice and Justice Blackmun, specifically wished to consider whether an injunction was appropriate in light of the "presumption" and "strong First Amendment policy" against prior restraints, thereby rejecting the absolutist view that would make his requested inquiry irrelevant.⁶⁹ And Justice Blackmun noted in his dissenting opinion that "even the newspapers concede that there are situations where restraint is in order and is constitutional."⁷⁰ In support of his position that the government has the right to prevent the publication of some sensitive information, albeit a "very narrow right," he cited no less a Justice than Oliver Wendell Holmes, whose own opinions on the First Amendment chartered the course of Supreme Court jurisprudence in the field for the better part of the past century.⁷¹ "It is a question of proximity and degree," noted

65. 2 ELLIOT'S DEBATES 449 (1787), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 99 (Neil H. Cogan ed., 1997).

66. I refer here in particular to the concurring opinions of Justices Black, Douglas, and Brennan in *New York Times*, 403 U.S. at 714, 720 & 724.

67. *Id.* at 731.

68. *Id.* at 749.

69. *Id.* at 753.

70. *Id.* at 761.

71. *New York Times*, 403 U.S. at 714, 720 & 724.

Holmes in *Schenck v. United States*.⁷² “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁷³

In other words, the Pentagon Papers case comes with a very big caveat—one that is fully in line with prior precedent permitting prior restraints when the information at issue is highly sensitive classified information of ongoing military intelligence operations. In *Near v. Minnesota*, for example, the Supreme Court noted that “the protection even as to previous restraint is not unlimited,” even though “the limitation has been recognized only in exceptional cases.”⁷⁴ Among the litany of exceptional cases mentioned by the Court was that “a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”⁷⁵ Similarly, in *United States v. Reynolds*, the Court upheld the government’s claim of privilege that investigation reports of an Air Force accident involving a plane that was testing classified electronics equipment need not be produced during discovery.⁷⁶ Chief Justice Vinson, for the Court, offered this highly relevant explanation in support of the holding:

In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. *It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests.* On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.⁷⁷

It seems pretty clear that the disclosure of classified information about our intelligence-gathering capabilities and tactics fits within the “exceptional case”

72. *Schneck v. U.S.*, 249 U.S. 47, 52 (1919).

73. *Id.*

74. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

75. *Id.*

76. *See generally* *U.S. v. Reynolds*, 345 U.S. 1 (1953).

77. *Id.* at 10 (emphasis added).

caveat recognized by a majority of the Court in both the Pentagon Papers case⁷⁸ and in *Near*,⁷⁹ and although the Supreme Court has never expressly held that such a caveat exists, neither has it held that the First Amendment bars the government from preventing the publication of classified information about ongoing, highly-sensitive military operations in the same way that it can prevent the dissemination of classified information by other citizens.

The second extraordinary claim made by Mr. Keller that needs to be addressed is the notion that the First Amendment's Freedom of the Press Clause creates a special preserve for the institutionalized press, as opposed to ordinary citizens.⁸⁰ Although this is a common understanding among reporters and newspaper editors, it is wrong. The Freedom of the Press Clause was designed to protect the published word of all citizens, not just an institutionalized fourth estate. As one of the anti-federalist opponents of ratification of a constitution that did not include a bill of rights noted, the liberty of the press insures that "the *people* have the right of expressing and publishing their sentiments upon every public measure."⁸¹

James Madison's initial proposal for the First Amendment clearly expressed this common understanding, guaranteeing the right of the people "to speak, to write, or to publish their sentiments."⁸² Roger Sherman's own proposal a month later mirrored Madison's:

The people have certain natural rights which are retained by them when they enter into society, Such are the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom Of these rights therefore they shall not be deprived by the government of the United States.⁸³

These formulations were drawn from the amendments proposed by several of the state ratifying conventions,⁸⁴ and lest there be any doubt that "freedom of

78. See *Pentagon Papers Case*, 403 U.S. 713.

79. See *Near*, 283 U.S. 697.

80. See generally Keller, *supra* note 55.

81. CENTINEL, NO. 2 (Oct. 24, 1787), *reprinted in* Cogan, *supra* note 66, at 103 (emphasis added).

82. ANNALS OF CONG., June 8, 1789, *reprinted in* PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 128 (1987).

83. Proposal by Sherman to House Committee of Eleven, MADISON PAPERS, DLC (July 21–28, 1789), *reprinted in* Cogan, *supra* note 66, at 83.

84. See, e.g., Proposal of the North Carolina ratifying convention, STATE RATIFICATIONS, RG 11, DNA (Aug. 1, 1788), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 93–103 (Neil H. Cogan ed., 1997) ("That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of Liberty, and ought not to be violated"); Proposal of the Rhode Island ratifying convention, STATE RATIFICATIONS, RG 11, DNA (May 29, 1790) ("That the people have a right to freedom of speech and of writing and publishing their

the press” was synonymous with the right of the people generally to speak, write, and publish their sentiments, the Pennsylvania proponents of a Bill of Rights made that amply clear: “That the people have a right to the freedom of speech, of writing, and of publishing their sentiments, *therefore*, the freedom of the press shall not be restrained by any law of the United States.”⁸⁵ What is protected is not just the right to use a printing press or to go into the newspaper business, but the right of every citizen to publish, to make and distribute copies of words and/or pictures communicating his or her sentiments to the public. The founders would never have accepted the view that the freedom of the press is limited to members of a particular industry called “the press” or “the media.”⁸⁶

The consequence of this original understanding, of course, is that the First Amendment does not afford any greater protection to “the press” than it does to ordinary citizens, nor exempt “the press” from “the basic and simple duties of every citizen” to report information regarding discovery or possession of stolen property or secret government documents—a duty which Chief Justice Burger correctly noted rests equally “on taxi drivers, Justices, and the *New York Times*.”⁸⁷

Indeed, in analogous areas of media law involving matters with much lower stakes than national security, the Court has repeatedly emphasized that the media has no special exemption from generally applicable laws. The Court’s holding in *Associated Press v. United States*, for example, devastates any claim that the “press” has “a peculiar constitutional sanctuary” from the law.⁸⁸

[W]e are not unmindful of the argument that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act. No language in the Sherman Act or the summary judgment statute lends support to the suggestion. There is no single element in our traditional insistence upon an equally fair trial for every person from which any such

sentiments, that freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated); Proposal of the Virginia ratifying convention, STATE RATIFICATIONS, RG 11, DNA (June 27, 1788) (“That the people have a right to freedom of speech, and of writing and publishing their Sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated), *see* Cogan, *supra* note 66, at 93.

85. PENNSYLVANIA PACKET (Dec. 18, 1787), *reprinted in* Cogan, *supra* note 66, at 93 (emphasis added).

86. *See generally* Thomas G. West, *Free Speech in the American Founding and in Modern Liberalism*, in ELLEN FRANKEL PAUL, ET AL, FREEDOM OF SPEECH 310–84 (2004).

87. *New York Times*, 403 U.S. at 751.

88. *Associated Press v. U.S.*, 326 U.S. 1, 7 (1945).

discriminatory trial practice could stem. For equal-not unequal-justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and responsible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.⁸⁹

Justice Harlan made the same point for the Court plurality in *Curtis Publishing Co. v. Butts*: “The publisher of a newspaper has no special immunity from the application of general laws.”⁹⁰ And in the post-Pentagon Papers case of *Branzburg v. Hayes*, the Supreme Court refused to recognize a reporter/informant privilege that would exempt reporters from the obligation shared by other citizens to testify before a grand jury, explicitly noting that “otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.”⁹¹

So where does that leave us with respect to the New York Times’ contentions? Once it is clear that the “Freedom of the Press” acknowledged in the First Amendment does not create a special preserve for the institutional media, the full import of Bill Keller’s claims come into view, and it is the old saw, long since disproved, that democratic governments are not permitted secrets, even in time of war. Our Constitution expressly recognizes the common-sense necessity of government secrets, for example, in the Article I requirement that each House of Congress shall publish a journal of its proceedings, “excepting such Parts as in their Judgment may require Secrecy.”⁹² The need for secrecy is even more urgent in the executive branch, and as Alexander Hamilton noted in Federalist 71 (discussed above), it is one of the key reasons the Constitution provides for unity in the executive office, establishing an “energetic” executive who can operate with “secrecy” and “despatch” when necessary to protect “the community against foreign attacks.”⁹³

89. *Id.* at 6–7.

90. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 150 (1967). See also *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (holding no press exemption from labor laws).

91. *Branzburg v. Hayes*, 408 U.S. 665, 682–83 (1972).

92. U.S. Const. Art. I, § 5, cl. 3.

93. THE FEDERALIST NO. 70, *supra* note 48, at 355–56.

This need for secrecy in the conduct of certain executive functions such as those under consideration today has repeatedly been recognized and approved by the courts as well. Writing for the Court in *Curtiss-Wright*, for example, Justice Sutherland explained why the President's authority over foreign affairs was so great, noting that he "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."⁹⁴ A similar view was expressed by Justice Jackson in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and *ought not to be published to the world.*"⁹⁵

The constitutionality of protecting intelligence gathering and other operational military secrets in time of war is therefore beyond dispute, and the institutional press is no more permitted to ignore the legal restrictions imposed by the Espionage Act on the publication and other dissemination of such classified information than are ordinary citizens. Neither is it exempt from prosecution for willful violations of that Act.

Justice Goldberg famously noted in *Kennedy v. Mendoza-Martinez* that our Constitution "is not a suicide pact,"⁹⁶ and the sentiment is particularly apropos for the issues we are facing today. The simple fact is that the asymmetric nature of the current war against international terrorist organizations makes intelligence gathering the central and most critical front in the war. Not only must the executive branch aggressively pursue every legal means of gathering intelligence at its disposal, it must be equally aggressive in protecting the classified methods that it is using in that effort if it is to succeed in preventing future attacks on our homeland and fellow citizens such as those we witnessed on that fateful day in September five years ago. Every citizen, including—particularly including—those employed with major media organs, have a responsibility to prevent ongoing operational secrets from falling into the hands of our enemies by complying with the law regarding classified information. It is one of those "basic and simple duties" of citizenship that rests equally "on taxi drivers, Justices, and the *New York Times*."⁹⁷ We may never know how great the damage to our national security the recent disclosures of classified, highly-sensitive intelligence-gathering information have caused, but with the seriousness of the threat to our lives and liberty posed by terrorist organizations

94. *Curtiss-Wright*, 299 U.S. at 320.

95. *Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (emphasis added).

96. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

97. *New York Times*, 403 U.S. at 751.

such as Al Qaida, it is certainly the right, and may well be the duty, of the executive to prosecute those responsible for them.