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## BALANCING POWER IN THE U.S. RESPONSE TO EXTERNAL THREATS: NSA SURVEILLANCE AND GUANTÁNAMO DETENTION

*Jameel Jaffer\**

I am going to talk about legal challenges to surveillance conducted by the NSA—the National Security Agency. It may not be immediately obvious to you what this topic has to do with Guantánamo, beyond the fact that the administration has defended its surveillance policies, like its detention policies, by reference to the threat of international terrorism. But, in fact, the two contexts raise some of the same legal questions. In particular, the two contexts raise similar questions about the respective roles of the executive, legislative, and judicial branches in determining the nation's response to external threats.

In the area of national security policy—though not *only* in this area—the current administration has taken a capacious view of executive authority and it has taken a correspondingly circumscribed view of the authority possessed by the two other branches. Thus at various times over the last five years, the administration has proposed that the executive branch possesses exclusive or near-exclusive authority to determine, among other things, what interrogation methods may be used against suspected terrorists; whether individuals—including U.S. citizens—ought to be detained without charge as enemy combatants; and what rules should apply in the military's prosecution of foreign enemy combatants charged with war crimes. When pressed to identify the source of this sweeping authority, the administration has pointed to two things. It has pointed, first, to Congress's September 2001 Authorization for Use of Military Force (AUMF), which empowers the President to take action against those responsible for the September 11th attacks and against those who harbored them. And, more radically, the administration has pointed to Article II of the Constitution, which, it says, not only empowers the President to protect the nation against foreign threats, but also renders unconstitutional Congress's efforts to regulate this power.

This theory of executive power was tested to some degree in *Hamdi v. Rumsfeld*,<sup>1</sup> which addressed the Executive's authority to

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<sup>1</sup> 542 U.S. 507 (2004).

detain combatants seized on the battlefield, and in *Hamdan v. Rumsfeld*,<sup>2</sup> which addressed the Executive's authority to convene military tribunals. But I think it is the National Security Agency cases that will be the real crucible.

Most of the NSA cases—and there are a number of them now—grow out of the same set of facts. In early 2006, the *New York Times* disclosed that President Bush had authorized the NSA to conduct foreign intelligence wiretaps inside the United States without compliance with FISA—the Foreign Intelligence Surveillance Act—which is a statute that Congress enacted in 1978 to govern the collection of foreign intelligence inside the United States.<sup>3</sup> FISA allows the FBI wide latitude to monitor the communications of people who are thought to be agents of foreign governments or of foreign terrorist organizations.<sup>4</sup> However, the statute also includes important safeguards against abuse. It sets out specific procedures that the executive branch must follow in order to initiate foreign intelligence surveillance inside the United States. The executive must submit a written application to a specially constituted intelligence court. The application must show that a “significant purpose” of the surveillance is to gather information about foreign threats to the country—rather than, for example, to gather evidence of criminal activity by purely domestic groups. And the application must show what's called “foreign intelligence probable cause”—that is, probable cause to believe that the target of the surveillance is the agent of a foreign government, political group, or terrorist group.

The NSA program, as described by senior administration officials, does not comply with any of those requirements.<sup>5</sup> According to public statements by administration officials, the program involves, among other things, the warrantless interception of telephone calls that originate or terminate inside the United States. The interceptions are not subject to judicial oversight, and they are not based on probable cause. Instead, these interceptions are initiated on the basis of a NSA shift supervisor's unilateral determination that one party to the communication is “linked,” in some unspecified sense of the word, to a terrorist organization.

The administration announced in January that it was bringing

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<sup>2</sup> 126 S. Ct. 2749 (2006).

<sup>3</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>4</sup> 50 U.S.C. § 1802(a) (2004).

<sup>5</sup> See *supra* note 3, at A1.

the program within the authority of the FISA court, at least temporarily.<sup>6</sup> But it continues to insist that the program was legal, and it has expressly reserved the authority to resurrect the program at any time. For all we know, it has been resurrected already.

It is somewhat difficult to understand why the administration ever thought the program was necessary at all. FISA's requirements are not particularly onerous for the executive branch. In fact, the procedures are considerably less onerous than the ones that apply in criminal cases. In addition, FISA includes an emergency exception, for exigent circumstances, and it includes a provision that allows warrantless surveillance for fifteen days after a declaration of war. FISA, therefore, is not particularly burdensome. In drafting the legislation, Congress anticipated exigent circumstances, emergencies, and even war.

Nor is the FISA court unsympathetic to the executive branch. The FISA court meets in secret, allows only the government to appear before it, and does not ordinarily publish its decisions. Over the last twenty-five years, the Executive has submitted to the FISA court on the order of 20,000 surveillance applications, and of those 20,000 applications, the FISA court has denied only four. I do not want to say that the FISA court is simply a rubberstamp; I do not think that is entirely true. But the statistics are certainly suggestive, and it is difficult to believe that FISA has really been an impediment to the administration's intelligence efforts.

For whatever reason, though, the administration decided five years ago that it was going to inaugurate a domestic surveillance program outside the FISA framework and a program of warrantless wiretapping inside the nation's borders.

Now, as I said, the administration argues that Congress authorized the program through the Authorization to Use Military Force Act.<sup>7</sup> Here's the key sentence from a brief that the government recently filed in the Sixth Circuit: "Because the collection of foreign intelligence about the enemy in wartime is a fundamental and time-honored incident of armed conflict, such intelligence gathering is 'unmistakably' covered by Congress's Authorization for the Use of Military Force . . . ."<sup>8</sup> But it is difficult to believe that Con-

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<sup>6</sup> See, e.g., Eric Lichtblau, *Judges and Justice Dept. Meet over Eavesdropping Program*, N.Y. TIMES, Jan. 10, 2006, at A14.

<sup>7</sup> Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>8</sup> Brief for Appellants at \*14, *American Civil Liberties Union et. al. v. National Security Agency et. al.*, Nos. 06-2095, 06-2140, 2006 WL 4055616 (6th Cir. Oct. 17, 2006) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004)).

gress meant the AUMF to implicitly repeal a comprehensive foreign intelligence statute that has been on the books for almost thirty years. In fact, when Senator Arlen Specter was presented with the administration's argument, he had this to say: "I do not think that any fair, realistic reading of the [AUMF] gives [the President] the power to conduct electronic surveillance."<sup>9</sup> And Senator Specter was not the only one to offer this view. Senator Lindsey Graham, Republican of South Carolina, said this: "I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche."<sup>10</sup> So the administration's reliance on the AUMF is pretty weak, and even Republican members of Congress are saying so.

In fact, to accept the government's position would require us to conclude not only that the AUMF's general language authorized a program of judicially unsupervised electronic surveillance within the nation's borders, but also that the same general language implicitly repealed FISA's express prohibition of electronic surveillance except under the terms of FISA itself. As the Supreme Court has said repeatedly, repeals by implication are rarely recognized and can be established only by overwhelming evidence that Congress intended the repeal. And there is no such evidence here.

So everything comes down to the government's second defense of the program, which is not a statutory argument but a constitutional one. The government argues that under the Constitution, "[t]he 'President *alone*' is 'invested with the entire charge of hostile operations.'"<sup>11</sup> In other words, the protection of the nation from foreign threats is the exclusive domain of the executive branch. To the extent that Congress has enacted legislation that limits the President's authority, the government says, the legislation is unconstitutional. This argument proposes a fairly radical reconception of executive power. Until now, it has been generally accepted that, although the President is Commander-in-Chief, the war and foreign affairs powers are shared between the President and Congress. The President has constitutional authority in these areas, but Congress can regulate the President's exercise of this

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<sup>9</sup> *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 12 (2006) (statement of Sen. Arlen Specter).

<sup>10</sup> *Id.* at 17 (statement of Sen. Lindsey Graham).

<sup>11</sup> Brief for Appellants, *supra* note 8, at \*45 (emphasis added) (internal citations omitted).

authority.<sup>12</sup>

In fact, the Supreme Court said precisely this in *Youngstown*, which involved President Truman's attempted seizure of the nation's steel mills during the Korean War.<sup>13</sup> In that case, the government argued that the seizures were a permissible exercise of the President's authority as Commander-in-Chief and of the President's "inherent" authority to respond to emergencies.<sup>14</sup> But the Court rejected this argument, finding that the President could not constitutionally disregard a statute that implicitly prohibited the seizures.<sup>15</sup> Essentially, the Court held that the President did not have the authority to disregard a duly enacted law.<sup>16</sup> The Court wrote, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."<sup>17</sup>

The current administration's theory of executive power basically asks for a reconsideration of *Youngstown*. It proposes, again, that the President alone is invested with the entire charge of hostile operations—and, even more troubling, that the President enjoys this unfettered authority even as to operations that, like the NSA program, are aimed principally at constitutionally protected activity that takes place inside the nation's borders. This theory proposes that the President can ignore the laws that Congress has enacted in exercise of its own war powers. But the Supreme Court's recent detention cases suggest that the Court is unlikely to be sympathetic to this argument.<sup>18</sup> *Hamdan*, again, involved the President's authority to convene military commissions that did not comply with the Uniform Code of Military Justice.<sup>19</sup> Justice Stevens, writing for the Court, stated: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."<sup>20</sup> Justice Kennedy expanded on the same point in

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<sup>12</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>13</sup> *Id.* at 579.

<sup>14</sup> *Id.* at 584.

<sup>15</sup> *Id.* at 587–88.

<sup>16</sup> *Id.* at 585–86.

<sup>17</sup> *Id.* at 587.

<sup>18</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

his concurrence:

This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority.<sup>21</sup>

The application of the *Youngstown/Hamdan* framework to the NSA program is straightforward. The Executive does not have the authority to disregard FISA any more than it had the authority to disregard the Uniform Code of Military Justice in *Hamdan* or the Labor Management Relations Act in *Youngstown*. Like the statutes that were at issue in those cases, FISA was the result of "a deliberative and reflective process engaging both of the political branches."<sup>22</sup> In fact, when it was enacted, FISA was fully supported by the President, the Attorney General, and the directors of the FBI, CIA, and NSA. In his signing statement, President Carter characterized the statute as the result of "the legislative and executive branches of Government work[ing] together toward a common goal."<sup>23</sup> To use Justice Kennedy's phrase, FISA was a law "derived from the customary operation of the Executive and Legislative Branches."<sup>24</sup> It is not open to the President simply to ignore it.

The government argues that FISA is unconstitutional because it infringes on the President's constitutional authority. But if the NSA program conflicts with FISA (as the government has conceded that it does), it is the NSA program, not FISA, that is unconstitutional. That is the clear import of *Youngstown* and *Hamdan*. The President might have constitutional authority to engage in warrantless foreign intelligence surveillance in the context of Congressional silence; in fact some courts reached this conclusion before FISA was enacted.<sup>25</sup> But, through FISA, Congress has permissibly acted in a field of shared constitutional authority to regulate the exercise of the President's power. The *Youngstown/Hamdan* line of cases makes clear that the President cannot simply ignore limita-

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<sup>21</sup> *Id.* at 2799 (Kennedy, J., concurring).

<sup>22</sup> *Id.*

<sup>23</sup> Foreign Intelligence Surveillance Act of 1978, Statement on Signing S. 1566 into Law, 2 PUB. PAPERS 1853 (Oct. 25, 1978).

<sup>24</sup> *Hamdan*, 126 S. Ct at 2799 (Kennedy, J., concurring).

<sup>25</sup> *U.S. v. Brown*, 484 F.2d 418, 425 (5th Cir. 1973) (citing *United States v. Smith*, 321 F.Supp. 424 (C.D. Cal. 1971)).

tions that Congress has, in proper exercise of its own authority, placed on his authority.

To understand the significance of the administration's argument, you have to think about the other contexts in which Congress has regulated the war or foreign affairs powers. If it's true that Congress can't regulate the President's exercise of these powers, what other acts of Congress are unconstitutional? When it comes to national security policy, the administration wants a free hand. It wants a blank check.

With the administration ignoring FISA, it's important to remember why Congress enacted the law in the first place. During the 1960s and 1970s, the executive branch conducted indiscriminate surveillance of civil rights activists and peaceful political organizations.<sup>26</sup> For example, Martin Luther King, Jr., was the target of an intensive FBI surveillance and harassment campaign meant to "neutralize" him as a civil rights leader.<sup>27</sup> A Senate Committee that investigated this history in 1976 found "a clear and sustained failure by those responsible to control the intelligence community and to ensure its accountability."<sup>28</sup> It was in response to this history that Congress enacted FISA. And it is FISA that the executive branch is now disregarding.

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<sup>26</sup> See Scott Shane, *For Some, Spying Controversy Recalls a Past Drama*, N.Y. TIMES, Feb. 6, 2006, at A18.

<sup>27</sup> CONGRESSIONAL RESEARCH SERVICE, UNITED STATES LIBRARY OF CONGRESS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, UNITED STATES SENATE (Washington, U.S. Gov't. Print. Off. 1976).

<sup>28</sup> *Id.*



