Protecting the Public from Waste, Fraud, and Abuse: By Violating the Constitution

Prepared Statement of

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before the

Committee on Oversight and Government Reform
U.S. House of Representatives

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NOTE

This witness was invited to testify only forty-eight hours prior to the hearing, and was already scheduled to testify before a subcommittee of the Senate Judiciary Committee on the morning of May 13. During the May 14 hearing (the present hearing) before the House Oversight Committee, the witness requested and received unanimous consent from the Committee to revise and extend his prepared statement. This is the revised version, submitted to the Committee on May 19, 2009.

About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for several years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Senate Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, a post he left in 1987 to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional career studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law,* which he co-edits with Professor John Norton Moore, the founder of the academic discipline. Turner's most comprehensive examination of these issues, *National Security and the Constitution,* has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious American Bar Association's Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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MR. CHAIRMAN, it is an honor and a pleasure to appear before the Committee on Oversight and Government Reform this morning to discuss H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009."

I am not an expert on whistleblowers or statutes protecting whistleblowers, and my comments will be largely limited to Section 10 of the bill. The purpose of Section 10, as I understand it, is to extend to employees of the Intelligence Community protections already embodied in federal law for "whistleblowers" in other departments. Put differently, this is a proposed statute that would authorize employees of the Executive Branch to communicate classified national security information to members of several congressional committees irrespective of the views of their agency or departmental superiors or the President of the United States.

As a matter of public policy, I think this is a truly horrible provision that will materially undermine our national security, weaken our ability to obtain sensitive information from intelligence services in other nations, probably get a lot of innocent Americans killed, and conceivably endanger the liberty of all Americans. That is to say, on policy grounds I think this is a *very* bad idea. But others will disagree, and you may each draw your own conclusions about the desirability of this legislation as a matter of sound public policy.

I would respectfully submit that there is another problem with Section 10 that mandates its rejection irrespective of your personal policy preferences. Each of you, before assuming office, took an Oath to support the Constitution[1]—the highest law in this Nation. **This bill is flagrantly *unconstitutional.***

I. Constitutional Issues

I say the bill is unconstitutional with great confidence, having spent more than four decades studying, teaching, and writing about the separation of constitutional powers in the national security realm. I addressed these issues while serving as national security adviser to a member of the Senate Foreign Relations Committee more than three decades ago, and I wrote a 250 page-legal/historical memorandum while a lawyer in the White House more than twenty-five years ago entitled: "Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities."[2] My 1700-page doctoral dissertation was on

[1] U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

[2] Robert F. Turner, Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities (1984) (unpublished manuscript), *available at* http://www.virginia.edu/cnsl/pdf/Turner-Cong.Constitution&ForeignAffairs.pdf.

"National Security and the Constitution" and focused in detail on intelligence issues. It included more than 3,000 footnotes—mostly to primary historical sources. None of us has the time to go through those lengthy writings right now, but I will mention just a few of the reasons for my conclusion that this bill is unconstitutional.

The Framers Intentionally Excluded Congress From "The Business of Intelligence" Because It Could Not Be Trusted to Keep Secrets

Put simply, the Framers of our Constitution understood that Congress could not be trusted to keep secrets. Indeed, as early as 1776, when France agreed to provide covert assistance to the new American Revolution, Benjamin Franklin and the other four members of the Committee of Secret Correspondence agreed *unanimously* that they could not inform others in the Continental Congress because, "We find by fatal experience that Congress consists of too many members to keep secrets."[3] I testified at some length on this issue fifteen years ago before the House Permanent Select Committee on Intelligence.[4]

Having served as Secretary of State for Foreign Affairs and later President of the Continental Congress, and having been a key negotiator of the 1782 peace treaty with Great Britain, John Jay was America's most experienced diplomat and had first-hand experience with the problem of congressional "leaks."[5] He wrote at one point: "Congress never could keep any matter strictly confidential; someone always babbled."[6] Jay was offered the position of Secretary of Foreign Affairs (later re-designated "Secretary of State") by President Washington, but he preferred instead to serve as America's first Chief Justice—a role he had earlier filled in New York.

In his highly acclaimed *Witnesses at the Creation*, Columbia University Professor Richard B. Morris—who served as President of the American Historical Society and was probably America's preeminent scholar on constitutional history of his generation—discussed the problem of "legislative leaks" in the early days of our country:

> Complicating frank discussions were the pressures exerted by the ever-watchful French minister, Conrad Alexandre Gerard, chatting interminably with those Congressional delegates who appeared more concerned about France's goals in the war than America's, and seemed uninhibited by the Congressional rules of secrecy.
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> Jay was sickened by the pressures exerted by special interests and by the chicanery that too often kept sensible men from agreeing on sensible

[3] *Verbal Statement of Thomas Story to the Committee, in* 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES 819 (Fifth Series 1837-53).

[4] Secret Funding and the "Statement and Account" Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities: Hearing Before the H. Comm. on Intelligence, 103d Cong. (1994) (statement of Robert F. Turner), *available at* http://www.fas.org/irp/congress/1994_hr/turner.htm.

[5] *See, e.g., id*.

[6] HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 23 (1929).

> peace ends. "There is as much intrigue in this State House as in the Vatican," Jay observed to Washington, "but as little secrecy as in a boarding school." The General, who shared Jay's tight-lipped approach to commenting on sensitive matters, and who had suffered more than one affront from Congress about his conduct of the war, saw the point and commiserated with his friend.[7]

There are some today who assume that issues of "secrecy" and the need to protect "sources and methods" of foreign intelligence are relatively modern concerns–perhaps traceable back to the presidencies of Richard Nixon, Ronald Reagan, or George W. Bush. But, in reality, the Framers were well aware of the difficulty the new nation would have in acquiring foreign intelligence information unless our government could be trusted to keep secrets. As Jay explained in *The Federalist* No. 64:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done will therefore in so disposing of the power of making treaties, that although ***the president*** must in forming them act by the advice and consent of the senate, yet he ***will be able to manage the business of intelligence in such manner as prudence may suggest***.[8]

That the First Congress shared this understanding is evident from reading the first volume of *U.S. Statutes at Large*. Article I, Section 9 of the new Constitution required that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"[9]—language that was substituted for a requirement to report "annually" specifically for the purpose of permitting the President to conceal sensitive military and diplomatic expenditures until the need for secrecy had passed.[10] Despite this clear requirement, when the First Session of the First Congress appropriated money for foreign intercourse, it simply provided that:

> [T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .[11]

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[7] RICHARD B. MORRIS, WITNESSES AT THE CREATION 77 (1985).
[8] THE FEDERALIST No. 64, at 434-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).
[9] U.S. CONST. art. I, § 9.
[10] *See* Secret Funding and the "Statement and Account" Clause, *supra* note 4.
[11] 1 Stat. 129 (1790).

This boilerplate language was repeated for many years in subsequent statutes. Indeed, the consistent early practice under our Constitution was captured well by President Jefferson in a February 19, 1804, letter to Treasury Secretary Albert Gallatin:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the *duties* are by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties . . . . ***From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President***.[12]

Origins of "Executive Privilege" Over National Security Documents

The issue of the President's authority to deny classified information to Congress dates back to 1792, when the House of Representatives instructed Secretary of War Henry Knox to turn over documents related to a failed military expedition against the Miami Indians by Major General Arthur St. Clair. As Professor Mark Rozell writes:

> Washington convened his cabinet to determine how to respond to this first-ever request for presidential materials related to national security by a congressional committee. The President wanted to discuss whether any harm would result from public disclosure of the information and, most pertinently, whether he could rightfully refuse to submit documents to Congress.[13]

Thomas Jefferson attended this cabinet meeting with Washington, Treasury Secretary Alexander Hamilton, Knox, and Attorney General Edmund Randolph. Jefferson later wrote that:

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently we're to exercise a discretion. Fourth, that neither the committees nor House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that

[12] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. Ed. 1903) (bold emphasis added).
[13] MARK ROZELL, EXECUTIVE PRIVILEGE 33 (1994).

> the committee should instruct their chairman to move the House to address the President.[14]

Rozell continues:

> Washington eventually determined that public disclosure of the information would not harm the national interest and that such disclosure was further necessary to vindicate General St. Clair. Although Washington chose to negotiate with Congress over the investigating committee's request and to turn over relevant documents to Congress, his administration had taken an affirmative position on the right of the Executive Branch to withhold information [from Congress].[15]

This position was unanimous, and was reiterated during the controversy over whether Executive Branch should cooperate with a Senate motion "requesting" from President Washington correspondence "between the Minister of the United States at the Republic of France [Gouverneur Morris], and said Republic, and between said Minister and the Office of Secretary of State."[16] Washington once again sought the advice of his cabinet:

> General Knox is of the opinion, that no part of the correspondence should be sent to the Senate. Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the president may choose to withhold. Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the president thinks is improper, should not be sent.[17]

Attorney General William Bradford, who was not present at the meeting, later wrote: "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed."[18] Having sought the input of his cabinet, the President made his decision. As Professor Rozell explains:

> On February 16, 1794, Washington responded as follows to the Senate's request: "After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential."

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[14] 1 WRITINGS OF THOMAS JEFFERSON 189, 190 (Paul Leicester Ford ed., Fed. Ed. 1905).
[15] ROZELL, *supra* note 13, at 33.
[16] *Id.* at 34.
[17] *Id.*
[18] *Id.*

> Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. He believed that information damaging to the "public interest" could constitutionally be withheld from Congress. The Senate never challenged the President's authority to withhold the information.[19]

Two years later, in 1796, President Washington not only reserved the right to withhold national security information from Congress but exercised it when the "House passed a resolution requesting from Washington information concerning his instructions to the U.S. minister to Britain regarding the treaty negotiations" of the controversial Jay Treaty, which the Senate had consented to ratify by the narrowest of margins the previous year.[20] Professor Rozell writes that the "resolution raised the issue of the House's proper role in the treaty-making process. Washington refused to comply with the House request and explained his reasons for so deciding in a message to the House of Representatives":[21]

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent."[22]

In conclusion, Washington reasoned that "the boundaries fixed by the Constitution between the different departments should be preserved," declaring "a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."[23]

During House debate over the congressional request for Washington's instructions to Jay, Representative James Madison argued that each Department was to judge for itself what documents to share with the other:

> He [Madison] thought it clear that the House must have a right, in all cases, to *ask* for information which might assist their deliberations on the

[19] *Id.* at 34-35.
[20] *Id.* at 35.
[21] *Id.*
[22] 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194.
[23] ROZELL, *supra* note 13, at 35.

> subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that *the Executive had a right, under a due responsibility, also, to withhold information* when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply on a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it. . . . It belonged, he said, to each department to judge for itself. *If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them,* because he was the competent though a responsible judge within his own department.[24]

Note in the first sentence that Madison—often called the "Father of the Constitution"—said the House had a right to ask for information concerning "subjects submitted to them by the Constitution." But the Constitution grants Congress no role in "the business of intelligence," and indeed the *The Federalist* expressly explained that this business was entrusted entirely to the discretion of the president to be managed "as prudence might suggest."[25] This division of powers was firmly accepted by all three branches until a heady Democratic Congress, in the wake of Vietnam and Watergate, began usurping the constitutional powers of the presidency.

During the Jay Treaty debates, only a single member of the House argued the Congress had an absolute right to Executive documents—based upon its power of impeachment. However, several members argued that had the dispute actually involved a possible impeachable offense, such a right to evidence might exist.

Some modern students of Executive Privilege point to the 1974 Watergate case, *United States v. Nixon*, as evidence that traditional concepts of Executive Privilege have now been narrowed. But in *Nixon* the Supreme Court *repeatedly* distinguished its holding from a setting involving national security secrets, emphasizing that the President did "not place his claim of privilege on the ground that they are military or diplomatic secrets."[26] The *Nixon* Court affirmed that the doctrine of Executive Privilege was "constitutionally based" and noted that "The President's need for complete candor and objectivity from advisers calls for great deference from the courts."[27] But where issues of national security are not involved, the privilege is not absolute and courts must *balance* the competing claims in the interest of justice. Nothing the Court said in *Nixon* called into

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[24] 5 ANNALS OF CONG. 773 (1796) (emphasis added).

[25] *See* discussion, *supra* note 8, and accompanying text. Some may argue that the power of Congress to appropriate money for intelligence activities gives it control over intelligence activities. But by this same logic, the Congress would have a right to monitor and control the secret deliberations of the Supreme Court in pending cases since the Court cannot function without appropriations. The Constitution created three independent and co-equal branches, and each must respect the proper constitutional authority of the others. A contrary view would totally destroy the doctrine of separation of powers.

[26] United States v. Nixon, 418 U.S. 683, 710 (1974).

[27] *Id.* at 706 n.36.

question its earlier decision in *Reynolds* that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[28] This view was fully consistent with Chief Justice Marshall's 1803 decision in *Marbury v. Madison*, which will be discussed later in my testimony.[29]

The Grant of "Executive" Power to the President

Much of our modern difficulty in trying to understand the separation of foreign affairs powers results from a failure to study history, and to understand Article 2, Section 1, of the Constitution: when the Founding Fathers wrote that the "executive Power" of the new nation "shall be vested in a President of the United States of America,"[30] they understood that they were giving their new leader the general management of the nation's foreign relations. Thus, in a memorandum to President Washington dated April 24, 1790, Secretary of State Thomas Jefferson explained:

> The Constitution . . . . has declared that "the Executive powers shall be bested in the President," submitting only special articles of it to a negative by the Senate . . . .
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> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. . . .
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> The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them . . . .[31]

It is noteworthy that, in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the "secrets" of the Executive branch, and in the final version he decided to broaden that to "concerns."[32]

Three days later, Washington recorded in his diary that he had spoken with Representative James Madison and Chief Justice John Jay about Jefferson's memo, and both agreed that the Senate had "no Constitutional right to interfere" with the business of diplomacy save for the specific roles set forth in the Constitution: "all the rest being Executive and vested in the President by the Constitution."[33] (Madison had already recognized the importance of the grant of executive power during a House debate the previous year, while Jefferson was still representing the new nation in Paris.[34])

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[28] United States v. Reynolds, 345 U.S. 1, 7-8 (1952) (emphasis added).
[29] *See* discussion, *infra* note 50, and accompanying text.
[30] U.S. CONST. art. II, § 1.
[31] 16 PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961) (emphasis in original).
[32] *Id*. at 382 n.8.
[33] 4 DIARIES OF GEORGE WASHINGTON 122 (John C. Fitzpatrick ed., 1925).
[34] *See, e.g.,* Letter from James Madison to Edmund Pendleton (June 21, 1789), *in* 5 WRITINGS OF

In 1793, Alexander Hamilton wrote that "[t]he general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument."[35] From this, Hamilton concluded that:

> [A]s the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.[36]

Hamilton and Jefferson were bitter political rivals, but on with regard to the scope of the executive power, both Republicans and Federalists were in full accord. Indeed, it is significant that all three of the authors of *The Federalist* endorsed the same interpretation of the Constitution, as did Washington's cabinet and both houses of Congress. This was not a controversial issue to the Framers.

For those who might wonder where such interpretations of "executive" power came from, the answer is apparent from a reading of the scholars whose writings most influenced the Framers. In his *Second Treatise on Civil Government*—described by Jefferson as being "perfect as far as it goes"[37] —John Locke coined the term "federative" power to describe the "the management of the *security* and *interest of the publick without*, with all those that it may receive benefit or damage from";[38] he argued that, of necessity, this power needed to be entrusted to the Executive. Locke reasoned:

> And though this *federative power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.[39]

In *The Federalist* No. 64, John Jay paraphrased Locke's argument when he explained why the new American president would be given important powers that would not be controlled by Congress:

JAMES MADISON 405-06 (1904) ("[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department.").

[35] 15 PAPERS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed., 1969).

[36] *Id.*

[37] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 31, at 449.

[38] JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 145-46 (P. Laslett ed., rev. ed. 1963) (emphasis in original).

[39] *Id.* at § 147 (emphasis in original).

> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measures. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.[40]

Even before mentioning the business of executing laws enacted by the legislature, Montesquieu—whom James Madison in *The Federalist* No. 47 described as the celebrated authority "who is always consulted and cited" on issues of separation of powers[41]—described an "executive" power that was "dependent on the law of nations" by which the executive magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."[42] The management of foreign intercourse was also seen as "executive" by others who were widely read by the Framers, including Adam Smith[43] and William Blackstone—who, in the first volume of his *Commentaries on the Laws of England,* wrote that, "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . ."[44]

While it is common today to teach that the Framers sought to reject strong presidential power over foreign affairs, this is mistaken. To be sure, there are some very anti-Executive statements in the *Records of the Federal Convention*; but most of those statements were made on June 1, when the convention had just begun. In the months that followed, opinions changed. After noting the tendency of most of the state legislatures to usurp the power of the governors, Dr. Charles Thach in his classic 1922 study, *The Creation of the Presidency*, explained:

> State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. *The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that*

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[40] THE FEDERALIST No. 64, at 435-36 (John Jay) (Jacob E. Cooke ed., 1961).
[41] *Id.* No. 47, at 324 (James Madison).
[42] 1 MONTESQUIEU, SPIRIT OF THE LAWS 151 (Thomas Nugent trans., rev. ed. 1900).
[43] ADAM SMITH, LECTURES ON JURISPRUDENCE 204-09 (1978).
[44] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

> *the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth.* The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.[45]

This problem of "omnipotent" state legislatures—and the tyranny they begat—was described by Thomas Jefferson in his 1782 *Notes on the State of Virginia*:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual . . . .
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> The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered. [46]

Eleven days after the new Constitution went into effect, Jefferson wrote to Madison: "The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. The *tyranny of the legislatures* is the most formidable dread at present . . . ."[47] Madison very much shared this view, remarking that same year to a colleague: "[I]f the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department."[48]

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[45] CHARLES THACH, THE CREATION OF THE PRESIDENCY 1775-1789, at 52 (1922) (emphasis added).
[46] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245-46 (1782), *available at* http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all.
[47] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 31, at 659, 661.
[48] Letter from James Madison to Edmund Pendleton, *supra* note 34, at 405-06.

As a Federalist representative in the House of Representatives in 1800, John Marshall observed that under our Constitution the President was "the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole *Executive power*"; paraphrasing the words of Blackstone, the future chief justice added: *In this respect, the President expresses constitutionally the will of the nation . . . .*"[49]

As the nation's chief justice three years later, Marshall wrote in *Marbury v. Madison,* that:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive*.[50]

The next lines in this landmark Supreme Court opinion should dispel any doubt that Marshall was talking primarily about the President's exclusive[51] constitutional control over the nation's external intercourse::

> The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . The acts of such an officer, as an officer, can never be examinable by the courts.[52]

For further evidence that certain presidential powers were not to be "checked" by the other branches, we need look only at the most famous and frequently cited of all foreign affairs cases, *United States* v. *Curtiss-Wright Export Corp.,* where the Supreme Court said:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a

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[49] 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).
[50] Marbury v. Madison, 5 U.S. [1 Cranch] 137, 165-66 (1803).
[51] This power is "exclusive" save for the "exceptions' to executive power expressly enumerated in the Constitution such as the Senate's negative over a completed treaty and over diplomatic nominations. That these are in their nature "executive" powers is clear from that fact that to consider them the Senate goes into "executive session" and takes the treaties and nominations from the "executive calendar."
[52] *Id.* at 166.

> representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it*.[53]

Of particular relevance to the constitutionality of Section 10 of H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009," Justice Sutherland, speaking for the Court, went on to address the issue of executive privilege vis-à-vis documents in the foreign affairs realm (which at its core includes sensitive intelligence secrets):

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus *the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations*—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. 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. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. . . .
>
> The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[54]

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[53] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
[54] *Id*. at 319-21.

In his prepared testimony for today's hearing, my old friend Dr. Louis Fisher attempts to dismiss the *Curtiss-Wright* opinion as mere *dicta* unworthy of notice.[55] One could make exactly the same argument against *Marbury v. Madison* – widely regarded as the most important decision ever handed down by the Supreme Court – because Chief Justice Marshall's brilliant defense of judicial review was not necessary to decide the case. And had *Marbury* not been relied upon by the Supreme Court repeatedly in subsequent years to decide cases, perhaps such reasoning would make sense. But both *Marbury* and *Curtiss-Wright* have been relied upon as valuable precedent by the Supreme Court time and again over many decades.

Dr. Fisher seeks to use language from the concurring opinion of Justice Robert Jackson in the 1952 *Steel Seizure Case* (*Youngstown Sheet & Tube Co. v. Sawyer*)[56] to discredit the Supreme Court's majority in *Curtiss-Wright.*[57] There are two major problems with Dr, Fisher's reasoning. First of all, we know Justice Jackson accepted *Curtiss-Wright* as valid precedent for the proposition that "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs," because in writing the Court's majority opinion two years earlier in *Eisentrager*, Justice Jackson cited *Curtiss-Wright* for precisely that proposition.[58] Further, while he did mention *Curtiss-Wright* in his *Youngstown* concurrence, he dismissed its relevance by remarking: "That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories . . . ."[59] *Curtiss-Wright* was a foreign affairs case, while *Youngstown* involved the seizure of private property within the United States without the "due process of law" required by the Fifth Amendment.[60]

While I am responding to Dr. Fisher's prepared statement, I should also probably address his attempt to dismiss *Department of the Navy v. Egan* on the grounds that it merely involved statutory interpretation.[61] It is true that the case was largely decided on that ground, but it is significant that the Supreme Court noted that presidential power to grant or withhold access to classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."[62] Obviously, a power conferred directly upon the President by the Constitution may not be lawfully exercised by Congress without a constitutional amendment.

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[55] *Protecting the Public From Waste, Fraud and Abuse: Hearing on H.R. 1507 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 12 (2009) (statement of Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress) [hereinafter Fisher Statement], *available at* http://oversight.house.gov/documents/20090513183833.pdf.

[56] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579.

[57] Fisher Statement, *supra* note 55, at 12.

[58] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[59] *Youngstown*, 343 U.S. at 636 n.2 (Jackson, J., concurring).

[60] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[61] Fisher Statement, *supra* note 55, at 10.

[62] Department of the Navy v. Egan, 484 U.S. 518, 527 (1988).

This deference to presidential discretion in foreign affairs was recognized by both the courts and Congress well into the second half of the twentieth century. In the 1953 case of *United States v. Reynolds*, the Supreme Court discussed the Executive privilege to protect national security secrets, noting that: "Judicial Experience with the privilege which protects military and state secrets has been limited in this country"[63] (because it was seldom challenged). But the Court recognized an *absolute* privilege for military secrets, explaining:

> In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake*."[64]

Obviously, intelligence programs designed to intercept communications from or influence the behavior of our nation's enemies during a period of authorized war are valid "military secrets." Neither the courts nor the Congress were to have access to them without leave of the President.

Four years after the *Reynolds* decision, one of the nation's leading constitutional scholars of his era, Professor Edward S. Corwin, wrote in his classic volume, *The President: Office and Powers*:

> So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that *he is final judge of what information he shall entrust to the Senate as to our relations with other governments*.[65]

Professor Corwin, as some may recall, was called upon by Congress to oversee preparation of the first (1952) edition of *The Constitution of the United States of American: Analysis and Interpretation,* which was published by Congress and three decades later ran to some 2300 pages (not counting supplements).[66] And his views on executive privilege in the foreign affairs realm were widely shared by his predecessors.

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[63] United States v. Reynolds, 345 U.S. 1, 7 (1953).
[64] *Id.* at 11 (emphasis added).
[65] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 211-12 (4th rev. ed. 1957) (emphasis added).
[66] S. DOC. NO. 99-16 (1987).

As William Howard Taft wrote in his *Our Chief Magistrate and His Powers* while a Yale Law School professor between his service as president and chief justice of the United States:

> The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest.[67]

Similarly, Johns Hopkins Professor Westle Willoughby, in Volume Three of his classic treatise, *The Constitutional Law of the United States,* wrote that:

> The constitutional obligation that the President "shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," has, upon occasion, given rise to controversy between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests *it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.*
>
> The discretionary right of the President to refuse information to Congress has been exercised from the earliest times. Thus, President Washington refused to send to the House of Representatives correspondence relating to the British treaty; Presidents Jackson and Tyler similarly refused to transmit information relating to the Marine boundary dispute; President Polk declined to send to the Senate the entire correspondence relating to the Oregon dispute with Great Britain; in 1845 President Polk refused information to the Senate regarding the annexation of Texas, and again, in 1848, as to the pending treaty with Mexico; President Fillmore refused a request of the Senate for information regarding negotiations with the Sandwich Islands; President Lincoln refused to transmit correspondence with regard to the slave ship Wanderer; and refused to communicate Major Anderson's dispatches from Fort Sumter.[68]

Mr. Chairman, the understanding that the President is the "sole organ" of our government for what John Jay called "the business of intelligence"–the most sensitive element of diplomacy and war–was unchallenged and embraced by all three branches from the days of George Washington until the Vietnam War. This was not an unsettled issue, and the

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[67] WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 129 (1916).

[68] 3 WESTLE W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1488 (2d ed. 1929) (emphasis added).

basis of this authority was understood by all to be a grant of constitutional power that could not be taken away by a mere statute.

Origins of Congressional Usurpation of Presidential Power over Intelligence

As far as I have been able to determine, the campaign to have Congress usurp presidential authority over foreign intelligence began with a radical leftist named Richard J. Barnet, who was instrumental in the founding of the Institute for Policy Studies. This is a group that at one point assisted the notorious traitor and cashiered CIA spy Phillip Agee, who made a career of working with the Cuban DGI (intelligence service) and the Soviet KGB to publicize the name of western intelligence operatives. After several U.S. and allied intelligence officers were murdered—including Richard Welch, our CIA station chief in Athens—Congress enacted the Intelligence Identities Protection Act of 1982, making disclosure of such information a federal felony.[69]

In a book entitled *The Economy of Death*, Barnet argued to his radical followers:

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing Congressional committee to review the classification system and to monitor secret activities of the government such as the CIA. Unlike the present CIA review committee, there should be a rotating membership.[70]

Barnet is dead, and I would be surprised if anyone associated with H.R. 1507 has ever heard his name or has any motive beyond a sincere desire to protect whistleblowers and gain access to national security secrets they assume they should have access to as representatives of the American people. But I can only imagine the joy with which Barnet, Agee, and their ilk would greet this legislation. How better to neutralize the CIA and other elements of the Intelligence Community than by permitting any disgruntled employee to gleefully expose our most sensitive national security secrets to the sunshine?

If you enact this bill into law, you will earn the lasting admiration of our nation's enemies. In the process, you will no doubt also receive the approval of a considerable number of very honorable and patriotic Americans—some of them no doubt testifying in favor of this legislation this morning—who are wary of government secrets and simply fail to understand that control over such information is vested by our Constitution exclusively in the President. More importantly, if you enact this legislation you will betray the Oath of Office you each took to support our Constitution. That is your greatest duty to the Nation and to your constituents.

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[69] 50 U.S.C. § 421–26 (1982).
[70] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-79 (1969).

I have not the slightest doubt that supporters of this legislation will be able to bring before you a long line of distinguished academics who will confidently assure you this bill is constitutional. They will be every bit as honorable and sincere as I am, and some no doubt far more intelligent. And they will also likely be oblivious to the historical details I have briefly summarized in this statement.

In the end, the decision is yours. The Founding Fathers wisely entrusted legislative judgments to the two legislative chambers, providing in Article I, Section 6, that your legislative acts "shall not be questioned in any other Place."[71] To paraphrase Chief Justice Marshall's comment on presidential discretion over foreign affairs in *Marbury*,[72] for these decisions you are accountable only to your constituents in your political character—which is to say, if they conclude you have undermined our national security, your constituents may well vote for a different candidate in the next election[73]—and to your own conscience.

Sadly, I fear there will be some who will take that gamble and who do not take their Oaths of Office very seriously. How else can we explain the failure of the Legislative Branch to address some of the most flagrant abuses of our Constitution? Twenty-one years ago this month, a distinguished group of senators—including Sam Nunn, John Warner, Robert Byrd, and George Mitchell—took to the Senate floor to denounce the 1973 War Powers Resolution. During that colloquy Senator Mitchell, soon to become Majority Leader and hardly an apologist for Executive power, remarked:

> Although portrayed as an effort "to fulfill"—not to alter, amend or adjust—"the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war….
>
> By enabling Congress to require–by its own inaction–the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
>
> …[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

[71] U.S. CONST. art. I, § 6.
[72] *See* discussion, *supra* note 50, and accompanying text.
[73] You might want to consider the fate of the isolationist legislators in the 1930s who usurped presidential power in the belief they were promoting "peace" and keeping America out of the upcoming war in Europe. By undercutting deterrence they helped bring on World War II and the deaths of tens of millions, and few survived their next election.

> The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.[74]

Just last July, the bipartisan National War Powers Commission—that included among its distinguished members your former colleague Lee Hamilton, who chaired both the House Permanent Select Committee on Intelligence and the Foreign Affairs Committee—*unanimously* concluded that the War Powers Resolution is "unconstitutional" and ought to be repealed.[75] Yet I have detected little interest in either branch to terminate this unseemly usurpation of the constitutional powers of the President.

We are not just talking about constitutional technicalities here, but about unlawful conduct by the Legislative branch that led directly to the slaughter of 241 sleeping Marines in Beirut on October 23, 1983—four Marines fewer than died on the most costly day of the Vietnam War. It did not have to happen, but partisan Democrats—and the partisan nature of the debate was noted repeatedly by the *Washington Post* and other papers at the time—thought they could improve their prospects for the 1984 elections by attacking President Reagan's efforts to bring peace in an important part of the Middle East. Working in cooperation with the British, French, and Italians, the President deployed a contingent of Marines to Lebanon as a "presence" force to try to keep the country sufficiently stable so that the rival factions could attempt to negotiate peace. When the Senate voted to extend the deployment (which had nothing to do with the power of Congress to "declare War") another eighteen months, only two Democrats supported the President. And it was made very clear that if there were any further American casualties in Beirut, Congress could reconsider the vote at any time. Having unwittingly placed a bounty on the lives of our Marines, Congress set the stage for the tragedy that soon followed. Indeed, shortly before the deadly attack, we intercepted a message between two radical Muslim groups that said: "If we kill 15 Marines, the rest will leave."[76]

As you may know, in 1998 Osama bin Laden told an ABC News reporter in Afghanistan that the American pullout from Beirut following the October 23 bombing demonstrated that Americans are unwilling to accept casualties. We can only speculate whether that was a major factor in his decision to attack us on 9/11—but it reasonably follows. I would add that congressional constraints on the Intelligence Community—combined with the harm done by the Pike and Church Committee hearings on alleged "intelligence abuses" in 1975-76—clearly weakened our ability to detect and prevent the 9/11 attacks.

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[74] This statement appears in the *Congressional Record* of May 19, 1988, on pages 6177-78.

[75] *See* JAMES A. BAKER, III, ET AL., NATIONAL WAR POWERS COMMISSION REPORT (2008), *available at* http://millercenter.org/policy/commissions/warpowers.

[76] For a more detailed discussion of this issue, see ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-44 (1991). *See also* P.X. Kelley & Robert F. Turner, *Out of Harm's Way: From Beirut to Haiti, Congress protects Itself Instead of our Troops*, WASH. POST, Oct. 23, 1994, at C2 (General Kelley served as Commandant of the Marine Corps at the time of the Beirut bombing and cautioned Congress during Senate hearings that the debate was endangering the lives of Marines.).

I was a Senate staff member at the time of the Church Committee hearings, and I sat through some of them. I remember a lot of talk about CIA "assassinations," but, if I had not taken the time to read the lengthy volume on that topic in their final report, I would not have known that the Committee could not find a *single* instance in which the CIA had ever "assassinated" anyone. Indeed, both Directors of Central Intelligence Richard Helms and William Colby had on their own initiative issued CIA directives prohibiting any agency involvement with "assassination" years before the Church Committee began its work. One recent study of hundreds of pages of newly de-classified CIA "family jewels" documents, published in the *Indiana Law Journal*, concluded that but a single program—the testing of LSD on unaware Americans–was clearly illegal at the time of the Church hearings, and that program had been terminated during the Kennedy Administration. [77]

While I am on the topic of legislative lawbreaking, I cannot fail to mention the legislative vetoes that still permeate the statute books more than twenty-five years after the Supreme Court declared them to be unconstitutional in *INS v. Chadha*.[78] This is an issue of special interest to me, because as a Senate staff member in 1976—seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional—I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.[79]

One might have thought that the solemn obligations of their Oaths of Office would lead legislators to act quickly in the wake of the *Chadha* decision to identify and remove unconstitutional legislative vetoes from the statute books. But that has not happened. Disrespect for the law—in this case, the higher law of the Constitution—apparently breeds more disrespect for the law. For, rather than repealing the hundreds of legislative vetoes that were already on the statute books when *Chadha* was decided, Congress has enacted more than 500 *new* unconstitutional legislative vetoes since 1983.[80] Most of the hated "signing statements" issued by presidents since 1984 have involved flagrantly unconstitutional legislative vetoes—as was the case recently when President Obama found it necessary to issue his first signing statement.[81]

The disrespect for the rule of law engendered by statutes like the War Powers Resolution has clearly led some members to attempt further usurpations of the constitutional powers of the President–as Madison and Jefferson feared more than two centuries ago.[82] The decision of how seriously you take your Oath of Office is not mine to make. You have

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[77] Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?,* 84 IND. L. J. 639 (2009).
[78] 462 U.S. 919 (1983).
[79] The statement appears in the *Congressional Record* of June 11, 1976, from pages 17,643 to 17,646, *available at* http://www.virginia.edu/cnsl/pdf/Griffin-Congressional-Record_6-11-1976.pdf .
[80] My source for this figure was a statement made to me several years ago by Dr. Louis Fisher of the Library of Congress. This figure certainly has increased significantly since then.
[81] *See, e.g.,* Press Release, Office of the Press Secretary, The White House, Statement by the President (Mar. 11, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105; Jonathan Weisman, *Sighing Statements Reappear in Obama White House,* WALL ST. J., Mar. 12, 2009, *available at* http://online.wsj.com/article/SB123688875576610955.html.
[82] *See* discussion, *supra* notes 47-48, and accompanying text.

asked for my expert testimony on the pending legislation, and I have tried hard to provide you not only with my opinions but also with some of the historical and judicial authority that has led me to conclude that H.R. 1597 is flagrantly unconstitutional. How you individually deal with this information is a decision each of you must make.

II. Policy and Prudential Considerations

Mr. Chairman, I have no legal expertise in the area of whistleblower legislation and am thus a bit reticent to get involved in the policy side of this debate. But as I have read the prepared testimony of some of the witnesses invited to take part in today's hearing, my reaction as a citizen was that some of the more prominent "whistleblowers" very much deserved to be discharged from public service and perhaps charged with criminal wrongdoing for undermining the nation's security and endangering the lives of our fellow citizens.

Before I turn to the prepared remarks of other witnesses at this morning's hearing, however, it may be useful to say a word about perhaps the most celebrated national security "whistleblower" of the post-9/11 era, FBI lawyer Colleen Rowley. Ms. Rowley, you may recall, was one of *Time* magazine's three "Persons of the Year" in 2002 because of the rather angry memorandum she sent to FBI Director Robert Mueller complaining about the incompetence of certain lawyers at FBI Headquarters.

To hear Ms. Rowley's version, these incompetent nincompoops were totally oblivious to the al Qaeda threat and refused to even forward her repeated requests for a FISA warrant that would have allowed her to examine the contents of the laptop computer of terrorist Zacharias Moussaoui and prevent the 9/11 attacks. If there was ever a whistle in need of blowing, this was surely it. At least that's the way Ms. Rowley and her champions on Capitol Hill saw it.

In reality, the critics were wrong. The reason national security lawyers at FBI Headquarters repeatedly rejected Ms. Rowley's request for a FISA warrant was because in writing FISA, Congress failed to anticipate the possibility that U.S. national security might someday be threatened by a "lone wolf" terrorist who was not an "agent" of a "foreign power" (a term defined to include al Qaeda and other foreign terrorist organizations). Indeed, under FISA, had Ms. Rowley carried out the surveillance she intended, she would have committed a clear felony.

It was not until December 2004 that Congress quietly amended FISA to permit the granting of warrants to engage in surveillance of lone wolf terrorists like Moussaoui. When very conscientious FBI lawyers in Washington (many of them former students of mine[83]) rejected Ms. Rowley's request, they patiently explained to her that a factual

[83] Virtually every summer since 1991, our Center has run a two-week National Security Law Institute at the University of Virginia School of Law to train law professors and government lawyers who are teaching and practicing in this rapidly-growing field. Most years we have had between one and eight FBI lawyers take part in the program, and I have discussed the Rowley case at length with several who were involved in

predicate for a FISA warrant was evidence the subject of the investigation was an agent of a foreign power – and she had no such evidence. They suggested to her that she might have enough evidence to persuade the local U.S. attorney to try to obtain a criminal search warrant, but Ms. Rowley reportedly did not have a cordial relationship with the U.S. attorney and did not explore that alternative. It is indeed unfortunate that she was unable to pursue the leads developed by her colleagues in the Minneapolis FBI office, but the fault likes entirely with the Congress rather than with senior FBI lawyers who felt constrained to follow the letter of the law.

For the record, had the FBI lawyers in Washington decided to ignore FISA and seek a warrant without the statutory predicate, their application would certainly have been rejected by the Department of Justice Office of Intelligence Policy and Review. And had officials of that office joined in a conspiracy to bypass the law, presumably the judges on the FISA Court would have rejected the application. The only valid charge against the National Security Law Branch of the FBI's Office of General Counsel was that they obeyed the law.

My own view—a view first developed as a Senate staff member when FISA was pending before Congress in 1978—is that FISA was an unconstitutional usurpation of presidential authority under the Constitution. That view was shared by then-Attorney General Griffin Bell, and, in 2002, was endorsed as well by the appellate court established under FISA.[84] I have discussed these matters in some detail before the Senate and House Judiciary Committees.[85]

Witness Teresa Chambers was Chief of the U.S. Park Police when she told the *Washington Post* that the Park Police did not have enough resources to do its job. Presumably, the increased demand on law enforcement personnel following 9/11 required her superiors to make some difficult choices, one of them being to reduce resources to the Park Police so that the FBI or perhaps some other federal agencies might have more resources to try to prevent the next terrorist attack. Such decisions are never pleasant, but the people charged with making this one apparently concluded this was the best way to reallocate limited resources in a time of national emergency. Sometimes you must rob Peter to pay Paul–and pray that the forces of darkness don't find out and mug poor Peter. And if Peter's mother rushes into town and cries out for all to hear, "My poor son Peter is left all alone in the forest with a large sum of money in small bills and the police are so overworked they can't protect him!"—well, suffice it to say she has done Peter no

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the 2001 decisions. The former head and founder of the National Security Law Branch, M.E. "Spike" Bowman, is one of my dearest friends and is now a Distinguished Fellow at our Center.

[84] *In re Sealed Case No. 02-001*, 310 F.3d 717 (FISCR 2002).

[85] *See Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Robert F. Turner, Associate Director, Center for National Security Law, University of Virginia Law School), *available at* http://www.virginia.edu/cnsl/pdf/Turner-SJC- testimony- Sept-16-08-final.pdf; *The Role of Checks and Balances in Protecting Americans' Privacy Rights: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Robert F. Turner, Associate Director, Center for National Security Law, University of Virginia Law School), *available at* http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf.

service. Peter's mother may have no duty not to undermine national security, but the chief of the Park Police certainly does.

Chief Greenhouse asks: "Is telling the truth a firing offense in federal service?"[86] The obvious answer is that, in some settings, it clearly is. If an NSA code-breaker announces to the media (and thus to the world) that we have broken the enemy's codes during wartime, disclosing that truth to the press may lead to the loss of countless lives and even constitute treason. If a soldier in Afghanistan sends a text message to her *Washington Post* reporter boyfriend declaring that an enemy offensive in another part of the country has resulted in the withdrawal of the security force assigned to protect her small outpost, and the boyfriend publishes that "truth," the result may well be the slaughter of every American in the encampment, with the idiot who betrayed the camp's security avoiding serious criminal charges only because she, too, has been captured and beheaded by the Taliban.

I do not know all of the facts, but from Chief Greenhouse's account, it sounds to me like she revealed (or at least *confirmed*) very sensitive information that could have endangered the safety of her officers and those Americans they were assigned to protect. When you are in the business of trying to protect innocent lives against evil people equipped to do serious harm, "telling the truth" is not always such a good thing. One would hope Chief Greenhouse would not set up a departmental Web site where potential predators could go to find out exactly when law enforcement personnel will be miles away from a Girl Scout encampment in a national park, or publicize the combinations to padlocks intended to keep unauthorized people from dangerous areas or equipment. If she honestly did not understand that confirming accusations that her department could not do its job might encourage terrorists or other lawbreakers to exploit this weakness, I suspect she lacked the judgment to be a chief of police.

Article Two, Section One of our Constitution vests the entire "executive Power" of the nation in one "President of the United States."[87] To assist the President with the responsibilities of that office, subordinate departments, agencies, and employees are provided for by law. But, ultimately, the President is responsible for and in control of all decisions made by others within the Executive Branch. Somebody at a higher level in the bureaucracy apparently made a tough decision to reduce the resources of the Park Police in order to enhance those of another agency—quite possibly an agency more directly involved in preventing the next 9/11 attack, although it is clear that the Park Police might play an important role in that mission as well. I do not doubt that Chief Greenhouse was upset to see her resources reduced, and anxious lest the reductions result in tragic consequences on her watch. She had every right to call the problem to the attention of her superiors and to reduce her strong concerns to written form for the record. If her superiors concluded no adjustments were warranted, and she could not live with that decision, she had a right to resign her position and seek employment elsewhere. What she did *not* have

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[86] *Protecting the Public From Waste, Fraud and Abuse: Hearing on H.R. 1507 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 1 (2009) (statement of Teresa Chambers), *available at* http://oversight.house.gov/documents/20090513183800.pdf .

[87] *See* discussion, *supra* note 30, and accompanying text.

a right to do–and what she *should not* have had a right to do–was to take her anger to the *Washington Post*, alerting everyone from child predators to foreign terrorists that an important part of America's defensive perimeter was weak and her department was incapable of accomplishing its mission.

Another witness, Thomas Devine of the Government Accountability Project, declares in his prepared statement: "Air Marshal Robert MacLean's experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers, during a hijacker alert."[88]

With all due respect, it is not the province of junior government employees to determine whether a cost-saving measure is "indefensible." Once again, this was probably one of those settings where the lack of an infinite budget required those who were charged by the President with making such decisions to make some tough ones–cutting one program to make available resources for another. To be sure, the 9/11 attacks were carried out by crashing hijacked aircraft into buildings. But, since then, TSA had dramatically stepped up airport security, including enhanced screening of passengers and their baggage. Further, only a total fool would assume that, if a handful of terrorists with box cutters stood up and declared they were taking over a commercial airplane today, the other passengers would continue listening to their iPods or watching the in-flight movie. Does Mr. MacLean believe our terrorist enemies drew no lessons from United Flight 93, whose passengers rushed the hijackers after learning by cell phones of the Twin Tower attacks? My own sense has been that, since 9/11, protecting commercial airplanes from hijackers is not tremendously high on the list of essential national security objectives. I wish it were true that our enemies in this war were all idiots, but I do not think we should premise our national security strategy on that assumption.

That is not to say that having a well-publicized Air Marshal program was not a good idea. While the odds were probably good that, if one randomly selected three flights on any given day, there would not be an Air Marshal on any of the three, there was a *chance* that assumption would be wrong Thus, the program had some deterrent effect, and *secretly* removing all of the marshals from some categories of flights would not reduce that deterrent effect one iota. Deterrence is a function of *perception*, and reality only matters to the extent it contributes to perception. Obviously, if there is an actual hijacking attempt it may make a great deal of difference if there is a well-trained Air Marshal on board, but the decision to make an attempt to hijack a plane will be influenced not by reality but by the actor's perception of the likelihood he will face an armed marshal. Thus, removing Air Marshals from some flights either to make them available for other flights thought to be at greater risk, or to use the resources to address an entirely different security threat, might be a very wise decision. The greatest risk would be that potential hijackers might somehow *learn* that certain flights are definitely unprotected. Then you have a serious

[88] *Protecting the Public From Waste, Fraud and Abuse: Hearing on H.R. 1507 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 5 (2009) (statement of Thomas Devine, Government Accountability Project), *available at* http://oversight.house.gov/documents/20090513183928.pdf

security problem, and the lives of large numbers of Americans might be placed at increased risk. When Air Marshal Robert MacLean took it upon himself to inform the world of this decision, he betrayed the trust that had been placed in him by the American people; in my view, he was lucky he was merely fired and not sent to prison.

Then there is the testimony of Bunnatine Greenhouse, whose complaints include that, when she was transferred to a new position that did not require access to Top Secret information, her superiors vindictively took away her Top Secret clearance.[89] Ms. Greenhouse should have received a briefing at the time she received her first security clearance explaining that one of the criteria for having access to classified information is a "need to know"—and she admits dealing with Top Secret materials was not a requirement of her new position. Between 1981 and 1984, I served in the White House as Counsel to the President's Intelligence Oversight Board (PIOB). I was regularly briefed on all covert operations and the programs of every department and agency within the Intelligence Community. As a result, there was a long list—several lines' worth—of the special intelligence programs to which I was entitled to have access. Then I was asked by the White House Personnel Office to transfer to the Department of State to serve as the Principal Deputy Assistant Secretary for Legislative Affairs. My Senior Executive Service grade was raised from Level Four to Level Five, but, as soon as I made the move, I lost all of my Special Intelligence clearances. I had not done a thing wrong, and it did not occur to me to run to Congress and "blow the whistle" on this travesty of justice.

While I am on the subject of the PIOB, I might mention that our primary function was to report directly to the President in the event even one of our bipartisan board members believed an intelligence activity violated the law. Every department and agency head was required by Executive Order 12,334 to notify us in the event they discovered an activity they believed might be illegal, and the generals counsel and inspectors general of every department and agency within the Intelligence Community was required to do the same, as well as to make quarterly reports to the Board.[90] Individual employees within the Intelligence Community also had a right to bring matters to our attention, and had a whistleblower subsequently suffered retaliation from a supervisor, you may be assured we would have taken the matter up either with senior agency officials or the President himself to ensure justice was done.

Mr. Chairman, I do not mean to be making light of the issue before us today by observing that losing a Top Secret security clearance when an employee no longer has a "need to know" Top Secret information is standard policy rather than evidence of vindictive retaliation. I do not doubt that there are government employees who are punished because they discover waste, fraud, or abuse likely to embarrass their supervisors. However, unless the President of the United States is involved in the conspiracy, the odds are very good there is someone in the *Executive* chain of command who will be grateful to learn of the abuse and will want to see it fixed. I remember attending a meeting in which

[89] *See Protecting the Public From Waste, Fraud and Abuse: Hearing on H.R. 1507 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 3 (2009) (statement of Bunnatine Greenhouse), *available at* http://oversight.house.gov/documents/20090513183641.pdf.
[90] Exec. Order No. 12,334, 3 C.F.R. 216 (1981).

President Reagan declared he wanted his inspectors general to behave like "junkyard dogs" in their zeal to root out waste, fraud, and corruption. One of the reasons large departments and agencies have inspectors general is precisely to investigate such allegations. Doing so is an *Executive* function of government, just as conducting trials to determine legal rights and duties is a Judicial function.

It is perfectly permissible–indeed, I think it is admirable–for Congress to hold hearings with the view to identifying problems that might be appropriate for legislative resolution. Listening to cashiered whistleblowers may well assist this Committee in understanding the problem and drafting new legislation to reduce the risk that future government employees who call attention to waste, fraud, and abuse will be treated unfairly. But, as a general principle, neither Congress nor its members ought to become involved in individual cases–any more than Congress or its members ought to intervene in ongoing cases before the Judicial Branch when a party to litigation feels unsatisfied. That is not the job of legislators, and such interference could easily corrupt the judicial process.

There are strong prudential reasons for avoiding this practice: you do not have a lot of time or subject matter expertise, you are likely to get a one-sided account of the facts, and you are likely to get whiners who would love to befriend a member of the House or Senate. (When, in the end, you do not spent you full time holding their hand and fighting their case, they may well turn on you for "betraying" them.) Let's face it: some "whistleblowers" are incompetent malcontents looking for a way to avoid dismissal on the merits. Some may even be smart enough to use the media or constituent audiences to get you caught in the middle in a setting where you neither know nor have the time to learn all of the relevant facts to defend yourselves from either side of the battle.

Far more importantly, however, the reason you should not become involved in such disputes is because doing so is not part of the *legislative process*, and you are members of the Legislative Branch. It is constitutionally improper for you to interfere in either the Executive or Judicial business of government, save to the extent the branches are expressly blended by the Constitution. The men who founded this great nation did not want the legislature to be distracted from its important business by focusing on the details of execution—which the Constitution vests exclusively in the President. This was both to prevent tyranny and because such conduct distracts Congress from the important business of legislation. In an August 4, 1787, letter to Edward Carrington concerning the ongoing Constitutional Convention, Thomas Jefferson wrote from Paris:

> I think it very material, to separate . . . the executive and legislative powers, as the judiciary already are, in some degree. This, I hope, will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions

> hanging over, from week to week, and month to month, till the occasions have passed them, and the things never done.[91]

Mr. Chairman, my bottom line is a simple one. Legislation to protect government employees who identify waste, fraud, or abuse and are harassed or disciplined for attempting to call it to the attention of their supervisors is a good idea. But it is not the job of Congress to investigate or decide individual cases. That is the business in the first instances of the Executive Branch, and in the final instance (in appropriate cases) of the Judiciary. As a general principle, I see no reason why employees of the Intelligence Community ought not also to have some protections in this area, but the sensitive nature of their business requires that the President and agency heads have a great deal more discretion. When we are taking about entrusting people with our Nation's most sensitive secrets, the normal presumption of innocent until proven guilty is unwise. (I am not talking about punishing anyone, but rather about when to entrust them with our nation's most valuable information.) Agency heads must affirmatively establish that an individual is worthy of being entrusted with this responsibility. And if an agency head concludes that an employee is no longer worthy of that trust–for whatever reason, even if the individual employee has done nothing wrong[92]–the agency head must be left in position to immediately remove the employee from said position without lengthy procedural delays or intervention by Congress or its members.

Perhaps most importantly, whistleblower protections cannot constitutionally involve immunizing employees who disclose classified information to unauthorized sources. As I hope my testimony has demonstrated, Congress and its members are not entitled to have access to any national security classified information that the President does not consent to being shared with them. The logical consequences of this reality is that if Section 10 is not removed, enacting this bill will put each member who votes "aye" on passage in flagrant violation or the Oath of Office you each took upon assuming this distinguished public office.

The Harm Done by Congressional Usurpation of Presidential Power

In addition to working as a senior Senate staff member in the 1970s, I have worked in the Senior Executive Service in the Pentagon, the White House and the Department of State. I have seen the harm done by national security "leaks" at both ends of Pennsylvania

[91] 11 PAPERS OF THOMAS JEFFERSON, *supra* note 31, at 679.

[92] I am not familiar with current rules, but during the Cold War it was extremely difficult to get a high-level security clearance if you had close friends or relatives living behind the Iron Curtain. That was because of concerns that an employee might be compromised by threats of violence against those loved ones from a hostile intelligence service. An applicant or employee facing excessive financial indebtedness–even if caused by the misconduct of a spouse or other individual–was likely to lose access to highly-sensitive national security information because such an individual was deemed more susceptible to bribery. Similarly, closet homosexuals or married employees secretly cheating on their spouses were considered more vulnerable to blackmail and might have clearance problems.

Avenue, and year after year I have become more impressed with the wisdom of the Founding Fathers in entrusting "the business of intelligence"[93] entirely to the President.

I recall attending a closed meeting of the Senate Foreign Relations Committee more than thirty years ago in which the committee received a copy of a classified executive agreement between the United States and Saudi Arabia. Some members were not happy with the agreement (as I recall, they believed it would offend Israel), and upon their motion the committee voted to "declassify" the agreement and gave copies immediately to the press. It appeared the next day on the front page of the *Washington Post*.

After the meeting, I went back to my office and examined my copy of the *Senate Manual*. The rules provided that no member or committee could make public a classified document received from the Executive Branch without "leave of the Senate." I showed the provision to Senator Griffin, my boss, who contacted the committee chairman. The following morning, the Foreign Relations Committee held another meeting and voted to rescind their decision of the previous morning to declassify the document. (No effort was made to recover the numerous copies of the *Washington Post* that contained the text of the classified agreement.)

I remember another case from when I was Acting Assistant Secretary of State for Legislative Affairs. A very nice freshman member of the House had taken a junket to a Latin American country that was involved in a civil war, and upon returning had put his trip report in the *Congressional Record.* Among other things, the report thanked all of the wonderful American Embassy officials who had put aside their pressing work to wine and dine him. Oblivious to the reality that our CIA station chief was under deep cover, he printed his name with the title "Intelligence"—in the process totally blowing his cover. We had to withdraw the station chief for his own protection, and our intelligence-gathering efforts in that important country were seriously compromised. Then-Secretary of State George Shultz asked me to speak with the member, and he was absolutely clueless that he had done something wrong. He kept assuring me that he strongly supported the President and was merely "being polite."

If the United States cannot be trusted to keep secrets, intelligence services from even our closest allies will be reticent to share sensitive information with us. Without such information, our ability to protect the country from terrorist attacks or other national security threats will be substantially reduced. It was precisely because large deliberative assemblies like the Senate and House of Representatives cannot be trusted to keep secrets—and will not be so trusted by foreign intelligence sources—that, as John Jay explained in *The Federalist* No. 64, this business had been entrusted by the Constitution exclusively to the president.[94]

When Congress enacted the Hughes-Ryan Amendment in 1973, demanding that the President sign a formal "finding" and inform Congress about all covert operations,[95] it

[93] *See* discussion, *supra* note 8, and accompanying text.
[94] *Id.*
[95] Pub.L. No. 93-559, 88 Stat. 1804 (1974).

violated the Constitution. And even if the Hughes-Ryan Amendment was constitutional, it undermined our security. There are times when it is in our national interest and in the interest of world peace for the President to maintain "plausible deniability" concerning sensitive foreign policy initiatives. Congress has largely taken that option away.

Let me give you an example. In 1975, the Soviets had begun a major Soviet covert operation that ultimately involved sending tens of thousands of Cuban soldiers into Angola to try to take control of that country by armed force rather than rely upon the scheduled free elections to decide the country's future. President Ford decided to respond. To quietly signal to the Soviet Union that their armed international aggression would not be permitted to succeed, at the President's direction the CIA began providing various forms of assistance—including military equipment and training—to the two non-Communist factions involved in the struggle for control of Angola.

As a Senate staff member I was closely following this program. Some members of Congress who were briefed on the operation quickly told their friends and the press, and legislation was soon proposed to prohibit CIA efforts to prevent the Soviet Union from taking control of Angola by armed force. In the Senate, my boss (Senator Griffin) led the fight against this legislation (generally referred to as the "Clark Amendment") on the Senate floor.

Why did President Ford want to keep U.S. involvement in the situation covert? Because it was more likely to be successful if done covertly. We were trying to persuade Moscow to cease its armed intervention. The Soviets had watched congressional liberals undermine a nearly two-decades old commitment by treaty[96] (approved by the Senate with but a single dissenting vote) and statute[97] (approved by a 99.6% majority in Congress) to protect the people of South Vietnam, Laos, and Cambodia from Communist aggression. America was turning inward after Vietnam and Watergate and apparently had lost its will to resist international aggression. Moscow saw targets of opportunity to expand Communism in places like Angola and Afghanistan.

There was a major debate going on within the international Communist movement about the utility of "armed struggle" at the time. Eisenhower had deterred Khrushchev from launching new "Korean War"-type conflicts with threats of "massive retaliation" under the New Look Doctrine, but rivals like Mao in China and Ché Guevara in Cuba were arguing that, while fierce in appearance, the "Imperialists" were in reality but "paper tigers." Nuclear weapons were indeed powerful, but they were totally useless against guerrilla warfare, since the guerrillas live and fight among the population. Eisenhower's strategy was also undermined when the Soviet Union developed a deliverable nuclear capability of its own, as there was little real chance America was going to bomb Moscow to save Saigon with the knowledge that New York and Washington, DC, would quickly be struck by Soviet missiles.

[96] *See* Southeast Asia Collective Defense Treaty, Sept 8., 1954, 209 U.N.T.S. 23.
[97] *See* Pub. L. No. 93-52, 87 Stat. 130, 134 (1973); Pub. L. No. 88-408, 78 Stat. 384 (1964).

Emboldened by the decision of the Democratic Congress in 1973 to enact legislation making it unlawful for the President to spend appropriated funds on combat operations anywhere in Indochina[98] (which, I might add, snatched a horribly expensive defeat from the jaws of victory, as we were clearly winning the war at the time), the USSR decided to see if it could grab Angola as a Communist foothold for revolution in sub-Saharan Africa. Had we confronted the Soviets directly, such an act would have substantially raised the price to Moscow of changing its policy. First of all—as was also the case with a covert response—Moscow would have to abandon its efforts to help the (pro-Soviet) MPLA achieve power, which had it no intention of doing. Additionally, an open confrontation with America would have required Moscow to publicly back down in response to Washington's challenge—in the process losing face to the more militant Communist movements in Beijing and Havana. To impose that cost of the Soviet Union would have taken a *far* greater American effort. When Congress leaked the existence of the American covert response, and the story was spread around the globe in newspapers, the risk of unnecessary human lives being lost increased dramatically. Since the world knew of the confrontation, Moscow could not back down without also losing face in its struggle to maintain the allegiance of Marxist-Leninist groups around the world.

When Congress went a step further and enacted the Clark Amendment,[99] preventing the CIA from trying to help the two non-Communist factions in Angola balance the playing field by offsetting some of the military aid being provided by Moscow and Havana, any chance for peace evaporated. During the years that followed, an estimated 500,000 Angolans paid for this unconstitutional usurpation of presidential authority with their lives.[100]

Transparency in government is not always a good thing—especially when there is no means of keeping the American people informed about government programs without in the process informing our enemies around the world of our military, diplomatic, and intelligence secrets. And congressional efforts to usurp presidential power in the intelligence and foreign affairs area—often in the belief that such interference will play well at the polls with worried voters—can result in serious harm.

Let me give you some examples of unintended consequences.

As already mentioned, in May 1973 Congress enacted legislation making it unlawful to spend treasury funds to send U.S. military forces into hostilities in the air, off the shore, or on the ground of North Vietnam, South Vietnam, Laos, or Cambodia. In May 1975–days following the final U.S. withdrawal from South Vietnam (I was there)–Cambodian vessels captured an American merchant ship, the S.S. *Mayaguez*, and took the crew to a Cambodian island. President Ford could easily have gone to the American people and explained that Congress had unconstitutionally made it unlawful for him to try to rescue those Americans, and written them off to Pol Pot's butchers—who had already started the

[98] War Powers Resolution, 50 U.S.C. § 1544 (2006).
[99] Pub. L. No. 94-329, 90 Stat. 729 (1976).
[100] Calvin Woodward, *Wars Rack Up High Human Cost*, ASSOCIATED PRESS, June 12, 1999, http://www.atour.com/news/international/20000531w.html.

slaughter of more than twenty percent of the Cambodian population.[101] Instead, he ignored that unconstitutional[102] law and rescued the ship's crew. Rather than denounce this blatant violation of several new statutes, the Foreign Relations Committee passed a unanimous resolution praising the rescue. When Senator Church, a co-sponsor of all of the said legislation, was asked about the violation, he remarked: "I don't want anyone saying that we liberals or doves would prevent the President from protecting American lives in a piracy attack";[103] however, that is exactly what legislation he had sponsored had purported to do.

Consider also the 1979 Iran hostage crisis, during which fifty-two American diplomats were held for 444 days at the American Embassy in Tehran. Six Americans who were outside the embassy when it was seized managed to evade capture and found their way to the Canadian Embassy. The Canadians issued Canadian passports to assist the Americans to escape from Tehran,[104] and some accounts of the so-called "Canadian Caper" assert that issuance of those passports to non-Canadians required the first secret session of the Canadian parliament since World War II. Reliable sources have told me that a Canadian "condition" on this covert assistance to their southern neighbor was that the operation not be reported to the American Congress at the time. The slightest "leak" of the operation (which involved the covert assistance of CIA officers deployed to Iran to assist in the rescue)[105] could have endangered the lives of the Americans and led to the seizure of the Canadian Embassy as well.

While some of the details remain uncertain, the point of this anecdote is that are situations in which American national interests would be greatly furthered by the assistance of foreign nationals who would not trust our Congress to keep secrets—a point specifically recognized and addressed by John Jay in *Federalist* No. 64.[106]

I would wager that not a single member of Congress who voted to tie the President's hands in May 1973 by making it unlawful to use appropriated funds to fund U.S. involvement in "hostilities" anywhere in Indochina anticipated that 1.7 million Cambodians they thereby left defenseless against Pol Pot's tyranny would in

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[101] *See* Cambodian Genocide Program, Genocide Studies Program, Yale University, http://www.yale.edu/cgp/ ("The Cambodian genocide of 1975-1979, in which approximately 1.7 million people lost their lives (21% of the country's population), was one of the worst human tragedies of the last century.").

[102] In December 1984, I had the honor of debating retired Senator Jacob Javits–the leading Senate sponsor of the War Powers Resolution–before the American Branch of the International Law Association in New York City. I observed that several parts of the War Powers Resolution were unconstitutional, including Section 2(c)'s failure to recognize the president's power to rescue American civilians abroad. I was pleased to hear Senator Javits agree during his rebuttal that the president has this power under the Constitution and it cannot be taken away by mere statute. He noted that the Senate had acknowledged this power in its version of the War Powers Resolution, but the House refused to agree. *See* War Powers Resolution § 2(c).

[103] ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 122 (1991).

[104] *See, e.g.,* ANTONIO MENDEZ, MASTER OF DISGUISE (1999).

[105] *Id.*

[106] *See* discussion, *supra* note 8, and accompanying text.

consequence be slaughtered in the greatest genocide of the twentieth century (on a per-capita, per-annum, basis). I also doubt a single legislator anticipated that they were outlawing an effort by a future President to rescue forty-two endangered U.S. merchant seamen from the same potential threat. However, it was precisely because it is impossible to anticipate all of the developments in negotiations or on a far-off battlefield that, as Locke explained, decisions in such foreign matters must be left "to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good."[107] This reasoning was embraced by the Founding Fathers and expressly relied upon in explaining the new Constitution to the American people in the *The Federalist*.[108]

Congressional "Whistleblowing" to Usurp Executive Power

Disgruntled employees of the Executive Branch are hardly the only people to "blow the whistle" on programs or policies with which they disagree. Legislators do it as well. Seldom acting with a serious appreciation of the issues involved, they not only betray their Oaths of Office by usurping the constitutional powers of a co-equal branch, but often undermine the nation's foreign policy and security as well.

One of the most valuable short books on this subject is Professor Stephen F. Knott's *Secret and Sanctioned: Covert Operations and the American Presidency*, published in 1996 by Oxford University Press. He discusses such congressional initiatives as the October 2, 1974, amendment offered by Senator James Abourezk to "abolish all clandestine or covert operations by the Central Intelligence Agency . . . ."[109] Well, that was the way Senator Abourezk described the amendment—and most likely his interpretation was shared by liberal Senators like future-Vice President Joe Biden, then-Senate Majority Leader Mike Mansfield, future Foreign Relations Committee chairman Frank Church, 1972 Democratic Party presidential nominee George McGovern, and the dozen others who voted in favor of the amendment.[110] But in reality, the amendment merely prohibited the CIA from conducting any activities in a foreign country that violated the laws of that country. While that would certainly preclude most CIA special or covert operations, it would also have empowered every tyrant in the world to prevent the CIA from collecting even open-source intelligence on their country simply by passing a new law banning such collection.[111]

Perhaps the most alarming congressional "whistleblowing" has been a practice one might describe as "veto by leak." Although throughout American history it has been recognized that intelligence operations were the exclusive constitutional province of the President, in recent years legislators of both parties have claimed the power to usurp that power and

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[107] *See* discussion, *supra* note 39, and accompanying text.
[108] *See* discussion, *supra* note 40, and accompanying text.
[109] STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 165 (1996).
[110] *Id*. at 164-65.
[111] The Abourezk Amendment (no. 1922 to S. Res. 3394) appears in the *Congressional Record* of October 2, 1974, on page 33,477.

undermine such operations—even if every other member of Congress supports them. Professor Knott notes that "[t]he late Leo Ryan, coauthor of the Hughes-Ryan amendment, defended the practice of individual members blowing the whistle on covert operations if that was the only way to block an operation the member disliked."[112]

Senator Jesse Helms reportedly did this to block a CIA program he opposed in El Salvador, and Senator (now Vice President) Joseph Biden bragged about doing it. Professor Knott explains:

> One member of Congress, Senator Joseph Biden of Delaware, has boasted of being "the single most active Democrat on the Intelligence Committee." He noted with pride in 1986 that he "twice threatened to go public with covert action plans by the Reagan administration that were harebrained," causing the administration to cancel the operations.[113]

What stronger evidence could one find to establish the brilliance of the decision by our Founding Fathers to exclude Congress from "the business of intelligence?" Surely it is not a fundament of sound democratic governance to permit a single member of the legislature to usurp the constitutional powers vested in a different branch. During World War II the courageous operatives of the Office of Strategic Services (OSS—the forerunner to the CIA) achieved a series of incredible victories against America's enemies that saved countless lives and helped speed the war to a successful outcome. But imagine for a moment that the Biden-Ryan Doctrine was in effect at that time, and Presidents Roosevelt and Truman were compelled to keep Congress fully informed about all such sensitive activities. A single isolationist who really didn't believe we should have gone to war in the first place—or perhaps a highly partisan member of the opposition who just could not stand the idea that a Democratic president might be credited with winning a victory—could have destroyed one covert program after another. Should one legislator have been able to "blow the whistle" on the fact that FDR was "concealing from the American people" the fact the our intelligence services had broken both the German and Japanese codes? (Remember that in 1929 Secretary of State Henry Stimson shut down the State Department's code-breaking section on ethical grounds, stating that "Gentlemen don't read each other's mail.") It is no understatement to observe that, had those intelligence successes been compromised, we might all be speaking German or Japanese today.

Even ignoring the issue of betraying your Oaths of Office, do you truly want to authorize every disgruntled government employee who has access to sensitive national security information to make it public? Many covert operations violate foreign law, and more than a few at least arguably violate international law as well. At the height of the arms race with the Soviet Union, America tried to make things better by negotiating Strategic Arms Limitation Treaties (SALT) and other international agreements with Moscow that could have proven extremely dangerous to our security had we not been able to verify compliance with reasonable confidence. For the sake of discussion, let's say that one

[112] KNOTT, *supra* note 109, at 176.
[113] *Id.*

verification measure was to send an American submarine into Soviet internal waters for the purpose of raising an antenna wire above the surface in order to download telemetry from a Soviet missile test to determine how many reentry vehicles (warheads) were actually being tested. Would it have been helpful to have a disgruntled Intelligence Community employee spreading this information all over Capitol Hill—with the likely result that at least one highly-partisan member or staffer would pass it on to the press?

What if we found an opportunity to bribe Osama bin Laden's or Mahmoud Ahmadinejad's secretary, chauffeur, or girlfriend into revealing sensitive information about nuclear weapons testing or planned terrorist attacks against Israel or the United States? What if that information came into the hands of someone who has just been passed over for promotion at CIA—or perhaps a closet Republican who is still angry that John McCain lost the last election—who decided to "blow the whistle" on this clear act of "bribery," which surely must violate the law?

We do not need to speculate about the harm that can be done as a result of ignorance of the law (perhaps encouraged by the thought of $20,000-a-pop lectures on the college circuit), because we have seen it happen repeatedly in recent years. In December 2005, the *New York Times* published a front-page story about the highly-classified Terrorist Surveillance Program.[114] Despite the sensationalism that has accompanied discussion of the "warrantless wiretapping" controversy even since, the program leaked to the times was and remains a legal one. As I have observed in previous testimony, presidential authorization of warrantless "wiretaps" and similar electronic surveillance of foreign powers and their agents in this country (even when those agents are Americans) has taken place throughout our history and has expressly been approved by Congress and by every federal appellate court to decide the issue.[115] The Supreme Court has twice issued relevant opinions on the issue, and both times included footnotes emphasizing that it was not limiting the President's constitutional authority to authorize such warrantless wiretaps. Decades ago, when such cases were appealed to the Supreme Court on Fourth Amendment grounds, two or three justices would vote to grant certiorari. In the last case to be appealed, not a single justice voted to take the case. The foreign intelligence exception to the warrant and probable cause requirements of the Fourth Amendment was as well established as the exception permitting the search of commercial airline passengers and their luggage. Although the Supreme Court has never formally decided cases on either issue, with respect to the later it declared while upholding mandatory drug testing of customs agents without a warrant or probable cause in *National Treasury Employees Union v. Von Raab*:

> The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, . . . the lower courts

[114] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
[115] *See* note 85 *supra*.

> that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches: "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness . . . ."[116]

Similarly, those who leaked the story that the NSA was using computers to analyze (data-mine) telephone records provided by telecommunications companies to try to identify telephone numbers that were in frequent contact with phone numbers known or believed to be used by international terrorists (records that did not include a name, address, or a single word of the content of those communications) believed they were "blowing the whistle" on illegal activities. I would bet money they had never heard of *Smith v. Maryland*, in which the Supreme Court thirty years ago established that there is no "reasonable expectation of privacy" (and thus no Fourth Amendment protections) in a citizens' telephone number or the telephone numbers that are dialed from a phone.[117]

The "leaking" of NSA programs has done tremendous harm to our national security—and not merely by misleading the American people about their legality and dividing the nation during a period of national crisis, but also by exposing to our enemies (against whom Congress has authorized the use of military force) critically important techniques by which we might have been able to discover and prevent terrorist attacks on this nation.

For some, these leaks may be viewed as a good thing—especially to the extent that they may have affected the outcome of last year's presidential elections. In thirty-five years of watching political partisanship at work in Congress, I have come to the conclusion that both parties are at fault. I have watched Republicans and Democrats leak sensitive national security secrets, and I have watched both place their party's interests ahead of those of the nation in the hope of gaining an edge for the next election. And each year I become more persuaded that such conduct is unacceptable, and that the American people deserve better.

Indeed, on this issue I am reminded of the stirring remarks made by the great Republican Senator from Michigan, Arthur Vandenburg, who is often referred to as the "father" of modern bipartisanship for his efforts as ranking Republican and then Chairman of the Senate Committee on Foreign Relations to bring the nation together when we faced a hostile world during the Truman Administration. In a Lincoln Day address in Detroit on February 10, 1949, Senator Vandenburg declared:

> It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world.

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[116] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 n.3 (1989) (internal citations omitted).
[117] Smith v. Maryland, 442 U.S. 735 (1979).

> In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.[118]

Mr. Chairman, this concludes my prepared statement. I will be delighted to take questions at the appropriate time.

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[118] ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 118 (1983).