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## Symposium

### It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism

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#### I. Introduction

The past few decades have seen the rise of a deeply influential strain of constitutional argument, sometimes called “presidential exclusivity.” Exclusivists argue that the President has substantial discretion to override statutory limits that he believes interfere with his ability to protect national security.<sup>1</sup> To borrow terminology from Justice Jackson’s famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>2</sup> exclusivists deem any number of “zone three” presidential actions defensible. On the spectrum of presidential actions, zone three comprises those acts that contravene statutory mandates.<sup>3</sup> “Zone one,” in contrast, includes presidential actions that are statutorily authorized.<sup>4</sup> Presidential actions in “zone two,” or the “zone of twilight,” occur in the absence of legislation either authorizing or prohibiting them.<sup>5</sup>

Exclusivists deem the President’s discretion to act in zone three essential to his constitutional role. In this respect, some emphasize that

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1. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1027 (2008) [hereinafter Barron & Lederman II] (invoking the term “presidential exclusivity” to describe this school of thought); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 694 (2008) [hereinafter Barron & Lederman I] (describing exclusivist reasoning).

2. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

3. *Id.* at 637.

4. *Id.* at 635.

5. *Id.* at 637.

Article II of the Constitution vests “[t]he executive Power” in the President.<sup>6</sup> Others stress the President’s role as Commander in Chief of the military.<sup>7</sup> Exclusivists argue that Founding Era understandings and logic dictate that the President, to fulfill these constitutional roles, has significant discretion to violate statutes as he deems necessary to protect national security.<sup>8</sup> Central to this argument is the premise that the Executive and Commander in Chief powers demand—and the founders structured the Presidency to ensure—the capacity to act with “energy,” meaning with “decision, activity, secrecy, and dispatch . . . .”<sup>9</sup> Statutes that restrict the President’s ability to exercise this capacity to protect national security raise serious constitutional questions, say exclusivists.<sup>10</sup>

Exclusivists commonly buttress these arguments by citing American history beyond the founding. For example, when presidential intelligence-gathering operations have been challenged as exceeding statutory limits, exclusivists have defended them by citing to comparable programs throughout American history.<sup>11</sup> Non-exclusivists, or “balancers,” typically respond to such arguments by challenging the similarity of the historical examples to current situations or by noting that multiple illegalities do not cancel one another out.<sup>12</sup>

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6. U.S. CONST. art. II, § 1, cl. 1; *see also, e.g.*, Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 376, 381–84, 389–93 (2008) (presenting the exclusivist component of his Vesting Clause argument tentatively, explaining that he offers only “a few tentative words on the subject”).

7. *See, e.g.*, U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–7, 29–35 (2006) [hereinafter DOJ WHITEPAPER] (positing an exclusivist argument by reference to the Commander in Chief Clause); JOHN YOO, WAR BY OTHER MEANS 103, 114, 119–22 (2006) (describing justifications for wartime exclusivity grounded partly in the Commander in Chief clause). Of course, the Commander in Chief argument is not exclusive of the Vesting Clause argument. *See, e.g.*, Lawson, *supra* note 6, at 384 (“[A]lthough the [DOJ WHITEPAPER] does not articulate the Vesting Clause thesis with clarity, it seems clear that the Vesting Clause thesis lurks beneath the argument and provides it with substance.”); YOO, *supra*, at 103 (combining Vesting Clause and Commander in Chief arguments).

8. *See, e.g.*, YOO, *supra* note 7, at 119–21 (citing Hamilton’s views in the *Federalist Papers* to support his argument that the President’s discretion to use military powers in national emergencies must not be limited by Congress).

9. Minority Report, in REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 460 (1987) [hereinafter Minority Report] (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

10. *See, e.g., id.* (citing Federalist No. 70 to argue that the Constitution gives the President—who is “more energetic” and more politically accountable—control over national security and foreign policy); YOO, *supra* note 7, at 120–21 (citing Federalist No. 70 to argue that the presidential power to protect the nation “ought to exist without limitation”).

11. *See, e.g.*, DOJ WHITEPAPER, *supra* note 7, at 6–8 (chronicling uses of warrantless searches and surveillance under Presidents Roosevelt, Truman, and Johnson).

12. *See, e.g.*, Letter from Curtis A. Bradley et al., to Members of Congress 5–6 (Feb. 2, 2006) [hereinafter Law Professors Letter] (arguing that the long wiretapping history cited by the Bush Administration is irrelevant to current debates because that history predated statutory regulation of wiretapping).

Some commentators chide exclusivists and balancers alike for citing evolving history. For example, Professor Paulsen observes:

Under one school of thought, ours is a “living Constitution,” the meaning of which changes with the times. Under another, the Constitution sets forth immutable principles of fundamental law that must never be altered by mere government officials. The “Living Constitution” position is usually associated with “liberal” constitutional theorists, and the “Original Meaning” position with “conservatives.” But in the area of war powers, the positions of the contending parties seem almost exactly reversed. “Conservatives” frequently defend broad presidential war-initiating power, against the greater weight of evidence of original meaning and design. More shockingly yet, they do so largely for *policy* reasons and defend such antioriginalist constitutional revisionism on the basis of consistent modern *practice*—a position that few conservative constitutional scholars would defend in other areas (like criminal procedure, abortion, or expansive conceptions of federal government power). But so too do “liberals” change their constitutional stripes when it comes to war: In few, if any, areas do those who otherwise so fervently defend the idea of an evolving, changing Constitution cling so tenaciously to the Framers and the original meaning of the words of the Constitution!<sup>13</sup>

Yet unless one rejects the notion that post-founding history can ever shed light on constitutional law, the question is not whether post-founding history categorically is or is not relevant. Rather, the question is case specific: whether—given the constitutional provisions at issue, the post-founding history cited, and the interpretive proposition for which that history is offered—the history indeed furthers the proposition. If one reads the relevant provisions of Articles I and II as sufficiently vague to leave room for bounded shifts in application,<sup>14</sup> then it is important to examine exclusivist uses of evolving history on their own terms. Only then can one determine if evolving historical practice remains within acceptable bounds of constitutional construction and what further light, if any, practice sheds on such construction.<sup>15</sup> Furthermore, as a practical matter, the increasing influence of

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13. Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL’Y 113, 120 (2010).

14. See Lawrence B. Solum, *Semantic Originalism* 69 (Ill. Coll. of Law, Working Paper No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244> (positing that “constitutional construction operates after interpretation yields semantic content that is vague, ambiguous, or contains gaps or contradictions”).

15. See *id.* at 59 (explaining that “individual words and phrases that comprise the constitution could have different meanings if they were uttered in different contexts”); cf. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 433 (2007) (“If the original meaning of the text requires ‘equal protection,’ then we enforce equal protection today because the text continues to require it . . . . How we apply the principles of equal protection, however, may well be different from what people expected in 1868 based in part on our contemporary understandings.”).

exclusivity in the political branches and courts alike provides an important independent reason to address major exclusivist arguments, including those from evolving history.

This Article considers exclusivist arguments from evolving history. It finds that such arguments reflect a fundamental error that runs throughout exclusivist analyses. That is, exclusivists conflate the President's structural capacities—in particular, his “energy,”<sup>16</sup>—with a legal prerogative to utilize those capacities as he sees fit, even to circumvent statutory constraints, to protect the nation. Elsewhere, I have discussed this error as a matter of text, structure, and Founding Era history. Using these tools, I explain that the President's capacities are constitutionally subject to statutory restraint outside of extraordinary and temporally limited cases, such as where Congress is physically unable to amend legislation in time to confront an emergency.<sup>17</sup> In this Article, I examine this exclusivist error through the use of evolving American history.

This Article focuses predominantly on examples involving wiretapping from the administration of FDR through the present. It identifies two major respects in which exclusivist arguments from evolving history err by conflating capacity with legal prerogative. First, exclusivists deem past instances of presidential initiative or legislative acquiescence (with the latter demonstrated either through silence or through failure to react meaningfully where the President circumvents statutory limits) to arise naturally from the President's and Congress's respective capacities and therefore to reflect the proper constitutional order.<sup>18</sup> Hence, to defend a years-long warrantless wiretapping program during the Bush Administration (the Terrorist Surveillance Program, or TSP) that many concluded violated the Foreign Intelligence Surveillance Act (FISA),<sup>19</sup> the Administration argued that many past presidents had engaged in wiretapping on their own initiative.<sup>20</sup> At least one Administration supporter argued that FDR had done so in the face of a prohibiting statute.<sup>21</sup> Yet this history supports the TSP only if one assumes that a capacity to initiate and undertake a warrantless wiretapping program is the same as a legal prerogative to do so in the face of a contrary statute. If the two are not the same, then the fact that prior administrations have har-

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16. Minority Report, *supra* note 9, at 460.

17. I have made this point extensively in the context of the President's capacity to keep secrets. See, e.g., Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 896–926. I also make this point with respect to the President's capacities more generally in Heidi Kitrosser, “Macro-Transparency” as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1167–73 (2007).

18. See *infra* subpart II(A).

19. See John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 565 (2007) (noting that both academic and political critics claim that TSP violates FISA).

20. DOJ WHITEPAPER, *supra* note 7, at 7–8, 16–17.

21. YOO, *supra* note 7, at 114–15.

nessed their capacities to take such initiative, possibly in the face of contrary legislation, hardly proves that such actions are legal prerogatives of the President. If one's premise is that constitutional text, structure, and history dictate that presidential capacities are dangerous and thus to be restrained through legislation, such past instances are better read as cautionary prods to the people and the Congress—reminders of James Madison's warning that the Constitution's "parchment barriers" are meaningless if not actively guarded.<sup>22</sup>

Second, another thread in the exclusivist narrative about post-founding history—that past instances of presidential initiative and congressional acquiescence reflect longstanding acknowledgment by each branch of the President's exclusive role in much of foreign affairs and national security<sup>23</sup>—is infused with the assumption that acts or omissions reflecting the branches' respective capacities, including the relative ease of unilateral action on the President's part and the difficulty of enacting legislation, also reflect their respective legal prerogatives. This assumption is belied by substantial evidence to the contrary. In the case of wiretapping, for example, while members of the FDR through Kennedy Administrations acknowledged that they wiretapped and at times lobbied Congress for legislation "clarifying" their authority to do so,<sup>24</sup> there is a near absence (with one exception discussed below) in the extensive legislative hearings on wiretapping and in administration statements of anything resembling an exclusivist argument.<sup>25</sup> To the contrary, these discussions and statements overwhelmingly assume that Congress, even in the midst of a World War, has the legal power to prohibit or restrict national security wiretapping.<sup>26</sup>

The Article also observes exclusivity's rise over the past several decades. Exclusivity reared its head to a limited degree in congressional hearings preceding FISA's passage in the mid-to-late 1970s.<sup>27</sup> By the early twenty-first century, exclusivist arguments were a substantial presence in hearings preceding the 2008 FISA Amendments Act.<sup>28</sup> This trajectory reflects the rising influence of exclusivist thought in modern political debate. Exclusivists have themselves become part of the story of the imperial presidency. As their arguments have increasingly entered the mainstream, they have helped to translate the President's structural capacities into legal prerogatives. Indeed, exclusivity has increasingly gained a presence in public debate as well as in the halls of Congress and the courts. Furthermore, by exclusivity's own logic, these developments have an ongoing ratcheting

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22. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

23. See *infra* subpart II(B).

24. See *infra* notes 74–76, 137–41 and accompanying text.

25. See *infra* note 147 and accompanying text.

26. See *infra* subpart III(B).

27. See *infra* subpart IV(A).

28. See *infra* subpart IV(B).

effect. From an exclusivist perspective, the more that Congress and the President evince respect for exclusivity, the more constitutionally imperative it becomes.<sup>29</sup>

Part II explains that presidential exclusivity conflates the President's structural capacities with legal prerogatives. This error manifests itself in exclusivist uses of evolving history generally and with respect to wiretapping in particular. Part III examines political-branch developments concerning wiretapping from the FDR through Johnson Administrations. The events demonstrate the President's formidable structural capacities to act despite congressional and public disapproval. The notion that these events bolster exclusivity makes sense only if one assumes that strong presidential capacities must reflect strong legal prerogatives. Instead, the events confirm the wisdom of ringing the President's capacities with statutory limits and inter-branch oversight. Part III also demonstrates the near absence of exclusivity from the political-branch debates over wiretapping during this time. Part IV explains that wiretapping-related exclusivity arguments have begun to gain acceptance and momentum in the political branches over the past few decades. Exclusivists thus have themselves become part of the evolving history that they cite on behalf of their views.

## II. Presidential Exclusivity and the TSP

As is now well known, the Bush Administration operated the TSP in secret from shortly after September 11, 2001 until the *New York Times* publicly revealed the program in December 2005.<sup>30</sup> Under the TSP, the Administration authorized the National Security Agency (NSA) to wiretap certain calls between the United States and abroad without warrants, despite FISA's prohibition on warrantless wiretapping of calls between the United States and other nations.<sup>31</sup> As such, TSP critics said that the program took place in zone three and that there was no emergency or other rationale that could constitutionally justify a years-long, secretive statutory violation.<sup>32</sup> TSP defenders disputed that it took place in zone three at all. They maintain that FISA was implicitly amended by the joint congressional resolution that authorized the President to use force in the wake of 9/11.<sup>33</sup> In the alternative, they make the presidential exclusivity argument that, if FISA did preclude

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29. See *infra* subparts II, IV(B).

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

31. *Id.*; OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF DEFENSE ET AL., REPORT NO. 2009-0113-AS, (U) UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 1 (2009) [hereinafter DOD REPORT], available at <http://www.fas.org/irp/eprint/psp.pdf>.

32. See, e.g., Law Professors Letter, *supra* note 12, at 2–9 (explaining that the TSP violates FISA and that the Commander in Chief Clause does not authorize the violation).

33. See DOJ WHITEPAPER, *supra* note 7, at 2–3 (deeming the AUMF statutory wiretapping authorization as contemplated by FISA).

the TSP, FISA was unconstitutional as so applied.<sup>34</sup> As such, the TSP was legal even if it occurred in zone three.<sup>35</sup> At minimum, TSP defenders argue that their statutory interpretation should prevail to avoid the constitutional problem that would exist, from an exclusivity perspective, under a different reading.<sup>36</sup>

To support their constitutional position, TSP defenders explain that presidents have authorized domestic and international wiretapping for national security purposes “at least since the administration of Franklin Roosevelt in 1940.”<sup>37</sup> TSP opponents rejoin that this history is not on point, as the cited events took place prior to FISA and hence in zone two.<sup>38</sup> Yet at least one TSP defender argues that Section 605 of the Telecommunications Act of 1934, as interpreted by the Supreme Court in two cases decided in 1937<sup>39</sup> and 1939,<sup>40</sup> prohibited wiretapping.<sup>41</sup> Wiretapping engaged in while that version of the Act controlled thus is precedent, he argues, for wiretapping contrary to FISA.<sup>42</sup> Two other commentators, in a coauthored piece, similarly say that the FDR Administration wiretapped in violation of the Telecommunications Act, establishing “surprisingly” strong—though ultimately insufficient—precedent for the TSP.<sup>43</sup>

If evolving history is neither categorically irrelevant to nor determinative of presidential-power issues, then the question is why a history of presidential initiative in the face of statutory restraints or congressional silence bears on the TSP’s legality if the TSP occurred in zone three. TSP defenders, and exclusivists generally, do not always spell out the implications of the evolving history that they cite. Yet we can glean, as a matter of logic, two major arguments as to why evolving history might support exclusivity. Furthermore, as I explain in the next section, exclusivists sometimes invoke these arguments explicitly.

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34. *Id.* at 35.

35. *Id.* at 3, 35.

36. *Id.* at 3, 28–35.

37. *Id.* at 7; *see also id.* at 7–8, 16–17 (recounting practices of Roosevelt and subsequent presidents authorizing both wartime and peacetime wiretapping); YOO, *supra* note 7, at 114–15 (contending that, until the enactment of FISA, presidents since FDR had authorized peacetime domestic wiretapping); Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1025 (2008) (describing the Bush Administration’s defense of TSP through historical precedents).

38. *See* Law Professor Letter, *supra* note 12, at 5–6 (deeming the precedents cited by the Bush Administration irrelevant because they predated FISA); *see also* Katyal & Caplan, *supra* note 37, at 1025–27 (recounting the view of TSP opponents that the historical precedent cited by the Bush Administration does not support the Administration’s actions).

39. *Nardone v. United States (Nardone I)*, 302 U.S. 379 (1937).

40. *Nardone v. United States (Nardone II)*, 308 U.S. 338 (1939).

41. *See* Yoo, *supra* note 19, at 588 & n.164 (stating that FDR ordered surveillance even though the Supreme Court decision of *Nardone I* interpreted section 605 of the Federal Communications Act of 1934 to prohibit electronic surveillance).

42. YOO, *supra* note 7, at 114–15.

43. Katyal & Caplan, *supra* note 37, at 1024, 1027–29.

A. *History as Reflecting Constitutional Capacities, Hence Prerogatives*

The first exclusivist argument from evolving history was invoked explicitly by Professor Yoo, who drafted memoranda justifying the TSP's legality while in the Department of Justice's Office of Legal Counsel.<sup>44</sup> In a book chapter justifying the TSP's legality published after he left the Justice Department, Yoo argues that the Constitution grants the President control over intelligence policy "because the office's structure allows it to act with unity, secrecy, and speed."<sup>45</sup> He also cites "[d]ecades of American constitutional practice" whereby, among other things, "[p]residents have long ordered electronic surveillance without any judicial or congressional participation" and whereby "FDR ordered . . . surveillance even though a Supreme Court decision and a federal statute at the time prohibited" it.<sup>46</sup> Proceeding from founding intent to constitutional structure to evolving history, he explains that the President has been able to take such actions over time—that is, to "[gain] the leading role in war and national security" because of his office's capacities and hence its "superior ability to take the initiative in response to emergencies."<sup>47</sup>

The same logic was voiced in a classic exposition of exclusivity in the *Minority Report of the Congressional Committees Investigating the Iran-Contra Affair* in 1987. The *Minority Report* was joined by Senators James McClure and Orrin Hatch and by Representatives Dick Cheney, William S. Broomfield, Henry J. Hyde, Jim Courter, Bill McCollum, and Michael DeWine.<sup>48</sup> Years later, as Vice President under George W. Bush and a key supporter of the TSP, Dick Cheney would point to the *Minority Report*—written partly by David Addington, then a committee staff member and later chief of staff to Vice President Cheney and an architect of the TSP<sup>49</sup>—as embodying his views on presidential power.<sup>50</sup> The *Minority Report* argues that some of the statutory directives that President Reagan and his subordinates were said to have violated in the Iran–Contra affairs were unconstitutional

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44. DOD REPORT, *supra* note 31, at 11. For some background on Professor Yoo's involvement with the TSP, see, for example, *id.* at 10–14.

45. YOO, *supra* note 7, at 114.

46. *Id.* at 121, 114–15.

47. *Id.* at 119.

48. *Minority Report*, *supra* note 9, at 431.

49. See Jane Mayer, *The Hidden Power: A Secret Architect of the War on Terror*, NEW YORKER, July 3, 2006, at 44, 49 (stating that Addington "contributed legal research" to the *Minority Report*); Chitra Ragavan, *Cheney's Guy*, U.S. NEWS AND WORLD REPORT, May 29, 2006, at 32, 35 (noting that Addington "helped write" the *Minority Report*).

50. FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 154–55, 159–60, 200 (2008) (quoting Vice President Dick Cheney, Remarks to the Traveling Press (Dec. 20, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051220-9.html>).

infringements that the President was free to ignore.<sup>51</sup> The *Minority Report* cites the founding premises that the President will be capable of ““decision, activity, secrecy, and dispatch”” and that he will be readily accountable for his actions.<sup>52</sup> From this, the *Minority Report* draws a constitutional presumption that activities that call for such capacities or that involve case-by-case decision making for which a single person can most readily be held to account belong to the President alone.<sup>53</sup> Among the activities in this category are “the deployment and use of force (but not declarations of war), together with negotiations, intelligence gathering, and other diplomatic communications (but not treaty ratification).”<sup>54</sup>

The *Minority Report* argues that this founding design has been borne out by actions of the political branches throughout history.<sup>55</sup> The *Minority Report* cites instances in which the President took unilateral action without seeking congressional approval, including covert operations, intelligence gathering, uses of force, and actions taken pursuant to the President’s interpretation of treaties.<sup>56</sup> The report deems it unsurprising that presidents have frequently asserted rights to act without congressional sanction. It quotes Gary Schmitt’s observation to the effect that such assertions follow naturally from the President’s structural capacities:

To some extent, the enumerated powers found in Article II are deceiving in that they appear understated. By themselves, they do not explain the particular primacy the presidency has had in the governmental system since 1789. What helps to explain this fact is the presidency’s radically different institutional characteristics, especially its unity of office. Because of its unique features, it enjoys—as the framers largely intended—the capacity of acting with the greatest expedition, secrecy and effective knowledge. As a result, when certain stresses, particularly in the area of foreign affairs, are placed on the nation, it will “naturally” rise to the forefront.<sup>57</sup>

#### B. *History as Reflecting Acknowledgment of Constitutional Prerogatives*

Another implicit and sometimes explicit exclusivist argument is that a history of presidential initiative and congressional acquiescence reflects acknowledgment of presidential exclusivity by both branches. In his book chapter supporting the TSP, for example, John Yoo characterizes “[d]ecades

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51. See *Minority Report*, *supra* note 9, at 450–51 (arguing, for example, that the Boland Amendment was “clearly unconstitutional” to the extent that it prohibited the President or his agents from engaging in diplomatic communications with whatever countries he wished).

52. *Id.* at 460 (quoting THE FEDERALIST NO.70 (Alexander Hamilton)).

53. *Id.*

54. *Id.*

55. *Id.* at 463–69.

56. *Id.*

57. *Id.* at 465–66 (quoting Gary J. Schmitt, *Jefferson and Executive Power: Revisionism and the “Revolution of 1800”*, 17 PUBLIUS 7, 23 n.29 (1987)).

of American constitutional practice” as “reject[ing] the notion of an omnipotent Congress.”<sup>58</sup> He goes so far as to characterize TSP opponents, who deemed it impermissible for the President to violate FISA in secret for several years after 9/11, as “want[ing] to overturn American historical practice in favor of a new and untested theory about the wartime powers of the President and Congress.”<sup>59</sup>

This argument fits within a more general exclusivist narrative. The narrative posits that Congress, for the bulk of American history, respected presidential exclusivity and thus passed few statutory constraints in the realms of foreign affairs or national security. It was only in the twentieth century, for a period between the two World Wars and then again—with a vengeance—from the 1970s through today, that Congress broke this pattern.<sup>60</sup> From this perspective, we are today left with a “fettered Presidency” that stands in sorry contrast to the constitutional plan that Congress acknowledged and respected for nearly two centuries.<sup>61</sup> Many of the essays in a 1989 book titled *The Fettered Presidency*, published by the American Enterprise Institute, make this point.<sup>62</sup> One essay in the collection argues that early congresses “[appear] to have understood [their] power to ‘make all laws . . . necessary and proper for carrying into execution . . . all other powers’ as mandating that [they] ‘facilitate the exercise of executive power in the realm of foreign affairs.’”<sup>63</sup> In contrast, the essay’s authors use the example of congressional oversight of covert action to lament that more recent congresses have overstepped their traditional and constitutional role.<sup>64</sup> The *Minority Report* is rife with similar sentiments. Referring to the use of force without congressional authorization, for example, the report concludes that, “[u]ntil recently, the Congress did not even question the President’s

58. YOO, *supra* note 7, at 121.

59. *Id.* at 124–25.

60. See, e.g., Gary J. Schmitt & Abram N. Shulsky, *The Theory and Practice of Separation of Powers: The Case of Covert Action* (explaining that congressional oversight was generally very deferential to the President until the mid-1970s), in *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 59, 61–65 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Abraham D. Sofaer, *Separation of Powers and the Use of Force* (deeming the War Powers Resolution a shift from “the historic pattern of separation of powers”), in *THE FETTERED PRESIDENCY*, *supra*, at 18–20; John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 *FOREIGN AFF.* 229, 229–30, 234, 242–43 (1981) (observing that after World War II, Congress generally deferred to the President’s judgment on national security and foreign policy but that Congress became more aggressive in the 1970s); cf. Barron & Lederman II, *supra* note 1, at 947 (criticizing this narrative, or “legislative abdication paradigm,” as “severely overdrawn insofar as it purports to describe longstanding practice”).

61. See, e.g., Schmitt & Shulsky, *supra* note 60, at 61–65 (arguing that while recent Congresses have adopted an aggressive oversight posture, Congress historically understood its constitutional role as subordinate to the President in national security matters, and this traditional understanding was consistent with founding views); Sofaer, *supra* note 60, at 20 (deeming the War Powers Resolution to threaten the “planned separation of powers” of the Constitution’s founders).

62. *THE FETTERED PRESIDENCY*, *supra* note 60.

63. Schmitt & Shulsky, *supra* note 60, at 62.

64. *Id.* at 62–65, 71–75.

authority.”<sup>65</sup> It also observes that, “[f]or the Congresses that had accepted the overt presidential uses of military force summarized [elsewhere in the report], the use of Executive power for . . . covert activities raised no constitutional questions.”<sup>66</sup> The *Minority Report* explicitly links these examples to the case for presidential exclusivity, concluding that:

[c]ongressional actions to limit the President in [the area of foreign policy] should be reviewed with a considerable degree of skepticism. If they interfere with core presidential foreign policy functions, they should be struck down. Moreover, the lesson of our constitutional history is that doubtful cases should be decided in favor of the President.<sup>67</sup>

### III. Lessons from the FDR Through Johnson Administrations

In the context of the TSP, then, exclusivists seem to rely on exclusivity to make three main points, whether explicitly or by implication. First, as a descriptive matter, they characterize the period from FDR until FISA’s passage as one in which presidents freely wiretapped without congressional sanction and possibly in the face of a contrary statute. Second, they suggest that this pattern of presidential initiative and congressional acquiescence reflects the respective constitutional capacities of the two branches. From this, they infer a constitutional prerogative on the President’s part to act in the face of a statutory prohibition. Third, they suggest that Congress’s long history of acquiescence reflects its acknowledgment that it lacks much constitutional power to restrict intelligence gathering.

This Part argues that the history does not support exclusivity but rather demonstrates its fatal flaw—its reliance on conflating capacity with legal prerogative. Subpart A explains that the history confirms the relatively great structural capacities of the Presidential office, an advantage compounded by the growth of both technology and government. This structural advantage does not amount to or support a right to ignore legal restraints on the same. To the contrary, evidence of this advantage confirms the wisdom of subjecting presidential capacities to statutory restrictions. Subpart B explains that Congress’s failure to pass legislation in this period to establish or “clarify” restraints on wiretapping reflects the arduousness of the legislative process relative to the President’s capacities for unilateral action. The failure does not reveal a historical consensus that Congress may not legally restrict intelligence gathering. To the contrary, the debates of the time suggest a widely held assumption that it is for Congress to decide (in tandem with the President’s veto power) whether to limit intelligence gathering.

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65. *Minority Report*, *supra* note 9, at 467.

66. *Id.* at 469.

67. *Id.*

A. *The Wisdom of Containing the President's Capacities*

1. *The President as Default Policymaker.*—As noted earlier, some observers characterize wiretapping during the FDR Administration as taking place in zone three.<sup>68</sup> Specifically, they cite Section 605 of the Telecommunications Act of 1934, which provided that “no person receiving . . . any interstate or foreign communication by wire . . . shall divulge or publish the [same] . . . , except through authorized channels of transmission or reception.”<sup>69</sup> They also cite two Supreme Court cases from 1937 and 1939 (the “*Nardone* cases,” so called after a defendant in the underlying criminal cases), which they characterize as interpreting Section 605 to prohibit all wiretapping by federal officers.<sup>70</sup> The *Nardone* cases held that statements tapped on a wire (*Nardone I*) and the fruits of such statements (*Nardone II*) must be excluded as evidence in federal courts.<sup>71</sup>

Yet as one set of these commentators observes, FDR and his Justice Department vigorously disputed that Section 605, on its own or through the *Nardone* cases, had this effect. They maintained that Section 605 prohibited only wiretapping and “divulg[ing]” its fruits in an evidentiary or similar context.<sup>72</sup> Attorney General Jackson explained in a 1941 letter to Congress that he had suspended wiretapping for a short period in 1940 because the *Nardone* evidentiary restrictions limited its usefulness. He made clear, however, the Justice Department’s position that wiretapping is legal:

There is no federal statute that prohibits or punishes wire tapping alone . . . .

. . . It is [the divulging of evidence obtained by wiretapping in open court] that court decisions hold to violate the statute . . . . [S]ince our use of [wiretapping] would have as its chief purpose the proof of a case against criminals, the practical effect of these decisions is to make wire tapping unavailing to law-enforcement officers . . . . For this reason it was discontinued by the Department of Justice.<sup>73</sup>

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68. See *supra* notes 6–10 and accompanying text.

69. 47 U.S.C. § 605(a) (2006).

70. See YOO, *supra* note 7, at 114–15 (citing these authorities to argue that FDR wiretapped in zone three); Katyal & Caplan, *supra* note 37, at 1041–52 (citing these authorities to argue that FDR wiretapped in zone three).

71. *Nardone v. United States (Nardone I)*, 302 U.S. 379, 380–82 (1937); *Nardone v. United States (Nardone II)*, 308 U.S. 338, 339–41 (1939).

72. Katyal & Caplan, *supra* note 37, at 1049–52.

73. *To Authorize Wiretapping: Hearing on H.R. 2266 and H.R. 3099 Before the H. Comm. on the Judiciary*, 77th Cong. 18–19 (1941) [hereinafter *To Authorize Wiretapping Hearing*] (statement of Robert H. Jackson, Att’y Gen. of the United States); see also Herbert Brownell, Jr., *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 199 (1954) (explaining that Jackson’s suspension was short-lived—FDR ordered that wiretapping resume later that year).

This position was maintained in subsequent administrations.<sup>74</sup> Herbert Brownell, President Eisenhower's first Attorney General, stated in a 1954 *Cornell Law Quarterly* article that "except for a short period during 1940, every Attorney General over the last twenty-two years has favored and authorized wiretapping by federal officers . . . . Moreover, this policy adhered to by my predecessors has been taken with the full knowledge, consent and approval of Presidents Roosevelt and Truman."<sup>75</sup> In 1962 Attorney General Robert Kennedy told Congress that, under Section 605, it was legal to wiretap, but not to divulge the acquired information as evidence. He observed that all administrations since FDR's have engaged in limited wiretapping and that "Congress has been advised [as such] each year by the Director of the [FBI]."<sup>76</sup>

Despite these confident public pronouncements, there was widespread dispute within and outside of the Executive Branch about wiretapping's legality under Section 605. Attorney General Jackson later acknowledged that he had temporarily suspended wiretapping because he thought it was illegal.<sup>77</sup> And many within Congress, the press, and the public reacted with dismay to the fact of FBI wiretapping throughout these years, insisting that it was against the law.<sup>78</sup> A 1940 resolution of the Senate Interstate Commerce Committee deemed wiretapping illegal in light of Section 605 and the *Nardone* cases, but lamented that it is "not likely to be eschewed by law-enforcement agencies."<sup>79</sup> It added that wiretapping is "especially dangerous at the present time, because of the recent resurgence of a spy system conducted by Government police."<sup>80</sup> Twelve years later, a *Columbia Law Review* article observed that, "despite the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels."<sup>81</sup>

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74. In fact, this position was maintained by the Justice Department until 1965. CONGR. RESEARCH SERV., THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT: BACKGROUND AND SUMMARY OF ITS PROVISIONS 17 (1968); SUBCOMM. ON CONSTITUTIONAL RIGHTS., SENATE COMM. ON THE JUDICIARY, WIRETAPPING AND EAVESDROPPING: SUMMARY—REPORT OF HEARINGS 1958–1961, 5–6, 15–16, 18–19 (1962).

75. Brownell, *supra* note 73, at 200.

76. *Wiretapping—The Attorney General's Program—1962: Hearing on S. 2813 Before the S. Comm. on the Judiciary*, 87th Cong. 11 (1962) [hereinafter *1962 Wiretapping Hearing*] (statement of Robert Kennedy, Att'y Gen. of the United States).

77. ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68–69 (2003); *see also* Brownell, *supra* note 73, at 199 (suggesting that Jackson issued the suspension order because he thought wiretapping illegal); *To Authorize Wiretapping Hearing*, *supra* note 73, at 221–22 (citing a *New York Times* article describing Jackson's actions after *Nardone II*).

78. Katyal & Caplan, *supra* note 37, at 1047 ("By this point, hostility towards wiretapping had been expressed by Congress, affirmed by the Court, and applauded by the media.").

79. S. REP. NO. 76-1304, at 4–5 (1940).

80. *Id.*

81. Alan F. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 167 (1952); *see also id.* at 168–69 (alerting the reader to the prevalence of wiretapping by private actors and blaming it on the government's poor example).

The article reported “[t]he general mood of the press . . . [as] one of dissatisfaction with the prevalence of unlimited wire tapping.”<sup>82</sup>

Consider what it says about the Presidency’s structural advantages that, despite the acknowledged existence and hotly contested legality of administration policies permitting FBI wiretapping, the policies persisted for decades.<sup>83</sup> This history reflects the natural capacity of the President and his subordinates to prevail by default, simply by continuing to take a disputed course of action.<sup>84</sup> As government’s “doer” branch, the Executive has unique access to its human and technological resources.<sup>85</sup> Unlike Congress, which can draft legislation but lacks the tools to implement it, and the Judiciary, which announces but lacks the means to execute legal rulings, the President’s constitutional tools uniquely equip him for self-propelled action.<sup>86</sup>

Presidential wins by default in the wiretapping realm also reflect how the President’s intrinsic capacity advantages are compounded by the growth of government infrastructure since the nation’s founding. Prior to “World War II and the preparations for it in the late 1930s,” communications surveillance—while engaged in, and sometimes heavily so by the federal government—was not entrenched in permanent government infrastructure.<sup>87</sup> Rather:

The first century and a half of American democracy was marked by intermittent episodes of internal intelligence gathering. Monitoring dissent, by the federal government at least, was undertaken only in response to a crisis of the moment; with the passing of the crisis, the monitoring ceased, and the federal machinery that supported it was dismantled or retooled for other tasks.<sup>88</sup>

In this period, government called upon a hodgepodge of resources for help in intelligence gathering, including private detective agencies, citizens’ groups,

82. *Id.* at 189.

83. See Brownell, *supra* note 73, at 197–200 (chronicling the debate on legality and the continued use of the policy through the years).

84. See Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 399 (2009) (explaining that, given their “power to execute . . . Presidents often win by default”); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 855–56 (1999) (describing President’s unique structural capacity to “shift the status quo by taking unilateral action”); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 518 (2008) (citing the President’s first-mover advantage); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677 (2005) (citing the President’s first-mover advantage).

85. See, e.g., Marshall, *supra* note 84, at 511–17 (citing examples of the President’s advantageous access to government resources).

86. Moe & Howell, *supra* note 84, at 860–62, 866–70 (describing the weaknesses of Congress and the Judiciary relative to the President).

87. RICHARD E. MORGAN, *DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA* 15–16, 36 (1980).

88. *Id.* at 16.

and personnel from throughout the Executive Branch.<sup>89</sup> Yet “[w]ith World War II, which marked in so many ways the modernization of the American national government, this distinctly premodern pattern of intermittent public–private efforts was broken, and a permanent, specialized domestic intelligence capacity was institutionalized at the federal level.”<sup>90</sup>

The growth of an intelligence infrastructure equips the Executive Branch with a permanent arsenal of powerful tools.<sup>91</sup> The arsenal adds substance to the structural advantages intrinsic in the President’s “doer” role.<sup>92</sup> Absent a permanent and continuously funded infrastructure, intelligence gathering is obviously more difficult to achieve without explicit congressional sanction and funding.<sup>93</sup> The difficulty is all the greater in the face of an explicit congressional prohibition, making it harder, for example, for the President to allocate funds based on vaguely worded appropriations.<sup>94</sup> Yet, like the effective creation of a large standing army, the creation of a vast and permanent intelligence infrastructure adds substance to the President’s theoretical capacity to go it alone.<sup>95</sup>

As noted, exclusivists infer from the President’s physical capacity to “go it alone” by wiretapping in zone two or zone three that he has a legal prerogative to do so.<sup>96</sup> Yet the latter need not follow from the former. To the

89. *Id.* at 22–26. An important caveat to this observation is that institutionalized intelligence apparatus arose in the military during the Civil War and in the FBI’s predecessor, the Bureau of Intelligence (BOI) during the infamous Palmer Raid period after World War I. While these events were important precursors to the modern intelligence bureaucracy, they were also products of their times insofar as the infrastructure in each case was at least partly dismantled for a period—in the case of the Civil War because the war ended, in the case of the Palmer Raids because of the disgrace that they brought to the BOI. *Id.* at 19–21, 27–30; David Williams, *The Bureau of Investigation and its Critics 1919–1921: The Origins of Federal Political Surveillance*, 68 J. AM. HIST. 560, 560–61, 579 (1981). The post-Palmer Raids period is particularly interesting as it seems to mark a gray area between the worlds of interim and permanent intelligence infrastructure—while the BOI formally shut down surveillance operations not directly related to criminal investigations, between 1924 and 1936 it “hired paid informers to collect information on the activities of liberal and radical political and labor organizations.” *Id.* at 560, 578.

90. MORGAN, *supra* note 87, at 16; *see also* GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* 57, 59–61, 82–83, 98 (explaining that a permanent “national security state” arose after World War II, including a permanent surveillance infrastructure).

91. *See* Marshall, *supra* note 84, at 515–17 (noting that the power of the Executive Branch is heightened by its control of intelligence gathering and other technological and human resources).

92. *Id.*

93. *See, e.g.*, WILLS, *supra* note 90, at 99–102 (explaining that the Constitution seeks to check Executive Branch power through Congress’s control over funding and that aspects of the national security state enable the Executive Branch to circumvent this check).

94. *See, e.g.*, HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 52–53 (1990) (recounting congressional efforts to curtail military activities through explicit funding restrictions).

95. *See supra* notes 91–92; *see also, e.g.*, KOH, *supra* note 94, at 52–53 (detailing examples of military activities that continued to be funded and supported by the Executive Branch despite congressional prohibitions on such funding and support).

96. *See infra* subpart II(A) (explaining that exclusivists often infer from the President’s demonstrated structural capacity to act without or against statutory authority that he has a legal right to so act).

contrary, the wiretapping history discussed above could be invoked to demonstrate the logic of a constitutional design that accords the President strong capacities but deems their uses legally legitimate only when authorized by Congress (in zone one) or at minimum not prohibited by Congress (not in zone three). As history demonstrates, the absence of legal legitimacy alone is not enough to stop a determined administration.<sup>97</sup> Yet there are logical and historical bases to believe that the stamp of legal illegitimacy has political and practical deterrent effects.<sup>98</sup> That potential deterrent weakens considerably where presidents manage not only to engage in self-initiated, even statute-violating activity, but to convince Congress, courts, and most importantly the people, that those acts are legally legitimate. Furthermore, the potentially endless ratcheting effect of this pattern should be obvious. The more that presidents act in zone two or three, the more constitutional such behavior becomes from the exclusivist perspective, hence the fewer deterrents on such behavior in the future.<sup>99</sup> In short, the exclusivist reading of evolving history's constitutional significance in the realm of wiretapping is far from the best, let alone the only plausible, reading. Rather, such reading appears to rest on a deeply underexamined and ultimately mistaken premise—that capacity equals prerogative in the realm of presidential power.

2. *Secrecy.*—The previous subpart addresses only those aspects of mid-twentieth-century wiretapping policies that were publicly known while in place. Yet the President's capacity to keep secrets is an important part of the story as well. First, the FDR administration initially kept the fact of wiretapping a secret. Second, while the fact of wiretapping eventually became known, FDR and his successors dramatically misrepresented its scope and nature for decades. As this history demonstrates, the President's capacity for secret keeping enables him to dissemble about the existence and scope of programs. This helps presidents to obtain years of congressional "acquiescence" that future presidents can cite as precedent of constitutional magnitude.

As the previous section discussed, the FDR administration acknowledged publicly that it wiretapped.<sup>100</sup> Yet it was not consistently so

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97. See *supra* 77–83 and accompanying text (chronicling years of wiretapping by different administrations despite debates over the legality of the practice).

98. See, e.g., ATHAN THEOHARIS, *SPYING ON AMERICANS* 132 (1978) (recounting the effects on the Executive Branch of heightened public concern for the rule of law in the wake of the Vietnam War and Watergate); *Justice Department Bans Wiretapping; Jackson Acts on Hoover Recommendation*, N.Y. TIMES, Mar. 18, 1940, at A1 (reporting that Attorney General Jackson's order banning wiretapping might have been in response to backlash after the practice began becoming public).

99. See Marshall, *supra* note 84, at 510 ("Presidential power inevitably expands because of the way Executive Branch precedent is used to support later exercises of power."); *id.* at 511, 521 (explaining that only presidential uses of power tend to be cited as constitutional precedent, whereas presidential abstentions are often overlooked).

100. See *supra* notes 37, 43 and accompanying text.

forthcoming. While the *Nardone* cases were decided in December 1937 and December 1939, the Administration did not publicly acknowledge that it wiretapped until March 1940, shortly after Robert Jackson became Attorney General.<sup>101</sup> In his public statement to this effect, Jackson indicated that he would henceforth suspend wiretapping because, “[u]nder the existing state of the law [wiretapping] cannot be done unless Congress sees fit to modify the existing statutes.”<sup>102</sup> On May 31, 1940, Jackson wrote to Congress. Quoting his earlier lament about the “existing state of the law,” he urged Congress to pass legislation enabling the Justice Department to wiretap in a limited class of cases including kidnapping, extortion, racketeering, and national defense matters such as espionage and sabotage.<sup>103</sup> Yet while Jackson apparently did suspend the program in March of 1940,<sup>104</sup> it was soon reauthorized pursuant to President Roosevelt’s order of May 21, 1940.<sup>105</sup> While the Justice Department acknowledged by late 1941 that it was again wiretapping,<sup>106</sup> Jackson’s May 31, 1940, plea to Congress and similar Administration statements of the time reflect a short-lived effort to keep the program a secret until new legislation could be procured.<sup>107</sup>

Furthermore, while the FDR Administration eventually acknowledged the fact of wiretapping and later administrations followed suit,<sup>108</sup> it is now well-known that administrations wildly misrepresented the scope of their wiretapping activities for decades. Administrations repeatedly explained that they wiretapped under careful procedural controls and only in a very limited class of cases involving a handful of specified crimes including espionage, sabotage, and kidnapping.<sup>109</sup> Attorney General Brownell epitomized the public face taken by administrations when he insisted in a 1954 law review article that “[e]xperience demonstrates that the [FBI] has never abused the

101. See Katyal & Caplan, *supra* note 37, at 1048 (citing the Administration’s March 1940 public acknowledgment and its pledge to ban wiretapping going forward); *Justice Department Bans Wiretapping*, *supra* note 98 (citing Administration’s March 1940 admission and pledge to ban wiretapping from that point on).

102. *Justice Department Bans Wiretapping*, *supra* note 98.

103. *Wiretapping for National Defense: Hearing Before the H. Comm. on the Judiciary*, 76th Cong. 1–2 (1940) (statement of Robert Jackson, Att’y Gen. of the United States).

104. JACKSON, *supra* note 77, at 68.

105. THEOHARIS *supra* note 98, at 98–99.

106. *Biddle Approves FBI Wiretapping*, N.Y. TIMES, Oct. 8, 1941, at A4; see also J. Edgar Hoover, *Rejoinder by Mr. Hoover*, 58 YALE L.J. 422, 422–24 (1949) (providing examples of public acknowledgements by Administration members of wiretapping); Katyal & Caplan, *supra* note 37, at 1056–59 (citing inconsistent public signals from the Administration from early- to mid-1941).

107. See Katyal & Caplan, *supra* note 37, at 1052–54 (describing Jackson’s effort to keep the program a secret).

108. See *supra* subpart III(A).

109. See, e.g., *1962 Wiretapping Hearing*, *supra* note 76, at 11–12 (statement of Robert Kennedy, Att’y Gen. of the United States); THEOHARIS, *supra* note 98, at 102 (citing Justice Department statements that wiretapping is strictly controlled); Brownell, *supra* note 73, at 199–200, 207–08 (claiming that wiretapping has been strictly limited across administrations); Hoover, *supra* note 106, at 424 (asserting that the FBI only conducted surveillance under rigid supervision in cases of extreme emergency).

wiretap authority. Its record of ‘nonpartisan, nonpolitical, tireless and efficient service over the years gives ample assurance that the innocent will not suffer in the process of the Bureau’s alert protection of the Nation’s safety.’”<sup>110</sup>

Of course, a very different reality came to light in the 1970s. Investigations sparked by Nixon Administration scandals brought to light shocking abuses of wiretapping and of intelligence gathering generally by every administration since that of FDR.<sup>111</sup> Over the years, these revelations have filled volumes of primary and secondary literature. For example, the report of the Church Committee—the 1970s Senate investigative committee headed by Senator Frank Church and charged with investigating intelligence-community abuses—observed that “[b]y 1938, the FBI was investigating alleged subversive infiltration of: the maritime industry; the steel industry; the coal industry; the clothing, garment, and fur industries; the automobile industry; the newspaper field; educational institutions; organized labor organizations; Negroes; youth groups; Government affairs; and the armed forces.”<sup>112</sup>

As this history illustrates, the presidential capacity to act in secret can easily be abused. As with the presidential capacity to self-initiate, past abuses of secrecy by no means clearly support exclusivity. To the contrary, they remind us of the wisdom of subjecting the President’s capacities to statutory limits and interbranch oversight. Secrecy-fueled historical abuses also heighten the folly of equating congressional acquiescence with congressional support for exclusivity. History suggests that such acquiescence is often facilitated in part by Congress’s ignorance about past or ongoing secret activities.<sup>113</sup>

3. *Accountability.*—Thus far, I have used terms such as “presidency” and “presidential power” to describe the person, acts, and powers not only of the President but of his advisors and of others within the Executive Branch that act or purport to act under color of presidential authority. This usage is a product of the reality that at any given time there are countless individuals who exercise the presidency’s structural capacities—such as the ability to self-initiate and to do so in relative secrecy—and its claimed legal

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110. Brownell, *supra* note 73, at 207.

111. See, e.g., MORGAN, *supra* note 87, at 4–8 (describing how the death of J. Edgar Hoover and the Watergate scandal led to the disclosure of records detailing decades of surveillance by the FBI); KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT 1–2, 11–17, 41–44, 94–99 (1996) (recounting the 1970s investigations that revealed decades of surveillance abuses); THEOHARIS, *supra* note 98, at 9–13 (discussing the 1970s investigations of intelligence activities and the political climate and scandals that helped to generate them).

112. S. REP. NO. 94-755, at 32 (1976).

113. See Katyal & Caplan, *supra* note 37, at 1067–68 (questioning the precedential value of presidential actions taken secretly).

prerogatives.<sup>114</sup> As a result, the President may either genuinely not know of acts taken in his name or retain plausible deniability regarding the same.<sup>115</sup> This bears on exclusivity in an important respect. As we have seen, a key aspect of exclusivity is its conflation of the President's capacity to act energetically with a legal prerogative to do the same regardless of statutory restrictions. Yet exclusivists frequently bolster this analytical move with assurance that the rule of law will be maintained by the President's political accountability. If Americans are unhappy with how he exercises his power, they can retaliate against him or his political allies at the ballot box.<sup>116</sup> Yet such assurances do not measure up to the realities of a sprawling Executive Branch and intelligence infrastructure. The accountability-defeating features of these realities are bolstered by the presidency's structural capacity for secrecy, which can obscure chains of responsibility both during and after an activity or program.

In the case of wiretapping, some striking examples of presidential ignorance involve J. Edgar Hoover's misleading communications to Presidents FDR, Truman, and Eisenhower. With respect to FDR, Hoover apparently encouraged FDR's belief that the latter's wiretapping authorizations did not cover surveillance of "subversive activities."<sup>117</sup> Yet unbeknownst to FDR, Hoover ensured that the authorizations were applied to subversive activities very broadly defined.<sup>118</sup> To Presidents Truman and Eisenhower, Hoover represented that FDR had authorized subversive-activities surveillance.<sup>119</sup> Truman and Eisenhower each approved such

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114. See, e.g., Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49–50, 65–70, 93–94 (2006) (explaining that many players, sometimes with conflicting agendas, exercise "presidential" oversight of agency policy making); Kitrosser, *Classified Information Leaks*, *supra* note 17, at 892–93 (noting that several million government employees and contractors have some form of classification authority).

115. See GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* 52 (2010) (noting that the concentration of emergency powers in the Executive Branch increases the number of individuals who "say they can speak for the President" and thus provide plausible deniability); Bressman & Vandenberg, *supra* note 114, at 78–84, 93–94 (presenting survey results showing that EPA personnel believe that White House pressure on the EPA comes from different and sometimes competing White House offices and is not visible to the public); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1763 (stating that a President can distance himself from unpopular actions and also can be genuinely "out of the loop"); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 172–73, 207–08 (1995) (criticizing George H.W. Bush's Council on Competitiveness as a vehicle to influence agency regulatory decisions while retaining plausible deniability for the President).

116. See, e.g., Minority Report, *supra* note 9, at 460 (citing the President's political accountability).

117. Katyal & Caplan, *supra* note 37, at 1039.

118. THEOHARIS, *supra* note 98, at 66–76; Katyal & Caplan, *supra* note 37, at 1039; Athan G. Theoharis, *The FBI's Stretching of Presidential Directives, 1936–1953*, 91 POL. SCI. Q. 649, 654–61 (Winter 1976–1977).

119. Theoharis, *supra* note 118, at 652.

surveillance based partly on the misconception that they were reaffirming what FDR had authorized.<sup>120</sup>

History is also rife with examples of the intentional provision for presidential plausible deniability regarding intelligence gathering. For example, Athan Theoharis reports that the Carter Justice Department decided not to prosecute former CIA officials for illegal mail opening on the basis that “executive approval . . . could not be established because, under the practice of ‘plausible deniability’ or ‘presidential deniability,’ no ‘written records [were made] of presidential authorizations of sensitive intelligence-gathering operations.’”<sup>121</sup> In the realm of intelligence gathering, presidents and administration officials long have sought to minimize written directives or otherwise take steps to protect presidential deniability.<sup>122</sup> The importance of deniability is illustrated by a standoff between President Hoover and President Nixon. Hoover, sensitive to increasing public and congressional skepticism over surveillance activities, sought to avoid personal responsibility for certain programs (including but not limited to certain wiretapping programs) by demanding that the President or the Attorney General sign off on them in writing.<sup>123</sup> Not surprisingly, President Nixon refused this request.<sup>124</sup> Adding a final twist to the uncertain lines of responsibility that this confrontation reflects, the Intelligence Community proceeded to engage in some of the activities on which Nixon had refused to sign off, despite Nixon’s apparent belief that his refusal had been their death knell.<sup>125</sup>

Ironically, then, the blanket of broad secrecy and discretion that exclusivity justifies can help to defeat the accountability that exclusivists trumpet. This lesson pokes additional holes in the notion that a history of presidential initiative or congressional acquiescence supports exclusivity. For one thing, it is not always so clear that acts of “presidential” initiative are acts of the President’s initiative. Furthermore, it often is difficult if not impossible for Congress or others to discern what the President—or others acting under color of presidential power—knew or did and when they knew or did it. The latter reflects the problems in equating congressional acquiescence with a knowing embrace of exclusivity. More so, it undercuts the

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120. *Id.* at 649, 661–68, 671–72.

121. THEOHARIS, *supra* note 98, at xiii.

122. *Id.* at xi–xiii; *see also, e.g.*, H.R. REP. NO. 95-1283, at 119 (1978) (dissenting views on H.R. 7308) (“In reviewing the abuses of the past, it can be seen that the method used by senior executive branch officials to try to escape responsibility was by establishing ‘plausible deniability.’”); Simon Chesterman, *Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis*, 28 MICH. J. INT’L L. 553, 566 (2007) (describing origins and more expansive later uses of plausible deniability).

123. THEOHARIS, *supra* note 98, at 19.

124. *Id.* at 30–34 (describing Nixon’s insistence on retaining “plausible deniability” in the face of Hoover’s request for specific authorization).

125. *Id.* at 13–14, 19, 32–39.

notion that accountability counterbalances excesses that might otherwise flow from exclusivity.

*B. The Near Absence of Exclusivity in the Debates of the Time*

The second major premise underlying exclusivist uses of evolving history is that Congress until recently took a hands-off approach to national security and foreign policy, and that this reflects a traditional acceptance of exclusivity by the political branches.

In an important two-article series, Professors David Barron and Martin Lederman challenge this premise. First, they demonstrate that Congress has repeatedly passed legislation constraining the President's conduct of military campaigns from the Founding Era through the present.<sup>126</sup> They also demonstrate that presidents almost never made explicit zone three arguments—that is, arguments defending the legality of national security actions taken against statutory authority on the basis of their Commander in Chief or Executive Power—prior to the mid-twentieth century.<sup>127</sup> This was so even when presidents “confronted problematic restrictions, some of which could not be fully interpreted away and some of which even purported to regulate troop deployments and the actions of troops already deployed.”<sup>128</sup> Exclusivity thus was relatively silent within the political branches until the mid-twentieth century. This Part examines the sound of that silence as it relates to wiretapping while the Telecommunications Act of 1934 remained in effect.

Secondary accounts reflect that FDR did not argue that he had a constitutional prerogative to wiretap in the face of contrary statutory authority.<sup>129</sup> Rather, he claimed that wiretapping was not statutorily prohibited in all cases. In his May 21, 1940, directive ordering Attorney General Jackson to reauthorize wiretapping, FDR explained his narrow reading of the Supreme Court's interpretation of the Telecommunications Act of 1934 in the *Nardone* cases, stating, “I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.”<sup>130</sup> Attorneys general in subse-

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126. Barron & Lederman I, *supra* note 1, at 693, 696–97, 704–15; Barron & Lederman II, *supra* note 1, at 947–48, 951–52, 996–97, 1009–15, 1027, 1058–59; *cf.* Barron & Lederman I, *supra* note 1, at 772–86 (noting that actions of the Continental Congress during the Revolutionary War and texts of post-revolution state constitutions reflected the understanding that legislatures could direct details of military campaigns waged by the “commanders-in-chief”).

127. Barron & Lederman I, *supra* note 1, at 697, 718–20, 763–64; Barron & Lederman II, *supra* note 1, at 948–49, 952, 993–94, 999–1004, 1007–09, 1015–16, 1027, 1034–35, 1057–58.

128. Barron & Lederman II, *supra* note 1, at 948.

129. THEOHARIS, *supra* note 98, at 99; *see also* Barron & Lederman II, *supra* note 1, at 1052 (chronicling near absence of any exclusivity claims by the FDR Administration); Katyal & Caplan, *supra* note 37, at 1049–52 (citing the FDR Administration's arguments, all grounded in statutory interpretation).

130. Katyal & Caplan, *supra* note 37, at 1050 (quoting FDR's memorandum to Jackson).

quent administrations also relied on statutory interpretation claims, which they articulated publicly, to defend wiretapping.<sup>131</sup>

That exclusivity was outside the bounds of mainstream legal thought at the time is exemplified by a fascinating exchange in the pages of the *Yale Law Journal* in 1949. FBI Director J. Edgar Hoover wrote a letter to the journal challenging statements made in a December 1948 article about FBI practices.<sup>132</sup> In his letter, Hoover noted that “the FBI does tap telephones in a very limited type of cases.”<sup>133</sup> The authors of the original article called Hoover’s “admission” of wiretapping an “astounding statement” in light of Section 605’s prohibition on intercepting and divulging wiretapped information.<sup>134</sup> In a rejoinder to the authors’ written response, Hoover explained that he had “never attempted to keep [his] views on this subject a secret,” citing public statements by himself and other administration officials throughout the 1940s.<sup>135</sup> As was typical of administration statements supporting wiretapping in the mid-twentieth century, Hoover did not even hint at the possibility that the President could legally circumvent statutory constraints. Rather, he reiterated the Administration’s public position that Section 605 prohibited the introduction of wiretap-derived evidence but did not outlaw wiretapping itself.<sup>136</sup>

In congressional hearings on wiretapping during World War II,<sup>137</sup> the sole invocation of exclusivity that I found by an administration official is a statement by Attorney General Francis Biddle during a 1942 House Judiciary Committee hearing. Biddle explained that he had already “publicly made clear” his position that Section 605 does not prohibit wiretapping.<sup>138</sup> He added that he believed his views to be consistent with those of his predecessor, former Attorney General Jackson.<sup>139</sup> Yet, “since there [was] some confusion and some doubt on the matter,” Biddle concluded that it would be “extremely valuable for the Congress to clarify [wiretapping authority] in legislation.”<sup>140</sup> To this, Biddle added his belief that

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131. See, e.g., *1962 Wiretapping Hearings*, *supra* note 76, at 12–13 (statement of Robert Kennedy, Att’y Gen. of the United States) (explaining that under then current law, wiretapping in itself, without subsequent disclosure, was not a crime); Brownell, *supra* note 73, at 199–200 (arguing that the Telecommunications Act does not make wiretapping a crime in its own right).

132. Thomas I. Emerson & David M. Helfeld, *Reply By the Authors*, 58 *YALE L.J.* 412, 413 (1949).

133. *Id.* at 413 (quoting Hoover’s letter).

134. *Id.* at 413–15.

135. Hoover, *supra* note 106, at 422–23.

136. *Id.* at 424.

137. See *infra* note 147 for description of the scope of my search of congressional hearings on wiretapping during the World War II period.

138. *Authorizing Wire Tapping in the Prosecution of the War: Hearing on H.R. 283 Before the H. Comm. on the Judiciary, 77th Cong. 2* (1942) [hereinafter *Authorizing Wire Tapping*] (statement of Francis Biddle, Att’y Gen. of the United States).

139. *Id.*

140. *Id.*

Congress perhaps could not, and certainly would not, wish to prevent the President, as Commander in Chief of the Army and Navy, making use, in time of war, of the right to tap wires. I think it is very doubtful, if the Commander in Chief found it was essential as a military matter to do this in wartimes, whether the legislative branch of the Government could interfere with that, and I am certain they would not wish to, even if they could.<sup>141</sup>

These thoughts, to which Biddle made no further reference in his testimony, comprise an exception that proves the rule of exclusivity's general absence from the legal and political debates of the time. For one thing, Biddle's brief statement sits in relative isolation among his own more copious body of statutory arguments to Congress on wiretapping in both the hearing just cited and his 1941 confirmation hearing before the Senate Judiciary Committee.<sup>142</sup> That body of arguments comprises the standard refrain of the FDR and subsequent administrations: that Section 605 does not prohibit wiretapping, that Congress should nonetheless "clarify" the right to wiretap, and that Congress should pass legislation permitting some wiretap-derived evidence to be introduced in court.<sup>143</sup>

Furthermore, the overall tenor of Biddle's comments on wiretapping legislation strongly reinforces the notion that his exclusivist statement was directed at most to extraordinary cases within a normative constitutional context of legislative control. For example, following his exclusivist remark, Biddle discussed the desirability of legislation to clarify the right to wiretap and to allow the limited introduction of wiretap-derived evidence.<sup>144</sup> He

141. *Id.*

142. *Id.* at 2–4; see also *Hearing on Biddle Nomination Before the S. Judiciary Comm.*, 77th Cong. (1941) [hereinafter *Biddle Nomination*]. Barron and Lederman make a similar finding about Biddle's relationship to exclusivity during his tenure as Attorney General. In their review, they found only one exclusivist remark by Biddle (or by anyone in the FDR administration, for that matter)—a comment made "in an almost offhand manner" during a Supreme Court oral argument about the power to try enemy combatants via military commission. Barron & Lederman II, *supra* note 1, at 1055. Barron and Lederman explain that, while Biddle's remark was unusual for the time and stood out even within his own larger body of arguments, it "nonetheless [stood] as an indication that [exclusivity] was beginning to make "inroads in the political branches." *Id.* at 1055–56.

143. See, e.g., *Authorizing Wire Tapping*, *supra* note 138, at 2–4 (stating that Section 605 does not prevent wiretapping but that it prohibits the introduction of its fruits into evidence, stressing that legislation should be passed narrowing the right to wiretap and permitting wiretap-derived evidence to be used in court); *Biddle Nomination*, *supra* note 142, at 5–6, 10 (explaining his support for limited wiretapping and his view that Congress should pass a law that permits wiretapping but limits its scope and enables Congress to oversee its use); *1962 Wiretapping Hearings*, *supra* note 76, at 11–13 (statement of Robert Kennedy, Att'y Gen. of the United States) (stating that Section 605 does not prohibit wiretapping but that it prevents wiretap-derived evidence from being introduced in court, urging the passage of legislation to narrow wiretapping's permitted uses and allow the introduction of wiretap-derived evidence); Brownell, *supra* note 73, at 199–203 (citing Biddle's views on the meaning of Section 605 and on the need for new legislation, noting that Biddle's views have been shared by all subsequent Attorney Generals including Brownell).

144. See *Authorizing Wire Tapping*, *supra* note 138, at 3–4 (statement of Francis Biddle, Att'y Gen. of the United States) (recommending passage of House Joint Resolution 283 to clarify the legality of wiretapping and permit the introduction of evidence from wiretaps).

noted that “it puts a much greater control in the Congress if they wish at any time—if they think at any time it has been abused—to withdraw that power.”<sup>145</sup> Similarly, Biddle spoke of the importance of congressional oversight as a tool by which Congress could determine if any legislative wiretapping authority has been abused.<sup>146</sup>

Most tellingly, Biddle’s lone statement marked the only clear reference, and certainly the only approving one, to exclusivity in the several congressional hearings held to consider authorizing wiretapping during and shortly prior to America’s entry into World War II.<sup>147</sup> Overall, statements of witnesses and questioners alike in these hearings were premised on the assumption that it is for Congress (in conjunction with the President’s veto power) to decide on the proper scope, if any, of a national security wiretapping power.<sup>148</sup> The apparent foreignness of exclusivist reasoning to most hearing participants is captured in an exchange between Congressman Earl C. Michener of Michigan, who spoke favorably of granting the President statutory authority to wiretap for national security purposes, and a witness from the ACLU who deemed wiretapping, and hence legislative authorization for the same, undesirable. The ACLU witness suggested that it might be less dangerous to liberty for a president to violate a statute in a moment of true emergency than for Congress to formally broaden the President’s statu-

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145. *Id.* at 4.

146. See *Biddle Nomination*, *supra* note 142, at 6, 10 (statement of Francis Biddle, Att’y Gen. of the United States) (remarking that any wiretapping should be reported regularly to Congress).

147. According to LexisNexis Congressional, there were several congressional hearings on wiretapping between the start of World War II (including before America’s entry into the War) and the War’s end. Hearings by the Senate Interstate Commerce Committee (ICC) focused predominantly on allegations of state and private wiretapping and did not discuss the President’s power to wiretap in any depth. See generally *Investigation of Alleged Wire Tapping, Part 1: Hearing on S. 224 Before the Subcomm. of the S. Interstate Commerce Comm.*, 76th Cong. (1940); *Investigation of Alleged Wire Tapping, Part 2: Hearing on S. 224 Before the Subcomm. of the S. Interstate Commerce Comm.*, 76th Cong. (1940); *Investigation of Alleged Wire Tapping, Part 3: Hearing on S. 224 Before the Subcomm. of the S. Interstate Commerce Comm.*, 76th Cong. (1941) (focusing on state and private wiretapping, based on a reading of large portions of the transcripts as well as an electronic word search of the transcripts for the terms “president,” “commander,” “chief,” “constitution,” “article ii,” “article 2,” “article two,” “second article,” and “executive power”). The remaining hearings listed by LexisNexis Congressional are more relevant to my focus on the role (or relative lack thereof) of presidential exclusivity in World War II Era congressional hearings on wiretapping. Those hearings are thus my main points of reference. They are *Authorizing Wire Tapping in the Prosecution of the War, Part 1: Hearing on H.J. Res. 283 Before the H. Comm. on the Judiciary*, 77th Cong. (1942) [hereinafter *Authorizing Wire Tapping Part 1*]; *Authorizing Wire Tapping in the Prosecution of the War, Part 2: Hearing on H.J. Res. 283 Before the H. Comm. on the Judiciary*, 77th Cong. (1942) [hereinafter *Authorizing Wire Tapping Part 2*]; *To Authorize Wire Tapping: Hearing on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 77th Cong. (1941); and *Wire Tapping for National Defense: Hearing on H.J. Res. 553 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. (1940). I also refer at points to relevant parts of Francis Biddle’s 1941 confirmation hearing as Attorney General before the Senate Judiciary Committee. *Biddle Nomination*, *supra* note 142.

148. See generally *supra* note 147.

tory powers.<sup>149</sup> Michener expressed shock, asking, “[y]ou believe, then, that the Chief Executive, regardless of the Constitution, should just go and do that which he thinks is best and pay no attention to the Congress or the Constitution?”<sup>150</sup> Suffice it to say, neither Michener, the ACLU witness, nor other participants in or following the exchange suggested that the President could constitutionally override legislation in the name of national security.<sup>151</sup>

Debates over Section 605 and possible amendments thereto belie the exclusivist premise that Congress’s acquiescence (in this case, its failure for decades to pass legislation clarifying the contours of presidential wiretapping power) reflects its belief that it may not constitutionally constrain the President in the realm of national security. To the contrary, the debates of the time, including congressional hearings directly addressing wartime wiretapping, overwhelmingly evince the assumption that national security wiretapping is a matter for legislative policymaking.<sup>152</sup>

The hearings on wartime wiretapping also indicate that many who opposed amending Section 605 did so because they deemed the murky status quo a lesser evil than legislation clearly granting or expanding presidential wiretapping powers.<sup>153</sup> Thus, Congress’s failure to pass new legislation during World War II, or for years beyond that,<sup>154</sup> hardly reflects an exclusivist consensus. Further, the fact that presidents continued to wiretap for decades in the face of their controversial statutory interpretations and Congress’s inertia reflects the phenomenon discussed in the previous section: the

149. *See To Authorize Wire Tapping, supra* note 147, at 199 (statement of Osmond Fraenkel, American Civil Liberties Union) (noting with apparent approval that during the Civil War Lincoln acted outside the law, and although emergency circumstances may have justified his actions, Lincoln “did not seek to have the law changed” or to “have a great principle of constitutional government disregarded”).

150. *Id.*

151. In his testimony, the ACLU witness stated,

I regret any deviation from the law, but I say this, just as I would rather have somebody lose his temper occasionally and do a cruel act than have somebody do a cruel act in cold blood. So I say if in a moment of intense crisis it is believed that something has to be done, human nature is such that it will be done and afterward it will be judged.

*Id.* (statement of Osmond Fraenkel, American Civil Liberties Union)

152. *See supra* notes 129–151 and accompanying text. For additional statements evincing this assumption in the wartime congressional hearings, see, e.g., *To Authorize Wire Tapping, supra* note 147, at 2–5 (statement of Rep. Francis E. Walter, H. Comm. on the Judiciary) (arguing for legislation that would give the power to authorize wiretapping to the courts rather than to the executive department); *id.* at 21–29 (statement of Rep. Sam Hobbs) (contending that Congress should grant to the federal government—“whose sole responsibility is to enforce the laws [Congress] write[s]”—the authority to conduct wiretaps); *id.* at 214–17 (statement of Rep. John H. Coffee) (emphasizing that executive investigative agencies should only be able to exercise the “great power” of wiretapping if Congress gives it to them).

153. *See, e.g., id.* at 204–05 (statement of S.D. Kapelsohn, National Federation for Constitutional Liberties) (opposing the proposed amendment on the ground that wiretapping should not be statutorily authorized unless its proponents can demonstrate why it is necessary).

154. CONG. RESEARCH SERV., *supra* note 74, at 16 (stating in 1968 that “[d]uring the past 40 years numerous bills to authorize limited forms of wiretapping have been considered by Congress but none has ever been enacted”).

President's structural capacity to make policy by default. As we have seen, this phenomenon, too, hardly provides logical support for exclusivity.

#### IV. Presidential Exclusivity from the Omnibus Crime Act Through Today: A Growing Tool of the Imperial Presidency

##### A. *The Omnibus Crime Bill Through FISA*

Congress finally elaborated on the law of wiretapping in the Omnibus Crime Control and Safe Streets Act in 1968. The Act permitted the Attorney General or a designated Assistant Attorney General to authorize federal agents to apply for federal court warrants to wiretap in investigating particular crimes.<sup>155</sup> Covered crimes included the national security related offenses of espionage, sabotage, and treason.<sup>156</sup> Section 2511(3) of the Act included a vague reservation of power to the President, resolving that:

Nothing contained [herein] shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national-security information against foreign intelligence activities.

Nor shall anything contained [herein] be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

From the sparse legislative history, recounted by the Supreme Court in *United States v. United States District Court*,<sup>157</sup> and from the Government's own representations in that case, it appears that both Congress and the Executive Branch interpreted § 2511(3) solely to acknowledge that the President may have Jacksonian zone two powers and to disclaim an intent to override the same through legislation.<sup>158</sup> In short, neither political branch read § 2511(3) as an exclusivist statement denying Congress's constitutional

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155. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 216 (codified at 18 U.S.C. § 2516 (2006)).

156. *See id.* § 2516(1)(a).

157. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

158. *Id.* at 303–08 (examining the text and history of the statute and concluding that “nothing in § 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security”); *see id.* at 339 & n.3 (White, J., concurring) (explaining that the Government did not claim that Congress could not constitutionally restrict the President's capacity to wiretap in the domestic bombing case at issue); *id.* at 344 (“The United States concedes that the act of the Attorney General authorizing a warrantless wiretap is subject to judicial review to some extent . . . and it seems improvident to proceed to constitutional questions until it is determined that the Act itself does not bar the interception here in question.”).

prerogative to restrict the President's power to engage in national security wiretapping. That exclusivity went unmentioned in the Act's legislative history despite the concept's obvious relationship to the subject matter suggests that exclusivity was simply off the radar of most political and legal thinkers of the time.

The scandals that unfolded a few years after the Act's passage appeared to impact exclusivity's relationship to mainstream discourse in two major ways. On the one hand, the scandals of the Watergate era—including revelations that every administration since that of FDR had dramatically abused wiretapping—likely stunted any near-term chance of mainstream respectability for exclusivity. Yet in the longer run, the controversies of the 1970s invigorated and inspired exclusivists. For example, former Vice President and avid TSA defender Dick Cheney has frequently cited his dismay at post-Watergate restrictions on presidential power, including FISA.<sup>159</sup> This dismay helped to inspire his contributions (in collaboration with another future TSA co-architect, David Addington) to the *Iran Contra Minority Report*, an exclusivist classic.<sup>160</sup> Similar reactions were had elsewhere within government, academia, and think tanks, as exemplified by another work mentioned above, the American Enterprise Institute's collection of essays, *The Fettered Presidency*.<sup>161</sup> Exclusivity's nascent presence can be spotted in the legislative record underlying FISA. In the hearing transcripts and committee and conference reports from 1976–1978 that I reviewed,<sup>162</sup> the strongest exclusivist position is staked out by Robert Bork. In a 1978 House Judiciary Committee hearing, Bork concludes that FISA “probably” violates Article II.<sup>163</sup> With respect to war and foreign affairs, Bork reasons that Congress's powers are constitutionally “confined to the major issues, issues such as whether or not to declare war and how large the armed forces shall

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159. SCHWARZ & HUQ, *supra* note 50, at 154–55; Devins, *supra* note 84, at 396, 411–13.

160. *See, e.g.*, SCHWARZ & HUQ, *supra* note 50, at 154–61 (describing Cheney's disapproval of the “erosion of presidential power” and how it influenced his contribution to the Minority Report).

161. *See* Robert H. Bork, *Foreward* to THE FETTERED PRESIDENCY, *supra* note 60, at ix (noting that the articles contained in the book “demonstrate that the office of the president of the United States has been significantly weakened in recent years”); *see also, e.g.*, Tower, *supra* note 60, at 230 (lamenting the decline of presidential power after the Vietnam War).

162. Using the LexisNexis Congressional Database, I obtained the 1976, 1977, and 1978 congressional hearings held on FISA. While the Judiciary and Intelligence Committees of both chambers held hearings, I read only the Judiciary Committee hearings to keep the project manageable. I thus read and summarized hearings of the House Judiciary Committee from 1976 and 1978 and of the Senate Judiciary Committee from 1976 and 1977. I also read and summarized the Joint Explanatory Report of the Committee of Conference No. 95-1720 (1978); the Senate Intelligence Committee Report No. 95-701 (1978); the House Intelligence Committee Report No. 95-1283 (1978); and the Senate Judiciary Committee Report including Minority Views No. 95-604 (1977).

163. *Foreign Intelligence Surveillance Act: Hearings on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 131 (1978) [hereinafter *FISA Hearings I*].

be.”<sup>164</sup> What Congress may not do is “dictate the President’s tactics” in these areas, such as how the President conducts intelligence surveillance.<sup>165</sup> While Bork’s view received a few nods of support in the hearings,<sup>166</sup> most of those who raised Article II-based objections recognized a significant regulatory and oversight role for Congress. Their concern was the power that FISA accorded the Judiciary to grant or deny intelligence-gathering warrants.<sup>167</sup> Even Bork suggested that Congress could play a robust oversight role to ensure that administrations complied with their internal regulations.<sup>168</sup> Bork also supported subjecting non-compliant administrations to civil or criminal sanctions.<sup>169</sup>

Of course, the view that ultimately prevailed was that Congress was well within its power to pass FISA. This view was represented in much of the congressional testimony.<sup>170</sup> For example, Attorney General Edward Levi of the Ford Administration testified that, while there was some core of Presidential power that Congress could not infringe, FISA’s restrictions fell

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164. *Id.* at 138.

165. *Id.*

166. See *Foreign Intelligence Surveillance Act of 1976: Hearing on S. 743, S. 1888, and S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 94th Cong. 2 (1976) [hereinafter FISA Hearings II]* (statement of Sen. McClellan, Chairman, Subcomm. on Criminal Laws and Procedures) (recounting his judgment at the time of the 1974 hearings that if past presidents had derived the power to wiretap from “the Constitution, no statute could change or alter it” and recalling that “the then Attorney General, Mr. Saxbe, and the FBI Director, Mr. Kelley, expressed the same judgment in their [1974] testimony”).

167. See *FISA Hearings I, supra* note 163, at 24–28, 48 (statement of Rep. McClory, Member, U.S. House of Representatives) (opining that statutory regulation and congressional oversight are “entirely appropriate,” although the President has some exclusive powers under Article II; his objection to the bill was its concession of a role for the courts); H.R. REP. NO. 95-1283, pt. 2, at 114–21 (1978) (dissenting views of Reps. Wilson, McClory, Robinson, and Ashbrook on H.R. 7308) (arguing that statutory regulation of the area and congressional oversight are appropriate, but that a judicial role is not appropriate); S. REP. NO. 95-701, at 91–96 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4042–48 (additional views of Sen. Wallop) (contending that the bill improperly checks presidential power through *ex ante* judicial intervention; *ex post* congressional review would be a more constitutionally appropriate check).

168. See *FISA Hearings I, supra* note 163, at 131, 144–46 (statement of Robert Bork, former Solicitor General of the United States) (noting that Congress will oversee Executive Branch enforcement of its internal regulations so there is no “need to worry about future administrations just changing [those regulations] without anybody in Congress knowing about them”).

169. *Id.* at 144.

170. See, e.g., *id.* at 3–4, 7–8 (statement of Griffin B. Bell, Att’y Gen. of the United States); *id.* at 158 (statement of Jerry Berman, Legislative Counsel, American Civil Liberties Union); *id.* at 81–83 (statement by Senator Edward Kennedy); *Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 23–24 (1976)* (statement of Philip A. Lacovera, former Deputy Solicitor General); *id.* at 38–39 (statement of John Shattuck, National Staff Counsel, American Civil Liberties Union); *id.* at 40–41 (statement of Dr. Morton Halperin, Director, Project on National Security and Civil Liberties); *id.* at 61, 69 (statement of William Van Alstyne, Professor, Duke University); *id.* at 75–76 (statement of Louis Henkin, Professor of International Law and Diplomacy, Columbia University); *FISA Hearings II, supra* note 166, at 16–20, 23–24 (statement of Edward Levi, Att’y Gen. of the United States).

within an area that Congress could regulate.<sup>171</sup> With respect to this area, Levi explained that, even if the President had inherent power to act absent congressional action (in short, to take zone two action), Congress could constitutionally regulate such acts (thus placing contrary activity in zone three).<sup>172</sup> As such, Levi affirmed that his and future administrations would be constitutionally obliged to abide by FISA's terms.<sup>173</sup> This view was also reflected in the fact that Congress removed a so-called "disclaimer" provision that had appeared in an earlier FISA bill.<sup>174</sup> The disclaimer, similar to that in the 1968 Omnibus Crime Act, had disavowed any intent to "limit the constitutional power of the President to order electronic surveillance" in certain cases "if the facts and circumstances giving rise to such order are beyond" FISA's terms.<sup>175</sup> The disclaimer's defenders, including Levi, had deemed it simply a statement of neutrality as to the President's constitutional powers in areas not covered by FISA.<sup>176</sup> Yet disclaimer opponents—who had expressed concern that it would be invoked as a "blank check" by future administrations<sup>177</sup>—carried the day when Congress removed the provision

171. *FISA Hearings II*, *supra* note 166, at 16–20, 23–25 (statement of Edward Levi, Att'y Gen. of the United States).

172. *Id.*

173. *Id.* at 16.

174. *Foreign Intelligence Surveillance Act of 1977: Hearings on S. 1566 Before the Subcomm. on Criminal Laws & Procedures of the S. Judiciary Comm.*, 95th Cong. 14–15 (1977) (statement of Griffin Bell, Att'y Gen. of the United States) (citing the provision's removal approvingly); S. REP. NO. 95-604, at 82–83 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3966 (minority views of Sen. Abourezk) (citing the provision's removal approvingly).

175. *FISA Hearing II*, *supra* note 166, at 134 (quoting S. 3197, 94th Cong. § 2528 (1976)).

176. *See, e.g., Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties, & Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 92 (1976) (statement of Edward H. Levi, Att'y Gen. of the United States) (explaining that the provision "in no way expands or contracts the President's constitutional powers"); *FISA Hearings II*, *supra* note 166, at 17–18, 25 (statement of Edward H. Levi, Att'y Gen. of the United States) (interpreting the provision as a statement of congressional neutrality regarding the scope of the President's powers in areas not covered by FISA).

177. *See, e.g., FISA Hearings II*, *supra* note 166, at 30–31 (statement of Morton H. Halperin, American Civil Liberties Union) (suggesting that the disclaimer "would be read, in fact . . . as going beyond . . . neutrality . . . and, in fact, endorsing the notion that there is a power here to wiretap, without a warrant"); *id.* at 35–36 (statement of John Shattuck, American Civil Liberties Union) ("I think it is a mistake, a very serious and grave mistake for anyone who is considering this bill to think that it is neutral on the point of Presidential powers . . ."); *id.* at 66, 69 (statement of Professor Phillip Heymann, Harvard Law School) (expressing concern that the disclaimer is subject to abuse and stating his preference to eliminate it or at minimum to narrow it substantially); *id.* at 67 (statement of Professor Herman Schwartz, Law School, State University of New York at Buffalo) ("[I]t seems to me that what this disclaimer does is to give the President a virtual blank check, and says Congress agrees that he has a blank check when he is dealing with matters affecting foreign affairs not within the scope of this statute."); *id.* at 69 (statement of Dean Louis H. Pollak, University of Pennsylvania School of Law) ("[I]f the Congress wishes simply to reflect its awareness that there may be a claim of inherent Presidential power, then it should couch a waiver, I believe, not in terms which are open to Professor Schwartz's concern that Congress is in effect acknowledging the constitutional claim"); *id.* at 71, 74–76 (statement of Sen. Nelson) (suggesting that the disclaimer raises concerns similar to that raised by the disclaimer in the Omnibus Crime Act, which the previous Administration had interpreted as a license to "engage in wholesale

and labeled FISA the “exclusive means” to conduct electronic surveillance within its coverage.<sup>178</sup>

*B. The FISA Amendments Act of 2008*

As the TSP demonstrates, exclusivity had become an influential presence in political and legal circles by the post-9/11 period. To further illustrate exclusivity’s relative political force today, this section briefly recounts exclusivity’s role in the 2008 congressional debates over the FISA Amendments Act (FAA). Specifically, this section considers exclusivity’s role in debates regarding Title II of the Act, which retroactively immunizes telecommunications providers who cooperated with the TSP from lawsuits, so long as the providers acted upon a written request “from the Attorney General or the head of an element of the Intelligence Community (or the deputy of such person) . . . indicating that the activity was (i) authorized by the President and (ii) determined to be lawful.”<sup>179</sup> In congressional hearings and reports leading up to the FAA’s passage, immunity proponents argued, among other things, that it would be unfair to punish companies that “patriotically cooperated with the Government.”<sup>180</sup> Opponents argued that the telecommunications companies have sophisticated legal staffs who are equipped to determine the legality of government requests.<sup>181</sup> They added that telecommunications companies supported FISA in the 1970s because it offered them clear legal guidance.<sup>182</sup> Immunity opponents also argued that

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electronic surveillance”); *id.* at 81–83 (statement of Professor Nathan Lewin) (observing that the disclaimer clause in the Omnibus Crime Act “has continued to be relied upon by the Department of Justice and by those representing individuals or Government agents who have engaged in electronic surveillance as a source of statutory or constitutional authority” and that the disclaimer in the proposed legislation would be used in the same manner).

178. S. REP. NO. 95-701, *supra* note 167, at 71–72; S. REP. NO. 95-604, *supra* note 174, at 6–7; *id.* at 83 (minority views of Sen. Abourezk) (praising the Senate Judiciary Committee’s removal of the provision).

179. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 802(a)(4)(B), 122 Stat. 2436, 2468 (to be codified at 50 U.S.C. § 1885a).

180. *Strengthening FISA: Does the Protect America Act Protect Americans’ Civil Liberties and Enhance Security?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 16 (2007) [hereinafter *Strengthening FISA Hearing*] (statement of J. Michael McConnell, Director of National Intelligence); *see also, e.g., FISA Amendments: How to Protect Americans’ Security and Privacy and Preserve the Rule of Law and Government Accountability: Hearing before the S. Comm. on the Judiciary*, 110th Cong. 17–18 (2007) [hereinafter *FISA Amendments Hearing*] (statement of Kenneth L. Wainstein, Assistant Att’y Gen. for National Security, United States Department of Justice) (supporting immunity from suit for telecommunications companies who, “acting out of a sense of patriotic duty,” cooperated with government investigatory information requests).

181. *FISA Amendments Hearing*, *supra* note 180, at 28 (statement of Sen. Cardin) (noting that the providers are “sophisticated companies,” “large companies with big legal staffs”); *id.* at 36–38 (statement of Sen. Durbin) (suggesting that companies are capable of determining the legitimacy of government requests and noting that one company indeed refused to cooperate with the TSP due to legal concerns).

182. *Id.* at 59–60 (statement of Morton Halperin, Director of U.S. Advocacy, Open Society Institute).

the companies are meant to play a gatekeeper role against government illegality.<sup>183</sup>

Exclusivist arguments helped immunity proponents to prevail in the final legislation in two major respects. First, as evidenced in congressional reports from 2007 and 2008, several members of Congress adopted the view that the TSP was legal from an exclusivist perspective.<sup>184</sup> For example, Senators Bond, Chambliss, Hatch, and Warner criticized “[t]hose who constantly harp on the misleading assertion that the TSP was illegal.”<sup>185</sup> The Senators expressed their belief, “without any doubt, that the President properly used his authority under Article II . . . .”<sup>186</sup>

Second, the ubiquity of exclusivist arguments in defense of the TSP simply muddied the waters. The arguments’ presence helped some congresspersons and witnesses to justify immunity without taking a clear stance on exclusivity. That is, it enabled them to deem questions about the TSP’s legality terribly complex and possibly irresolvable. As such, they suggested that it would be unwise and unjust to linger on those questions or to allow litigation about them to proceed. For example, former Deputy Assistant Attorney General Patrick Philbin told the Senate Judiciary Committee that it would have been unfair to expect telecommunications companies to examine the legality of presidential requests to cooperate with the TSP.<sup>187</sup> He explained that “the legal questions . . . often involve constitutional questions of separation of powers that have never been squarely addressed by courts, and are not readily susceptible for analysis by lawyers at a company whose primary concern is providing communications services to the public.”<sup>188</sup> Assistant Attorney General for National Security Kenneth Wainstein testified

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183. See, e.g., *FISA Amendments Hearing*, *supra* note 180, at 46–47 (statement of Edward Black, President and CEO, Computer and Communications Industry Association) (discussing the need for companies to resist improper government demands for information); *id.* at 50 (statement of Morton H. Halperin, Director of U.S. Advocacy, Open Society Institute) (identifying the importance of the FISA process in guiding companies as to when to comply with government requests for information); *Strengthening FISA Hearing*, *supra* note 180, at 56 (statement of Suzanne E. Spaulding, Principal, Bingham Consulting Group) (“telecommunications providers [must be] our last line of defense against abuse by the government.”); S. REP. NO. 110-258, at 20 (2008) (additional views of Sen. Leahy) (explaining that retroactive immunity “would subvert the gatekeeping role that FISA contemplates for the providers”).

184. S. REP. NO. 110-258, at 36 (minority statements of Sens. Kyl, Hatch, Grassley, Sessions, Graham, Cornyn, Coburn & Brownback) (“Congress cannot take away the President’s power to monitor foreign enemies of the United States without a warrant . . . . To the extent that FISA purports to do so, it is unconstitutional.”); S. REP. NO. 110-209, at 35 (2007) (additional statements of Sens. Bond, Chambliss, Hatch, and Warner) (“Those who constantly harp on the misleading assertion that the TSP was illegal conveniently ignore federal case law that recognizes the President’s Article II authority to engage in warrantless surveillance in the context of gathering foreign intelligence.”).

185. S. REP. NO. 110-209, at 35.

186. *Id.*

187. *FISA Amendments Hearing*, *supra* note 180, at 49 (statement of Patrick F. Philbin, Partner, Kirkland & Ellis).

188. *Id.*

before the same Committee in support of retroactive immunity.<sup>189</sup> Wainstein also opposed Inspector General review of the TSP, deeming it best to “leave that aside in terms of whether the TSP was within the constitutional authority of the President or not, legal or not, and just focus on how we’re going to fix FISA for the American people.”<sup>190</sup>

Congressional debate over FAA’s immunity provisions also reflects an exclusivist tendency to blur or stretch the concept of “emergency” to suggest that any number of actions taken over long time periods fall within the President’s emergency prerogatives. This tendency takes the form of arguments that entail four major steps. First, such arguments start from the exclusivist premise that the President has a legal prerogative, at least in some cases, to circumvent statutory limits that interfere with his ability to defend national security. Second, they involve an assumption or explicit explanation to the effect that such prerogatives stem in large part from the fact that the President is the sole constitutional actor who is structurally equipped to respond to emergencies. Third, they categorize a particular challenged action as an “emergency” action that falls within the President’s constitutional prerogatives. Fourth, they take step three even when the action in question occurred long after Congress could feasibly have acted, and when the temporal component of the emergency rationale thus is absent.

This exclusivist approach to emergency is illustrated in a book passage in which John Yoo defends the TSP.<sup>191</sup> Yoo explains that the Constitution’s framers “created an executive with its own independent powers to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws . . . . If ever there were an emergency that Congress could not prepare for, it was the war brought upon us on 9/11.”<sup>192</sup> The problem with this appeal to emergency is that it seeks to justify a program that went on for years. Even if Yoo’s argument could have justified circumventing FISA in the days immediately following 9/11 (putting aside the fact that FISA already provided for its own 15-day suspension in the case of a congressional war declaration),<sup>193</sup> it hardly follows that the appeal to emergency justifies years of statutory circumvention.

This tendency to stretch the concept of emergency also factored into the congressional debates on retroactive immunity. For example, the Senate Intelligence Committee, in a 2007 report on the FAA, supported immunity based partly on its view that the telecommunications providers had a “good

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189. *Id.* at 7 (statement of Kenneth L. Wainstein, Assistant Att’y Gen. for National Security, United States Department of Justice) (testifying that “as a matter of fundamental fairness and as a way of ensuring that providers will continue to provide cooperation to our surveillance efforts,” retroactive immunity is necessary).

190. *Id.* at 11.

191. YOO, *supra* note 7, at 119–20

192. *Id.*

193. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 111, 92 Stat. 1783, 1796 (codified at 50 U.S.C. § 1811 (2006)).

faith” belief in the TSP’s legality.<sup>194</sup> To reach this view, the Committee considered, among other things, “the extraordinary nature of the time period following the terrorist attacks of September 11, 2001.”<sup>195</sup> Yet as the Committee noted in the same report, while the providers received initial request or directive letters from the government shortly after 9/11, they received renewed requests or directives “at regular intervals” thereafter.<sup>196</sup> On a note similar to that struck by the Senate Intelligence Committee, Assistant Attorney General Wainstein stressed, in support of immunity, that the government had contacted the providers “in the aftermath of the worst attack upon the United States, at least since Pearl Harbor.”<sup>197</sup> Former Deputy Assistant Attorney General Philbin also testified that “protecting the carriers who allegedly responded to the government’s call for assistance in the wake of the devastating attacks of 9/11 is simply the right thing to do.”<sup>198</sup>

## V. Conclusion

Exclusivists have been remarkably successful over the past several decades in shepherding exclusivity from a fringe notion to one with widespread mainstream purchase. Americans may still scoff when presented with exclusivity in a form as stark as Richard Nixon’s infamous line, “[W]hen the [P]resident does it, that means that it is not illegal.”<sup>199</sup> Yet precisely this notion underscores politically influential arguments to the effect that the TSP was legal or that its legality is a matter on which reasonable people can disagree. As we have seen, those arguments have had some success in deterring TSP investigations and in shaping related legislation. Such arguments are also used to deter future restrictions that exceed administration preferences. For example, a Justice Department witness told Congress during the 2007 hearings on the FAA that the Bush Administration would not feel the need to invoke exclusivity to circumvent the FAA if it is satisfied with the final legislation.<sup>200</sup>

There are descriptive lessons to be gleaned from exclusivity’s rise. The history sheds light on important and dynamic relationships between political and legal argument and political and legal legitimacy. It also helps to illumi-

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194. S. REP. NO. 110-209, at 10–11 (2007).

195. *Id.*

196. *Id.* at 10.

197. *FISA Amendments Hearing*, *supra* note 180, at 8 (statement of Kenneth L. Wainstein, Assistant Att’y Gen. for National Security, United States Department of Justice).

198. *Id.* at 48 (statement of Patrick F. Philbin, Partner, Kirkland & Ellis, L.L.P.).

199. SCHWARZ & HUQ, *supra* note 50, at 155–56 (quoting Nixon’s exchange with television interviewer David Frost).

200. *FISA Amendments Hearing*, *supra* note 180, at 15 (statement of Kenneth L. Wainstein, Assistant Att’y Gen. for National Security, United States Department of Justice) (remarking that since the President and Congress were moving “toward a point where we are all on the same page . . . there is not going to be any need for the executive branch to go beyond what FISA has required”).

nate the under examined role of constitutional theory in the oft-told story of the imperial presidency.

Normative engagement with exclusivity is called for as well. As we have seen, among exclusivist arguments are those that draw from evolving history. These arguments start from the premise that there is a long history of congressional acquiescence and presidential initiative with respect to national security. This history, exclusivists argue, reflects the correct constitutional order, one in which Congress oversteps when its legislation conflicts with presidential judgments concerning national security and in which presidents may circumvent such legislation.

The first and most important response to this line of exclusivist argument is simply to deconstruct it. That is, to ask why a history of congressional acquiescence and presidential initiative necessarily supports exclusivity. As we have seen, exclusivists sometimes take this point as a given. Second, once we probe more deeply into the history, we may find—as is certainly true in the case of wiretapping—that relative congressional inaction does not reflect anything close to an exclusivist consensus on Congress's part and that even the Executive Branch has not consistently taken an exclusivist stance. Of course, this historical insight does not answer the question of whether, why, and to what extent post-founding political branch history *should* matter in the realm of separated powers. Still, it is an important corrective to the historical narrative often assumed among exclusivists. At minimum, it calls into question the veracity of the notion—for whatever the notion might be worth if true—that critics of programs like the TSP “want to overturn American historical practice in favor of a new and untested theory about the wartime powers of the President and Congress.”<sup>201</sup>

Finally, even where evolving historical arguments reflect some historical truths—such as the fact that administrations from FDR onward wiretapped despite the view of many that wiretapping was illegal under the 1934 Telecommunications Act<sup>202</sup>—exclusivity does not follow automatically from the same. To the contrary, historical developments may prove to be so deeply at odds with constitutional principles as to counsel that the historical course be righted, not that the nation throw its hands up in defeat. As we have seen, decades of wiretapping abuses at the highest levels of American government offer just such counsel. What history has yet to reveal is whether we will heed its lessons.

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201. YOO, *supra* note 7, at 124.

202. *See supra* subpart III(A).