

ARTICLE

Eavesdropping on Our Founding Fathers:
How a Return to the Republic's Core Democratic Values Can
Help Us Resolve the Surveillance Crisis

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Table of Contents

Introduction	3
A. <i>Moving Forward: Who Says Don't Look Back!?</i>	3
B. <i>A Roadmap through the Congressional Record and a Context from Which to View It</i>	5
I. What Was FISA? The Parameters of Compromise	7
A. <i>The FISA Judicial Structure</i>	9
B. <i>The FISA Regulatory Scheme</i>	10
C. <i>Surveillance for Foreign Intelligence Purposes (Foreign Powers, Foreign Persons, and Foreign Organizations)</i>	10
D. <i>Surveillance for Foreign Counterintelligence Investigations</i>	11
E. <i>Congress Reacts</i>	12
F. <i>The Objectors</i>	13
II. FISA: Seeds of Destruction in a Time of Change	17
III. FISA's Primer for the Future: Lessons Learned	21
A. <i>A Word of Caution</i>	21
B. <i>A First Lesson: Pay attention to the fundamental values of the Republic and the core goals that lie at the heart of the 1978 FISA legislation</i>	22
C. <i>A Second Lesson: Pay attention to the historical roots of the current surveillance crisis to provide context and guidance for future reforms</i>	26
D. <i>A Third Lesson: Preserve the checks and balances of the branches of government that make the United States Constitution the ingenious and resilient document that it has proved to be over the past two plus centuries</i>	32
1. <i>In the Beginning: The Framers of the Constitution and the Importance of Separation of Powers and Checks and Balances</i>	32
2. <i>The FISA Drafters' Struggle Over the Separation of Powers</i>	36
3. <i>FISA's Dismal Failings to Abide the Founding Fathers' Admonitions</i>	38
E. <i>A Fourth Lesson: Demand accountability, including honest and specific answers to hard questions such as: Who is making the request for information and why? What is the utility of the information being sought? Has a proper showing been made that particular information is necessary?</i>	43
F. <i>A Fifth Lesson: Keep in mind the relationship of the government and the governed to guarantee citizens publicly active and uninhibited political lives in which they can dissent from official policy</i>	48
Concluding Thoughts: Lessons Learned and a Blueprint for the Future	53
A. <i>Echoes of the Past</i>	53
B. <i>A Blueprint for the Future</i>	55
C. <i>A Final Thought</i>	57

Eternal vigilance is the price of liberty.

– The anonymous American political writer pen-named Junius (c. 1763) as quoted by Thomas Jefferson and Frederick Douglass.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

– James Madison in the *Federalist Papers* on February 6, 1788¹

Introduction

A. Moving Forward: Who Says Don't Look Back!?

On April 20, 1978, the Democratic Senator from Indiana, Birch Bayh, stood in the well of the U.S. Senate. He rose to speak in support of S.1566, which, six months later, would receive overwhelming congressional approval, the signature of President Jimmy Carter, and become the Foreign Intelligence Surveillance Act of 1978, commonly known as FISA. Senator Bayh admitted to “mixed feelings” that day, wishing that the legislation “was not necessary.” Realism, however, demanded otherwise:

I must confess to having rather mixed feelings as we gather together here. I suppose in the depth of my heart, as one who believes very strongly in the freedoms of this country, I am nervous when we get involved in legislation which has the end product of guaranteeing and prescribing the use of scientific and technological devices which can spy on and pry into our lives. I wish we were living in a world and at a time when that was not necessary, but I think anyone who is at all realistic has to recognize that this is a utopian view which we hope someday will come if we all persist, but certainly is not the kind of time in which we are living today.²

¹ THE FEDERALIST NO. 51 (James Madison).

² 124 CONG. REC. S.5997 (daily ed. Apr. 20, 1978) (statement of Sen. Birch Bayh).

Bayh's state of mind made his quotation of Madison's 200-year-old conjecture about the relationship between men and angels particularly apt.³ Madison had noted the difficulty and contradictions of the government "controlling the governed" while at the same time "control[ing]itself;" hence, "the necessity of auxiliary precautions." FISA was intended to be one of those precautions.

History had amply demonstrated the wisdom of Madison's observations. Just six years earlier, on June 17, 1972, five men broke into the Democratic National Committee (DNC) headquarters at the Watergate apartment complex in Washington, D.C. Despite President Richard Nixon's characterization of Watergate as a "third rate burglary," the break-in mushroomed into a scandal that shook the country's democratic foundations, revealing widespread government abuses that would result in sixty-nine indictments and dozens of convictions that sent over forty people to jail.⁴ The Watergate burglary was, indeed, the proverbial tip of the iceberg as congressional investigating committees, including Senator Sam Ervin's (D-NC) Select Watergate Committee and Senator Frank Church's (D-SD) Select Committee to Study Governmental Operations with respect to Intelligence Activities, would soon reveal. These events, in a sense, gave birth to FISA.

It would be a mistake, however, to view FISA in the limited context of the Watergate scandals and the myriad abuses that were revealed in its wake—a long list that included the break-in at Daniel Ellsberg's psychiatrist's office in search of evidence about the Pentagon Papers and the FBI's COINTELPRO program, which illegally targeted, surveilled, and harassed American citizens, most notably African-Americans who had the temerity to join the Black Panther Party. FISA was not spawned by these events alone. In truth, FISA was the result of two centuries of the federal government's overreach into, and attempt to control, the lives of ordinary Americans. The Alien and Sedition Acts of 1798, President Lincoln's unilateral suspension of *habeas corpus* during the Civil War, World War I's Palmer Raids, World War II's internment of Japanese-Americans, and the McCarthyism of the 1950s were the ancestors of the abuses uncovered by Senators Ervin and Church that led to FISA's enactment. In each of those situations, the fundamental struggle was the same: finding an appropriate balance between security and liberty. In each of those instances, the former trumped the latter and the government overplayed its hand, coming down too heavily on the security side of the equation, a miscalculation that in most cases led to eventual national regret and retreat. FISA, at the time of its enactment, was just the latest example of that behavior and Congress's most recent effort to get the balance right.

³ *Id.*

⁴ Bob Woodward, *The Watergate Legacy, 35 Years Later*, WASH. POST (June 18, 2007), <http://perma.cc/LSW3-2MK8>.

Ultimately, the structure of FISA, particularly its flawed vision for shared responsibility among the branches of government, would undermine the Act and enable the surveillance crisis that confronts the United States in 2015. So, too, would events that were unimaginable in 1978—some tragic, like 9/11, and others wondrous, like the digital technology revolution that has fundamentally reshaped how we live, work, play, socialize, and engage in politics. Reactions to those catastrophic events—the passage of the USA Patriot Act in September 2001 and the 2008 amendments to FISA, among them—combined with new technologies created possibilities for surveillance that were unimaginable at the time of FISA’s passage—would undo critical parts of the original FISA legislation and expose its weaknesses.

Nonetheless, for a brief time in 1977 and 1978, an effort was made to reaffirm the fundamental values of the Republic and to check illegal government conduct and abuse. Senator Bayh, and others like him, in a bipartisan manner that seems unfathomable today, articulated values and identified issues that warrant our close scrutiny if we are serious about resolving the current crisis.

Indeed, the arguments and suggestions made during the FISA debates provide important guidance to tackle today’s surveillance issues. It turns out that those on both sides of the debate were proved very right and very wrong: sometimes sober and cogent in their analysis and at other times naïve and hyperbolic. Dusting off the records of those debates by focusing on the merits of the arguments rather than the party or ideology of any member of Congress or witness, and, viewing the legislative record through the lens of thirty-six years of history, one can identify core values and mechanisms that must be reaffirmed in the context of the new realities of the twenty-first century if we are to find the correct balance between security and liberty.

B. A Roadmap through the Congressional Record and A Context from Which to View It

The legislative record is immense. It spans at least six years of work of multiple House and Senate committees, scores of witnesses, and congressional reports written over the course of the 92nd to the 95th Congress. A careful review of that record reveals inspiring reminders of the values that guide the Republic and insight into how we can maintain those values in the face of technological capacities and national security threats that put the country on the precipice where it finds itself today. In sum, in FISA’s legislative record are kernels of truth that provide a foundation for constructing Madison’s “auxiliary precautions” for the twenty-first century.

Despite the length of the record, and the thousands of pages of testimony from elected government officials, others in public service, the private sector, and

representatives of various advocacy groups, several themes emerge. They revolve around five areas:

- The relationship of foreign intelligence gathering to the core values of the Republic;
- The historical origins of Congress's quest to find the proper balance between liberty and security;
- The explicit goals of the legislation;
- The parameters of the compromise that became FISA; and
- Analyses of specific issues that the legislation raised, including the role of the branches of government and the procedural safeguards necessary to protect the rights of the American public generally and those surveilled in particular.

Those five general themes in turn offer five critical lessons that can help guide us through today's surveillance crisis:

- Lesson One: Pay attention to the fundamental values of the Republic and the core goals that lie at the heart of the 1978 FISA legislation.
- Lesson Two: Pay attention to the historical roots of the current surveillance crisis to provide context and guidance for future reforms.
- Lesson Three: Preserve the checks and balances of the branches of government that make the United States Constitution the ingenious and resilient document that it has proved to be over the past two plus centuries.
- Lesson Four: Demand accountability, including honest and specific answers to hard questions. What is the utility of the information being sought? Has a proper showing been made that particular information is necessary? Who is making the request for information and why?
- Lesson Five: Keep in mind the relationship of the government and the governed so that citizens may be guaranteed publicly active and uninhibited political lives in which they can dissent from official policy.

Each of those lessons is fleshed out fully below. First, however, it is necessary to outline the parameters of FISA and the nature of the compromise that the 95th Congress achieved in October 1978.

Thirty-six years after FISA's passage—having witnessed the digitization and destruction that have marked the end of the twentieth and the beginning of the twenty-first centuries—we have a good idea of what works and what doesn't, of what is good policy and what is problematic policy, and what generates confidence in government and what doesn't. FISA's voluminous record does not

provide all of the answers, but it does point us in a direction that might finally help us achieve the elusive proper balance between security and liberty.

I. What Was FISA? The Parameters of Compromise

FISA passed with overwhelming congressional support in 1978, gaining Senate approval by a vote of 95-1 and House approval by a vote of 246-128. President Jimmy Carter's signing statement on October 25, 1978, reflected the optimism surrounding FISA's passage and hinted at the compromise it entailed. President Carter noted that "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other." Carter was confident that the legislation had struck such a balance, "deal(ing) skillfully with sensitive issues" and assuring that intelligence officials would act "lawfully." The legislation, he wrote, will "remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism. In short, the act helps to solidify the relationship of trust between the American people and their Government."⁵

President Carter's confident and optimistic signing statement gave no hint of the complexity of the statutory framework on which the legislation rested and the tensions in the Act that would help to undo it. It is difficult to chide the President for the hopes he expressed for FISA. The legislation was, in retrospect, a bold first effort. At the time, the need for a search warrant to engage in foreign intelligence surveillance had yet to be resolved and Congress had never enacted legislation in the arena.⁶

In fact, prior to FISA's passage, history had suggested that warrantless searches for foreign intelligence purposes were lawful. For example, in 1940, President Roosevelt stated his view that electronic surveillance was appropriate where "grave matters involving defense of the nation" were involved.⁷ President Truman took a similar position.⁸ Warrantless surveillance for foreign intelligence was pervasive by the time of the Kennedy Administration.⁹

The entry of the United States Supreme Court into the fray in 1967 in *Katz v. United States*, holding that wiretapping phone calls required a search warrant,

⁵ Jimmy Carter: "Foreign Intelligence Surveillance Act of 1978 Statement on Signing S. 1566 Into Law," Oct. 25, 1978, *The American Presidency Project*, <http://perma.cc/DEW5-KXQ>.

⁶ S. REP. NO. 95-604, at 7 (1977), reprinted in 1978 U.S.C.C.A.N. 3906.

⁷ *Id.* at 10.

⁸ *See id.*

⁹ *See id.* at 12.

did not change the situation.¹⁰ In *Katz*, the Court disclaimed any intent to make the strictures of the Fourth Amendment applicable to the gathering of foreign intelligence. One year later, in 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act (also known as Title III).¹¹ The Act established a procedure for the judicial authorization of electronic surveillance to investigate specified crimes and for the use of the information in criminal proceedings.¹² The law, however, specifically stated that it did not apply to the gathering of foreign intelligence.¹³

By the time the Supreme Court decided *United States v. United States District Court* (the *Keith* case)¹⁴ in 1972, the analysis had become more nuanced, but the bottom line remained the same. In *Keith* the issue was clearly stated as: “The delicate question of the President’s power, acting through the Attorney General, to authorize electronic surveillance in *internal security* matters without prior judicial approval.”¹⁵ The *Keith* Court held that regardless of the fact that the surveillance of United States citizens involved matters of *domestic national security*, the Fourth Amendment requirements for a search warrant applied.¹⁶ The Court emphasized, however, that the case only involved “the *domestic aspects of national security*. We have *not* addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”¹⁷

FISA sought to fill that void with a complex scheme that, as President Carter noted, “requires, for the first time, a prior judicial warrant for all electronic surveillance for foreign intelligence or counterintelligence purposes,” and “clarifies the Executive’s authority to gather foreign intelligence by electronic

¹⁰ 389 U.S. 347, 353 (1967) (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”) Regardless of the location, a conversation is protected from unreasonable search and seizure under the Fourth Amendment if it is made with a “reasonable expectation of privacy.” Wiretapping counts as a search (physical intrusion is not necessary).

¹¹ Pub. L. No. 90-351, 82 Stat. 197 (1968) codified at 18 U.S.C. §§ 2510–2521.

¹² S. REP. NO. 95-604, at 12 (1977).

¹³ “Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) 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.” *Id.* at 12–13.

¹⁴ 407 U.S. 297 (1972).

¹⁵ *Id.* at 299.

¹⁶ *Id.* at 316–17.

¹⁷ *Id.* at 321–22.

surveillance in the United States.”¹⁸ That simple sentence, however, told only a very small part of a very complicated story.

The basics of FISA were set forth by Senator Bayh on the floor of the Senate on March 14, 1978.¹⁹ FISA amended Title 18 of the United States Code to include a chapter entitled “Electronic Surveillance Within the United States for Foreign Intelligence Purposes,” precisely the area that *Katz*, Title III, and *Keith* assiduously avoided. The legislation was a high-wire act, trying to maintain the appropriate balance Congress deemed necessary to engage in the gathering of foreign intelligence while, at the same time, protecting rights guaranteed under the Constitution.²⁰

What emerged was a tangled web of provisions that distinguished between different types of surveillance and targets. The legislation also created a judicial structure cloaked in secrecy that was intended to permit the Executive Branch to engage in effective foreign intelligence surveillance, but in a manner that complied with due process. Provisions for congressional oversight and civil and criminal sanctions were added to the mix. In sum, Congress struggled to simultaneously protect the rights of American citizens and avoid hamstringing the government from engaging in foreign intelligence efforts believed to be necessary to assure national security. In the end, that Herculean task would fail—a failure that cannot be explained without understanding the dynamics of the pieces of the FISA puzzle.

A. The FISA Judicial Structure

The starting point for understanding FISA’s ultimate failure is the structure of the FISA court itself, which proved to be the statute’s Achilles’ heel. Were one permitted into the Foreign Intelligence Surveillance Court’s (FISC) windowless courtroom at 333 Constitution Avenue in Washington D.C., it would appear very different from courtrooms that anchor the system of justice in the United States. In its concern to maintain secrecy, the statute created a non-adversarial process in which orders are issued by the court on the basis of information provided almost exclusively by the Executive Branch. For the most part, opposition parties, cross examination, and opposing arguments—the staples of the American justice system—are absent. The proceedings are conducted entirely in secret.

The same departure from America’s constitutional judicial structure is evident in the selection of the FISC judges, who are handpicked by the Chief Justice of the United States Supreme Court. While the judges are selected from

¹⁸ Carter, FISA Signing Statement, *supra* note 5.

¹⁹ See S. REP. NO. 95-701, at 1 (1978).

²⁰ There are many nuances to the legislation that are beyond the purview of this Article, which is focused on surveillance of American citizens living within the borders of the United States.

sitting Article III judges who have been confirmed by the Senate, their seven-year assignment to the FISA court occurs without the benefit of any congressional input or oversight.

B. The FISA Regulatory Scheme

The same disjunction from basic American constitutional principles is apparent in the manner in which FISA's regulatory scheme was to be applied. That scheme depended upon the nature of the foreign intelligence being sought and the target of the intelligence gathering operation. Thus, the statute distinguished between so-called *positive intelligence*, directed against foreign powers that typically relates to national defense, security, and the conduct of foreign affairs,²¹ and *foreign counter-intelligence operations* that are typically part of an investigative process to ferret out the commission of serious crimes such as espionage or sabotage, and that are more likely to involve U.S. citizens as targets.²²

C. Surveillance for Foreign Intelligence Purposes (Foreign Powers, Foreign Persons, and Foreign Organizations)

If the target was a foreign power or entity under its control,²³ surveillance could be conducted for one year *without* an order of the FISA court so long as the Attorney General certified to the court that the intelligence was "necessary."²⁴ No further explanation of "need" was required.²⁵ Other foreign persons or foreign organizations could also be targeted without a FISA court order. In such cases, however, the "need" had to be explained to the court, but was *not* subject to the court's review.

If the surveillance of foreign powers, persons, or organizations revealed information about U.S. citizens, the FISA court judge was required to employ "minimization procedures" to ensure that the information sought related "solely to national security or foreign affairs interests" and protected the identity of the individual unless it was "needed to understand or assess information about a

²¹ S. REP. NO. 95-701, at 9 (1978).

²² *Id.* at 9–11.

²³ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801(a)(1)–(3) ("Foreign power means: (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments' were defined as a foreign government, any faction(s) or foreign governments not substantially composed of U.S. person, and any entity directed or controlled by a foreign government").

²⁴ S. REP. NO. 95-701, at 10.

²⁵ *See id.*

foreign power” or was “otherwise publicly available.”²⁶ According to Senator Bayh, these requirements would ensure that the information sought fulfilled proper intelligence objectives and that the surveillance did not intrude unnecessarily into the personal privacy of the individual.²⁷ Bayh candidly noted, however, that the responsibility for making the determinations was largely in the hands of the Attorney General and that the role of the court was “very limited.”²⁸ Bayh also noted that “regular reporting to the Intelligence Committees of the House and Senate” would help to insure that the Attorney General’s actions met “appropriate standards of international conduct.”²⁹

D. Surveillance for Foreign Counterintelligence Investigations

The process was different for surveillance conducted for foreign counterintelligence investigations, which often involve U.S. citizens and criminal activity. Explaining the distinction, Senator Bayh stated: “The targeting of U.S. persons and the overlap with criminal law enforcement require close attention to traditional Fourth Amendment principles.”³⁰

The need for “close attention,” however, did *not* include maintaining traditional Fourth Amendment protections for U.S. citizens in several significant ways: for example, to obtain a warrant, the Attorney General was not required to show “probable cause” that a crime had been committed; rather, the standard was merely that the citizen’s actions “may involve” criminal activity.³¹ Moreover, if a U.S. citizen was targeted, the court *did* review the need to engage in the surveillance, but could only deny the Attorney General’s request if it was “clearly erroneous,” again, a far less stringent requirement than finding “probable cause” pursuant to the Fourth Amendment in regular criminal cases. In addition, the statute permitted the surveillance of U.S. citizens to continue without notice even after conclusive evidence of the commission of a crime had been obtained if “protective measures other than arrest and prosecution are more appropriate.”³²

These relaxed standards applicable to United States citizens would prove to be among the most controversial aspects of FISA and, arguably, instrumental in its undoing. At the time, however, Senator Bayh did not see it that way, noting that the Executive Branch requests required specific information that would protect against abuse, including a description of the target and the locations subject to surveillance, the type of information sought, the methods to be used

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 11–12.

³¹ *Id.*

³² *Id.*

(including whether a break-in would be necessary), and the period of time for which the surveillance would be approved.³³ Bayh again cited the requirement of court monitored “minimization” procedures and congressional oversight as added checks.

In the end, FISA’s precarious balancing act relied heavily on the assumption that Fourth Amendment guarantees against unreasonable searches and seizures could be constitutionally relaxed in the context of foreign intelligence. It also relied on the assumption that special courts with judges hand-picked by the Chief Justice could oversee the delicate balance in non-adversarial, closed proceedings whose deliberations were intended to remain secret.³⁴ In addition, FISA relied on good faith execution of its duties by the Executive Branch, the prospect of congressional oversight,³⁵ and the availability of criminal and civil sanctions against those violating the Act.³⁶ Each of these assumptions would prove flawed. Those flaws, coupled with revolutionary technological changes, an onslaught of horrific and tragic events, and a legislative mindset at the turn of the new century that put security above liberty in ways never experienced by the Republic, would undo FISA at a time when its hoped-for protections were more necessary than ever.

E. Congress Reacts

Bayh acknowledged the howl that some of these provisions unleashed among some members of Congress,³⁷ but maintained that the basic structure of the legislation met *Keith*’s mandate for reasonable procedures “in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”³⁸ He said:

The need to preserve secrecy for sensitive counterintelligence sources and methods justifies elimination of the notice requirement, consolidation of judicial authority in a special court, and *in camera* procedures allowing persons to challenge illegal surveillance without endangering the surety of legitimate surveillances. . . . The essential point is that, if electronic surveillance is to make an effective contribution to foreign counterintelligence, it must be available for use when necessary for the investigative process. The criminal laws are enacted to

³³ 50 U.S.C. § 1805(C)(1)(A–E).

³⁴ The Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR).

³⁵ The Act required the FISC to report to Congress’s House and Senate Select Intelligence Committees regarding its overall activities. 50 U.S.C. § 1802(a).

³⁶ 50 U.S.C. §§ 1809–1810.

³⁷ Senator Eugene Tunney (D-CA) and Representative Robert Drinan (D-MA), in particular.

³⁸ *Keith*, 407 U.S. at 392.

establish standards for arrest and conviction . . . Foreign counterintelligence investigations have different objectives.³⁹

Others were equally congratulatory and optimistic about FISA's framework, including Attorney General Griffin Bell who told Congress that for "the first time in our society, the clandestine intelligence activities of our government shall be subject to regulation and receive the positive authority of a public law for all to inspect."⁴⁰ Similarly, Senator Edward Kennedy (D-MA), who shepherded FISA through Congress and introduced the initial version of FISA,⁴¹ noted that it "would relegate to the past the wire-tapping abuses brought to light . . . providing, for the first time, effective substantive and procedural statutory control over foreign intelligence electronic surveillance."⁴² Senator Robert Mathias (D-MD) called FISA "a milestone in our nation's history"⁴³ and a "ringing affirmation of a commitment to fundamental liberties."⁴⁴ Even Senator Barry Goldwater (R-AZ), the Republican Party's conservative standard-bearer in the 1964 Presidential contest, co-sponsored the legislation and hailed it as "constructive and needed."⁴⁵

F. The Objectors

Despite overwhelming support for the final version of the law, FISA had its vociferous detractors. Two of them came from outside the Congress. Their objections came as no surprise. Throughout many years of hearings, a consistent voice in opposition was the American Civil Liberties Union (ACLU) and its chief spokesperson John Shattuck, who argued on several occasions that any compromise on the applicability of Fourth Amendment protections to foreign intelligence surveillance was unconstitutional, and that the statute's lack of specific standards would surely lead to abuse. As early as July 29, 1976, at a hearing before a House Judiciary subcommittee, the ACLU staked out the position from which it would never waver: the legislation⁴⁶ violated the Fourth Amendment by relaxing its standards, ignoring its particularity requirements, and permitting non-criminal activity to bring a target within the surveillance web.⁴⁷ In a prepared statement, Shattuck explained that "the ACLU is greatly disturbed by

³⁹ S. REP. NO. 95-701, at 12 (1978).

⁴⁰ S. REP. NO. 95-604, at 4 (1977).

⁴¹ The Foreign Intelligence Surveillance Act of 1976, S. 3197, 94th Cong. (1976).

⁴² S. REP. NO. 95-604, at 15 (1977).

⁴³ 124 CONG. REC. S.6013 (daily ed. Apr. 20, 1978) (statement of Sen. Robert Mathias).

⁴⁴ *Id.*

⁴⁵ *The Matter of Wiretapping, Electronic Eavesdropping, and Other Surveillance: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 277 (1975) (statement of Sen. Barry Goldwater).

⁴⁶ In this case, speaking to S. 1566's predecessor, S. 3197.

⁴⁷ See *Katz*, 389 U.S. 347 (1967); see also *Berger v. New York*, 388 U.S. 41 (1967) (*Katz's* sister case).

the dramatic relaxation of Fourth Amendment law” and argued that under S. 3197 (S. 1566’s predecessor) American citizens “engaged in non-criminal ‘clandestine intelligence activities’” had less protection than “the KGB agent engaged in criminal espionage who would be entitled to the protections of existing law.”⁴⁸ The best solution in the eyes of the ACLU was simply to repeal “all electronic surveillance authority . . . because in [its] view no such statute can comply with *Berger*.”⁴⁹

The ACLU’s comrade-in-arms was Morton Halperin, himself a victim in 1971 of an illegal wiretap during his service on the National Security Council. The wiretap on Halperin, one of seventeen initiated by then-National Security Advisor Henry Kissinger, had come to light during the trial of Pentagon Papers defendant Daniel Ellsberg. Halperin won a judgment against the government (albeit symbolic damages of one dollar) that found the wiretaps illegal. By the time of his first of many appearances before Congress to testify about FISA, Halperin had served in the Johnson and Nixon administrations.⁵⁰ In 1976, Halperin joined with Shattuck in presenting the position of the ACLU, emphasizing the requirement that surveillance comply with the dictates of the Fourth Amendment and the absence of any inherent power on the part of the Executive Branch to engage in surveillance without a judicial imprimatur. Any legislation, stated Halperin, should “comprehensively limit the power of the executive branch to wiretap without a warrant.”⁵¹

Halperin had first testified about foreign intelligence matters in 1974 when his own legal battles were still fresh in the nation’s mind. At the time, Halperin warned that Congress needed to be more vigilant and engage in more oversight of the Executive Branch’s surveillance activities, that most of the information gleaned from illegal wiretaps was without value, and that caution should be the rule because “bureaucracies feel neither the responsibility nor the capability to take the values of society, other than those with which they are formally charged, into account in making decisions.”⁵² The prescience of Halperin’s comments would soon be apparent, as would the potential benefits of his suggested solutions,

⁴⁸ *Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 120 (1976) (statement of John Shattuck, National Staff Counsel, American Civil Liberties Union).

⁴⁹ *Id.*

⁵⁰ He would eventually go on to the Clinton Administration and a number of roles with think tanks, such as the Council on Foreign Relations, and universities, such as Harvard.

⁵¹ *Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 40 (1976) (statement of Dr. Morton Halperin, Director, American Civil Liberties Union).

⁵² *Wiretapping and Electronic Surveillance: Hearing on H.R. 1597, H.R. 7773, H.R. 9781, H.R. 9815, H.R. 9973, H.R. 10008, H.R. 10331, H.R. 11629, H.R. 11836, and H.R. 13825 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93rd Cong. 113 (1974) (statement of Dr. Morton Halperin, Former National Security Council staffer).

including setting minimum standards to ensure that surveillance stayed within the confines of “information of importance to the national security” and avoided what Halperin described as “surveillance creep.”⁵³

Opposition from members of Congress was also persistent and fierce even though by the time of FISA’s passage, such opposition was not widespread. Leading the charge were Senator Eugene Tunney (D-CA) and House member Father Robert Drinan (D-MA), who would go on to become a member of the committee that voted to impeach President Nixon. Both Tunney and Drinan stated their positions early and often.

In a prepared statement to a subcommittee of the Senate Select Committee on Intelligence delivered on June 29, 1974, Tunney, who had been the sole dissent in an 11-1 vote of the Senate Judiciary Committee hearing that considered S. 3197, could not have been more clear.⁵⁴ He decried the legislation for authorizing spying on American citizens, lacking standards, and continuing to recognize the “inherent authority” of the Executive Branch to target American citizens. Tunney characterized the legislation as a “backdoor charter for the FBI to continue its investigations of dissenting Americans who commit no crime,” invoking George Orwell’s *1984* and alleging that McCarthyite tactics were alive and well in S. 3197.⁵⁵

On the House side, Representative Drinan, who was also a priest at a time when church doctrine permitted the mixing of politics and religion, carried the civil liberties banner. Drinan made his most comprehensive attack on H.R. 7308 in a statement prepared for a House Judiciary subcommittee in July 1978.⁵⁶ It was a reprise of views he expressed in 1977 as the bill wended its way through committee.⁵⁷ Drinan’s introductory statement thundered against the legislation, claiming that it was far from the “model wiretap bill” that the *New York Times* had dubbed it just days earlier:

⁵³ *Id.*

⁵⁴ *Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 94th Cong. 72 (1976) (statement of Sen. John V. Tunney). As Senator Bayh said of Senator Tunney’s stance in the debates: “You, more than any other member of the Judiciary Committee have focused on the shortcomings of this legislation.” *Id.* at 72 (comment of Sen. Birch Bayh).

⁵⁵ *Id.* at 70 (statement of Sen. John V. Tunney).

⁵⁶ *The Foreign Intelligence Surveillance Act of 1978: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. 6 (1978) (statement of Rep. Robert Drinan).

⁵⁷ *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the Permanent Select Comm. on Intelligence H. of Reps.*, 95th Cong. 7 (1978) (statement of Rep. Robert Drinan).

[The bill] permits surveillance of Americans, in certain circumstances, without a court order. It does not contain adequate safeguards to minimize the acquisition of the conversations of innocent people. It requires telephone company employees, custodians, landlords and others to assist, against their will, the CIA, the FBI and other agencies which are engaging in electronic surveillance. And it gives no notice to persons who are overheard that their conversations have been recorded.⁵⁸

Drinan demanded the “most compelling” evidence to justify passage of the Act. Contending that proponents of the legislation had “not adduced testimony anywhere near that level,”⁵⁹ and citing “extensive abuses” uncovered by the Church Committee, Drinan urged “extreme caution” in this “very sensitive area.”⁶⁰ Drinan went on to outline his belief that the intelligence yielded would be of little value, that the particular dictates of the Fourth Amendment were not satisfied, and that the legislation violated the Vienna Convention on Diplomatic Relations.⁶¹ Drinan feared that “the bill leaves us with a secret judicial proceeding conducted under the most secret circumstances to sanction current Executive practices to engage in electronic surveillance to gather foreign intelligence information.”⁶² His historical references were not subtle. “Administration claims that the bill improved upon existing law deserved no more credit,” said Drinan, than “did glorification of Mussolini for making the trains run on time. Improvement is fine, but at what price?” He answered his own rhetorical question: “An integral part of our free institutions is the security of the people from unwarranted intrusions by Government agents into their privacy, intrusions which H.R. 7308 unnecessarily authorizes.”⁶³

Of the 470 Senators and Representatives who cast votes on the Foreign Intelligence Surveillance Act, only 129—128 of whom were in the House—would register their dissent.⁶⁴ In the end, those in support recognized the sometimes eloquent and often impassioned objections on both sides of the aisle, but concluded that, on balance, the legislation was worthwhile. Senator Kennedy rose in summation on the floor of the Senate on April 20, 1978, and expressed what must have been on the minds of many:

Mr. President, some might argue that this legislation is regressive and does not provide sufficient protection for civil liberties; others

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ratified by the United States in 1965. *Id.* at 10.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 124 CONG. REC. 10906 (1978) (Nay vote of Senator William Scott).

might maintain that it goes too far and will inhibit the function of our intelligence agencies . . . I (too) am not completely satisfied with every single facet of the legislation; few people will be. In an area as sensitive and important as this, it is difficult if not impossible to support every provision. But those who would defeat this bill, because they are not satisfied with every section in it ignore the fact that today there is no statute at all Despite my own reservations . . . I remain even more uncomfortable leaving the American people with no legislative protections whatsoever in this area.⁶⁵

The truth was that at the time of FISA's passage it was a grand compromise and a grand experiment whose outcome remained very much in doubt. Congress's work had only begun and the real test lie ahead, a fact that Senator Bayh, who echoed Senator Kennedy's conclusions about the need for the legislation despite reservations, ominously noted:

Much more has to be done before the system of check and balances is fully restored to the conduct of foreign intelligence activities. This act deals with only one technique for intelligence gathering The challenge ahead is to apply constitutional principles to the full range of clandestine intelligence technique that may be used within the United States or that may affect the rights of Americans abroad.”⁶⁶

No member of the 95th Congress could have foreseen the events of the next thirty-six years and the devastating impact they would have on the experiment that was FISA. Nor could any member have envisioned the government's dismal failure throughout those years to address the constitutional issues raised by Senator Bayh. The words of those in the Congress during its 94th and 95th sessions, however, need not have been uttered in vain. In fact, they still may help us secure the future.

II. FISA: Seeds of Destruction in a Time of Change

Ecclesiastes' notion that “there is nothing new under the sun” and the aphorism that “the more things change, the more they stay the same” are surprisingly relevant to the development of America's modern surveillance state.⁶⁷ Despite unprecedented threats and mind-bending technological advances, the history of surveillance in America has followed a remarkably similar pattern over the last 120 years, leading one commentator to note: “[t]he technology is state-of-

⁶⁵ 124 CONG. REC. S.5996 (daily ed. Apr. 20, 1978) (statement of Sen. Edward Kennedy).

⁶⁶ *Id.* at S5976 (statement of Sen. Birch Bayh).

⁶⁷ *Ecclesiastes* 1:9.

the-art; the impulse, it turns out, is nothing new.”⁶⁸ In every instance, perceived and real threats and technological advances combined to produce enhanced surveillance that challenged democratic values—whether it be Samuel Morse’s first telegraph transmission in 1844 and Philo Remington’s first production of the typewriter in 1873, which enabled the accurate transmission of conversations; Melvil Dewey’s 1876 decimal system, which permitted “reliable encoding and rapid retrieval of limitless information,” or Herman Hollerith’s invention of the “punch-card” and punch card machine in 1889, which IBM would make famous in its early mainframe computers and which university students during the 1960s would come to revile as the symbol of the all-pervasive, soulless corporate multiversity.⁶⁹ Thus, it should surprise no one that the birth of the Internet combined with the horrific 9/11 attacks wrought major changes in America’s surveillance infrastructure.

The story of the changes to the post-9/11 surveillance infrastructure, which began in earnest within the first twenty-four hours of the attacks, is a dizzying tale of complicated new laws, amendments to existing law, and incomprehensible legal definitions, which were hastily considered and enacted under widespread fears of follow-on attacks.⁷⁰ In some ways, though, it is a remarkably simple story of a Nation’s panicked reaction to an unprecedented tragedy and the Executive Branch’s unilateral declaration of the Global War on Terror at a time when the United States had the technological capacity to track its citizens in ways that Morse, Dewey, Remington, and Hollerith could never have fathomed. In this sense, the history of America’s relentless pursuit of intelligence in the post-9/11 world is simply the story of a perfect storm. In the end, the intelligence landscape, including FISA, would change dramatically; and so too would America.

Within seventy-two hours of the attack on the World Trade Center, Congress passed a Joint Resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁷¹ It was followed forty-one days later by the enactment of the USA Patriot Act, which passed the Senate by a vote of 98-1 and the House by a vote of 357-66 without the benefit of a single committee report.⁷²

⁶⁸ Alfred McCoy, *Surveillance Blowback: The Making of the US Surveillance State, 1898-2020*, TRUTHOUT (July 15, 2013), <http://perma.cc/44NB-HSE3>.

⁶⁹ *Id.*

⁷⁰ For example, the Terrorist Surveillance Act of 2006 was introduced in the Senate at the same time competing bills were introduced: the National Security Surveillance Act of 2006 and the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006. On the House side, the Electronic Surveillance Modernization Act was introduced in July 2006. Finally, in August of the following year, the Congress passed the Protect America Act of 2007 by a vote of 227-183 in the House and a vote of 60-28 in the Senate.

⁷¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁷² 147 CONG. REC. H.7282; 147 CONG. REC. S.11059.

The Patriot Act jettisoned FISA's requirement that foreign intelligence be the "primary purpose" for which information is sought, replacing it with a lesser "significant purpose" standard that opened the surveillance floodgates in ways that FISA did not originally envision. It also blurred the line between counter-intelligence and criminal investigations, making it more likely that evidence obtained pursuant to FISA's relaxed Fourth Amendment standards would be admitted as evidence in criminal prosecutions.

Most ominously, Section 215 of the Patriot Act expanded the power of the FBI to subpoena "tangible things" if they were believed to be "relevant to an authorized investigation" into international terrorism or foreign intelligence activities.⁷³ The amendment proved to be a bonanza for the Executive Branch when the FISA Court, in an opinion that remains secret to this day, expanded the definition of "relevance" to include "an entire database of records on millions of people."⁷⁴ The *Wall Street Journal* reported that, according to the FISA Review Court, "the special nature of the national-security and terrorism-prevention cases means 'relevant' can have a broader meaning for those investigations."⁷⁵ In 1991, the United States Supreme Court in *United States v. R. Enterprises* rejected such a broad definition of relevance in criminal cases because it inevitably meant that records of innocent individuals would be included.⁷⁶

Ironically, it would be a Democrat, Senator Diane Feinstein (D-CA), who would seek to explain and support the rationale for President George W. Bush's signature legislation:

In today's world, things are not so simple. In many cases surveillance will have two key goals—the gathering of foreign intelligence and the gathering of evidence for a criminal prosecution. . . . Rather than forcing law enforcement to decide which purpose is primary . . . this bill strikes a new balance. It will now require that a "significant" purpose of the investigation must be foreign intelligence gathering to proceed with surveillance under FISA.⁷⁷

⁷³ Jennifer Valentino-Devries & Siobhan Gorman, *Secret Court's Redefinition of "Relevant" Empowered Vast NSA Data-Gathering*, WALL STREET JOURNAL (July 8, 2013), <http://www.wsj.com/articles/SB10001424127887323873904578571893758853344>; see EDWARD C. LIU, CONG. RESEARCH SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXTENDED UNTIL JUNE 1, 2015 (2011) (The amendments discussed ultimately extended Section 215 of the Patriot Act).

⁷⁴ Valentino-Devries, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ *United States v. R. Enterprises*, 498 U.S. 292 (1991).

⁷⁷ William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1245 (2007).

Post-9/11 history also included a willingness on the part of the Bush Administration to ignore FISA completely if it believed national security so demanded—a tack it took with the institution of the 2002 Terrorist Surveillance Program (TSP) that completely side-stepped FISA. The program was revealed by the *New York Times* in 2005, and the Bush Administration was forced to admit that TSP violated existing surveillance statutes.⁷⁸

By 2008, the perfect storm roiled to a peak when, with overwhelming bipartisan support, Congress passed the FISA Amendments Act (FAA),⁷⁹ which eliminated many of the specificity requirements needed to obtain a warrant under the FISA regime in its initial incarnation. Moreover, the FAA for the first time defined an “international wire communication” to include communications where an “end point is in the United States,” thereby subjecting U.S. citizens to its reach.⁸⁰ The amendment led the Congressional Research Service to conclude that FISA now “provides a mechanism for the domestic acquisition *without* a court order, of communications that persons in the United States, including citizens, would be a party to. Prior to the enactment of Section 702, such acquisitions would require a court order in all but emergency situations.”⁸¹

⁷⁸ *Id.* at 1254 n. 300. “Subsequently, President George W. Bush acknowledged that, after the attacks of September 11, 2001, he had authorized the NSA to conduct a TSP ‘to intercept international communications into and out of the United States’ by ‘persons linked to al Qaeda or related terrorist organization’ based upon his asserted ‘constitutional authority to conduct warrantless wartime electronic surveillance of the enemy.’” EDWARD C. LIU, CONG. RESEARCH SERV., R42725 REAUTHORIZATION OF THE FISA AMENDMENTS ACT (2013). Now discontinued, the TSP appears to have been active from shortly after September 11, 2001 to January of 2007. Thereafter, Congress enacted the Protect America Act (PAA), which expired on February 16, 2008. The PAA permitted the surveillance—without FISA court supervision—of all persons, including United States citizens, reasonably believed to be located outside the United States. Section 702 of the FISA Amendment Acts (FAA) limited such surveillance to non-U.S. citizens and set up special procedures for U.S. citizens located outside the United States (Sections 703 and 704). See discussion in text.

⁷⁹ The FAA was passed after the expiration of the PAA, which was enacted in August of 2007 as a temporary legislative stop-gap measure that would allow the TSP to continue. The PAA permitted the capture of communications that began or ended in a foreign country without supervision by the FISA court. In addition, individuals reasonably believed to be located outside of the United States could be surveilled without an application to or order from the FISA court so long as the communications did not involve solely domestic communications and a “significant purpose of the acquisition [was] to obtain foreign intelligence information.” These provisions applied to both non-U.S. and U.S. persons, a structure that the FAA would change. The PAA required Internet service providers such as Verizon to provide such information and granted immunity to the providers for any assistance given. At the time of its passage, some commentators suggested that the PAA might ultimately permit the seizure of data of U.S. citizens while they are in the United States, a prediction which came to fruition. See James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. TIMES (Aug. 19, 2007), <http://perma.cc/5TTW-TJJH>.

⁸⁰ LIU, *supra* note 78 (citing 50 U.S.C. § 1801(f)(2)).

⁸¹ *Id.* (emphasis added).

Finally, in 2013, the FISA court received an additional layer of insulation from review when the Supreme Court decided *Clapper v. Amnesty International*.⁸² In *Clapper*, the Court rejected an opportunity to rule on the constitutional merits of many of the post-9/11 changes to FISA by holding that the plaintiffs lacked standing to bring the action. In a 5-4 opinion authored by Justice Alito, the Court held that plaintiffs' fear that they would be subject to surveillance in the future was "too speculative" to establish standing.⁸³

Ultimately, new laws, amendments to FISA, secret rulings of the FISA court, and *Clapper* are partially responsible for landing us where we are today—in a surveillance environment in which it is possible for the government to collect data on essentially every phone call made in the United States. In fact, in light of all of these changes, it would be unfair to place all of the blame on the drafters of the original FISA statute for the Act's inability to weather the 9/11 storm and the concurrent technology revolution. Nonetheless, the reality is that even without the Patriot Act, the FAA, and *Clapper*, FISA was destined to implode because of fundamental flaws in its structure. FISA may have been ambushed by subsequent events but it is not blameless for its own demise. FISA may no longer be recognizable relative to its initial incarnation, but the seeds of its destruction in its original structure surely are and they shed light on the lessons that FISA teaches for the future. It is to those flaws and those lessons that we now turn.

Time is of the essence. After the Supreme Court's decision in *Clapper*, one commentator wrote: "Absent a radical sea change from the courts, or more likely intervention from the Congress, the coffin is slamming shut on the ability of private citizens and civil liberties groups to challenge government counterterrorism policies."⁸⁴ That ominous prognosis punctuates the urgency of learning from the past if we are to halt the march toward democracy's extinction, a march led by the very institutions that the Framers created to sustain it.

III. FISA's Primer for the Future: Lessons Learned

A. A Word of Caution

FISA's Primer for the Future is based upon examination of a voluminous record through the lens of hindsight and past experience. Its premise bears repeating: FISA's original intent and the debates over the years that preceded it offer important lessons about how we should act in the future. Any list of lessons, however, necessarily implies an *ad seriatum* approach, the listing of each

⁸² See *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013).

⁸³ Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES (Feb. 28, 2013), <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html>.

⁸⁴ *Id.* (quoting Stephen J. Vladeck, American University Law School).

sequentially. This is not to imply that one lesson is more important than another. In fact, each is critically important in its own right. Heeding a particular lesson will be of no particular benefit absent heeding them all. This word of caution is perhaps the most important lesson of all. A review of the record demonstrates that, in fact, some or parts of lessons were heeded and others were not.

B. A First Lesson: Pay attention to the fundamental values of the Republic and the core goals that lie at the heart of the 1978 FISA legislation.

Those who voted for and even those who voted against FISA in the 95th Congress deserve high marks for articulating the fundamental values at stake. In fact, well before FISA's passage in 1978, members of Congress had invoked the fundamental values of American democracy in trying to come to grips with the Watergate crisis and how America should handle the balance between the nation's legitimate security needs and the rights of its citizens. Thus, on June 29, 1972, just twelve days after the White House "plumbers" bungled their Watergate break-in, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee held hearings. Senator Kennedy gaveled the hearing to order and intoned the words of Justice Lewis Powel in *Keith*, which he characterized as "one of the most stirring judicial statements of our times."⁸⁵ He stated:

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public disclosure is essential to our free society.⁸⁶

Kennedy's linking of Justice Powell's comments to the purpose of the hearing was equally stirring:

Our goal here today is to relieve all Americans of that "dread of unchecked surveillance power" and that "fear of unauthorized official eavesdropping. . . ." We are here to see that the constitutional promise is kept, that our right to be let alone, our right to privacy, our right to speak freely in public and in private, our right to have different views, and the other rights which keep our lives free from unwarranted government intrusion, are vindicated rather than evaded, preserved and not avoided, enhanced instead of circumvented.⁸⁷

⁸⁵ *Warrantless Wiretapping: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 92nd Cong. 1 (1972) (statement of Sen. Edward Kennedy).

⁸⁶ *Keith*, 407 U.S. at 314.

⁸⁷ Kennedy, *supra* note 85.

Indeed, at the June 29 hearing, there was a definite sense of dread of unchecked power and outright fear about where the Republic was headed. Senator Edmond Muskie (D-ME) expressed the views of many: “George Orwell may prove to have been right 10 years ahead of his time if we cannot bring under control whom Big Brother is watching and when.”⁸⁸ The urgency was laced with a sense of betrayal. Again, Senator Muskie captured the feeling: “As reasonable men we had put our faith in the reasonable use of power. That faith has been abused and we offer this legislation to check the unreasonable power now vested in the President to order actions in the name of national security.”⁸⁹

Former Attorney General Ramsey Clark echoed these comments when he testified at the same hearing: “Unfortunately, our ignorance exceeds our knowledge in such subjects [the history of wiretapping and electronic surveillance], because we practice government by secrecy, which in my opinion is wholly incompatible with a free society.”⁹⁰

That sense of urgency and concern was exacerbated by the findings of the Church Committee two years later. The Committee report, often cited during the FISA debates, was blunt in its analysis:

Since the early 1930’s, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. . . . [P]ast subjects of these surveillances have included a U.S. Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group.⁹¹

The Church Committee’s findings, coupled with the findings of the Senate Select Watergate Committee which he chaired, led the self-described “simple country lawyer” from North Carolina, Senator Sam Ervin (D-NC), to opine in 1974 at a hearing on one of the bills that was the precursor to FISA: “The problem, as I see it, is to legislate controls over the practice of warrantless

⁸⁸ *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the S. Comm. on the Judiciary*, 93rd Cong. 41 (1974) (statement of Sen. Edmond Muskie).

⁸⁹ *Id.*

⁹⁰ *Warrantless Wiretapping: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 92nd Cong. 48 (1972) (statement of Ramsey Clark, former Attorney General).

⁹¹ S. REP. NO. 94-755, pt. 2, at 12 (1976).

wiretapping which would protect the constitutional rights of all citizens. . . .”⁹²

It is fair to say, that these comments reflected a deep concern that time might have run out and that it might be too late to act. It was in that context that on March 23, 1976, President Gerald Ford, who had inherited his office from a disgraced Richard Nixon who had resigned eighteen months earlier, formally forwarded the first version of a bill that would morph into FISA to the Speaker of the House, Carl Albert (D-OK). Ford’s letter accompanying the legislation lacked the inspirational tones of Senator Kennedy but stated the same goal that Senator Ervin had articulated two years earlier:

The enactment of this bill will ensure that the government will be able to collect necessary foreign intelligence. At the same time, it will provide major assurance to the public that electronic surveillance for foreign intelligence purposes can and will occur only when reasonably justified in circumstances demonstrating an overriding national interest, and that they will be conducted according to standards and procedures that protect against possibilities of abuse.⁹³

Thus, by 1976, when the FISA bill was being debated, there were multiple statements by Democrats and Republicans arguing that the current state of affairs was inconsistent with the foundation on which the country was built and affirming the underlying values of the Republic. Senator Mathias’s statement on October 10, 1978, that FISA was a “milestone in our nation’s history” and a “ringing affirmation of a commitment to fundamental liberties,”⁹⁴ mirrored the comments of Senator Bayh, who staked out the moral high ground and the underlying values of the nation in support of the legislation:

The bill also sends a message around the world . . . [that] in the United States we like to feel that we establish a higher standard, and we feel a high degree of sensitivity about the rights of all human beings . . . I believe the American people can take pride in this legislation. It represents all that we stand for as a nation with a living constitution that can be adapted to new problems without sacrificing its fundamental values.⁹⁵

In addition, the country’s roots in the rule of law became a common theme

⁹² *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the S. Comm. on the Judiciary, 93rd Cong. 39 (1974) (statement of Sen. Sam Ervin).*

⁹³ H.R. DOC. NO. 94-422, at 1 (1976).

⁹⁴ Mathias, *supra* note 43.

⁹⁵ 124 CONG. REC. S.5999 (daily ed. Apr. 20, 1978) (statement of Sen. Birch Bayh).

throughout the debate. In the House, Representative Robert Kastenmeier (D-WI) hailed the bill as a return to the “rule of law,”⁹⁶ as did Senator Kennedy upon his introduction of S. 1566 on May 18, 1977: “Mr. President, today I am introducing legislation—endorsed and supported by this administration—which would at long last place foreign intelligence electronic surveillance under the rule of law.”⁹⁷ Kennedy had offered the same rationale when he introduced S. 3197 the previous year: “It is a recognition, long overdue, that the rule of law must prevail in the area of foreign intelligence surveillance.”⁹⁸

Even stalwart opponents of FISA echoed the need to be vigilant about the fundamental values upon which American democracy rests. Listen to Senator Malcolm Wallop (R-WY), a vocal Republican opponent of FISA, who nonetheless understood the core values that were at stake: “In order to be lawful . . . the power of electronic surveillance, like all other powers, must be exercised only for the purpose for which it was intended. Each exercise of power must be reasonably and proportionally related to the end for which the power exists.”⁹⁹

It was Senator John Tunney (D-CA), however, the lone wolf to vote against S3197 (the precursor to S1566) in the Senate Judiciary Committee, who best and most presciently articulated why the fate of the Republic hung in the balance:

Technological developments are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny. This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom, and our dignity—in short, control over the most meaningful aspects of our lives as free human beings.¹⁰⁰

Thus, when it came to the first lesson—paying attention to the fundamental values of the Republic—the FISA-era legislators, at least rhetorically, carried themselves well. Assuming their good intentions—an assumption that many at the

⁹⁶ 124 CONG. REC. H.12533 (daily ed. Oct. 12, 1978) (statement of Rep. Robert Kastenmeier).

⁹⁷ 123 CONG. REC. S.7856 (daily ed. May 18, 1977) (statement of Sen. Edward Kennedy).

⁹⁸ *Electronic Surveillance Within the United States for Foreign Intelligence Purposes Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 94th Cong. 5 (1976) (statement of Sen. Edward M. Kennedy).

⁹⁹ S. REP. NO. 95-701, at 91 (1978).

¹⁰⁰ *Joint Hearings on Surveillance Technology Before the Sen. Comm. on the Judiciary, Subcomm. on Const. Rights, Comm. on Commerce, Spec. Subcomm. on Science, Tech., and Commerce*, 94th Cong. 1 (1975) (Statement of Sen. John Tunney), <https://perma.cc/E2GE-A96J>.

time called into question¹⁰¹—their failure to heed other lessons would ultimately undermine their soaring rhetoric.

C. A Second Lesson: Pay attention to the historical roots of the current surveillance crisis to provide context and guidance for future reforms.

The history of the abuses that demanded remedial legislation was certainly on the minds of the legislators as they debated the contours of FISA over the course of the 94th and 95th Congresses. So too was the history of Congress's attempts to deal with the problem that those abuses spawned, a history that had practical and the political implications. Some feared that congressional failure to act would give the Supreme Court time to decide that warrantless searches did *not* violate the Constitution, making it "even more difficult to obtain a satisfactory congressional-executive agreement for controlling the exercise of presidential power."¹⁰² Others focused on a sympathetic sitting president, initially Ford, and then Carter:

We have no guarantee that a future president will give his support to such legislation with its highly desirable provision of a judicial warrant, controls over the use and dissemination of the surveillance product and the submission of annual reports to the Congress which will serve as the basis for oversight investigations.¹⁰³

For some, the passage of time had become a source of consternation. On June 13, 1977, Senator Kennedy lashed out in frustration during opening hearings on S. 1566:

This is the latest chapter in the ongoing 7-year effort to bring national security electronic surveillance under the rule of law. The dismal record is there to examine. Seven sets of hearings on this subject have been conducted in the past 6 years; bills have been introduced only to die a slow death in committee; speeches have been made only to fall on deaf ears; inquiries made of the Executive Branch have been ignored or answered in a half-hearted way.¹⁰⁴

The expedient and frustrated citation to history, however, was the exception, not the rule. The FISA debates reflect a deep-seated sense of immediate

¹⁰¹ S. REP. NO. 94-1035, at 67-68 (1976).

¹⁰² S. REP. NO. 94-1035, at 67-68 (1976).

¹⁰³ *Id.* at 121.

¹⁰⁴ *Foreign Intelligence Surveillance Act of 1977: Hearing on S. 1566 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 95th Cong. 1* (1977) (Statement of Sen. Edward M. Kennedy).

history and concern that the lessons of the recent past would not be heeded or, for that matter, even remembered. Senate Judiciary Committee members James Abourezk (D-SD), Phillip Hart (D-MI), and Mathias warned that memory fades and with it, the will to act:

It is true that recent memories of Watergate and the revelations of improper intelligence investigations may make officials more cautious in their use of national security wiretapping. But the deterrent effect of recent scandals and revived congressional oversight are bound to diminish with time.¹⁰⁵

Upon the introduction of S. 1566, Senator Kennedy sounded a corollary theme, noting that too much time had elapsed since the passage of any legislation regulating the gathering of intelligence resulting in the proliferation of abuses the country was then experiencing:

[T]he Congress has not passed any major legislation dealing with electronic surveillance since 1968. During this long interim there have been too many instances of abuse, too many examples of surveillance based on arbitrary whim and caprice. This bill goes a long way in satisfying the objections I and others have had over the years.¹⁰⁶

In fact, from the moment of the Watergate break-in on June 17, 1972, the debates drew heavily upon the history of surveillance generally and upon recent abuses to demonstrate the need for regulation.¹⁰⁷ Senators Kennedy¹⁰⁸ and Bayh, Representative Kastenmeier, and former Attorney General Ramsey Clark¹⁰⁹ were but a few examples of those who outlined how pervasive warrantless surveillance had become by the time Richard Nixon took office in 1968. Neither Republicans nor Democrats were spared in their recitals of the sweep of surveillance history.

For example, in November 1977, Senator Kennedy, presenting the Judiciary Committee's full report to the Senate, launched into a detailed recitation of the history of warrantless electronic surveillance beginning with *Olmstead v. United States*,¹¹⁰ a 1928 case in which the United States Supreme Court eschewed the applicability of the Fourth Amendment to surveillance, moving on to the Communications Act of 1934, which placed the first limits on surveillance, and

¹⁰⁵ S. REP. NO. 94-1035, at 67 (1976).

¹⁰⁶ 123 CONG. REC. S.7858 (daily ed. May 18, 1977) (statement of Sen. Edward Kennedy).

¹⁰⁷ Woodward, *supra* note 4.

¹⁰⁸ S. REP. NO. 95-604, at 9 (1977), *reprinted in* 1978 U.S.C.C.A.N.

¹⁰⁹ Clark, *supra* note 90; *see* CONG. REC. H. E4863 (daily ed. Sept. 7, 1978) (statement of Rep. Robert W. Kastenmeier).

¹¹⁰ *Olmstead v. United States*. 277 U.S. 468 (1928).

then detailing the actions of Presidents Roosevelt, Truman, Eisenhower, and Kennedy, all of whom assumed their inherent power to engage in warrantless domestic and foreign intelligence gathering to combat real or imagined threats from organized crime to the Communist Party.¹¹¹ Kennedy then took the Senate through a guided tour of post-*Olmstead* Supreme Court precedent beginning with *Katz*,¹¹² winding his way to Title III and *Keith*, and concluding with the 1976 decision rendered by the D.C. Circuit Court of Appeals in *Zweibon v. Mitchell*,¹¹³ all of which demonstrated the “confusion around the issue of warrantless surveillance for foreign intelligence purposes and the need for regulatory legislation.”¹¹⁴ Kennedy summed up: “[A]fter almost 50 years of case law dealing with the subject of warrantless electronic surveillance, and despite the practice of warrantless foreign intelligence surveillance sanctioned and engaged in by nine administrations, constitutional limits on the President’s powers to order such surveillances remain an open question.”¹¹⁵ Kennedy was confident that S.1566 would finally provide “the secure framework” and appropriate regulation.¹¹⁶

In addition to the sweep of history, recent abuses uncovered by the Church Committee and Senator Ervin’s Watergate Committee imbued the FISA debate with a sense of urgency. Senator Kennedy opened with that premise in 1977: “This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused,”¹¹⁷ and closed with it in summation in 1978: “[The FISA regulations] relegate to the past the wiretapping abuses visited on Joseph Kraft, Martin Luther King Jr and Morton Halperin. They prevent the National Security Agency from randomly wiretapping American citizens whose name just happen to be on a list of civil rights or antiwar activists.”¹¹⁸ Senator Mathias also reminded his colleagues of the illegal wiretaps on Halperin and King, and of President Nixon’s comment that illegal surveillance had produced “gobs of material: gossip and bull,” a characterization that Mathias agreed was “correct.”¹¹⁹ In the end, the history of recent abuses brought with it a “major responsibility for seeing to it that history does not repeat itself, that civil liberties and the rights of our citizens are not

¹¹¹ S. REP. NO. 95-604, at 11 (1977), reprinted in 1978 U.S.C.C.A.N. 3906 (FBI Director J. Edgar Hoover in a memo to the Deputy Attorney General on May 4, 1961) (“We are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence . . . and . . . in the interests of national safety in uncovering major criminal activities”).

¹¹² *Id.* at 12–15.

¹¹³ *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976).

¹¹⁴ S. REP. NO. 95-604, at 15 (1977), reprinted in 1978 U.S.C.C.A.N. 3906.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 7.

¹¹⁸ 124 CONG. REC. S.5995 (daily ed. Apr. 20, 1978) (statement of Sen. Edward Kennedy).

¹¹⁹ *Electronic Surveillance Within the United States for Foreign Intelligence Purposes Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 94th Cong. 20 (1976) (statement of Sen. Charles Mathias, Jr.).

bargained away in the name of national security.”¹²⁰

While the sweep of the history of surveillance and the impact of recent abuses played an important role in FISA’s calculus, an examination of past instances in which America had overplayed the national security card and subsequently was forced to retreat is virtually absent from the legislative record. This was fertile ground that Congress failed to plow and that might have led to a FISA structure that was not as fundamentally flawed as the 1978 Act proved to be. That ground remains to be tilled today and would be a useful guidepost for Congress’s dealing with the current crisis. Surely, that history—beginning with the Alien and Sedition Acts of 1798 and continuing with the Executive’s unilateral

¹²⁰ Kennedy, *supra* note 118. History drove S. 1566’s supporters, but also drove its detractors from both the left and the right. Senator Tunney was the most strident, asserting his opposition in part because “when we write a bill to control the CIA and to prohibit future ‘Plumbers,’ we must write so no one can mistake our meaning,” and concluded with a call to act in the Nation’s year of bicentennial celebration, sounding a clarion call to remember America’s revolutionary times and comparing the current abuses to Britain’s oppressive Writs of Assistance: “Were John Adams to reappear today, he might well wonder why 200 years after the battles of 1776, our government is seeking powers to conduct general searches like those of the colonial King. Today, as in 1776, diligent protection of our rights against Government infringement is necessary so that Americans may continue to enjoy life, liberty and the pursuit of happiness.” S. REP. NO. 94-1035, at 30 (1976).

On the other side of the debate were far less persuasive historical analyses in opposition. In the House, Representative McClory argued: “They are abuses that relate to a period beginning long years ago – and which no longer occur,” and that since the abuses were in the past that “I say do not be in a hurry to make a mistake like this.” 123 CONG. REC. H.12535 (daily ed. Oct. 12, 1978) (Statement of Rep. McClory). Representative Butler cited the existing “communist threat” as a reason not to pass the legislation: “The bill comes at a time when the Soviet Union and other hostile foreign governments are enjoying increased opportunities for espionage in this country.” *The Foreign Intelligence Surveillance Act of 1978 Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. 30 (1978) (statement of Rep. Butler). And in the Senate, the Republican Senator Malcolm Wallop echoed a similar theme, lamenting the fact that activists who opposed the war in Vietnam would be exempt from surveillance and rhetorically noting: “One cannot escape the question of how many ‘cutouts’ are enough to exempt an American acting on behalf or in conjunction with a Communist regime from lawful electronic surveillance?” LEGISLATIVE REP. NO. 95-701, at 96 (1978). Senator Patrick Moynihan (D-NY) expressed a similar sentiment: “I would not be surprised if upwards of one million American citizens were, at this moment having their telephone calls listed to by the KGB . . . we will be unduly restricting our foreign intelligence capabilities by this bill and as a result needlessly subject the American people to the increasing espionage activities of foreign intelligence agencies.” *The Foreign Intelligence Surveillance Act of 1978 Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. 30 (1978) (statement of Rep. Moynihan).

It would, however, be left to Yale law Professor and former Solicitor General Robert Bork to make the most hyperbolic historical reference and metaphor: “Periods of sin and excess are commonly followed by spasms of remorse and moralistic overreaction. That is harmless enough: Indeed, the repentance of the hung over reveler is standard comic fare. In Washington, however, politicians are apt to repent only the sins of others, and matter become rather less humorous when the moral hangover is written into laws that promise permanent damage to constitutional procedures and institutions.” *The National Intelligence Reorganization and Reform Act of 1978 Hearing on S. 2525 Before the S. Select Comm. on Intelligence*. 95th Cong. (1978).

suspension of *habeas corpus* during the Civil War, the Palmer Raids during World War I, the internment of Japanese-Americans during World War II, McCarthyism, and the Nixon-era abuses—is there for all to see, a history that has only been reinforced in the thirty-six years since FISA became law.

Yale Professor Robert Bork, who was later unsuccessful in his bid for a seat on the United States Supreme Court, was a frequent witness of the FISA debates. His dime-novel prose—“periods of sin and excess are commonly followed by spasms of remorse”¹²¹—contained a kernel of truth but not in the way that he characterized it. U.S. history is replete with examples of legal excesses followed by serious feelings of remorse. These instances require correction to redress harms to individuals who were simply exercising their fundamental liberties, including the right to express their views, or to whole races of people that suffered discrimination because of the color of their skin.

For instance, in 1944, the United States Supreme Court decided *Korematsu v. United States*, upholding the constitutionality of Executive Order 9066, which ordered the internment of Japanese-Americans during World War II.¹²² Justice Jackson in dissent noted that Fred Korematsu “was born on our soil,” was a citizen of the United States, and that “no claim [was] made that he is not loyal to this country (or that) he is not law abiding.” Justice Murphy, also in dissent, was even more blunt: “I dissent . . . from this legalization of racism.” *Korematsu*’s core holding would never be formally reversed but a correction would come. In 1983, Federal District Judge Marilyn Hall Patel granted Korematsu’s request for a writ of *coram nobis* and reversed his criminal conviction on the grounds that the government had knowingly presented false information. National regret was also forthcoming in the form of public exhibitions at the Smithsonian National Museum of American History honoring those interned¹²³ and from the likes of former Supreme Court Justice Tom C. Clark who represented the Justice Department at the time of *Korematsu*. In the epilogue to the book *Executive Order 9066: The Internment of 100,000 Japanese Americans*, Clark wrote:

The writ of habeas corpus shall not be suspended, and despite the Fifth Amendment’s command that no person shall be deprived of life, liberty or property without due process of law, both of these constitutional safeguards were denied by military action under Executive Order 9066.¹²⁴

¹²¹ *The National Intelligence Reorganization and Reform Act of 1978 Hearing on S. 2525 Before the S. Select Comm. on Intelligence*. 95th Cong. 287 (1978).

¹²² *Korematsu v. United States*, 323 U.S. 214 (1944).

¹²³ “A More Perfect Union” Exhibit. Smithsonian Institution Archives.

¹²⁴ TOM C. CLARK, *Epilogue* to MAISIE CONRAT & RICHARD CONRAT, *EXECUTIVE ORDER 9066: THE INTERNMENT OF 110,000 JAPANESE AMERICANS*, at 110 (1972).

Fred Korematsu's brush with the illegal suspension of *habeas corpus* and the tragic denial of his constitutional rights was not an isolated example of government overreaction requiring subsequent retreat. Indeed, as recently as 2004, the U.S. Supreme Court was required to intervene to restore the right of *habeas corpus* in its decision in *Hamdi v. Rumsfeld*.¹²⁵ In *Hamdi*, U.S. citizen Yaser Esam Hamdi had been detained indefinitely as an illegal enemy combatant after his capture in Afghanistan in 2001. The Court was fractured, but it upheld Hamdi's right to pursue a writ of *habeas corpus*. Eight of nine justices agreed that Hamdi's due process rights had been violated and that he was entitled to judicial review of his detention. Justice O'Connor's opinion explained:

Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion It would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.¹²⁶

The McCarthy Era provides another example. In June 1977, Representative Drinan referred to the days of the red-baiting of Senator Joe McCarthy to attack certain provisions of the proposed FISA, particularly those provisions that sought to employ third parties to aid in foreign intelligence surveillance.¹²⁷ At the time, others disagreed with Drinan's characterization, but there was one fact about McCarthy that was beyond debate. The junior senator from Wisconsin had overplayed his hand. Thousands had been wrongly accused of being Communists and thousands of lives had been ruined, including the young lawyer, Fred Fisher, whose character McCarthy mercilessly besmirched. At the 1954 Army McCarthy hearings, the Wisconsin Senator's attack on Fisher prompted counsel Joseph Welch to intone: "Until this moment, Senator, I think I

¹²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹²⁶ *Id.* at 536. *Hamdi* is not the only case in which the Supreme Court has restrained the Executive Branch during its self-declared War on Terror. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004) (holding that foreign nationals and other Guantanamo detainees are entitled to the right of *habeas corpus*); *see also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating Congress's effort to bar judicial review of the military commissions created pursuant to the Detainee Treatment Act); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that detainees, including foreign nationals, are permitted direct access to U.S. courts to challenge their detention).

¹²⁷ 123 CONG. REC. H.5420 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

never really gauged your cruelty or your recklessness. . . . Have you no sense of decency, sir, at long last?" Welch's damning speech would be followed by Edward R. Murrow's famous indictment of McCarthy on March 9, 1954, on the CBS program *See It Now*. McCarthy's excesses in the name of national security had been exposed and months later, on December 2, 1954, by a vote of 67 to 22, the Senate censured McCarthy, ending his reign of terror. Once again, excess had led to retreat and remorse.

Abuses during the Presidency of Richard Nixon also merit review. Whether they formally recognized it or not, the 94th and 95th Congresses were engaged in precisely the same dance, trying to find the right balance in FISA to correct course after the Nixon Administration overzealously played the national security card. Senator Bayh's effort to stand on the moral high ground bears repeating:

The bill sends a message around the world (that in) the United States we like to feel that we establish a higher standard, and we feel a high degree of sensitivity about the rights of all human beings. . . . I believe the American people can take pride in this legislation. It represents all that we stand for as a nation with a living constitution that can be adapted to new problems without sacrificing its fundamental values.¹²⁸

Again, the United States was in the process of admitting excess and retreating to higher ground.

The lesson to be learned is clear: the abuses detailed reveal recurring patterns that are critically important as we consider solutions to American's current surveillance crisis. Senator Kennedy was right that we have a "major responsibility for seeing to it that history does not repeat itself, and that civil liberties and the rights of our citizens are not bargained away in the name of national security."¹²⁹ That responsibility is best fulfilled if our historical perspective is broad and deep and past repetitions of history are kept on the radar screen, something the 94th and 95th Congresses failed to do.

D. A Third Lesson: Preserve the checks and balances of the branches of government that make the United States Constitution the ingenious and resilient document that it has proved to be over the past two plus centuries.

1. In the Beginning: The Framers of the Constitution and the Importance of Separation of Powers and Checks and Balances

¹²⁸ 124 CONG. REC. S.5999 (daily ed. Apr. 20, 1978) (statement of Sen. Birch Bayh).

¹²⁹ Kennedy, *supra* note 118.

If FISA as enacted in 1978 had a fundamental flaw, it was its failure to maintain the separation of powers on which the Founders' delicate constitutional framework rested, and in particular, its failure to establish an independent FISA court, the linchpin of the statute's reform. The congressional surveillance debates of the 1970s exposed this glaring weakness. Subsequent events would demonstrate its consequences.

The Founding Fathers' conception of the separation of powers was both complex and remarkably simple, taking into account human nature and political reality. On successive weeks in February 1788, James Madison authored *Federalist* Paper No. 47, and Madison and/or Alexander Hamilton¹³⁰ authored *Federalist* Paper No. 51, detailing their conceptions of the doctrine that lies at the heart of the Constitution.

Madison began by noting the critical importance of a proper allocation of power to each branch of the government. According to Madison, the Republic's survival depended on it. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective," he wrote, "may justly be pronounced the very definition of tyranny."¹³¹ A similar theme was sounded in *Federalist* No. 51, which also deemed the separation of powers "essential to the preservation of liberty."¹³²

To merely state the principle, however, did not answer a much more difficult question: What formula should guide the proper allocation of power among the three branches of the new government? Madison first noted that the branches of government need not be totally separate and distinct. To support that conclusion, he drew on the French Enlightenment philosopher Montesquieu, "the oracle who is always consulted and cited on this subject,"¹³³ and on Montesquieu's governing "gold standard," the British constitution, which contained multiple examples of the involvement of each branch of the government in the affairs of the others.¹³⁴

Federalist No. 51, believed to be the work of Madison and Hamilton, set forth a workable, if imprecise, formula to gauge whether a proper separation had been achieved:

¹³⁰ The authorship is in dispute.

¹³¹ THE FEDERALIST NO. 47 (James Madison).

¹³² THE FEDERALIST NO. 51 (James Madison, Alexander Hamilton).

¹³³ Madison, *supra* note 131.

¹³⁴ *Id.*

In order to lay a due foundation for that separate and distinct exercise of the different powers of government . . . each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.¹³⁵

The proper balance, concluded the author, consists in “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” *Federalist* No. 51 summed up by asking and answering its own question:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer is . . . by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. The constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other¹³⁶

The structure of the new government mirrored these thoughts. The branches were neither separate nor totally distinct, but each was given tools to check the other: legislative approval of federal judges, executive veto of legislative decrees, legislative overrides of executive vetoes, judicial review of legislative enactments, and legislative ratification of treaties entered into by the Executive Branch, among others.

If there was any one branch of the government where independence and separation were particularly critical, it was the Judicial Branch. Hamilton characterized the judiciary as the weakest of the three branches, lacking “influence over either the sword or the purse.”¹³⁷ “It may truly be said,” wrote Hamilton, “that (the judiciary) has neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”¹³⁸ From this conclusion flowed this imperative:

There is no liberty, if the power of judging be not separated from the legislative and executive powers . . . [and] [t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . which contains certain specified exceptions to the legislative authority; such . . . as that it shall pass no bills of

¹³⁵ Madison and Hamilton, *supra* note 51.

¹³⁶ *Id.*

¹³⁷ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹³⁸ THE FEDERALIST NO. 78 (James Madison).

attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹³⁹

The importance of an independent judiciary to maintaining effective checks and balances necessary to sustain the Republic has often been cited from the likes of Thomas Jefferson to Andrew Jackson to modern figures who occupy varying positions along the political spectrum. Thomas Jefferson surely understood the need for an independent judiciary despite being the most vocal of the Founding Fathers about the dangers of judicial overreach:

The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that.¹⁴⁰

Consider Jackson: “All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”¹⁴¹

A bevy of modern commentators on all points on the political spectrum echo similar thoughts from the likes of Caroline Kennedy (“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing”¹⁴²) to President George W. Bush’s Solicitor General Ted Olson (“[I]n this country we accept the decisions of judges, even when we disagree on the merits, because the process itself is vastly more important than any individual decision. Our courts are essential to an orderly, lawful society [which] would crumble if we did not respect the judicial process and the judges who make it work.”¹⁴³) to conservative columnist Charles Krauthammer (“Let us have a bit of sanity here. One of the glories of American democracy is the independence of the judiciary. The deference and reverence it enjoys are priceless assets and judicial

¹³⁹ *Id.*

¹⁴⁰ Thomas Jefferson to George Wythe, 1776. *The Papers of Thomas Jefferson* 1:410.

¹⁴¹ Andrew Jackson, 1822, <http://perma.cc/9HTG-W8L8>.

¹⁴² Caroline Kennedy, *quoted in* Rodrique Ngowi, *JFK Awards for Ousted Iowa Justices*, *US Diplomat*, YAHOO (May 7, 2012), <https://perma.cc/ZPR3-SWPA?type=image>.

¹⁴³ Theodore Olson, *Lay Off Our Judiciary*, *WALL STREET JOURNAL* (Apr. 21, 2005), <http://online.wsj.com/article/0,,SB111405378792112943,00.html>.

independence and supremacy are necessary checks on the tyranny of popular majorities.”¹⁴⁴).

Taken together, the *Federalist* papers’ formula for the separation of powers demanded a precarious balance that required vigilance to maintain. Hamilton and Madison put it this way: “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of ‘auxiliary precautions.’”¹⁴⁵ The separation of powers detailed in the new Constitution has proved to be effective and durable and the necessary auxiliary precautions that Hamilton and Madison envisioned. FISA, however, would prove to be otherwise.

2. The FISA Drafters’ Struggle over the Separation of Powers

In the beginning, there was surely hope that FISA satisfied the Founders’ mandate for the proper separation of powers. Senator Bayh boldly declared S. 1566 “[a] triumph for our constitutional system of checks and balances” in which “foreign intelligence will be shared by all branches of the Government and no longer the exclusive domain of the Executive Branch.”¹⁴⁶ “The framers of the Constitution believed that the principle of checks and balances was crucial for the preservation of individual rights and free government,” he said, and “the Act restores this to the “field of foreign intelligence where it has been absent for decades.”¹⁴⁷

FISA’s Republican detractors took a more sanguine view, arguing that FISA did precisely the opposite, upsetting the Founders’ carefully crafted balance. These conservative opponents first took aim at the distribution of powers itself, claiming that FISA gutted Article II’s grant of power to the Executive in the area of foreign affairs by a wholesale transfer of the oversight of foreign intelligence surveillance to the judiciary. In the House, Representative Butler proclaimed:

My principal concern is that the bill raises serious constitutional questions in that it may well violate Articles II and III of the Constitution. HR 7308 [the House version of S. 1566] denies any inherent authority on the part of the executive to conduct warrantless intelligence gathering activities. I believe not only that the President has the power under Article II to authorize warrantless electronic surveillance but that we would be in violation of Art II by transferring this executive power to the

¹⁴⁴ Charles Krauthammer, *Equal rights rulings have judges all puffed up on power*, EUGENE REGISTER-GUARD (Apr. 22, 2005), A13.

¹⁴⁵ Madison, *supra* note 131.

¹⁴⁶ 124 CONG. REC. S.5997 (daily ed. Apr. 20, 1978) (statement of Sen. Birch Bayh).

¹⁴⁷ *Id.*

judiciary.¹⁴⁸

Senator Wallop made the same argument in the Senate:

Is it possible under our constitution for ordinary legislation to take away from the President's power to do what he deems necessary to successfully command this country's defense force and to successfully run our foreign relations? Let there be no mistake that the bill tried to do this when it stipulates that before exercising a power that is acknowledge to be his, he must receive authorization from a judge.¹⁴⁹

In one sense, these opponents of FISA were entirely correct. The final FISA legislation did alter the powers of the President in a fundamental way. The tortured history of efforts to control the warrantless gathering of foreign intelligence prior to FISA had provided little clarity about the President's powers. In fact, Section 2511(3) of the Omnibus Crime Control Act of 1968 (Title III) enacted into law on the heels of the Supreme Court's decision in *Katz*, clearly stated: "Nothing contained (in this statute) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation (and to) to obtain foreign intelligence information deemed essential to the security of the United States."¹⁵⁰

FISA, however, lay to rest to any doubt about whether the President retained the "inherent power" that Section 2511(3) seemed to imply. Introducing S. 1566, Kennedy stated:

[The legislation repeals the] so-called executive "inherent" disclaimer clause currently found in section 2511(3) of Title 18, and provides instead that the statutory procedures [of this legislation and Title 18] "shall be the exclusive means" for conducting electronic surveillance.¹⁵¹

Kennedy explained the theory underlying the "exclusive" language:

The basis for this legislation is the understanding—concurrent in by

¹⁴⁸ *The Foreign Intelligence Surveillance Act of 1978 Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, H. of Reps.*, 95th Cong. 29 (1978). (statement of Rep. Butler) (Citing the pervasive use of warrantless foreign intelligence by all presidents dating back to Franklin Roosevelt).

¹⁴⁹ S. REP. NO. 95-701, at 91 (1978). Others who testified took a similar position. *See e.g.*, the testimony of Yale law professor Robert Bork, CONG. REC. E.1204–1206 (Mar. 10, 1978); *see also* the testimony of Representatives Robert Wilson, Robert McClory, J. Kenneth Robinson, and John M. Ashcroft, S. REP. NO. 94-1035, at 111 (1976).

¹⁵⁰ Omnibus Crime Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

¹⁵¹ S. REP. NO. 95-604, at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3906.

the Attorney General—that even if the President has an “inherent” constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.¹⁵²

Indeed, there had been a restructuring or at least a firm clarification of the President’s power with regard to foreign intelligence surveillance, and some opponents of FISA, like Representative McClory (R-IL), fully understood the use and meaning of the word “exclusive” as opposed to the phrase “exclusive statutory” for which he had vigorously argued:

It is true that the Senate conferees insisted on eliminating the word “statutory”. They insisted on that because, in effect, what they are endeavoring to do with regard to all of our intelligence agencies and with respect to all of the intelligence activities, is to transfer the power that is granted by the Constitution to the President to the courts. And we should realize that. It is an attempt to amend the Constitution by a simple legislative enactment.¹⁵³

This restructuring helps to explain Senator Bayh’s confidence that the Act restored the checks and balances to the field of foreign intelligence where it has been absent for decades. The “inherent power” of the President had been explicitly rejected by the Congress which, in turn, allowed, for the first time, for the implementation of a form of judicial review to be added to the mix (particularly with regard to United States “persons” against whom surveillance could not proceed without judicial examination of the Executive Branch’s certificate of need).¹⁵⁴

3. FISA’s Dismal Failings to Abide the Founding Fathers’ Admonitions

The hoped-for balance, however, would prove impossible to achieve in light of FISA’s fundamentally flawed structure. If blame be assigned to any one piece of the legislation, the lion’s share of it would reside in FISA’s vision for the role of the judiciary. The role of the judges, the manner of their selection, and the process and opportunity for review by the FISA court, all coalesced to guarantee that the balance among the branches would go horribly wrong. This ensured that

¹⁵² *Id.* at 16.

¹⁵³ 124 CONG. REC. H.12535 (daily ed. Oct. 12, 1978) (statement of Sen. Robert McClory).

¹⁵⁴ *See* S. REP. NO. 95-701, at 11 (1978). (Senator Bayh: “It requires the judge to review the certification that sure of a U.S. person is necessary for foreign counterintelligence purposes. Because the probable cause standards are more flexible under the bill, the judge must also determine that the executive branch certification of necessity is not ‘clearly erroneous’”).

the judiciary's role, despite some well-intentioned judges, would at best be hollow, that the Executive Branch would exercise unbridled power aided by the imprimatur of judicial approval, and that congressional oversight would prove meaningless at best and corrosive at worst, undermining public confidence in the ability of government to properly balance national security needs against the rights of American citizens, the very goal of FISA from the beginning.

The consequences of FISA's structure were unintended but not unforeseeable. FISA's opponents on the right and the left predicted its implosion. Their arguments in opposition were remarkably congruent and would be proven correct over the course of thirty-six years of unimaginable events and technological advances. Those arguments demand our attention if we are to create a future structure that will not suffer a similar fate.

By any measure, FISA's structure ignored all of the admonitions regarding the need for a separation of powers generally and the independence of the judiciary in particular. On the right, Senator Wallop, Representative McClory, Representative Allen Ertel (R-PA), and Professor Bork led the charge. On the left were Representative Drinan and Senator Tunney. To be sure, the Wallops, McClorys, Ertels, and Borks differed from the Drinans and Tunneys about the proper role of the judge in the foreign intelligence realm: the latter demanding that the judiciary employ Fourth Amendment standards in an adversarial setting to judge the validity of a request by the Executive Branch to engage in foreign intelligence surveillance, and the former decrying any involvement of the judiciary at all and claiming that the power to engage in such surveillance was reserved to the President under Article II. When it came to FISA's structure, however, their messages were identical: the role of the judge had been gutted.

Neither side minced words. The most benign description was "managerial," a phrase used by Professor Bork¹⁵⁵ and Representative Ertel.¹⁵⁶ Representative Drinan harshly noted that "[t]he role of the federal judge in the administration proposal is almost a degradation of the federal judiciary, making 'a mockery and a travesty of the judicial function.'"¹⁵⁷ Mockery was the same word used by Senator Tunney two years earlier when commenting on S. 3197, whose judicial structure mirrored that of S.B. 1566.¹⁵⁸

¹⁵⁵ *The Foreign Intelligence Surveillance Act of 1978 Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary, H. of Reps.*, 95th Cong. 22 (1978) (statement of Rep. Allen Ertel).

¹⁵⁶ *Id.* at 172.

¹⁵⁷ 123 CONG. REC. H.5422 (daily ed. June 3, 1977) (statement of Rep. Drinan).

¹⁵⁸ *Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of S. Select Comm. on Intelligence*, 94th Cong. 125 (1976) (statement of Sen. John V. Tunney) ("The bill provides the illusion but denies the reality of impartial judicial review. Judges review only half the elements needed for the warrant – whether the target is an 'agent' and whether he uses a certain place or

The root of the problem stemmed from the limited information supplied to the judge, the *ex parte* nature of the proceedings, and the absolute secrecy in which the judge was to operate. Drinan noted:

[T]he judge is not permitted to question the administration's claims in its certification to the FISA court that the information sought is in fact foreign intelligence information. [Even in the case of citizens of the United States] the judge must accept the certification unless he finds that it is "clearly erroneous" on the basis of the statement submitted with the application [by the Executive Branch].¹⁵⁹

The testimony of Bork and Drinan, ardent political adversaries, on the role of the FISA judge is virtually identical. Drinan wrote:

Even more fraudulent is the pretense in the administration bill that the judge is in a position to make any well informed judgment. [There is] no way by which a judge could receive or even request information necessary for the conduct of American foreign policy. The judge is a rubber stamp from whom virtually all of the essential background of the requested authorization could be withheld.¹⁶⁰

While Bork wrote:

How can this be the rule of law if: It would set apart a group of judges who must operate largely in the dark and create rules known only to themselves. Whatever that may be, it debases an important idea to call it the rule of law. It is more like the uninformed, unknown and uncontrolled exercise of discretion.¹⁶¹

In the end, FISA's most conservative opponents best articulated the bottom-line impact of FISA's judicial structure on the judge, the judiciary, and the

phone. The other half are decided by a 'certificate from the FBI director or some other Government official, denying the judge authority to review the potential for picking up 'foreign intelligence information . . . Such a restricted role for the judge makes the bill's 'warrant' requirement a mockery of the Fourth Amendment which requires a court finding that something specific is being sought and that it is lawfully subject to seizure.'"). The similarity of the judicial role in S.B. 3197 and S.B. 1566 was noted by Representative Drinan who characterized them as "virtually identical." 123 CONG. REC. H.5422 (daily ed. June 3, 1977) (statement of Rep. Drinan).

¹⁵⁹ 123 CONG. REC. H.5422 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

¹⁶⁰ 123 CONG. REC. H.5419 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

¹⁶¹ 124 CONG. REC. E.3602 (daily ed. June 29, 1978) (statement of Sen. Robert McClory) (citing Robert Bork).

targets of the surveillance. The debates emphasized the dilemma that FISA court judges would face. Pennsylvania's Democratic Representative Allen Ertel contended that the judge would be put in the untenable position of either deferring to the Executive Branch or ruling based on limited information, which would preclude the court from exercising an impartial review.¹⁶²

Bork considered the impact of the structure on a judge who dissents to a court-ordered warrant for foreign intelligence surveillance wondering:

If the dissenting [judges] are convinced that the decision and others it presage constitute a denial of the basic constitutional rights of Americans, what are those [judges] to do? Should they confer themselves to write a dissent that will be classified top secret and stored in a locked vault? Must they remain stoically silent about what they believe to be the secret destruction of rights they are sworn to uphold? Should they publish a decision and damage national security? . . . [They are in an] intolerable moral and constitutional position.¹⁶³

Three-term Republican Senator Malcolm Wallop (R-WY), part of a Wyoming congressional delegation during the Reagan years that would include Vice President (then Representative) Dick Cheney and Senator Alan Simpson, argued that the lack of an adversarial component would negatively impact FISA's judicial structure and due process. He noted the lack of opportunity to contest decisions and the fundamental incompatibility of secrecy and judicial fairness:

The cases which would come before the special court would not, and would not be expected to go beyond the procedure for the warrant. Only incidentally some would result in real trials. But trials are precisely the concrete adversary proceedings which make judgments issued in *ex parte* proceedings something other than advisory opinions. *Ex parte* proceedings which do not normally result in trials are also questionable from the standpoint of individual rights. Unless there is ultimately a trial, the individual

¹⁶² *The Foreign Intelligence Surveillance Act of 1978: Hearing 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. 22 (1978) (statement of Rep. Allen Ertel).

¹⁶³ *Id.* at 133–134 (statement of Robert H. Bork); see S. REP. NO. 95-701, at 94 (1978) reprinted in 1978 U.S.C.C.A.N. 3906 (statement of Malcolm Wallop) (“It is not altogether clear that all the judges would be privy to the records of all the cases. If they were not, what good could dissenting opinions do? In the end, the only real means available to a dissenting judge or Justice of the Supreme Court, if he deemed a Government act of surveillance grossly abusive, would be to break secrecy and make the case public. It is far from clear that any action short of impeachment could be taken against such a judge”).

affected will never have an opportunity to contest the government's case.¹⁶⁴

In fact, Ertel's, Wallop's and Bork's predictions proved to be correct. In 2006, in the wake of Stellar Wind, one of President George W. Bush's illegal surveillance programs, FISA court federal Judge James Robertson resigned in "frustration" over the judicial role afforded by FISA.¹⁶⁵ In July 2013, following the initial disclosures of NSA documents by Edward Snowden, Judge Robertson told CBS News, "Anyone who has been a judge will tell you a judge needs to hear both sides of a case."¹⁶⁶ Although Judge Robertson denied that the court acted as a "rubber stamp," he concluded, "This process needs an adversary."¹⁶⁷ Judge Robertson proposed "the naming of an advocate, with high-level security clearance, to argue against the government's filings [and] suggested that the Privacy and Civil Liberties Oversight Board, which oversees surveillance activities, could also provide a check."¹⁶⁸ Wallop's recommendations thirty-six years earlier were eerily similar: "There should at least be a kind of public defender or devil's advocate to argue against the executive branch's position."¹⁶⁹

Another prediction made by Wallop came to pass. Wallop worried: "A body of case law is likely to grow without benefit of arguments contrary to the Government."¹⁷⁰ Snowden leaks revealed that that fear, too, had been realized. In 2013, the *Wall Street Journal* reported that the FISA court's definition of "relevance" had allowed the NSA to engage in programs such as PRISM under which metadata of billions of phone calls of American citizens are daily collected by the NSA in cooperation with giant third party internet companies such as Google and Verizon.¹⁷¹ The FISA court's definition of "relevance" was at odds with narrow United States Supreme Court definitions of this critical evidentiary term. Despite its importance, the basis of the FISA court's ruling remains impossible to decipher because of the classified, secret nature of the proceedings. *The Journal* reported, "The Foreign Intelligence Surveillance Court . . . has developed separate precedents, centered on the idea that investigations to prevent

¹⁶⁴ 1 FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, P.L. 92 Stat. 1783 91 1978, at 94 (additional views of Sen. Malcolm Wallop).

¹⁶⁵ Mike Masnick, *Released Memos Justifying Warrantless Wiretapping Point To Limitless Executive Branch Authority*, TECHDIRT (July 10, 2013), <http://perma.cc/5KUD-N82H>.

¹⁶⁶ *Former Judge Admits Flaws With Secret FISA Court*, CBS NEWS (July 9, 2013), <http://perma.cc/8TFV-ZREU>.

¹⁶⁷ *Id.*; see Eric Lichtblau, *Judges on Secretive Panel Speak Out On Spy Program*, N.Y. TIMES (Mar. 29, 2006), <http://perma.cc/JR66-B9HZ>.

¹⁶⁸ James G. Carr *A Better Secret Court*, N.Y. TIMES (July 22, 2013), <http://perma.cc/89DP-86JD>.

¹⁶⁹ S. REP. NO. 95-701, at 94 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3906.

¹⁷⁰ *Id.*

¹⁷¹ See Valentino-Devries, *supra* note 73.

national-security threats are different from ordinary criminal cases.”¹⁷² Precisely how they did it, however, remains a mystery.

During the 1970s FISA debates, Wallop was left to ask “[w]hether these are to be real judicial proceedings or not.” “The secrecy of the entire proceedings,” observed Wallop, “is itself quite foreign to our legal and constitutional system. Can our legal system stand a body of secret case law?”¹⁷³ The short answer to Wallop’s very pertinent question is that it cannot.

It bears repeating that the right and left in the FISA Congresses differed fundamentally on whether judges should be involved in the foreign intelligence surveillance equation. Drinan characterized S. 1566 as a “real grab for power by the intelligence community”¹⁷⁴ while Ertel and his conservative compatriots complained of “judicial imperialism.”¹⁷⁵ Nonetheless, both wholeheartedly agreed that the formula arrived at in the fall of 1978 for the structure of FISA’s judiciary was destined to fail. Representative Drinan spoke for all of them:

Attorney General [Bell] asserted the hope that bringing “the judiciary into the process” would be beneficial because “I think the American people trust the judiciary, and they will have more confidence in the system if we have the executive, the congressional and the judiciary all tied into the process so as to have one check the other.” The critical point totally omitted by the Attorney General is the secrecy built into his plan which prevents even the judge much less the Congress from knowing the real reasons [the case is before it].¹⁷⁶

The accuracy of their predictions is a powerful lesson for the future.

E. A Fourth Lesson: Demand accountability, including honest and specific answers to hard questions such as: Who is making the request for

¹⁷² *Id.*

¹⁷³ 1 FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, P.L. 92 Stat. 1783 91 1978, at 94 (additional views of Sen. Malcolm Wallop).

¹⁷⁴ 123 CONG. REC. H.5421 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

¹⁷⁵ H.R. REP. NO. 95-1720, at 22 (1978) (statement of Rep. Allen Ertel). *See* CONG. REC. E.3602 (daily ed. June 29, 1978) (statement of Robert H. Bork) (“No one should underestimate the strength of the tendency displayed by the judiciary in recent years to take over both legislative and executive functions.”); H.R. REP. No. 95-1283, Pt. I, at 116 (1978) (statement of Robert H. Bork) (“Federal judges are for the most part unequipped either by training or experience, to make the subtle political operational decisions that must be made daily by intelligence personnel. Judges are simply not selected in order that they might by pass on the merits of foreign intelligence gathering just as they are not called up to draft treaties or negotiate trade agreements – and this is how it should be.”).

¹⁷⁶ 123 CONG. REC. H.5421 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

information and why? What is the utility of the information being sought? Has a proper showing been made that particular information is necessary?

Accountability: The quality or state of being accountable; *especially* an obligation or willingness to accept responsibility or to account for one's actions <public officials lacking *accountability*>¹⁷⁷

The notion of the separation of powers assumes that each branch of government is accountable to the citizenry for its actions. Where a proper balance of power among the branches exists, accountability is achievable. Absent a proper balance, accountability is unlikely. Senator Bayh had hoped that FISA would demonstrate that “all three branches of Government can share responsibility for the most sensitive intelligence activities” and show that “our system of checks and balances will continue to work as the framers of the Constitution intended.”¹⁷⁸ In fact, FISA's judicial structure doomed the effort to failure, creating instead a lack of Executive Branch accountability for its actions—the polar opposite of what the Congress sought in the months and years following Watergate.

Today the naiveté of the chief proponents of FISA is painfully obvious. For example, responding to charges that the FISA court's secrecy would undermine its integrity and the ability to check Executive Branch actions, Senator Kennedy responded in ways that future events would prove devastatingly inaccurate:

There is no “judicial secrecy” today [at the time of FISA's consideration], because the courts are not part of the process at all. It is the executive branch that exercises the secret and uncontrolled discretion, free from any statutory restraint. And even if a lenient judge is quick to rubberstamp 99 out of 100 applications, the ever-present possibility that this application will be the one rejected by the court should act as an effective deterrent for abuses.¹⁷⁹

That hoped-for deterrent would not come to pass. Surveillance programs with names like Stellar Wind, Terrorist Surveillance Program, and PRISM speak volumes about the pervasiveness of surveillance in today's America. The FISA court's inability to say “no” to requests from the Executive Branch is best demonstrated by statistics detailing how frequently the court grants and denies warrant applications. In the thirty-three years from 1979 to 2012, the FISA court granted 33,942 requests for warrants and denied only eleven, compiling a denial

¹⁷⁷ MERRIAM-WEBSTER DICTIONARY. <http://perma.cc/F57U-G7RH>.

¹⁷⁸ 124 CONG. REC. S.5999 (daily ed. Apr. 20, 1978) (statement of Sen. Birch Bayh).

¹⁷⁹ 124 CONG. REC. S.59976 (daily ed. Apr. 20, 1978) (statement of Sen. Edward Kennedy).

rate of three tenths of one percent of the total warrants requested.¹⁸⁰ In the twenty-two years prior to the September 11, 2001 attacks, the court approved 14,036 warrants and did not reject any. The eleven denials came after 2002, but in the ten-year period from 2002 to 2012, the court granted 19,906 warrants, 6,804 more warrants granted than in the twenty-one years preceding the attacks. As noted, former FISA court judge James Robertson, now a critic of the court and a proponent for its reform, denied that the court acted as a “rubber stamp.”¹⁸¹ The statistics, however, overwhelmingly suggest otherwise. Senator Kennedy’s hoped for a deterrent proved to be a pipedream.

In fact, Drinan once again proved the better seer. During the debates, he noted that the Omnibus Crime Bill required full Fourth Amendment protections for issuing search warrants in national security matters not involving foreign intelligence, but even applying those stringent standards “almost no requests” had been denied.¹⁸² The implications for FISA in the context of foreign intelligence were apparent: FISA judges would “in all probability be even more reluctant to go against the Government when the request originates with the intelligence community and is surrounded by warnings that the defense or security of the United States would be endangered if the requested authorization for surveillance is not granted.”¹⁸³ Looking at the figures today, no doubt even Representative Drinan would be stunned about how right he was. Secrecy and *ex parte* proceedings have taken their toll.

Representative Ertel also forecast that FISA’s structure would make it difficult to control the actions of the Executive Branch, and his comments help explain why the warrant statistics turned out as they have. He rightly surmised that the court would give so much deference to the Attorney General that it would “totally defeat the purpose of this special court as an agent for impartial review and provides no protection at all against abuse.”¹⁸⁴ Ertel warned, “The knowledge that a particular judge is predisposed to defer to the applicant presents all too great a temptation to misrepresentation or deceit especially in ‘borderline’ requests.”¹⁸⁵ He concluded by stating the obvious: “Most interceptions will never be revealed to the target or those incidentally overheard. They will not lead to a prosecution and will not, therefore, be subject to subsequent judicial review in an adversary proceeding.”¹⁸⁶

¹⁸⁰ FOREIGN INTELLIGENCE SURVEILLANCE ACT COURT ORDERS 1979-2012, ELECTRONIC PRIVACY INFORMATION CENTER (July 12, 2013), <https://perma.cc/PDM8-A9M4>.

¹⁸¹ See *Lichtblau*, *supra* note 167.

¹⁸² 123 CONG. REC. H.5422 (daily ed. June 3, 1977) (statement of Rep. Robert Drinan).

¹⁸³ *Id.*

¹⁸⁴ *I Foreign Intelligence Surveillance Act of 1978*, P.L. 92 Stat. 1783 i 1978, *Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong., 2nd Session, 31-438 (July 1978), at 23 (statement of Rep. Allen E. Ertel).

¹⁸⁵ Ertel, *supra* note 155.

¹⁸⁶ S. REP. NO. 94-1035, at 74 (1976), *reprinted in* 1978 U.S.C.C.A.N. 3906.

The statistics are also explained by another phenomenon. Once armed with judicial approval, the Executive Branch would be able to “wash its hand of the whole matter by passing the buck to the judge that approved it.”¹⁸⁷ Drinan put forward the accountability issue four-square:

A primary lesson that has been learned from the disclosures of abuses by past administrations is the need to insure high-level executive branch responsibility and accountability for particular actions taken in the name of national security. Yet, HR 7308 will surely have the opposite effect. It should be seen that by shifting from the President to the judiciary the responsibility to authorize foreign intelligence electronic surveillance, the courts become a buffer to executive accountability. If an intelligence agency wants to use electronic surveillance for an improper purpose, an application can be made to the court for authorization.¹⁸⁸

That prediction also came to pass. In 2005, the *New York Times* revealed the Bush Administration’s Terrorist Surveillance Program (TSP) that authorized warrantless surveillance on a massive scale that clearly violated the dictates of FISA and the Patriot Act. Initially, the Bush Administration argued that the program was legal, citing the 9/11 attacks and national security emergencies. Ultimately, a simpler path was taken: the Administration went to and received *ex post facto* approval from the FISA court.¹⁸⁹ A moment of accountability—the Bush Administration’s acknowledgement that it had engaged in illegal surveillance—was side-stepped by simply seeking the approval of the court charged with monitoring the illegal activity, thereby making the Executive Branch unaccountable yet again.¹⁹⁰

The structure of the FISA court—shrouded in secrecy and devoid of any opposition to the government’s position—also took its toll on the accountability of the Executive Branch to the Congress, a consequence that also had been roundly predicted during the FISA debates. Senators Abourezk, Hart, and Mathias candidly acknowledged throughout the debates over S. 3197, “In depth congressional oversight is a crucial element of the safeguards which justify embarking on the [FISA] legislative scheme.”¹⁹¹ Representative Ertel hoped that

¹⁸⁷ 1 *Foreign Intelligence Surveillance Act of 1978*, P.L. 92 Stat. 1783 1 1978 (June 8, 1978), at 118 (statement of Rep. Robert Drinan).

¹⁸⁸ *Id.*

¹⁸⁹ James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=1&.

¹⁹⁰ Elizabeth LaForgia, *US Releases Documents on NSA Surveillance Origins*, JURIST (Dec. 21, 2013) [HTTP://PERMA.CC/MP5H-2ZLH](http://PERMA.CC/MP5H-2ZLH).

¹⁹¹ S. REP. NO. 94-1035, at 74 (1976) (referring to S.3197).

FISA's congressional reporting requirements would serve that end.¹⁹²

Congressional opponents on the left and right, however, realized the difficulty in achieving such a goal in light of the FISA court's lack of transparency. Democrats Drinan and Tunney both warned that the reporting mechanism "would not give the Congress adequate information to exercise oversight over the Executive Branch." Congress, claimed Drinan, "would never know whether abuses—or successes—were occurring under the bill's provisions."¹⁹³ Moreover, opponents in the House, among them Republican John Ashcroft, who would become President Bush's Attorney General, warned that Congress "could easily be lulled into laziness, feeling that the court was adequately reviewing the situation."¹⁹⁴

Wyoming's Senator Wallop also contended that the Executive Branch would not be accountable to Congress because of the impact of a judicial imprimatur of validity:

In a sense the bill succeeds too well. Under it, each and every act of electronic surveillance authorized by the special court would be ipso facto legal . . . what could any Congressman or Senator do about any act of surveillance he considered unjust or inappropriate? That act would have been not only requested under congressional standards, but certified as meeting those standards by a Federal judge. For all practical purposes, the Congressman or Senator would face *res judicata* [a matter finally decided on its merits by a court having competent jurisdiction].¹⁹⁵

Written to ensure accountability, FISA proved to be the end of accountability. Representative Ertel summed it up this way: "The oversight committee and the executive branch get the protection of a judicial order which has no real factual basis for a court's decision but which absolves them of any responsibility for their actions."¹⁹⁶ Professor Bork stated the conclusion more pithily: "This statute has the effect of immunizing everyone and sooner or later that fact will be taken advantage of."¹⁹⁷ History proved FISA's opponents on the right and the left correct.

¹⁹² See Ertel, *supra* note 155.

¹⁹³ S. REP. NO. 94-1035, at 126 (1976).

¹⁹⁴ H.R. REP. NO. 95-1283, Pt. I, at 117 (1978).

¹⁹⁵ S. REP. NO. 95-701, at 94 (1978).

¹⁹⁶ *The Foreign Intelligence Surveillance Act of 1978: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. 22-25 (1978) (statement of Rep. Allen E. Ertel).

¹⁹⁷ 124 CONG. REC. E.3602 (daily ed. June 3, 1978) (Statement of Robert H. Bork).

F. A Fifth Lesson: Keep in mind the relationship of the government and the governed to guarantee citizens publicly active and uninhibited political lives in which they can dissent from official policy.

Lesson Five is certainly related to Lesson One (Pay Attention to the Core Values of the Republic). A government of the people, by the people, and for the people is a core value distilled by Lincoln and known to every schoolchild in America. As basic and obvious as it may seem, its relevance to questions about next steps in the surveillance debate cannot be overstated. The simple fact is that secrecy has bred distance between the government and the governed in profound ways. Indeed, we have arrived at a point in our history where government actions related to intelligence gathering are only discernable if an individual commits a criminal act—Edward Snowden being the prime current example. While people disagree about his motives and how he should be viewed and treated, few would argue with the fact that but for Snowden’s actions, the microscope under which we currently have placed our surveillance policies would not exist. That fact should tell us something: The government is acting in ways that do not respect Lincoln’s words, which we drill into our children as a first lesson in civics.

The response to these assertions is that the threat is so extraordinary and the pace of technology so breathtaking that there is nothing that can or should be done to curb the government’s expanding surveillance practices. Yes, the argument goes, transparency in a democracy is important, and yes, the people should participate in the decision-making that affects their lives and rights, particularly the rights to expression and privacy, but those aspirations must give way if we are to protect our democratic values. Absolute secrecy and the pervasive gathering of information, aided by revolutionary technologies that keep us safe, the argument concludes, are necessary imperatives.

In reality, to accept that argument is to end the argument. Such reductionist logic can only result in the unbridled, unchecked authority of the Executive Branch. It has the ring of the argument made during the Vietnam War that “we had to burn the village in order to save it.”¹⁹⁸ It also assumes that the middle ground that FISA sought to achieve in 1978, and which hopefully we continue to search for today, does not exist.

To stress the importance of the relationship of the government to the governed is not a novel concept. The debates during the 1970s that led to FISA eloquently articulated its importance in the context of intelligence gathering. On June 23, 1975, Senator Tunney opened the Joint Hearings of his Special

¹⁹⁸ Peter Arnett, *Major Describes Move*, N.Y. TIMES (Feb. 8, 1968) (“‘It became necessary to destroy the town to save it,’ a United States major said today. He was talking about the decision by allied commanders to bomb and shell the town regardless of civilian casualties, to rout the Vietcong”).

Subcommittee on Science, Technology and Commerce of the Senate Judiciary Committee with words that could have easily been uttered in 2014:

The need for [these] hearings is overwhelming. Technological developments are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny. This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom, and our dignity—in short, control over the most meaningful aspects of our lives as free human beings.¹⁹⁹

Tunney's position was clear: "Our concern (is that) that powerful new technologies . . . will destroy the Constitution's delicate balance between the powers of the State and the rights of individuals."²⁰⁰

Tunney demanded answers to the same questions that are relevant today: "We want to know who, if anyone, controls surveillance technology. And can we assure American taxpayers that their scarce dollars are being spent for their benefit and not for the creation of an Orwellian nightmare that will haunt them and their children for decades to come?"²⁰¹

Moreover, Tunney's frustration with the answers that had been forthcoming echoed the frustration that many feel today: "To date our investigations have been discouraging. No one seems to be in charge. New technologies are developed and seem to be allowed to speak without thought for their future social and political ramifications or for the ease with which they can be surreptitiously abused."²⁰²

Senator Tunney's focus, as the name of his subcommittee implied, was on the impact of science and technology on democratic institutions. The conversation about the relationship of the government to the governed, however, extended well beyond those confines. It was also about the abuse of political power in the time of Watergate when, in Senator Kennedy's words, a "blanket of fear" had swept the

¹⁹⁹ *Surveillance Technology: Joint Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and the Special Subcomm. on Science, Technology, and Commerce of the Comm. on Commerce S.*, 94th Cong. 1 (1975) (statement of Sen. John Tunney, Member, S. Comm. on the Judiciary).

²⁰⁰ *Id.* at 61.

²⁰¹ *Id.* at 62.

²⁰² *Id.*

country.²⁰³ Senator Tunney, in his opening remarks quoted *New York Times* columnist James Reston, who had connected the dots between technology, power, and the protection of our right, as citizens, to participate in our democracy. Reston observed that “what has happened here over the last postwar generation is that the scientific capacity to use the arts of wartime espionage on private citizens has greatly expanded while the political capacity to control all this has actually declined.”²⁰⁴

In sum, the ultimate threat lay in the inability of citizens to participate in the decisions that affect their lives—a threat understood by those who supported and opposed S. 1566. Senator Kennedy, the bill’s chief proponent, who had split with Senator Tunney over the legislation, fully understood that the ability of a citizen to participate in our democracy was at stake. In November 1977, when he presented the Judiciary Committee’s report regarding S. 1566 to the full Senate, Kennedy spoke directly to his concerns about the “chilling effect” of surveillance on the populace at large, noting:

The exercise of political freedom depends in large measure on citizens’ understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.²⁰⁵

Neither Tunney nor Kennedy was tone deaf to the need for national security to protect the nation from foreign threats. Tunney acknowledged the importance of technology for national security purposes, even lauding it: “The arrival of the ‘electronic battlefield’ promises to increase our security against foreign aggressors and . . . can even become a technological aid in the pursuit of peace. [Indeed] law enforcement experts tell us that computers and electronics will

²⁰³ *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062, Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Comm. on the Judiciary S.*, 93rd Cong. 40 (1974) (statement of Sen. Edward Kennedy).

²⁰⁴ *Id.*

²⁰⁵ S. REP. NO. 95-604, at 8 (1977). Representative Drinan spoke to the same concern in 1978 during hearings over H.R. 7308, S. 1566’s companion legislation then working its way through the House. Noted Drinan: “The real evil of electronic surveillance [is that it is] indiscriminate. It brings within its scope conversations of the innocent as well as those allegedly guilty. It is this indiscriminate quality of electronic surveillance that is most to be fear.” *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the Permanent Select Comm. on Intelligence H. of Reps.*, 95th Cong. 191 (1978) (statement of Rep. Robert Drinan).

. . . reduce the threats posed by organized crime and terrorists.”²⁰⁶

Similarly, Kennedy repeatedly noted over the years that national security required protection. In summation on April 20, 1978, on the floor of the Senate, Kennedy stated that S. 1566 was “designed to strike a balance between the protection of national security and the protection of our human liberties and rights.”²⁰⁷ Indeed, in Kennedy’s case, his concern for protecting the security of the nation was such that he acceded to compromises in the legislation that arguably helped to unravel it, including the government’s ability to target American citizens absent a showing of the commission of a criminal act.²⁰⁸

For both Kennedy and Tunney, however, the concern about protecting national security did not trump the need to protect the fundamental right of American citizens to meaningfully participate in our democratic institutions. In fact, Kennedy’s effort to “strike the right balance” between national security and individual rights could not be achieved if the relationship between the government and the governed was not itself secure. That in turn required, in Kennedy’s words, that the citizenry be “publicly active,” capable of “dissent[ing] from official policy,” and “uninhibited” in their political lives.

The importance of the relationship of the government to the governed was also expressed in regard to the critique of FISA’s fundamental flaw—the structure established for its courts. Representative Ertel, who was vehemently opposed to any judicial involvement, in sharp contrast to Tunney, Drinan, and Kennedy, nonetheless expressed a view on which all of them could agree. Ertel spoke to FISA’s disenfranchisement of the citizenry from the judiciary and its inconsistency with the fundamentals of American democracy:

One of the distinctions between a civilized, democratic nation and others is an adherence to the rule of law Beginning with our Constitution, we have established an open judicial system which, in interpreting the law, must rationalize its legal interpretations in the ruling, which are subjected to public scrutiny. This legislation, for the first time in our history, will develop a hidden, secret body of law which will be available to only a very few people [whom we do not know] which is to guide the intelligence community If, by some chance, legal standards are established in this secret body of law, no one will know what they are.²⁰⁹

²⁰⁶ *Surveillance Technology: Joint Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and the Special Subcomm. on Science, Technology, and Commerce of the Comm. on Commerce S.*, 94th Cong. 1–2 (1975) (statement of Sen. John V. Tunney).

²⁰⁷ 124 CONG. REC. S.5995 (daily ed. Apr. 20, 1978) (statement of Sen. Edward Kennedy).

²⁰⁸ *See id.*

²⁰⁹ 124 CONG. REC. E.1015–1016 (daily ed. July 25, 1978) (statement of Rep. Allen Ertel).

The violation of Kennedy's *sine qua non* of a "publicly active" citizenry was apparent. Concluded Ertel: "The development of this secret body of law by our judicial system is alien to any theory of the rule of law. If we do not know what the law is, how do we make it better, how do we change, and how do we monitor it?"²¹⁰

Indeed, the ability to participate in and affect the political debate and process lies at the heart of Lesson Five. Throughout the FISA debates, this fact was stated dramatically over and over again, sometimes in dire tones by people with access to America's deepest held secrets such as Senator Frank Church, whose committee reports in the wake of Watergate remain seminal sources to this day. His analysis is stark, declaring that surveillance powers could:

at any time be turned around on the American people, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide . . . The NSA could "impose total tyranny [and] we must see to it this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross that abyss. That is the abyss from which there is no return."²¹¹

Senator Muskie put it more diplomatically at the very first hearing after the Watergate break-in:

In our democracy, the decision to invade the privacy of an American citizen or of anyone living in America must be made with a full regard for the constitutional rights which could thus be jeopardized. Such a decision should not be made lightly or arbitrarily by the Executive Branch It is government's first responsibility to safeguard the rights and liberties of its citizens.²¹²

Representative Drinan perhaps put it most cogently:

It should be remembered too that the liberty of the people is at least as important as the marginal increment in intelligence information which we acquire through the inherently indiscriminate method of

²¹⁰ *Id.*

²¹¹ John W. Whitehead, *The NSA: "The Abyss from Which There is no Return,"* TRUTHOUT (Aug. 25, 2013), <http://perma.cc/KZ27-Z7Y9>.

²¹² *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Comm. on the Judiciary S., 93rd Cong. 41 (1974) (statement of Rep. Edmond Muskie).*

electronic surveillance. As the District Judge in the *Pentagon Papers* case cogently observed: “The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions.”²¹³

The theme resonated throughout virtually all aspects of the FISA debate, particularly in the areas of greatest controversy: whether to require actual criminal conduct to secure a warrant to target U.S. citizens, a standard rejected in favor of conduct that might lead to criminal activity; whether notice should be given to those surveilled at any point in the process, a requirement that was discarded; and whether “minimization” requirements were adequate, the resolution of which failed to satisfy many, including those who ended up voting for FISA. The specifics of those debates need not be detailed here. New legislation and reforms will inevitably generate their own issues. The point is that in resolving complex issues, whether the relationship of the judiciary to surveillance requests or the rights of those surveilled, a prime consideration must be the impact on citizens’ ability to participate in the political process—a lesson FISA failed to abide in 1978.

Concluding Thoughts: Lessons Learned and a Blueprint for the Future

The importance of considering the past to construct the future could not be greater. Daily headlines bring new revelations and with them come court rulings and proposals for change. Within a week’s span in December 2013, a federal judge issued a sixty-two-page opinion that declared unconstitutional the broad metadata collection programs begun under President Bush and pursued with equal vigor by President Obama. President Obama’s Review Group on Intelligence and Communications Technology issued a 300-page report with forty-six recommendations, which was immediately hailed by civil liberties advocates. The Administration reacted cautiously to the report and then sought to block further federal court consideration of the constitutionality of its most pervasive electronic surveillance programs. And then, as if on cue, an interview with Edward Snowden appeared in the *Washington Post*.

A. Echoes of the Past

In each of those December 2013 events, echoes of past debates can be heard. Representative Drinan decried the “indiscriminate” nature of surveillance as its greatest evil.²¹⁴ In his recent decision in *Klayman v. Obama*, District Court Judge Richard J. Leon, holding unconstitutional metadata collection, opined that:

²¹³ *The Foreign Intelligence Surveillance Act of 1978 Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary H. of Reps.*, 95th Cong. 18–19 (1978) (statement of Rep. Robert Drinan).

²¹⁴ Drinan, *supra* note 157, at 94.

“I cannot image a more ‘indiscriminate’ and ‘arbitrary’ invasion than this systematic and high-tech collection and retention of personal data on virtually every citizen for purposes of querying and analyzing it without prior judicial approval.”²¹⁵

The President’s Review Group’s recommendations were generated by the same concerns reflected throughout the post-Watergate and FISA debates. The Review Group, in its report entitled “Liberty and Security in a Changing World,” demanded that the “nation must . . . live up to its promises to its citizens and to posterity.”²¹⁶ The Review Group reminded its readers that security included security from attack but also the right to be secure in one’s person, and wrote: “Both forms of security must be protected.” This parroted much the same thought as Judge Byrne’s during the Pentagon Papers trial: “The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions.”²¹⁷

Moreover, the Review Group’s words about the need for a proper balance between national security and individual rights echoed the words of Tunney, Drinan, and Clark. The Review Group wrote:

In a free society, public officials should never engage in surveillance in order to punish their political enemies; to restrict freedom of speech or religion; to suppress legitimate criticism and dissent; to help their preferred companies or industries; to provide domestic companies with an unfair competitive advantage; or to benefit or burden members of groups defined in terms of religion, ethnicity, race, and gender.²¹⁸

The Review Group suggested concrete steps to guarantee transparency and accountability to “promote public trust,”²¹⁹ recommending that “surveillance decisions should depend . . . on a careful assessment of the anticipated consequences, including the full range of relevant risks.”²²⁰ The Review Group added that “[s]uch decisions should also be subject to continuing scrutiny, including retrospective analysis, to ensure that any errors are corrected.”²²¹ These were the identical demands for specificity, answers to hard questions, and oversight eloquently advocated by many during the FISA debates—demands that the FISA compromise ultimately did not meet.

²¹⁵ *Klayman v. Obama*, 957 F. Supp. 2d.1, 42 (D.D.C. 2013).

²¹⁶ REVIEW GROUP ON INTELLIGENCE AND COMMUNICATION TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (2013).

²¹⁷ *Id.* at 15.

²¹⁸ *Id.* at 16.

²¹⁹ *Id.* at 18.

²²⁰ *Id.* at 50.

²²¹ *Id.* at 51.

Edward Snowden's most recent press interview also recalls the past. "All I wanted was for the public to be able to have a say in how they are governed," he noted, reprising the exhortations of the Kennedys and Tunneys and Muskies of the post-Watergate era.²²² Indeed, Snowden's comments are sum and substance of Lesson Five gleaned from FISA's times: The need to pay attention to the relationship of the government and governed to guarantee citizens' "publicly active" and "uninhibited political" lives in which they can "dissent from official policy."²²³

The truth is that over the past thirty-six years the problems, concerns, and themes have remained identical. What has changed is the urgency to find a solution, accelerated by technological advances in the midst of a permanent War on Terror unilaterally declared by President George W. Bush and pursued with the approval of every Congress since the 9/11 attacks.

B. A Blueprint for the Future

Just as the past teaches important lessons, it also provides the basics of a blueprint for a path forward. Early on in the electronic surveillance debate, *before* S. 3197 was introduced and morphed into S. 1566 and *before* endless hearings and debates resulted in compromises and a fundamentally flawed FISA, many members of Congress laid out the basics for a legislative solution that could lead to surveillance decisions consistent with the fundamental values of the Republic, rooted in fact, and made by individuals accountable to those charged with oversight. Those basics held out the promise of a true sharing of responsibility among the branches of government tempered by the adversarial tensions that the Framers intended. Although different members of Congress stated them in different ways, the essence of their suggestions was the same: recognition of the need for measures to protect national security within a regulatory framework that promoted executive accountability through meaningful judicial review and congressional oversight. In the heat of post-Watergate battles and prior to the enactment of the compromise FISA legislation signed by President Carter nearly six years later, there was no language that suggested secret, non-adversarial proceedings. The recommendations were unvarnished and undiluted and bear repeating here:

²²² Bridie Jabour, *Edward Snowden Declares "Mission Accomplished" in Moscow Interview*, THE GUARDIAN (Dec. 24, 2013), <http://perma.cc/3YQT-SGD6>.

²²³ S. REP. NO. 95-604, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3906.

- An application for a court order signed by the President identifying and specifying the precise information sought including certainty regarding the national security justification for the request.²²⁴
- An order of limited duration that respects the dictates of the Fourth Amendment signed by a federal judge whose name would be unknown to the Executive Branch at the time of the application.²²⁵
- A determination that eavesdropping on innocent conversations would be minimized in effective ways²²⁶ and a directive to the Attorney General “to devise regulations to safeguard the right of privacy of persons overheard.”²²⁷
- A bar on national security surveillance being used “to gather evidence for a criminal prosecution.”²²⁸
- Regular record keeping, including the number, duration, and cost of all national security surveillance every three months²²⁹ and a “clear understanding [by] those engaging in surveillance that they risk the possibility of prosecution.”²³⁰
- The ability of congressional committees to engage in careful review.²³¹
- Notification to all U.S. citizens surveilled within ninety days “as an extra safeguard unless a judge determines that disclosure would endanger national security.”²³²
- Recognition that the Executive Branch has no inherent power to engage in warrantless surveillance.²³³

The irony is that had these basic recommendations been followed the abuses that exist to this day might have been avoided and there might be no need

²²⁴ See *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Comm. on the Judiciary S.*, 93rd Cong. 42 (1974) (statement of Rep. Edmond Muskie).

²²⁵ *Warrantless Wiretapping: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary S.*, 92nd Cong. 55 (1972) (statement of Ramsey Clark, former Attorney General); Muskie, *supra* note 223.

²²⁶ Clark, *supra* note 224 (“a full justification by all interested agencies”).

²²⁷ *Electronic Surveillance for National Security Purposes Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Comm. on the Judiciary S.*, 93rd Cong. 41 (1974) (statement of Sen. Edward Kennedy).

²²⁸ *Id.*

²²⁹ Muskie, *supra* note 223, at 42.

²³⁰ Clark, *supra* note 224, at 55–56.

²³¹ *Id.* at 55.

²³² Muskie, *supra* note 223.

²³³ The essence of these recommendations was also stated by Representative Drinan at the time of FISA’s passage. Despite his vehement opposition to the legislation, he stated: “I do not wish to leave the impression that I am totally against any legislation to control electronic surveillance. On the contrary, it seems to me that an alternative could easily be drafted. Such a measure would have three essential features: (1) repeal the so-called “reservation clause” [which FISA ultimately did]; (2) require the use of [Fourth Amendment safeguards]; and (3) strengthen the minimization standards and remedies available to private persons for unlawful surveillance.” *House Subcomm. on the Courts, Civil Liberties and Justice*, 95th Cong. 2d. 18 (1978) (view of Rep. Robert Drinan on H.R. 7308).

to learn from the lessons the FISA debates urgently counsel. The opportunity to heed these basic ideas, however, exists again. The recommendations of many, including the President's Review Group, mirror the basics proposed forty years ago. The concepts are the same: refusing to sacrifice America's fundamental values in the necessary pursuit of national security; attempting to not repeat history; putting in place checks and balances on each of the branches of government; and, ensuring meaningful citizen participation in democratic decision-making. If implemented, they could truly help us to craft a solution to resolve today's surveillance crisis.

C. A Final Thought

The urgency of the moment bears emphasis. On Monday morning, June 23, 1975, Senator Tunney gavelled to order his Constitutional Rights and Science, Technology and Commerce subcommittees and uttered words that referenced the ongoing Cold War with the Soviet Union:

We are internalizing the cold war—turning upon ourselves its attitudes, techniques, and technologies. If that is true, then the White House enemies list was not an aberration, but a brief reflection of reality. And certainly the revelations of the recent past reinforce this belief by demonstrating the inherent danger of concentrating extraordinary powers behind a rigid curtain of secrecy. Continued ignorance of surveillance technology—its size and structure as a separate industry, the justifications for its growth, its impact on society—could prove to be an Orwellian catastrophe for our privacy and our freedoms.²³⁴

Those chilling words should haunt us today: The likes of Stellar Wind, TSP, and Prism “may not be aberrations” but “reflections of a reality” that we have “internalized” in an endless War on Terror. They too may demonstrate “the inherent danger of concentrating extraordinary powers behind a rigid curtain of secrecy.” They too may portend a “an Orwellian catastrophe for our privacy and our freedoms.”

It is said that in 1789, Benjamin Franklin, elderly and ill, upon leaving the Constitutional Convention was asked by a woman passerby: “What have you wrought?” Franklin replied: “A Republic madam, if you can keep it.”²³⁵

²³⁴ See Tunney, *supra* note 206.

²³⁵ Benjamin Franklin, Constitutional Convention of 1787, <http://perma.cc/57BF-65D3>.