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

Prepared Statement of

Prof. Robert F. Turner, SJD

Co-Founder and Associate Director

CENTER FOR NATIONAL SECURITY LAW

University of Virginia School of Law

before the

House Committee on Oversight and Government Reform

Thursday, May 14, 2009 • 10:00 AM

Rayburn House Office Building • Room 2154

About the Witness

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

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

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

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

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

• • • •

MR. CHAIRMAN, it is an honor and a pleasure to appear before the Committee on Oversight and Government Reform this morning to discuss H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009." Let me apologize for any typos or other errors you may find in my prepared statement, which I will submit for the record: since I received your invitation on Tuesday and I was already committed to preparing testimony on another topic for a Senate Judiciary subcommittee hearing that took place yesterday morning, my statement was of necessity prepared in some haste.

The purpose of H. 1507, as I understand it, is to extend to employees of the Intelligence Community protections already embodied in federal law for "whistleblowers" in other departments. Put differently, this is a proposed statute that would authorize employees of the Executive Branch to communicate classified national security information to members of several congressional committees irrespective of the views of their agency or departmental superiors or the President.

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

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

I say the bill is unconstitutional with great confidence, having spent more than four decades studying, teaching, and writing about the separation of constitutional powers in the national security realm. I addressed these issues while serving as national security adviser to a member of the Senate Foreign Relations Committee more than three decades ago, and I wrote a 250 page-legal/historical memorandum while a lawyer in the White House more than twenty-five years ago entitled: "Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities."[2] My 1700-page doctoral dissertation was on "National Security and the Constitution" and had a special emphasis on intelligence issues. It included more than 3,000 footnotes – mostly to primary sources. None of us has the time to go through those lengthy writings right now, but please allow me to mention a few of the reasons for my conclusion that this bill is unconstitutional.

---

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

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

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

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

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

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

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done will therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest.*[7]

---

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

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

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

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

[7] FEDERALIST No. 64, at 434-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

That the First Congress shared this understanding is made apparent by reading Volume One of *U.S. Statutes at Large*. Despite the clear requirements of Article I, Section 9 of the Constitution, requiring that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," when the First Session of the First Congress appropriated money for foreign affairs it provided:

> [T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .[8]

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

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the *duties* are by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties . . . . ***From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President***.[9]

Origins of "Executive Privilege" Over National Security Documents

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

> Washington convened his cabinet to determine how to respond to this first- ever request for presidential materials related to national security by a congressional committee. The President wanted to discuss whether any harm would result from public disclosure of the

[8] 1 Stat. 129 (1790).
[9] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. Ed. 1903) (bold emphasis added).

> information and, most pertinently, whether he could rightfully refuse to submit documents to Congress.[10]

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

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently we're to exercise a discretion. Fourth, that neither the committees nor House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[11]

Rozell continues:

> Washington eventually determined that public disclosure of the information would not harm the national interest and that such disclosure was further necessary to vindicate General St. Clair. Although Washington chose to negotiate with Congress over the investigating committee's request and to turn over relevant documents to Congress, his administration had taken an affirmative position on the right of the Executive Branch to withhold information [from Congress].[12]

This position was unanimous, and was reiterated during the controversy over whether Executive Branch should cooperate with a Senate motion "requesting" from President Washington correspondence "between the Minister of the United States at the Republic of France [Gouverneur Morris], and said Republic, and between said Minister and the Office of Secretary of State."[13] Washington once again sought the advice of his cabinet:

> General Knox is of the opinion, that no part of the correspondence should be sent to the Senate. Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the president may choose to withhold. Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the president thinks is improper, should not be sent.[14]

---

[10] MARK ROZELL, EXECUTIVE PRIVILEGE 33 (1994).

[11] 1 WRITINGS OF THOMAS JEFFERSON 189, 190. (Paul Leicester Ford ed., Fed. Ed. 1905).

[12] ROZELL, *supra* note 10, at 33.

[13] *Id.* at 34.

[14] *Id* (citation omitted).

Attorney General William Bradford, who was not present at the meeting, wrote that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed."[15] Having sought the input of his cabinet, the President made his decision. As Rozell writes:

> On February 16, 1794, Washington responded as follows to the Senate's request: "After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential."
>
> Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. He believed that information damaging to the "public interest" could constitutionally be withheld from Congress. The Senate never challenged the President's authority to withhold the information.[16]

Two years later, in 1796, President Washington not only reserved the right to withhold national security information from Congress but exercised it when the "House passed a resolution requesting from Washington information concerning his instructions to the U.S. minister to Britain regarding the treaty negotiations" of the controversial Jay Treaty, which the Senate had consented to ratify by the narrowest of margins the previous year.[17] Rozell writes that the "resolution raised the issue of the House's proper role in the treaty-making process. Washington refused to comply with the House request and explained his reasons for so deciding in a message to the House of Representatives":[18]

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

[15] *Id.*
[16] *Id.* at 34-35.
[17] *Id.* at 35.
[18] *Id.*

> foreign power would be to establish a dangerous precedent."[19]

In conclusion, Washington reasoned that "the boundaries fixed by the Constitution between the different departments should be preserved," declaring "a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."[20]

During this debate, Representative James Madison – often referred to as the "Father of our Constitution" – argued that each Department was to judge for itself what documents to share with the other. Only a single member of the House argued the Congress had an absolute right to Executive documents—based upon its power of impeachment. However, several members argued that had the dispute actually involved a possible impeachable offense, such a right to evidence might exist.

Some modern students of Executive Privilege point to the 1974 Watergate case, *United States v. Nixon*, as evidence that traditional concepts of Executive Privilege have been narrowed. But in *Nixon* the Supreme Court *repeatedly* distinguished its holding from a setting involving national security secrets, emphasizing that the President did "not place his claim of privilege on the ground that they are military or diplomatic secrets."[21] The *Nixon* Court affirmed that the doctrine of Executive Privilege was "constitutionally based" and noted that "The President's need for complete candor and objectivity from advisers calls for great deference from the courts."[22] But where issues of national security are not involved, the privilege is not absolute and courts must *balance* the competing claims in the interest of justice. Nothing the Court said in *Nixon* called into question its earlier decision in *Reynolds* that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.[23]

The Grant of "Executive" Power to the President

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

> The Constitution . . . . has declared that "the Executive powers shall be bested in the President," submitting only special articles of it to a negative by the Senate . . . .

[19] 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194.
[20] ROZELL, *supra* note 10, at 35 (citation omitted).
[21] United States v. Nixon, 418 U.S. 683, 710 (1974).
[22] *Id.* at 706 n.36.
[23] United States v. Reynolds, 345 U.S. 1, 7-8 (1952) (emphasis added).

> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. . . .
>
> The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them . . . .[24]

It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the "secrets" of the Executive branch.[25]

Three days later, Washington recorded in his diary that he had spoken with Representative James Madison and Chief Justice John Jay about Jefferson's memo, and both agreed that the Senate had "no Constitutional right to interfere" with the business of diplomacy save for the specific roles set forth in the Constitution, "all the rest being Executive and vested in the President by the Constitution."[26] (Madison had already recognized the importance of the grant of executive power during a House debate the previous year, while Jefferson was still representing the new nation in Paris.)

In 1793, Alexander Hamilton wrote that "[t]he general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument."[27] From this, Hamilton concluded that "as the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution."[28]

For those who might wonder where such interpretations of "executive" power came from, the answer is apparent from a reading of the scholars whose writings most influenced the Framers. In his *Second Treatise on Civil Government*—described by Jefferson as being "perfect as far as it goes"[29] —John Locke coined the term "federative" power to describe the "the management of the *security* and *interest of the publick without*, with all those that it may receive benefit or damage from"; he argued that, of necessity, this power needed to be entrusted to the Executive. Locke reasoned:

> And though this *federative power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive;

---

[24] 16 PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961) (emphasis in original).
[25] *Id*. at 382 n.8.
[26] 4 DIARIES OF GEORGE WASHINGTON 122 (John C. Fitzpatrick ed., 1925).
[27] 15 PAPERS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed., 1969).
[28] *Id.*
[29] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 449.

> and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.[30]

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

> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measures. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.[31]

Even before mentioning the business of executing laws enacted by the legislature, Montesquieu–whom James Madison in *Federalist* No. 47 described as the celebrated authority "who is always consulted and cited" on issues of separation of powers—described the "executive" power as "dependent on the law of nations" by which the executive magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."[32] The management of foreign intercourse was also seen as "executive" by others who were widely read by the Framers, including Adam Smith[33] and William Blackstone—who in the first volume of his *Commentaries on the Laws of England* wrote that, "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . ."[34]

---

[30] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 147 (P. Laslett ed., rev. ed. 1963) (emphasis in original).
[31] FEDERALIST No. 64 at 435-36 (John Jay) (Jacob E. Cooke ed., 1961) (emphasis added).
[32] 1 MONTESQUIEU, SPIRIT OF THE LAWS 151 (Thomas Nugent trans., rev. ed. 1900).
[33] ADAM SMITH, LECTURES ON JURISPRUDENCE 204-09 (1978).
[34] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

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

> State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers**.** *The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth.* The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.[35]

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

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

[35] CHARLES THACH, THE CREATION OF THE PRESIDENCY 1775-1789, at 52 (1922).

> to drawing his teeth and talons after he shall have entered. [36]

Eleven days after the new Constitution went into effect, Jefferson wrote to Madison: "The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. The *tyranny of the legislatures* is the most formidable dread at present . . . ."[37]

As a Federalist representative in the House of Representatives in 1800, John Marshall observed that under our Constitution the President was "the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole *Executive power*." Paraphrasing the words of Blackstone, the future chief justice added: *In this respect, the President expresses constitutionally the will of the nation . . .* ."[38]

As the nation's chief justice three years later, Marshall wrote in what is widely regarded as the most famous Supreme Court decision of all, *Marbury v. Madison*, that:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive*.[39]

If there is any doubt Marshall was talking primarily about the President's exclusive constitutional control over the nation's external intercourse, the next lines in this landmark Supreme Court opinion should dispel them:

> The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . The acts of such an officer, as an officer, can never be examinable by the courts.[40]

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

---

[36] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245-46 (1782), *available at*: http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all.

[37] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 659, 661.

[38] 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).

[39] Marbury v. Madison, 5 U.S. [1 Cranch] 137, 165-66 (1803).

[40] *Id.* at 166.

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it*.[41]

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

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

[41] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

> official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[42]

This deference to presidential discretion in foreign affairs was recognized by both the courts and Congress well into the second half of the twentieth century. In the 1953 case of *United States v. Reynolds*, the Supreme Court discussed the Executive privilege to protect national security secrets, noting that: "Judicial Experience with the privilege which protects military and state secrets has been limited in this country . . . ."[43] But the Court recognized an absolute privilege for military secrets, explaining:

> In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake*."[44]

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

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

> So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that *he is final judge of what information he shall entrust to the Senate as to our relations with other governments*.[45]

Mr. Chairman, the understanding that the President is the "sole organ" of our government for what John Jay called "the business of intelligence" – the most sensitive element of diplomacy and war – was unchallenged and embraced by all three branches from the days of George Washington until the Vietnam War. This was not an unsettled issue, and the basis of this authority was understood by all to be a grant of constitutional power that could not be taken away by a mere statute.

---

[42] *Id*. at 319-21.
[43] *United States v. Reynolds*, 345 U.S. 1, 7 (1953).
[44] *Id.* at 11.
[45] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 211-12 (4th rev. ed. 1957) (emphasis added).

Origins of Congressional Usurpation of Presidential Power Over Intelligence

As far as I have been able to determine, the campaign to have Congress usurp presidential authority over foreign intelligence first came from a radical leftist named Richard J. Barnet, who was instrumental in the founding of the Institute for Policy Studies. This is a group that at one point assisted the notorious traitor and cashiered CIA spy Phillip Agee, who made a career of working with the Cuban DGI (intelligence service) and the Soviet KGB to publicize the name of western intelligence operatives. After several U.S. and allied intelligence officers were murdered – including Richard Welch, our CIA station chief in Athens – Congress enacted the Intelligence Identities Protection Act of 1982,[46] making disclosure of such information a federal felony.

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

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing Congressional committee to review the classification system and to monitor secret activities of the government such as the CIA. Unlike the present CIA review committee, there should be a rotating membership.[47]

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

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

I have not the slightest doubt that supporters of this legislation will be able to bring before you a long line of distinguished academics who will confidently assure you this bill is constitutional. They will be every bit as honorable as I am, and some no doubt far

[46] 50 U.S.C. § 421–26 (1982).
[47] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-79 (1969).

more intelligent. And they will also likely be oblivious to the historical details I have briefly summarized in this statement.

In the end, the decision is yours. The Founding Fathers wisely entrusted legislative judgments to the two legislative chambers, providing in Article I, Section 6, that your legislative acts "shall not be questioned in any other Place."[48] To paraphrase Chief Justice Marshall's comment[49] on presidential discretion over foreign affairs in *Marbury*, for these decisions you are accountable only to your constituents in your political character – which is to say, if they conclude you have undermined our national security, they may well vote for a different candidate in the next election – and to your own conscience.

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

> Although portrayed as an effort "to fulfill" – not to alter, amend or adjust – "the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war….
>
> By enabling Congress to require – by its own inaction – the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
>
> …[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.
>
> The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.[50]

Just last July, the bipartisan National War Powers Commission – that included among its distinguished members your former colleague Lee Hamilton, who chaired both the House Permanent Select Committee on Intelligence and the Foreign Affairs Committee –

[48] U.S. CONST., Art. I, § 6.
[49] *See* discussion, *supra* page 12.
[50] This statement appears in the *Congressional Record* of May 19, 1988, on pages 6177-78.

unanimously concluded that the War Powers Resolution is "unconstitutional" and ought to be repealed.[51] Yet I have detected little interest in either branch to terminate this unseemly usurpation of the constitutional powers of the President.

We are not just talking about constitutional technicalities here, but about unlawful conduct by the Legislative branch that led directly to the slaughter of 241 sleeping Marines in Beirut on October 23, 1983 – four Marines fewer than died on the most costly day of the Vietnam War. It didn't have to happen, but partisan Democrats – and the partisan nature of the debate was noted repeatedly by the *Washington Post* and other papers – thought they could improve their prospects for the 1984 elections by attacking President Reagan's efforts to bring peace in an important part of the Middle East. Working in cooperation with the British, French, and Italians, the President deployed a contingent of Marines to Lebanon as a "presence" force to try to keep the country sufficiently stable so that the rival factions could attempt to negotiate peace. When the Senate voted to extend the deployment (which had nothing to do with the power of Congress to "declare War") by 18 months, only two Democrats supported the President. And it was made very clear that if there were any further American casualties in Beirut, Congress could reconsider the vote at any time. Having unwittingly placed a bounty on the lives of our Marines, Congress set the stage for the tragedy that soon followed. Indeed, shortly before the deadly attack we intercepted a message between two radical Muslim groups that said: "If we kill 15 Marines, the rest will leave."[52]

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

I was a Senate staff member at the time of the Church Committee hearings, and I sat through some of them. I remember a lot of talk about CIA "assassinations," but, if I had not taken the time to read the lengthy volume on that topic in their final report, I would not know that the Committee could not find a single instance in which the CIA had ever "assassinated" anyone. Indeed, both Directors of Central Intelligence Richard Helms and William Colby had on their own initiative issued CIA directives prohibiting any agency involvement with "assassination" years before the Church Committee began its work. One recent study of hundreds of newly de-classified CIA "family jewels" documents that was published in the *Indiana Law Journal* concluded that but a single program – the testing of LSD on unaware subjects – was clearly illegal at the time of the Church hearings, and that program had been terminated during the Kennedy Administration. [53]

---

[51] The Commission's report can be found on line at: http://millercenter.org/policy/commissions/warpowers

[52] For a more detailed discussion of this issue, see ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-44 (1991).

[53] Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 IND. L. J. 639 (2009).

While I'm on the topic of legislative lawbreaking, I can't fail to mention the legislative vetoes that still permeate the statute books more than twenty-five years after the Supreme Court declared them to be unconstitutional in *INS v. Chadha*.[54] This is an issue of special interest to me, because as a Senate staff member in 1976 – seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional – I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.[55]

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

The disrespect for the rule of law engendered by statutes like the War Powers Resolution has clearly led some members to attempt further usurpations of the constitutional powers of the President – as Madison and Jefferson feared more than two centuries ago.[56] The decision of how seriously you take your Oath of Office is not mine to make. You have asked for my expert testimony on the pending legislation, and I have tried hard to provide you not only with my opinions but also with some of the historical and judicial authority that has led me to conclude that H.R. 1597 is flagrantly unconstitutional. How you individually deal with this information is a decision each of you must make.

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

• • • •

[54] 462 U.S. 919 (1983).

[55] The statement appears in the *Congressional Record* of June 11, 1976, from pages 17,643 to 17,646, *available at* http://www.virginia.edu/cnsl/pdf/Griffin-Congressional-Record_6-11-1976.pdf .

[56] *See* discussion, *supra* page 12.