

John Bassett Moore Society of International Law

The Foreign Intelligence Surveillance Act and the “Lone Wolf” Terrorist: How Congress Inadvertently Facilitated the 9/11 Attacks



Prof. Robert F. Turner
October 28, 2009

Enjoy your lunches, but
FASTEN YOUR SEAT BELTS



John Locke

on Executive Control of Foreign Affairs

§147. These two Powers, Executive and Federative, though they be really distinct in themselves, yet one comprehending the Execution of the Municipal Laws of the Society within its self, upon all that are parts of it; the other **the management of the security and interest of the publick without**, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative Power in the well or ill management of it be of great moment to the commonwealth, yet it is **much less capable to be directed by antecedent, standing, positive Laws**, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [sic] good. . . .

John Locke

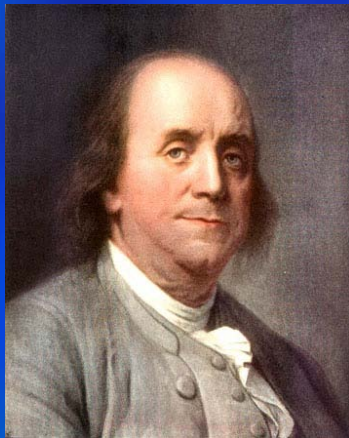
on Executive Control of Foreign Affairs

[W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation 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.

—J. Locke, *Second Treatise of Government*

Secrecy and the Continental Congress

**“We find, by fatal experience, the
Congress consists of too many
members to keep secrets.”**



—Benjamin Franklin
Committee of Secret Correspondence
(unanimous report, 1776)

John Jay on Foreign Affairs Discretion (*Federalist 64*)

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.**

John Jay on Control of Intelligence (*Federalist 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.**”**

Professor Quincy Wright



“The need of concentration of power for the successful conduct of foreign affairs was dwelt upon in the works of John Locke, Montesquieu, and Blackstone, the political Bibles of the constitutional fathers.”

Quincy Wright,
The Control of American Foreign Relations 363 (1922).

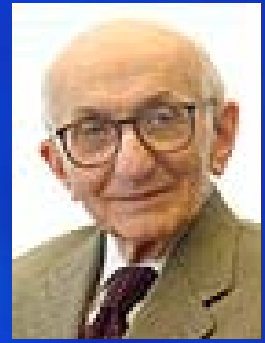


Prof. Edward Corwin on Executive Prerogative

“The fact is that what the Framers had in mind was . . . the ‘balanced constitution’ of **Locke, Montesquieu, and Blackstone**, which carried with it the idea of a *divided initiative in the matter of legislation and a broad range of **autonomous executive power or ‘prerogative.’**”*

Edward S. Corwin, *The President: Office and Powers*
14-15 (4th Rev. ed. 1957) (emphasis in original).

Prof. Lou Henkin on “Executive Power”



“The **executive power** . . . was not defined because it was well understood by the Framers raised on **Locke, Montesquieu and Blackstone.**”

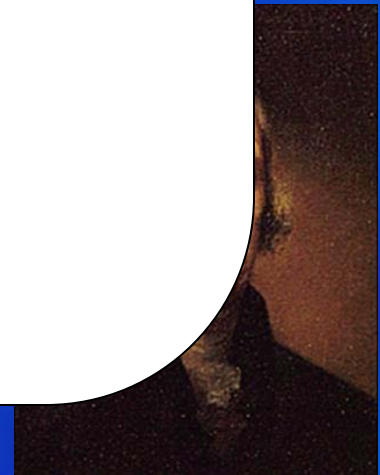
- *Foreign Affairs and the Constitution* 43 (1972).

**How do we know the
Founding Fathers
accepted this theory of
“Executive Power”?**



How do we know the
Founding Fathers
accepted this theory of
“Executive Power”?

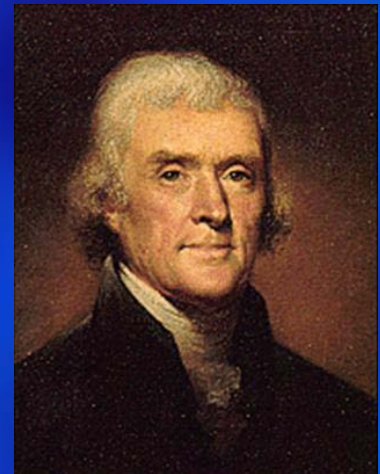
**Because they
told us so.**



Thomas Jefferson

Memorandum to President Washington (April 1790)

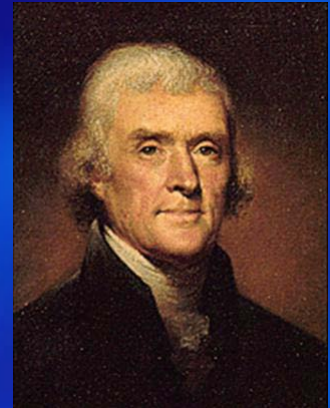
“The Constitution has declared that ‘**the Executive power** shall be vested in the President,’ submitting only special articles of it to a negative by the Senate



Thomas Jefferson

Memorandum to President Washington (April 1790)

“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.”



Washington, Madison, and Chief Justice Jay on the Scope of “Executive Power” (1790)

“Tuesday, 27th [April 1790]. Had some conversation with **Mr. Madison** on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—**His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that they have no Constitutional right to interfere with either**, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, **all the rest being Executive and vested in the President by the Constitution.**”

- 4 *Diaries of George Washington* 122 (Regents’ Ed. 1925).

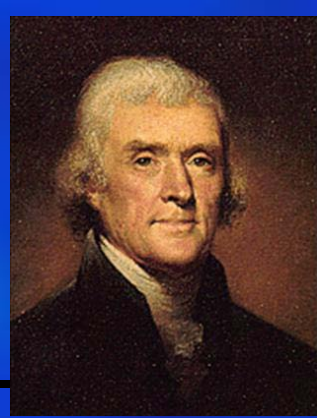
Alexander Hamilton on “Executive Power” (1793)



“[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are **exceptions** out of the general “**executive power**” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”

15 *The Papers of Alexander Hamilton* 39
(Harold C. Syrett ed., 1969).

Thomas Jefferson on Appropriations
letter to Secretary of the Treasury Albert Gallatin
(19 February 1804)



The Constitution has made the Executive the organ for managing our intercourse with foreign nations....

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.**

- *11 Writings of Thomas Jefferson* 5, 9, 10 (Mem. ed. 1903).

First Appropriations Bill for Foreign Intercourse (1 July 1790)

“[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...”

- U.S. Statutes at Large, vol. 1, p. 129 (1790).

Rep. Henry Clay (1818)

“There was a contingent fund of \$50,000 allowed to the President by law, which he was **authorized to expend without rendering to Congress any account of it** — it was confided to his discretion, and, if the compensation of the Commissioners had been made from that fund, **...it would not have been a proper subject for inquiry. ...**”

Rep. Forsyth added during the debate: “It was true the President might have taken it out of the secret service fund, and no inquiry would have been made about it. ...”

—32 *Annals of Cong.* 1466 (1818).

Marbury v. Madison

(Marshall, C.J.)

“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. . . . [W]hatever 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.****

”



Marbury v. Madison

(Marshall, C.J.)



“The subjects are political. They respect the **nation**, not individual rights, and **being entrusted to the executive, the decision of the executive is conclusive**. The application of this remark will be perceived by adverting to the **act of congress 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.**”

- *Marbury v. Madison* (Marshall, C.J.)

SFRC Chairman J. William Fulbright on Executive Preeminence in Foreign Policy (1959)

“The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs ‘which the Constitution does not vest elsewhere in clear terms.’”

Shortly Thereafter, Congress Began Usurping Presidential Power

E.g.,

- War Powers Resolution
- Hughes-Ryan Amend (covert action)
- FISA
- Legislative vetoes & conditional appropriations re foreign affairs

Senate Majority Leader George Mitchell (1988)

“[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.”

Congressional Record, 19 May, 1988.

Unanimous Conclusions of 2008 National War Powers Commission

““One topic on which a broad consensus does exist is that the War Powers Resolution of 1973 does not provide a solution because it is at least in part **unconstitutional**”

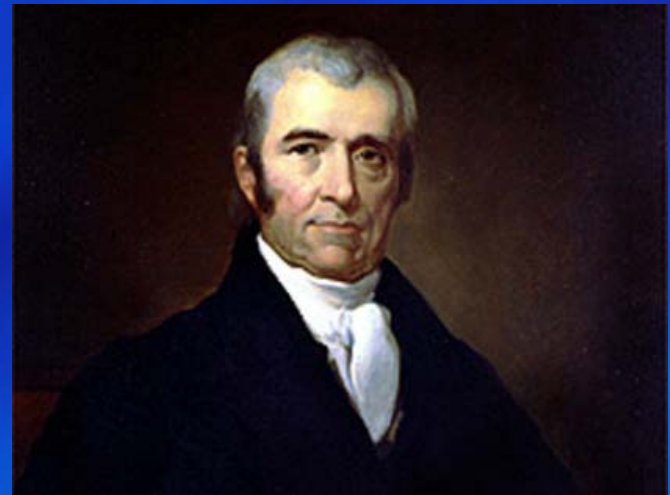
-NATIONAL WAR POWERS COMMISSION
REPORT 6

Can Congress Take Away the President's Constitutional Power by Statute?

Chief Justice John Marshall

Marbury v. Madison (1803)

“[A]n act of the legislature,
repugnant to the constitution,
is **void.**”



Prof. Quincy Wright on Congressional Foreign Policy Making

“Declarations of foreign policy may be made by Congress in the form of joint resolutions, but such resolutions are not binding on the President. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in mandatory terms and in defense of his independence the President has frequently vetoed them.”

- *The Control of American Foreign Relations* 278 (1922).

Barenblatt v. United States

360 U.S. 109 (1959).

“Congress...cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the executive.”

Wiretaps and Electronic Surveillance



Katz v. United States

389 U. S. 347 (1967)

FOOTNOTE 23:

“Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the **national security** is a question not presented by this case.”

1968 Omnibus Crime Control and Safe Streets Act

"Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States"

Title 18 U.S.C. § 2511(3)

Keith Case

U.S. v. U.S. District Court, 407 U.S. 297 (1972)

“[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, **within or without this country**. . . .

“We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only 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**.”

Keith Case

U.S. v. U.S. District Court, 407 U.S. 297 (1972)

“Given these potential distinctions between Title III criminal surveillances and those involving the **domestic** security, **Congress may wish to consider protective standards for the latter** which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”

Congress Misrepresented Supreme Court's "Invitation"

The Supreme Court in *Keith* invited Congress to consider enacting new legislation governing warrants for domestic national security wiretaps. Instead, Congress decided to seize control over **foreign** intelligence activities (FISA).

Atty. Gen. Griffin Bell

(Carter Admin.) to HPSCI (1978)

“The current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that ***this [FISA] does not take away the power [of] the President under the Constitution.***”



Foreign Intelligence Surveillance Court of Review (2002)

“The *Truong* court, as did **all the other courts to have decided the issue**, held that the **President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information**. . . . We take for granted that the President does have that authority and, assuming that is so, **FISA could not encroach on the President’s constitutional power**.

Partisan Debate Under the War Powers Resolution Contributed to al Qaeda's Decision to Attack Us

War Powers Resolution and 1983 Peacekeepers in Beirut

When Reagan sent peacekeepers to Beirut, Democrats invoked WPR in hopes of gaining advantage for 1984 elections.

The deployment was not even arguably a usurpation of the power to “declare War.”

Congress Signals Weakness

“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressman would immediately reconsider their support.”

Knickerbocker & Southerland, “Congress: A Wary ‘Aye’ on Marines,”
Christian Science Monitor, 22 Sept. 1983, p. 1.

Congress Signals Weakness

“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressman would immediately reconsider their support.”

Knickerbocker & Southerland, “Congress: A Wary ‘Aye’ on Marines,”
Christian Science Monitor, 22 Sept. 1983, p. 1.

Terrorists Told To Kill Marines

“[U.S. intelligence intercepted]...a radio message between two Moslem militia units: ‘If we kill 15 Marines, the rest will leave.’”

“Marines Draw a Bead on Snipers,” U.S. News & World Report, 31 October 1983, p. 13.

October 23, 1983

At dawn a terrorist truck loaded with explosives killed 241 sleeping marines at the BLT Headquarters in Beirut, Lebanon.

Shortly thereafter, the remaining marines were withdrawn.

“My God!
They’ve nuked the Yanks!”



Effect of Beirut Bombing on Osama bin Laden

In 1998, bin Laden told an AP reporter in Afghanistan that the American withdrawal following the Beirut bombing showed him that America was unwilling to accept casualties.

FISA Hampered Efforts to Prevent 9/11

FBI Whistleblower Coleen Rowley

Named *Time* “Person of the Year” in 2002 for scathing memo to FBI Dir. Robert Muller over failure of FBI Hq. lawyers to even request the FISA warrant she requested to examine Moussaoui’s laptop. Congress and media were outraged at FBI.



FBI Whistleblower Coleen Rowley

THE REST OF THE STORY

Rowley was *clueless* about FISA.

Didn't know **Congress had failed to foresee** danger of "lone wolf" terrorist like Moussaoui.

FBI merely obeyed the law.

FISA amended in 2004 to permit surveillance of lone wolf terrorists.



FISA Defined “Agent” of a “Foreign Power” Narrowly

The 1978 HPSCI Report on FISA emphasizes that the term “agent of a foreign power” intentionally *excluded* “mere sympathizers, fellow-travelers, or persons who may have merely attended meetings of the group”

— 1 H. REP’T NO. 95-1283 at 34.

FISA Prohibits Surveillance
Because Suspect Believes in Radical Islam
(50 U.S.C. § 1804)

“[N]o United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States”

The Attempt to Tie Moussaoui to Ibn Khattab

There was an allegation Moussaoui while in France urged a friend to go fight in Chechnya (where he died).

But even had Khattab's rebel group engaged in terrorism against Russian forces in Chechnya, to be a "foreign power" must be engaged in "international" terrorism. (Designation would have taken months they didn't have – "speed and dispatch.")

FBI and CIA could find no information linking Moussaoui to any foreign power until after 9/11.

Senator Specter's FISA Bill S. 2453 (2006)

“Congress finds the following:

For days before September 11, 2001, the Federal Bureau of Investigation suspected that confessed terrorist Zacarias Moussaoui was planning to hijack a commercial plane. **The Federal Bureau of Investigation, however, could not meet the requirements to obtain a traditional criminal warrant or an order under the Foreign Intelligence Surveillance Act of 1978 to search his laptop computer.”**

Tying the President's Hands

Hypothetical

“Good afternoon, ladies and gentlemen. My name is Abdullah, and I share the religious views of Osama bin Laden and believe that membership in al Qaeda is mandatory for all true Muslims. It is my hope and prayer that all infidels will perish in the most painful manner, starting here in the United States.”

Is that speech protected by the First Amendment?

Should the United States government be permitted to seek a warrant to learn more about this individual and his contacts with al Qaeda?

Senators Patrick Leahy, Charles Grassley, and Arlen Specter

2004 SJC Report

3. FBI's Misunderstanding of Legal Standards Applicable to the FISA

*The FISA Statutory Standard: "Agent of a Foreign
Power"*

[I]n the Moussaoui case, to obtain a FISA warrant the FBI had to collect only enough evidence to establish that there was "probable cause" to believe that Moussaoui was the "agent" of an "international terrorist group" as defined by FISA.

. . . .

Senators Patrick Leahy, Charles Grassley, and Arlen Specter

2004 SJC Report

In making this evaluation, **the fact**, as recited in the public indictment, that **Moussaoui “paid \$6,800 in cash” to the Minneapolis flight school, without adequate explanation for the source of this funding, would have been a highly probative fact bearing on his connections to foreign groups.**

The Church-Pike Hearings

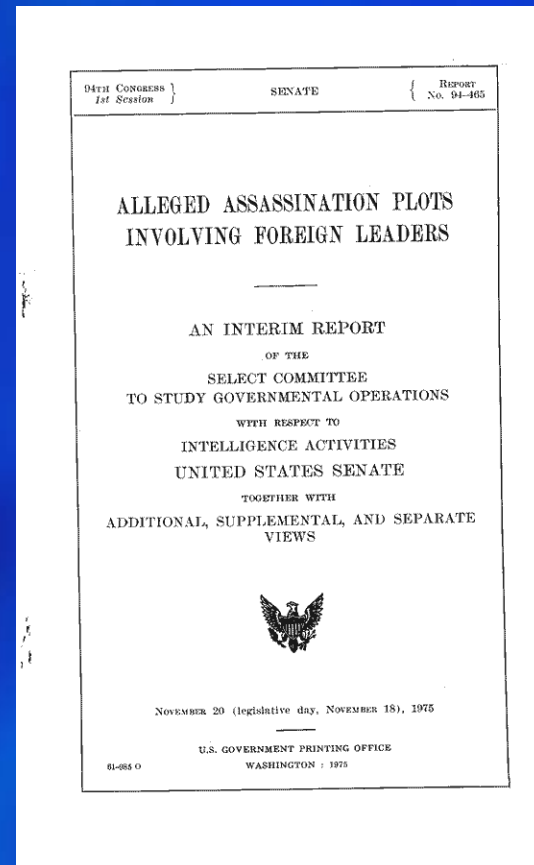
Highly political event.

Mistakes were made, but overblown in my view.



The Church-Pike Hearings

350-page report on
“Assassination”
found not a single
case in which the
CIA had ever
assassinated
anyone.



The Church-Pike Hearings

350-

“

cas

assassi
anyone

Long before the start of the Church Committee hearings, DCI's Richard Helms and Bill Colby issued regulations prohibiting any CIA involvement in assassination.

Report
No. 94-465

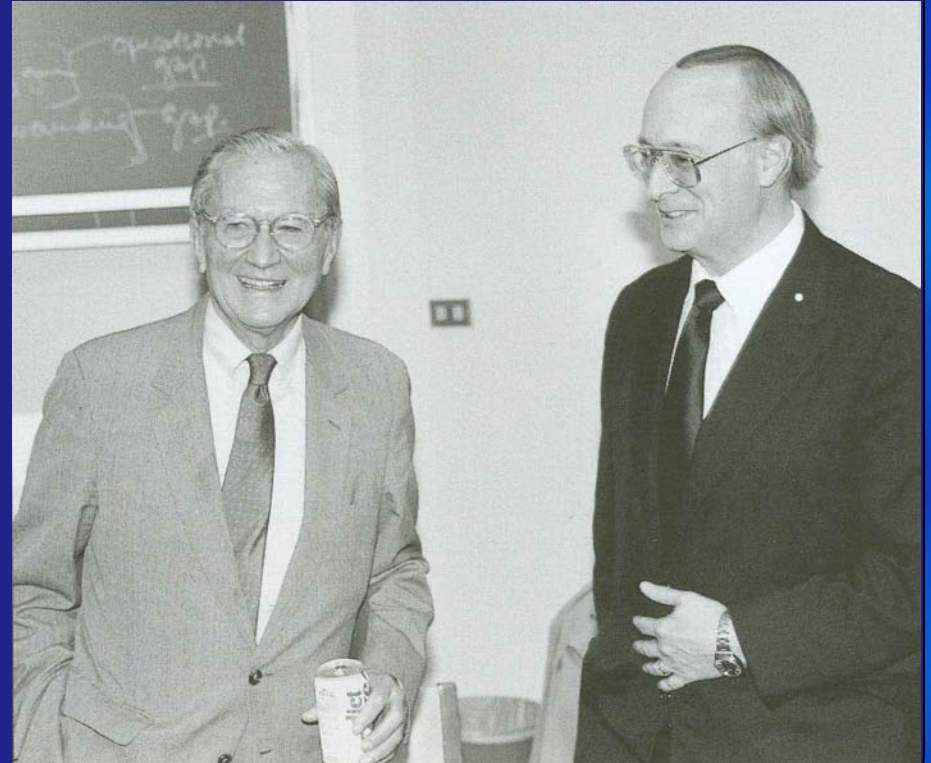
AND SEPARATE

NOVEMBER 20 (legislative day)

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

81-885 O

Bill Colby was a regular guest lecturer in our Indo-China War Seminar here at the Law School.



Daniel L. Pines
The Central intelligence Agency's "Family Jewels"
84 IND. L. J. 637 (2009)

One recent examination of the Church Committee report concluded that only a single CIA activity was unlawful at the time—the testing of LDS on unsuspecting Americans.

Daniel L. Pines
The Central intelligence Agency's "Family Jewels"
84 IND. L. J. 637 (2009)

One recent examination of the Church Committee report concluded that only a single CIA activity was unlawful at the time—the testing of LDS on unsuspecting Americans.

That program was terminated during the Kennedy Administration in 1962.

Congress and “Risk-Avoidance” Culture in Intelligence Community

After **Church-Pike** hearings of 1975 and felony convictions of **Felt and Miller**, Buck Revell said FBI could not get a *single* volunteer for counter-terrorism work.

Even a good faith violation of FISA is a **felony**.

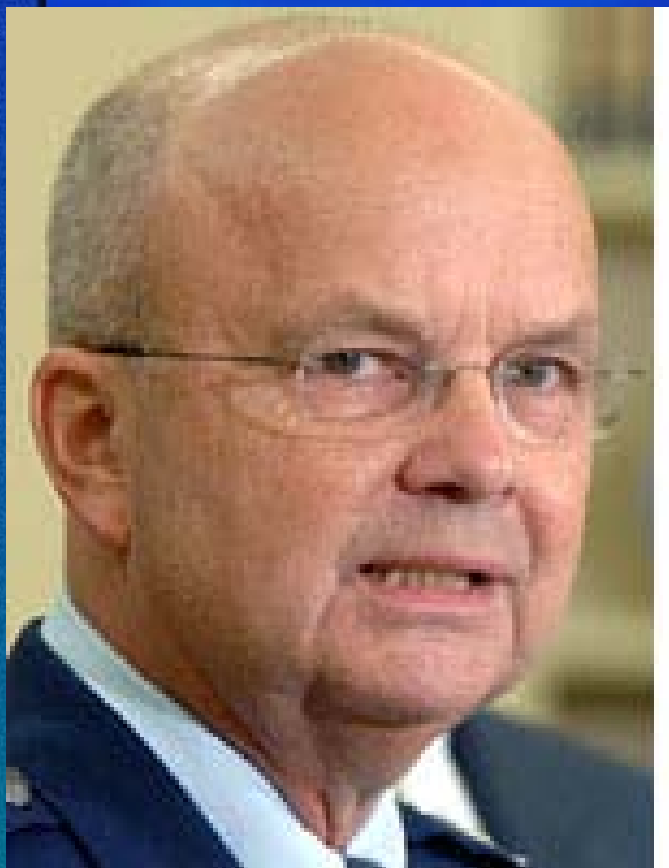
Congress and “Risk-Avoidance” Culture in Intelligence Community

Colleen Rowley told IG after 9/11 that FBI agents who made “mistakes” saw “their careers plummet and end,” which created a “climate of fear.”

OIPR Deputy Counsel told IG “the FBI allowed a number of FISAs to expire because agents were concerned that they would find themselves under investigation . . . for errors in applications.”

Gen. Michael Hayden

Director, NSA (1999-2005)



“Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.”

Fourth Amendment

Historic Exception to Warrant
Requirement for Foreign
Intelligence Surveillance

Warrant and Probable Cause Not Always Necessary

Supreme Court has held that “**special needs**” in cases involving **safety** may make searches “reasonable” without probable cause or a warrant:

- Searching airline passengers (0.0004% chance will find a firearm);
- Border searches and highway stops near borders
- Traffic sobriety checkpoints;
- Safety inspections of corporations and restaurants
- Drug tests of Customs agents and high school athletes

*National Treasury Employees Union v.
Von Raab* 489 U.S. 656, 666 (1989)

“While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, . . . , our decision in *Railway Labor Executives* reaffirms the **longstanding principle** that **neither a warrant nor probable cause**, nor, indeed, any measure of individualized suspicion, **is an indispensable component of reasonableness in every circumstance.**

. . .

*National Treasury Employees Union v.
Von Raab* 489 U.S. 656, 666 (1989)

“[O]ur cases establish that where a Fourth Amendment intrusion serves **special governmental needs, beyond the normal need for law enforcement**, it is necessary to **balance** the individual's **privacy expectations** against the **Government's interests** to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”

Haig v. Agee
453 U.S. 280 (1981)

“It is "obvious and unarguable" that **no governmental interest is more compelling than the security of the Nation**. . . . Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized. Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests.”

*National Treasury Employees Union v.
Von Raab* 489 U.S. 656, 666 (1989)

“The point is well illustrated also by the Federal Government's practice of **requiring the search of all passengers** seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, . . . the lower courts that have considered the question have consistently concluded that **such searches are reasonable under the Fourth Amendment.**”

National Treasury Employees Union v. Von Raab
489 U.S. 656, 666 (1989)

“As Judge Friendly explained in a leading case upholding such searches: **“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness”**

Are there any questions?

