



THE SURPRISINGLY STRONGER CASE FOR THE  
LEGALITY OF THE NSA SURVEILLANCE  
PROGRAM: THE FDR PRECEDENT

Neal Katyal & Richard Caplan

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\*\* Class of 2007, Georgetown University Law Center.

## INTRODUCTION

This Article explains why the legal case for the recently disclosed National Security Agency surveillance program turns out to be stronger than what the Administration has advanced. In defending its action, the Administration overlooked the details surrounding one of the most important periods of presidentially imposed surveillance in wartime—President Franklin Delano Roosevelt’s (FDR) wiretapping and his secret end-run around both the wiretapping prohibition enacted by Congress and decisions of the United States Supreme Court. In our view, the argument does not quite carry the day, but it is a much heftier one than those that the Administration has put forth to date to justify its NSA program. The secret history, moreover, serves as a powerful new backdrop against which to view today’s controversy.

In general, we believe that compliance with executive branch precedent is a critical element in assessing the legality of a President’s actions during a time of armed conflict. In the crucible of legal questions surrounding war and peace, few judicial precedents will provide concrete answers. Instead, courts will tend to invoke the political question doctrine or other prudential canons to stay silent; and even in those cases where they reach the merits, courts will generally follow a minimalist path.<sup>1</sup> For these and other reasons, the ways in which past Presidents have acted will often be a more useful guide in assessing the legality of a particular program, as Presidents face pressures on security unimaginable to any other actor outside or inside government. At the same time as Presidents realize these pressures, they are under an oath to the Constitution, and so the ways in which they balance constitutional governance and security threats can and should inform practice today. As Justice Frankfurter put it in *Youngstown*:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by [Section] 1 of Art. II.<sup>2</sup>

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1. As Justice Jackson remarked:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

2. *Id.* at 610-11 (Frankfurter, J., concurring); *see also* *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-73 (1915) (looking to executive branch practice to justify the power to withdraw public lands from private acquisition); *Deployment of United States Armed Forces into Haiti*, 18 Op. Off. Legal Counsel 173, 178 (1994) (citing many examples of presidents using the military without express congressional approval and observing that “[s]uch a pattern of executive conduct, made under claim of right, extended over many

So it is fitting that a good measure of the contemporary debate over the legality of the NSA program has centered around the surveillance orders of past Presidents. The Administration's defense, in two white papers,<sup>3</sup> emphasized its fidelity to the past:

Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. *See, e.g., United States v. United States District Court*, 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). In a Memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigat[ing] agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as possible to aliens.

President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Attorney General advised that "it is as necessary as it was in 1940 to take the investigative measures" authorized by President Roosevelt to conduct electronic surveillance "in cases vitally affecting the domestic security."<sup>4</sup>

This executive branch precedent defense at first glance looks rather convincing. (Leave aside the white paper's mangling of the facts, such as claiming that Attorney General Clark drafted the Truman Memo about FDR when it actually was controversial Federal Bureau of Investigation (FBI) Director J. Edgar Hoover.) As constitutional scholars pointed out rather quickly in response to the white papers, the problem is that FDR was acting before Congress had occupied the field with respect to electronic surveillance,

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decades and engaged in by Presidents of both parties, 'evidences the existence of broad constitutional power.'" (quoting *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. Off. Legal Counsel 185, 187 (1980)); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1323-24 (2000) (arguing that executive branch lawyers should look to the conduct of previous presidents in assessing legal questions); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 538 (1999) ("Constitutional practice unaccompanied by express legal argument may also be entitled to precedential weight . . .").

3. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 7-8, 16-17 (2006), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf> [hereinafter LEGAL AUTHORITIES SUPPORTING NSA ACTIVITIES]; Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Justice, to Senate and Permanent Select Comms. on Intelligence 3 (2005), available at <http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf>.

4. LEGAL AUTHORITIES SUPPORTING NSA ACTIVITIES, *supra* note 3, at 7-8 (citations omitted).

whereas President Bush was defying Congress's wishes.<sup>5</sup> The 1978 Foreign Intelligence Surveillance Act (FISA), these critics argued, said it was the "exclusive" means of carrying out surveillance<sup>6</sup>—which makes it quite different than FDR's order, an order that supposedly operated without any statutory constraint.

To put the Department of Justice's (DOJ) critics' claim into constitutional law jargon, FDR was acting in *Youngstown Zone 2*—the "twilight zone"—where his powers were greater. President Bush, by contrast, was acting in Zone 3—the Zone of Prohibition—where his powers were at their nadir. So, for example, as perhaps the most sophisticated analyst of the NSA controversy, David Kris (who formerly handled such issues for DOJ), summarized: "The DOJ whitepaper contains an extensive discussion of [previous presidential action] that I am more or less prepared to accept for present purposes. The constitutional question presented here, however, is whether the President retains such authority in the face of Congressional efforts to restrict it."<sup>7</sup> Professor Walter Dellinger, a former head of the Office of Legal Counsel, has similarly argued that the Bush Administration crated a "vast expansion" of presidential powers by confusing Zones 2 and 3 in the NSA program:

It is said by the defenders of what the President did that Presidents going back to Lincoln have authorized eavesdropping (Johnson, Roosevelt, others) authorized wiretapping in the national security interest. I'm perfectly willing to accept that as part of the inherent power of the President . . . when there is no law one way or the other and it is in the national security interest . . . What of course is amazing about the argument that that is a precedent is that those actions all preceded a decision by Congress to enact into law the Foreign Intelligence Surveillance Act which said here's how you do it and if you don't do it this way it is a felony.<sup>8</sup>

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5. See Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. BOOKS (2006), available at <http://www.nybooks.com/articles/18650> ("It is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked warrantless *domestic* spying as included in that authorization, especially where an existing statute specifies that other laws are the 'exclusive means' by which electronic surveillance may be conducted and provides that even a declaration of war authorizes such spying only for a fifteen-day emergency period."). This letter was signed by Curtis Bradley, David Cole, Walter Dellinger, Ronald Dworkin, Richard Epstein, Philip B. Heymann, Harold Hongju Koh, Martin Lederman, Beth Nolan, William S. Sessions, Geoffrey Stone, Kathleen Sullivan, Laurence H. Tribe, and William Van Alstyne.

6. 18 U.S.C. § 2511(2)(f) (2000) (stating that the "procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted").

7. Memorandum from David Kris, former Assistant Deputy Attn'y Gen. 8 (Jan. 25, 2006), available at <http://balkin.blogspot.com/kris.fisa.pdf> (footnotes omitted).

8. Walter Dellinger, Comments at Conference: The Mukasey Hearings Revisited: Legal Experts Analyze the New Attorney General's Views on National Security and Separation of Power (Nov. 29 2007), available at <https://www.law.georgetown.edu/>

As a result of such claims—that during the FDR Administration there was “no law one way or the other”—the FDR precedent defense has rapidly lost its steam and the Administration has largely abandoned reference to it.

*The problem is that this criticism of the DOJ White Paper is wrong.* The true facts surrounding FDR’s activity will undoubtedly provide ammunition to those defending the Administration in today’s controversy. They will show that FDR’s wiretapping policy was far closer to today’s wiretapping program than what the Administration has thus far argued. Then, as now, Congress regulated electronic surveillance. The Supreme Court of the United States had taken expansive views of that statute to bar certain forms of electronic surveillance. Then, as now, the President—acting on the advice of certain advisors—adopted a dubious statutory interpretation in order to conduct the surveillance anyway, and defy the Supreme Court. Then, as now, senior advisors, including an Attorney General of the United States, warned that such surveillance was illegal. And then, as now, some Administration officials lobbied Congress for additional surveillance powers at the very same time as they were conducting that very surveillance in secret. The Attorney General at the time, Robert Jackson, would write that “[t]he only case that I recall in which [FDR] declined to abide by a decision of the Supreme Court was its decision that federal law enforcement officers could not legally tap wires.”<sup>9</sup>

The upshot is that today’s surveillance program, in many key respects, looks strikingly similar to the one blessed by FDR. Both programs, in essence, have defied congressionally enacted law. For those who believe that the actions of one of our country’s greatest Presidents—FDR—create an unwritten pattern and practice that informs constitutional interpretation, this precedent should loom large in debates about Executive Power to conduct such surveillance.

At the same time, we believe that the FDR precedent should not be overread. Ultimately, it does not do enough to convince us of the legality of today’s program. Instead of trying to distinguish the two programs, we believe that the facts reveal that both programs were illegal. We further believe that great Presidents make mistakes, and FDR was not immune to them, even (or especially) in this area.<sup>10</sup> And we further believe that one of the key conditions for a “super-*stare decisis*” rule for executive branch precedent, open acquiescence by the other branches of government, something that Frankfurter himself mentioned, has not been met.

Nevertheless, we believe that these conclusions are debatable, and that the FDR precedent deserves widespread debate, instead of the inattention it has received thus far. FDR, after all, took a tendentious statutory interpretation, informed both by his view on the balance between security and law as well as

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webcast/eventDetail.cfm?eventID=455 (comments at minutes 37:00-38:30).

9. ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68 (John Q. Barrett ed., 2003).

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

his robust views of executive power. The question should then become how much weight to afford the precedent in evaluating today's controversy. The FDR precedent is also a helpful reminder that mistakes can be made by Presidents of any political party, and that it is too facile to call the current NSA controversy something that could only be concocted in a Republican Administration.

Part I briefly describes the current NSA controversy. Part II discusses the history of FDR's surveillance program, and in particular the remarkable *Nardone* case, which went up to the Supreme Court two different times and which led the Court to conclude that the 1934 Communications Act prohibited wiretapping.<sup>11</sup> Part III details the post-*Nardone* activity by FDR, including his decision to defy the Supreme Court and Congress in deputizing the FBI to engage in surveillance. The secret history is at times rich—replete with back-room deals between FBI Director J. Edgar Hoover and FDR, and a bypass of the Attorney General himself, the legendary Robert Jackson, who believed that the Government was acting illegally. Part IV discusses how the FDR precedent serves as a better defense of the NSA program than the current one offered by the Administration. This Part also discusses our views as to why this better defense ultimately does not succeed in defending today's program.

In the end, this Article shows that at a time when the nation faced new threats from frightening and unknown new movements and ideologies overseas, the President worried more than anything about what could happen if those movements placed cells inside the United States. FDR wanted to wiretap communications by these people and groups to protect the country, but the law—as interpreted by the Supreme Court—prohibited it. Civil liberties advocates fretted that these wiretapping powers could be abused. The President's advisors, including FBI Director J. Edgar Hoover, suggested doing it anyway. But his Attorney General, Jackson, had already gone on record saying that wiretapping was prohibited under order of Congress and the Supreme Court. The FDR episode as such provides a stronger basis for the current Administration's program than any it has advanced. In the end, however, instead of justifying the Administration's surveillance program, the FDR precedent counsels looking closely at the workings of the executive

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11. The analysis in this Article draws heavily upon primary sources, including material from the Collection of the Manuscript Division of the Library of Congress and the National Archives. Some of the details of these events have been written about in, for example, JOSEPH E. PERSICO, ROOSEVELT'S SECRET WAR 35-36 (2001); RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR (1999); and Athan Theoharis, *FBI Wiretapping: A Case Study of Bureaucratic Autonomy*, 107 POL. SCI. Q. 101 (1992). Unfortunately, these authors do not pull together all the material necessary to discuss the many nuances of this particular story. No analysis has appeared in the law review literature that fully fleshes out the legal and policy nuances raised by the various actors and activities involved, and certainly not one that ties that history to the recent controversy. This Article seeks to set out an objective history that, in so doing, occasionally belies the separate analyses put forward by J. Edgar Hoover and Jackson, published years later.

branch to develop internal checks on presidential overreach. The precedent reveals the relative frailty of both courts and Congress in national security disputes, and highlights the need to lace the concept of “separation of powers” into the Executive Branch.

## I. THE NSA CONTROVERSY

The details surrounding the so-called “Terrorist Surveillance Program” have still not been released. According to Administration documents and news reports, however, it appears that sometime shortly after the September 11, 2001 attacks, the President authorized the electronic surveillance of United States persons in a way that did not require permission from the FISA court. This section first describes FISA and then moves to a discussion of the NSA program.

### A. *The Foreign Intelligence Surveillance Act*

FISA was created in 1978 as part of Congress’s overhaul of intelligence activities to govern domestic electronic surveillance of agents of foreign powers.<sup>12</sup> The Act mandates that the Chief Justice of the United States designate eleven district judges from seven of the United States judicial circuits to form a Foreign Intelligence Surveillance Court (FISC).<sup>13</sup> Of these, at least three judges must reside within twenty miles of Washington, D.C.<sup>14</sup> The judges of this court hear the government’s applications for foreign intelligence surveillance in secret and determine whether the requested surveillance meets the requirements set forth in FISA. Once a judge of the FISA court has denied an application for surveillance, the government may not petition another judge of the same court for approval of the same application.<sup>15</sup>

In most cases, FISA requires that the government conduct domestic surveillance for foreign intelligence purposes only pursuant to judicial authorization. The standards for that authorization, however, do not comport with the Fourth Amendment’s probable cause requirements for an ordinary warrant. Rather, FISA is more permissive in the type and scope of the searches it allows, requiring far less judicial supervision when the government collects

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12. *See* Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, § 101, 92 Stat. 1783.

13. 50 U.S.C. § 1803(a) (2000).

14. *Id.*

15. *Id.* Rather, upon denial of an application by a FISC judge, the government may pursue an appeal in the FISA Court of Review. That court is comprised of three judges, either district judges or circuit judges, appointed by the Chief Justice and having jurisdiction to review the denial of any FISA application. If the Court of Review denies an application, it must transmit a statement of decision to the Supreme Court, which may then review the decision. *Id.* § 1803(b). Judges on the FISC and the Court of Review serve for a maximum of seven years with no redesignation. *Id.* § 1803(d).



intelligence about foreign powers domestically.<sup>16</sup>

In most circumstances, a federal agent seeking to use surveillance under FISA must, with the approval of the Attorney General, submit an *ex parte* application to the Foreign Intelligence Surveillance Court.<sup>17</sup> That application must state, among other things, (1) the identity or description of the target of surveillance, (2) the facts relied upon to justify the belief that the target is a foreign power (or agent thereof) and that each of the places to be targeted is used by or about to be used by a foreign power (or agent thereof), (3) detailed description of the type of information sought and the type of communications to be monitored, (4) that obtaining foreign intelligence information is “a significant purpose” of the surveillance, and (5) that such information cannot reasonably be obtained by alternative methods.<sup>18</sup>

An application for surveillance must also state the “minimization procedures” that will be utilized by the government.<sup>19</sup> “Minimization procedures” are, with certain exceptions, procedures adopted by the Attorney General and approved by the FISC which are “reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.”<sup>20</sup>

In three circumstances, however, the government may proceed with surveillance for foreign intelligence purposes without a FISA court order. First, the President may authorize surveillance without approval from the FISC if the Attorney General certifies that the proposed surveillance is solely directed at intercepting communications transmitted by means used exclusively between foreign powers or directed at the acquisition of technical information (other than spoken communication) from property under the exclusive control of a foreign power.<sup>21</sup> In this case, the Attorney General must further certify that there is no substantial likelihood of the proposed surveillance obtaining communications to which a United States person is a party, and any authorized surveillance must be concluded within a one year time period.<sup>22</sup> Further, the Attorney General’s certification must be sent to the FISC immediately and

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16. Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1289 (2004).

17. 50 U.S.C. § 1804(a) (2000).

18. *Id.*

19. *Id.* § 1804(a)(5).

20. *Id.* § 1801(h).

21. *Id.* § 1802(a)(1)(A).

22. *Id.* § 1802(a)(1)(B). A “United States person” is defined to include U.S. citizens, aliens lawfully admitted for permanent residence, corporations incorporated in the United States, and unincorporated associations who have a substantial number of U.S. citizens or lawful permanent resident aliens as members. *Id.* § 1801(i).

maintained there under security measures.<sup>23</sup>

Second, the government may carry out foreign intelligence surveillance without a FISA court order if the Attorney General reasonably determines that the factual basis for an order approving the surveillance exists and that an emergency situation requires foreign intelligence surveillance before a court order can be reasonably obtained.<sup>24</sup> Under this scenario, the Attorney General must immediately notify the FISC of his decision to authorize surveillance and seek a formal court order from a FISA judge within seventy-two hours.<sup>25</sup> If no court order is issued, the surveillance must end when the desired information is obtained, when the court denies the application, or at the end of seventy-two hours, whichever comes first. And if a judge does not approve the application, there are severe restrictions on how the obtained information may be used.<sup>26</sup>

Finally, under FISA, the Attorney General may authorize foreign intelligence surveillance without a court order for a period not to exceed fifteen days following a formal declaration of war by Congress.<sup>27</sup>

If a FISA judge approves a request for surveillance, the judge's order must specify the identity or description of the target of the surveillance and the nature and location of each facility to be placed under surveillance.<sup>28</sup> It must further specify the type of information sought, the types of communication to be monitored, the means by which surveillance will take place, whether physical entry will be utilized, and the period of time for which surveillance is approved.<sup>29</sup> The court's order may also, at the request of the government, direct that a specified communication or other common carrier aid the government with all information, facilities, or technical assistance necessary to carry out the surveillance secretly.<sup>30</sup> Moreover, the common carrier in question will be ordered to maintain any records of its surveillance or assistance under the Attorney General's approved security procedures.<sup>31</sup>

FISA also requires that certain statistics on the use of the Act's procedures be submitted to Congress, including the total number of applications for FISA orders and the total number of court orders issued for FISA surveillance.<sup>32</sup> In 1997 there were 748 FISA orders approved. In 2002 this figure increased to

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23. *Id.* § 1802(a)(3).

24. *Id.* § 1805(f).

25. *Id.*

26. *Id.*

27. *Id.* § 1811.

28. *Id.* § 1805(c)(1)(A), (B).

29. *Id.* § 1805(c)(1)(C)-(E). A FISA order may approve surveillance for up to 120 days. If the order is aimed at surveillance of a foreign power, the period may be up to one year. And if the order is aimed at a non-US person, the order may last up to 120 days. *Id.* § 1805(e)(1).

30. *Id.* § 1805(c)(2)(B).

31. *Id.* § 1805(c)(2)(C).

32. *Id.* § 1807.

932 orders. And in 2006, there were 2181 approved orders.<sup>33</sup> This represents almost a 200% increase in approved FISA orders between 1997 and 2006.

### B. *The NSA Program*

On December 16, 2005, the *New York Times* revealed a wiretapping program authorized by the Bush Administration. According to the article, the Bush Administration's rationale for keeping the program classified was to ensure that terrorists not learn of the program.<sup>34</sup> Although the program remains among the most classified of government secrets,<sup>35</sup> it is now known that many in the Executive Branch, including FBI Director Robert S. Mueller III and then-Attorney General John Ashcroft, expressed considerable dissent about the legality of the program.<sup>36</sup>

The secrecy surrounding the program makes detailed legal analysis quite difficult. But some things can be said based on the existing public record. To briefly summarize that record: then-Attorney General Alberto Gonzales affirmed that the program authorizes warrantless interception of electronic data lines where the government "has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda" and another party to the conversation is located "outside of the United States."<sup>37</sup> Formulated soon after September 11, 2001, the surveillance program was utilized in early 2002 when the CIA captured high-ranking al Qaeda operatives overseas and seized their computers, cellular telephones, and personal phone directories. However, in addition to eavesdropping on the phone numbers and e-mail messages of those operatives, the NSA also began to monitor others associated with these operatives, generating an ever-expanding web of surveillance.

Although most of the phone numbers and addresses were overseas, many were in the United States. Since 2002, the NSA has monitored the international phone calls and e-mail messages of hundreds, perhaps even thousands, of people inside the United States without warrants.<sup>38</sup> The names on the list are classified and the number of people the list contains is constantly fluctuating; at

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33. U.S. DEP'T OF JUSTICE, FISA REPORT TO CONGRESS (2007), available at <http://www.fas.org/irp/agency/doj/fisa/#rept>.

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

35. Press Briefing, Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), available at [www.whitehouse.gov/news/releases/2005/12/20051219-1.html](http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html) ("It is probably the most classified program that exists in the United States government . . .").

36. David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, Mar. 16, 2007, at A1.

37. Risen & Lichtblau, *supra* note 34.

38. *Id.*

any given moment under this program the NSA eavesdrops on approximately five hundred people in the United States and an additional five to seven thousand people overseas.<sup>39</sup> Several officials, whose identities remain unknown due to the classified nature of the information, stated that the program enabled them to successfully uncover and thwart several terrorist plots, including a scheme to attack British pubs and train stations with fertilizer bombs and a plan by Iyman Faris, an al Qaeda supporter, to destroy the Brooklyn Bridge with blowtorches.<sup>40</sup> Nevertheless, the officials also stated that the majority of the people monitored by the NSA have never been charged with a crime.<sup>41</sup>

The Administration has claimed that, based on these revelations, the program is lawful. Evidently, the Administration believes that FISA is too cumbersome and that it needs to act more rapidly to approve surveillance. While we will defer consideration of this argument until Part IV, we briefly want to register our immediate disagreement with aspects of this claim. Our starting point is that the Constitution's text and structure generally presuppose legislative action unless such action is impossible due to an emergency.<sup>42</sup> The Administration's claim might therefore have worked on September 15, 2001, at a time when Congress might have found it difficult to act in time to authorize an immediate exception to FISA, but not scores of months after those attacks. Yet the Administration clung to this rationale for years after the immediate exigency had lapsed, at a time when Congress was fully capable of modifying FISA. (Of course, within 60 days of the 9-11 attacks Congress had already modified FISA in a number of respects in the much-debated USA PATRIOT Act.<sup>43</sup>)

The Administration has also issued a separate defense of its action, invoking FDR's wiretapping. As the first page of this Article demonstrates, the

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39. *Id.*

40. *Id.*

41. *Id.*

42. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1266 (2002) (“[T]he Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure from the legal status quo. Certainly, when a president is to take action that puts basic constitutional guarantees at risk, legislative authorization is presumptively required. Nothing in the Constitution, including the Commander-in-Chief Clause, alters this basic constitutional arrangement. Like any precept in constitutional discourse, this presumption may be overcome in circumstances where the President is manifestly unable to consult in a timely way with Congress before decisive action must be taken. But in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution's text, structure, and logic demand approval by Congress if life, liberty, or property are to be significantly curtailed or abridged.”).

43. For example, the Patriot Act changed the language of 50 U.S.C. § 1804 to require the government to certify only that foreign intelligence is a “significant purpose” of either a FISA electronic or physical surveillance application. Prior to the Patriot Act, law enforcement was required to show that foreign intelligence was the “primary purpose” of the requested surveillance. *See* Solove, *supra* note 16, at 1290-92.

Justice Department White Paper used FDR's action to buttress claims of "inherent" presidential power to wiretap. Claims of "inherent" power, however, fall flat given the fact that FISA has been enacted. The central issue in the legal dispute today is that FISA proclaims that it is the "exclusive" means of conducting electronic surveillance, and those procedures were defied.<sup>44</sup> The FDR precedent, as the Justice Department has cast it, bears only on executive action in the zone of Congressional silence (*Youngstown Zone 2*), not executive defiance of the law (*Youngstown Zone 3*). Due to this supposed discrepancy, the FDR defense has fallen like a load of bricks. But the facts turn out to show that FDR, like President Bush, was not operating in a statutory zone of silence. Instead, FDR was ordering a secret end-run around Congress and the courts.

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44. The Administration has a technical argument that the AUMF Resolution authorized the surveillance under FISA. It asserts that *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that:

Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad.

LEGAL AUTHORITIES SUPPORTING NSA ACTIVITIES, *supra* note 3, at 2.

The government's argument here is quite weak, for reasons detailed by many. *See, e.g.*, Posting of Orin Kerr to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_12\\_18-2005\\_12\\_24.shtml](http://volokh.com/archives/archive_2005_12_18-2005_12_24.shtml) (Dec. 19, 2005, 4:02 PM) ("[The] AUMF doesn't extend to [the NSA wiretapping program]. I have three reasons. First, O'Connor's opinion [in *Hamdi*] says the following about detention for interrogation: 'Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.' It seems to me that surveillance and wiretapping is pretty similar to interrogation: the point of both is getting information about your enemy. Second, it doesn't seem like wiretapping counts as a 'use of force' [according to the text of the AUMF]. Finally, note that Congress passed the Patriot Act about a month after passing the AUMF; if Congress had intended the AUMF to give the [P]resident wide authority to conduct domestic surveillance against al Qaeda, I don't think they would have spent so much time amending FISA for terrorism investigations."); *see also* Posting of Marty Lederman to Balkanization, <http://balkin.blogspot.com/2007/07/whats-legal-significance-of-data-mining.html> (July 29, 2007, 7:11 AM) ("[According to the Court in *Hamdi*,] the AUMF only authorizes conduct that had historically been undertaken by the President [sic] in wartime. Roosevelt and other Presidents had intercepted overseas telegrams and other *international* communications; but there was no precedent for interception of wholly do[m]estic communications without court approval. . . . [T]he AUMF itself requires a nexus to those responsible for 9/11 . . . . [It requires] that the communications involve at least one person in, or associated with, Al Qaeda[a] or related groups."); *Meet the Press: John Boehner, Arlen Specter, John Harwood & Ron Brownstein* (NBC television broadcast Feb. 5, 2006) (former Judiciary Committee Chairman Sen. Arlen Specter stating that the Administration's AUMF "contention is very strained and unrealistic. The authorization for the use of force doesn't say anything about electronic surveillance, [the] issue was never raised with the Congress. And there is a specific statute on the books, the Foreign Intelligence Surveillance Act, which says flatly that you can't undertake that kind of surveillance without a court order").

II. THE PRECURSOR TO THE FDR PRECEDENT: *NARDONE I* AND *II*A. *The 1934 Communications Act*

Since just about the time that the telegraph and telephone were invented, the government has been wiretapping them. But the extent of wiretapping has waxed and waned over various administrations. Officials eavesdropped on telegraph lines during the Civil War,<sup>45</sup> and the government took over operation of the phones in 1918 as a war time measure.<sup>46</sup> In 1924, Attorney General Harlan Fiske Stone, seeking to regain credibility for the Justice Department's then-named Bureau of Investigation in the wake of various scandals (including surveillance of members of Congress<sup>47</sup> and the Palmer Raids<sup>48</sup>) announced that the FBI was concerned only with investigating conduct forbidden by law, and not opinions, political or otherwise.<sup>49</sup> Stone prohibited the use of wiretaps by the FBI and Bureau regulations referred to the practice as unethical.<sup>50</sup>

Four years later, the Supreme Court rendered its decision in *Olmstead*,<sup>51</sup> an opinion that would become the dominant legal analysis of the practice for four decades.<sup>52</sup> The case concerned the prosecution of one notorious Seattle bootlegger, Roy Olmstead, during Prohibition.<sup>53</sup> Evidence against Olmstead had been obtained through wiretaps "inserted along the ordinary telephone wires . . . without trespass upon any property of the defendants."<sup>54</sup> The Court held that the Fourth Amendment did not apply to wiretapping because the Framers did not contemplate such technology when the Amendment was adopted.<sup>55</sup> It noted, however, that Congress could bar evidence derived from wiretaps through legislation.<sup>56</sup>

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45. SAMUEL DASH ET AL., *THE EAVESDROPPERS* 23 (1959).

46. Brief of Defendant-Appellant at 7, *Nardone v. United States* (*Nardone I*), 302 U.S. 379 (1937) (No. 190).

47. *FROM THE SECRET FILES OF J. EDGAR HOOVER* 2 (Athán Theoharis ed., 1991).

48. CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* (2007).

49. 2 SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE, S. REP. NO. 94-755, at 23 (1976) [hereinafter CHURCH COMMITTEE REPORT].

50. RICHARD E. MORGAN, *DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA* 89 (1980).

51. *Olmstead v. United States*, 277 U.S. 438 (1928).

52. *Katz v. United States*, 389 U.S. 347, 353 (1967) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.')

53. *Olmstead*, 277 U.S. at 455-56.

54. *Id.* at 457.

55. *Id.* at 465.

56. *Id.* at 465-66.

Justices Holmes and Brandeis filed vigorous dissents, the latter warning: “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>57</sup> Justice Brandeis also approvingly cited an amicus brief filed by telephone companies that stated, “[I]t is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government.”<sup>58</sup> Responding to the dissenters, the majority stated: “A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.”<sup>59</sup>

The *Olmstead* decision received considerable attention. *The New York Times*, for example, lamented the decision, stating: “Prohibition, having bred crimes innumerable, has succeeded in making the Government the instigator, abettor and accomplice of crime. It has now made universal snooping possible.”<sup>60</sup> Members of Congress began to introduce bills—launching a debate that would stretch over many years.<sup>61</sup>

The Treasury and Justice Departments conducted internal analyses of the privacy issues posed by wiretapping. Despite *Olmstead*, in December 1929 Director J. Edgar Hoover publicly proclaimed the FBI did not engage in it.<sup>62</sup> The Bureau policy stood in sharp contrast to that of the Prohibition Bureau, part of the Department of the Treasury. The head of the Prohibition Bureau, Colonel Amos Woodcock, was asked in a congressional hearing in 1930 if his Department permitted wiretapping; Woodcock’s answer: “We do; and the Supreme Court has approved that practice. . . . I have not qualms at all about that, sir.”<sup>63</sup> After the Prohibition Bureau was transferred to the Justice Department, debate in Congress continued over legislation to deny funding for wiretapping.<sup>64</sup> Representative Paul Schafer stated that if the FBI “has been able to function and function properly without wire tapping, I believe that the Prohibition Department can do so.”<sup>65</sup> But the amendment was defeated.<sup>66</sup>

57. *Id.* at 479 (Brandeis, J., dissenting) (footnote omitted).

58. *Id.* at 479 n.12.

59. *Id.* at 468 (majority opinion).

60. Editorial, *Government Lawbreaking*, N.Y. TIMES, June 6, 1928, at 24.

61. In 1929, for example, during the debate over one bill to prohibit wiretapping, the ensuing exchange on the House floor was not dissimilar from that between Justice Brandeis in dissent and Chief Justice Taft for the majority. Representative Schafer called government wiretapping “tyranny equal to that of the most backward medieval despotisms,” while Representative McKeown challenged that Schafer was “going to hamstring the officers to prevent them from using means to ferret [criminals] out.” 71 CONG. REC. 5968, 5968 (1929).

62. 74 CONG. REC. 2901, 2901-02 (1931).

63. WALTER F. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS 128 (1965).

64. 74 CONG. REC. 2901, 2901-06 (1931).

65. *Id.* at 2905.

66. *Id.* at 2906.

Ultimately, Attorney General Mitchell lamented that he wanted to wiretap and that “[t]he present condition in the Department cannot continue.”<sup>67</sup> He authorized wiretapping by agents only upon personal approval of their bureau chief and the Assistant Attorney General.<sup>68</sup>

The resumption of FBI wiretapping ultimately fed the desire for protective legislation. During debate on the floor in 1932, Representative Leonidas Dyer claimed that “people and the press so severely condemn” wiretapping, and noted a *St. Louis Post-Dispatch* editorial from days earlier that stated Col. Woodcock had changed his mind and denounced wiretapping.<sup>69</sup> The House Judiciary Committee also solicited Attorney General Mitchell’s opinion on a bill to make evidence obtained by wiretapping inadmissible.<sup>70</sup> The next month the Attorney General replied that he did not recommend passage because regulations already in place prohibited wiretapping without express authorization from multiple officials.<sup>71</sup> Nonetheless, in 1933 Congress passed a law to bar funds from being used for wiretapping in prohibition cases.<sup>72</sup> Prohibition ended shortly thereafter with the passage of the Twenty-First Amendment.

#### B. FDR’s Thirst for Intelligence

Two events emerged after FDR’s inauguration that would ultimately put the new President on a collision course with Congress: (1) the rapid growth of Nazi Germany and the Soviet Union; and (2) the 1934 Communications Act. With respect to the former, FDR’s deep interest in obtaining information about fascist activities led him in 1934 to order Hoover to investigate the domestic Nazi movement.<sup>73</sup> But just two months earlier, Congress had enacted the Communications Act, which stipulated:

No person receiving . . . or transmitting . . . any interstate or foreign communication by wire or radio shall divulge or publish the . . . contents . . . thereof, except through authorized channels of transmission or reception, to any person other than the addressee . . .<sup>74</sup>

No mention of wiretapping occurred during the floor debate leading to the

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67. MURPHY, *supra* note 63, at 129.

68. *Id.* at 129-30.

69. 75 CONG. REC. 4733 (1932).

70. Brief for the United States at 26, *Nardone v. United States (Nardone I)*, 302 U.S. 379 (1937) (No. 190).

71. *Id.* at 26-27.

72. *Id.* at 27.

73. 2 CHURCH COMMITTEE REPORT, *supra* note 49, at 25. By 1936 Roosevelt’s concern expanded to include the activities of Soviet officials and American Communists. *See* FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 180-81.

74. Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064.



passage of this bill, during committee hearings, or in committee reports.<sup>75</sup> Despite the Act's text, Justice Department officials ultimately decided that it did not preclude wiretapping per se, only wiretapping plus disclosure.<sup>76</sup> As a result, the Act did not deter the government from wiretapping.<sup>77</sup>

That view of the law helped FDR's Administration slake its thirst for more information about threats to the nation. In 1936, Secretary of War George Dern advised FDR's Attorney General Homer Cummings to establish a counterespionage service.<sup>78</sup> Also that year, on August 24, 1936, Hoover met with FDR at the White House to discuss intelligence collection.<sup>79</sup> Hoover told FDR that, though no governmental organization existed to gather general intelligence, the FBI could undertake any investigation provided there was a request to do so by the State Department.<sup>80</sup> FDR, however, was afraid that a formal request for non-criminal intelligence investigations would leak and generate public controversy.<sup>81</sup> Instead, FDR advised Hoover that he would "put a handwritten memorandum of his own in his safe in the White House, stating he had instructed the Secretary of State to request this information to be obtained by the Department of Justice."<sup>82</sup> No such memorandum has ever been found.<sup>83</sup>

FDR immediately sought to put Hoover's suggestion in place. The next day, August 25, 1936, Hoover and Secretary of State Cordell Hull met at the White House with the President.<sup>84</sup> Expressing concerns about Communists and fascists, FDR told Hull that the FBI could conduct an investigation into their activities if Hull asked Hoover to do so.<sup>85</sup> Hull asked if the request should be in writing, and FDR said it should not, "desir[ing] the matter to be handled quite confidentially and that it would be sufficient that the President, the Secretary of State and I [Hoover] should be the ones aware of this request."<sup>86</sup> Hull accordingly asked Hoover to conduct such an investigation, and FDR suggested that both Hull and Hoover talk with Attorney General Cummings.<sup>87</sup> The lack of specific legal authority for such FBI intelligence investigations does not appear to have been a concern to FDR or Hoover.<sup>88</sup>

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75. MURPHY, *supra* note 63, at 133.

76. PERSICO, *supra* note 11, at 35.

77. *Id.*

78. ATHAN THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN 67* (1978).

79. *Id.* at 67-68.

80. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 181.

81. *Id.*

82. *Id.* (emphasis omitted).

83. THEOHARIS, *supra* note 78, at 67.

84. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 182.

85. *Id.*

86. *Id.*

87. *Id.*

88. THEOHARIS, *supra* note 78, at 68-70.

Hoover apparently did not take FDR's instruction to talk with Attorney General Cummings seriously. That same day, August 25, despite FDR's instructions and the requirement of a World War I-era law requiring the approval of the Attorney General,<sup>89</sup> Hoover, acting on his own, directed staff to commence planning a surveillance program.<sup>90</sup> He waited until September 10 to meet with Cummings,<sup>91</sup> and when that meeting finally occurred, Hoover misled the Attorney General in multiple ways that would have continuing policy consequences.<sup>92</sup> Hoover gave the Attorney General an incorrect meeting date—telling Cummings that his meeting with FDR took place on September 1 when it actually took place a week earlier.<sup>93</sup> One can speculate that Hoover did not want to let Cummings know he had waited weeks to speak with him. More importantly, Hoover told Cummings that FDR ordered him to investigate “subversive activities.”<sup>94</sup> The difference between the program FDR authorized (a program to investigate the itemized category of Communists and fascists) and the one Hoover actually used (to root out all “subversive” activity) was dramatic, and resulted in FDR having one understanding of the FBI's activities while the Attorney General had another.<sup>95</sup> In the end, according to Hoover, Cummings “verbally directed me [Hoover] to proceed with this investigation.”<sup>96</sup>

Nine days before Christmas in 1936, the conflict between FDR's desire for information and the 1934 Communications Act came into sharp relief, triggered by a pending court case. *United States v. Nardone*, in the Southern District of New York, involved four defendants accused of smuggling large quantities of alcohol into the Port of New York.<sup>97</sup> Much of the evidence against the defendants had been obtained through wiretapping. At trial, attorneys for the defendants objected to the admission of such evidence as a violation of the 1934 Communications Act. District Court Judge Grover Moscowwitz said, “I will look at the Act. Come up.”<sup>98</sup> The resultant colloquy is lost to history, as the trial transcript simply records: “Discussion at bench between Court and counsel.”<sup>99</sup> After the judge and counsel conversed, Nardone's attorney told the court that the Communications Act was passed after the *Olmstead* case, and

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89. A pre-World War I statute allowed the Attorney General to direct the FBI to conduct investigations on behalf of the State Department; it did not authorize the FBI to act unilaterally. 3 CHURCH COMMITTEE REPORT, *supra* note 52, at 395.

90. THEOHARIS, *supra* note 78, at 69.

91. *Id.* at 70.

92. *Id.*

93. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 182.

94. *Id.* at 182-83.

95. THEOHARIS, *supra* note 78, at 70.

96. 2 CHURCH COMMITTEE REPORT, *supra* note 49, at 25 n.10.

97. Transcript of Record at 2-3, *Nardone v. United States (Nardone I)*, 302 U.S. 379 (1937) (No. 190).

98. *Id.* at 57.

99. *Id.*

that he thinks “this is the very first case” to decide upon the meaning of the language of the Act.<sup>100</sup> The judge asks, “How important is this?” to which attorneys for the defendant presciently reply, “Very. It will become very important.”<sup>101</sup>

The judge, concerned less with the language of the Act and more with what he perceived as the purpose, replied:

I do not believe it was the intent of Congress under this section to prevent the use of such evidence . . . I think it was the express purpose of Congress that it may be used. The objection is overruled. . . . Otherwise I think Congress would use the express language, where the telephone or telegraph is used as an instrument of crime. I have the language of Congress saying so. I do not think it says that. I will look at it.<sup>102</sup>

The court eventually found the defendants guilty, and an appeal was promptly filed. The government carried on believing that wiretapping was not in any danger. In a D.C. Circuit case, defense attorneys had objected to evidence obtained by wiretapping as violating the 1934 Communications Act, and the court dismissed the objection in a single sentence, citing *Olmstead* without any apparent concern that the decision predated the statute by seven years.<sup>103</sup>

*Nardone I* went up to the Second Circuit, which promptly sided with the government in a decision joined by Judge Learned Hand.<sup>104</sup> The court first noted that if the approximately 500 tapped telephone calls “were erroneously admitted, reversal must follow without question.”<sup>105</sup> It also stated that it took “for granted” that the language of the Communications Act applied “only to interstate and foreign messages,” and because so many of them were introduced into evidence, “we need not now be concerned with any distinction between what were purely intrastate messages and what were not.”<sup>106</sup>

The court then got into the substance of the 1934 Act. After discussing the Supreme Court’s *Olmstead* decision, the Second Circuit held that because the Communications Act was “silent as to the admissibility of messages intercepted contrary to its provisions” and “Congress did not see fit to adopt the suggestion of direct legislation to make such evidence inadmissible,” the permissive rule of *Olmstead* still prevailed.<sup>107</sup> The evidence could not be suppressed because Congress had not created an exclusionary rule.<sup>108</sup> The defendants promptly sought certiorari, relying on the Act’s plain language:

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100. *Id.*

101. *Id.* at 58.

102. *Id.*

103. *Smith v. United States*, 91 F.2d 556, 557 (D.C. Cir. 1937).

104. *United States v. Nardone (Nardone I)*, 90 F.2d 630 (2d Cir. 1937), *rev’d* 302 U.S. 379 (1937).

105. *Id.* at 631.

106. *Id.* at 632.

107. *Id.*

108. *Id.*

This statute means just what it says. . . . The words used when it refers to intercepting a message are the words “no person” and when it refers to the prohibition against divulging and publishing the contents are “any person.”

Had Congress wished or desired to make an exception in the prosecution of criminal cases, it would have been a simple matter for Congress to so state in writing the law.<sup>109</sup>

A subsequent brief filed on behalf of one of Nardone’s associates noted that the *Olmstead* court had stated, “Congress did the very thing which this Court suggested it could do to make telephone messages secret, and said legislation is therefore controlling in the case at bar.”<sup>110</sup>

The brief for the United States, in contrast, claimed: “It is inconceivable that Congress . . . would . . . repudiate the consequences of the *Olmstead* decision without due consideration revealing its express intention to do so.”<sup>111</sup> The government further argued that the language of the Communications Act was obviously “not the language that would ordinarily have been employed if Congress had had in mind a direct prohibition in evidence of telephone messages intercepted as the result of wire tapping,” and that Congress’s purpose was aimed at wiretapping “for purposes of private gain or benefit.”<sup>112</sup> In addition, the government argued, the Communications Act did not apply to the government based on “a fundamental principle of statutory construction. . . . [T]he general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.”<sup>113</sup> Finally, the United States also claimed that the Communications Act only applied to interstate messages and not intrastate messages.<sup>114</sup> Although the intrastate/interstate question would not be decided until 1939, the Supreme Court in 1937 handed down a decision in *Nardone I* that shocked nearly everyone.

### C. Nardone I

*Nardone I*, decided five days before Christmas, 1937, was clear: “[T]he plain words of section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that ‘no person’ shall divulge or publish the message or its substance to ‘any person.’”<sup>115</sup> The Court also rejected the government’s argument that the

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109. Petition for Writ of Certiorari at 7, *Nardone I*, 302 U.S. 379 (No. 190).

110. Brief on Behalf of Appellant, Robert Gottfried at 6, *Nardone I*, 302 U.S. 379 (No. 190).

111. Brief for the United States, *supra* note 70, at 13-14.

112. Brief for the United States in Opposition at 7-8, *Nardone I*, 302 U.S. 379 (No. 190).

113. Brief for the United States, *supra* note 70, at 34-35 (internal quotation marks omitted).

114. *Id.* at 37.

115. *Nardone I*, 302 U.S. at 382.

language should be interpreted to exclude federal agents, stating the principle that “the sovereign is embraced by general words of a statute intended to prevent injury and wrong.”<sup>116</sup>

*Nardone I* posed immediate questions for the Justice Department and FBI. According to a front-page *New York Times* story, unnamed officials at the Justice Department were not convinced that the Court’s opinion banned wiretapping per se, and instead clung to the view that the *Nardone* holding was confined to prohibiting interception plus disclosure of the wiretap.<sup>117</sup> In a December 22 memorandum to Hoover found in his personal and confidential files years after his death, FBI Assistant Director Edward Tamm reported on a meeting he had had with Assistant Attorney General Alexander Holtzoff. Holtzoff, we should telegraph, is going to play a central role in this story. In addition to his central role in the FDR wiretapping, he later went on to become a federal judge in Washington, D.C., where he ruled in favor of the government in preliminary proceedings in *Youngstown*.<sup>118</sup>

But back to 1937, where Holtzoff advised Tamm that the Communications Act did not prohibit wiretapping per se, but only wiretapping and divulging or publishing the contents of the wiretapping.<sup>119</sup> Holtzoff also advised Tamm that intrastate calls were not covered, and that although reporting the contents of calls internally to the Bureau may technically violate the law, the Justice Department would never prosecute such a case.<sup>120</sup> Hoover’s handwritten note on Tamm’s memo records that, despite the Supreme Court’s decision in *Nardone I*, the “same rule prevails as formerly.”<sup>121</sup>

Seven days after the decision, Attorney General Cummings ordered his assistant, Gordon Dean, as follows: “Consideration should be given to the latest decision and its scope. . . . I would like to be assured as to the distinction, if any, between receiving or obtaining information and actually publishing it. . . . Consideration should be given to the question of whether an amendment to the law should be suggested.”<sup>122</sup> Dean thereupon worked with Holtzoff, in January advising him that, with respect of the Department’s policies on wiretapping, “It is impossible to keep it secret,” and, “It is going to look a lot better to the public if we surround the tapping of wires with every safeguard.”<sup>123</sup> That

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116. *Id.* at 384.

117. *High Court Bars Testimony Based on Wire-Tapping*, N.Y. TIMES, Dec. 21, 1937, at A1. A subheadline in the paper stated that the *Olmstead* decision was reversed, which is not accurate. See Margaret Lybolt Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 536 (1947). The *New York Times* article itself offers a more nuanced and accurate statement that the Court, “in effect, reversed its attitude of nine years ago.” *High Court Bars Testimony Based on Wire-Tapping*, *supra*.

118. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 978 (D.D.C. 1952).

119. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 133.

120. *Id.*

121. *Id.*

122. SELECTED PAPERS OF HOMER CUMMINGS 251 (Carl Brent Swisher ed., 1939).

123. Memorandum from Gordon Dean to Robert H. Jackson, Att’y Gen. 3 (Mar. 22,

month, Dean urged the Attorney General to send a memorandum to Hoover banning wiretapping in interstate communications and requiring certain safeguards for intrastate wiretapping, “at least until Congress or the Courts carve out an exception.”<sup>124</sup> On January 25, Holtzoff wrote Cummings that internal agreement in the Department was very difficult, in part because Hoover did not want to be required to secure approval from an Assistant Attorney General before wiretapping. Hoover claimed that if he approved the taps and kept careful records, that alone should be a sufficient check on abuse.<sup>125</sup>

The internal debate continued. On January 27, Dean prepared a memorandum for Holtzoff advocating the abolition of wiretapping completely, for both interstate and intrastate communications. But days later, Dean wrote again to Holtzoff. Although calling wiretapping “obnoxious to all persons,”<sup>126</sup> Dean had been persuaded by Holtzoff that intrastate communications could be tapped with approval of the FBI Director and relevant Assistant Attorney General. Dean, however, still held firm that interstate communications could not be tapped.<sup>127</sup> Despite all of these discussions at the Justice Department, the Attorney General never issued an order regarding wiretapping,<sup>128</sup> in effect allowing the differing interpretations of the law to exist without clarification.

In response to *Nardone I*, some members of Congress sought legislation to permit wiretapping. On March 17, 1938, then-Solicitor General Robert Jackson wrote to Holtzoff expressing his understanding that legislation would be introduced that day. He said: “We have some cases that involve this question, and several people have discussed the matter with me. If this reaches you, I will be glad to talk the matter over with you.”<sup>129</sup>

The Administration assisted with some of these legislative efforts, suggesting at times that *Nardone I* had hamstrung their investigations when in actuality they were still wiretapping.<sup>130</sup> The report on one Senate wiretapping bill noted that “enactment of this bill is made necessary” because, as a result of *Nardone I*, “[f]ederal law-enforcement officers are forbidden to listen in on communications.”<sup>131</sup> The report continued: “The enactment of this bill is desired and recommended by all departments and agencies of the Federal Government engaged in law-enforcement activities.”<sup>132</sup> Similarly, a House

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1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8)

124. *Id.* at 4.

125. *Id.* at 6 (reporting on January meetings).

126. *Id.* at 7.

127. *Id.* at 7-8.

128. *Id.* at 8.

129. Memorandum from Robert H. Jackson, Solicitor Gen., to Alexander Holtzoff, Assistant to the Attn’y Gen. (Mar. 17, 1938) (on file with Library of Congress, Robert H. Jackson files, Box 94, Folder 9).

130. *See infra* text accompanying notes 196-255.

131. S. REP. NO. 75-1790, at 3 (1938).

132. *Id.*

Report on another proposed bill cited the “approval of the bill” by the Justice Department based on a letter from the Attorney General.<sup>133</sup> Even though both the House and Senate approved bills enabling wiretapping, Congress could not reconcile differences between the bills before adjournment.<sup>134</sup>

Meanwhile, internal debate within the Executive Branch continued. In October 1938, FDR appointed Cummings to head a committee to examine the current state of domestic intelligence and to investigate, among other issues, whether more resources were required.<sup>135</sup> On October 20, Cummings sent a letter to FDR along with a memorandum from Hoover. Hoover’s memo on the current state of FBI intelligence activities, along with “suggestions for expansion,” stated that the agency was collecting information on activities “of either a subversive or so-called intelligence type.”<sup>136</sup> Cummings’s letter pointedly did not refer to subversive activities, instead citing FDR’s interest in “the so-called espionage situation.”<sup>137</sup>

Attorney General Cummings resigned and was replaced by Frank Murphy in January 1939. Although Murphy initially informed several federal departments that the FBI would be undertaking investigations into both espionage and subversive activities, Murphy soon stopped using the term “subversive activities” as a basis for wiretapping investigations. Shortly thereafter, FDR issued a confidential memorandum authorizing the FBI, Military Intelligence Division, and Office of Naval Intelligence to investigate “all espionage, counter espionage, and sabotage matters”; the directive did not mention subversive or general intelligence.<sup>138</sup> FDR’s directive also confined FBI investigations to violations of federal statutes.<sup>139</sup>

The apparent confusion regarding the intended scope of the FBI’s intelligence gathering became further muddled when war broke out in Europe in September, 1939. Hoover expressed concern that citizens would report information not to the FBI but rather to local police departments. Seeking to have the FBI be the central repository of information, on September 6, 1939, Hoover urged Murphy to ask FDR to direct local officials to give the FBI all information on “espionage, counterespionage, sabotage, subversive activities, and neutrality regulations.”<sup>140</sup> FDR responded the same day with a “confusing” statement.<sup>141</sup> The statement listed matters that the FBI had been instructed to investigate but did not include the phrase subversive activities. However, later in this statement, FDR directed local officials to relay any information about

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133. H.R. REP. NO. 75-2656, at 4 (1938).

134. MURPHY, *supra* note 63, at 135.

135. THEOHARIS, *supra* note 78, at 70.

136. 2 CHURCH COMMITTEE REPORT, *supra* note 49, at 25-26.

137. *Id.* at 26.

138. *Id.*

139. THEOHARIS, *supra* note 78, at 73.

140. 2 CHURCH COMMITTEE REPORT, *supra* note 49, at 27.

141. *Id.*

subversive activities to the FBI. FDR accordingly had not formally authorized the FBI to investigate subversive activities, but only to collect such information if investigated by others.<sup>142</sup> During this time, FDR also apparently relied on friends to conduct intelligence gathering for him completely outside of any executive channels. Longtime friend Vincent Astor, for example, a Western Union Cable Company director, let FDR know he was illegally listening in on foreign transmissions “in accordance with your wishes.”<sup>143</sup>

#### D. Nardone II

The Supreme Court’s decision in *Nardone I* did not end the government’s efforts to punish Nardone and his co-defendants. The United States, unable to introduce the intercepted wiretapped conversations on remand, successfully introduced the substance of the calls at trial without introducing the calls themselves. The defendants objected but lost. On appeal, the defendants claimed that the Supreme Court’s rule in *Nardone I* “was disregarded by the trial Court” because “the Government, in the proof of its case indirectly did that which this Court has said could not be done directly.”<sup>144</sup> During these proceedings the defendants stayed in jail, having been denied bail by the U.S. Supreme Court.<sup>145</sup>

The Second Circuit, in an opinion by Judge Learned Hand, sided with the government once again. In the opinion, Judge Hand mused about whether *Olmstead* had been overruled.<sup>146</sup> Hand still thought *Olmstead* good law, believing that *Nardone I* only dealt with the limited scenario when information from wiretapping was divulged in court by a government official.<sup>147</sup> But he still thought it “[p]ossible *Olmstead* . . . is no longer law,” necessitating a broader prohibition on the admission of evidence.<sup>148</sup> The Supreme Court soon accepted the case to clarify the issue.<sup>149</sup>

The government told the Supreme Court that nothing in the Communications Act explicitly forbade the introduction of evidence obtained through leads derived from wiretapping. They claimed that the statute could only be read as such if, after the prohibition on use, the words “or any information derived therefrom” were added to the text of the statute.<sup>150</sup> In a

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142. THEOHARIS, *supra* note 78, at 74-75. Interpretation and misinterpretation of the September 1939 FDR memo would continue for decades. *Id.* at 66-67.

143. PERSICO, *supra* note 11, at 16.

144. Notice of Motion, Affidavit and Brief for Defendants-Appellants at 4, 7-8, United States v. Nardone (*Nardone II*), 308 U.S. 338 (1939) (No. 240).

145. United States v. Nardone, 307 U.S. 614 (1939).

146. United States v. Nardone (*Nardone II*), 106 F. 2d 41, 43-44 (2d Cir. 1939).

147. *Id.*

148. *Id.* at 44.

149. United States v. Nardone, 308 U.S. 539 (1939).

150. Brief for the United States at 17, Nardone v. United States (*Nardone II*), 308 U.S.



pithy rejoinder, the defendants countered: "It can not be assumed that Congress intended to express a pious abhorrence and condemnation of the practice, but to wink at its continuance."<sup>151</sup>

Once again, the Court wiped out the lower court opinions and ruled against the government in an opinion handed down fourteen days before Christmas, 1939.<sup>152</sup> The Court, with Justice Frankfurter writing for the majority, criticized the lower court for reducing *Nardone I* to "a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being."<sup>153</sup> Not mincing any words, it rejected the Government's interpretation, observing that "[a] decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."<sup>154</sup> Indeed, "[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'"<sup>155</sup>

As a result of *Nardone II*, the government lost the ability to use wiretaps and any indirect evidence obtained through them.<sup>156</sup> The very same day that *Nardone II* was handed down, Attorney General Murphy penned a letter to an acquaintance, discussing a talk he had recently given on civil liberties. Although it is unclear whether he was aware of the *Nardone II* decision, his claim that "we are not going to turn our backs on the Bill of Rights just because the times are as troublesome as they are" indicates a respect for privacy and the Constitution.<sup>157</sup>

Frank Murphy resigned as Attorney General on January 18, 1940, and was sworn in as a Justice of the Supreme Court two weeks later.

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338 (1939) (No. 240).

151. Brief on Behalf of Petitioner Nardone at 16, *Nardone II*, 308 U.S. 338 (No. 240).

152. *Nardone II*, 308 U.S. 338. On the same day as *Nardone II*, the Court also decided *Weiss v. United States*, 308 U.S. 321 (1939), holding that the Communications Act applied to intrastate communications as well as interstate communications. Thus, the Court closed off yet another possible avenue of wiretapping by the government.

153. *Nardone II*, 308 U.S. at 340.

154. *Id.* at 341.

155. *Id.* at 340; *see also id.* at 341 ("[T]he knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively.").

156. Ironically, although the *Nardone* cases held that Congress prohibited government wiretapping, the defendants ultimately went to jail because enough evidence could be introduced to establish guilt without any information from wiretaps. The court felt the government "had purged itself of its unlawful conduct." *United States v. Nardone*, 127 F.2d 521, 523 (2d Cir. 1942), *cert. denied* 316 U.S. 698 (June 1, 1942).

157. Letter from Att'y Gen. Frank Murphy to Caroline Parker, Bentley Historical Library, Univ. of Mich. (Dec. 11, 1939) (on file with Library of Congress, The Frank Murphy Papers on Microfilm).

### III. FDR'S DEFIANCE OF CONGRESS AND THE SUPREME COURT

#### A. Attorney General Jackson's Wiretapping Prohibition Under Nardone and the 1934 Communications Act

Murphy's replacement as Attorney General was the Solicitor General, Robert Jackson. Jackson took office in January 1940, a few weeks after *Nardone II* had been decided. By this point, hostility towards wiretapping had been expressed by Congress, affirmed by the Court, and applauded by the media. To the new Attorney General, the totality of the legal and political landscape indicated that wiretapping could not be permitted. The *Times* had lauded the *Nardone II* Court for clarifying that the 1934 Communications Act "precludes the use of wiretapping evidence, in what seems every form."<sup>158</sup> Aware of the Court's decisions, and despite discussion on multiple proposed bills, Congress consistently failed to amend the Act to permit any exceptions. Many in Congress continued to publicize wiretapping abuses, as did a prominent investigation by the Senate Interstate Commerce Committee. Jackson even obtained an advance copy of that Committee's report, highlighted it, and kept it in his personal files.<sup>159</sup>

After conferring with Hoover and independently reviewing FBI practice,<sup>160</sup> Jackson spelled out his position on wiretapping. Jackson kept three different versions of a Justice Department press release in his files: one says "For Immediate Release, March 15, 1940" but has "Draft" handwritten across the top; one says "For Release, March 15, 1940;" and one says "For Release, Monday Morning Papers, March 18, 1940."<sup>161</sup> The versions are similar but contain several important differences. The "Draft" contained one paragraph not included in the other two versions:

The Supreme Court has, however, held that it is unlawful to use evidence obtained by wire tapping. There has been considerable difference of legal opinion as to whether this prevented the tapping of wires to obtain information

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158. *High Court Widens Wiretapping Ban; Bars Indirect Use*, N.Y. TIMES, Dec. 12, 1939, at A1.

159. S. REP. NO. 76-1304 (1940); see also undated, unnumbered version on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8.

160. Memorandum from J. Edgar Hoover, FBI Dir., to Robert H. Jackson, Att'y Gen. (Mar. 13, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 6) ("Pursuant to our discussion this morning . . ."). The same day Hoover wrote Jackson to let him know he thought wiretapping should only be done if "outstanding lawyers, with liberal reputations, were consulted as to the type of legislation to be drafted." Memorandum from J. Edgar Hoover, FBI Dir., to Robert H. Jackson, Att'y Gen. (Mar. 13, 1940) (second letter dated the same day, on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 6).

161. "For Immediate Release [draft]," "For Release [Mar. 15, 1940]," and "For Release: Monday Morning Papers" (Mar. 18, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 6).

where such evidence was not disclosed in court, but was only communicated to other investigators on the case. While the difference of opinion is a reasonable one we feel that it is probably a “divulging” within the meaning of the statute for one [sic] investigator to report communications to another and that, therefore, the use in investigation of the wire tapping method has been banned by the Supreme Court. This being true, this Department is not justified in presenting to courts and jurors cases which rest on an illegal foundation.<sup>162</sup>

This analysis suggests a strong desire to implement a policy prohibiting wiretapping without exception.

The March 15 version for release was no less clear in its pronouncements that wiretapping was prohibited. This version stated that Jackson has “taken this action following a study of the recent decisions of the Supreme Court in which the provisions of the Federal Communications Act of 1934, prohibiting the intercepting and divulging of communications, has been construed.”<sup>163</sup> As a result, Jackson ordered that “the 1928 rule promulgated by Mr. Hoover, which prohibits wire tapping under any circumstances, be reinstated.”<sup>164</sup> Jackson tempered this conclusion in form (but not substance) by stating that:

While the courts have not had occasion to consider the application of the statute to many different circumstances, nevertheless, I feel that any doubt should be resolved against the employment of a practice which the Supreme Court has indicated to be “inconsistent with ethical standards and destructive of personal liberty.”<sup>165</sup>

The version “For Release, Monday Morning Papers” took a different tack. It did not mention the 1928 rule, instead noting that the Department was reinstating a 1931 FBI position that called wiretapping intolerable. This move was “required” to “conform to the decisions of the Supreme Court in recent cases . . . . These decisions have in effect overruled the contentions of the Department that it might use wire tapping in its crime suppression efforts.”<sup>166</sup> Admitting it “will handicap” the FBI’s ability to solve some cases, Jackson nonetheless believed that the use of wiretapping would discredit the agency and thus declared that he had “completely abandoned the practice as to the Department of Justice.”<sup>167</sup> The *Times* announced the news on the front page with the primary headline “Justice Department Bans Wire Tapping.”<sup>168</sup> The secondary headline was even more interesting: “Jackson Acts on Hoover Recommendation.” The story went on to identify Hoover as the instigator of the plan, a factor that had been stressed in the final edited version of Jackson’s press release.

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162. “For Immediate Release [draft],” *supra* note 161.

163. “For Release [Mar. 15, 1940],” *supra* note 161, at 3.

164. *Id.*

165. *Id.* (quoting *Nardone v. United States (Nardone II)*, 308 U.S. 338, 340 (1939)).

166. “For Release: Monday Morning Papers,” *supra* note 161, at 2.

167. *Id.* at 4.

168. *Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation*, N.Y. TIMES, Mar. 18, 1940, at A1.

Jackson's announcement received acclaim at the Department, including praise from the aforementioned Gordon Dean, who had earlier urged Cummings to do the same thing. Dean wrote to Jackson, recounting the lack of consensus despite years of debate at the Justice Department and emphasizing: "It has all been corrected by your recent order which prohibits wire tapping. The problem which we now face is that of not letting this constructive move be undone . . . ." <sup>169</sup> Jackson's files include a personal and confidential letter from Dean stating that thirty-five newspaper editorials praised Jackson's move, and offered suggestions to ensure it was not undone through hasty legislation that would allow wiretapping with inadequate safeguards to protect liberty. <sup>170</sup>

In contrast to Dean, Hoover—the supposed author of the wiretapping ban in the public's eye—bristled at the constraints. Hoover wrote to Jackson that he was "greatly concerned over the present regulation which prohibits the use of telephone taps in all types of cases."<sup>171</sup> The use of wiretaps was "essential," Hoover observed, as the agency "cannot cope with this problem without the use of wire taps and I feel obligated to bring this situation to your attention at the present time rather than to wait until a national catastrophe focuses the spotlight of public indignation upon the Department because of its failure to prevent some serious occurrence."<sup>172</sup> Hoover contacted Jackson several times to convey his desire to wiretap. In one instance, Hoover had sought to cooperate with Canadian police in monitoring several people of German origin. But because he felt that wiretapping "affords the best opportunity to obtain such information, I cannot be too optimistic about the results of the Bureau's activities. I believed you would desire to be advised of this situation."<sup>173</sup> Hoover failed to move Jackson from his firm position.

#### *B. FDR Secretly Resurrects Wiretapping by Confidential Memorandum*

The Executive Branch would soon undergo a rapid, internecine battle about whether to continue to respect the unity of Congress and the Court on broad prohibitions against government wiretapping. Having failed to convince the Attorney General to permit FBI wiretapping, Hoover soon employed other means. He began leaking stories to the press of how Jackson's policies

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169. Memorandum from Gordon Dean to Robert H. Jackson, Att'y Gen. 8 (Mar. 22, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

170. Letter from Gordon Dean to Robert H. Jackson, Att'y Gen. (Mar. 23, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 6).

171. Memorandum from J. Edgar Hoover, FBI Dir., to Robert H. Jackson, Att'y Gen. 1 (Apr. 13, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

172. *Id.* at 1, 3.

173. Memorandum from J. Edgar Hoover, FBI Dir., to Robert H. Jackson, Att'y Gen. 2 (May 15, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 9).

hindered FBI investigations.<sup>174</sup> Rather than continue to raise the matter directly with Jackson, Hoover contacted FDR's Treasury Secretary Henry Morgenthau.<sup>175</sup> Morgenthau's diary for May 20 reads:

I spoke to J. Edgar Hoover and asked him whether he was able to listen in on spies by tapping the wires and he said no; that the order given him by Bob Jackson stopping him had not been revoked. I said I would go to work at once. He said he needed it desperately.<sup>176</sup>

Hoover told Morgenthau about the proposed Canadian-U.S. surveillance of the four alleged Nazi spies. Morgenthau reacted predictably, dispatching an aide to convey Hoover's concern to FDR. (That aide, it was later discovered, happened to believe that wiretapping was illegal.) FDR's answer to the aide was immediate: "Tell Bob Jackson to send for J. Edgar Hoover and order him to do it and a written memorandum will follow."<sup>177</sup> FDR prepared his memorandum in a hurry the next day.<sup>178</sup> (This Memorandum is reproduced in the Appendix.) Years later, in a Bureau-endorsed history book, Hoover disguised his role in the unfolding of events, with the book only reporting that, after Jackson issued his press release banning wiretapping, "President Roosevelt had other ideas."<sup>179</sup> The book fails to mention Hoover's role in putting those ideas there.

FDR's May 21, 1940 confidential memo to Jackson mightily strove to avoid characterizing his directive as conflicting with the *Nardone* cases. FDR "agreed with the broad purpose of the Supreme Court decision relating to wiretapping in investigations" but he was "convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation."<sup>180</sup> Consequently, FDR authorized Jackson, in cases "involving the defense of the nation," to wiretap subject to certain specified conditions. The Attorney General could only authorize FBI wiretapping after an investigation of the need in each case, with wiretaps limited: (1) to a minimum number; (2) insofar as possible to aliens; and (3) by devices direct to the conversation. FDR had effectively resurrected the continued use of wiretapping in national defense investigations via a confidential two-page memorandum on White House stationery, signed "FDR."

The FDR memo's legal argument was, to put it mildly, weak. The Supreme Court had interpreted the 1934 Act to prohibit wiretapping of any sort. The decision was a straightforward interpretation of the statutory terms "no person . . . shall intercept any communication and divulge or publish the

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174. CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 231 (1991).

175. PERSICO, *supra* note 11, at 35.

176. *Id.*

177. *Id.*

178. FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 167 (1967).

179. DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE* 179 (1956).

180. Memorandum from FDR to Robert H. Jackson, Att'y Gen. (May 21, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 6).

existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person”<sup>181</sup> from the 1934 Act. To the Court, “the plain words . . . forbid *anyone*, unless authorized by the sender, to intercept a telephone message, and direct in *equally clear language* that ‘no person’ shall divulge or publish the message or its substance to ‘any person.’”<sup>182</sup> There was no logic in saying that the terms “no person,” “intercept,” and “any person” meant one thing in criminal cases and something entirely different in cases involving “the defense of the nation,” to use FDR’s words. It was a distinction without a difference to any reasonable observer—particularly since the last lines of the Court’s opinion had rejected the argument that the statute did not apply to government agents.<sup>183</sup> *Nardone I* had reasoned that the “plain words” of the statute compelled this result, and *Nardone II* agreed, noting that the Court was “dealing with specific prohibition of particular methods in obtaining evidence.”<sup>184</sup> There was no wiggle room in the Court’s opinions, as members of FDR’s Administration themselves told Congress when they sought changes to the 1934 Act in the wake of *Nardone I* and *II*. But FDR got away with his legal maneuvering because, after all, his memo was secret.

Jackson, however, pointedly disagreed with FDR. He would later write:

The only case that I recall in which he declined to abide by a decision of the Supreme Court was its decision that federal law enforcement officers could not legally tap wires. Wire tapping had been used in the Department of Justice by my predecessors. After the decision in *Nardone v. United States* came down in late 1939, I as Attorney General quickly issued an order to discontinue all use of the interception of wire communications . . . I had not liked [FDR’s May 21, 1940 Memorandum authorizing wiretapping as an] approach to the problem. It seemed to me that wire tapping was a source of real danger if it was not adequately supervised, and that the secret of the proper use of wire tapping was a highly responsible use in a limited number of cases, defined by law, and making wire tapping criminal outside of those purposes or limits.<sup>185</sup>

Days after receiving FDR’s memo, Jackson appears to have abdicated responsibility for overseeing government wiretapping. According to a strictly confidential memo from Hoover to three Assistant Directors, marked “Return to Director as soon as noted,” Jackson told Hoover that he “would have no

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181. Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064.

182. *Nardone v. United States (Nardone I)*, 302 U.S. 379, 382 (1937) (emphasis added).

183. *See id.* at 384 (“For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.” (footnote omitted)).

184. *Nardone v. United States (Nardone II)*, 308 U.S. 338, 340 (1939).

185. JACKSON, *supra* note 9, at 68-69.

detailed record kept concerning the cases in which wire-tapping would be utilized” in his office.<sup>186</sup> This has looked to some as if Jackson was going to wash his hands of the whole controversy and trust his subordinate with tremendous power and latitude,<sup>187</sup> so that it “effectively negated the intended restrictions of Roosevelt’s directive.”<sup>188</sup> In a memoir posthumously published, Jackson claimed with respect to wiretapping that he was “pretty closely in touch with that sort of thing to make sure that it was not abused.”<sup>189</sup> This may be historical revisionism. Jackson’s failure to keep records in his office or monitor how such wiretaps were used (by not requiring his reauthorization of ongoing taps) left a gaping hole for Hoover to exploit. Jackson’s memoir also glibly blamed Congress for having “dawdled and diddled” about legislation, claiming that its inaction led FDR to issue the secret memo.<sup>190</sup> In fact, Congress was not dawdling at all. Rather it had begun its work and ultimately refused to legalize national defense wiretapping.

*C. The (Uninformed) Debate over Wiretapping in Congress, Courts, and Executive Branch Continues*

The courts and Congress, unaware of FDR’s confidential May 21, 1940, memorandum, and thus in the dark about current government policy, continued to ponder statutory changes that would permit wiretapping. Twenty days after FDR’s secret memo, the Second Circuit held that for a phone call to be admitted into evidence at trial, both parties to the call must consent to it being recorded. Otherwise, that court held, *Nardone II* would be “sham and illusion.”<sup>191</sup> Days later, Representative Emmanuel Celler introduced legislation to authorize the FBI to wiretap.<sup>192</sup> The Congress of Industrial Organizations (“CIO”) opposed the legislation and conveyed their opposition to Jackson. In his reply to the CIO, Jackson acknowledged “the dangers of grave abuse of the privilege of wire tapping,” but, nonetheless, supported the Celler bill.<sup>193</sup> “[S]ome kind of wire tapping authorization will be given and should be given,” Jackson affirmed, and because this bill had sufficient limitations on government abuse, he wrote, it should be supported. Jackson did, however, offer a cryptic caveat: “Of course this limitation will depend very much on the

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186. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 134.

187. Theoharis, *supra* note 11, at 105.

188. *Id.*

189. JACKSON, *supra* note 9, at 69.

190. *Id.* at 48.

191. *United States v. Polakoff*, 112 F.2d 888, 889 (2d Cir. 1940).

192. H.R.J. Res. 571, 76th Cong. (1940).

193. Letter from Robert H. Jackson, Att’y Gen., to John L. Lewis, Cong. of Indus. Orgs. (June 19, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Folder 8).

attitude of the Attorney General at the time.”<sup>194</sup> Jackson undoubtedly recognized the potential for abuse by the Executive Branch.

Celler’s bill, opposed by labor, civil liberties groups, and others, never became law. By the end of the year, Jackson wrote to his assistant that: “It is necessary that we obtain a re-introduction of the wire-tapping bill.”<sup>195</sup>

Members of Congress continued to seek legislation to legalize wiretapping with the support and constructive engagement of the Executive Branch. Often times, these officials deliberately omitted the fact that wiretapping was already part and parcel of government policy, and instead pretended that legislation was a precondition before any wiretapping could take place. In his Annual Report to the Congress, the Attorney General claimed that “monitoring of telephone communications is essential in connection with investigations of foreign spy rings.”<sup>196</sup> Jackson told Congress: “today the criminal and the spy may use the highways of communication without restraint or even surveillance.”<sup>197</sup> His aide Holtzoff had testified:

The safest thing today that a foreign spy can do is to get on a telephone because he knows nobody is permitted to listen in on his conversation. Certainly, we want this authority not only in cases of sabotage but we want it in connection with espionage also. We need it, also, for some of the crimes which do not affect national defense.<sup>198</sup>

Later, Holtzoff told Congress that:

The only reason why legislation is needed on the subject is because in December 1937, the Supreme Court construed an obscure provision of the Communications Act, for the first time in the history of the United States, making it impossible for law-enforcement officers to use evidence obtained by listening in on any telephone conversation.<sup>199</sup>

Holtzoff and Jackson did not fess up about the fact that the government was already wiretapping, nor did they acknowledge that their claims about the need for legislation were misleading and overblown.

Congress, for its part, was also convinced that wiretapping was prohibited under *Nardone* and that legislation was required before it could resume. A House Committee Report after *Nardone I* had said that:

The enactment of this bill is made necessary, therefore, by the decision in the

194. *Id.*

195. Memorandum from Robert H. Jackson, Att’y Gen., to Alexander Holtzoff, Assistant to the Attn’y Gen. (Dec. 12, 1940) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

196. *To Authorize Wire Tapping: Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the H. Comm. on the Judiciary, 77th Cong. 17* (1941) [hereinafter *Hearings*] (letter from Robert H. Jackson, Att’y Gen., to Hatton W. Sumners, Chairman, Comm. on the Judiciary, House of Representatives (Feb. 10, 1941)).

197. *Id.*

198. *Id.* at 7 (statement of Alexander Holtzoff, Special Assistant to the Att’y Gen., Dep’t Justice).

199. *Id.* at 9.



*Nardone case*. As a result of this decision, the Federal law-enforcement officers are forbidden to listen in on communications by wire and radio, with the result that the organized underworld is at full liberty to make unrestricted use of the wire-and-radio facilities of the Nation to carry on their rackets and schemes to the detriment of the public.<sup>200</sup>

As World War II loomed, matters began to shift. In January 1941, Representative Sam Hobbs introduced a wiretapping bill. Holtzoff advised Jackson that “our” bill had been introduced.<sup>201</sup> Holtzoff sought to put a more positive spin on wiretapping, reminding Congress that before *Nardone I*, wiretapping “was considered perfectly legal . . . and nobody thought that our fundamental principles were being torn to tatters.”<sup>202</sup> Holtzoff’s efforts, which claimed wiretapping was impermissible under *Nardone*, were only the public face. In private, executive branch officials were acting under the legal view that they had wiretapping authority regardless of the *Nardone* cases.

Upon reintroduction, Hobbs’s bill commanded considerable assistance from Jackson and his staff. Holtzoff worked with acquaintances at various newspaper editorial boards to obtain placement of articles favorable to the bill.<sup>203</sup> In a public letter, Jackson endorsed the Hobbs bill over a competing bill.<sup>204</sup> Hobbs himself worked to promote the bill with unwavering support for the Executive Branch: “I do not care what party is in power, the executive head of any executive department of this Government, no matter what administration he may be serving, is a responsible gentleman who has some respect for his oath of office and for the law that he is sworn to enforce.”<sup>205</sup> As part of this strategy and to allay fears of abuse, FDR wrote to Representative Thomas Eliot to express his belief that “[a]s an instrument for oppression of free citizens, I can think of none worse than indiscriminate wire tapping.”<sup>206</sup> FDR claimed that any legislation permitting wiretapping should strictly limit its use, but should concede to the President’s latitude in war time.<sup>207</sup> FDR’s letter caused Justice Frankfurter, the author of *Nardone II*, to write to the President and commend

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200. H.R. REP. NO. 75-2656, at 2 (1938); *see also* S. REP. NO. 75-1790, at 3 (1938).

201. Memorandum from Alexander Holtzoff, Assistant to the Att’y Gen., to Robert H. Jackson, Att’y Gen. (Jan. 17, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

202. *Hearings, supra* note 196, at 9 (statement of Alexander Holtzoff, Special Assistant to the Att’y Gen. ).

203. Memorandum from Alexander Holtzoff, Assistant to the Att’y Gen., to Robert H. Jackson, Att’y Gen. (Feb. 15, 1941) (attaching *Wire-Tapping Safeguards*, EVENING STAR, Feb. 14, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box. 94, Folder 8).

204. *Hearings, supra* note 196, at 18-20 (letter from Robert H. Jackson, Att’y Gen., to Hatton W. Sumners, Chairman, Comm. on the Judiciary, House of Representatives. (Feb. 10, 1941)).

205. *Id.* at 21 (statement of Sam Hobbs, House of Representatives).

206. *Id.* at 257 (letter from FDR to Thomas Eliot, House of Representatives (Feb. 21, 1941)).

207. *Id.*

him on his “admirable letter on wire-tapping—limiting its uses to the strictest possible area, and then only under utmost safeguards.”<sup>208</sup>

The Administration’s public relations efforts continued to cast wiretapping in a positive light. Whitewashing the Department’s 1920s characterizations of wiretapping as unethical and intolerable (something which Hoover had publicly reinforced for many years), a January 1941 annual report by the Attorney General claimed that before *Nardone I*, the Department considered wiretapping “a proper and legitimate form of investigation.”<sup>209</sup> The FBI had been extensively wiretapping, and Hoover continued to extend and press the legal limits on eavesdropping for much of his tenure.

Jackson, however, appeared concerned about implementing FDR’s confidential memorandum. Writing to the President of the CIO, Jackson wrote: “If I sat in your chair I presume I would take the same position with reference to the wire tapping bill that you take . . . . On the other hand, I am very sure that if you sat in my chair you would take the same position that I take.”<sup>210</sup> Jackson rebuffed a four-page letter from the liberal National Federation for Constitutional Liberties (NFCL) pointing out numerous inconsistencies with executive branch testimony regarding wiretapping legislation.<sup>211</sup> Jackson simply replied: “I have not had, and probably will not have, an opportunity to examine the transcript of these hearings in detail . . . .”<sup>212</sup> Jackson was moving to a position of willful ignorance concerning the reality of FBI wiretapping activity.

At the same time, as Attorney General, Jackson knew that the government was in fact wiretapping under a direct order from the President. Despite his personal views, he started to shore up legal support for such activity, trying a number of different tacks. In each, he revealed himself to be far more forthright about current government policy than other Executive Branch officials—officials both at the time and, as we will later discover, those sixty years afterwards. He first tried to trot out and revive the argument someone at the Justice Department anonymously provided to the *Times* the day of *Nardone I*,<sup>213</sup> that the 1934 Act did not ban wiretapping unless the content of the call

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208. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 582 (Max Freedman ed., 1967).

209. *Hearings*, *supra* note 196, at 8 (statement of Alexander Holtzoff, Special Assistant to the Att’y Gen.).

210. Letter from Robert H. Jackson, Att’y Gen., to Philip Murray, President, Cong. of Indus. Orgs. (Feb. 20, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

211. Letter from Reverend Owen A. Knox, Chairman, Nat’l Fed’n for Constitutional Liberties, to Robert H. Jackson, Att’y Gen. (Feb. 24, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

212. Letter from Robert H. Jackson, Att’y Gen., to Reverend Owen A. Knox, Chairman, Nat’l Fed’n for Constitutional Liberties (Mar. 3, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

213. *High Court Bars Testimony Based on Wire-Tapping*, *supra* note 117.

was published.<sup>214</sup>

Jackson then attempted to loosen up a bit about current government action. He wrote to Representative Sumners that because wiretapping could be a critical tool in law enforcement cases, he had ordered it done to prevent a ticking time bomb scenario of sorts involving a kidnapping, knowing the evidence would not be admissible in court.<sup>215</sup> The letter stated that because wiretapping “might [b]e decisive in saving the life of the child, or in convicting the kidnap[er], and it might be equally decisive in clearing an innocent person unfortunate enough to be under suspicion. . . . I directed Mr. Hoover to put a recording device on that line.”<sup>216</sup> The Justice Department was now indirectly implying that it did not need legislation from Congress and had further informed Congress that it would condone wiretapping when needed.

Other agencies got pulled into the dispute. Before FDR’s May 1940 memorandum, the Federal Communications Commission had concluded that wiretapping was flatly illegal, regardless of whether the contents of the communication were disclosed.<sup>217</sup> On March 21, 1941, Holtzoff wrote Jackson a secret memorandum observing that FCC Chairman James Fly had requested the opportunity to testify confidentially to Congress and, “From a confidential source, I [Holtzoff] learned that Fly read from a prepared manuscript and vehemently opposed the wire tapping bill in its entirety, affirmatively criticizing the President’s attitude, as expressed in his letter to Congressman Eliot, and your attitude, as expressed in your letters to the Committee.”<sup>218</sup>

While Fly’s full testimony appears lost to the dustbin of history, we have been able to unearth a remarkable summary of it at the National Archives along with a summary of Jackson’s private testimony. The House Judiciary Committee Minutes contain the following notations. On March 17, 1941, Jackson had told the Committee that he wanted wiretapping authority to be severely limited, even dodging a question about whether wiretapping should be permitted when trying to detect a conspiracy to kill the President.<sup>219</sup> Jackson was admirably forthright about the present legal position; when asked if the military could wiretap he replied “at present the inhibitions are against ‘interception and disclosure’ of a message and that it may be possible to tap wires now.”<sup>220</sup> He did not, however, acknowledge that in fact the Executive

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214. *Hearings*, *supra* note 196, at 18 (letter from Robert H. Jackson, Att’y Gen., to Hatton W. Sumners, Chairman, Comm. on the Judiciary, House of Representatives (Mar. 19, 1941)).

215. *Id.* at 19.

216. *Id.*

217. MORGAN, *supra* note 50, at 35.

218. Memorandum from Alexander Holtzoff, Dep’t of Justice, to the Att’y Gen. (Mar. 21, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

219. Minutes of the Committee on the Judiciary, House of Representatives, 77th Congress, 1st Sess. (Mar. 17, 1941) (on file with the National Archives).

220. *Id.*

Branch was engaged in wiretapping.

But that revelation was about to come one week later when Fly took the witness chair. The minutes report: “Mr. Fly charged that wires have been tapped by the Department of Justice in violation of the law.”<sup>221</sup> Senator Hancock “asked if it was not a fact that prosecuting authorities actually tap wires. Mr. Fly answered that there was probably more of that being done than there should be.”<sup>222</sup> Fly argued against any legalization of wiretapping, even if the authorization were subject to a short legislative sunset. And he further argued “that as a defense measure the statute (Communications Act) be strengthened to forbid all wire-tapping.”<sup>223</sup> And not content with a mere parchment barrier, Fly “[f]urther [stated] that steps should be taken to avoid having [wiretapping] equipment generally available.”<sup>224</sup>

Due to the tightly controlled House hearing, the full details of Jackson and Fly’s testimonies never emerged in the public eye. FDR and others in the Administration did not retaliate against Fly.<sup>225</sup> While Congress continued to deliberate on the desirability of enacting wiretapping legislation,<sup>226</sup> Hoover and Jackson continued to tussle over permissible surveillance targets. FDR’s confidential memorandum had permitted wiretapping in certain circumstances but did not define the exact parameters. Instead, the President required the Attorney General’s prior review and approval for each tap. Hoover sought to expand intelligence gathering beyond mere criminal investigations into a far more expansive program, notably targeting suspected Communists in labor groups.<sup>227</sup> Hoover wrote a “personal and strictly confidential” memorandum to Jackson, observing that he was having trouble operating under the constraints of “legal, ethical investigations.”<sup>228</sup> Hoover desired to “disregard technicalities” and use “extraordinary means and methods” but declared himself “guided in all matters of this kind by [Jackson’s] judgement and decisions.”<sup>229</sup> Jackson went to FDR privately and urged caution.<sup>230</sup> Concerned

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221. Minutes of the Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess. (March 25, 1941) (on file with the National Archives).

222. *Id.*

223. *Id.*

224. *Id.*

225. JACKSON, *supra* note 9, at 69.

226. The House Judiciary Committee reported favorably on the latest wiretapping bill on April 1, 1941. Memorandum from Alexander Holtzoff, Assistant to the Attn’y Gen., to Robert H. Jackson, Att’y Gen. (Apr. 2, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

227. FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 187-93.

228. Memorandum from John Edgar Hoover, Dir., Fed. Bureau of Investigation, to the Att’y Gen. (Apr. 26, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 11).

229. *Id.*

230. Memorandum from Robert H. Jackson, Att’y Gen., to FDR (Apr. 29, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 11).

about lawlessness, Jackson described his position as one which he “took very emphatically and upon which I feel very deeply.”<sup>231</sup> This included a concern about how wiretapping could demoralize the Department of Justice, just as it did after the Palmer Raids. Jackson told FDR that, “unless some times of danger much greater than anything I now see shall later appear, we should adhere to the legal and ethical standards of investigation in cases dealing with subversion in the labor movement the same as any others.”<sup>232</sup> Jackson did implicitly offer one way for FDR to accomplish his goals: rather than saying it could not be done, he simply said, “I certainly would not be the type of man to run that sort of unit.”<sup>233</sup> Jackson was trying desperately to balance the views of Hoover, FDR, Congress, the Court, and himself.

It is now quite clear that surveillance of labor groups took place during this time. The National Security Electronic Surveillance Card File, partially declassified in 1983, includes information about wiretaps conducted by the FBI over many years, in addition to details regarding planting electronic bugs and conducting surreptitious break-ins.<sup>234</sup> Many entries exist for the time period during Roosevelt’s administration following the secret 1940 memo and onward, although they are heavily redacted and do not indicate if they were initiated at the direction of the White House or received the approval of the Attorney General. They include wiretaps of organizations and businesses as varied as the NAACP, Kyffhaeuser Bund, and the Revolutionary Workers League. In addition, many unions were surveilled, including the CIO Maritime Committee, CIO Food, Tobacco, Agricultural & Allied Workers of America, International Longshoremen’s and Warehousemen’s Union (CIO), National Maritime Union, National Negro Labor Council, National Union of Marine Cooks & Stewards, United Electrical Radio & Machine Workers of America, and the United Public Workers of America—CIO.

A complete listing of wiretapping under Roosevelt’s order is not possible because records remain classified or have been destroyed. But there is evidence suggesting that the wiretapping policy was extensively implemented, and not at all limited to labor unions. For example, the White House requested an investigation of Henry Grunewald beginning in June 1940 out of concern that he headed a German spy ring; the investigation revealed no such evidence.<sup>235</sup> In March and April 1942, Attorney General Biddle approved taps on John G. O’Brien and Lillian Moorehead based on allegations they were engaged in a conspiracy to overthrow the Roosevelt administration; the wiretapping revealed

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231. *Id.*

232. *Id.*

233. *Id.*

234. See FBI WIRETAPS, BUGS, AND BREAK-INS: THE NATIONAL SECURITY ELECTRONIC SURVEILLANCE CARD FILE AND THE SURREPTITIOUS ENTRIES FILE (Univ. Publ’ns of Am., Athan Theoharis ed., 1988) (microform collection).

235. Theoharis, *supra* note 11, at 107.

no evidence of such a plan.<sup>236</sup> In 1942 the Attorney General also approved a wiretap of Inga Arvad, a newspaper columnist that Hoover claimed “may be engaged in a most subtle type of espionage activity against the United States;”<sup>237</sup> although the FBI found no evidence of such activity,<sup>238</sup> recordings detailing Arvad’s affair with then-ensign John F. Kennedy remained in Hoover’s files until his death.<sup>239</sup> After Hoover ordered the Arvad tap discontinued fearing its imminent discovery, Roosevelt, suspicious of Hoover’s reports on Arvad’s contacts, ordered the tap reinstated without informing the attorney general, which it was for two additional months.<sup>240</sup>

Despite his private misgivings, Jackson’s public rhetoric grew increasingly irritated over congressional delay and he began backtracking on his previous forthrightness. Once again, he started implying that the executive branch could not wiretap, telling the Hill that without legislation permitting national defense wiretapping, telephone systems in the United States “will continue to be the safest and most effective methods of communication that foreign agents can employ against our government.”<sup>241</sup> Jackson wrote to a liberal member of the House the following day “that if you and any of the other liberals in Congress sat in my seat and were held to some degree of responsibility for the perpetration of acts of sabotage and espionage in this country you would feel differently about the wire tapping bill.”<sup>242</sup> Jackson unsuccessfully sought to convince Congress to enact legislation that would authorize the Attorney General to do what the President was already confidentially requiring him to do.

Within the executive branch, concerns about the looming world war had effectively squelched opposition to wiretapping. Initially, Jackson tried to convince the War Department that the problems they sought to solve through wiretapping would “be aggravated rather than solved by the methods you propose.”<sup>243</sup> The Assistant Secretary of War J.J. McCloy replied that the government should be able to “take all measures necessary.”<sup>244</sup> Unfazed by the

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236. *Id.* at 108-09.

237. *Id.* at 109.

238. *Id.* at 110.

239. See FROM THE SECRET FILES OF J. EDGAR HOOVER, *supra* note 47, at 4.

240. Theoharis, *supra* note 11, at 111.

241. Letter from Robert H. Jackson, Att’y Gen., to A.J. Sabath, Chairman, Rules Comm., House of Representatives (May 14, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

242. Letter from Robert H. Jackson, Att’y Gen., to John W. Coffee, House of Representatives (May 15, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

243. Memorandum from Robert H. Jackson, Att’y Gen., to Robert Patterson, Undersec’y of War, and J.J. McCloy, Assistant Sec’y of War (Apr. 30, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 11).

244. Letter from J.J. McCloy, Assistant Sec’y of War, to Robert H. Jackson, Att’y Gen. (May 6, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94,

rejoinder, Jackson tried to stop the Office of Naval Intelligence from installing wiretaps. Evidently disagreeing with FDR's May 1940 memo, Jackson told the Secretary of the Navy that such wiretaps were prohibited by statute and the Court, and if discovered would jeopardize pending legislation to permit wiretapping.<sup>245</sup> Jackson's purpose, sensitive to past military abuse, was to confine wiretapping to the FBI.

When dealing with the War Department, Jackson continued to hold off largely uncontrolled governmental wiretapping. Jackson warned McCloy that illegal wiretapping would jeopardize passage of legislation to permit limited wiretapping.<sup>246</sup> He also resorted to a different kind of argument. "The man who today will rifle your desk for me," Jackson cautioned, "tomorrow will rifle mine for someone else. I just don't want that type of fellow in my outfit."<sup>247</sup> McCloy responded that the War Department would assist Jackson's efforts to secure legislation, admitting "that there is a real problem and, perhaps, the only solution is via legislation."<sup>248</sup> But McCloy explained that he felt that "abnormal and, no doubt in some cases, quite distasteful means" are necessary.<sup>249</sup> Jackson, in turn, tried to stay firm.

Ultimately, military interests played a critical role in thwarting Jackson's efforts to protect civil liberties. The War Department, frustrated by Jackson's intransigence, sought help from the President directly. In a letter to FDR, the Secretary of War and the Secretary of the Navy "urged 'a broadening'" of FBI surveillance authority, and the President replied that he was forwarding their letter to Jackson along "with [his] general approval."<sup>250</sup> FDR had trumped Jackson again. As the Executive Branch became increasingly hostile to his views on wiretapping, shepherding legislation through Congress became Jackson's best hope for protecting civil liberties.

However, Jackson's efforts to secure legislation abruptly failed just as his time as Attorney General came to an end. The House defeated the wiretapping bill, 154 to 147,<sup>251</sup> due in part to pressure from "labor unions, the American Civil Liberties Union, [and] business and citizen groups."<sup>252</sup> No doubt Jackson

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Folder 11).

245. Letter from Robert H. Jackson, Att'y Gen., to the Sec'y of the Navy (May 13, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 9).

246. Letter from Robert H. Jackson, Att'y Gen., to J.J. McCloy, Assistant Sec'y of War (May 16, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 11) ("Meanwhile, resort to means outside the law would certainly prejudice our chance to get the many improvements in the law which I am seeking.").

247. *Id.*

248. Letter from J.J. McCloy, Assistant Sec'y of War, to Robert H. Jackson, Att'y Gen. (May 19, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 11).

249. *Id.*

250. 2 CHURCH COMMITTEE REPORT, *supra* note 49, at 27 n.20.

251. NORMAN M. LITTELL, *MY ROOSEVELT YEARS* 39 n.2 (1987).

252. David M. Helfeld, *A Study of Justice Department Policies on Wire Tapping*, 9

shared Representative Hobbs's "dissatisfaction" when the latter called him on the day of the vote to complain about "the lack of progress" in securing the desired legislation.<sup>253</sup> But Jackson would not be around much longer. The same day as the House vote, Jackson received news from the Senate that permanently removed him from the fight on wiretapping: his confirmation as an Associate Justice of the United States Supreme Court.<sup>254</sup> By the time he left the office of Attorney General for his new position, Jackson's efforts on the wiretapping issue had taken a toll on him.<sup>255</sup> But instead of facing reprisal for his defense of civil liberties and his relative forthrightness, FDR had rewarded him.

#### D. FDR Solidifies Wiretapping as Government Policy

FDR, however, did not want to continue Jackson's policies. He sought an Attorney General who would not sacrifice security for liberty.<sup>256</sup> FDR somewhat unexpectedly found such a person in his nominee, Francis Biddle, a member of the ACLU. In Biddle's first press conference as Attorney General, he announced that the FBI should be allowed to wiretap in cases ranging from spies to kidnapping.<sup>257</sup>

Congress attempted to address wiretapping once more in 1941—but this time, the executive branch disengaged with the Hill. At an internal meeting, Biddle brought up the idea of seeking legislation.<sup>258</sup> Hoover shot him down "rather bitterly," claiming that legislation would likely fail again, in part because of opposition from the CIO.<sup>259</sup> In a later effort to make the case for wiretapping, "Hoover pointed out that we [the U.S.] were the only restricted ones in wire-tapping and that the British and Free French intelligence services, which are enormous in this country, make free use of wire-tapping."<sup>260</sup> Ultimately, after 1942, the Justice Department ceased their efforts to amend the 1934 Communications Act.<sup>261</sup> They resumed these efforts in 1949, and intermittently thereafter, until the passage of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>262</sup>

Under President Truman, Attorney General Tom Clark, a strong supporter

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LAW, GUILD REV. 57, 63 (1949).

253. Memorandum from NHF to Robert H. Jackson, Att'y Gen (June 30, 1941) (on file with Library of Congress, Robert H. Jackson Papers, Box 94, Folder 8).

254. STEELE, *supra* note 11, at 93.

255. *Id.* at 98.

256. *See id.* at 112.

257. *Biddle Approves FBI Wiretapping*, N.Y. TIMES, Oct. 9, 1941, at 4.

258. *See* LITTELL, *supra* note 251, at 39-40.

259. *Id.* at 40.

260. *Id.* at 44 (footnote omitted). Hoover's lament diverged from his actual policy of extensively wiretapping individuals and organizations which he believed threatened the national security, ranging from right-wing to left-wing activists.

261. Helfeld, *supra* note 252, at 63.

262. Pub. L. No. 90-351, 82 Stat. 197.



of wiretapping, expanded the meaning of FDR's confidential memorandum by manipulating its original text.<sup>263</sup> In a July 1946 letter to President Truman, Clark sought Truman's "reaffirm[ation]" of FDR's memorandum.<sup>264</sup> Clark's letter had been largely ghostwritten by Hoover,<sup>265</sup> who purposefully stretched the language in the FDR memo to suggest that it authorized wiretapping subversives, which it did not.<sup>266</sup> Truman therefore unwittingly expanded the authority of the FBI to wiretap in cases involving domestic radicals in peacetime.<sup>267</sup> Clark would later inaccurately claim FDR's wiretapping rules had not been changed.<sup>268</sup> Rather, Clark "contemporaneously stretched [the memorandum] to embrace domestic leftists generally, and its original intended purpose was subsequently obscured."<sup>269</sup> When a White House aide later brought to Truman's attention that Clark's 1946 letter inappropriately extended FDR's 1940 memorandum, the White House decided to do nothing, fearing public criticism of its ability to oversee the FBI.<sup>270</sup> It was not until March 1962 that Jackson's short-lived-in-practice prohibition on wiretapping was formally rescinded by the Justice Department.<sup>271</sup>

#### IV. ESCAPING THE PAST: LEARNING FROM THE BUSH AND FDR ADMINISTRATIONS

At the time of this writing, litigation about the NSA program continues in a number of courts. An Attorney General, Alberto Gonzales, has resigned amid accusations that he misled Congress about the program.<sup>272</sup> Another Justice Department official, the former Number Two, James Comey, testified that the entire senior leadership of the Department, including the FBI Director (Robert Mueller, III) and Attorney General (John Ashcroft) had at the time contemplated resignation because the President was not obeying legal restrictions on the program. Another official, Patrick Philbin, was reputedly blocked from an internal promotion because the Vice President did not like the fact that Philbin tried to enforce those legal restrictions. Still another

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263. THEOHARIS, *supra* note 78, at 99-100.

264. *Id.* at 99.

265. See OVID DEMARIS, *THE DIRECTOR: AN ORAL BIOGRAPHY OF J. EDGAR HOOVER* 127 (1975).

266. THEOHARIS, *supra* note 78, at 99-100.

267. *Id.* at 100.

268. DAVID WISE, *THE AMERICAN POLICE STATE: THE GOVERNMENT AGAINST THE PEOPLE* 99 (1976).

269. FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 244 (1980).

270. THEOHARIS, *supra* note 78, at 103-04.

271. MORGAN, *supra* note 50, at 90.

272. Philip Shenon, *Inspector General at the Justice Dept. Is Investigating Gonzales's Testimony*, N.Y. TIMES, Aug. 31, 2007, at A17. Mr. Gonzales did not say he was resigning because of this issue.

Department of Justice official, Jack Goldsmith, resigned as the head of the Office of Legal Counsel in part due to the internal fighting over this issue.

The FDR precedent suggests two important lessons. First, and contrary to the oft-repeated claim from the political left, the Bush Administration is by no means the first administration with hostility to Congress and the courts when it comes to war powers—even within the realm of electronic surveillance. Second, and contrary to the oft-repeated claim from the political right, the fact that other Presidents have engaged in such conduct does not automatically immunize or excuse a current President from doing the same thing. Rather, the pattern of past presidential conduct should be closely analyzed before accepting the precedent.

In this particular case, the FDR precedent serves as a cautionary example of how best to structure government's various institutions to avoid abuse. It suggests both that executive branch officials, in times of crisis, will push to expand the powers of the President and also that the courts and Congress are not likely to prevent them from doing so. Even a deeply engaged Supreme Court (as the *Nardone*-era Court certainly was) cannot do much given the twin facts of executive branch secrecy and the long time lags inherent in federal court litigation. For these reasons, instead of focusing on the courts as the ultimate protectors of liberty in times of national security crises, more attention needs to be given to "internal" separation of powers. By restructuring the architecture of the executive branch, some inappropriate concentrations of power can be avoided and fidelity to the rule of law encouraged.

#### A. *The FDR Precedent and Executive Branch Lawbreaking*

The FDR precedent is far closer to the NSA program than what analysts, including even those within the Bush Administration itself, have claimed. While the Administration has repeatedly invoked FDR when defending its wiretapping program, its analysis has been spotty. The relevant facts are these:

- FDR defied a Supreme Court decision that prohibited wiretapping. As Justice Jackson would later put it, this was the only instance in which FDR "declined to abide by a decision of the Supreme Court."<sup>273</sup>
- The Court decision at issue in *Nardone* was based on a law of Congress, the 1934 Telecommunications Act. In effect, then, FDR was using tendentious statutory construction as a way to trump legislation.
- FDR, of course, did not put it that way or otherwise assert a lawbreaking power. Instead, like any canny politician, he simply pretended the *Nardone* decision did not mean what it said. The dubious contortion of the Court's decision in *Nardone* was not

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273. See JACKSON, *supra* note 9, at 69.

credible—as many in the Justice Department warned.

- The Attorney General, Robert Jackson, had tried to put a stop to wiretapping, but was overruled by FDR after the FBI Director (J. Edgar Hoover) insisted on it.
- The Administration continued to urge Congress to permit wiretapping, often without disclosing that it believed it already had that authority and was acting on that basis.
- The courts and Congress were, ultimately, unsuccessful in preventing the executive branch from engaging in this surveillance and complying with the law.
- Many of the strongest voices against wiretapping were housed within the executive branch itself, such as the FCC's Fly and Attorney General Jackson.

Each of these events has a parallel to today. We first outline those parallels and then discuss them in greater detail:

- President Bush defied a statute, the 1978 FISA, that prohibited the NSA's electronic surveillance.
- The terms of the statute forbade the surveillance; the NSA program violated the statutory text and not merely a judicial interpretation of it.
- The Administration asserted that the program did not violate the statute, but also claimed that, if it did, then it was of no consequence because the President had "inherent authority" to trump the statute and violate the law.
- In claiming that the program did not violate FISA, the Administration engaged in some of the same sorts of patently weak contortions about the statute that FDR had engaged in about *Nardone*.
- The Attorney General at the time, John Ashcroft, as well as Deputy Attorney General James Comey and FBI Director Robert Mueller, tried to put a stop to the program. Ultimately, after the President's intervention, some sort of program continued afterwards.
- The Administration continued to seek authorization to continue the NSA program, and had even sought legislation to do so before the NSA program was revealed by the *New York Times*.
- The courts and Congress have been largely irrelevant in stopping this surveillance program thus far.<sup>274</sup>

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274. One district court decision declared the program illegal, but that decision was reversed on appeal. *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev'd*, 493 F.3d 644 (6th Cir. 2007).

In a second development, due to a new FISA Court decision, Congress recently approved a temporary six-month legislative fix that would permit some sort of continued

- Many of the strongest opponents of the NSA program have been internal officers of the executive branch itself.

As one delves into the above points, facial differences emerge. The most obvious such difference is that FDR's activity was prompted by a judicial decision; today's controversy involves the text of a statute. But that distinction is of no real significance. While the reach of the 1978 FISA to the War on Terror has not been the subject of a judicial interpretation like its 1934 analogue, the language of the 1978 statute is far more explicit. As discussed in Part I, the statute announces that it is the "exclusive" way of conducting such surveillance, and prohibits virtually all domestic surveillance (short of a declaration of war or short-term emergency exception in the statute itself) when that surveillance is not approved by the FISA court. Nevertheless, the Administration took a ludicrous view of the statute. They first asserted that FISA permitted "authorization" through other statutes (even when those statutes do not invoke the surveillance power), and then claimed that Congress's authorization to use military force (AUMF) on September 18, 2001, somehow transmuted into that missing statute to give permission for the NSA's program. Of course, the 2001 AUMF said not one word about electronic surveillance, and there is no reason to suspect that Congress had any idea that it thought it was creating an end-run around FISA:

The next time a president asks Congress to pass something akin to what Congress passed on Sept. 14, 2001—the Authorization for Use of Military Force—the resulting legislation might be longer than Proust's *Remembrance of Things Past*. Congress, remembering what is happening today, might stipulate all the statutes and constitutional understandings that it does not intend the act to repeal or supersede.

But, then, perhaps no future president will ask for such congressional involvement in the gravest decision government makes—going to war. Why would future presidents ask, if the present administration successfully asserts its current doctrine? It is that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be.

This monarchical doctrine emerges from the administration's stance that warrantless surveillance by the National Security Agency targeting American citizens on American soil is a legal exercise of the president's inherent powers as commander in chief, even though it violates the clear language of the 1978 Foreign Intelligence Surveillance Act, which was written to regulate wartime surveillance.

Administration supporters incoherently argue that the Authorization for Use of Military Force allowed the NSA surveillance—and that if the administration had asked, Congress would have refused to authorize it. The first assertion is implausible: None of the 518 legislators who voted for the

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NSA program. Protect America Act of 2007, Pub. L. No. 110-55, 21 Stat. 552. The fact that Congress, particularly a Congress of the opposite political party of the President, gave the President these powers is some further evidence that internal separation of powers, instead of external ones, will be a necessary check on government power.

Authorization has said he or she then thought it contained the permissiveness the administration now discerns in it. Did the administration, until the program became known two months ago?<sup>275</sup>

The FISA-AUMF jig should remind readers of the FDR dance around *Nardone*. Recall that FDR didn't claim, as President Jackson allegedly did in 1832 after *Worcester v. Georgia*, "'John Marshall has made his decision: now let him enforce it!'"<sup>276</sup> There was no need to do that. Instead, the President could make a bold and implausible legal argument—in secret—that the decision did not really reach his program. He did not need to worry about persuading a court, or even Congress, about his legal reasoning; he simply had to articulate some sort of cover story.

Fast-forward to the NSA controversy. While the details have still not emerged, it is clear that the Administration authorized, in secret, a program with a shaky reading of FISA. Indeed, the reading was so implausible that when a new head of the Justice Department Section responsible for overseeing its legality (the Office of Legal Counsel) reviewed it, he declined to authorize the program. The White House Chief of Staff, Andrew Card, and the White House Counsel, Alberto Gonzales, then made an attempt to persuade the Justice Department to reconsider, prompting the *en masse* resignation threat.<sup>277</sup> Eventually, the White House persuaded the Justice Department to authorize some sort of limited program.

While one cannot know what transpired in those days due to classification and executive branch secrecy, it is a pretty safe bet to assume that those in favor of the program never understood the FDR precedent. FDR had taken a step that put the government's surveillance on a collision course with congressionally enacted law and the Supreme Court. If FDR could do it in 1940, why could not President Bush do so in response to 9-11? To be sure, the Presidential action involves different statutes—the 1934 Communications Act and the 2001 AUMF. But if the Constitution permits the President to advance a dubious interpretation of the 1934 Act to protect the nation in lieu of successfully seeking legislation to modify that Act, then shouldn't the same principle apply today to the AUMF? Particularly when the President who made that decision was not Warren Harding, but none other than FDR? This is a strong defense—much stronger than that put forth by the Administration in its

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275. George Will, Editorial, *Law and Disorder in Washington*, CHI. SUN-TIMES, Feb. 16, 2006, at 37.

276. 1 HORACE GREELEY, *THE AMERICAN CONFLICT* 106 (Chicago, O.D. Case & Co. 1866) (emphasis omitted) (attributing remark to Andrew Jackson).

277. The events are considerably more complicated than this brief description, involving a late-night hospital visit from these White House officials to John Ashcroft, who was ordinarily Attorney General but suffering from a serious illness at the time. Interested readers should consult *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part IV: Hearing of the S. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of James B. Comey, former Deputy U.S. Att'y Gen.).

various attempts to defend the program—but it ultimately should not carry the day.

### B. *Why the FDR Defense Ultimately Fails*

In virtually all national security disputes, there are few judicial precedents to follow for reasons well articulated by Justice Jackson in the opening lines of his famous *Youngstown* concurrence.<sup>278</sup> For that reason, executive branch tradition is often a touchstone for finding the limits of presidential power. If Presidents have historically acted in a particular way—such as by putting troops on the ground without a declaration of war by Congress—that practice is often compelling precedent for the legality of such behavior by modern-day Presidents. In this sphere, the text of the Constitution offers little guidance and executive branch precedent can be the most authoritative guide. (As Jackson would put it in *Youngstown*, “the practical working of our Government” can inform the boundaries of executive power.<sup>279</sup>) For that reason, we believe the FDR precedent will offer much comfort to defenders of the NSA program. We ultimately reject the defense, but our reasons for doing so are obviously debatable. The fact remains that one of our greatest Presidents did something quite similar to what President Bush has done.

There are three basic reasons why we reject the FDR precedent defense of today’s NSA program. None of these reasons is the one offered by Dellinger, Kris, and others who have established the “conventional wisdom” that FDR’s activity was limited to presidential action within the zone of silence and did not defy Congress. After the 1934 Telecommunications Act and its interpretation in *Nardone*, that reading of history is too weak. Instead of trying to isolate facial differences and artificially elevate their importance, we would do better to admit the parallels and learn from them.

*First*, while executive precedent is always important, it attains the bulk of its force when it is open. Justice Frankfurter’s *Youngstown* concurrence put the point well, that before executive precedent can become a “gloss” on Article II, it must be “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”<sup>280</sup> Therefore, the actions of a previous President, while a helpful guide, should not settle a controversy—particularly when those actions took place in secret. Those of us who are Unitary Executivists derive much of our position from the fact that the President is publicly accountable for his actions. That visibility prompts better decisions.<sup>281</sup> But secret activity cannot be imbued with that level of credibility

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278. See *supra* note 1.

279. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).

280. See *id.* at 610-11 (Frankfurter, J., concurring); *supra* note 2 and accompanying text.

281. Neal Kumar Katyal, Comment, *The Supreme Court, 2005 Term—Hamdan v.*

since it takes place without that critical check of public accountability. For that reason, a secret precedent like FDR's, read properly, should inspire caution instead of blind allegiance. After all, the full details of this story are still being dug out of the archives decades later; it is hardly the type of precedent that the nation's political processes have blessed over a long period of time.

This is not the proper place to develop a full taxonomy of when executive branch precedent should be authoritative. But we think a few guidelines, at this juncture, can be offered. Some of the factors in determining whether an executive branch precedent should have force are: (a) whether it was done openly and was the subject of public debate; (b) whether it was approved—or at least not rejected—by the legislature at the time; (c) whether it was approved by other Presidents, legislatures, and analysts in subsequent time periods; and (d) whether it concerns a practice as to which the Constitution does not offer a clear guide. There are solid normative reasons for considering these factors, such as the democratic legitimacy inherent in open decisions by major government actors. There are also epistemic reasons as well, chief among them that executive branch precedent can often be a powerful mechanism for learning what efficacious Presidents have needed to do. Since courts, Congress, and analysts each lack full information—and since there is no consensus in values on the proper boundaries of executive power—the actions of previous Presidents can be quite revealing, particularly in understanding those areas of the Constitution where the text does not offer clear answers. For that reason, transparency cannot function as an absolute requirement before executive branch precedent has force. Some executive precedents might have weight even when they are secret. But their weight must necessarily be reduced tremendously, since a secret precedent is imbued primarily with epistemic benefits rather than ones of democratic legitimacy.

*Second*, the fact that a President—even a great one—acted in a certain way does not mean that future Presidents are justified in following his lead. FDR is perhaps the most cautionary tale of all. As every law student knows, FDR was the President who ordered the internment of tens of thousands of Japanese-Americans in camps—individuals who had no suspicion of disloyalty apart from being Japanese-Americans. And FDR's track record with civil liberties was not limited to this episode. Rather, "Franklin Roosevelt displayed a consistent lack of leadership in the area of civil rights and liberties."<sup>282</sup> It is a simple category mistake to assume that a President who possesses exquisite

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Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 n.16 (2006) ("[A] chief normative reason for the unitary executive is to avoid blurred lines of political accountability, not to sidestep accountability altogether, which is what the Administration's secretive memos attempted to do.")

282. Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 693 (1984). Irons discusses, inter alia, the prosecution of the Trotskyites under the Smith Act, a prosecution that even Attorney General Biddle later lamented as overblown and unnecessary. *See id.* at 716.

judgment in one arena carries that judgment over into other areas. That may sometimes be the case, but it is not inexorably so.

*Third*, as a matter of constitutional governance, it is exceptionally dangerous to vest a President with the power to break the laws, at least at a time when Congress can act. If the 1934 Act was such a problem, FDR should have dispatched his staff to Congress to explain why new legislation was needed to modify it. Instead, they pursued the Janus-faced strategy of seeking legislation in public and then secretly wiretapping anyway. In one sense, that decision not to put all their eggs in one basket was understandable; had the legislation failed then its failure could be seen as an implicit acknowledgment that Congress was against wiretapping (thereby complicating subsequent executive efforts to engage in the practice).<sup>283</sup> But that is the wrong way to look at the situation. The right way is this: if legislation does not pass, that failure is a pretty good indicator that such action is contravening the nation's norms. If the President is unable to persuade Congress to authorize a measure he believes necessary to national security, there is likely to be good reason for that refusal.

After all, national security is not like other spheres of law where relevant interests are being drowned out in the political process, in contrast to laws that impact "discrete and insular minorities."<sup>284</sup> If anything, national security is the flip-side of such spheres, for it is inherently subject to overrepresentation in the political process as legislators posture themselves as tough. The idea that a President, even a magnificent one, can reinterpret a statute to favor security over liberty should give us pause. The proper course of action is for him to ask Congress to remedy the situation, and not for him to issue a secret memo with a strained legal interpretation to get around a statutory restriction.

We have foreshadowed in Part I an obvious exception to the above analysis for those short-term emergencies in which Congress is incapable of action. On September 12, 2001, if the President needed to engage in surveillance outside of FISA, there would have been little, if any, grounded principle of law that would have forbidden it. Obviously, the drafters of FISA sought to anticipate emergency situations. They went so far as to craft a fifteen-day provision for declared wars and another emergency provision for extremely time-limited surveillance. But if a plausible argument can be advanced that Congress, in 1978, did not fully anticipate or appreciate some new threat or situation, the President should possess a temporary power to act outside of the statutory law altogether.

But that emergency power must, in a constitutional democracy, be tightly circumscribed. It would necessarily end at the moment Congress is capable of taking action to remedy the statutory gap—and a President who acts in the gap

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283. However, this inference is not inexorable. Sometimes legislation fails because, for example, it is redundant with existing powers.

284. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).



should seek retroactive approval for his activity, as Abraham Lincoln successfully did.<sup>285</sup> Emergency power would otherwise convert itself into a tool for lawbreaking in perpetuity. So the theory of emergency power might justify the first days of the Administration's NSA program, but certainly not one many months (or years) later. Indeed, Congress passed over a dozen pieces of post 9-11 legislation (including, most obviously, the Patriot Act), within three months of the attacks.<sup>286</sup> The notion that an emergency precluded Congress from altering FISA to permit the NSA program is simply implausible.<sup>287</sup>

But casting blame at Presidents, either one out of office or one about to be so, is not our aim. Instead, we believe the FDR and Bush Administration episodes demonstrate deeper lessons about the American government in a time of crisis—lessons that will prove important as America elects its next set of leaders who will grapple with these issues.

### C. *Lessons for the Future*

The most striking fact from both the FDR and Bush Administration electronic surveillance programs is that the courts and Congress were powerless to stop them. In America, Congress is supposed to have primacy. As Federalist No. 51 puts it, "In republican government, the legislative authority necessarily predominates."<sup>288</sup> But in the context of electronic surveillance that predomination had little concrete effect. So, too, with the courts. Americans pride themselves on a Supreme Court that stands up to Presidents in the name

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285. Acceding to Lincoln's request, the 37th Congress passed a statute stating that it "hereby approved and in all respects legalized and made valid" the previous unilateral acts done by the President "as if they had been issued and done under the previous express authority and direction of the Congress of the United States." Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

286. Katyal & Tribe, *supra* note 42, at 1276 & n.66 ("However perilous the times, the fact is that Congress has responded expeditiously. It is functioning with much more than all deliberate speed. In record time, it considered and enacted a broad array of laws, many of them in almost precisely the form sought by the President." (footnote citing a number of such laws omitted)).

287. A greater difficulty is posed by the fact that sometimes Congressional debate, or an executive branch request for legislation to authorize a practice, may inadvertently disclose a source or method that can help the enemy. Because the American tradition rebels at secret laws, the argument here bumps up against a considerable practice of openness. But one can envision circumstances in which an open debate, or even a closed one with a leak from a politician, can undermine national security. With the NSA program, of course, such a claim appears fairly dubious. The idea that al Qaeda thought they could talk without fear of surveillance is wildly implausible, particularly since FISA itself would permit such surveillance in an extremely broad range of circumstances.

288. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department derives a superiority in our governments from other circumstances.").

of principle.<sup>289</sup> But in both World War II and the War on Terror, nothing happened in the courts or Congress that had any practical impact on the surveillance either.

Congress's ineffectiveness stems partially from the fact that it is often dominated by security interests and unable to vote for "liberty" when such decisions will be portrayed as against "security." But it also stems from the reality that the President holds the veto pen. So Congress, even once apprised (and aghast) about a massive electronic surveillance program, cannot easily act. So long as the President claims to ground his surveillance program in some law, no matter how dubious, it will require Congress to pass a new law to trump that interpretation. And because Article I, section 7, requires a bicameral supermajority to override a veto, the only way such legislation can pass is with widespread support in both houses.<sup>290</sup> Given the American political-party system, loyalty to the President alone will stymie such efforts. As a result of Congress's appreciation of this voting problem *ex ante*, it often does not even try to launch reforms.<sup>291</sup>

The courts, for their part, are almost non-actors in such events. Even if a program is disclosed to a journalist, it is likely to be some time before that story is published. The government will implore the newspaper to delay or squelch the story, citing patriotism. If that fails, a promise for exclusive stories about something else may be dangled in front of the reporter. Even if the reporter (and newspaper management) resists all of that and the story eventually runs, it will be very hard for an individual plaintiff opposed to the program to assert standing—to prove that they were actually a target of such surveillance. And even if that hurdle can somehow be overcome, the government may try to block the litigation altogether on the state secrets privilege—claiming the litigation is too much of a threat to the nation's security to be heard in court. And we have not even gotten to the range of other defenses, from political questions to judicial deference for executive branch activity.

But all is not lost, and the values of our Founders can be adapted to this new age. Madison would not have been surprised to discover FDR and Bush acting as they have. His whole theory of government was predicated on the expansionist tendencies of the branches: "Ambition must be made to counteract

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289. NEAL KATYAL, *THE IDEAL OF LAW* (forthcoming). For example, as Senator Max Baucus recently put it: "In effect, the [Supreme Court] was standing up for all of us as Americans, protecting our rights against Presidents who want to have their way, which Presidents want to do after they are in power after several years." 151 CONG. REC. S8409, S8410 (daily ed. July 18, 2005) (statement of Sen. Baucus) (citing *United States v. Nixon*, 418 U.S. 683 (1974); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and other cases).

290. U.S. CONST. art. I, § 7.

291. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1255 (2007) ("[V]eto power functions *ex ante* as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass." (footnote omitted)).

ambition. . . . 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.”<sup>292</sup> That is particularly the case when national security decisions are being made:

Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. The same malignant aspect in republicanism may be traced in the inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and in the degeneracy of manners and of morals, engendered by both. No nation could preserve its freedom in the midst of continual warfare.<sup>293</sup>

Madison was not entirely correct, of course. The bright spot in the FDR and Bush Administration episodes is the willingness of individuals of principle to stand up to the President internally—whether it be Attorney General Robert Jackson in 1940 or FCC Chairman Fly in 1941 or Deputy Attorney General James Comey and Assistant Attorney General Jack Goldsmith in 2003.<sup>294</sup> Instead of seeking to curry favor with the Executive, they attempted to stand up for the rule of law.

The relevant question, then, is how to harness that internal check and build upon it. For Jackson, Comey, and Goldsmith never fully succeeded in their efforts, and each left their office abruptly. (Though one suspects Jackson appreciated his subsequent employment a tad more.) In other work, one of us has outlined a variety of concrete mechanisms that can help build an institutional apparatus, and culture, of internal checks and balances.<sup>295</sup> Some of

292. THE FEDERALIST NO. 51 (James Madison), *supra* note 288, at 322.

293. James Madison, *Political Observations*, reprinted in IV LETTERS AND OTHER WRITINGS OF JAMES MADISON 491-92 (Phil., J.B. Lippincott & Co. 1865).

294. Just as with Jackson and Goldsmith, Justice Department lawyers stood up to the Secretary of War in the early 1940s when he proposed interning Japanese Americans. They contended that the internment was unconstitutional, but were unsuccessful. The War Department succeeded in persuading Attorney General Biddle himself to adopt the detention scheme. “When Biddle announced his agreement with the War Department, his two assistants at the meeting, Edward J. Ennis and James H. Rowe, Jr., were devastated. ‘Ennis almost wept,’ Rowe later said. ‘I was so mad that I could not speak at all myself . . . [.]’” Irons, *supra* note 282, at 718 n.126.

Later, during the briefing in *Korematsu*, Justice Department lawyers again tried to indicate to the Court that some of the “‘military necessity’ rationale[s]” being advanced were overblown and possibly incorrect. They drafted a footnote for the brief, but after the War Department intervened, the Solicitor General ordered the printing presses stopped and a new brief printed that lacked the footnote’s text. *Id.* at 720.

295. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

those mechanisms center on the need to change the architecture of the federal bureaucracy—to create institutional friction and to play upon it. Just as government can function better when the Departments of State and Defense have overlapping mandates and resulting tensions, so, too, it might be the case that rivalries can be exploited through other agencies, such as the Department of Homeland Security and the Justice Department.<sup>296</sup> Instead of the standard separation of powers—whereby Congress checks the President, and the courts check both—the bureaucracy itself can be structured to create internal checks.

Some reforms involve changes within individual agencies themselves. Vibrant civil service protections are often necessary so that employees feel they can do their job without reprisal.<sup>297</sup> Agencies might consider borrowing here from the foreign service, where longstanding policies create the conditions for a bureaucracy that is, comparatively speaking, focused on long-term horizons and the development of balanced policy.<sup>298</sup> Indeed, the State Department has explicit procedures in place that permit foreign service officers to dissent and warn Washington of actions they feel are problematic in the field. The Foreign Service Officer who uses this so-called “dissent channel” in the most productive way each year wins an award.<sup>299</sup>

Our point in this short essay is not to recommend any one particular solution as much as it is to highlight that while courts and Congress dominate public debate, we believe that a number of solutions are likely to emerge by looking into the executive branch—as the stories of Fly and Jackson, and Comey and Goldsmith, suggest. That is not to say that Congress and the courts are irrelevant, but only that they have, historically speaking, been far less effective in this area than the standard trope about American government suggests. If we want to create the conditions for an executive that acts with greater fidelity to the law, greater attention to internal checks is likely to be necessary.

#### CONCLUSION

Due to documents released years after the deaths of giants like Jackson and Hoover, we now have greater detail about the inner workings of the executive branch during FDR’s Administration with respect to wiretapping. Regarding Jackson’s legacy, we know he was one of a few voices speaking out presciently against centralized presidential abuse of power and disregard of the rule of law. We would be wise to learn from him.

Jackson’s efforts to prevent warrantless wiretapping and excessive executive power left an indelible impression upon him. His concurrence in

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296. *See id.* at 2324-27 (describing bureaucratic friction model).

297. *See id.* at 2328-42 (describing internal agency reforms).

298. *Id.* at 2328-31.

299. *See id.* at 2328-31 (describing foreign service model and “dissent channel”).

*Youngstown*, perhaps the most influential war powers opinion by an American jurist ever, began with a discussion of his time as Attorney General. Jackson explained that his experience in that position, more than “the conventional materials of judicial decision,” guided his opinion.<sup>300</sup> It is an interesting coincidence that a footnote in his description of Zone 3, a President acting against express or implied congressional action, cites FDR.<sup>301</sup> Jackson also criticized the Truman Administration’s efforts to rely on “nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.”<sup>302</sup> Jackson undoubtedly appreciated that he was part of that chain of history—going so far even to reference his frustration with congressional dereliction: Congress must be “wise and timely in meeting its problems” for “only Congress itself can prevent power from slipping through its fingers.”<sup>303</sup> The opinion takes on new meaning once the secret history of Jackson’s wiretapping struggles as Attorney General is considered.

Robert Jackson is trying to tell us something right now. So too, it seems, is John Ashcroft. The people appointed as the nation’s top lawyers looked at wiretapping programs proposed by Presidents in secret, compared them with the Constitution, statutes, and judicial precedent, and fought not just to apply the brakes, but to stop the car and look at a map.

The FDR episode reveals that the Bush Administration, in one sense, is actually on stronger footing than even they realize. After all, a previous President, FDR, secretly defied both the Supreme Court and Congress with respect to a remarkably similar issue, wiretapping on American soil. At the same time, the fact that a previous President, even a great one, acted in this way does not make such conduct lawful or appropriate. After all, it was also FDR who interned tens of thousands of Japanese Americans in the midst of World War II in detention camps, even though there was no individualized suspicion apart from these individuals’ ethnicity. Today, virtually no one supports that precedent.

The system formulated by our Founders did not anticipate the balance of power currently in place between the legislative, executive, and judicial branches. Over time, the executive has usurped power, making it more difficult for the other two branches to counter it. This gravitational pull makes it particularly important to encourage internal checks on the executive that emerge from the interagency process. Ignoring such checks, or allowing an easy bypass of them when controversies reach the upper echelons of the White House, does a great disservice.

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300. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

301. *Id.* at 638 n.4.

302. *Id.* at 646.

303. *Id.* at 654.

For these reasons, it is folly to repose all our hopes in Congress and the courts. War is a tough business. It demands the most careful calibration of our institutions so that those with the most expertise are given the greatest decision-making authority, and often times that expertise will be reposed in the executive branch and not the others. At the same time, America is a government under law,<sup>304</sup> and the system cannot tolerate presidential edicts to sweep away legal restrictions when Congress is capable of altering the statutory landscape in ways that the President sees fit. A system of vibrant internal checks can encourage fidelity to the rule of law and force the Executive to go to Congress for the necessary changes, instead of letting the Administration adopt contorted legal positions just to get around the legislative process.

Rather than stifling debate about government activity, we should welcome it. And instead of ignoring signs of internal dissent within the executive branch, we should encourage a deliberative process and trust that it will result in better decisions. If the Attorney General tries to protect civil liberties and others in the executive branch disagree, it should always raise suspicions. In true emergencies, one cannot fault a President for acting to protect security. But if time permits our Chief Executive to obtain legislation from Congress and he does not, that end-run around our constitutional process—even with as noble a precedent as that of Franklin Delano Roosevelt—is inconsistent with our form of Republican Government.

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304. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (concluding words of opinion, that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction”).

## APPENDIX: MEMORANDUM FROM FDR

CONFIDENTIAL

THE WHITE HOUSE  
WASHINGTON



May 21, 1940.

MEMORANDUM FOR

THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been


THE WHITE HOUSE  
WASHINGTON

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engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

 F. D. R.



