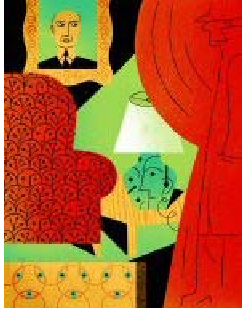
Taking the Stand: A Defining Constitutional Moment

By Bruce Fein[1]



A defining moment in the nation's constitutional history is at hand. This fateful hour has been forced by President George W. Bush's claim of virtual omnipotence in the war against international terrorism.

If Congress flinches from its duty to reject the legality of the president's directive to the National Security Agency (NSA) to target American citizens on American soil for warrantless surveillance in flagrant violation of the Foreign Intelligence Surveillance Act (FISA), a precedent will have been set that will permanently cripple the Constitution's checks and balances. The theory invoked by the president to justify the eavesdropping would equally justify mail openings, burglaries, torture, or internment camps in the name of gathering foreign intelligence. Unless rebuked, it will lie around like a loaded weapon, ready to be used by any incumbent who claims an urgent need.

History of Intelligence Abuses

FISA was the child of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities in 1975–76 (the Church Committee). Its exhaustive hearings disclosed, inter alia, that in 1938, when a secret program of domestic surveillance not authorized by Congress was undertaken to identify Fascists and Communists, the director of the Federal Bureau of Investigation (FBI), the attorney general, and the president concurred as follows: "In considering the steps to be taken for the expansion which then occurred 'of the present structure of intelligence work, it is believed imperative that it be proceeded with the utmost degree of secrecy in order to avoid criticism or objections which might be raised to such an expansion by either ill-informed persons or individuals having some ulterior motive. . . . Consequently, it would seem undesirable to seek special legislation which would draw attention to the fact of what is being done.' " President Bush has advanced the identical justification for refusing to seek congressional authority for the NSA's warrantless eavesdropping targeting American citizens at home.

After the secret 1938 intelligence program commenced, widespread abuses came: mail openings, burglaries, Internal Revenue Service harassments, a security index list beyond that authorized by the Internal Security Act of 1950, and COINTELPRO (the FBI's Counter Intelligence Program). The bureaucratic mentality of the spy was captured in the following FBI response to its New York office's conclusion that surveillance of a civil rights leader should cease because an investigation had unearthed no evidence of Communist sympathies: "The Bureau does not agree with the expressed belief of the New York Office that Mr. X is not sympathetic to the Party cause. While there may not be any direct evidence that Mr. X is a Communist, neither is there any direct substantial evidence that he is anti-Communist."

Spies, whether at the Federal Bureau of Investigation, the Central Intelligence Agency, or the National Security Agency, are unschooled in the values of privacy and the Fourth Amendment. They are not sensitized to Justice Louis D. Brandeis's teaching in *Olmstead v. United States*, that the makers of our Constitution "conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."**[1]**

The Church Committee's findings of systematic intelligence illegalities by the executive branch should inform the congressional response to President Bush's claims of constitutional power and necessity to

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direct the NSA to spy on American citizens without accountability to anyone but himself. The FISA was enacted to check a well-documented tendency toward intelligence collection abuses fueled by the political ambitions of the president or his subordinates. The response to President Bush should not expose Congress to the reproach of the French Bourbons: they forgot nothing, and learned nothing.

Philosophy of the Founding Fathers

President Bush's assertions of unchecked authority to fight international terrorism would have alarmed the Founding Fathers, whose collective wisdom has never been surpassed. The constellation included John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, John Marshall, James Monroe, and George Washington. Those who would dispute their constitutional philosophy shoulder a heavy burden. They understood, like Lord Acton, that power tends to corrupt, and absolute power corrupts absolutely.

President Bush says that "trust me" should be the measure of our civil liberties protected by the Bill of Rights. The Founding Fathers understood that ambition must be made to counteract ambition because men are not angels.

President Bush insists that he should hide from the American people knowledge of the simple fact that he is spying on them to collect foreign intelligence (without disclosing intelligence sources or methods) pursuant to a claimed constitutional authority. The Founding Fathers believed that without public knowledge and accountability, democracy is a farce.

President Bush claims wartime omnipotence as commander in chief. The Founding Fathers empowered Congress to regulate war measures to reduce the likelihood of historically documented executive usurpations or overreaching.

In *The Federalist No. 69* Alexander Hamilton elaborated: "The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of military and naval forces . . . ; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."

Accordingly, in the early case of *Brown v. United States***[2]** Chief Justice John Marshall held that Congress, not the president, enjoyed the power to confiscate enemy property during the War of 1812. And in *Little v. Barreme***[3]** the chief justice denied that the president was empowered to seize a ship coming from France when Congress had authorized only the seizure of ships headed for France—a statutory regulation of tactics on the high seas.

Claim of Necessity

The Constitution, of course, is not a suicide pact. The Founding Fathers provided ample authority to thwart terrorism by collecting foreign intelligence without creating a monarchical form of government. Thus, the NSA may intercept every international communication into the United States of a suspected al Qaeda member or other alien during its transit outside the United States before it reaches an American citizen. Neither a warrant issued by a judge nor probable cause is required. As the U.S. Supreme Court has explained in *United States v. Verdugo-Urquidez,***[4]** the Fourth Amendment does not protect aliens abroad in any respect. And the American citizen lacks any protected privacy when the target of the surveillance is al Qaeda.

Furthermore, checks and balances—some limits on power—do not mean anemic government. As Supreme Court Justice Robert Jackson lectured in *West Virginia State Board of Education v. Barnette*, "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."**[5]**

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President Bush has tacitly discredited his insistence that the FISA hobbles the collection of foreign intelligence against international terrorism and thus requires a bypass for the NSA to protect the nation. Attorney General Alberto Gonzales, speaking on behalf of the president, informed the Senate Judiciary Committee on February[6] that purely domestic al Qaeda–to–al Qaeda calls are intercepted through FISA warrants without apparent difficulty. Further, on July 31, 2002, the Department of Justice informed the Senate Intelligence Committee that USA PATRIOT Act amendments to the FISA enabled swift and nimble electronic surveillance of terrorists and that no further FISA amendments were needed.

Speaking for the Bush administration, James Baker, counsel for intelligence policy, amplified: "The reforms . . . have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening emergency FISA warrants from 24 to 72 hours] has allowed us . . . to ensure that the government acts swiftly to respond to terrorist threats."

The department also voiced Fourth Amendment concerns over lowering the FISA standard for surveillance against non-U.S. persons from probable cause to reasonable suspicion.

The White House has not asserted that anything new has developed since that testimony, which has compounded the problems of assembling foreign intelligence against al Qaeda. All that has been forthcoming is a conclusory insistence that the warrantless NSA spying on American citizens on American soil is imperative despite the availability of FISA warrants and the power to intercept without any restraints whatsoever alien calls to American citizens into the United States. That proposition smacks of President Roosevelt's unpersuasive justification during World War II for herding Japanese Americans into concentration camps voiced by General John DeWitt: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

Well-Founded Fears of Spying Abuses

Spying abuses are invited by the NSA's sweeping definition of *foreign intelligence* to include any information with respect to a foreign power that is necessary for "the conduct of the foreign affairs of the United States." Virtually every citizen with knowledge of a foreign country might be targeted by the NSA under the spongy definition because their conversations might arguably yield something useful in forging alliances or opposing unfriendly nations or terrorist organizations.

President Bush's claim that the NSA is only targeting Americans reasonably believed to be "a member of al Qaeda, or an affiliated terrorist organization," is not comforting. Terrorists do not keep membership lists. An "affiliated" terrorist organization has an elastic definition. No judge or other independent third party reviews the judgments of NSA professionals to prevent dragnet searches or political vendettas. As the Church Committee hearings convincingly established, unchecked spying by a government agency generally degenerates into surveillance for partisan political advantage. Would it surprise any reader if the NSA's warrantless eavesdropping has targeted detractors of the USA PATRIOT Act, the Iraq war, or President Bush's claims of monarchlike war powers?

It is inconceivable that any NSA professional would be reproached for spying too broadly or indiscriminately on American citizens. The intelligence imperative is that more surveillance is always superior to less, and that more spying will never be criticized if carried out under the banner of fighting terrorism. In addition, NSA professionals involved in the warrantless spying are expert in al Qaeda and international terrorism, not in securing the cherished values protected by the Fourth Amendment.

The FISA guards against the intelligence agency propensity for excesses or illegalities by interposing a neutral and independent magistrate between an American citizen and the spy. As Justice Jackson explained in the criminal justice context in *Johnson v. United States*, "The point of the Fourth

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Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."6 President Bush similarly resists coming under the FISA law and its judicial check in favor of being the law himself.

Authorization for Use of Force

Attorney General Gonzales has conceded in statements to Congress that the NSA's electronic surveillances fall within the scope of the FISA. That means it must be targeting American citizens on American soil and intercepting communications within the territorial jurisdiction of the United States in which the citizen holds a reasonable expectation of privacy. He has further stated that to avoid political repercussions, the president has chosen to confine the NSA's warrantless electronic surveillances to international calls with one point in the United States and one point abroad. The attorney general has not disputed that his interpretation of the Authorization for Use of Military Force (AUMF) would permit NSA warrantless interceptions of purely domestic communications.

The attorney general unconvincingly argues that the AUMF constitutes a recognized exception to the FISA under 50 U.S.C. § 1809. First, that interpretation was fashioned only after the disclosure of the NSA's spying program by the *New York Times* more than four years after enactment of the AUMF. It was not hinted at in a presidential signing statement. No member of Congress who voted for the AUMF in September 2001 thought it would supersede the FISA. No legislative history supports that interpretation. Indeed, it supports the opposite. As former senator Tom Daschle has recounted, Congress rejected AUMF language that would have authorized necessary and appropriate force "in the United States." The Supreme Court has instructed that contemporaneous interpretations are preferred to tardy interpretations of statutes by authorities entrusted with their enforcement. And the contemporaneous interpretation of the AUMF was that it did not trump the FISA in the collection of foreign intelligence by electronic surveillance in the aftermath of war.

That conclusion is reinforced by President Bush's support for the USA PATRIOT Act to assist the war against international terrorism by, for example, authorizing FISA electronic surveillance of lone-wolf terrorists, breaking down the wall between intelligence and law enforcement, and extending emergency FISA warrants to 72 hours. Those FISA amendments would have been superfluous if the AUMF had authorized unlimited collection of foreign intelligence. And Bush's flagellation of Congress for temporizing and hedging over extending the USA PATRIOT Act would be absurd if the AUMF means what he says it means.

A cardinal rule of statutory construction favors the specific over the general. The FISA expressly addresses both electronic surveillance for foreign intelligence purposes and surveillance during wartime (i.e., a 15-day window of authority to conduct surveillance without a court warrant). The AUMF does not mention electronic surveillance. At best it hints at surveillance as a war measure. The FISA thus trumps the AUMF as the more specific congressional direction as to how electronic surveillance should be conducted during war.

Moreover, if the AUMF is interpreted as authorizing the president to gather foreign intelligence as an incident to war irrespective of contrary statutes, then it necessarily also overrides federal laws prohibiting burglaries, mail openings, torture, and even internment camps that might be employed in such a quest. To think that Congress would have demolished these fundamental statutory protections of civil liberties without expressly saying so is to enter the domain of Alice in Wonderland.[7]

In addition, Congress specified as unambiguously as language permits in 18 U.S.C. § 2511(2)(f) that the FISA and the criminal code are the "exclusive means" for conducting electronic surveillance. That

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emphatic statement was reinforced by Congress's attaching criminal punishments for wiretapping except as "specifically provided in this chapter, or as authorized by FISA."[8] It is implausible to believe that Congress would have overridden such an emphatic policy with the opaque language of the AUMF regarding necessary and appropriate force.

Finally, the FISA is clearly a constitutional regulation of the president's authority to collect foreign intelligence during wartime. There is thus no occasion to skew a natural interpretation of the statute to avoid a knotty constitutional question.

The FISA fits comfortably within congressional power to enact laws "necessary and proper" to the execution of any power entrusted to the United States or any department or agency thereof, including the president's authority as commander in chief and the authority of Congress to establish rules for the regulation of land and naval forces.

Constitutionally protected liberties have been regularly compromised by the commander in chief during wartime, from the Civil War to World War I and II to the cold war. In 1975–76 the Church Committee unearthed 20 years of illegal mail openings by the CIA and the FBI; Operation Shamrock, in which three international telegraph companies were enlisted by the NSA to turn over certain international telegraph traffic, including the messages of U.S. citizens; and the misuse of the NSA's foreign intelligence mission for law enforcement purposes. The short-lived Vietnam War–era Huston Plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." The FISA was thus a rational response to prevent unjustified executive branch encroachments on the civil liberties of U.S. citizens.

The FISA, moreover, does not deprive the president of tools to collect foreign intelligence through electronic surveillance, physical searches, or otherwise. It simply regulates the tools in striking a balance between privacy interests protected by the First and Fourth amendments and national security, similar to the McCain Amendment, which regulates the ability of the president to acquire foreign intelligence in the interrogation of detainees by prohibiting torture and cruel, degrading, or inhumane treatment. During wartime the FISA authorizes warrantless surveillances or physical searches for an initial 15 days, which Congress can extend by an amendment if the crisis persists. Further, the president at any time may spy without a warrant for 72 hours by declaring emergency circumstances.

Chief Justice Marshall stated the constitutional test for a statute enacted under the "necessary and proper" clause in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[9]

The FISA's end is to protect First and Fourth Amendment rights consistent with the need to gather foreign intelligence by electronic surveillance during wartime. Congress is empowered to safeguard the Bill of Rights beyond a constitutional floor. Thus, the Religious Freedom Restoration Act protects the free exercise clause of the First Amendment against the federal government more broadly than the constitutional minimum.

The FISA regulates the military tactics of the United States by generally requiring a judicial warrant based on probable cause before the surveillance is undertaken and requiring that the warrant request be submitted by a politically responsible official. In operation FISA courts almost universally grant warrant requests. And its compatibility with the president's commander-in-chief powers is testified to in part by President Bush's complacency with the FISA to intercept domestic al Qaeda–to–al Qaeda calls.

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In sum, the argument that the FISA fails the necessary-and-proper clause test of *McCulloch* is frivolous.

Inherent Constitutional Power

President Bush has insinuated that the FISA unconstitutionally handcuffs his power to war against al Qaeda and international terrorism. As amplified above, however, the FISA leaves the president with muscular means to collect foreign intelligence through electronic surveillance. The burden of persuasion should be on the president to show that the FISA is defective in a post-9/11 world. By keeping the NSA's warrantless spying program and yield of foreign intelligence secret, President Bush's national security justification for circumventing the FISA cannot be sensibly evaluated. If the FISA is flawed, Congress can amend the law without compromising national security, as was done in funding the Manhattan Project during World War II. In any event, Supreme Court precedents are decisively against the president.

According to Attorney General Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, such as a law forbidding concentration camps, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a denial of federal funds to extend the Iraq war into Iran to destroy its nuclear facilities. Under that unprecedented and insidious theory, the stream of federal statutes during the Vietnam War, ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos, were all unconstitutional. As Shakespeare's Cassius would have asked, "Upon what meat doth this our president feed, that he has grown so great?"

President Bush's constitutional power is not established by the fact that many predecessors have made comparable assertions. In *Youngstown Sheet & Tube v. Sawyer*[10] the Supreme Court rejected President Truman's claim of inherent power to seize a steel mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other presidents. Writing for a 6–3 majority, Justice Hugo Black said, "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the Government of the United States. . . .' "[11]

Longevity does not save usurpation. For 50 years Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in *Immigration and Naturalization Service v. Chadha*.[12] Approximately 200 laws were set aside. Similarly, the high court declared in *Erie Railroad v. Tompkins*[13] that federal courts for a century since *Swift v. Tyson*[14] had unconstitutionally exceeded their adjudicative powers in fashioning a federal common law to decide disputes between citizens of different states.

In a concurring opinion in *Youngstown*, Justice Jackson instructed that the war powers of the president are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. That case invalidated a seizure of private property (with just compensation)—a vastly less troublesome invasion of civil liberties than the NSA's interception of the conversations of American citizens on American soil on President Bush's say-so alone. In addition, *Youngstown* involved a refusal by Congress to grant authority, whereas the FISA involves a direct denial of presidential power. The latter creates a greater clash with the president than the former.

It might be said that *Youngstown* did not implicate battlefield tactics, in contrast to the NSA's surveillances of international calls that target American citizens on American soil. Those surveillances, however, are not on a battlefield in the ordinary understanding of the word. Attorney General Gonzales's suggestion that all the world's a battlefield after 9/11 would destroy a vital demarcation between civilian and military life. Furthermore, *Little v. Barreme* did implicate tactics at sea in the United States' conflict with France, and congressional authority was sustained against the president.

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The war against international terrorism is unique in an important constitutional sense. It is permanent. Unlike all previous assertions of presidential war powers, President Bush's has no end point. If Bush's assertion is accepted, Congress would become a permanent vassal of the White House, which circumstance would further militate against its validity.

Even President Bush seems unconvinced of his own arguments. According to published reports not denied by the White House or the Department of Justice, the administration has bowed to the FISA courts' insistence that no information extracted from the NSA's warrantless electronic surveillance be used to justify an FISA warrant because the program is legally tainted. In addition, the president has signed amendments to the FISA without ever indicating in a signing statement or otherwise that he believed that his handiwork in conjunction with Congress was unconstitutional.

Fourth Amendment

In addition to violating the FISA and the Constitution's checks and balances, the NSA's warrantless electronic surveillances may transgress the Fourth Amendment's prohibition of unreasonable searches. The constitutional analysis is elusive because President Bush is still concealing the scope of the NSA's eavesdropping. Attorney General Gonzales made clear to the Senate Judiciary Committee in February that he was discussing only the parts of the program that the president had confirmed, but that unconfirmed and undisclosed NSA surveillances would continue to be kept secret.

That is troublesome. How can a president be held accountable to the law and to the public for surveillance activity that is unknown to anyone but himself?

Further, the constitutional reasonableness of any surveillance program requires an assessment of its success in gathering foreign intelligence. But Congress, the FISA courts, and the American people are clueless as to what percentage of the Americans targeted by the NSA yield useful foreign intelligence. If the percentage is tiny or microscopic, then the spying would be unconstitutional, akin to a general search warrant abhorred by the Founding Fathers. Indiscriminate searches based on the hope that something will turn up clearly violate the Fourth Amendment. Otherwise every home in the United States could be burglarized in the expectation that at least a handful would produce evidence of material support or sympathy for al Qaeda.

The Fourth Amendment is fact specific. It balances privacy values against public needs. But President Bush's secrecy over the foreign intelligence yield from the NSA's warrantless surveillance program makes a constitutional appraisal conjectural.

The Power of the Purse

Congress should employ the power of the purse to arrest President Bush's circumvention of the FISA. A statute should be enacted that prohibits the use of any funds of the United States for electronic surveillance to gather foreign intelligence except in accord with the FISA.

In testifying before the Senate Judiciary Committee in February, the attorney general acknowledged that "Congress has a powerful check on the commander in chief [and it] is through the purse." In the past Congress has employed the power of the purse to end covert action in Angola, to curtail support for the resistance in Nicaragua, and to prevent expansion of the Vietnam War into neighboring countries.

It is altogether fitting that this be done. The power of the purse originated in Parliament's effort to restrain King Charles I from warring with Spain. In *The Federalist No. 58* James Madison elaborated: "The House of Representatives . . . hold the purse that powerful instrument by which we behold, in the history of the British Constitution, an infinite and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. The power over the

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purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

The effective date of ending surveillance outside the FISA should be deferred for 30 days, during which time the president might propose amendments professedly needed to collect foreign intelligence against international terrorism more effectively. That 30-day period could be extended if additional time was appropriate to fashion a new law.

Further, Congress should enact a fast-track procedure for considering the president's amendments, as has been done for certain international trade agreements. Every member who receives classified information to evaluate the need should be required to take a secrecy oath.

Congress should not ratify the NSA's past illegal surveillances, but it should not permit al Qaeda members to go free because the constable blundered. Instead Congress should prohibit exclusionary rule remedies for the NSA's lawlessness, and authorize *Bivens*[15] damage actions against the United States, for constitutional violations subject to a customary good-faith defense.

Checks and Balances
Checks and balances are every bit as important to the protection of civil liberties as is the Bill of Rights. But the scheme works only if each branch fights for its prerogatives. If Congress surrenders to President Bush over the FISA, the civil liberties of the living and those yet to be born will be permanently threatened. This is no time for summer soldiers or sunshine patriots.

Notes
[1] 277 U.S. 438, 478 (1928).
[2] 12 U.S. (8 Cranch) 110 (1814).
[3] 6 U.S. (2 Cranch) 170 (1804).
[4] 494 U.S. 259 (1990).
[5] 319 U.S. 624, 636 (1943).
[6] 333 U.S. 10, 13–14 (1948).
[7] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confidant that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").
[8] 18 U.S.C. § 2511(1), (2)(e).
[9] 17 U.S. (4 Wheat.) 316, 320 (1819).
[10] 343 U.S. 579 (1952).
[11] *Id.* at 589.
[12] 462 U.S. 919 (1983).
[13] 305 U.S. 637 (1938).
[14] 41 (16 Pet.) U.S. 1 (1842).
[15] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

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