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Legal eagle eye on wiretap flap

By Robert F. Turner

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Last weekend I attended a reunion of my law school class. Knowing my career for the last quarter-century has focused on the study and teaching of "national security law" -- a field that originated in the 1970s at our law school -- friends I hadn't seen in decades sought my thoughts about the "illegal domestic spying program" that has been in the papers since mid-December.

Here is the short version of my response.

The Constitution does not mention "intelligence," "national security," or even "foreign affairs"; and, largely because of failures in our education system, few Americans today understand how these powers were allocated among the branches of government by the Framers of our Constitution. But the record is clear.

The Founding Fathers knew large deliberative assemblies could not keep secrets or act with the "unity of plan," "secrecy," or "speed and dispatch" requisite for success in dealing with the external world. They had read Locke, Montesquieu, and Blackstone -- each of whom placed management of foreign intercourse within the "Executive Power" -- and these theoretical lessons were reinforced by personal experiences.

In 1776, for example, Benjamin Franklin and his colleagues on the Committee of Secret Correspondence unanimously decided they could not tell the Continental Congress about a major French covert operation to assist the American Revolution, explaining: "We find by fatal experience that Congress consists of too many members to keep secrets."

John Jay, foreign affairs secretary in the Continental Congress, lamented to Gen. George Washington that there was as much "intrigue" in Congress as in the Vatican, but "as little secrecy as in a boarding school."

After the new Constitution was written, Jay explained in Federalist No. 64: "There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery." Since few foreigners would trust the Congress to keep secrets, Jay explained, the new Constitution left the president "able to manage the business of intelligence as prudence may suggest."

By vesting the nation's "executive power" in the president in Article II, Section 1, the Constitution gave that office the general control of the nation's foreign relations, subject to "negatives" or "checks" expressly vested in Congress and the Senate -- none of which deal with having access to intelligence secrets. As Thomas Jefferson explained in 1790, the "transaction of business with foreign nations is executive altogether," and thus belongs to the president; and the "exceptions" vested in the Senate were to be "construed strictly." Jefferson added: "The Senate is not supposed by the Constitution to be acquainted with the concerns of the executive department. It was not intended that these

should be communicated to them."

President Washington, Rep. James Madison, and Chief Justice Jay endorsed Jefferson's position, which three years later was embraced as well by Alexander Hamilton in his first *Pacificus* essay. In 1800, Rep. (later Chief Justice) John Marshall observed that, because the president "possesses the whole executive power," he was "the sole organ of the nation" in foreign affairs.

That others in Congress shared this view is clear from their laws and statements. When Congress first appropriated funds for foreign intelligence purposes, the law provided the president was to "account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*."

This deference to executive power continued until the 1970s, with the great Henry Clay explaining to his House colleagues in 1818 that expenditures from the president's "secret service fund" were not "a proper subject of inquiry" by the Congress.

When Congress enacted the first wiretapping statute in 1968, it expressly provided "Nothing contained in this chapter... shall limit the constitutional power of the president ... to obtain foreign intelligence information deemed essential to the security of the United States."

This widely recognized constitutional power was not seriously challenged until the 1970s, and thus the Supreme Court has had no occasion to address it. But in many ways it is similar to the president's control over foreign negotiations, which also often require secrecy for success. And in the most famous of all foreign affairs cases, *United States v. Curtiss-Wright Export Corp.*, the Supreme Court in 1936 explained: "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited.... Into the field of negotiation the Senate cannot intrude, and *Congress itself is powerless to invade it*."

The president's power to withhold national security secrets from Congress and the courts was firmly established prior to the post-Vietnam congressional assault on the president's constitutional powers. In 1796, Washington refused to provide information to the House regarding the Jay Treaty. Even Madison, leader of the Republican opposition, acknowledged the president had a "right" to withhold information from Congress "when of a nature that did not permit a disclosure of it at the time." As the Supreme Court observed in *Curtiss-Wright*, the wisdom of Washington's refusal to provide the information to the House "was recognized by the House itself and has never since been doubted." Indeed, as recently as 1957, Princeton Professor Edward Corwin observed in his classic book, *The President: Office and Powers*, that the president "is final judge of what information he shall entrust to the Senate as to our relations with other governments."

Just three years earlier, in explaining that "executive privilege" disputes were normally to be resolved by balancing the competing interests, the Supreme Court in *United States v. Reynolds* declared "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." This view was not disturbed by the famous 1974 case of *United States v. Nixon*, which, while directing the president to surrender materials related to the Watergate inquiry, emphasized the president did "not place his claim of privilege on the ground they are

military or diplomatic secrets," noting: "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities."

When the president's critics allege the concept of unchecked executive discretion is "undemocratic" and "monarchical," they reveal an alarming ignorance of our Constitution. In perhaps the most famous of all Supreme Court cases, *Marbury v. Madison*, Chief Justice Marshall noted in 1803: "By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion.... [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

One might add that, in *Marbury*, Marshall also established the fundamental principle that "an act of the legislature, repugnant to the Constitution, is void." And this brings us to such statutes as the 1973 War Powers Resolution (which even former Senate Majority Leader George Mitchell acknowledged "oversteps the constitutional bounds on Congress' power") and the Foreign Intelligence Surveillance Act (FISA). When FISA was being enacted during the Carter administration, Attorney General Griffin Bell observed it failed to recognize the president's "inherent power" to authorize foreign intelligence collection and noted a statute could not usurp a constitutional power.

In 2002, the FISA Court of Review observed that every federal court to consider the issue has "held that the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and concluded: "We take for granted that the president does have that authority and, assuming that is so, *FISA could not encroach on the president's constitutional power.*"

Despite this long history of all three branches recognizing that "the business of intelligence" was vested by the Constitution in the president -- and his military powers are *enhanced* during periods of congressionally authorized war -- we still have legislators who seem to believe the legislative power is unlimited. At some point, they must recognize Congress is but one of three coequal branches of our government. And it, too, must "obey the law" -- in this case the *higher* law of the Constitution.

Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He is a former three-term chairman of the ABA Standing Committee on Law and National Security and has authored many books and articles on the separation of national security powers. He has testified before the Senate Judiciary Committee on this issue twice since February.