2006 WL 4055622 (C.A.6) (Appellate Brief)
United States Court of Appeals,
Sixth Circuit.

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs-Appellees/Cross-Appellants,
v.
NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE, et al., Defendants-Appellants/Cross-Appellees.

Nos. 06-2095, 06-2140.
November 2, 2006.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

# Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence, in Support of Defendants-Appellants/Cross-Appellees and in Support of Reversal

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## *INTEREST OF AMICUS CURIAE*[1]

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief pursuant to Fed. R. App. Proc. 29(a) with the consent of all parties.

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the President of the United States has inherent constitutional authority to protect the United States and its citizens against foreign attack.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases such as this of constitutional significance. Of particular relevance here, the Institute has previously appeared as *amicus curiae* before the Supreme Court of the United States in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).

## *SUMMARY OF ARGUMENT*

On September 11,2001 our nation experienced one of the deadliest attacks ever to occur on American soil, an attack that cost approximately 3,000 innocent American citizens their lives, crippled portions of the nation's financial and defense centers, and resulted in billions of dollars in damage. In the immediate aftermath of that attack, the President instituted the NSA surveillance program to aide in his efforts to capture those responsible and to protect the United States from any future acts of aggression. This program has proven to be a vital tool in uncovering an enemy capable of slipping into the United States undetected, and the President is fully authorized under Article II of the Constitution to continue its use as an aspect of the "executive power," particularly when added to his power as "Commander-In-Chief" during time of war.

Our Founders knew that it was extremely important to provide the Executive Branch with an ample reserve of powers that would enable the President to protect the nation adequately from foreign attack. Thus, they bestowed upon the President an inherent constitutional authority over the nation's foreign affairs powers through the creation of a unitary executive and the grant of the "executive power" in Article II of the Constitution. This interpretation of Article II is fully supported by the writings of political philosophers such as John Locke, Baron de Montesquieu, and Sir William Blackstone on whom the Founders heavily relied; the actions of the Founders before, during and after ratification of the Constitution; and Supreme Court precedent. Electronic surveillance of enemy communications during time of war easily qualifies as an aspect of the President's Article II foreign affairs and war-making powers. As several court decisions have recognized, electronic surveillance is a crucial tool in the President's execution of his constitutional responsibilities.

Not only is the NSA program within the President's powers under Article II of the Constitution, the broad language of the

Authorization to Use Military Force (AUMF), passed by Congress on September 14, 2001, provides implied congressional support for the NSA program. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court, by analogy, endorsed this interpretation of the AUMF when it determined that its broad language authorizes the detention of enemy combatants as a fundamental incident of waging war. Similarly to the detention of enemy combatants, electronic surveillance of the enemy is clearly a fundamental incident of waging war.

The President's powers here are therefore at their zenith, and are easily broad enough to support his authorization of the NSA Surveillance Program at issue here; the decision of the District Court for the Eastern District of Michigan, Southern Division to the contrary must be *reversed.*

## ARGUMENT

### I. The Founders Bestowed Upon the President Both Inherent and Express Constitutional Authority Over the Nation's Foreign Affairs Powers.

Our Nation's Founders knew how important it was to provide the executive with an adequate reserve of power that would enable it to protect the nation from foreign attack, especially in a time of war. Thus, in Article II, the Founders designed a unitary executive and conferred upon the office the entire "executive power" of the United States of America, including the authority to act as "Commander in Chief of the Army and Navy." U.S. Const. art. II, §§ 1 and 2, cl. 1.

The Founders intentionally established a "unitary executive" instead of a "plural executive," as they believed that "the superior despatch, secrecy, and energy, with which one man can act, render it more politic to vest the power of executing the laws in one man, than in any number of men." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot ed., 2d ed. n.d.) (1888), *reprinted in* KURLAND ET AL., 3 THE FOUNDERS' CONSTITUTION 513 (2000). Indeed, John Adams went so far as to write that "[t]he worst evil that can happen in any government is a divided executive; and, as a plural executive must, from the nature of men, be forever divided, this is a demonstration that a plural executive is a great evil, and incompatible with liberty." John Adams, Letter to Timothy Pickering (Oct. 31, 1797), *in* 8 THE WORKS OF JOHN ADAMS 560 (Charles Francis Adams ed., 1850-1856), *reprinted in* KURLAND ET AL., 3 THE FOUNDERS' CONSTITUTION 519 (2000). Furthermore, the Framers bestowed upon the President the "executive power," a phrase well understood to include not only the power to execute the laws, but also the foreign affairs powers of the nation, unless specifically assigned elsewhere. Indeed, while serving as Secretary of State after the ratification of the Constitution, Thomas Jefferson advised President George Washington that "the transaction of business with foreign nations is Executive *altogether.* It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 378-80 (Julian P. Boyd et al. eds., 1950) (emphasis added), *reprinted in* KURLAND ET AL., 4 THE FOUNDERS' CONSTITUTION 109 (2000).

The Framers structured Article II in this manner in order to ensure that the executive branch would be able to protect the security of our nation from foreign attack with "secrecy and dispatch." As Alexander Hamilton noted in Federalist No. 70, "[e]nergy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 17 (Max Farrand rev. ed., 1937), *reprinted in* KURLAND ET AL., 3 THE FOUNDERS' CONSTITUTION 494 (2000) ("the chief Advantages ... in favour of Unity in the Executive, are the Secrecy, the Dispatch, the Vigour and Energy which the Government will derive from it; especially in time of war"). Such qualities in the Executive were viewed as "the bulwark of national security." THE FEDERALIST NO. 70, at 427. The Framers established a unitary executive because they believed that execution of foreign policy and war by a larger

  

group would tend to breed differences of opinion, animosity, and "bitter dissentions" that would "lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide." *Id.,* at 426.

This understanding of the "executive power" was not novel, but was well articulated in the writings of the leading political theorists of the day, theorists upon whom our Founders relied heavily in their thinking about the institutional structures to be crafted in the new Constitution. John Locke, for example, believed that in a properly structured Commonwealth, one individual should be responsible for both the Executive and Federative powers. The Executive power includes the powers traditionally associated with the executive branch, the powers to execute the laws of the Commonwealth. The Federative power, on the other hand, is the modern day equivalent of the foreign affairs powers and "contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and communities without the Commonwealth." John Locke, Two TREATISES OF GOVERNMENT 365 (Peter Laslett rev. ed. 1963) (1690). The Baron de Montesquieu, another theorist of critical importance to our Founders, agreed with Locke's understanding, treating the two components as "simply the executive power," which in addition to law enforcement included the power to "make[ ] peace or war, send[] or receive[ ] embassies, establish [] the public security, and provide[] against invasions." Baron de Montesquieu, 1 THE SPIRIT OF LAWS 151 Thomas Nugent trans., Hafner Pub. Co. 1949) (1751); *see also* William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND *245-50 (1769) (adamantly contending that no nation should place the foreign affairs powers in the hands of more than one person, as proper interaction with foreign nations requires "unanimity" and "strength of execution").

This theoretical understanding was bolstered by the Founders' own experiences. One of the key motivations for adopting a new constitution in 1787 was to remedy defects in the Articles of Confederation, *see, e.g.,* Alexander Hamilton, Letter to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 400-03 (Harold C. Syrett et al. eds., 1961-79), *reprinted in* KURLAND ET AL., 1 THE FOUNDERS' CONSTITUTION 150 (2000), and the grant of the "executive" power to Congress was considered to be "a fatal defect in the [Articles of] Confederation." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1407 (1833), *reprinted in* KURLAND ET AL., 3 THE FOUNDERS' CONSTITUTION 531 (2000). Congress under the Articles was simply unable to manage the nation's foreign affairs because it could not act with the requisite unanimity, secrecy, and dispatch. Benjamin Franklin reached an agreement with Committee of [Secret] Correspondence members not to share information with Congress on a sensitive shipment of arms from France, for example, noting: "[W]e agree in opinion that it is our indispensable duty to keep it secret even from Congress ..." Thomas Story, Verbal Statement to the Committee, 2 Peter Force, American Archives: A Documentary History of the North American Colonies, Fifth Series, 818, 19 (1837-53). Britain and Spain both stood ready to take advantage of the weakness of Congress under the Articles, fully expecting a quick collapse of the new government, for example. And the Barbary pirates wreaked havoc on American mercantile interests off the coast of North Africa, successfully demanding repeat payments of "tributes" from a Congress too weak to respond as a single executive might (and ultimately did under President Thomas Jefferson).

The Framers of the Constitution ultimately decided to grant to the President the "executive power," a phrase which included the foreign affairs powers of the nation. As Alexander Hamilton noted in Federalist 74, "The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and *essential part in the definition of the executive authority.*" THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). The future Chief Justice John Marshall made the identical point while serving in Congress: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.... He possesses the whole Executive power. He holds and directs the force of the nation." 10 ANNALS OF CONG. 613 (1800).

Article II of the Constitution was intentionally drafted broadly in order to grant the whole of the nation's foreign affairs powers to the President, save for a few specifically enumerated exceptions that were intended to be viewed strictly (Senate involvement in the making of treaties and appointment of certain executive officers and the power of Congress to "declare war and grant letters of marque and reprisal"). *See* 1 ANNALS OF CONG. 515-517 (Joseph Gales ed., 1789). Alexander Hamilton made the same point in his defense of a broad reading of the powers conferred by Article II, noting in addition that a comparison of the broad wording of Article II ("*The Executive Power shall be vested* in a President of the United States of

  

America") with the more restrictive wording of Article I ("*All legislative Powers herein granted* shall be vested in a Congress of the United States") demonstrated that the Framers of the Constitution intended to grant to the President the whole of the executive power subject only to the express exceptions identified in Article II. Alexander Hamilton, Pacificus, No. I, *in* THE PAPERS OF ALEXANDER HAMILTON 33-43 (Harold C. Syrett et al. eds., 1961-79), *reprinted in* KURLAND ET AL., 4 THE FOUNDERS' CONSTITUTION 63-66 (2000); *see also* *Myers v. United States*, 272 U.S. 52, 128 (1926) ("The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed").

As the above discussion illustrates, the structure, theory, and express provisions of the Constitution provide the President with an inherent power to act with the secrecy and dispatch necessary to protect the United States from foreign attacks. Following disclosure of the NSA surveillance program in the press, President Bush defended the program, stating that in order to "effectively detect enemies hiding in our midst and prevent them from striking us again ... we must be able to act fast and to detect conversations so we can prevent new attacks." Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html. This is exactly the ability to act with "secrecy and dispatch" that the Founders fully conferred upon the President, and we would be foolish to revoke that power now, at the very moment its necessity is most keenly felt.

**II. Supreme Court Precedent Supports the President's Authorization of the NSA Surveillance Program.**

The President's authorization of the NSA surveillance program is further supported by Supreme Court precedent, which recognizes that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss--Wright Export Corporation*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800)). The President's role as "sole organ" of the nation is particularly strong with respect to the exercise of war powers, and Presidents have appropriately "tend [ed] to view *Curtiss-Wright* as establishing the principle that under the Constitution, the President is vested with all the authority traditionally available to any head of state in his foreign relations, except insofar as the Constitution limits that authority or places it in Congress." Douglas W. Kmiec et al., THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION 274 (2d ed. 2004).

The District Court relied instead upon the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952), to conclude that the NSA program is unconstitutional, *see* *ACLU v. National Security Agency*, 438 F.Supp.2d 754, 778 (E.D. Mich. 2006), yet a careful reading of that case, particularly against the backdrop of *Curtiss-Wright*, compels just the opposite conclusion.

In his landmark concurring opinion in *Youngstown*, Justice Jackson famously described a three-tiered system for assessing the separation of powers issues that lie at the intersection of presidential and congressional power. Obviously, the President's authority is at its peak when he acts both pursuant to his own authority under the Constitution and by virtue of additional statutory authority given to him by Congress--Justice Jackson's Category 1. Less strong, but no less certain, is when the President acts by virtue of his own constitutional powers, in the face of congressional silence--Category 2. Finally, Justice Jackson even conceded that, at times, the President could act pursuant to his Article II constitutional powers despite an explicit act of Congress to the contrary--Category 3. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Congress simply cannot pass a law that curtails powers the President has directly from the Constitution itself.

The problem for President Truman in the *Youngstown* case, according to Justice Jackson, was not that he exceeded statutory authority, but that his constitutional war powers did not, *under the circumstances*, permit him to trump the mechanisms of the relevant congressional statute. Congress had not authorized the war, and the nation's steel mills were too far removed from the "theater of war" to fall under the President's power as Commander-in-Chief.

These findings from Justice Jackson's opinion in *Youngstown* yield important distinctions that vindicate President Bush's

  

authorization of the NSA surveillance program. First, as we discuss at greater length in Part III below, Congress has authorized the use of force in terms broad enough to permit the President's actions. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) ("AUMF"). Second, as September 11 made very clear, the United States *is* a "theater of war," and the full panoply of presidential powers in time of war comes into play--his power as Commander-in-Chief; his power as the nation's top executive; and his inherent power as the organ of U.S. sovereignty on the world stage. The agents of our stateless, terrorist enemies are here on U.S. soil, aiming to strike at our infrastructure, our citizens, and our very way of life at every possible opportunity.

Thus, even if the AUMF was not sufficient to sustain the President's executive order, and even if the Foreign Intelligence Surveillance Act is read as an attempt by Congress to circumscribe the President's own constitutional powers, Justice Jackson recognized that in such a conflict, Congress could not by statute restrict powers that the President has directly from Article II of the Constitution. Congress itself recognized this in the AUMF, when it noted that "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States ...." AUMF, Preamble, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added); *see also Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence,* 103d Cong. 2d Sess. 61 (1994) (Statement of Jamie Gorelick, Deputy Attorney General during the Clinton administration) ("[T]he Department of Justice believes, and the case law supports, that the President has the authority to conduct wireless physical searches for foreign intelligence purposes"); Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on HR. 5764, H.R. 9745, HR. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (Statement of Griffin Bell, Attorney General during the Carter administration) ("I want to interpolate here to say that this [FISA statute] does not take away the power [of] the President under the Constitution").

In other words, the NSA surveillance program is more properly viewed as an exercise of the external affairs and war-making powers, which *Curtiss-Wright* recognized inhered in the office of the President, than of the domestic powers at issue in *Youngstown,* subject to legislative control. The NSA program specifically targets "international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations." *See* U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" (Jan. 19. 2006). The fact that one end of the conversation is located within the United States is not enough to render the program "domestic," any more than the capture of German saboteurs on U.S. soil rather than on the front in Western Europe rendered them subject to domestic rather than military law, *see Ex Parte Quirin,* 371 U.S. 1 (1942). Because Al Qaeda and other terrorist organizations have successfully infiltrated and dispersed themselves throughout the United States, the battlefield--or at least one of the battlefields--in the present war is here, on U.S. soil. The NSA surveillance program is directed at foreign enemies and their collaborators in the United States, not U.S. citizens per se. Under such circumstances, the President not only has the authority, but indeed the duty, to exercise the full measure of his Article II powers to prevent future attacks.

Those powers clearly include the interception of enemy communications. As the Supreme Court recognized in *Johnson v. Eisentrager,* 339 U.S. 763, 778 (1950), the "grant of war power includes all that is necessary and proper for carrying these powers into execution." "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 111 (1948). The President's authority to gather information from enemies on U.S. soil was upheld even during the Civil War, when the "enemy" consisted of fellow citizens. As the Court noted in *Totten v. United States,* 92 U.S. 105, 106 (1876), the President "was undoubtedly authorized during the war, as commander-in-chief ... to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy." And while there is an obvious difference between "entering rebel lines" and conducting surveillance of electronic communications, the difference is not material to this case. As described above, we are fighting a new and unique form of war in which the United States is itself the "theater of war." The "rebel lines" are defined by electronic communications networks, not geographic territory, and the need to cross those lines to gather intelligence is at least as great today as it was when President Lincoln's generals sent union soldiers across rebel lines to gather intelligence about the enemy's plans.

  

The President's ability to conduct surveillance of enemy communications is such a fundamental aspect of the President's war-making powers that three appellate courts have explicitly recognized that the President can conduct such surveillance without a warrant, deciding in the President's favor an issue technically left open by the Supreme Court in *United States v. United States District Court,* 407 U.S. 297 (1972) (the "*Keith* case"). *See* *United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko,* 494 F.2d 593 (3rd Cir. 1974); *United States v. Brown,* 484 F.2d 418 (5th Cir. 1973). For example, in *Truong,* the Fourth Circuit correctly recognized:

> [T]he needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, ... 'unduly frustrate' the President in carrying out his foreign affairs responsibilities.... [A]ttempts to counter foreign threats ... require the utmost stealth, speed, and secrecy.

629 F.2d at 913. The Fifth Circuit's holding in *Brown* is equally compelling:

> [B]ecause of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm ... that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.... Our holding... is buttressed by a thread which runs through the Federalist Papers: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations. See e. g., The Federalist No. 64, at 434-36 (Jay); The Federalist No. 70, at 471 (Hamilton); The Federalist No. 74 at 500 (Hamilton) (J. Cooke ed. 1961).

484 F.2d at 426.

Even more compelling is the FISA Court of Review's discussion of the very program at issue here: "We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence information], and, assuming that is so, *FISA could not encroach on the President's constitutional power."* *In re Sealed Case,* 310 F.3d 717, 742 (U.S. Foreign Intell. Surveillance Ct. Rev. 2002) (emphasis added). The District Court did not even mention, much less rebut, the holdings of these appellate courts, and while the holdings are technically not binding on this court, they are so manifestly correct against the backdrop of the Founders' understanding of executive powers, discussed above, that this Court should likewise affirm the exercise of Presidential authority at issue here.

### III. Congress Has Lent Its Own Authority to the Exercise of Executive Power at Issue.

In this case, the President's inherent and express executive powers are supported, and thereby enhanced, by Congressional action. In the immediate aftermath of the 9/11 attacks, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force §2(a). Under Justice Jackson's *Youngstown* analysis, the President's powers are therefore at their "zenith."

  

Although the AUMF does not specifically authorize the NSA surveillance program at issue here, that fact does not alter the importance of the AUMF to the President's claims. It is well established that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). *See also* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations ... Congress--in giving the Executive authority over matters of foreign affairs--must of necessity paint with a brush broader than that it customarily wields in domestic areas"). The AUMF accordingly uses broad language that sanctions the use of "all necessary and appropriate force" and expressly permits the President to determine those against whom the use of force is necessary. Surely this broad grant of power is more than sufficient to include surveillance of enemy communications, particularly in light of Congress's own acknowledgement in the preamble of the AUMF that the current enemy poses an "unusual and extraordinary threat." As the Department of Justice has correctly noted, because "the agents who carried out the initial attacks resided in the United States and had successfully blended into American society and disguised their identities and intentions until they were ready to strike, the necessity of using the most effective intelligence gathering tools ... including electronic surveillance, was patent." U.S. Department of Justice, at 12. Thus, the NSA surveillance program is a crucial tool in the President's ability to carry out his mandate under the AUMF--identifying our enemies and successfully using force to deter and foil their destructive plans--and should be properly included within the authority conferred by the AUMF. Debate on the floor of Congress during consideration of the AUMF confirms that intelligence-gathering activities were among the actions contemplated by the AUMF: "This war will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out enemies among us and those outside our borders." 147 Cong. Rec. H5660 (daily ed. Sept. 14, 2001) (statement of Rep. Menendez).

The Supreme Court has already addressed, and rejected, an identical challenge to the breadth of the AUMF in the context of combatant detentions, holding in *Hamdi v. Rumsfeld that* "it is of no moment that the AUMF does not use specific language of detention." "Because detention to prevent a combatant's return to the battlefield is *a fundamental incident of waging war,*" the Court held, "in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention." 542 U.S. at 519 (emphasis added).

History demonstrates that surveillance of the enemy is every bit as much a fundamental incident of waging war as is the detention of combatants. "Every belligerent has a right... to discover the signals of the enemy and ... to seek to procure information regarding the enemy through the aid of secret agents," notes an important treatise from a century ago. Joseph R. Baker & Henry G. Crocker, THE LAWS OF LAND WARFARE 197 (1919) (cited in DOJ report, at 14). In fact, warrantless electronic surveillance has been utilized within the United States as a "fundamental incident of waging war" since the days of the Civil War. G.J.A. O'Toole, THE ENCYCLOPEDIA OF AMERICAN INTELLIGENCE AND ESPIONAGE 498 (1988) ("[t]elegraph wiretapping was common, and an important intelligence source for both sides") (cited in DOJ report, at 16). President Wilson ordered electronic surveillance of submarine cables, telegraph and telephone messages sent outside the U.S. during World War I. *See* Exec. Order No. 2604 (Apr. 28, 1917)Exec. Order No. 2604 (Apr. 28, 1917) (cited in DOJ report, at 16). President Roosevelt also utilized electronic surveillance during World War II against persons suspected of subversive activities against the United States. *See* Memorandum for the Secretaries of War, Navy, State, and Treasury, the Postmaster General, and the Federal Communications Commission from Franklin D. Roosevelt (Dec. 8, 1941) (cited in DOJ report, at 16).

Thus, not only does the President's own Article II powers support his decision to conduct surveillance of enemy communications under the NSA program, but Congress has added its own authority to that power, pushing the President's power to its zenith.

## ***CONCLUSION***

The President's authority to conduct the NSA surveillance program is at its zenith, "for it includes all that he possesses in his

own right plus all that Congress can delegate." *Youngstown,* 343 U.S. at 635. The decision of the District Court for the Eastern District of Michigan, Southern Division severely intrudes upon core powers that the Constitution assigns to the President, not to the Courts, and must be *reversed.*

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