

# NATIONAL SECURITY AND THE ARTICLE II SHELL GAME

*Heidi Kitrosser\**

## INTRODUCTION

This essay considers the important but under-explored link between politics and constitutional interpretation in the realm of national security. The school of constitutional interpretation at which it looks is “presidential exclusivity,” which has gone from relative obscurity to prominence in the political branches and in public debate over the past several decades. Exclusivists deem the President to have substantial discretion under Article II of the Constitution “to override statutory limits that he believes interfere with his ability to protect national security.”<sup>1</sup> Exclusivists often claim that they champion a return to the presidency’s traditional role.<sup>2</sup> Yet other scholars, particularly David Barron and Martin Lederman in a two-article series in the *Harvard Law Review*, have shown that exclusivity has only recently become a presence, let alone a prominent and influential one, in the political branches.<sup>3</sup>

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\* Associate Professor, University of Minnesota Law School. I am very grateful to Dale Carpenter, David Dana, and Jill Hasday for extremely thoughtful comments.

1. Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEXAS L. REV. \_\_\_\_ (forthcoming 2010) (internal citations omitted).

2. See, e.g., JOHN YOO, WAR BY OTHER MEANS 119–25 (2006); U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–7, 29–35 (2006) (hereinafter DOJ WHITE PAPER); Abraham D. Sofaer, *Separation of Powers and the Use of Force*, in THE FETTERED PRESIDENCY 15, 18–20 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Gary J. Schmitt & Abram N. Shulsky, *The Theory and Practice of Separation of Powers: The Case of Covert Action*, in THE FETTERED PRESIDENCY, *supra*, at 59, 61–62.

3. See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1027 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008). See also, e.g., Kitrosser, *supra* note 1, at \_\_\_\_ (exploring the recent rise of exclusivity within the political branches in the context of wiretapping).

The first question that this essay takes up is *why* exclusivity has come so far over the past several decades in the political branches and why it has demonstrated appeal and staying power across parties. Such a question admittedly lends itself to no magic bullets, no one factor or handful of factors to explain everything. Yet logic suggests that political incentives must constitute at least an important piece of the puzzle, and that is the piece on which this essay focuses.

The upshot is this: Since roughly the end of World War II, with a notable exception in the post-Watergate period, it has increasingly been in the interests of congresspersons to be perceived as non-obstructionist toward whatever activities the President deems necessary to advance national security. To avoid the dreaded “weak on national security” label, and to balance that avoidance against the risk of seeming either a presidential lackey (particularly if the President is of a different party) or of being implicated should scandals emerge (think Iran Contra or Abu Ghraib), congresspersons are generally best off appearing tough and resolute, while retaining the ability to plead ignorance should things turn out badly. These incentives are captured in a statement reportedly made in 1973 by Senate Armed Services Committee Chairman John Stennis (D-Miss.) to CIA Director James Schlesinger: “Just go ahead and do it, but I don’t want to know!”<sup>4</sup> Other former CIA Directors corroborate the ubiquity of this attitude among members of Congress. For example, former Director William Colby has said that “Congress is informed to the degree that Congress wants to be informed” and “stressed . . . that several [congressional] overseers had expressed little interest in briefings from the CIA.”<sup>5</sup> Happily for the President, these incentives complement his own. If it is politically problematic for a congressperson to be perceived as “weak on national security,” it is the kiss of death for a President or presidential candidate. The President must straddle the line in public perception between seeming willing to “do whatever it takes” to protect national security and being able to credibly invoke American ideals of fairness and the rule of law. Of course, the President is also deeply invested in avoiding scandal,

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4. DENIS McDONOUGH ET AL., *CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN* 9 (2006).

5. Loch K. Johnson, “*The Contemporary Presidency*”: *Presidents, Lawmakers, and Spies: Intelligence Accountability in the United States*, 34 *PRES. STUDIES Q.* 828, 833 (2004). See also, e.g., KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT* 42–44 (1996).

or at minimum, retaining plausible deniability should scandal develop over national security activities.

Exclusivity, then, aligns with the political interests of nearly everyone in national political life. Embracing exclusivity enables Presidents and congresspersons to associate themselves with the iconic image of a tough President and to situate their allegiance to that image in a larger narrative of keeping faith with the Constitution. Furthermore, making or acquiescing in exclusivity claims enables one to suggest that the Constitution simply ties their hands, preventing them, for instance, from disclosing or demanding information or taking a clear, public stand on a controversial matter. While this is not the only explanation for exclusivity's rise in ubiquity and legitimacy among the political branches over the past several decades, it is an important part of the picture.

This essay also considers *how* exclusivity manifests itself in the political branches. Exclusivity's manifestations are closely linked to its political appeal. The latter is contingent, after all, on the uses to which political actors are able to put exclusivity. In this respect, this essay observes that political branch players benefit as much if not more from exclusivity's shadow effect as from their invoking it explicitly. For example, however weak exclusivist arguments might be to the effect that the President had a constitutional power to secretly circumvent the Foreign Intelligence Surveillance Act ("FISA") for several years, the frequent repetition of these arguments by administration defenders created a fog of uncertainty around the issue among the public. This fog makes it more politically palatable for others, without invoking exclusivity explicitly, to suggest that the matter comes down to mere political differences, or that it is simply best to look ahead rather than to linger on complex questions of legal culpability.

This essay also explains that the combined effect of exclusivity's many active and passive uses is that of an elaborate shell game. In this "Article II shell game," accountability is the palmed object and potential accountability mechanisms are the shells.<sup>6</sup> If the game is well played, the public will often be told

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6. According to The Random House College Dictionary (1988), a shell game is "a sleight-of-hand swindling game resembling thimble-erig but employing walnut shells or the like instead of cups." *Id.* at 1212. The same dictionary defines thimble-erig as a "swindling game" in which "the operator palms a pellet or pea while appearing to cover it with one of three thimblelike cups, and then, moving the cups about, offers to bet that no one can tell under which cup the pellet or pea lies." *Id.* at 1365.

that accountability does not lie under one shell for exclusivist reasons, but that it may lie under the next shell, only for the process to repeat *ad infinitum*. For example, Congress may retroactively immunize certain groups for alleged statutory violations, partly on the basis that the legality question is uncertain in light of exclusivity. Members of Congress or witnesses supporting retroactive liability may argue, however, that other means for investigation exist such as congressional hearings. Later, those same persons or others may argue that congressional hearings ought not to occur or must be very narrow to avoid unveiling information that the President alone has the constitutional power—again, from an exclusivist perspective—to determine whether to reveal. To be clear, my claim is not that each participant subjectively intends, at the time that they raise a particular Article II objection, to close off other accountability avenues and thus to partake in a shell game. Rather, my point is that the increasing presence and perceived legitimacy of exclusivist arguments—and the incentive of political branch actors to raise or acquiesce in exclusivist claims or to benefit from their shadow effect—give rise to multiple, often successive exclusivist blocks to accountability. Thus, the effect is like that of a coordinated shell game.

Part I of this essay discusses historical and cultural changes that make exclusivity increasingly attractive politically to Presidents and congresspersons alike. Part II summarizes some of the major ways in which politicians actively make use of, or passively benefit from, exclusivist invocations of Article II. Part III demonstrates that the overall effect of such uses is that of an elaborate shell game across branches, parties, and administrations. It illustrates this phenomenon through the example of the Bush Administration’s “Terrorist Surveillance Program,” or “TSP.” Exclusivity contributed to the program’s years-long secrecy, defenses of it after it was publicly revealed, and efforts across the Bush and Obama administrations to shield its participants from accountability.

## I. THE AGGRESSION HEURISTIC, THE RULE OF LAW IDEAL, AND PARTISANSHIP: THE POLITICS OF NATIONAL SECURITY

### A. THE NATIONAL SECURITY STATE AND THE AGGRESSION HEURISTIC

While the United States was born out of war and was no stranger to war for its first two centuries,

[i]t was not until the Second World War that the United States, which heretofore had maintained small military budgets and a modest regular army, experienced a dramatic change in its world view. From then on this country has operated on the assumption that it faced a permanent national security emergency that had to be handled primarily by military means. . . . Mobilization of the society for ‘national security’ has long been the substitute for total war.<sup>7</sup>

While this passage was published in the midst of the Cold War, the staying power of the “national security state”<sup>8</sup> that it describes was evidenced throughout the nineteen-nineties, when the large-scale military and national security infrastructure that had been built up since the Second World War—what President Eisenhower famously called “the military-industrial complex”<sup>9</sup>—continued, in some respects even broadened its activities, with retooled justifications.<sup>10</sup> As historian Andrew J. Bacevich puts it, “at the end of the Cold War, Americans said yes to military power.”<sup>11</sup> From this perspective, Bacevich explains, the U.S. response to the tragic events of September 11th “demonstrates how *little* the unprecedented attacks [of that day] affected the assumptions underlying U.S. foreign policy; the terrorists succeeded only in reinvigorating the conviction that destiny summons the United States” and that military power is the means to achieve that destiny.<sup>12</sup>

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7. Richard J. Barnet, *The Ideology of the National Security State*, 26 MASS. REV. 483, 483, 485 (1985). See also GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1–4, 57–59, 98–102, 237–40 (2010); ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 16, 26–28, 32–33 (2005); Marcus G. Raskin, *Democracy Versus the National Security State*, 40 LAW & CONT. PROBLEMS 189, 196–99, 209–11 (1976).

8. This term is commonly used to refer to the post-World War II state of affairs. See generally, e.g., WILLS, *supra* note 7; Barnet, *supra* note 7; Raskin, *supra* note 7.

9. Farewell Radio and Television Address to the American People, 8 PUB. PAPERS 1035, 1038 (Jan. 17, 1961).

10. See BACEVICH, *supra* note 7, at 19, 35, 53–59, 63–64, 79–90 (2005).

11. *Id.* at 14.

12. *Id.* at 13–14.

The rise of the national security state caused two crucially important shifts in American life and government. First, while the Constitution's founders detested the notion of a large standing army and took steps to ensure against the same, the U.S. now has a sprawling military and national security infrastructure etched deeply into its architecture. As late as 1939, the United States had only "a small standing army, spent 1.4% of the gross national product on defense, [and] had a handful of foreign bases."<sup>13</sup> While annual defense spending in the years since the end of World War II has had its relative ups and downs, it has remained substantially higher as a percentage of GDP and by other measures than in the years before 1940, with the exception of the World War I years.<sup>14</sup>

The second major shift brought about by the national security state is cultural. Between World War I and World War II:

[A] U.S. Army chief of staff could veto plans for an airplane because it was immoral to bomb civilians. A secretary of state could reject plans for an intelligence operation because 'gentlemen do not read each other's mail.' And just before World War I a president (Woodrow Wilson in 1915) could fly into a rage upon discovering that the army actually had contingency plans for fighting wars.<sup>15</sup>

Even during World War II, members of Congress could publicly proclaim that the federal government should never wiretap and Congress could reject FDR's pleas to pass a statute authorizing wire-tapping and the use of wiretap-derived evidence in courts.<sup>16</sup> Yet over the past several generations, mainstream consensus has shifted. In 1985, Richard Barnet made a striking set of observations that remain equally apt in 2010:

[T]he national security state, despite its failure to deliver physical, psychological or spiritual security, enjoys the overwhelming support of the American public. And this is so despite rising concern about huge budget deficits substantially attributable to military expenditures and a disturbing increase in secrecy and surveillance in American life, all in the name of

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13. Barnet, *supra* note 7, at 485.

14. See James L. Clayton, *The Fiscal Limits of the Warfare-Welfare State: Defense and Welfare Spending in the United States Since 1900*, 29 W. POL. Q. 364, 366 tbl.1, 368 tbl.2, 369 chart 2, 370 tbl.3, 371 tbl.4 (1976). See also OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010, at 47–55 tbl.3.1 (2010).

15. Barnet, *supra* note 7, at 485.

16. See Kitrosser, *supra* note 1, at \_\_\_\_.

national security.

The “engineering of consent” is crucial to the national security state. Edward L. Bernay’s definition of public relations accurately describes the process by which the consensus on national security is maintained. Most Americans are inhibited from having or expressing personal convictions on matters relating to national security for a number of reasons. First, the topic is amorphous and seemingly complex. The masses of numbers about weapons, budgets, “kill ratios” and other bits of jargon make it seem almost hopeless to follow the “debate.” Second, the great emphasis put by government on the creation of classified information and the highly publicized, though not always successful, effort to protect secret information, cause most citizens to believe that they do not know sufficient “facts” to challenge official truth. Third, the threat to the survival of the nation is invoked in support of every new weapons system.<sup>17</sup>

The myopia of mainstream discourse is evident in politics, culture and journalism today.<sup>18</sup> Particularly since 9/11, such discourse has evinced a phenomenon that I call the “aggression heuristic.” By the aggression heuristic I mean a presumption that, as between two national security policies, one that relies on “aggression” and one that does not, the former is more security-enhancing. By aggression, I mean either violence or significant civil liberties incursions. The aggression heuristic exists despite the fact that evidence for the relative efficacy of particular

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17. Barnet, *supra* note 7, at 494–95. For an outstanding critique of academic arguments that champion deference to the executive branch through rationales similar to those described by Barnet, see Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 245 (2008). Cf. Louis Fisher, *The Law: Scholarly Support for Presidential Wars*, 35 PRES. STUD. Q. 590 (2005) (explaining, in article’s abstract, that “political scientists and historians have . . . imbued the presidency with magical qualities of expertise and good intentions. . . . Supported by the academic community, presidents now regularly claim that the Constitution allows them to wage war against other countries without receiving either a declaration or authorization from Congress.”); David Gray Adler, *The Law: Textbooks and the President’s Constitutional Powers*, 35 PRES. STUD. Q. 376, 379 (2005) (college political science textbooks typically “prefer vanilla descriptions to constitutional critiques and criticisms,” leaving students “untutored and thus unequipped to pose citizen challenges to executive claims of authority.”).

18. See, e.g., WILLS, *supra* note 7, at 161–66, 238–40; BACEVICH, *supra* note 7, at 14–15, 18, 90; Glenn Greenwald, *The NYT’s View of “Journalistic Objectivity”*, SALON.COM, Dec. 23, 2009, <http://www.salon.com/opinion/greenwald/2009/12/23/objectivity/>; Glenn Greenwald, *The Foreign Policy Community*, SALON.COM, Aug. 8, 2007, <http://www.salon.com/opinion/greenwald/2007/08/08/powers/>; Glenn Greenwald, *The Washington Post, Dan Froomkin and the Establishment Media*, SALON.COM, June 19, 2007, <http://www.salon.com/opinion/greenwald/2009/06/19/washpost/>; Glenn Greenwald, *Joe Klein and Beltway Seriousness*, SALON.COM, July 26, 2007, <http://www.salon.com/opinion/greenwald/2007/07/26/klein/>.

aggressive measures at best is inconclusive.<sup>19</sup> At worst, the evidence reveals that aggression often is counter-productive, making Americans less safe in both the short and long terms.<sup>20</sup>

That the aggression heuristic pervades mainstream thinking and politics is evidenced in a number of ways. First, public opinion polls routinely show that large numbers of Americans, often majorities, support aggressive techniques. For example, an April 2009 Gallup poll found that 55% of Americans believe that the use of “harsh interrogation techniques on terror suspects during the Bush Administration” was justified, “while only 36% say it was not.”<sup>21</sup> Similarly, an August 2009 Rasmussen

19. For example, a 2009 Inspectors General Report on the TSP and related surveillance programs explains that “[m]ost [intelligence community (IC)] officials interviewed by the [IC Inspectors General] had difficulty citing specific instances where [the TSP and related programs] had directly contributed to counterterrorism successes.” It noted, however, that “[t]here are several cases identified by IC officials and in IC documentation where [the TSP and related programs] may have contributed to a counterterrorism success.” OFFICES OF INSPECTORS GENERAL OF THE DEP’T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM 36 (2009) [hereinafter IG REPORT].

20. See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007). See also, e.g., Jane Mayer, *Counterfactual*, THE NEW YORKER, Mar. 29, 2010, at 98 (detailing flaws in former Bush speechwriter’s claims about the efficacy of enhanced interrogations and noting, among other things, that the speechwriter “does not address the many false confessions given by detainees under torturous pressure, some of which have led the U.S. tragically astray”); Charlie Savage and Scott Shane, *Experts Urge Keeping Two Options for Terror Trials*, N.Y. TIMES, Mar. 8, 2010, at A15 (Bush and Obama Administration officials express concern that political pressures to hold only military commission trials are counterproductive to national security); Matthew Alexander, *Torture’s Loopholes*, N.Y. TIMES, Jan. 21, 2010, at A39 (former Air Force interrogator notes that in his experience, “torture or even harsh but legal treatment never got us useful information. Instead, such tactics invariably did just the opposite, convincing detainees to clam up”; abuse of prisoners is also used by al-Qaeda “as a recruiting tool”); *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. On Administrative Oversight and the Courts of the S. Committee on the Judiciary*, 111th Cong. 22–46, 514–26 (2009) (testimony of Ali Soufan, Chief Executive, The Soufan Group LLC) (extensive analysis by former FBI terrorist interrogator as to the ineffectual nature of “enhanced interrogation” methods; among other things Soufan recounts his successes with non-enhanced methods on Abu Zubaydah and the failures of CIA contractors who took over with enhanced methods; Soufan also identifies falsehoods in examples given by Dick Cheney and others of enhanced interrogation’s successes); Coleen Rowley & Other Intelligence Veterans, *How Not to Counter Terrorism*, CONSORTIUMNEWS.COM, June 18, 2007, <http://www.consortiumnews.com/2007/061807a.html> (citing counter-productive nature of torture and of mass data collection—with respect to the latter, explaining that, in the wake of loosened restrictions on data collection, most data collected “will never be evaluated” and much will be irrelevant).

21. Jeffrey M. Jones, *Slim Majority Wants Bush-Era Interrogations Investigated*, GALLUP.COM, Apr. 27, 2009, <http://www.gallup.com/poll/118006/Slim-Majority-Wants-Bush-Era-Interrogations-Investigated.aspx>. A somewhat curious twist, however, is that the same poll found that 51% of Americans favor, though 42% of Americans oppose, an

poll found that 65% of U.S. voters “say it is at least somewhat likely that waterboarding and other harsh interrogation techniques helped secure valuable intelligence information.” 44% deemed it “very likely.”<sup>22</sup> And a nationwide Rasmussen telephone survey taken shortly after the attempted airliner bombing on Christmas Day, 2009 found that 58% of U.S. voters “say waterboarding and other aggressive interrogation techniques should be used to gain information” from the attempted bomber.<sup>23</sup> Americans’ assumptions about the efficacy of telephone wiretapping appear similar to those about torture. In the wake of the discovery that the Bush Administration had secretly approved the warrantless wiretapping of calls between the U.S. and abroad for several years through the TSP, despite a statute requiring warrants, a majority of Americans deemed the Bush Administration “right” to have done so in a USA Today Gallup poll.<sup>24</sup>

Politicians of both parties frequently behave in a manner consistent with the aggression heuristic. That is, they act as though their being viewed as averse to aggressive policies—or even supporting investigations of the same—is equivalent to being deemed weak on national security and is thus a political liability to be avoided. For example, in 2008, a majority-Democratic Congress facing a deeply unpopular Republican Administration passed legislation—the FISA Amendments Act, or FAA—granting the Administration much of the wiretapping authority that it had sought including retroactive immunity for telecommunications companies that had participated in the TSP. Many Democrats who initially opposed the legislation changed

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investigation into the use of such techniques. *Id.* Statistician Nate Silver explains Gallup’s interpretation of the investigation findings: “this isn’t really about torture—rather, it’s about investigations. We Americans like to investigate! ‘While a slim majority favors an investigation, on a relative basis the percentage is quite low because Americans are generally [more] supportive of government probes into potential misconduct by public officials.’” Nate Silver, *Explaining the Contradictory Torture Polling*, FIVETHIRTYEIGHT, Apr. 27, 2009, <http://www.fivethirtyeight.com/2009/04/explaining-torture-polling.html> (quoting Jones, *supra*).

22. 49% *Oppose Justice Department Probe of Bush-era CIA*, RASMUSSEN REPORTS, Aug. 27, 2009, [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2009/49\\_oppose\\_justice\\_department\\_probe\\_of\\_bush\\_era\\_cia](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2009/49_oppose_justice_department_probe_of_bush_era_cia).

23. 58% *Favor Waterboarding of Plane Terrorist to Get Information*, RASMUSSEN REPORTS, Dec. 31, 2009, [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/december\\_2009/58\\_favor\\_waterboarding\\_of\\_plane\\_terrorist\\_to\\_get\\_information](http://www.rasmussenreports.com/public_content/politics/general_politics/december_2009/58_favor_waterboarding_of_plane_terrorist_to_get_information).

24. USA Today Gallup Poll, <http://www.usatoday.com/news/polls/tables/live/2006-09-18-poll.htm>, question #17 (last visited May 17, 2010) (recording majority approval in polls taken Jan. 6–8, 2006 and Sep. 15–17, 2006; recording sizable minority approval in polls taken Jan. 20–22, 2006 and Feb. 9–12, 2006).

course, apparently responding to the political risk of appearing weak on terrorism. In championing the FAA, President Bush publicly stated that he would veto any bill that did not contain retroactive immunity, that a temporary set of FISA Amendments was soon to expire, and that Congress thus would leave dangerous intelligence gaps and make Americans vulnerable to terrorist attack should they not pass the FAA. Democrats who supported the FAA echoed President Bush's remarks. Diane Feinstein said that "taking no action means that we will be opening ourselves, in my view, to the possibility of a major attack."<sup>25</sup> Then-presidential candidate and Senator Barack Obama also supported the FAA after having earlier vowed to oppose any legislation containing retroactive immunity. Citing national security, Obama said, "I felt it was most—more important for me to go ahead and support this compromise."<sup>26</sup> Senator Russ Feingold, a Democrat who voted against both bills, dismissed these arguments as "the same old story. It's been the same ever since, basically, 9/11. Whenever the—ultimately the White House raises the specter of terrorism and even though it's clearly wrong on the merits, the—too many Democrats have caved."<sup>27</sup> A piece in *The Economist* similarly surmised that "with 'the war on terror' still a potent political issue, [Democratic] resistance could only last so long."<sup>28</sup>

A similar story can be told with respect to so-called "enhanced interrogation techniques." For example, former FBI special agent Coleen Rowley and a group of intelligence veterans calling themselves "Veteran Intelligence Professionals for Sanity" recount that:

Pragmatists (experienced intelligence and law enforcement professionals, in particular) oppose torture because it does not work and often is counterproductive. Nevertheless, the president grabbed the headlines when he argued on Sept. 6, 2006 that "an alternative set of procedures" (already outlawed by the U.S. Army) for interrogation is required to extract information from terrorists. He then went on to

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25. David Welna, *Democrats in Eavesdropping About-Face*, (NPR radio broadcast June 26, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91934916&ps=rs>.

26. *Id.* See also Alex Koppelman, *Obama Says He Supports FISA Compromise*, SALON.COM, June 20, 2008, [http://www.salon.com/news/politics/war\\_room/2008/06/20/obama\\_fisa](http://www.salon.com/news/politics/war_room/2008/06/20/obama_fisa); *Sen. Obama Issues Statement on FISA Bill*, U.S. FED. NEWS, Dec. 17, 2007 (earlier vow to support a filibuster of legislation with retroactive immunity).

27. Welna, *supra* note 25.

28. *Guarding the Guards*, ECONOMIST, June 28, 2008, at 36.

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Virtually omitted from media coverage were the same-day remarks of the pragmatist chief of Army intelligence, Lt. Gen. John Kimmons, who conceded past “transgressions and mistakes” and made the Army’s view quite clear: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”<sup>29</sup>

Here too, the aggression heuristic drove political and media discourse. Indeed, the heuristic’s force was strong enough to withstand, with little contest, the pragmatic objections of intelligence veterans.

Interestingly, the first year of the Obama Administration has seen aggression heuristic-infused push-back against perceptions that the Administration is not using or condoning sufficiently aggressive policies. The push-back comes from persons and groups ranging from members of Congress to organizations such as Elizabeth Cheney’s “Keep America Safe” campaign.<sup>30</sup> For example, as of this essay’s writing in March 2010, a bi-partisan firestorm has been brewing against the Administration’s announced plans to try some accused 9/11 terrorists in the civilian court system rather than through military commissions.<sup>31</sup> And initial bi-partisan support for closing the detention center at Guantanamo Bay crumbled over the last year in the wake of fears over the possible transfer to the United States of Guantanamo Bay prisoners.<sup>32</sup>

This last set of examples—involving push-back against a President for appearing insufficiently aggressive—warrants a few preliminary observations. First, given significant continuities between the Bush and Obama Administrations on counter-terrorism, it is a testament to the strength of the aggression heuristic and its perceived political currency that President

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29. Rowley et al., *supra* note 20. See also other sources cited *supra* note 20.

30. See Keep America Safe, <http://www.keepamericasafe.com/> (last visited May 17, 2010).

31. See, e.g., Savage & Shane, *supra* note 20; Anne E. Kornblut & Peter Finn, *Obama Advisors Set to Recommend Military Tribunals for Alleged 9/11 Plotters*, WASH. POST, Mar. 5, 2010, at A1; Susan Crabtree, *Gates, Holder Oppose Limiting Decisions on Where Executive May Try Terrorists*, THEHILL.COM, Feb. 25, 2010, <http://thehill.com/homenews/administration/83839-gates-holder-say-they-oppose-legislation-limiting-decisions-on-where-to-try-terrorists>.

32. See, e.g., Charlie Savage, *Plan to Move Guantanamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 23, 2009, at A1; Charlie Savage, *U.S. Said to Pick Illinois Prison to House Detainees*, N.Y. TIMES, Dec. 15, 2009 at A26.

Obama has faced substantial pro-aggression pushback.<sup>33</sup> Second, so long as political incentives favor both aggression and mindfulness of rule of law ideals, it stands to reason that exclusivity will most often be used to defend aggressive behavior rather than non-aggression. From Congress' perspective, it is technically consistent to argue both that the President has discretion under Article II to act however he deems best for national security and that the President is using this discretion badly through insufficient aggression. Yet the two arguments sit somewhat uneasily next to each other when one considers that exclusivity is built partly on arguments that the President alone is structurally equipped to determine and carry out national security strategy.<sup>34</sup> Furthermore, exclusivity is surely in tension with legislative efforts to force the President's hand in more aggressive directions. Hence, where congresspersons seek to require more aggressive action—as in recent legislation restricting the transfer of Guantanamo Bay prisoners to the United States<sup>35</sup>—they are likely to put exclusivist arguments to the side. From the President's perspective, there is some logic in invoking exclusivity across the board to defend both aggressive and non-aggressive decisions. We have seen some inkling of this approach from the Obama Administration—Attorney General Eric Holder and Defense Secretary Robert Gates stated that the President has discretion to determine where he tries suspected terrorists in response to demands for military commission trials<sup>36</sup>—and it will be fascinating to see if this approach is used with any frequency. Still, insofar as political incentives continue to militate toward aggression, it is likely that the President and Congress both will typically embrace aggression while remaining mindful—rhetorically and perhaps more broadly—of the rule of law ideal. Thus, it seems most plausible that the President, like Congress, generally will continue to invoke exclusivity to favor aggression rather than to defend presidential decisions to forego aggressive behavior.<sup>37</sup>

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33. See, e.g., Glenn Greenwald, *Nostalgia for Bush/Cheney Radicalism*, SALON.COM, Jan. 31, 2010, [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/01/31/nostalgia](http://www.salon.com/news/opinion/glenn_greenwald/2010/01/31/nostalgia).

34. See Kitrosser, *supra* note 1, at \_\_\_\_.

35. Savage, *U.S. Said to Pick Illinois Prison to House Detainees*, *supra* note 32.

36. Crabtree, *supra* note 31.

37. For example, President Obama reportedly rejected suggestions to invoke an emergency power statute to help fund the transfer of Guantanamo Bay prisoners to Thompson Correctional Center in Illinois. While this approach would have relied on statutory authority and thus would have been less extreme than exclusivity, the President reportedly rejected the move on the basis that it would anger congresspersons critical of

## B. THE RULE OF LAW IDEAL

A potential offset to the aggression heuristic is what I call the “rule of law ideal.” The rule of law ideal embodies concepts that are deeply embedded in our national psyche, concepts about which Americans have learned since grade school. They include the familiar notions that no one in the United States is above the law, that checks and balances prevent government tyranny, and that Americans greatly value freedom and the right to dissent. Of course, these concepts too often take the form of empty phrases or are even invoked to justify restrictions on freedom. It is not uncommon, after all, to hear a politician explain that civil liberties incursions are justified to protect freedom or to defeat those who “hate our freedoms.”<sup>38</sup> Yet the concepts at their core have real content that resonates in U.S. history, culture, and politics.

The rule of law ideal is evidenced in public opinion polls. Surveys reflect that Americans support transparency, checks and balances, and civil liberties as general matters. On the other hand, the aggression heuristic seems to overtake these ideals where a polling question situates rule of law values in the context of specific national security initiatives. In a summary of civil liberties and national security polling results from 2002-06, the Gallup organization explained:

Numerous polling organizations have asked Americans for their views on civil liberties, the Patriot Act, wiretapping, and the government’s collection of massive telephone records. The results produce mixed results depending on what is

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plans to transfer Guantanamo Bay prisoners to the U.S. Reportedly, the President was also concerned that the move might lead to the statute’s rescission, a concern that is logically irrelevant from the perspective of exclusivity, whereby statutes can be circumvented when the President deems national security to demand it. See Savage, *Plan to Move Guantanamo Detainees Faces New Delay*, *supra* note 32. Additionally, as of March 2010, the Administration reportedly was very seriously considering reversing course on its plan to hold some civilian trials for detainees in the face of strong political pushback against the same. See Kornblut & Finn, *supra* note 31.

38. Perhaps most famously, George W. Bush and his administration characterized the “war on terror” as a response to those who “hate our freedoms” and “a global struggle against the enemies of freedom.” Matthew Davis, *New Name for “War on Terror,”* BBC NEWS, July 27, 2005, <http://news.bbc.co.uk/2/hi/americas/4719169.stm>; Address Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001). The rhetorical use of “freedom” to defend restrictions on freedom is hardly isolated or limited to anti-terrorism measures. For instance, Justice Stevens argued in a dissenting opinion that states should be permitted to ban flag burning in part because the flag “uniquely symbolizes” “ideas of liberty and equality.” *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting).

emphasized within the question. Polls on the one hand find some reluctance to give up civil liberties and concern about how far the government will go in this regard. On the other hand, polls that stress the positive aspects of the Patriot Act or positive reasons for restricting civil liberties find greater public support than those that do not.<sup>39</sup>

The rule of law ideal also has some demonstrated political currency. This was perhaps most pronounced in the early 1970s, when a large group of “freshmen Democrats known as the ‘Watergate babies’” was swept into office amid national perceptions of out of control presidential power.<sup>40</sup> As a New York Times reporter put it at the time:

What we are beginning to see here are the reactions to the misuse of Presidential power in Vietnam and Watergate. The Congress is determined to try to regain some of the power it lost or abandoned to the President in the postwar generation, to limit the scope of executive privilege, to limit the President’s power to make war without the consent of the Congress, and to insist, if possible, that the President spend all funds appropriated by the Congress.<sup>41</sup>

Landmark hearings were also held in both houses of Congress in the 1970s, examining in some detail intelligence and national security related abuses of the preceding several decades.<sup>42</sup> In more recent times, perceived national security excesses in the Bush Administration led to some limited hearings and rebukes in Congress, at times from members of President Bush’s own party.<sup>43</sup>

As with public opinion, however, the rule of law ideal in politics is vulnerable to the appeal of the aggression heuristic when national security is invoked. Even during the post-Watergate period, investigations and legislative proposals faced political stumbling blocks in the form of national security based objections.<sup>44</sup> And angry talk by Republicans and Democrats alike about national security abuses have generally given way, in the post-9/11 era, to curtailed investigations, legislative

39. Gallup’s Pulse of Democracy: The Patriot Act and Civil Liberties, <http://institution.gallup.com/content/?ci=5263> (last visited May 18, 2010).

40. See Steven V. Roberts, *House G.O.P. Freshmen are Speaking up on Party Issues*, N.Y. TIMES, Oct. 29, 1979, at A16; James Reston, *The Class of 1974*, N.Y. TIMES, Dec. 18, 1974, at 45.

41. Reston, *supra* note 40.

42. See generally, e.g., OLMSTED, *supra* note 5.

43. See, e.g., *infra* Part III.A.3.b.1; text accompanying note 56.

44. See, e.g., OLMSTED, *supra* note 5, at 2–9, 103–12, 121–43, 147–51, 154–89.

acquiescence to aggression, and legislative push-back against perceptions of insufficient aggression.<sup>45</sup>

### C. PARTISANSHIP

The Constitution assumes that Congress and the President will keep one another in check as natural institutional rivals.<sup>46</sup> From this perspective, the President has incentives to defend the presidency against congressional encroachment and Congress has incentives to defend itself against presidential encroachment. Yet as an entire genre of literature is devoted to explaining, that plan hasn't worked out so well. Instead, history has seen the rise of an imperial presidency and a relatively quiescent, enabling Congress.<sup>47</sup> One reason for the failure of founding assumptions is the rise of cohesive national political parties and Presidents as party leaders.<sup>48</sup> The political fortunes of congresspersons are much more closely tied to their respective political parties than to the institutions in which they sit.<sup>49</sup> Hence, members of Congress by and large are unwilling to challenge a President within their own party, even where the President steps on the powers and interests of Congress as an institution.<sup>50</sup>

It is self-evident why the "separation of parties, not powers"<sup>51</sup> lends itself to congressional acquiescence during times of unified government. Yet even during times of divided government, "members of the President's party are not likely to break ranks and vote to limit presidential initiatives."<sup>52</sup> This is a particularly strong impediment to Congress' ability to pass legislation over a presidential veto.

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45. See, e.g., *infra* Part III.A.3.b.1-2; *supra* text accompanying notes 25-28.

46. See, e.g., THE FEDERALIST NO. 51, at 317-20 (Madison) (Signet Classic 2003).

47. The seminal work that describes this phenomenon is ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973). For a more recent take, see generally, CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY (2007).

48. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313-14 (2006); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678-79 (2005).

49. Levinson & Pildes, *supra* note 48, at 2323; William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters*, 88 B.U. L. REV. 505, 518-19 (2008).

50. Levinson & Pildes, *supra* note 48, at 2344; Marshall, *supra* note 49, at 518-19; Tushnet, *supra* note 48, at 2679.

51. See Levinson & Pildes, *supra* note 48.

52. Neil Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 409 (2009).

More to the point, any challenge that divided government poses to the presidency tends to be overcome in the realm of national security, especially post-9/11, by the aggression heuristic. The bipartisan impact of the aggression heuristic is demonstrated by the post-9/11 examples of deep congressional acquiescence during divided government detailed earlier. More generally, the phenomenon of bipartisan deference to aggressive presidential policies in the realm of national security and foreign affairs has been widely observed.<sup>53</sup>

## II. THE POLITICAL APPEAL AND USES OF EXCLUSIVITY

If political incentives are an important part of their calculus, what, then, is a politician to do when it comes to national security? If the aggression heuristic were the only factor, then perhaps every day in politics would be like the Republican primary debate in May 2007 in which, responding to a hypothetical question about the actions that each would take as President after a terrorist attack, Representative Tancredo announced that he would be “looking for ‘Jack Bauer,’” Rudolph Giuliani said that he would tell interrogators “to use every method they could think of,” and Mitt Romney added for good measure that he wants “to double Guantanamo.”<sup>54</sup> Of course, the aggression heuristic is not limitless and does not exist in a vacuum. Despite the strength of both the heuristic and of partisanship, there are still potential political costs to being viewed as a mere presidential lackey, whether across party lines (think then-Democrat, now-Independent Joe Lieberman circa 2006)<sup>55</sup> or within the same party (think Republican Dan Burton reminding President Bush that “this is not a monarchy” in 2001).<sup>56</sup> Nor is the rule of law ideal without any currency in the realm of national security. For example, politicians often strain to couple remarks to the effect that we must use any means necessary to interrogate terrorists with the caveat, “but not torture.”<sup>57</sup> And surely Watergate, Iran-Contra and Abu Ghraib

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53. See, e.g., Devins, *supra* note 52, at 414–15; Marshall, *supra* note 49, at 518; Levinson & Pildes, *supra* note 48, at 2345, 2352; Tushnet, *supra* note 48, at 2678–80.

54. Transcript of Republican Presidential Primary Debate at the University of South Carolina, May 15, 2007, available at <http://www.nytimes.com/2007/05/15/us/politics/16repubs-text.html>.

55. See Editorial, *A Senate Race in Connecticut*, N.Y. TIMES, July 30, 2006, at C11.

56. See Ellen Nakashima, *Bush Invokes Executive Privilege on Hill*, WASH. POST, Dec. 14, 2001, at A43.

57. For example, in the primary debate referenced above, Rudolph Giuliani

dwelling within politicians' mental calculi, reminders of the political and legal risks of getting caught in an abuse-of-power scandal.

Given these conflicting pressures, the political appeal of presidential exclusivity (again, at least insofar as it supports aggression) is substantial. From the President's perspective, invoking exclusivity enables him to combine the image of the tough and decisive leader with that of constitutionalism and the rule of law. As a practical matter, successful exclusivity claims enable him to duck much scrutiny. He can, for example, claim *ex ante* or *ex post* that he must forego congressional notification requirements in the name of national security. He can also seek to avoid judicial review by invoking the state secrets doctrine and to stave off statutory limits on that doctrine by claiming that they would violate Article II. The availability of exclusivity defenses may also embolden him to violate statutes in secret, on the theory that, if caught, he can claim an Article II based right to circumvent the statutes. Similarly, he can argue against congressional investigations of past statutory violations on the theory that the violations were legal from an exclusivity perspective and that Congress would therefore be investigating mere political differences. Depending on the composition of Congress, the President could add that Congress seeks to engage in a partisan witch-hunt over political differences.<sup>58</sup>

For members of Congress, a variety of political factors—including whether a member shares a party affiliation with the President, the nature of a member's base (particularly in "safe" House districts where party base views are often politically determinative), and whether a member has carved out a niche

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followed his remark that interrogators should "use every method they could think of" with the words, "It shouldn't be torture, but every method they can think of." See Transcript, *supra* note 54.

58. Arguments to the effect that investigations of the TSP or other aggressive anti-terror programs are or could turn into mere "witch-hunts" that seek to criminalize political differences have been frequently voiced over the past several years from persons ranging from Presidents Bush and Obama to members of Congress to commentators inside and outside of government. See, e.g., *Looking Back in Anger*, ECONOMIST, July 18, 2009, at 29; Press Release, Sen. John Cornyn, President and American People Want Unity, Not Partisan Prosecutions and Witch Hunts (May 19, 2009); Josh Gerstein & Amie Parnes, *Obama: Truth Commission is a Mistake*, POLITICO.COM, Apr. 23, 2009, <http://www.politico.com/news/stories/0409/21654.html>; *Getting to the Truth Through a Non-Partisan Commission of Inquiry: Hearing Before the Senate Committee on the Judiciary*, 111th Cong. 157-61 (2009) (statement of David B. Rivkin, Partner, Baker Hostetler); Scott Shane, *To Investigate or Not: Four Ways to Look Back at Bush*, N.Y. TIMES, Feb. 22, 2009, at WK3. Logically, these arguments benefit from the prevalence of exclusivist commentaries suggesting that the TSP and other statutory violations were or might have been legal.

reputation as one who stands up to abuses of power—may impact the degree to which it is in their interest to actively invoke exclusivity. Yet as we have seen, for many in Congress this position is indeed in their political interests. Rhetorically, invoking exclusivity enables a congressperson to show their support for a tough and in-command President and to wrap that support in the vestments of law and founding wisdom. Better still, exclusivity provides an escape hatch for members of Congress to avoid responsibility for that which may go wrong. After all, the gist of the exclusivity case is that the Constitution does not allow Congress to take certain actions, such as passing legislation to constrain particular national security activities or demanding information from the intelligence community in the face of national security based refusals.<sup>59</sup>

Finally, exclusivity's advantages are not reaped solely by those who explicitly invoke it. Rather, exclusivity has an important shadow effect for the President and members of Congress alike, even where they choose (say, for fear of appearing to overreach in light of the rule of law ideal) not to invoke exclusivity explicitly. Take the example of arguments over whether to investigate past violations of statutes restricting torture and wiretapping. The frequently made exclusivist defense of such violations helped to create a sense in the public and political spheres that there is a legitimate legal debate on the matter, however tenuous exclusivist arguments might be. This sense helps to underscore the position that investigations would be undertaken solely for political gain and would unnecessarily

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59. John Hart Ely made a parallel observation about Congress' incentives with respect to decisions to go to or to remain at war. Congress' incentives, he explained, lend themselves to "studied ambiguity." John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 878 (1990). He also demonstrated, using the example of the Tonkin Gulf Resolution's repeal, how the combined effect of congressional and presidential incentives favor exclusivity:

To a legislature unwilling either to stop the war or to take responsibility for it, the prospect of getting that incriminating Tonkin Gulf Resolution off the books must have seemed a godsend: "The . . . debate made evident a Senate consensus that repeal . . . would 'wipe the slate clean' of any residual congressional authority for the Vietnam war and leave the President relying exclusively upon his powers as Commander in Chief." And to an executive interested in increasing presidential power—in attempting to set a precedent to the effect that troops can be deployed without congressional authorization—it must have seemed so too (particularly when the President in question could claim that this unpopular war wasn't really his, but his predecessor's). The repeal had it all: Congress could hide, and the President could aggrandize.

*Id.* at 907 (quoting STAFF OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., THE WAR POWERS RESOLUTION 1-202 (Comm. Print 1982)).

demoralize the intelligence community and harm national security.<sup>60</sup>

Another example of exclusivity's shadow effect involves White House failures to meet statutory requirements to share information with the congressional intelligence committees. The ubiquity of exclusivity in public and political discourse creates a setting in which the President can claim with relative political safety, should such transgressions later come to light, that he deemed the information too dangerous to share. While this is not an explicit exclusivist defense, an unspoken premise is that the President legally may circumvent statutory information-sharing requirements. The more embedded this exclusivist premise is in the national psyche, the easier it is for the President to rely on it without invoking it and to get little political pushback for so doing. By the same token, the exclusivist premise removes much of the political onus from congressional committee members to push back (and to take on the political risks of so doing) should they learn that they have not received disclosures to which they are statutorily entitled.<sup>61</sup>

### III. THE ARTICLE II SHELL GAME

Given the wide-ranging political appeal of Article II exclusivity and the varying ways in which it can be utilized, it is not surprising that its use has bridged parties and administrations since 9/11. This section focuses on exclusivity's use by Congress, the Bush Administration and the Obama Administration (through March 2010) in justifying the TSP and in shielding TSP participants from accountability through congressional or judicial inquiry. Similar accountability-avoiding moves have been used in other contexts in recent years, particularly with respect to the designation and treatment of terror detainees. For the sake of brevity, this section focuses on the TSP.

As noted earlier, I refer to the pattern of activities and decisions chronicled here as an Article II shell game because it amounts to an indefinite bi-partisan, cross-administration, cross-institutional pattern of accountability-avoidance.<sup>62</sup> The key

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60. See sources cited *supra* note 58.

61. See, e.g., *infra* text accompanying notes 77–84.

62. See *supra* note 6 and accompanying text. Legal commentator Dahlia Lithwick more colorfully referred to an example of this phenomenon—the Obama Administration's avoidance of court review of Bush era extraordinary rendition

feature of the game is that at times, one accountability mechanism is thwarted in the name of Article II with assurances that alternative mechanisms lie ahead, only for the alternative mechanisms to be thwarted later by similar reasoning. The Article II shell game enables Congress and the President alike repeatedly to pay homage to national security and the rule of law while working to ensure that no one looks too closely at what is being, or has been, done.

#### A. THE TSP'S INITIAL SECRECY AND LEGAL JUSTIFICATIONS

As of March 2010, many of “[t]he specific intelligence activities that were permitted by [post-9/11] Presidential Authorizations remain highly classified.”<sup>63</sup> Thanks to admissions by the White House and the Department of Justice in the wake of revelations by the New York Times in December 2005, however, we do know about the existence of the Terrorist Surveillance Program, or TSP, the program whereby the government intercepted calls between the United States and abroad without a warrant.<sup>64</sup> This section focuses on how exclusivity enabled that program’s secrecy for roughly four years and how exclusivity underscores defenses of the program. For precision’s sake, it should be noted that some of the examples also involve efforts to foreclose inquiries into related and still not publicly described surveillance programs. The broader family of Bush Administration surveillance programs, including but not limited to the TSP, has been called the President’s Surveillance Program, or “PSP.”<sup>65</sup> For ease of reference, the remainder of this section refers interchangeably to any programs within the PSP as the TSP or “the program.”

##### 1. Exclusivity-Fueled Secrecy

The TSP’s roughly four-year secrecy was facilitated by the deeply ingrained exclusivist premise that the President alone must determine when information is too dangerous to be

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programs—as “judicial Whac-a-Mole. . . . When another case pops up, the administration slaps it down.” Dahlia Lithwick, *Torture Roulette*, Dec. 14, 2009, <http://www.slate.com/id/2238568/>.

63. IG REPORT, *supra* note 19, at 5.

64. *Id.* at 5–6. The Report differentiates between the TSP, which has been publicly acknowledged, and the President’s Surveillance Program or “PSP,” which comprises the larger family of surveillance programs authorized through secret presidential authorization after 9/11. The PSP includes the TSP as well as other, still classified programs. *Id.* at 1, 5–6.

65. See *supra* note 64.

revealed beyond select individuals. This power is manifested especially, though not exclusively, in the classification system.<sup>66</sup> In keeping with this premise, the White House—in large part through the Office of the Vice President, to whom the President had “delegated much of the national security portfolio,”<sup>67</sup> and particularly through the Vice President’s highly influential counsel, David Addington<sup>68</sup>—tightly controlled access to information about the TSP.<sup>69</sup> Plans for the TSP and other closely-held post 9/11 programs emanated from the self-described “War Council,” consisting of Addington, Office of Legal Counsel (OLC) Deputy Assistant Attorney General John Yoo, White House Counsel (later Attorney General) Alberto Gonzales, Timothy Flanigan of the White House Counsel’s Office, and Pentagon general counsel Jim Haynes.<sup>70</sup>

One of the most significant senses in which access to the TSP was restricted within the executive branch was that John Yoo—as the sole War Council member “with authority to issue [OLC] legal opinions that were binding throughout the executive branch”<sup>71</sup>—essentially received *carte blanche* to issue legal opinions justifying the TSP without going through OLC’s normal channels of review.<sup>72</sup> This deeply insular process has since been blamed by subsequent Bush Administration OLC officials and by a July 2009 Inspectors General Report for substantial flaws in the opinions’ legal and factual reasoning. Indeed, it was only after Yoo left the Department and was replaced by Jack Goldsmith, and then-Assistant Attorney General for OLC Jay Bybee became a federal judge and was replaced at OLC by Patrick Philbin, and Philbin, unlike Bybee, was “read in” to the TSP, that alarm bells were sounded by Goldsmith and Philbin as to the earlier opinions. What followed was a combination of withdrawn opinions, new opinions, and a now infamous internal revolt at the Department of Justice that reportedly led to changes in the TSP.<sup>73</sup> As Goldsmith put it in retrospect, the War Council “dealt with FISA the way they dealt with other laws

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66. See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. Ill. L. Rev. 881, 887–905.

67. JANE MAYER, *THE DARK SIDE* 63 (2008). See also JACK GOLDSMITH, *THE TERROR PRESIDENCY* 76–77 (2007).

68. See MAYER, *supra* note 67, at 63–64; GOLDSMITH, *supra* note 67, at 76–79.

69. See IG REPORT, *supra* note 19, at 5–7, 10, 16; GOLDSMITH, *supra* note 67 at 166–67, 181–82, 205–06; MAYER, *supra* note 67 at 68–70, 268–69.

70. MAYER, *supra* note 67, at 66; GOLDSMITH, *supra* note 67, at 22–23, 98.

71. GOLDSMITH, *supra* note 67, at 23.

72. IG REPORT, *supra* note 19, at 10–14, 19–20, 30.

73. See IG REPORT, *supra* note 19, at 19–30.

they didn't like: they blew through them in secret based on flimsy legal opinions they guarded closely so no one could question the legal basis for the operations."<sup>74</sup>

Meanwhile, the congressional intelligence committees were also kept out of the loop prior to the press revelations of December 2005. This is so despite the statutory informing requirements of the National Security Act. One requirement mandates that the President "ensure that the congressional intelligence committees are kept fully and currently informed of... intelligence activities... including any significant anticipated intelligence activity."<sup>75</sup> Another requires the Director of National Intelligence [DNI] and the intelligence agency heads to "keep the congressional intelligence committees fully and currently informed of all intelligence activities," including through written reports on "significant anticipated intelligence activity."<sup>76</sup>

There is no dispute that the Bush Administration did not, at any point prior to the New York Times story, notify the congressional intelligence committees about the TSP. Instead, the Administration reportedly provided limited notification to members of the Congressional leadership, or "Gang of Eight."<sup>77</sup> The Gang of Eight consists of the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.<sup>78</sup> As I have detailed elsewhere, there is no credible argument that the TSP fell into one of the narrow statutory exemptions from disclosure.<sup>79</sup> Presumably, the Administration relied on the premise that, even if the statutory informing requirements applied, it had the constitutional prerogative to override those mandates.<sup>80</sup> Indeed, while President Bush signed a 2001 amendment that bolstered the National Security Act's

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74. GOLDSMITH, *supra* note 67, at 181.

75. 50 U.S.C. § 413(a)(1) (2006).

76. 50 U.S.C. § 413a(a)(1), (b).

77. *See, e.g.*, ALFRED CUMMING, CONG. RES. SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTIONS 6-7 (2006); Sheryl Gay Stolberg, *Senate Chairman Splits With Bush on Spy Program*, NY TIMES, Feb. 18, 2006, at A1; 154 Cong. Rec. S6456-59 (daily ed. July 9, 2008) (remarks of U.S. Senator Russ Feingold in opposition to the FISA Amendments Act).

78. CUMMING, *supra* note 77, at 5.

79. Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1054-58 (2008).

80. *Id.*

disclosure requirements, he wrote in a signing statement that the heightened requirements would, “in some circumstances . . . fall short of constitutional standards” and that “the Act shall be construed . . . in a manner consistent with the President’s constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”<sup>81</sup>

It is also worth noting that, once the program was revealed in the press, the Bush Administration used its Gang of Eight notification to suggest that the TSP had been approved by Congress.<sup>82</sup> Thus, rather than pointing ahead to accountability that might occur down the road, the Administration suggested that it had already been held accountable. On the one hand, this is highly disingenuous given the exclusivity-fueled, administration-defined terms on which notification was provided. In addition to the limited number of persons informed, Gang of Eight notification sessions are notorious for failing to provide meaningful oversight. As a former congressional staffer writes:

As a former legal counsel for both Republican and Democratic leaders of the House and Senate intelligence committees, I’m well aware of the limitations of these “gang of eight” sessions. They are provided only to the leadership of the House and Senate and of the intelligence committees, with no staff present. The eight are prohibited from saying anything about the briefing to anyone, including other intelligence panel members. The leaders for whom I worked never discussed the content of these briefings with me.

It is virtually impossible for individual members of Congress, particularly members of the minority party, to take any effective action if they have concerns about what they have heard in one of these briefings. It is not realistic to expect them, working alone, to sort through complex legal issues, conduct the kind of factual investigation required for true oversight and develop an appropriate legislative response.<sup>83</sup>

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81. Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 2 PUB. PAPERS 1555 (Dec. 28, 2001).

82. See Kitrosser, *supra* note 79, at 1058. See also, e.g., *Transcript: Interview with Vice President Cheney on FOX News Sunday*, FOX NEWS, Dec. 22, 2008, <http://www.foxnews.com/story/0,2933,470706,00.html>.

83. Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1. Senator Arlen Specter also has noted that, “[f]rom [his] experience as a member of the ‘Gang of Eight’ when [he] chaired the Intelligence

On the other hand, members of Congress should not be permitted to wriggle off the hook entirely. Congresspersons could refuse to adhere to the Administration's restrictive terms, could insist that statutory disclosure rules are legally controlling, and could take their constitutional and policy arguments to the court of public opinion. Of course, this is where congresspersons' own political incentives come into play. As discussed earlier, and as the facts recounted here illustrate, it is often in the political interests of a congressperson, even one politically antagonistic to the President, to acquiesce in requests for national security secrecy. This, in turn, makes it in their interest to free-ride off of exclusivity arguments, regardless of whether they genuinely, even publicly oppose such arguments in general. Indeed, the specter of exclusivity (and hence of relative congressional helplessness) arguably redounded to the benefit of some Democratic Gang of Eight members who were criticized for not having reacted more forcefully when told of the TSP and other Bush Administration programs, and who were also accused of understating how much they knew about the programs.<sup>84</sup>

Prior to the public revelations, then, the information control exercised or acquiesced in by Gang of Eight Members and the Bush Administration laid the groundwork for a shell game in several respects. First, the Bush Administration sought to use exclusivist information-control prerogatives to keep the TSP so tightly held as to avoid accountability (outside of a small and like-minded circle) in the first place. Second, the Administration built a foundation for later finger-pointing—and hence for accountability-shifting—by providing limited notice to the Gang of Eight. In the case of the program's public discovery, the Administration could, and eventually did argue that accountability had already occurred through Gang of Eight notification. Third, by acquiescing in such limited notice

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Committee of the 104th Congress, even that group gets very little information." Letter from Sen. Arlen Specter to Vice President Dick Cheney (June 7, 2006), available at [http://www.fas.org/irp/congress/2006\\_cr/specter060706.pdf](http://www.fas.org/irp/congress/2006_cr/specter060706.pdf).

84. See, e.g., Walter Pincus, *Spying Necessary, Democrats Say; But Harman, Daschle, Question President's Legal Reach*, WASH. POST, Feb. 13, 2006, at A3. See also, e.g., *Transcript: Interview with Vice President Cheney on Fox News Sunday*, supra note 82 (arguing that Gang of Eight was fully briefed on, made no objections to, and expressed full support of the TSP). An even more heated controversy arose over Nancy Pelosi's representations as to what she was and was not told in Gang of Eight briefings on the treatment and interrogation of terror detainees. See, e.g., Scott Shane, *CIA Reviewing Its Process for Briefing Congress*, N.Y. TIMES, July 10, 2009, at A16; Walter Pincus, *House Votes to Revise Intelligence Disclosure Rules for President*, WASH. POST, Mar. 2, 2010, at A13.

procedures, Gang of Eight members retained the ability to claim that they were helpless to act and thus blameless in light of the restricted nature of the notice.

## 2. The Exclusivist Defense of the TSP's Legality

The TSP was defended internally prior to the 2005 press revelations, and publicly after the revelations, on the basis of exclusivist reasoning. The basic exclusivist argument is that Congress constitutionally may not restrict the President from engaging in intelligence gathering activities that he deems necessary to protect national security. Thus, FISA should not be construed to prohibit the TSP in order to avoid the constitutional question that would otherwise arise. Alternatively, if FISA is construed to prohibit the TSP, it is unconstitutional and can be circumvented by the President.<sup>85</sup> The substantial problems with this argument have been rehearsed at length elsewhere by myself and many others<sup>86</sup> and the bulk of that discussion is beyond the scope of this essay.

What is quite relevant, however, is that exclusivist reasoning typically is bolstered by assurances that the President bears political responsibility for how he uses his exclusive constitutional powers.<sup>87</sup> Yet in light of the secrecy that exclusivity supports, such assurances, combined with exclusivist assertions, often amount to a multi-step shell game. Step one (assertion): Congress may not limit the President through measures like FISA. Step two (assurance): Congress still retains checking power. It may make funding cuts, hold up presidential nominees in committee, or take other blunt retaliatory measures if it does not like the President's decisions and actions.<sup>88</sup> Step three (assurance combined with assertion): Congress may request information to discern the President's decisions and actions. Obtaining such information is a condition precedent to step two. However, the President retains the constitutional prerogative to refuse such information requests on the basis that fulfilling them

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85. See DOJ WHITE PAPER, *supra* note 2, at 28–36.

86. See, e.g., Letter from Law Professors Curtis A. Bradley, et al. to Members of Congress 3–7 (Jan. 9, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf>; Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1199–206 (2007); John Cary Sims, *What NSA is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 128–32 (2006).

87. See YOO, *supra* note 2 at 125–26.

88. *Id.*

would harm national security or inhibit the candor of executive branch deliberations.

Such shell games can span generations. For example, Robert Bork testified against FISA in 1978, prior to its enactment. He explained at the time that FISA “probably” violates Article II for exclusivist reasons,<sup>89</sup> but that other accountability mechanisms remain without FISA. Referring to internal executive branch regulations in effect at the time, he stated:

[I]t is impossible to imagine a President and an Attorney General who would be so foolhardy as to materially weaken their provisions. Furthermore, it is also true that there will be oversight by the Congress about the enforcement of such regulations, so I don’t think we need to worry about future administrations just changing them without anybody in Congress knowing about them.<sup>90</sup>

Of course, as we have since seen, it is entirely possible not only that a President would secretly circumvent or alter his own regulations but that he would secretly circumvent statutory law. As for congressional oversight, as we have seen it can be thwarted by exclusivity-fueled secrecy.

The same may be said for another accountability avenue suggested in Bork’s testimony, that an agent who violates internal regulations would “expose himself to criminal liability.”<sup>91</sup> As discussed below, we have seen in both the Bush and Obama Administrations that civil judicial relief can be thwarted through state secrets arguments grounded implicitly or explicitly in Article II. An administration could decline to initiate a criminal prosecution on the same basis. Finally, to add a further twist to this cross-generational shell game, we have seen administrations, beginning with that of Ronald Reagan, invoke prosecutorial discretion to decline to prosecute members of their administration for actions, such as executive privilege based refusals to testify, taken in the name of Article II.<sup>92</sup>

89. *Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong.*, 131, 134, 137–38 (1978) [hereinafter *1978 FISA Hearings*].

90. *Id.* 131.

91. *Id.* at 135.

92. Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 U.S. Op. Off. Legal Counsel 101, 113–115 (1984). See also EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY 20 (2009).

### 3. Thwarting Accountability after the Public Revelations

#### a. *Foreclosing Judicial Review*

##### 1. *Statutory Immunity*

One important means to uncover and punish illegal behavior is litigation. In the wake of revelations about the TSP, a number of lawsuits were filed against telecommunications companies for their alleged participation in the program. As discussed in Part I, in 2008 a majority-Democratic Congress, responding to pressure from President Bush and the constraints of the aggression heuristic, passed legislation geared toward ending these lawsuits. Title II of the FAA retroactively immunizes telecommunications providers who cooperated with the TSP from lawsuits, so long as the providers acted upon a written request “from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) . . . indicating that the activity was (i) authorized by the President and (ii) determined to be lawful.”<sup>93</sup>

Exclusivity played important roles—both explicit and implicit—in the campaign for retroactive immunity. First, some supporters of Title II argued that the TSP was clearly legal from an exclusivist perspective and that there was thus no illegal behavior to punish. “For example, Senators Bond, Chambliss, Hatch, and Warner criticized ‘[t]hose who constantly harp on the misleading assertion that the TSP was illegal.’ The Senators expressed their belief, ‘without any doubt, that the President properly used his authority under Article II . . . .’”<sup>94</sup> Second, some congresspersons and congressional witnesses made more subtle use of exclusivity, relying on the general sense of legal uncertainty to which exclusivist arguments gave rise. They suggested that telecommunications providers could not fairly have been expected to parse through difficult constitutional questions to second-guess government requests to cooperate with the TSP. For example:

[F]ormer Deputy Assistant Attorney General Patrick Philbin told the Senate Judiciary Committee that it would have been unfair to expect telecommunications companies to examine

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93. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 802(a)(4)(B), 122 Stat. 2436, 2469 (codified at 50 U.S.C. § 1885a (West 2010)).

94. Kitrosser, *supra* note 1, at \_\_\_ (quoting S. REP NO. 110-209, at 32 (2007) (additional views of Senators Bond, Chambliss, Hatch, and Warner)).

the legality of presidential requests to cooperate with the TSP. He explained that “the legal questions . . . often involve constitutional questions of separation of powers that have never been squarely addressed by courts and are not readily susceptible for analysis by lawyers at a company whose primary concern is providing communications services to the public.” Assistant Attorney General for National Security Kenneth Wainstein testified before the same committee in support of retroactive immunity. Wainstein also opposed Inspector General review of the TSP, deeming it best to “leave that aside in terms of . . . whether the TSP was within the constitutional authority of the president or not, legal or not, and just focus on how we’re going to fix FISA for the American people.”<sup>95</sup>

Consistent with the Article II shell game, immunity proponents observed that other means for accountability existed. In particular, many pointed out that lawsuits against the government could still go forward. Yet as we shall see in the next section, lawsuits against the government and providers alike have faced another major blocking mechanism—one that spans the Bush and Obama administrations—in the form of the state secrets privilege.<sup>96</sup> That roadblock, too, is underscored by exclusivist reasoning.<sup>97</sup>

Of course, the adoption of retroactive immunity itself moved the accountability ball from its previous location in FISA. FISA had established its warrant procedures and enumerated exemptions thereto as the “exclusive means” to conduct wiretapping and had deemed non-compliant wiretapping legally actionable. Indeed, telecommunications providers had supported

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95. Kitrosser, *supra* note 1, at \_\_\_ (quoting *FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability: Hearing Before the S. Comm. on the Judiciary 110th Cong. 49* (2007) [hereinafter *2007 FISA Hearings*] (statement of Patrick Philbin, Partner, Kirkland & Ellis); *id.* at 11 (statement of Kenneth L. Wainstein, Assistant Attorney General, U.S. Dep't of Justice)). See also Kitrosser, *supra* note 1, at \_\_\_ (observing that Title II proponents also argued that it would have been particularly unfair to expect telecommunications providers to second-guess the government shortly after 9/11, but noting that these proponents ignore the fact that the government requests were reauthorized at regular intervals stretching well past 9/11).

96. State secrets and related arguments also helped to deter the passage of suggested alternatives to retroactive immunity. Proposed alternatives included allowing lawsuits against the providers to proceed and indemnifying the companies, and allowing lawsuits to proceed but substituting the government for the providers as defendants. See, e.g., *2007 FISA Hearings, supra*, at 11–15, 18–19, 25, 33 (Statement of Kenneth L. Wainstein Assistant Attorney General, U.S. Dep't of Justice), at 48–50 (Statement of Patrick Philbin, Partner, Kirkland & Ellis).

97. See *infra* Part III.A.3.a.2.

FISA's passage on the basis that the legislation would give them clear guidance as to when they legally could—and could not—comply with government surveillance requests.<sup>98</sup> From this perspective, it is striking that immunity proponents argued, thirty years later, that telecommunications providers could not have been expected to assess the legality of government requests to participate in the TSP.

Finally, one compromise accountability measure was included in the FAA: a requirement that the Inspectors General of the relevant intelligence agencies produce a report on the TSP and release an unclassified version of the report.<sup>99</sup> This provision led to a valuable unclassified report released in July 2009. That said, a purely internal check conducted by members of the executive branch is no replacement for meaningful external checks by Congress or the judiciary. Nor is the IG Report a comprehensive substitute for other accountability measures. For example, the Report does not offer a view on the legality of the TSP.<sup>100</sup> And the IGs, who lacked the authority to compel testimony, were unable to obtain the cooperation of several key Bush Administration officials in preparing the report, including “Counsel to the Vice President David Addington, White House Chief of Staff Andrew Card, Attorney General John Ashcroft, DOJ Office of Legal Counsel Deputy Assistant Attorney General John Yoo, and former Director of Central Intelligence George Tenet.”<sup>101</sup>

## 2. *State Secrets*

Dozens of lawsuits indeed were brought against telecommunications providers and the government regarding the TSP. Whether as intervenors in the cases against private companies or as defendants in cases against the government, the

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98. See *1978 FISA Hearings*, *supra* note 89, at 90–102 (statement of H.W. William Caming, Attorney, AT&T). See also *2007 FISA Hearings*, *supra* note 95, at 49–55 (statement of Morton Halperin, Director of U.S. Advocacy, Open Society Institute).

99. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 301, 122 Stat. 2436, 2471-73; IG REPORT *supra* note 19, at Preface.

100. Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value*, *Officials Report*, N.Y. TIMES, July 11, 2009, at A1; Spencer Ackerman, *Stuff That's Missing From the Inspectors General Report on Warrantless Surveillance*, WASH. INDEPENDENT, July 10, 2009, <http://washingtonindependent.com/50443/stuff-thats-missing-from-the-inspectors-general-report-on-warrantless-surveillance>.

101. IG REPORT, *supra* note 19, at 4. See also Carrie Johnson & Ellen Nakashima, *'Inappropriate Secrecy' Hurt Surveillance Effort, Report Says*, WASH. POST, July 11, 2009, at A3.

Bush Administration consistently sought to have the cases dismissed on the basis that they could lead to the disclosure of state secrets. The Obama Administration has followed suit, pursuing the state secrets argument with full force in TSP cases still pending when it took office.<sup>102</sup>

The Obama Administration followed the Bush Administration's lead not only in pursuing state secrets based dismissals, but also in arguing to courts that the privilege, while developed at common law, "has a firm foundation in the constitutional authority of the President under Article II to protect national security information."<sup>103</sup> Both administrations invoked Article II to argue not only that the President has an inherent power to protect state secrets, but that at minimum there is a serious constitutional question as to whether that power is exclusive. In an April 2009 brief urging dismissal of *Jewel v. National Security Agency* on state secrets grounds, for instance, the Obama Administration "incorporate[d] by reference [the government's] prior detailed discussion" to the effect that FISA should not be read to preempt the state secrets privilege.<sup>104</sup> The referenced prior argument was made in two Bush Administration briefs in *Al Haramain Islamic Foundation v. Bush*.<sup>105</sup> There, the government had argued, among other things, that a preemptive reading of FISA should be avoided because "any effort by Congress to regulate an exercise of the Executive's authority to protect national security through the state secrets privilege would plainly raise serious constitutional concerns, and it is well-established that courts should construe statutory law to avoid serious constitutional problems unless such construction is "plainly contrary to the intent of Congress."<sup>106</sup>

102. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Penn. L. Rev. \_\_\_\_ (forthcoming 2010) (detailing progression of the TSP cases and role of state secrets doctrine in the same).

103. Government Defendants' Notice of Motion and Motion to Dismiss and for Summary Judgment at 12 n.9, *Jewel v. National Security Agency*, No. C:08-cv-4373-VRW (9th Cir. Apr. 3, 2009), 2009 WL 944175 [hereinafter *Jewel Motion to Dismiss*].

104. *Jewel Motion to Dismiss*, *supra* note 103, at 23–24.

105. *Jewel Motion to Dismiss*, *supra* note 103, at 25 n.25 (citing to briefs filed in *al-Haramain*).

106. Defendants' Notice of Motion and Second Motion to Dismiss in or, in the Alternative, for Summary Judgment in *al-Haramain Islamic Foundation v. Bush*, at 14, 564 F. Supp. 1109 (N.D. Cal. 2008) (No. 07-cv-109-VRW), 2008 WL 5552047; *see also* Defendants' Reply in Support of Second Motion to Dismiss or, in the Alternative, for Summary Judgment in *al-Haramain Islamic Foundation v. Bush*, 564 F. Supp. 1109 (No. 07-cv-109-VRW), 2008 WL 1956160.

The Bush and Obama administrations thus have both used the state secrets doctrine as a means to move the accountability ball further along, away from lawsuits against any party over the TSP. And both have deemed it at least strongly arguable, on exclusivist grounds, that Congress can not constitutionally curtail the privilege. Indeed, the Bush Administration directly objected, on exclusivist and other grounds, to legislation that Congress considered in 2008 to place limits on the doctrine.<sup>107</sup> While the Obama Administration has not, as of this writing, spoken directly to that legislation—the State Secrets Protection Act, which was introduced in 2008 and again in 2009—its exclusivist response to the claim that FISA preempts the state secrets privilege could obviously be applied to such legislation. Furthermore, the Obama Administration has issued policy and signing statements objecting to other information-sharing requirements on exclusivist grounds.<sup>108</sup> Finally, it is worth noting that while the Obama Administration announced a new policy whereby it would seek to invoke the privilege only when necessary and as narrowly as possible in each case, this policy is entirely internal to the Administration. It provides no means for external accountability to check the Administration’s use of the policy.<sup>109</sup> Such external accountability mechanisms would, of course have to come from the courts or Congress. Yet the legality of such mechanisms is called into question by the exclusivist positions taken in the Bush and Obama Administrations.

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107. See Letter from Attorney Gen. Michael Mukasey to Sen. Patrick Leahy (Mar. 31, 2008), available at <http://www.justice.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf>.

108. See Statement on Signing the Supplemental Appropriations Act, 2009 DAILY COMP. PRES. DOC. No. 501 (June 24, 2009); Statement on Signing the Fraud Enforcement Recovery Act of 2009, 2009 DAILY COMP. PRES. DOC. No. 387 (May 20, 2009); Statement on Signing the Omnibus Appropriations Act, 2009 DAILY COMP. PRES. DOC. No. 145 (Mar. 11, 2009); Statement of Administration Policy: S. 1390—National Defense Authorization Act for Fiscal Year 2010 (July 15, 2009), available at [http://www.whitehouse.gov/omb/assets/sap\\_111/saps1390s\\_20090715.pdf](http://www.whitehouse.gov/omb/assets/sap_111/saps1390s_20090715.pdf); Statement of Administration Policy: H.R. 2701—Intelligence Authorization Act for Fiscal Year 2010 (July 8, 2009), available at [http://www.whitehouse.gov/omb/assets/sap\\_111/aphr3081r\\_20090708.pdf](http://www.whitehouse.gov/omb/assets/sap_111/aphr3081r_20090708.pdf).

109. See, e.g., Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625 (2010).

*b. Stymieing Congressional Inquiries**1. During the Bush Administration*

Congressional oversight is another means to facilitate accountability over executive branch activities. As we have seen, the Bush Administration avoided meaningful congressional accountability about the TSP prior to the public revelations. Even after the public revelations and the rule-of-law-based political pressures that they engendered, and even after the Democratic take-over of Congress after the 2006 elections, the Bush Administration continued to resist oversight and investigation through congressional hearings, and Congress remained relatively quiescent.

As before the public revelations, exclusivity played an important role in the Bush Administration's relationship to oversight after the revelations. Even when exclusivity was not invoked explicitly, exclusivist positions cast a large shadow over negotiations and plans for congressional hearings. One such position was the defense of the TSP's legality. The argument that the TSP was perfectly legal plainly cuts against the notion that the program was illegal and merits investigation. Furthermore, as in the immunity context, this defense underscored arguments to the effect that any investigations at best are much ado about nothing and at worst are partisan witch-hunts. The other exclusivist position that cast a shadow over the prospect of congressional investigations was the argument that the President must make the ultimate call as to when information should not be disclosed. In particular, a shadow was cast by the ever-present specter of executive privilege. An executive privilege claim is a claim that the President may, under Article II, withhold information on the basis that its disclosure would harm national security or threaten the candor of executive branch discussions.<sup>110</sup> Though invoked relatively rarely, executive privilege casts a long shadow. Congress knows that an administration may "run out the clock" by claiming executive privilege until the public tires of a controversy, a special committee's tenure ends, or administrations change, and this naturally factors into their calculus. Furthermore, like the exclusivist defense of the TSP's legality, the very existence of executive privilege doctrine helps to imbue administration refusals to provide information with a

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110. See Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491-92 (2007).

specter of legitimacy even when executive privilege is not invoked explicitly.<sup>111</sup>

In events bolstered by the shadows of both the exclusivity defense of the TSP and executive privilege, the Senate Intelligence Committee rejected calls in early 2006 to hold investigative hearings on the TSP.<sup>112</sup> In return for the jettisoned hearings, the White House agreed to provide limited briefings to a special seven-person subcommittee.<sup>113</sup> Such briefings were to be styled like Gang of Eight briefings, with briefed members barred from discussing the information with anyone else, including fellow congresspersons.<sup>114</sup> Yet members of the subcommittee later complained that the Administration did not keep its word to brief them under even these restricted conditions. As subcommittee member Senator Rockefeller lamented in September 2006:

For the past six months, I have been requesting without success specific details about the program, including: how many terrorists have been identified; how many arrested; how many convicted; and how many terrorists have been deported or killed as a direct result of information obtained through the warrantless wiretapping program. I can assure you, not one person in Congress has the answers to these and many other fundamental questions.<sup>115</sup>

The Senate Judiciary Committee was somewhat more aggressive than the Intelligence Committee, holding oversight hearings on the TSP beginning in early 2006. Yet these hearings left much unexplored. For one thing, the Administration opposed the calling of some witnesses and the committee initially relented in their plans to call them.<sup>116</sup> Two prospective witnesses whom the Justice Department opposed calling were former Attorney General John Ashcroft and former Deputy

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111. *Id.* at 500–01.

112. See Dan Eggen & Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying*, WASH. POST, Mar. 9, 2006, at A3; Editorial, *The Death of the Intelligence Panel*, NEW YORK TIMES, at A22; Patrick Radden Keefe, *Orwell Would Be Proud*, SLATE, Mar. 9, 2006, <http://www.slate.com/id/2137796/>; Walter Pincus, *Senate Panel Blocks Eavesdropping Probe*, WASH. POST, Mar. 8, 2006, at A3.

113. See Eggen & Pincus, *supra* note 112.

114. *Id.*

115. Glenn Greenwald, *Voting in the Dark on Eavesdropping*, SALON.COM, Sept. 26, 2006, [http://www.salon.com/news/politics/war\\_room/2006/09/26/eavesdropping/index.html](http://www.salon.com/news/politics/war_room/2006/09/26/eavesdropping/index.html).

116. See Maura Reynolds & Greg Miller, *U.S. Lawmakers Signal Plans to Monitor Spying*, L.A. TIMES, Feb. 18, 2006, at A21; Eric Lichtblau & Sheryl Gay Stolberg, *Accord in House to Hold Inquiry on Surveillance*, N.Y. TIMES, Feb. 17, 2006, at A1.

Attorney General James Comey.<sup>117</sup> The Department explained that Ashcroft and Comey would have nothing to add to testimony already given by Attorney General Alberto Gonzales regarding the legal justifications for the TSP.<sup>118</sup> In retrospect, the Justice Department's bland observation that Comey and Ashcroft had nothing to add was less than fully accurate. In May of 2007, Comey finally appeared before the then Democrat-controlled Judiciary Committee, ostensibly to talk about the firing of U.S. Attorneys.<sup>119</sup> When questioned about the TSP, Comey publicly revealed for the first time the existence of a dramatic internal administration rebellion over the TSP in 2004.<sup>120</sup>

The Bush Administration also sought to stymie Judiciary Committee inquiries on other occasions. At one point, for example, Vice-President Cheney successfully lobbied Republican members of the Judiciary Committee to oppose closed door hearings with telephone company executives who had allegedly participated in the TSP.<sup>121</sup> Furthermore, administration witnesses who appeared before the Judiciary Committee to discuss the TSP frequently refused to answer questions.<sup>122</sup> While the Administration did not formally claim executive privilege with respect to these hearings, it explained its intransigence by reference to the core justifications underlying executive privilege—the preservation of national security and deliberative candor in the executive branch.<sup>123</sup>

Finally, when Congress granted retroactive immunity to telecommunications providers in the FAA in 2008, it did so despite complaints by many congresspersons that the Administration had refused to provide sufficient documentation

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117. Reynolds & Miller, *supra* note 116 (citing letter from Assistant Attorney General Moschella).

118. *Id.*

119. See David Johnston, *Bush Intervened in Dispute Over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1.

120. *Id.*

121. See Speech of Senator Specter on Senate Floor, 153 CONG. REC. S15,719-22 (daily ed. Dec. 17, 2007); Letter From Vice President Cheney to Sen. Specter (June 8, 2006), 153 CONG. REC. S15720 (daily ed. Dec. 17, 2007); Letter from Sen. Specter to Vice President Cheney (June 7, 2006), 153 CONG. REC. S15,719-20 (daily ed. Dec. 17, 2007).

122. See, e.g., *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 17, 78, 84, 93, 95-96, 102-03, 120-21, 151-52, 160-61 (2006).

123. See *supra* note 122. See also, e.g., Letter from Assistant Attorney Gen. William E. Moschella to Sen. Dianne Feinstein (Feb. 28, 2006), attachment at 10-11, 17-20, available at <http://www.justice.gov/ag/readingroom/surveillance17.pdf>.

for them to cast well-informed votes.<sup>124</sup> At one point, the White House had disclosed requested documents to the Senate Intelligence Committee while refusing to disclose the same to the House Intelligence Committee and the House and Senate Judiciary Committees. A White House spokesperson explained that the Senate Intelligence Committee “showed a willingness to want to include in their legislation retroactive liability protection for companies that were alleged to have helped the United States in the days after 9/11 . . . . Because they were willing to do that, we were willing to show them some of the documents that they asked to see.” As for the other committees, she said, “I think that we’ll wait and see to see who else is willing to include that provision in the bill.”<sup>125</sup>

There are two senses in which these examples fit into a larger narrative of an Article II shell game. First, the position that the President may circumvent FISA for a long period of time rests partly on the assurance that the President retains political accountability for such circumvention. Yet if the TSP’s ostensible legality is used as a basis to thwart congressional hearings, then a major accountability avenue is eluded. The same is true where the basis for thwarted hearings is executive privilege, a related exclusivist claim about information control, or the shadow effect of such arguments. Second, stymied hearings do not exist in a vacuum. To the extent that other accountability mechanisms—such as judicial review—are also thwarted based on exclusivist reasoning, missed or stunted hearings are part of a larger pattern of Article II based accountability avoidance.

## 2. *During the Obama Administration (thus far)*

As President Obama took office, commentators speculated as to whether he would support renewed congressional investigations into the TSP and other Bush Administration terrorism programs. Some debated whether he might also or instead encourage Congress to create an independent investigative commission. A number of congressional Democrats championed such measures.<sup>126</sup> As of March 2010, however, it

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124. See, e.g., Foreign Intelligence Surveillance Act of 2007 Amendments Act of 2007, S. REP. No. 110-258 at 19–20 (2008) (additional views of Sen. Leahy); S. REP. No. 110-209, at 42 (additional views of Sen. Nelson), 46–48 (minority views of Senators Feingold, Wyden); *2007 FISA Hearings*, *supra* note 95, at 2–5.

125. Editorial, *The Price of Admission*, WASH. POST, Oct. 23, 2007, at A18.

126. See, e.g., Shane, *supra* note 58, at WK3; William Fisher, *To Investigate Bush or*

appears that neither the Administration nor sufficient numbers of congresspersons have had nor will discover the will to champion comprehensive new hearings or investigations.<sup>127</sup> The reluctance seems attributable at least partly to a combination of the aggression heuristic and fears of being accused of running a partisan witch-hunt.<sup>128</sup> A reticence to investigate also is partly explicable—and made more politically palatable, even politically beneficial—by exclusivity.

For one thing, as we have seen, the frequent repetition of the exclusivist defense of the TSP helped to create a public sense that the program was legal or that at minimum the matter is one on which reasonable minds can differ. This sense, in turn, adds plausibility to the position that the nation ought not to linger on questions about the TSP. It also helps to soften any appearance of contradiction in statements by President Obama to the effect that by and large the nation should “mov[e] forward” and resist backward looking investigations, but that “[t]hat doesn’t mean that if somebody has blatantly broken the law, that they are above the law.”<sup>129</sup>

Furthermore, President Obama’s words and deeds since taking office indicate a willingness to make copious use of exclusivist objections to turning over requested information to Congress, including information about the previous Administration. The likelihood of such objections would surely

*Not*, THE PUBLIC RECORD, Feb. 13, 2009, <http://pubrecord.org/politics/1009/to-investigate-bush-or-not/>; David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES, Jan. 12, 2009, at A1.

127. See, e.g., WILLS, *supra* note 7, at 237–41; Mayer, *supra* note 20, at 99; Matt Renner, *Obama Administration Accused Again of Concealing Bush Era Crimes*, TRUTHOUT, Oct. 12, 2009, <http://www.truthout.org/10120912>; Opinion, Derrick Z. Jackson, *Cheney’s Dark Side—and Ours*, BOSTON GLOBE, Sept. 1, 2009, at A15; Scott Shane, *Obama Faces a New Push to Look Back*, N.Y. TIMES, July 13, 2009, at A1; Scott Shane, *Lawsuits Force Disclosures by CIA*, N.Y. TIMES, June 10, 2009, at A12; David M. Herszenhorn & Carl Hulse, *Obama Resisting Push for Interrogation Panel*, N.Y. TIMES, Apr. 24, 2009, at A1.

There has been some congressional inquiry over the past year into Bush Administration interrogation tactics. However, these hearings appear to have been fairly limited. Furthermore, some are classified and it is not clear when and if unclassified information from them will be made available. See, e.g., Shane, *Lawsuits Force Disclosure*, *supra*; David Johnston, *Bitter Start to a Hearing on Interrogation Tactics*, N.Y. TIMES, May 14, 2009, at A14; Herszenhorn & Hulse, *supra*; Mark Mazzetti, *Senate Panel to Pursue Investigation of CIA*, N.Y. TIMES, Dec. 7, 2009, at A14.

128. See *supra* note 58.

129. Transcript of interview of President Elect Obama by George Stephanopoulos on ABC’s *This Week*, Jan. 11, 2009, available at <http://abcnews.go.com/ThisWeek/Economy/story?id=6618199> (while Obama made this particular comment in response to a question about a special prosecutor, he repeated his larger point about moving forward and balancing forward-movement with the rule of law many times in multiple contexts).

factor into decisions by congresspersons as to whether to hold hearings or to create an investigative commission. Indeed, the Obama Administration's first public statements on executive privilege arose in the context of attempts by the House Judiciary Committee to have former Bush Administration officials testify about controversial firings of U.S. Attorneys. A federal judge had denied the officials' claims of blanket immunity and the Obama Administration would have had to decide whether or not to appeal the ruling had a compromise not been negotiated between the committee and the officials. White House Counsel Gregory Craig explained the dilemma that the White House would have faced had the parties not reached a compromise: "The President is very sympathetic to those who want to find out what happened. But he is also mindful as President of the United States not to do anything that would undermine or weaken the institution of the presidency."<sup>130</sup> Later in 2009, the Obama Administration raised eyebrows when it said that it would not permit its social secretary to appear before a congressional committee in regard to a controversy over security at a White House state dinner. White House press secretary Robert Gibbs stated that "[b]ased on the separation of powers, staff here don't go to testify in front of Congress."<sup>131</sup>

The Obama Administration also has objected in several signing and policy statements to requirements that administrations share information with Congress.<sup>132</sup> For example, the Administration objected on exclusivist grounds to proposed legislation to require notice to the full intelligence committees in circumstances where administrations currently have discretion to notify only the Gang of Eight.<sup>133</sup> The Administration also threatened to veto an amended proposal, written in response to its initial objection, to allow Gang of Eight notice while requiring some general information—including the fact that more detailed notice was given to the Gang of Eight—to be provided to the full intelligence committees.<sup>134</sup>

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130. Jason Leopold, *Conyers Cuts a Deal With Rove, Miers for Testimony in Attorney Firings*, PUBLIC RECORD, Mar. 4, 2009, <http://pubrecord.org/politics/1015/rove-miers-to-testify-behind-closed-doors-about-attorney-firings/>. See also, e.g., Josh Gerstein, *Rove, Miers to Testify*, POLITICO.COM, Mar. 4, 2009, <http://www.politico.com/news/stories/0309/19631.html>.

131. Michael D. Shear, *Government Openness is Tested by Salahi Case*, WASH. POST, Dec. 4, 2009, at C7.

132. See sources cited *supra* note 108.

133. Statement of Administration Policy: H.R. 2701—Intelligence Authorization Act for Fiscal Year 2010, *supra* note 108. See also, e.g., Scott Shane, *supra* note 84, at A16.

134. See Letter from Peter R. Orszag, Director, U.S. Office of Mgmt. and Budget to

To the extent that the Obama Administration and many in Congress prefer to avoid congressional or independent investigations of the TSP, then, they benefit from the shadow effect of exclusivist arguments that have been advanced generally and with respect to the TSP in particular. These uses of exclusivity fit into the Article II shell game in the same way as did such uses during the Bush Administration. First, when the exclusivist defense of the TSP is bootstrapped to support the view that the TSP should not be investigated, the latter undermines the very premise of accountability that underscores the former. Second, congressional and independent oversight are hardly the only accountability mechanisms that have been stunted by exclusivity. Indeed, in public remarks in May 2009, President Obama explained his lack of enthusiasm for proposals to create an independent investigative commission partly by citing other accountability mechanisms. He maintained his belief “that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.”<sup>135</sup> Of course, we have seen that in the context of the TSP, the Obama Administration and others have helped to thwart some of these alternative accountability mechanisms. Hence, the accountability ball continues to move about, propelled by exclusivity among other forces.

## CONCLUSION

Over the past several decades, exclusivity has gone from being a marginal and rarely invoked interpretive approach to one with substantial influence in legal and political circles. As I explain elsewhere, I find exclusivity to be deeply flawed, most fundamentally in its conflation of the President’s capacities to act secretly and energetically with a legal prerogative to so act in the face of prohibiting legislation.<sup>136</sup> Nonetheless, those of us who consider exclusivity to be mistaken and even dangerous in its

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Sen. Diane Feinstein (Mar. 15, 2010), *available at* <http://www.fas.org/irp/news/2010/03/omb031610.pdf>. *See also, e.g.*, Walter Pincus, *White House Threatens Veto on Intelligence Activities Bill*, WASH. POST, Mar. 16, 2010, at A4.

135. Remarks at the National Archives and Records Administration, 2009 DAILY COMP. PRES. DOC. No 388 (May 21, 2009), at 9.

136. *See, e.g.*, Kitrosser, *supra* note 1, at \_\_\_\_.

effects ignore its growing significance at our peril. Furthermore, exclusivity's importance extends well beyond courtrooms and academia. It has gained much influence in the realms of politics and public debate.

This Article has sought not only to convey exclusivity's rising political significance, but also to describe major factors that contribute to the same. The Article has also sought to examine some of the concrete ways that Article I and II actors use and benefit from exclusivity and the negative impact of these uses on government accountability. Understanding the politics of exclusivity might help in part to puncture the myth that exclusivity is simply a faithful reading of text, structure, and history. At a more basic level, exclusivity, whatever its legal and intellectual merits, is an important phenomenon within the political branches. This is particularly so in the realm of national security. If one is simply to understand the law and politics of national security, let alone to engage with it, exclusivity is a factor that ought not to be overlooked or underestimated.