

Congress deemed that the provisions for gathering intelligence in FISA and Title III were “exclusive.”

Now, there still may be a constitutional question about whether the President’s Article II powers exist, no matter whether Congress has passed a particular statute. But there can be no real question about the intention or the effect of FISA’s exclusivity provision.

I have sat and stared at FISA’s exclusivity provision and the OLC language side by side, and I cannot make sense of how they came to that conclusion. Congress says, plain as day, FISA is the exclusive means, and OLC says Congress did not say that.

So I wonder, maybe there is some strange legal use of the term “exclusive” that I missed in my 25 years of lawyering. Then I find this Court decision that says this very language in the FISA statute means Congress “intended to sew up the perceived loopholes,” that this language “makes it impossible for the President to ‘opt-out’” of the FISA requirements; that it “assures that the President cannot avoid Congress’s limitations,” and that by this language “Congress denied the President his inherent powers outright.”

Then I thought, maybe that is just a district court decision. That is a lower court. But here is the Supreme Court of the United States looking at an exclusivity clause in another statute and calling it “uncompromising language,” taking that word “exclusive” at its plain dictionary meaning. There is literally no way I can see to reconcile OLC’s statement with the clear, plain language of Congress.

I have, in the past, expressed the fear that the Office of Legal Counsel, under veils of secrecy, immune from either public scrutiny or peer review, became a hothouse of ideology, in which the professional standards expected of lawyers were thrown to the winds, all in order to produce the right answers for the bosses over at the White House.

Well, as I said at the beginning, here we go again. Oh, one more thing. When the Department of Justice sent me the letter acknowledging that there was nothing that needed to be classified about this phrase, they also said this phrase was now disclaimed—their opinion was now disclaimed; not just declassified but disclaimed—by the Department of Justice.

The letter reads:

[A]s you are aware from a review of the Department’s relevant legal opinions concerning the NSA’s warrantless surveillance activities, the 2001 statement addressing FISA does not reflect the current analysis of the Department.

But that does not answer this: What went wrong at the OLC? What led to this disclaimed opinion in the first place, and other opinions I have had to come to the floor about? Has it been put right? This is an important question because this is an important institution of our Government, and we need

to be assured it is working for the American people, that it is of integrity and that it is back to the standards of legal scholarship that long characterized the once-proud reputation of that office.

We do not have that assurance. There is a continuing drumbeat of what appears to be incompetence, and we need the reassurance. We are entitled to the reassurance. Something has to be done.

Mr. President, I ask unanimous consent that the Department’s letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 13, 2008.

Hon. DIANNE FEINSTEIN,
Hon. SHELDON WHITEHOUSE,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINSTEIN AND SENATOR WHITEHOUSE: This responds to your letter, dated April 29, 2008, which asked about a particular statement contained in a classified November 2001 opinion of the Department’s Office of Legal Counsel addressing the Foreign Intelligence Surveillance Act. The statement in question asserted that unless Congress had made clear in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area, FISA must be construed to avoid such a reading. The statement also asserted the view in 2001 that Congress had not included such a clear statement in FISA. As you know, and as is set forth in the Department of Justice’s January 2006 white paper concerning the legal basis for the Terrorist Surveillance Program, the Department’s more recent analysis is different: Congress, through the Authorization for Use of Military Force of September 18, 2001, confirmed and supplemented the President’s Article II authority to conduct warrantless surveillance to prevent catastrophic attacks on the United States, and such authority confirmed by the AUMF can and must be read consistently with FISA, which explicitly contemplates that Congress may authorize electronic surveillance by a statute other than FISA.

We understand you have been advised by the Director of National Intelligence that the statement in question, standing alone, may appropriately be treated as unclassified. We also would like to address separately the substance of the statement and provide the Department’s views concerning public discussion of the statement.

The general proposition (of which the November 2001 statement is a particular example) that statutes will be interpreted whenever reasonably possible not to conflict with the President’s constitutional authorities is unremarkable and fully consistent with the longstanding precedents of OLC, issued under Administrations of both parties. See, e.g., Memorandum for Alan Kreczko, Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 47 U.S.C. section 502 to Certain Broadcast Activities at 3 (Oct. 15, 1993) (“The President’s authority in these areas is very broad indeed, in accordance with his paramount constitutional responsibilities for foreign relations and national security. Nothing in the text or context of [the statute] suggests that it was Congress’s intent to circumscribe this authority. In the absence of a clear statement of such intent, we do not be-

lieve that a statutory provision of this generality should be interpreted so to restrict the President constitutional powers.”). The courts apply the same canon of statutory interpretation. See, e.g., Department of Navy v. Egan, 484 U.S. 518, 530 (1988) (“[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).

However, as you are aware from a review of the Department’s relevant legal opinions concerning the NSA’s warrantless surveillance activities, the 2001 statement addressing FISA does not reflect the current analysis of the Department. Rather, the Department’s more recent analysis of the relation between FISA and the NSA’s surveillance activities acknowledged by the President was summarized in the Department’s January 19, 2006 white paper (published before those activities became the subject of FISA orders and before enactment of the Protect America Act of 2007). As that paper pointed out, “In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute [in the AUMF] had confirmed and supplemented the President’s recognized authority under Article II of the Constitution to conduct such surveillance to prevent further catastrophic attacks on the homeland.” Legal Authorities Supporting the Activities of the National Security Agency Described by the President at 2 (Jan. 19, 2006). The Department’s white paper further explained the particular relevance of the canon of constitutional avoidance to the NSA activities: “Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda.” *Id.* at 3.

Accordingly, we respectfully request that if you wish to make use of the 2001 statement in public debate, you also point out that the Department’s more recent analysis of the question is reflected in the passages quoted above from the 2006 white paper.

We hope that this information is helpful. If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

BRIAN A. BENCKOWSKI,
Principal Deputy Assistant Attorney General.

Mr. WHITEHOUSE. Mr. President, I thank the Presiding Officer again for his courtesy and yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Jersey, Mr. LAUTENBERG.

Mr. LAUTENBERG. Mr. President, I thank you. I will not take long.

D-DAY AND THE GREATEST GENERATION

Mr. LAUTENBERG. Mr. President, today is a noteworthy anniversary. It is the anniversary of D-day, the day the largest invasion force in the history of man landed on the beaches of Normandy.

They came from across the world—133,000 brave soldiers, sailors, and airmen—from England, Canada, and the United States. On that particular day, more than 10,000 soldiers died, giving their lives so that their families, their

country, and the rest of the world could live in peace and be free.

The bravery and honor of those men has come to be known with three simple words: "the greatest generation." Their sacrifice in battle and their continued service once they got home defined everything that was good and right about America. We honored their service and sacrifice with parades and public ceremonies and memorials to the fallen, but it was also honored in another way. We gave them the chance to go to college and pursue an education. We gave them the chance to build a better future for themselves and their families. Those of us who served in that terrible war got the chance to begin the innovation that drove America into the future. We received the GI bill for our service.

Many veterans of World War II have served in the Senate, many of whom were honored by medals of valor. We still have someone who served in World War II who earned the Medal of Honor—Senator DAN INOUYE from Hawaii—for his incredible bravery in World War II, for his bravery under fire.

I am who I am today because of the GI bill. One of my dreams was to go to college—a dream that came true because of that bill, the GI bill. Eight of the sixteen million World War II veterans got an education because of that bill. It was paid for, and it even carried a small stipend for the expenses that one had as a college student. Now we need to start to build a new greatest generation. I want the veterans of the wars of Iraq and Afghanistan to have the same opportunity—an opportunity that enables them to contribute to their families and our Nation.

A college education is a key to that opportunity, but college costs have jumped so high—57 percent just in the last 6 years. The current GI bill does not cover those costs. So our brave veterans are forced to pay for their tuition and books out of their own pockets, watch their debts get worse and worse, and some cannot get to college at all.

We often say we honor our veterans, but now is the time to show them what we mean. That is exactly what our new GI bill does. Our bill closes the gap between the cost of college and the amount the veteran pays for their education. I am proud to be working with my colleagues. The occupant of the President's chair right now, Senator JIM WEBB of Virginia, started this process—this bill—16 months ago. Others, including Senator CHUCK HAGEL, Senator JOHN WARNER, and I, and more than half of the Senate, are fighting to get them the benefits they earned. They deserve no less.

The Senate has voted. The House has voted. Now we plead with President Bush to join with the majority of the Congress, all of the leading veterans organizations, and the American public in support of our bill. Since the beginning of the wars in Iraq and Afghanistan, more than 1.5 million Americans

have worn the uniform and served our Nation with honor and distinction. Now it is time for us to stand with our veterans who have served since 9/11 so they, too, can build a future for their families.

After D-day, Americans recognized the sacrifice our troops made and came together to honor that service. Now is the time for us to stop playing politics and come together once again.

Our veterans have earned a new GI bill. On this D-day anniversary, let's give them the respect and the benefits they deserve.

I close with once again commending our colleague, Senator JIM WEBB, who has himself a distinguished military record and insisted from his earliest days that we take care of our veterans so they can take care of America and regain the leadership this country has lost and will retrieve.

I yield the floor.

The PRESIDING OFFICER (Mr. WEBB). The Senator from North Dakota is recognized.

GI BILL

Mr. DORGAN. Mr. President, my colleague, Senator LAUTENBERG from New Jersey, just described something that is very important. He described the role of himself and others, and particularly the occupant of the chair as Presiding Officer, in working on the new GI bill. I was proud to be a cosponsor. I join him in hoping that President Bush will agree with the majority of the House and the Senate to look favorably upon this bill and agree to sign legislation that includes this bill. We owe it to America's veterans. I appreciate the comments made by my colleague from New Jersey.

TRIBUTE TO ROBERT KENNEDY

Mr. DORGAN. Mr. President, I wish to talk just for a moment today about the cloture vote on climate change legislation earlier today, but first, while I am getting some charts together, I wanted to mention also that this is the 40th anniversary that was yesterday of the death of Robert Kennedy.

I was driving to the Capitol listening to a news report about that day 40 years ago when Robert Kennedy was assassinated in Los Angeles, CA, and I was thinking about the fact that I was a very young man back then working on the Robert Kennedy Presidential campaign in my State when I heard that he had been assassinated. It was such an unbelievable blow to me and to all of the others who worked on the campaign and to so many other Americans who believed his campaign for the Presidency held such great promise.

Most young people in this country today know nothing about a 1968 Presidential campaign by Robert F. Kennedy. It was an extraordinary time, and he was an extraordinary man. I wish to read just a couple of comments by the late Robert F. Kennedy, who

was, by the way, a Senator and served in this body, as well as served as Attorney General of this country.

He gave a speech once that I have often quoted. It was a speech he gave in South Africa. Many will know these words. In his speech he said this:

Few will have the greatness to bend history; but each of us can work to change a small portion of the events, and in the total of all these acts will be written the history of a generation . . . it is from numberless diverse acts of courage and belief that human history is thus shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, they send forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

He gave that speech June 6, 1966, at the University of Cape Town in South Africa. People often talk about those ripples of hope that can sweep down the mightiest walls of resistance and oppression, and that passion and that dream and belief still exist today.

I reread this morning the speech Robert Kennedy gave during his Presidential campaign in Indianapolis, IN, on the evening of April 4, 1968, when Martin Luther King was assassinated. The crowd that had gathered for Robert Kennedy's appearance did not know that Dr. Martin Luther King had been assassinated and Robert Kennedy came to that area of Indianapolis. He was asked not to go because of concerns about his safety. He went anyway and he gave one of the most wonderful speeches. It was without a note, just an extemporaneous speech that had so much passion. I shall not read it today, but I ask unanimous consent that it be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Ladies and Gentlemen—I'm only going to talk to you just for a minute or so this evening. Because . . .

I have some very sad news for all of you, and I think sad news for all of our fellow citizens, and people who love peace all over the world, and that is that Martin Luther King was shot and was killed tonight in Memphis, Tennessee.

Martin Luther King dedicated his life to love and to justice between fellow human beings. He died in the cause of that effort. In this difficult day, in this difficult time for the United States, it's perhaps well to ask what kind of a nation we are and what direction we want to move in.

For those of you who are black—considering the evidence evidently is that there were white people who were responsible—you can be filled with bitterness, and with hatred, and a desire for revenge.

We can move in that direction as a country, in greater polarization—black people amongst blacks, and white amongst whites, filled with hatred toward one another. Or we can make an effort, as Martin Luther King did, to understand and to comprehend, and replace that violence, that stain of bloodshed that has spread across our land, with an effort to understand, compassion and love.

For those of you who are black and are tempted to be filled with hatred and mistrust of the injustice of such an act, against all white people, I would only say that I can