

S. HRG. 109-500

**WARTIME EXECUTIVE POWER AND THE NATIONAL
SECURITY AGENCY'S SURVEILLANCE AUTHORITY**

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

—————
FEBRUARY 6, FEBRUARY 28, AND MARCH 28, 2006

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Serial No. J-109-59

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WARTIME EXECUTIVE POWER AND THE NATIONAL SECURITY AGENCY'S SURVEILLANCE AUTHORITY

MONDAY, FEBRUARY 6, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. It is 9:30. The Judiciary Committee will now proceed with our hearing on the administration's program administered by the National Security Agency on surveillance.

We welcome the Attorney General of the United States here today, who will be testifying. We face as a Nation, as we all know, an enormous threat from international terrorism. The terrorists attacked this country on 9/11, and we remain in danger of renewed terrorist attacks.

The President of the United States has the fundamental responsibility to protect the country, but even as the Supreme Court has said, the President does not have a blank check. And this hearing is designed to examine the legal underpinnings of the administration's program from the point of view of the statutory interpretation and also from the point of view of constitutional law.

The Foreign Intelligence Surveillance Act was passed in 1978 and has a forceful and blanket prohibition against any electronic surveillance without a court order. That law was signed by President Carter with a signing statement that said it was the exclusive way for electronic surveillance. There is also a constitutional issue as to whether the President has inherent powers under Article II of the Constitution to undertake a program of this sort. If the President has constitutional authority, that trumps and supersedes the statute. The Constitution is the fundamental law of the country, and a statute cannot be inconsistent with a constitutional provision.

We will be examining the administration's contention that, notwithstanding the Foreign Intelligence Surveillance Act, there is

statutory authority for what the President has done by virtue of the resolution of Congress authorizing the use of force against the terrorists. I have already expressed myself as being skeptical of that interpretation, but I believe the administration is entitled to a full and fair opportunity to advance their legal case on that important issue.

We will be examining with the Attorney General the generalized rules of statutory interpretation. One of them is that a repeal by implication is disfavored. Also, the specific governs the generalizations. And in the Foreign Intelligence Surveillance Act you have the specific prohibition contrasted with the generalized authority under the resolution for the authorization for the use of force.

I sent a letter to the Attorney General propounding some 15 questions, and I thank the Attorney General for his responses. They will provide to a substantial extent the framework for our discussion here today. One of the key points on my mind is the role of the Foreign Intelligence Surveillance Court. One of the questions which I asked of the Attorney General was the role of the court in granting permission in advance, the role of the court in granting permission within 72 hours after the President exercises surveillance authority. I also asked whether the administration might now consider having the Foreign Intelligence Surveillance Court review this entire issue.

The whole question of probable cause is one with very substantial flexibility under our laws, depending upon the circumstances of the case. The Foreign Intelligence Surveillance Court has a great reputation for integrity, with no leaks—candidly, unlike the Congress; candidly, unlike the administration; candidly, unlike all of Washington, perhaps all of the world. But when that court has secrets, they keep the secrets, and they also are well respected in terms of their technical competence.

One of the questions, the lead question, which I will be asking the Attorney General is whether the administration would consider sending this entire program to the court for their evaluation. The scope of this hearing is to examine the law on the subject, and the ground rules are that we will not inquire into the factual underpinnings of what is being undertaken here. That is for another Committee and for another day. That is for the Intelligence Committee and that is for a closed session.

It may be that some of the questions which we will ask the Attorney General on legal issues may, in his mind, require a closed session, and if they do, we will accommodate his request in that regard.

One of the other questions which I will be directing to the Attorney General to follow up on the letter is the practice of making disclosures only to the so-called Gang of 8—the Speaker and the Democrat Leader in the House, the Majority Leader and the Democrat Leader in the Senate, and the Chairmen and Vice Chairmen of the two Intelligence Committees—and the adequacy of that in terms of the statute which calls for disclosure to the committees. The committees are much broader. And if the administration thinks that the current law is too broad, they have the standing to ask us to change the law, and we would certainly consider that on a showing of necessity to do so.

We have told the Attorney General we would require his presence all day. We will have 10-minute rounds, which is double what is the practice of this Committee, and as I have announced in advance, we will have multiple rounds.

There has been some question about swearing in the Attorney General, and I discussed that with the Attorney General, who said he would be willing to be sworn. After reflecting on the matter, I think it is unwarranted because the law provides ample punishment for a false official statement or a false statement to Congress. Under the provisions of 18 United States Code 1001 and 18 United States Code Section 1505, the penalties are equivalent to those under the perjury laws.

There has been a question raised as to legal memoranda within the Department, and at this time and on this showing, it is my judgment that that issue ought to be reserved to another day. I am sure it will come up in the course of questioning. The Attorney General will have an opportunity to amplify on the administration's position. But there is a fairly well-settled doctrine that internal memoranda within the Department of Justice are not subject to disclosure because of the concern that it would have a chilling effect. If lawyers are concerned that what they write may later be subjected to review by others, they will be less than candid in their positions.

This Committee has faced those issues in recent times with requests for internal memoranda of Chief Justice Roberts. They were not produced, and they were more relevant there than here because of the issue of finding some ideas as to how Chief Justice Roberts would function on the Court if confirmed. Here we have legal issues, and lawyers on this Committee and other lawyers are as capable as the Department of Justice in interpreting the law.

One other issue has arisen, and that is the issue of showing video. I think that would not be in order. The transcripts of what the President said and the transcripts of what you, Mr. Attorney General, said earlier in a discussion with Senator Feingold are of record. This is not a Sunday morning talk show, and the transcripts contain the full statement as to legal import and legal effect, and I am sure that those statements by the President and those statements by you will receive considerable attention by this Committee.

That is longer than I usually talk, but this is a very big subject.
Senator FEINGOLD. Mr. Chairman?

Chairman SPECTER. This is the first of a series of hearings, at least two more, because of the very profound and very deep questions which we have here involving statutory interpretation and the constitutional implications of the President's Article II powers. And this is all in the context of the United States being under a continuing threat from terrorism. But the beauty of our system is the separation of powers, the ability of the Congress to call upon the administration for responses, the willingness of the Attorney General to come here today, and the capability of the Supreme Court to resolve any conflicts.

Senator FEINGOLD. Mr. Chairman?

Chairman SPECTER. I would like to yield now—

Senator FEINGOLD. Mr. Chairman?

Chairman SPECTER [continuing]. To the distinguished Ranking—
Senator FEINGOLD. Can I just ask a quick clarification?

Chairman SPECTER. Senator Feingold?

Senator FEINGOLD. I heard your judgment about whether the witness should be sworn. What would be the distinction between this occasion and the confirmation hearing where he was sworn?

Chairman SPECTER. The distinction is that it is the practice to swear nominees for Attorney General or nominees for the Supreme Court or nominees for other Cabinet positions. But the Attorneys General have appeared here on many occasions in the 25 years that I have been here, and there should be a showing, Senator Feingold, to warrant swearing.

Senator FEINGOLD. Mr. Chairman, I would just say that the reason that anyone would want him sworn has to do with the fact that certain statements were made under oath at the confirmation hearing, so it seems to me logical that since we are going to be asking about similar things that he should be sworn on this occasion as well.

Senator LEAHY. And, Mr. Chairman, if I might on that point— if I might on that point, of course, the Attorney General was sworn in on another occasion other than his confirmation when he and Director Mueller appeared before this Committee for oversight. And I had asked the Chairman, as he knows, earlier that he should be sworn on this. And I made that request right after the press had pointed out where an answer to Senator Feingold appeared not to have been truthful. And I felt that that is an issue that is going to be brought up during this hearing, and we should go into it.

I also recall the Chairman and other Republicans insisting that former Attorney General Reno be sworn when she came up here on occasions other than her confirmation.

I think because, especially because of the article about the questions of the Senator from Wisconsin, Senator Feingold. I believe he should be sworn. That is obviously the prerogative of the Chairman, but I would state again, and state strongly for the record what I have told the Chairman privately. I think in this instance, similar to what you did in April with Attorney General Gonzales and Director Mueller, both of whom were sworn, and as the Chairman insisted with then-Attorney General Reno, I believe he should be sworn.

Chairman SPECTER. Senator Leahy and I have not disagreed on very much in the more than a year since we first worked together as ranking member and Chairman, and I think it has strengthened the Committee. I did receive the request. I went back and dug out the transcript, and reviewed Senator Feingold's vigorous cross-examination of the Attorney General at the confirmation hearings. I know the issues as to torture, which Senator Feingold raised, and the issues which Senator Feingold raised as to searches without warrants. I have reviewed the provisions of 18 USC 1001 and the case involving Admiral Poindexter, who was convicted under that provision. I have reviewed the provisions of 18 United States Code 1505, where Oliver North was convicted, and there are penalties provided there commensurate with perjury. It is my judgment that it is unnecessary to swear the witness.

Senator LEAHY. Mr. Chairman, may I ask, if the witness has no objection to being sworn, why not just do it and not have this question raised here? I realize only the Chairman can do the swearing in. Otherwise, I would offer to give him the oath myself, insofar as he said he would this morning be sworn in, but if he is willing to be, why not just do it?

Senator SESSIONS. Mr. Chairman?

Chairman SPECTER. The answer to why I am not going to do it is that I have examined all the facts, and I have examined the law, and I have asked the Attorney General whether he would object or mind, and he said he would not, and I have put that on the record. But the reason I am not going to swear him in, it is not up to him. Attorney General Gonzales is not the Chairman. I am. And I am going to make the ruling.

Senator SESSIONS. Mr. Chairman?

Senator FEINGOLD. Mr. Chairman?

Senator LEAHY. Mr. Chairman, I would point out that he has been here before this Committee three times. The other two times he was sworn. It seems unusual not to swear him this time.

Senator DURBIN. Mr. Chairman, I move the witness be sworn.

Chairman SPECTER. The Chairman has ruled. If there is an appeal from the ruling of the Chair, I have a pretty good idea how it is going to come out.

Senator DURBIN. Mr. Chairman, I appeal the ruling of the Chair.

Chairman SPECTER. All in favor of the ruling of the Chair say "aye."

[Chorus of ayes.]

Senator SCHUMER. Roll call.

Chairman SPECTER. Opposed?

Senator LEAHY. Roll call has been requested.

Senator FEINGOLD. Mr. Chairman, ask for a roll call vote.

Chairman SPECTER. The clerk will call the roll. I will call the roll.

[Laughter.]

Chairman SPECTER. Senator Hatch?

Senator HATCH. No.

Chairman SPECTER. Senator Grassley?

Senator GRASSLEY. No.

Chairman SPECTER. Senator Kyl?

Senator KYL. Mr. Chairman, is the question to uphold or to reject the ruling?

Chairman SPECTER. The question is to uphold the ruling of the Chair, so we are looking for ayes here, Senator.

[Laughter.]

Senator LEAHY. But we are very happy with the noes that have started on the Republican side, being the better position.

Senator HATCH. I am glad somebody clarified that.

Chairman SPECTER. The question is, should the ruling of the Chair be upheld that Attorney General Gonzales not be sworn?

Senator HATCH. Aye.

Senator GRASSLEY. Aye.

Senator KYL. Aye.

Senator DEWINE. Aye.

Senator SESSIONS. Aye.

Senator GRAHAM. Aye.

Senator CORNYN. Aye.

Chairman SPECTER. By proxy, for Senator Brownback, aye.

Senator Coburn?

[No response.]

Chairman SPECTER. We have enough votes already.

Senator Leahy?

Senator LEAHY. Emphatically, no.

Senator KENNEDY. No.

Senator BIDEN. No.

Senator KOHL. No.

Senator FEINSTEIN. No.

Senator FEINGOLD. No.

Senator SCHUMER. No.

Senator DURBIN. No.

Chairman SPECTER. Aye. The ayes have it.

Senator FEINGOLD. Mr. Chairman, I request to see the proxies given by the Republican Senators.

Chairman SPECTER. Would you repeat that, Senator Feingold?

Senator FEINGOLD. I request to see the proxies given by the Republican Senators.

Chairman SPECTER. The practice is to rely upon the staffers. But without counting that vote—well, we can rephrase the question if there is any serious challenge to the proxies. This is really not a very good way to begin this hearing, but I found that patience is a good practice here.

Senator SESSIONS. Mr. Chairman?

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. I am very disappointed that we went through this process. This Attorney General, in my view, is a man of integrity, and having read the questions, as you have, that Senator Feingold put forward, and his answers, I believe he will have a perfect answer to those questions when they come up at this hearing, and I do not believe they are going to show he perjured himself in any way or was inaccurate in what he said. I remember having a conversation with General Meyers and Secretary of Defense Rumsfeld, and one of the saddest days in their career was having to come in here and stand before a Senate Committee and raise their hand as if they were not trustworthy in matters relating to the defense of this country. And I think that is it not necessary that a duly confirmed cabinet member have to routinely stand up and just give an oath when they are, in effect, under oath and subject to prosecution if they do not tell the truth.

I think it is just a question of propriety and good taste, and due respect from one branch to the other, and that is why I would support the Chair.

Senator LEAHY. Mr. Chairman, I do not—

Chairman SPECTER. Let us not engage in protracted debate on this subject. We are not going to swear this witness and we have the votes to stop it.

Senator Leahy?

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Mr. Chairman, I stated my position why I believe he should be sworn in, but I understand that you have the majority of votes.

Now the question for this hearing goes into the illegality of the Government's domestic spying on ordinary Americans without a warrant.

The question facing us is not whether the Government should have all the tools it needs to protect the American people. Of course it should. Every single Member of Congress agrees they should have all the tools necessary to protect the American people. The terrorist threat to America's security remains very real. We should have the tools to protect America's security. That is why I co-authored the PATRIOT Act 5 years ago, and why it passed with such broad bipartisan support, and I would also remind everybody that is why we amended FISA, the Foreign Intelligence Surveillance Act, five times since 9/11 to give it more flexibility, twice during the time when I was Chairman.

We all agree that if you have al Qaeda terrorists calling we should be wiretapping them. We do not even need authority to do that overseas, and certainly going into, so far, the unsuccessful effort to catch Osama bin Laden in Afghanistan. Congress has given the President authority to monitor al Qaeda messages legally with checks to guard against abuses when Americans' conversations and e-mails are being monitored. But instead of doing what the President has the authority to do legally, he decided to do it illegally without safeguards.

A judge from the special court Congress created to monitor domestic spying would grant any request to monitor an al Qaeda terrorist. Of the approximately 20,000 foreign intelligence warrant applications to these judges over the past 28 years, about a half dozen have been turned down.

I am glad the Chairman is having today's hearing. We have precious little oversight in this Congress, but the Chairman and I have a long history of conducting vigorous bipartisan oversight investigations, and if Congress is going to serve the role it should, instead of being a rubber stamp for whoever is the Executive, we have to have this kind of oversight.

The domestic spying programs into e-mails and telephone calls, apparently conducted by the National Security Agency, was first reported by the New York Times on December 16, 2005. The next day President Bush publicly admitted that secret domestic wiretapping has been conducted without warrants since late 2001, and he has issued secret orders to do this more than 30 times.

We have asked for those Presidential orders allowing secret eavesdropping on Americans. They have not been provided. We have asked for official legal opinions of the Government that the administration say justify this program. They too have been withheld from us.

The hearing is expressly about the legality of this program. It is not about the operational details. It is about whether we can legally spy on Americans. In order for us to conduct effective oversight, we need the official documents to get those answers. We are

an oversight Committee of the U.S. Senate, the oversight Committee with jurisdiction over the Department of Justice and over its enforcement of the laws of the United States. We are the duly elected representatives of the United States. It is our duty to determine whether the laws of the United States have been violated. The President and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write the laws. They do not pass the laws. They do not have unchecked powers to decide what laws to follow, and they certainly do not have the power to decide what laws to ignore. They cannot violate the law or the rights of ordinary Americans.

Mr. Attorney General, in America, our America, nobody is above the law, not even the President of the United States.

There is much that we do not know about the President's secret spying program. I hope we are going to get some answers, some real answers, not self-serving characterizations.

Let's start with what we do know. Point one, the President's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act.

The law expressly states it provides the exclusive source of authority for wiretapping for intelligence purposes. Wiretapping that is not authorized under this statute is a Federal crime. That is what the law says. It is also what the law means. This law was enacted to define how domestic surveillance for intelligence purposes can be conducted while protecting the fundamental rights of Americans.

A couple of generations of Americans are too young to know why we passed this law. It was enacted after decades of abuses by the Executive, including the wiretapping of Dr. Martin Luther King, and other political opponents of earlier Government officials. After some of the so-called White House enemies on the Nixon White House enemies list, during that time another President asserted that whatever he did what was legal because he was President, and being President, he could do whatever he wanted to do.

The law has been updated five times since September 11, 2001. It provides broad and flexible authority. In fact, on July 31, 2002, your Justice Department testified this law is a highly flexible statute that has been proven effective. And you noted, "When you are trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind."

But now the Bush administration concedes the President knowingly created a program involving thousands of wiretaps of Americans in the United States over the periods of the last four or 5 years without complying with FISA.

And legal scholars and former Government officials, including many Republicans, have been almost unanimous in stating the obvious, this is against the law.

Point two, the authorization for the use of military force that Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11 attacks did not give the President the authority to go around the FISA law to wiretap Americans illegally.

That authorization said to capture or kill Osama bin Laden, and to use the American military to do that. It did not authorize domestic surveillance of American citizens.

Let me be clear. Some Republican Senators say that we are talking about special rights for terrorists. I have no interest in that. Just like every member of this Committee and thousands of our staffs, and every Member of the House of Representatives, I go to work every single day in a building that was targeted for destruction by al Qaeda. Of course, I want them captured. I wish the Bush administration had done a better job. I wish that when they almost had Osama bin Laden, they had kept on after him and caught him, and destroyed him, rather than taking our Special Forces out of Afghanistan and sending them precipitously into Iraq.

My concern is the laws of America, and my concern is when we see peaceful Quakers being spied upon, where we see babies and nuns who cannot fly in airplanes because they are on a terrorist watch list put together by your Government.

And point three, the President never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which NSA has been secretly engaged for the last several years.

After September 11, 2001, I led a bipartisan effort to provide legal tools. We passed amendments to FISA. We passed the U.S. PATRIOT Act, and we upgraded FISA four times since then. In fact, when a Republican Senator on this Committee proposed a legal change to the standards needed for a FISA warrant, the Bush administration did not support that effort, but raised questions about it and said it was not needed. The administration told the Senate that FISA was working just fine.

You, Mr. Attorney General, said the administration did not ask for legislation authorizing warrantless wiretapping of Americans, and did not think such legislation would pass. Who did you ask? You did not ask me. You did not ask Senator Specter.

Not only did the Bush administration not seek broader legal authority, it kept the very existence of this illegal wiretapping program completely secret from 527 of the 535 Members of Congress, including members of this Committee and members on the Intelligence Committee.

The administration had not suggested to Congress and the American people that FISA was inadequate, outmoded or irrelevant. You never did that until the press caught you violating the statute with the secret wiretapping of Americans without warrants. In fact, in 2004, 2 years after you authorized the secret warrantless wiretapping program—and this is a tape we are told we cannot show—the President said, “Anytime you hear the U.S. Government talking about wiretap, a wiretap requires a court order. Nothing has changed...When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so.” That was when he was running for reelection. Today we know at the very least, that statement was misleading.

Let me conclude with this. I have many questions for you. But first, let me give you a message, Mr. Attorney General, to you, to the President and to the administration. This is a message that should be unanimous from every single Member of Congress, no

matter what their party or their ideology. Under our Constitution, Congress is a co-equal branch of Government, and we make the laws. If you believe you need new laws, then come and tell us. If Congress agrees, we will amend the law. If you do not even attempt to persuade Congress to amend the law, then you are required to follow the law as it is written. That is true of the President, just as it is true of me and you and every American. That is the rule of law. That is the rule on which our Nation was founded. That is the rule on which it endures and prospers.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Leahy.

We turn now to the Attorney General of the United States, Alberto R. Gonzales. The Attorney General has held the office for a little over a year. Before that he was Counsel to the President, right after the President's inauguration in 2001. He had served in State Government with Governor Bush. He attended the U.S. Air Force Academy from 1975 to 1977, graduated from Rice University with a bachelor's degree, and from Harvard Law School. He was a partner in the distinguished law firm of Vinson and Elkins in Houston before going into State Government.

We have allotted 20 minutes for your opening statement, Mr. Attorney General, because of the depth and complexity and importance of the issues which you and we will be addressing. You may proceed.

STATEMENT OF ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Attorney General GONZALES. Good morning, Chairman Specter, Senator Leahy and members of the Committee. I am pleased to have this opportunity to speak with you.

And let me just add for the record, when Chairman Specter asked me whether I would be willing to go under oath, I did say I would have no objections. I also said that my answers would be the same, whether or not I was under oath.

Al Qaeda and its affiliates remain deadly dangerous. Osama bin Laden recently warned America, "Operations are under preparation and you will see them in your homes." Bin Laden's deputy, Ayman Al-Zawahiri added just days ago that the American people are, and again I quote, "destined for a future colored by blood, the smoke of explosions and the shadows of terror."

None of us can afford to shrug off warnings like this or forget that we remain a Nation at war. Nor can we forget that this is a war against a radical and unconventional enemy. Al Qaeda has no boundaries, no government, no standing army. Yet they are capable of wreaking death and destruction on our shores. And they have sought to fight us not just with bombs and guns. Our enemies are trained in the most sophisticated communications, counterintelligence, and counter-surveillance techniques, and their tactics, they are constantly changing.

They use video feed and worldwide television networks to communicate with their forces, e-mail, the Internet and cell phones to

direct their operations, and even our own training academies to learn how to fly aircraft as suicide-driven missiles.

To fight this unconventional war, while remaining open and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home. To succeed we must deploy not just soldiers and sailors and airmen and marines, we must also depend on intelligence analysts, surveillance experts, and the nimble use of our technological strength.

Before 9/11 terrorists were clustered throughout the United States preparing their assault. We know from the 9/11 Commission report that they communicated with their superiors abroad using e-mail, the Internet and telephone. General Hayden, the Principal Deputy Director of National Intelligence, testified last week before the Senate that the terrorist surveillance program instituted after 9/11 has helped us detect and prevent terror plots in the United States and abroad. Its continuation is vital to the national defense.

Before going any further, I should make clear what I can discuss today. I am here to explain the Department's assessment that the President's terrorist surveillance program is consistent with our laws and the Constitution. I am not here to discuss the operational details of that program or any other classified activity. The President has described the terrorist surveillance program in response to certain leaks. And my discussion in this open forum must be limited to those facts the President has publicly confirmed, nothing more.

Many operational details of our intelligence activities remain classified and unknown to our enemy, and it is vital that they remain so.

The President is duty bound to do everything he can to protect the American people. He took an oath to preserve, protect and defend the Constitution. In the wake of 9/11 he told the American people that to carry out this solemn responsibility, he would use every lawful means at his disposal to prevent another attack.

One of those means is the terrorist surveillance program. It is an early warning system designed for the 21st century. It is the modern equivalent to a scout team sent ahead to do reconnaissance or a series of radar outposts designed to detect enemy movements. And as with all wartime operations, speed, agility and secrecy are essential to its success.

While the President approved this program to respond to the new threats against us, he also imposed several important safeguards to protect the privacy and the civil liberties of all Americans.

First. Only international communications are authorized for interception under this program, that is, communications between a foreign country and this country.

Second. The program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization. As the President has said, if you are talking with al Qaeda, we want to know what you are saying.

Third. To protect the privacy of Americans still further, the NSA employs safeguards to minimize the unnecessary collection and dissemination of information about U.S. persons.

Fourth. This program is administered by career professionals at NSA. Expert intelligence analysts and their senior supervisors with access to the best available information, they make the decisions to initiate surveillance. The operation of the program is reviewed by NSA lawyers, and rigorous oversight is provided by the NSA Inspector General. I have been personally assured that no other foreign intelligence program in the history of NSA has received a more thorough review.

Fifth. The program expires by its own terms approximately every 45 days. The program may be reauthorized, but only on the recommendation of intelligence professionals, and there must be a determination that al Qaeda continues to pose a continuing threat to America based on the latest intelligence.

Finally, the bipartisan leadership of the House and Senate Intelligence Committees has known about this program for years. The bipartisan leadership of both the House and Senate has also been informed. During the course of these briefings, no Members of Congress asked that the program be discontinued.

Mr. Chairman, the terrorist surveillance program is lawful in all respects. As we have thoroughly explained in our written analysis, the President is acting with authority provided both by the Constitution and by statute. First and foremost, the President is acting consistent with our Constitution. Under Article II, the President has the duty and the authority to protect America from attack. Article II also makes the President, in the words of the Supreme Court, “the sole organ of Government in a field of international relations.”

These inherent authorities vested in the President by the Constitution include the power to spy on enemies like al Qaeda without prior approval from other branches of Government. The courts have uniformly upheld this principle in case after case. Fifty-five years ago the Supreme Court explained that the President’s inherent constitutional authorities expressly include, “the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns.”

More recently, in 2002, the FISA Court of Review explained that, “All the other courts to have decided the issue have held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information.” The court went on to add, “We take for granted that the President does have that authority, and assuming that that is so, FISA could not encroach on the President’s constitutional powers.”

Now, it is significant, that this statement, stressing the constitutional limits of the Foreign Intelligence Surveillance Act, or FISA, came from the very appellate court that Congress established to review the decisions of the FISA Court.

Nor is this just the view of the courts. Presidents, throughout our history, have authorized the warrantless surveillance of the enemy during wartime, and they have done so in ways far more sweeping than the narrowly targeted terrorist surveillance program authorized by President Bush.

General Washington, for example, instructed his army to intercept letters between British operatives, copy them, and then allow those communications to go on their way.

President Lincoln used the warrantless wiretapping of telegraph messages during the Civil War to discern the movements and intentions of opposing troops.

President Wilson, in World War I, authorized the military to intercept each and every cable, telephone and telegraph communication going into or out of the United States.

During World War II, President Roosevelt instructed the Government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to review, without warrant, all telecommunications, "passing between the United States and any foreign country."

The far more focused terrorist surveillance program fully satisfies the "reasonableness" requirement of the Fourth Amendment.

Now, some argue that the passage of FISA diminished the President's inherent authority to intercept enemy communications even in a time of conflict. Others disagree, contesting whether and to what degree the legislative branch may extinguish core constitutional authorities granted to the executive branch.

Mr. Chairman, I think that we can all agree that both of the elected branches have important roles to play during a time of war. Even if we assume that the terrorist surveillance program qualifies as electronic surveillance under FISA, it complies fully with the law. This is especially so in light of the principle that statutes should be read to avoid serious constitutional questions, a principle that has no more important application than during wartime. By its plain terms, FISA prohibits the Government from engaging in electronic surveillance "except as authorized by statute." Those words, "except as authorized by statute," are no mere incident of drafting. Instead, they constitute a far-sighted safety valve.

The Congress that passed FISA in 1978 included those words so that future Congresses could address unforeseen challenges. The 1978 Congress afforded future lawmakers the ability to modify or eliminate the need for a FISA application without having to amend or repeal FISA. Congress provided this safety valve because it knew that the only thing certain about foreign threats is that they change in unpredictable ways.

Mr. Chairman, the resolution authorizing the use of military force is exactly the sort of later statutory authorization contemplated by the FISA safety valve. Just as the 1978 Congress anticipated, a new Congress in 2001 found itself facing a radically new reality. In that new environment, Congress did two critical things when it passed the force resolution.

First, Congress recognized the President's inherent constitutional authority to combat al Qaeda. These inherent authorities, as I have explained, include the right to conduct surveillance of foreign enemies operating inside this country.

Second, Congress confirmed and supplemented the President's inherent authority by authorizing him "to use all necessary and appropriate force against al Qaeda."

This is a very broadly worded authorization. It is also one that must permit electronic surveillance of those associated with al Qaeda. Our enemies operate secretly, and they seek to attack us from within. In this new kind of war, it is both necessary and ap-

appropriate for us to take all possible steps to locate our enemy and know what they are plotting before they strike.

Now, we all agree that it is a necessary and appropriate use of force to fire bullets and missiles at al Qaeda strongholds. Given this common ground, how can anyone conclude that it is not necessary and appropriate to intercept al Qaeda phone calls? The term “necessary and appropriate force” must allow the President to spy on our enemies, not just shoot at them blindly, hoping we might hit the right target. In fact, other Presidents have used statutes like the force resolution as a basis for authorizing far broader intelligence surveillance programs. President Wilson in World War I cited not just his inherent authority as Commander in Chief to intercept all telecommunications coming into and out of this country; he also relied on a congressional resolution authorizing the use of force against Germany that parallels the force resolution against al Qaeda.

A few Members of Congress have suggested that they personally did not intend the force resolution to authorize the electronic surveillance of the enemy, al Qaeda. But we are a Nation governed by written laws, not the unwritten intentions of individuals. What matters is the plain meaning of the statute passed by Congress and signed by the President, and in this case, those plain words could not be clearer. The words contained in the force resolution do not limit the President to employing certain tactics against al Qaeda. Instead, they authorize the use of all necessary and appropriate force. Nor does the force resolution require the President to fight al Qaeda only in foreign countries. The preamble to the force resolution acknowledges the continuing threat “at home and abroad.”

Congress passed the force resolution in response to a threat that emerged from within our own borders. Plainly, Congress expected the President to address that threat and to do so with all necessary and appropriate force.

Importantly, the Supreme Court has already interpreted the force resolution in the *Hamdi* case. There the question was whether the President had the authority to detain an American citizen as an enemy combatant, and to do so despite a specific statute that said that no American citizen could be detained except as provided by Congress. A majority of the Justices in *Hamdi* concluded that the broad language of the force resolution gave the President the authority to employ the traditional incidents of waging war. Justice O’Connor explained that these traditional powers include the right to detain enemy combatants, and to do so even if they happen to be American citizens.

If the detention of an American citizen who fought with al Qaeda is authorized by the force resolution as an incident of waging war, how can it be that merely listening to al Qaeda phone calls into and out of the country in order to disrupt their plots is not?

Now, some have asked if the President could have obtained the same intelligence using traditional FISA processes. Let me respond by assuring you that we make robust use of FISA in our war efforts. We constantly search for ways to use FISA more effectively. In this debate, however, I have been concerned that some who have asked “Why not FISA?” do not understand how that statute really works.

To be sure, FISA allows the Government to begin electronic surveillance without a court order for up to 72 hours in emergency situations or circumstances. But before that emergency provision can be used, the Attorney General must make a determination that all of the requirements of the FISA statute are met in advance. This requirement can be cumbersome and burdensome. Intelligence officials at NSA first have to assess that they have identified a legitimate target. After that, lawyers at NSA have to review the request to make sure it meets all of the requirements of the statute. And then lawyers at the Justice Department must also review the requests and reach the same judgment or insist on additional information before processing the emergency application. Finally, I as Attorney General must review the request and make the determination that all of the requirements of FISA are met.

But even this is not the end of the story. Each emergency authorization must be followed by a detailed formal application to the FISA Court within 3 days. The Government must prepare legal documents laying out all of the relevant facts and law and obtain the approval of a Cabinet-level officer as well as a certification from a senior official with security responsibility, such as the Director of the FBI. Finally, a judge must review, consider, and approve the application. All of these steps take time. Al Qaeda, however, does not wait.

While FISA is appropriate for general foreign intelligence collection, the President made the determination that FISA is not always sufficient for providing the sort of nimble early warning system we need against al Qaeda. Just as we cannot demand that our soldiers bring lawyers onto the battlefield, let alone get the permission of the Attorney General or a court before taking action, we cannot afford to impose layers of lawyers on top of career intelligence officers who are striving valiantly to provide a first line of defense by tracking secretive al Qaeda operatives in real time.

Mr. Chairman, the terrorist surveillance program is necessary, it is lawful, and it respects the civil liberties we all cherish. It is well within the mainstream of what courts and prior Presidents have authorized. It is subject to careful constraints, and congressional leaders have been briefed on the details of its operation. To end the program now would be to afford our enemy dangerous and potentially deadly new room for operation within our own borders.

I have highlighted the legal authority for the terrorist surveillance program, and I look forward to our discussion and know that you appreciate there remain serious constraints on what I can say about operational details. Our enemy is listening, and I cannot help but wonder if they are not shaking their heads in amazement at the thought that anyone would imperil such a sensitive program by leaking its existence in the first place, and smiling at the prospect that we might now disclose even more or perhaps even unilaterally disarm ourselves of a key tool in the war on terror.

Thank you, Mr. Chairman.

[The prepared statement of Attorney General Gonzales appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Attorney General Gonzales.

Before proceeding to the 10-minute rounds for each of the Senators, let me request that you make your answers as brief as possible. You are an experienced witness, and we will try to make our questions as pointed and as brief as each Senator finds it appropriate.

Senator LEAHY. Mr. Chairman, could I also ask that we have for the record the statement that the Attorney General—well, obviously the statement that he just gave now, but the statement that he submitted to the Committee under our rules a couple days ago as part of the record.

Chairman SPECTER. Is there a difference between the two statements, Mr. Attorney General?

Attorney General GONZALES. Sir, there is a difference between the written statement and the oral statement, yes, sir.

Chairman SPECTER. Are they the same?

Attorney General GONZALES. There is a difference, sir. They are not the same.

Chairman SPECTER. Well, both will be made a part of the record.

All right. Now for the 10-minute rounds. Mr. Attorney General, let's start with the FISA Court, which is well-respected, maintains its secrets and is experienced in the field. I posed this question to you in my letter: Why not take your entire program to the FISA Court, within the broad parameters of what is reasonable and constitutional, and ask the FISA Court to approve it or disapprove it?

Attorney General GONZALES. Senator, I totally agree with you that the FISA Court should be commended for its great service. They are working on weekends, they are working at nights—

Chairman SPECTER. Now on to my question.

Attorney General GONZALES. They are assisting us in the war on terror. In terms of when I go to the FISA Court, once the determination was made that neither the Constitution nor FISA prohibited the use of this tool, then the question becomes for the Commander in Chief which of the tools is appropriate given a particular circumstance. And we studied very carefully the requirements of the Constitution under the Fourth Amendment. We studied very carefully what FISA provides for.

As I said in my statement, we believe that FISA does anticipate that another statute could permit electronic surveillance and—

Chairman SPECTER. OK. You think you are right, but there are a lot of people who think you are wrong. As a matter of public confidence, why not take it to the FISA Court? What do you have to lose if you are right?

Attorney General GONZALES. What I can say, Senator, is that we are continually looking at ways that we can work with the FISA Court in being more efficient and more effective in fighting the war on terror. Obviously, we would consider and are always considering methods of fighting the war effectively against al Qaeda.

Chairman SPECTER. Well, speaking for myself, I would urge the President to take this matter to the FISA Court. They are experts. They will maintain the secrecy. And let's see what they have to say.

Mr. Attorney General, did Judge Robertson of the FISA Court resign in protest because of this program?

Attorney General GONZALES. I do not know why Judge Robertson resigned, sir.

Chairman SPECTER. Has the FISA Court declined to consider any information obtained from this program when considering warrants?

Attorney General GONZALES. Sir, what I can say is that the sources of information provided or included in our application are advised or disclosed to the FISA Court because obviously one of the things they have to do is judge the reliability.

Chairman SPECTER. So if you have information that you are submitting to the FISA Court for a warrant than you tell them that it was obtained from this program?

Attorney General GONZALES. Senator, I am uncomfortable talking about how this—in great detail about how this information is generally shared. What I can say is just repeat what I just said, and that is, we as a matter of routine provide to the FISA Court information about the sources of the information that form the basis of an application—

Chairman SPECTER. I am not asking you how you get the information from the program. I am asking you, do you tell the FISA Court that you got it from the program? I want to know if they are declining to issue warrants because they are dissatisfied with the program.

Attorney General GONZALES. Senator, I am not—I believe that getting into those kind of details is getting into the detail about how the program is operated. Obviously, the members of the court understand the existence of this program. What I can say is we have a very open and very candid discussion and relationship with the FISA Court. To the extent that we are involved in intelligence activities that relate in any way to the FISA Court and they have questions about that, we have discussions with the FISA Court.

Our relationship with the court is extremely important, and we do everything that we can do to assure them with respect to our intelligence activities that affect decisions that they make.

Chairman SPECTER. I am not going to press you further, but I would ask you to reconsider your answer.

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. In your response to my letter, you said this: “No communications are intercepted unless it is determined that”—and then I am leaving some material out—“a party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.” You are representing to this Committee that before there is an interception, there is a determination that one of the parties is a member of al Qaeda, an agent of al Qaeda, or an affiliated terrorist organization. Is that true?

Attorney General GONZALES. Sir, I believe General Hayden, the Deputy Director of Intelligence, yesterday confirmed that before there is any interception, there is a determination made by an intelligence officer at NSA that, in fact, we have reasonable grounds to believe that one party in the communication is a member or agent of al Qaeda or an affiliate terrorist organization.

Chairman SPECTER. Is there any way you can give us assurance that it is true without disclosing the methods and sources of your program? It seems to me that that is a very important statement.

If we were really sure that you are dealing only with a communication where you have a member of al Qaeda, an agent of al Qaeda, or an affiliated with al Qaeda terrorist organization, it would be a good thing, because the concern is that there is a broad sweep which includes people who have no connection with al Qaeda. What assurances can you give to this Committee and beyond this Committee to millions of Americans who are vitally interested in this issue and following these proceedings?

Attorney General GONZALES. Well, I would say, Senator, and to the American people and to this Committee, that the program as operated is a very narrowly tailored program, and we do have a great number of checks in place to ensure, I am told by the operations folks, a great degree of certainty, a high degree of confidence that these calls are solely international calls. We have these career professionals out at NSA who are experts in al Qaeda tactics, al Qaeda communications, al Qaeda aims. They are the best at what they do, and they are the ones that make the judgment as to whether or not someone is on a call that is a member of al Qaeda or a member of an affiliated organization.

The Inspector General, as I have indicated, has been involved in this program from its early stages. There are monthly—

Chairman SPECTER. Mr. Attorney General, let me interrupt you because I want to cover a couple more questions and time is fleeting. I think you have given the substance of the response.

We have contacted former Attorney General Ashcroft about his availability to testify before this Committee, and he has not said yes and he has not said no. He is considering it. I believe that the testimony of former Attorney General Ashcroft would fall under a different category than that of line attorneys within the Department who are giving information. With them there is the concern about having a chilling effect on their advice if they know their views are later to be examined.

I think the Attorney General is different, and my question to you is: Would you have any objection to former Attorney General Ashcroft's appearance before this Committee on this issue?

Attorney General GONZALES. I would not, Senator, although, of course, if it relates to questions regarding the law and the position of the executive branch, that is what I am doing today, is conveying to this Committee what is the executive branch position on the legal authorities of the President in authorizing the terrorist surveillance program.

Chairman SPECTER. That is all we would ask him about. We wouldn't ask him about the operations. I take it, if I heard you correctly, you would not have an objection.

Attorney General GONZALES. Senator, this Committee, of course, can ask who they want to ask to come before the Committee.

Chairman SPECTER. I know we can ask. It is a totally different question as to what we hear in response. He has not told us that he is going to look to the Department of Justice. But I think he would feel more comfortable knowing that you had no objection. I thought I heard you say earlier that you didn't have an objection.

Attorney General GONZALES. Senator, I don't think I would have an objection.

Chairman SPECTER. OK. Two more questions, which I want to ask before my red light goes on.

On looking at congressional intent as to whether the resolution authorizing the use of force was intended to carry an authorization for this electronic surveillance with respect to the Foreign Intelligence Surveillance Act, you were quoted as saying, "That was not something that we could likely get." Now, that is different from the other response you had that it might involve disclosures.

If this is something you could not likely get, then how can you say Congress intended to give you this authority? Let the record show my red light went on with the conclusion of the question.

Attorney General GONZALES. Senator, in that same press conference, I clarified that statement, and I think, the next press conference I was at with Mike Chertoff, I clarified that statement. That is, the consensus was in a meeting that legislation could not be obtained without compromising the program, i.e., disclosing the existence of the program, how it operated, and thereby effectively killing the program.

Chairman SPECTER. Thank you very much.

Senator Leahy?

Senator LEAHY. Mr. Chairman, you have raised some interesting points. In listening to the Attorney General, who is now arguing that the President's wiretapping of Americans without a warrant is legal, that it does not violate the controlling law, the Foreign Intelligence Surveillance Act, they have given a fancy name to the President's program. But I would remind him that the terrorist surveillance program is the FISA law which we passed. I think you are violating express provisions of that Act.

Let me just ask you a few questions that can be easily answered yes or no. I am not asking about operational details. I am trying to understand when the administration came to the conclusion that the Congressional resolution authorizing the military force against al Qaeda, where we had hoped that we would actually catch Osama bin Laden, the man who hit us, but when you came to the conclusion that it authorized warrantless wiretapping of Americans inside the United States. Did you reach that conclusion before the Senate passed the resolution on September 14, 2001?

Attorney General GONZALES. Senator, what I can say is that the program was initiated subsequent to the authorization to use military force—

Senator LEAHY. Well, then let me—

Attorney General GONZALES. [continuing]. And our legal analysis was completed prior to the authorization of that program.

Senator LEAHY. So your answer is you did not come to that conclusion before the Senate passed the resolution on September 14, 2001.

Attorney General GONZALES. Senator, I certainly had not come to that conclusion. There may be others in the administration who did.

Senator LEAHY. Were you aware of anybody in the administration that came to that conclusion before September 14, 2001?

Attorney General GONZALES. Senator, sitting here right now, I don't have any knowledge of that.

Senator LEAHY. Were you aware of anybody coming to that conclusion before the President signed the resolution on September 18, 2001?

Attorney General GONZALES. No, Senator. The only thing that I can recall is that we had just been attacked and that we had been attacked by an enemy from within our own borders and that—

Senator LEAHY. Attorney General, I understand. I was here when that attack happened, and I joined with Republicans and Democrats and virtually every Member of this Congress to try to give you the tools that you said you needed for us to go after al Qaeda, and especially to go after Osama bin Laden, the man that we all understood masterminded the attack and the man who is still at large.

Now, back to my question. Did you come to the conclusion that you had to have this warrantless wiretapping of Americans inside the United States to protect us before the President signed the resolution on September 18, 2001. You were the White House Counsel at the time.

Attorney General GONZALES. What I can say is that we came to a conclusion that the President had the authority to authorize this kind of activity before he actually authorized the activity.

Senator LEAHY. When was that?

Attorney General GONZALES. It was subsequent to the authorization to use military force.

Senator LEAHY. When?

Attorney General GONZALES. Sir, it was just a short period of time after the authorization to use military force.

Senator LEAHY. Was it before or after NSA began its surveillance program?

Attorney General GONZALES. Again, the NSA did not commence the activities under the terrorist surveillance program before the President gave his authorization, and before the President gave the authorization, he was advised by lawyers within the administration that he had the legal authority to authorize this kind of surveillance of the enemy.

Senator LEAHY. So NSA didn't do this until the President gave them the green light that they could engage in warrantless wiretapping of Americans inside the United States under the circumstances you described in your earlier testimony?

Attorney General GONZALES. Of course, Senator, the NSA has other authorities to engage in electronic surveillance—

Senator LEAHY. I understand that.

Attorney General GONZALES [continuing]. And I am told that they—

Senator LEAHY. I am talking about this specific program.

Attorney General GONZALES. And I am told they took advantage of those authorities, but it is my understanding—and I believe this to be true—that the NSA did not commence the kind of electronic surveillance which I am discussing here today prior to the President's authorization.

Senator LEAHY. The President has said publicly that he gave about 30 of these authorizations, having held off for a period of time, I think, when the administration heard the New York Times was looking into it. But you were White House Counsel. Did the

President give his first authorization before or after Attorney General Ashcroft met with us and gave us the proposals from the administration which ultimately went into the USA PATRIOT Act?

Attorney General GONZALES. Sir, I don't know. I don't know when he gave you those proposals.

Senator LEAHY. Well, we enacted the USA PATRIOT Act in October 2001, and you were there at the signing ceremony. We used the—we tried to encompass those things that the administration said they needed. Was the first one of the President's authorizations done before he signed the USA PATRIOT Act?

Attorney General GONZALES. Sir, I would have to go back and check. I don't know.

Senator LEAHY. OK. You are going to be back here this afternoon. Please check because I will ask you this question again, and you will have a chance to ask—I am looking around the room. You have an awful lot of staff here. Let's have that answer. You were there when he signed the Act. Let us know when his first authorization was, whether it was before or after he signed that Act.

Now—

Attorney General GONZALES. Sir, may I make a statement? We believe the authorization to use military force constituted a statutory grant of authority to engage in this kind of surveillance, and, therefore, it wouldn't be necessary to seek an amendment to FISA through the PATRIOT Act.

Senator LEAHY. OK. My question still remains, and like Senator Specter, I am trying to ask basically things you could answer yes or no. You talk about the authorization for use of military force. We have a chart up over there that says that, "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

Now, basically what you are saying is that Congress must be understood to have authorized the President to do it, not that we actually did but that we must have understood it.

Now, this authorization is not a wiretap statute. I was a prosecutor. Senator Specter was a prosecutor. A lot of other prosecutors are here. We know what a wiretap statute looks like. This is not it.

So let me ask this: Under that logic, is there anything to stop you from wiretapping without a warrant somebody inside the United States that you suspect of having al Qaeda connections?

Attorney General GONZALES. Clearly, Senator, that is not what is going on here, first of all. The President has authorized a much more narrow program. We are always, of course, subject to the Fourth Amendment, so the activities of any kind of surveillance within the United States would, of course, be subject to the Fourth Amendment.

Senator LEAHY. Well, Mr. Attorney General, we are getting the impression that this administration is kind of picking and choosing what they are subject to, can you show us in the authorization for

use of military force, what is the specific language you say is authorized in wiretapping of Americans without a warrant?

Attorney General GONZALES. Sir, there is no specific language, but neither is there specific language to detain American citizens, and the Supreme Court said that the words “all necessary and appropriate force” means all activities fundamentally incident to waging war.

Senator LEAHY. But there was not a law—they did not have a law specifically on this.

Attorney General GONZALES. Sure they did, sir.

Senator LEAHY. If you use the Jackson test, they have a law on wiretapping. It is called FISA. It is called FISA. And if you do not like that law, if that law does not work, why not just ask us to amend it?

Attorney General GONZALES. Sir, there was a law in question in *Hamdi*. It was 18 USC 4001(a), and that is, you cannot detain an American citizen except as authorized by Congress. And *Hamdi* came into the Court saying the authorization to use military force is not such a permission by Congress to detain an American citizen, and the Supreme Court, Justice O’Connor said, even though the words were not included in the authorization, Justice O’Connor said Congress clearly and unmistakably authorized the President to detain an American citizen, and detention is far more intrusive than electronic surveillance.

Senator LEAHY. Let me ask you this: under your interpretation of this, can you go in and do mail searches? Can you open first-class mail? Can you do black-bag jobs? And under the idea that you do not have much time to go through what you describe as a cumbersome procedure, but most people think it is a pretty easy procedure, to get a FISA warrant, can you go and do that, of Americans?

Attorney General GONZALES. Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized.

Senator LEAHY. Did it authorize the opening of first-class mail of U.S. citizens? That you can answer yes or no.

Attorney General GONZALES. There is all kinds of wild speculation about what the—

Senator LEAHY. Did it authorize it?

Chairman SPECTER. Let him finish.

Attorney General GONZALES. There is all kinds of wild speculation out there about what the President has authorized, and what we are actually doing. And I am not going to get into a discussion, Senator, about—

Senator LEAHY. Mr. Attorney General, you are not answering my question. I am not asking you what the President authorized. Does this law—you are the chief law enforcement officer of the country—does this law authorize the opening of first-class mail of U.S. citizens? Yes or no, under your interpretation?

Attorney General GONZALES. Senator, I think that, again, that is not what is going on here. We are only focused on communications, international communications, where one party to the communication is al Qaeda. That is what this program is all about.

Senator LEAHY. You have not answered my question.

Well, Mr. Chairman, I will come back to this, and the Attorney General understands there are some dates he is going to check during the break, and I will go back to him.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch.

Senator HATCH. This is a very interesting set of issues, and a lot of constitutional issues, for people who are watching this. We have got, in addition to all kinds of constitutional issues about interpreting statutes, you have got the canon of constitutional avoidance here, that is a very important rule in constitutional law. You have got the Vesting Clause, vesting power in the President. You have got inherent Executive authority that people seem to just brush aside here. They will talk in terms of, well, Congress is co-equal with the President, but they do not ever really talk in terms of the President being co-equal with the Congress, or to pass laws, you have got the various canons of statutory interpretation. All of these are here, and it makes this a very interesting thing.

But let me just ask you some specific questions here. It is my understanding, as I have reviewed this, and as I have looked at a lot of the cases, that virtually all of the Federal Courts of Appeal that have addressed the issue, have affirmed the President's inherent constitutional authority to collect foreign intelligence without a warrant. Is that a fair statement?

Attorney General GONZALES. It is a fair statement, Senator, that all of the Court of Appeals that have reviewed this issue have concluded that the President of the United States has the authority, under the Constitution, to engage in warrantless searches consistent with the Fourth Amendment for purposes of gathering foreign intelligence.

Senator HATCH. That is what the *Katz v. U.S.* case seemed to say, is it not, that wiretapping to protect the security of the Nation has been authorized by successive Presidents; is that correct?

Attorney General GONZALES. It is certainly the case that successive Presidents, particularly during a time of war, have authorized warrantless searches.

Senator HATCH. And you are relying on the *Hamdi* case as well, where a majority of the Court basically authorized the President exceptional powers under the Authorized Use of Military Force Statute?

Attorney General GONZALES. I would not say they are exceptional powers. I think that they are traditional powers of the President in a time of war.

Senator HATCH. Then *U.S. v. Truong*. That was a 1983 case.

Attorney General GONZALES. Yes. Once again, the Court finding that the President of the United States does have the inherent authority to engage in warrantless searches, consistent with the Fourth Amendment, for purposes of gathering foreign intelligence.

Senator HATCH. That was the case after the enactment of the FISA law, right?

Attorney General GONZALES. It was a case after the enactment of FISA, but I think to be fair, I do not think the Court did a rigorous analysis about how FISA affects the analysis, but there was a decision by the Court that the President had the inherent authority.

Senator HATCH. That is the important part of the case, as far as I am concerned. *U.S. v. Butenko*. It is a 1974 case, before FISA. *U.S. v. Brown*, *U.S. v. U.S. District Court*, and the so-called *Keith* case.

Attorney General GONZALES. The *Keith* case was where the Court, for the first time, said that electronic surveillance, it would be subject—electronic surveillance for domestic security purposes is subject to the Fourth Amendment.

Senator HATCH. *Haig v. Agee*, that is a 1981 case, again, after FISA, that matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention. That is a recognition that the President has to make some decisions, right?

Attorney General GONZALES. Right. If I could just followup, Senator. My statement on the *Keith* case where the Court did say that electronic surveillance for purposes of domestic security would be subject to warrant requirements under the Fourth Amendment. The Court expressly made clear that they were not talking about electronic surveillance for foreign intelligence purposes. They were only talking about electronic surveillance for domestic security purposes.

Senator HATCH. What about *The Prize Cases*, they are very well-known cases, and culminating in the case that quotes *The Prize Cases* in *Campbell v. Clinton*.

Attorney General GONZALES. Again, there are a number of cases that recognize the President's inherent constitutional authority, particularly in a time of war—

Senator HATCH. And the President's independent authority; is that correct? That is what *Campbell v. Clinton* says.

Attorney General GONZALES. To engage in surveillance in order to protect our country.

Senator HATCH. In fact, there is a 2002 case, *In re: Sealed Cases*, right?

Attorney General GONZALES. *In re: Sealed Cases*, I said in my statement is—

Senator HATCH. I mean that is a case decided by the FISA Court of Review, the actual FISA Court, right?

Attorney General GONZALES. The FISA Court of Review was created by Congress to review the decisions by the FISA Court. In that decision, in that case, the FISA Court of Review acknowledged that these cases by other Circuit Courts, that the President does have the inherent authority, and the FISA Court of Review said, assuming that to be true, that FISA could not encroach upon the powers of the President.

Senator HATCH. They could not encroach on the President's constitutional powers.

Attorney General GONZALES. That is correct.

Senator HATCH. So people who are wildly saying that the President is violating the law are ignoring all of these cases that say that—at least imply—that he has the inherent power to be able to do what he should to protect our Nation during a time of war?

Attorney General GONZALES. And I want to emphasize, Senator, this is not a case where we are saying FISA—we are overriding FISA or ignoring FISA. Quite the contrary. We are interpreting the authorization to use military force as a statutory grant—

Senator HATCH. You use FISA all the time, don't you?

Attorney General GONZALES. FISA is an extremely important tool in fighting the war on terror. I know today there is going to be some discussion about whether or not we should amend FISA. I do not know that FISA needs to be amended, per se, because when you think about it, FISA covers much more than international surveillance. It exists even in peacetime. And so when you are talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite reasonable, and so that is one of the dangers of trying to seek an amendment to FISA, is that there are certain parts of FISA that I think provide good protections. And to make an amendment to FISA in order to allow the activities that the President has authorized, I am concerned will jeopardize this program.

Senator HATCH. It may even encroach on the inherent powers of the President, right?

Attorney General GONZALES. Yes, sir.

Senator HATCH. Let me just say this to you: as I view your arguments, we are faced with a war unlike any other war we have ever been in. We are faced with a war of international terrorists. That is one reason we did the PATRIOT Act was to bring our domestic criminal laws up—excuse me—our international antiterrorism laws up to the equivalent of domestic criminal laws. And you are saying that—and I have to say I find some solace in this—you are saying that when Congress, through a joint resolution, authorized the use of military force, gave the President these wide powers that are much wider than the ordinary single sentence declaration of war up through World War II, which was the last one if I recall it correctly, that that statute allowed you, coupled with inherent powers of the President, to be able to go after these terrorists before they hit us again?

Attorney General GONZALES. This is an example of Congress exercising its Article I powers to pass legislation, so the President, in exercising his inherent authorities under Article II, has all the authority that he needs to fight al Qaeda.

Senator HATCH. The Authorized Use of Military Force Resolution, which was a joint resolution of both Houses of Congress, declared that the Nation faces, "an unusual and extraordinary threat," and acknowledges that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States and provides that the President is authorized "to use all necessary and appropriate force" against those he determines are linked to the September 11th attacks.

That sweeping language goes a lot further than the usual single sentence declaration of war, right?

Attorney General GONZALES. It is a very broad authorization which makes sense. I do not think anyone in those days and weeks, certainly not in the Congress, were thinking about cataloguing all of those authorities that they wanted to give to the President. I think everyone expected the President of the United States to do everything he could to protect our country, and the Supreme Court has said that those words, "all necessary and appropriate force" mean that the Congress has given to the President of the United

States the authority to engage in all the activities that are fundamental and incident to waging war.

Senator HATCH. So you are relying on an Act of Congress, a joint resolution. You are relying on the inherent powers of the President to protect our borders and to protect us, and you are relying on the Fourth Amendment which allows reasonable searches and seizures in the best interest of the American public; is that a fair analysis?

Attorney General GONZALES. That is a fair analysis, yes, sir.

Senator HATCH. My time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. I think the final comments about all of us desiring to protect our country is something which is common. We certainly respect your strong dedication and commitment to that, Attorney General.

Attorney General GONZALES. Thank you, Senator.

Senator KENNEDY. I think all of us remember the time of 9/11. I certainly do, I was with Mrs. Bush just before her testimony at an education hearing. It is a moment that is emblazoned in all our minds.

I want to approach this in a somewhat different way. I am very concerned about the whole issue in question if you are not right legally. Now, you make a very strong case in your presentation here about the authority which you are acting on. You talk about the authorization by the Congress. You talk about inherent power. You talk about the President having the authority and the power to do this. But there is, of course, a very significant legal opinion to the contrary. There was within your Department, thoughtful lawyers who questioned it, constitutional authorities that have questioned it.

So we are taking really a risk with national security, which I think is unwise. We are sending the wrong message to those that are in the front lines of the NSA, that maybe someday they may actually be prosecuted, criminally or civilly. We are sending a message to the courts, that perhaps the materials that we are going to take from eavesdropping or signal intelligence, may not be used in the courts, in prosecutions against al Qaeda, people we really want to go after, because it was not done legally. We are sending a message to the telephone companies that they may be under assault and attack as well. There are already cases now brought by individuals against the telephone companies. We have to get it right, because if we do not get it right, we are going to find that we have paid a very harsh price. Some of the toughest, meanest and cruelest members of al Qaeda may be able to use illegality in the court system to escape justice, maybe or maybe not. But why take a chance?

We were facing the issue of electronic surveillance at another time, in 1976, with Attorney General Ed Levi and President Ford. They followed a much different course than you have followed. Ed Levi came and consulted with us. Members of this Committee went down and visited the Justice Department on four different occasions. The memoranda that we have from that period of time, the Buchen memoranda which are part of the record, the concerns that the Attorney General had about getting it right in terms of elec-

tronic surveillance, uncertainty in courts, validity of evidence, cooperation of the phone companies. And in a series of memoranda that go to the President of the United States and discussions that were actually held with Henry Kissinger, Don Rumsfeld, Ed Levi, Brent Scowcroft, George Bush, lengthy discussions with others, finally, the Attorney General said the main concern was whether this legislative initiative would succeed or whether, as some feared, the legislation which is actually passed would depart in objectionable ways, so that they were not sure about what Congress would do. But they dealt with the Congress and they got FISA.

He later goes on to say, that already the Attorney General has found key members of the Senate Judiciary receptive to the legislation. And then finally, "the Attorney General is strongly of the opinion that you," the President, "should support the legislation as drafted. If you feel any hesitancy, I'll come by and brief you."

This is what we had 27 years ago: an Attorney General that came up to the Judiciary Committee, had them come down and work out FISA, and it passed with one dissenting vote in the U.S. Senate. We might not have gotten it right, but certainly for that period of time, that it got it right.

The question that I have for you is, why did you not follow that kind of pathway which was so successful at a different time? We had a Republican President and a Republican Attorney General. We are talking about electronic surveillance. And as you know from the FISA, there are very sensitive provisions that were included in there that were directed against foreign nationals that this Committee was able to deal with, and did so in a responsible way. Why didn't you follow that pattern?

Attorney General GONZALES. Sir, the short answer is, is that we did not think we needed to, quite frankly. I have tried to make clear today that we looked at this issue carefully, decided that neither the Constitution nor FISA, which contemplated a new statute, would prohibit this kind of activity from going forward.

I might also say this is a little different time from what existed in 1976. Of course, we are at war, and we have briefed certain Members of Congress. So it is not entirely true that we did not reach out to the Congress and talk—certain Members of the Congress and talk to them about this program and about what we were doing.

Senator KENNEDY. The point, I would say, is that we were facing a nuclear threat. We have got terrorism now, but it was a nuclear threat then. The cold war was in full flow at that time. It was a nuclear threat at that time.

And you know what Attorney General Levi did? He took a day and a half to have outside constitutional authorities advise him on the questions of the constitutionality of the legislation, a day and a half. Now, did you talk to any outside authorities—not inside authorities that are going to give you, quite frankly, probably what you want to hear—but did you check any—the reason I question this, General, is because we have been through the Bybee memorandum, we have been through torture memoranda, where you and the OLC and the White House Counsel thought that the Bybee memorandum was just fine. Then we find out, during the course

of your hearings, that it was not fine, and it was effectively repealed, a year and a half after it was in effect.

So it is against that kind of background of certainty, of your view about its legality, and in-house review of the legality. Some of us would have wondered whether you took the steps that an Ed Levi, Republican Attorney General, on the same subject, was willing to take, to listen to outside constitutional authority, because as we have seen subsequently, you have had difficulty in your own Department and you have had substantial difficulty with constitutional authorities and others who might not believe that you are correct. If you are correct, we do not have a problem. If you are not correct, then it is a step back in terms of national security.

My question to you is, looking at the national security issue, would we not be in a stronger position if you had come to the Congress and said, "Let's get the kind of legislative authority that we need, rather than take a chance." Wouldn't our national security have been better defended if we did not have any question as to the legality of this issue? Wouldn't the people in the front lines of our national security be better protected, and our court system better defended? And when we are able to get those al Qaeda individuals, and they know they do not have any loopholes by appealing illegal eavesdropping, maybe then they would begin to talk and try to make a deal. Maybe that would enhance our national security as well.

Attorney General GONZALES. Well, sir, you have said a lot, so I do not know—

Senator KENNEDY. Yes, it is short time.

Attorney General GONZALES. Let me just say you are absolutely right, we have got to have a very clear message, and we cannot be wrong on this. I do not think that we are wrong on this. Are we worried about the front line people down at NSA? Of course we are. That is why the President, the day after the story ran in the New York Times, went out to the American people to reassure them this was not a situation where you had an agency running amok, that he had authorized this activity, and it was very narrowly tailored.

In terms of whether or not, are we concerned about activities that may jeopardize investigations or prosecutions? Absolutely, we are. That is the last thing we want to do. We do not believe this program is—we believe this program is lawful. We do not believe that prosecutions are going to be jeopardized as a result of this program. Obviously, we are in litigation now, so I do not want to say much more than that, but, of course, we ought to be operating in a way where we are doing what we need to do to protect our investigations and to protect our prosecutions, and I think that we are doing that.

Senator KENNEDY. My time is just about up. Thank you very much, General.

Chairman SPECTER. Thank you very much, Senator Kennedy.

I want to acknowledge the presence in the audience of Ms. Deborah Burlingame, who is the sister of Captain Charles F. Burlingame, the pilot on American Airlines Flight 77, which crashed into the Pentagon.

Would you like a break?

Attorney General GONZALES. If you are offering a break, Mr. Chairman, yes.

Chairman SPECTER. Well, I am not going to offer you one unless you want one.

[Laughter.]

Attorney General GONZALES. I am fine, sir. I will defer to you, Mr. Chairman.

Senator LEAHY. Take the break.

Attorney General GONZALES. I will take a break.

Chairman SPECTER. Let's take a vote here.

[Laughter.]

Chairman SPECTER. Ten-minute break.

[Recess from 11:06 a.m. to 11:14 a.m.]

Chairman SPECTER. Before proceeding, I would like to acknowledge the presence of Ms. Monica Gabrielle and Ms. Mindy Kleinberg whose husbands were in the World Trade Center at the time of the 9/11 attack.

Mr. Attorney General, thank you for rejoining us, and we turn now to Senator Grassley.

Senator GRASSLEY. Thank you very much.

I am going to start with something that is just peripheral to the issues we are on, but it does deal with our national security, and it is the leak of this information to New York Times. I am greatly concerned about this, and these leaks could be putting our Nation's safety into serious jeopardy. Could you tell us what is being done to investigate who leaked this national security information, and whether the Department of Justice will initiate a prosecution of an individual leaking the information?

Attorney General GONZALES. Senator, we have confirmed—the Department has initiated an investigation into possible crimes here, and consistent with Department practice, I am not going to talk much further about an ongoing investigation. Obviously, we have to look at the evidence and if the evidence shows that a crime has been committed, then, obviously, we will have to make a decision about moving forward with a prosecution.

Senator GRASSLEY. I do not blame you for this, but I do not hear as much about public outcry about this leak as I did about Valerie Plame and the White House disclosures of her—presumed disclosures of her identity as a CIA agent, and to me, that is a two-bit nothing compared to this sort of issue that we have before us or this information being leaked to the press.

In the followup commentaries, reading the newspapers and TV, you get the impression that this is some sort of an LBJ–J. Edgar Hoover operation that is designed to skirt the law to spy on domestic enemies. And I think you are making very clear the opposite, that this is only concerned about the national security of the United States, and that is where the focus should be.

The constant repetition on the news media of the term “domestic spying,” as opposed to spying and electronic surveillance of somebody outside the United States connected with an organization that has as their goal the killing of Americans, or the threatening of America, or the destruction that happened on September the 11th is entirely two different things, but when domestic spying is often

used, you can understand, General, the people having outrage maybe at what is going on.

Also, for my colleagues on this Committee, it seems to me that if we are doing our job right, we have got some problems. Because let's just say the Attorney General is wrong in the statutory and constitutional authority by which they proceeded to do what they are doing. And yet, Members of Congress were told about this program over a period of 4 years, a few Members of Congress were, the appropriate ones were. Then all of a sudden it hits the New York Times, and all of a sudden, then that story breaks, Congressmen change their tune from the one sung in private for 4 years, to outrage that this is going on.

So if Senator Grassley, who is not a member of that elite group that has to be concerned about oversight of foreign intelligence knows about it, and does not tell—if I were a member and did not tell my colleagues about it, and then express that outrage, where have I been as a member of that group for the last 4 years? If something is wrong after the New York Times reported it, there had to be something wrong before the New York Times reported it. All of a sudden I see Members of Congress who had that responsibility, if they really, sincerely think it is wrong today, that were caught not doing their job of congressional oversight as they should have, informing the other Members of Congress that there is really something wrong that the President is doing here.

So I think we in Congress have to do some looking, internal looking of whether or not we are doing our job as well of oversight.

I always to want to remind people in the United States that what we are talking about here today is to make sure that September the 11th does not happen again, and somehow we tend to have short memories. We ought to remember that it happened in Madrid, it happened in London, it happened in Amman, it happened in a resort in Egypt, it happened in Bali twice, and it has happened here. It can happen again. It seems to me that what you are trying to tell us is the President is determined to make sure that it does not happen in the United States again, and that is what this surveillance is all about. Yes?

Attorney General GONZALES. Senator, he is absolutely determined to do everything that he can, under the Constitution and the laws of this country, to prevent another September 11th from happening again.

Senator GRASSLEY. And I think you are telling us that in the case of people giving some information, that it is very necessary to act with dispatch, that acting with dispatch or not can be a matter of life or death for Americans.

Attorney General GONZALES. Absolutely. If we get information that may lead us to other information about a terrorist operating in this country, we may not have a matter of days or weeks or months, which is sometimes the case with respect to a FISA application, but we may not have that much time to begin surveillance. And if we wait—and again, FISA has been a wonderful tool and has been very effective in the war on terror. But there are certain circumstances where the requirements of FISA present challenges, and if we wait, we may lose valuable information that may help us, it may help us get information that might prevent another attack.

Senator GRASSLEY. I had an opportunity to speak to you on the phone recently, and I asked you to come ready to give us some specific instances of when past Presidents have ordered warrantless intelligence surveillance in the prosecution of a war or to otherwise fulfill the Commander in Chief's duties. I think that as the American public hears examples of how Democrat Presidents and Republican Presidents alike have done similar things, they may begin to see that this program, in a different light, particularly in regard to the Presidents' over 225 years use of the exercise of the power of Commander in Chief.

Attorney General GONZALES. I gave in my opening statement, Senator, examples where President Washington, President Lincoln, President Wilson, President Roosevelt, have all authorized electronic surveillance of the enemy on a far broader scale, without any kind of probable cause standard, all communications in and out of the country. So, for example, President Wilson, World War I, he relied upon his constitutional authority, inherent constitutional authority, and a use of force resolution, declaration of war, very consistent with what we are dealing with today.

Senator GRASSLEY. And December the 8th, '41, the day after Pearl Harbor, FDR ordered the FBI to intercept any communications between our country and any other country, whether it be by mail or any other source.

Attorney General GONZALES. President Roosevelt did authorize very broad surveillance of the enemy.

Senator GRASSLEY. It is well established that the President has a number of inherent constitutional powers. Today's hearing and the two that will follow will give the Senate an opportunity to analyze the President's case on constitutionality. When Moussaoui was arrested, the FBI could not look at his computer files and telephone contacts. That has been changed so you can have that sort of communication now. Could you tell us in the Department of Justice white paper entitled Legal Authority Supporting the Activities of a President doing this, the administration argued that "The President's power to authorize the NSA activities is at its zenith," citing Justice Jackson's concurrence in the *Sawyer* case. I guess you would call it the *Youngstown* case.

Would you, please, discuss the framework set by Justice Jackson for determining how much deference a President should be given, including why the administration believes that its power in this regard is at its zenith?

Attorney General GONZALES. Yes, sir. I will try to in the time remaining. Justice Jackson—

Senator GRASSLEY. All I have to do is finish my question before the time is up.

Attorney General GONZALES. Pardon me, Senator. Justice Jackson laid out a three-part test in terms of determining Presidential power. The first part is where the President is exercising his authority with the concurrence in essence of Congress. We believe that is what is occurring here. We believe the authorization to use military force is such a concurrence by Congress for the President to engage in this kind of activity, and therefore, we believe the President's power is at its zenith in this first category.

The second category is where the President is exercising his constitutional authority in the absence of any congressional action. And there Justice Jackson talked about being sort in the zone of twilight and trying to ascertain where the limits are between Presidential authority and congressional authority. That is not the case here.

The third part was where the President is acting in contravention—not in contravention, but in a way that is incompatible with congressional action. In that particular case, you looked at the President's constitutional authority minus whatever constitutional authority Congress has.

So the question is in which category we are in. We believe we are in the first category, that the Congress has, through the authorization to use military force, provided its support for Presidential action.

If in fact that is not the case, then we are in the third category, and I submit, Senator, that this case is very different from *Youngstown*, where we talked about the President of the United States taking over domestic industry. We are talking here about a core constitutional action by the President, and a long history of Presidents engaging in electronic surveillance of the enemy. So this is a much different situation.

My judgment is, while these are always very hard cases, and there is very little precedent in this matter, I believe that even under the third part, that the President does have the constitutional authority. I will just remind the Committee that Chairman Roberts just recently submitted a letter to the Committee, and he, himself, opined that he also believes that if we were in the third category, that he believes that the President does, would have the constitutional authority to engage in these kinds of activities.

Chairman SPECTER. Thank you, Senator Grassley.

Without objection we will admit into the record the letter from Senator Pat Roberts, Chairman of the Intelligence Committee, to Senator Leahy and to myself, dated February 3rd of this year.

Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman. I hope Chairman Roberts will see it is his responsibility to also hold extensive hearings in a forum that is more appropriate, totally secret. Thus far, I am told, he intends on not holding any, which I find bordering on lacking any responsibility in terms of congressional oversight, but I hope he will do as you have done here.

General, there are two real issues here in my view, and I am going to focus on one. That is the President's reassurance as to what is exactly happening, where if in fact the only people being wiretapped or e-mails read are al Qaeda operatives contacting American citizens, I do not think you are going to find anybody in America saying, "Oh, my God, don't do that."

What is really at stake here is the administration has made assertions in the past, where their credibility has somewhat been questioned. So it is not merely the constitutional reach you have, it is what is actually happening, what is actually going on. I am going to focus on that first, if I may.

How will we know, General, when this war is over?

Attorney General GONZALES. I presume the straightforward answer, Senator, is that when al Qaeda is destroyed and no longer poses a threat to the United States. Whenever that may be—we know it is not today. We know we are still at war today. We know we will probably be at war still tomorrow, and so we know it still continues today.

Senator BIDEN. The truth is there is no definition of when we are going to know whether we have won, because al Qaeda, as the President points out, has mutated into many other organizations that are not directly dealing with bin Laden and are free agents themselves; is that correct?

Attorney General GONZALES. It is certainly true that there are a number of terrorist groups who share many of the same objectives of al Qaeda in terms of destroying America.

Senator BIDEN. So as long as any of them are there, I assume you would assert you have this plenary authority?

Attorney General GONZALES. Well, Senator, obviously, if Congress were to take some kind of action to say the President no longer has the authority to engage in electronic surveillance of the enemy, then I think that would put us into the third part of Justice Jackson's three-part test, and that would present a much harder question as to whether or not the President has the authority. As I have already indicated in response to Senator Grassley, I believe that under those circumstances—and again, it is a hard question, and it may have been irresponsible for me to offer up an opinion because I would like to have to study it. I would like the opportunity to study it. But I think the fact would present a much different case than what we had in *Youngstown v. Sawyer*.

Senator BIDEN. Why if you—and I have read everything you have submitted, and I was here when FISA was written. I was a cosponsor. I was on the Intelligence Committee and on the Foreign Relations Committee, and as the Ranking Member of the Foreign Relations Committee, I was charged by the Democratic leadership to be part of the small group to write the authorization for the use of force, so I have been involved in this. Does not mean I am right, but I have been deeply involved.

As I understand your reasoning, I do not understand why you would limit your eavesdropping only to foreign conversations. In other words, al Qaeda communicating from Algeria—I am making it up—or from France or Germany or wherever, to the United States. That is the assertion, it is only emanating from a foreign country, correct?

Attorney General GONZALES. Yes, sir.

Senator BIDEN. Why limit it to that?

Attorney General GONZALES. The authorization of the program I am talking about—well, of course, that is a Presidential decision, and I believe, Senator—now I am purporting to speak for the President, but I believe it is because of trying to balance concerns that might arise that in fact the NSA was engaged in electronic surveillance with respect to domestic calls. So there was a decision made that this is the appropriate balance. There may be some in America, I suspect there are some in America who are saying, “Well, you know, if you’ve got reason to believe that you’ve got two members

of al Qaeda talking to each other in America, my God, why aren't you listening to their conversations?"

Again, this was a judgment made that this was the right balance between the security of our country and protecting the privacy interests of Americans.

Senator BIDEN. Well, the President said he would do everything under the law to prevent another 9/11. The communications that occurred within this country, not outside this country, which, in fact, brought about 9/11 would not be captured by the President's efforts here. Is he refusing to do it for public relations reasons, for appearance reasons, or because he thinks he does not have the constitutional authority to do it?

Attorney General GONZALES. I don't believe that it is a question of constitutional authority. That analysis, quite frankly, had not been conducted. It is not a question of public relations. In his judgment, it was the appropriate thing to do given the circumstances that we find ourselves in.

Senator BIDEN. Who determines what calls or e-mails are to be monitored?

Attorney General GONZALES. The decisions as to which communications are to be surveilled are made by intelligence experts out at NSA. As I indicated, I believe, in response to an earlier question, these are individuals who are expert in al Qaeda's aims, objectives, communications. I have heard General Hayden say that they are the best at what they do. They know about al Qaeda, and they would probably be in the best position, better than certainly any lawyer, in evaluating whether or not there are reasonable grounds to believe that this person is an agent or member of al Qaeda or an affiliated terrorist organization.

Senator BIDEN. How many of them are there?

Attorney General GONZALES. Senator, I do not know.

Senator BIDEN. There are thousands of people who work for NSA. It would be useful for us to know. Are there two people? Five people? Twenty-five people? Two hundred and fifty people? A thousand people?

Attorney General GONZALES. Senator, I don't know the exact number of people out at NSA who are working on this program. As I indicated to you, the people that are making the decision about where the surveillance should occur are people that are experts with respect to al Qaeda.

Senator BIDEN. Well, what are the guidelines? Are there any written guidelines they are bound by?

Attorney General GONZALES. Senator, there are guidelines. There are minimization procedures. As you know, there are minimization procedures for the work of NSA with respect to its collection activities under FISA, with respect to its collection activities under 12333, Executive Order 12333. There are minimization requirements that are generally comparable with respect to this program.

I understand there is also a monthly sort of senior directors' meeting, due diligence meeting out at NSA, where they talk about how the program is going. They evaluate how the program is going, try to identify if there are any problems. And so they spend a great deal of time making sure the program is being authorized in a way that is consistent with the President's authorization.

Senator BIDEN. By definition, you have acknowledged, though, the very minimization programs that exist under FISA you are not bound by. You have acknowledged that you are not bound by FISA under this program; therefore, are you telling me the minimization programs that exist under FISA as the way FISA is applied are adhered to?

Attorney General GONZALES. OK. I am sorry if I was confusing in my response. What I was meaning to say is that there are minimization requirements. Those minimization requirements are basically consistent with the minimization requirements that exist with respect to FISA if FISA were to apply.

Senator BIDEN. Would it be in any way compromise the program if you made available to the Intelligence Committee what those minimization procedures that are being followed are?

Attorney General GONZALES. Well, of course, the minimization procedures themselves under 12333, and I believe perhaps under the FISA Court, are classified. I also believe they probably have been shared with the Intel Committee.

Senator BIDEN. They have not, to the best of my knowledge. They have not been shared with the Intelligence Committee, to the best of my knowledge, unless you are talking about this very small group, the Chairman and the Ranking Member.

Attorney General GONZALES. Senator, I am talking about the minimization procedures for 12333 and for FISA.

Senator BIDEN. Let me be very precise. I have not heard of NSA saying to the Intelligence Committee, "We are binding ourselves as we engage in this activity under the minimization procedures of 12333 as well as statutes." I am unaware that that is written down or stated anywhere or been presented to the Intelligence Committee. Can you assure us that has been done?

Attorney General GONZALES. No, Senator, I can't assure you that.

Senator BIDEN. Can you assure us, General, that you are fully, totally informed and confident that you know the absolute detail with which this program is being conducted? Can you assure us, you personally, that no one is being eavesdropped upon in the United States other than someone who has a communication that is emanating from foreign soil by a suspected terrorist, al Qaeda, or otherwise?

Attorney General GONZALES. Senator, I can't give you absolute assurance—

Senator BIDEN. Who can?

Attorney General GONZALES [continuing]. The kind that you have asked for. Certainly General Hayden knows more about the operational details of this program. What I can give the American people assurance of is that we have a number of safeguards in place so that we can say with a high degree of confidence or certainty that what the President has authorized in connection with this program, that those procedures are being followed.

Senator BIDEN. Mr. Chairman, my time is up. This is why the Intelligence Committee has a responsibility to be able to look at someone and have an absolute, guaranteed assurance that under no circumstance is any American being eavesdropped upon unless it is coming from foreign soil and a suspected terrorist, and do it under oath and do it under penalty of law if they have misrepre-

sented. I am not suggesting the Attorney General can do that. We have got to find out who can do that.

Chairman SPECTER. Thank you, Senator Biden.

Senator Leahy?

Senator LEAHY. Mr. Chairman, just for Senator Biden's round, you put into the record the letter from Senator Roberts that was sent to the two of us concerning the authority. I want to place in the record a letter from Bruce Fein, formerly a senior Justice Department official in the Reagan administration, basically responding to Senator Roberts's letter. I mentioned earlier that Mr. Fein was very critical of this program. In fact, at that point, why don't I just put in—I have a number of things here, if I could.

Chairman SPECTER. Without objection, the letter from Mr. Bruce Fein will be made part of the record. And do you have other unanimous consent requests?

Senator LEAHY. For other material regarding this hearing, if I might put them all in the record.

Chairman SPECTER. Without objection, those materials will be made a part of the record.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. Thank you, Mr. Attorney General.

I think it is very interesting how the argument over this program has evolved in the last several weeks from initial concerns about the program itself now to some very different questions. And I think it is a good evolution because I doubt, if we polled the members of this Committee today, that there would be anybody who would vote against the conduct of this particular kind of surveillance.

There was then the suggestion that while the program is good, it is being conducted illegally. That was the charge, and I would submit a very serious charge, that the Ranking Member made earlier in his remarks.

It seems to me that a little humility is called for by the members of this Committee, especially before we accuse the President of committing a crime, which is what illegal activity is. If our hearings with now-Justices Alito and Roberts demonstrated anything, I think it is that there are a lot of smart lawyers in Washington, D.C., other than those who are sitting here on this Committee.

And in that regard, I appreciate the last couple of rounds of questions that were asked by Senators Kennedy, Biden, and Grassley because they got more into specifics about how we might have better oversight.

Before I get into that, let me just ask four specific questions that I think you can answer very, very briefly. I am reminded, by the way—I told one of my staff the very first time I saw a murder trial before I went to law school, I was absolutely persuaded after the prosecution's summation that this guy was guilty as could be. Then after his lawyers argued, I was absolutely certain that he was innocent. And by the time the prosecutor finished, I was once again convinced that maybe he was guilty—the bottom line being that with tough legal questions, good lawyers take both sides and there are two sides to every question and you should not prejudge. And that is what I think happened with regard to this program. Before

you and others in the administration explained the legal rationale for it, there were people jumping to conclusions about its illegality.

Now, I think you made four key points, and I just want to make sure that we have got them right.

Your first key point was that Article II of the U.S. Constitution has always been interpreted as allowing the President to do what is necessary to conduct war, and that includes surveillance of the enemy. Is that right?

Attorney General GONZALES. Yes, Senator.

Senator KYL. Second, that when Congress passed the authorization of military force on September 18, 2001, we actually did two things in that resolution. First of all, we affirmed the President's constitutional authority that I just spoke of.

Attorney General GONZALES. Yes.

Senator KYL. And, second, we granted authority that included the words "all necessary and appropriate force."

Attorney General GONZALES. Yes.

Senator KYL. And your point has been that that activity has always included surveillance of the enemy and, in fact, that the FISA Court itself has said that—has commented on that inherent authority in a situation in which it involved the detention of an American citizen who was involved in terrorist activity.

Attorney General GONZALES. That would be the Supreme Court, Senator, not the FISA Court.

Senator KYL. The Supreme Court. I am sorry.

Attorney General GONZALES. Yes, Senator.

Senator KYL. And that also, your second point is, the statutory authorization is contemplated in the FISA language except as authorized by statute.

Attorney General GONZALES. That is correct. We are acting in a way that the President has authorized activities that are consistent with what FISA anticipated.

Senator KYL. Right. The third point is you talked a little bit about FISA and noted that in your view—and it is difficult to further discuss the point because you cannot discuss the detail of the program itself, but that the 1978 FISA law is really not well suited to the particular kind of program that is being conducted here, including the 72-hour provision of FISA. Is that correct?

Attorney General GONZALES. That is correct, Senator, but I don't want these hearings to conclude today with the notion that FISA has not been effective. And, again, I think a lot of the safeguards, some of the procedures in FISA make a lot of sense. When you are talking about a peacetime situation, particularly domestic surveillance—FISA also covers that kind of activity. And so when you are talking about amending FISA because FISA is broke, well, the procedures in FISA under certain circumstances I think seem quite reasonable.

Senator KYL. And you continue to use FISA not only—well, you continue to use FISA including in regard to the war on terrorism.

Attorney General GONZALES. Absolutely.

Senator KYL. The fourth key point that you argued about the checks and balances in the program, the fact that it has to be reauthorized every 45 days by the President himself, that there has been extensive congressional briefing of the Democrat and Repub-

lican leaders and Chairmen and Ranking Members, respectively, of the Intelligence Committees, and that there is extensive IG review. Is that correct?

Attorney General GONZALES. That is correct.

Senator KYL. And the Inspector General is what Inspector General?

Attorney General GONZALES. This is the Inspector General for the NSA.

Senator KYL. OK. In addition, you noted the two qualifications of the program: international communications involving al Qaeda or affiliated individuals.

Attorney General GONZALES. That is correct, Senator.

Senator KYL. And, finally, you noted that this was as interpreted by the NSA professionals.

Now, I thought there were two particularly interesting lines of inquiry, and one was Senator Biden's question about whether or not, if this program is really necessary, we shouldn't try to evaluate whether it should also be applied to calls from al Qaeda terrorist A to al Qaeda B, though they happen to be in the United States. And it was my understanding you said that the analysis of that had not been conducted. Is that correct?

Attorney General GONZALES. The legal analysis as to whether or not that kind of surveillance—we haven't done that kind of analysis because, of course, the President—that is not what the President has authorized.

Senator KYL. I understand that, but I would suggest that that analysis should be undertaken because I think most Americans now appreciate that this is a very important program. It might warn us of an impending attack. It could be that the attackers are already in United States, and, therefore, it could involve communication within the United States. Understanding the need to balance the potential intrusion on privacy of American citizens within the United States, you would want to have a very careful constitutional analysis, and certainly the President would not want to authorize such an activity unless he felt that he was on very sound legal ground.

On the other hand, there is no less reason to do it than there is to intercept international communications with respect to a potential terrorist warning or attack. So I would submit that Senator Biden is correct and that this—at least the inference was in his question that this study should be accomplished, and I would think that it should.

I also think that both he and Senator Grassley and Senator Kennedy to some extent talked about, well, what happens if we are wrong here? How can we be assured that there is no improper surveillance? And in this regard, I would ask you to think about it, and if you care to comment right now, fine. But this might hit you cold.

It seems to me that you might consider either in the Presidential directive and the execution of that or even potentially in congressional legislative authorization some kind of after-action report, some kind of quarterly review or some other appropriate timeframe, maybe every 45 days, whatever is appropriate, to the eight people who are currently briefed in the Congress on questions such

as whether the program acted as it was intended, whether it appeared that somebody might have been surveilled who under the guidelines should not have been, and if there ever were such a case, how it happened and what is done to ensure that it does not happen again, and whether there was any damage as a result of that; and also just generally whether the program is having the intended result of being able to demonstrate important information to the people that we charge with that responsibility.

It seems to me that reporting on that kind of activity, including information about the guidelines to provide some additional assurance that it is being conducted properly, would be appropriately briefed to the Members of Congress. We do have an oversight responsibility, but we are not the only governmental entity with responsibility here. The President has critical responsibility, and I agree with those who say that should there be an attack and a review of all of this activity is conducted, the President would be roundly criticized if he had a tool like this at his disposal and did not utilize it to protect the people of the United States of America.

Attorney General GONZALES. Senator, I have not been present at all the briefings with Members of Congress, but in connection with those briefings where I was present, there was discussion about requiring some of the types of issues that you have just outlined. I would be happy to take back your comments.

Senator KYL. Thank you, Mr. Attorney General.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, the administration and the Congress and the courts share a common goal: to protect the American people. We all believe that as we face the long-term threat from terrorism, we must work together to ensure that the American people are safe. We in Congress have our role to play by writing the laws that protect Americans, and you have your role executing those laws, and, of course, the courts have their role.

As part of this effort against terrorism, we have drafted many laws to give the administration the powers that it needs, and I am hopeful that we can work together again to ensure that our laws are working to protect the American people.

Mr. Attorney General, if terrorists are operating in this country or people in this country are communicating with terrorists, then, of course, we must collect whatever information we can. To accomplish this, the administration had three options, as you know. First, you could have followed the current law, which most experts believe gives you all the authority you need to listen to these calls. Second, if you thought the law inadequate, you could have asked Congress to grant you additional authority. Or, third, the course you followed, conduct warrantless spying outside current law and without new authorization.

If you had the two options that would have given you unquestionable authority to monitor these calls and one whose legality was at best questionable, then why did you go for the most questionable one? Why not either follow the law or seek new laws?

Attorney General GONZALES. Senator, I agree with you, we are a Nation of laws, and we do believe we are following the law. And

we do believe that the Constitution allows the President of the United States to engage in this kind of surveillance. We also believe that the authorization to use military force represents a supplemental grant of authority by the Congress to engage in this kind of surveillance totally consistent with FISA.

If you study carefully the white paper that we have submitted, we are not arguing that somehow FISA was amended or that we are somehow overriding FISA. That is not what we are talking about here. We are acting in a manner consistent with FISA. FISA contemplates another statute. The Congress passed another—provided an additional supplemental statutory grant of authority through the authorization to use military force. And so I totally agree with what you are saying. We should be acting—particularly in a time of war, I think it is good to have the branches of Government working together. It is good for the country. I believe that is what happened here. Congress exercised its Article I authorities to pass the authorization to use military force. That supplemented the President's constitutional authorities as Commander in Chief, and we are working together—

Senator KOHL. Are you saying that there was never any debate within the administration at any level or Justice Department at any level about whether or not you were pursuing the right course?

Attorney General GONZALES. Senator—

Senator KOHL. It is my understanding that there was debate.

Attorney General GONZALES. Of course, there was a great deal of debate. Think about the issues that are implicated—

Senator KOHL. Well, but if there were debate—

Attorney General GONZALES. Of course, there was debate, Senator. Think about—if I may just finish this thought. Think about the issues that are implicated here. The very complicated Foreign Intelligence Surveillance Act, it is extremely complicated; the President's inherent authority under the Constitution as Commander in Chief; the Fourth Amendment; the interpretation of the authorization to use military force. You have got a program that has existed over 4 years. You have multiple lawyers looking at the legal analysis. Of course, there is—I mean, this is what lawyers do. We disagree, we debate, we argue.

At the end of the day, this position represents the position of the executive branch on behalf of the President of the United States.

Senator KOHL. Well, with all of the debate we are going through today and leading up to today, it seems to me clear that there is a real question about the course you pursued. That is why we are here today, which it would seem to me justify asking the question, Why did you take the third option? And, of course, you have given your answer. But there are some of us that would question that answer. Let's just move on.

Attorney General GONZALES. Yes, Senator.

Senator KOHL. Mr. Attorney General, if applying to the secret FISA Court is too burdensome, then would you agree to after-the-fact review by the FISA Court and by Congress of the wiretaps used specifically in this program? At least in this way we can ensure going forward that the authority will never be abused by this or any other President?

Attorney General GONZALES. Senator, obviously, we want to ensure that there are no abuses. The President has said we are happy to listen to your ideas about legislation. There is concern, however, that, of course, the legislative process may result—first of all, of course, we believe the President already has the authority and legislation is not necessary here. But the legislative process may result in restrictions upon the President’s—attempted restrictions upon the President’s inherent constitutional authority. He may not be able to protect the country in the way that he believes he has the authority to do under the Constitution. And then, finally, of course, the legislative process is one where it is pretty difficult to keep certain information confidential, again, because if you are talking about amending FISA, there are many aspects of FISA that make sense to me, they work well. Again, you are talking about—if you are talking about domestic surveillance during peacetime, I think having the kind of restrictions that are in FISA makes all the sense in the world. And so you are probably talking about a very narrowly tailored, focused amendment in FISA. And, again, I am not the expert on legislation, but we are talking potentially a very narrow-focused amendment of FISA. And I think I am concerned that that process will inform our enemies about what we are doing and how we are doing it.

Subject to those concerns, of course, as the President said, we are happy to listen to your ideas.

Senator KOHL. After-the-fact review by the FISA Court, you don’t have any problem with that?

Attorney General GONZALES. Again, Senator, we are happy to listen to what you—happy to consider it.

Senator KOHL. All right. Mr. Attorney General, is there anything the President cannot do in a time of war in the name of protecting our country? We saw that the Justice Department changed its position on torture, but are there other limits to the President’s power? Or can, in your opinion, the President assign to himself without an Act of Congress any powers that he believes are necessary?

Attorney General GONZALES. Well, of course, we are not talking about acting outside of an Act of Congress here. We think in this case the President has acted consistent with an Act of Congress. And, of course, there are limits upon the President of the United States. The Constitution serves as a limit of the President. The President’s authorities under Article II as Commander in Chief are not limitless. Obviously, Congress has a role to play in a time of war. The Constitution says Congress can declare war. The Constitution says it is Congress’s job to raise and support armies. The Constitution says it is Congress’s job to provide and maintain navies. It is the role of Congress to provide rules regarding capture.

And so in the arena of war, it is not true that the President inhibits—or works in that arena to the exclusion of Congress. Quite the contrary, the Framers intended that in a time of war, both branches of Government have a role to play.

Senator KOHL. If the administration investigates an American for ties to terrorism using this program and finds nothing—and, of course, news reports have indicated that this happens the vast majority of the time—then what is done with the information col-

lected? Does the administration keep this information on file somewhere? Is it disposed of? What happens with this information?

Attorney General GONZALES. Well, let me tell you that every morning I receive an intelligence briefing out at the FBI, and there are numbers of possible threats against the United States. Many of them wash out, thank God. The fact that they wash out does not mean that we should stop our intelligence collection. Intelligence is not perfect.

In terms of what is actually done with that information, what I can say is, again, I cannot talk about specifics about it, but information is collected, information is retained, and information is disseminated in a way to protect the privacy interests of all Americans.

Senator KOHL. So you are saying the information, even if it turns out to be without any correctness, the information is retained?

Attorney General GONZALES. Senator, I cannot provide any more of an answer than the one I just gave. In terms of there are minimization requirements that exist, and we understand that we have an obligation to try to minimize intrusion into the privacy interests of Americans, and we endeavor to do that.

Senator KOHL. Just to go back to what Senator Biden and then Senator Kyl referred to about al Qaeda-to-al Qaeda within the country, you are saying we do not get involved in those cases. Now, it would—

Attorney General GONZALES. Not under the program on which I am testifying, that is right.

Senator KOHL. It seems to me that you need to tell us a little bit more because to those of us who are listening, that is incomprehensible that you would go al Qaeda-to-al Qaeda outside the country, domestic-outside the country, but you would not intrude into al Qaeda-to-al Qaeda within the country. You are very smart. So are we. And to those of us who are interacting here today, there is something that unfathomable about that remark.

Attorney General GONZALES. Well, Senator, we certainly endeavor to try to get that information in other ways if we can. But that is not what the President—

Senator KOHL. No, but isn't it—you know, we need to have some logic, some sense, some clarity to this discussion this morning.

Attorney General GONZALES. Senator, think about the reaction, the public reaction that has arisen in some quarters about this program. If the President had authorized domestic surveillance as well, even though we were talking about al Qaeda-to-al Qaeda, I think the reaction would have been twice as great. And so there was a judgment made that this was the appropriate line to draw in ensuring the security of our country and the protection of the privacy interests of Americans.

Senator KOHL. I appreciate that. And before I turn it back, yet the President has said, you know, with great justification, he is going to protect the American people regardless, and if there is some criticism, he will take the criticism. And yet you are saying al Qaeda-to-al Qaeda within the country is beyond the bounds?

Attorney General GONZALES. Senator, it is beyond the bounds of the program which I am testifying about today.

Senator KOHL. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl—

[Audience disruption.]

Chairman SPECTER. If you do not sit down immediately, you will be removed from the chamber. Senator DeWine? Senator DeWine, that is your introduction.

Senator DEWINE. Thank you, Mr. Chairman.

Senator SESSIONS. Mr. Chairman, I would like to state for the record that you are not a fascist.

Chairman SPECTER. Thank you for that reassurance, Senator Sessions.

[Laughter.]

Chairman SPECTER. Senator DeWine?

Senator DEWINE. Mr. Chairman, this issue has been raised several times by several members. My understanding is Senator Roberts, Chairman of the Intelligence Committee, has announced that there will be a closed hearing on February 9th with Attorney General Gonzales as well as General Hayden to cover this issue.

Mr. Attorney General, thank you very much for being with us today. We have had a lot of discussion and I know we are going to continue to have discussion about this very serious constitutional issue, constitutional law issue. Let me tell you, though, what I know and what I truly believe. I truly believe that the American people expect the President of the United States in a time of national emergency and peril to take actions to protect them, even if those actions are not specifically authorized by statute. I think they expect no less. They would want the President to do no less than that.

Second, though, it is clear that there are serious legal and constitutional questions concerning whether the Fourth Amendment “reasonableness” requirement for searches requires the President, after a period of time, after a program has been in place for a period of time, to come to the Congress for statutory authorization to continue such actions. Legal scholars, Mr. Attorney General, can and certainly are debating this issue. But what is not debatable is that both from a constitutional as well as from a policy point of view, the President and the American people would be stronger, this country would be stronger and the President would be stronger if he did so, if he did come to the Congress for such specific statutory authorization.

There was a reason that President George H.W. Bush and President George W. Bush both came to Congress prior to the respective wars in Iraq, even though some people argued and would still argue today that such resolutions were legally and constitutionally unnecessary. Presidents are always stronger in the conduct of foreign affairs when Congress is on board.

Statutory authorization and congressional oversight for this program would avoid what may be a very divisive, hurtful debate here in Congress. I truly believe it is in our national interest to resolve this matter as quickly as possible.

Mr. Attorney General, we need meaningful oversight by the Intelligence Committee, followed then by whatever statutory changes in the law might be appropriate.

Let me ask you, to follow on that statement, a question. What if Congress passed a law which just excluded FISA from any electronic surveillance of international communications where one party to the communications is a member of or affiliated with al Qaeda or a related terrorist group? And, further, if we went on and provided that there would be the normal oversight by both the House and the Senate Intelligence Committee, periodically that the administration would report to the Intelligence Committees on the progress of that program? We obviously have the ability within the Committee to keep such things classified. We do it all the time. What would be your reaction to that? Is that something that would be possible from your point of view?

Attorney General GONZALES. Well, I will repeat what the President has said, and that is, to the extent that Congress wants to suggest legislation, obviously we will listen to your ideas. I have already in response to an earlier question talked about some of the concerns that we have. Obviously, generally most concerns can be addressed in one way or the other, and if they could legitimately be addressed, then obviously we would listen to your questions—I mean, we would listen and consider your ideas.

Senator DEWINE. I appreciate that. You know, I understand your legal position. You have made it very clear today, I think articulated it very well. The administration has articulated it. Obviously, there are others who don't agree with your position. This is going to be a debate we are going to continue to have. It just seems to me that some 4 years into this program, this debate could be put aside if—we ought to be able to find some way to be able to protect the American people, but take care of what legal issues that some might find to be there. And I would look forward, frankly, to working with you on that.

Let me move, if I could, to what to me has been a troubling question about FISA, really unrelated to this program. And you and I have talked about this before. You have talked today about how FISA is being used. Frankly, it is being used more than it has been used in the past.

Attorney General GONZALES. The use of FISA is up 18 percent from 2004 to 2005.

Senator DEWINE. Let me talk about something, though, that troubles me, and I have been talking and asking about this problem since 2004. Let me give you a quote from 2004. Director Mueller of the FBI said, and I quote, "We still have some concerns, and we are addressing it with the Department of Justice. But there is still frustration out there in the field in certain areas where, because we have had to prioritize, we cannot get to certain requests for FISA as fast as perhaps we might have in the past."

My understanding, Mr. Attorney General, from recent information that I have, current information, is that there is still a backlog, that there are still what I would call mechanical problems, both in the FISA Court and at Justice. Could you just briefly address that? Because every time I see you, I am going to go back at this because—I am not saying it is your fault, but I just think it is something that working together we need to resolve. And this is something, I think, that Congress has to play a part in. If you don't have the money, if you don't have the resources, we cannot

tolerate a backlog in FISA applications if it can be fixed mechanically.

Attorney General GONZALES. I appreciate the opportunity to respond to that question, Senator.

I will say that the staff, our staff at the Department of Justice—these are the experts in the FISA process—has in essence tripled since 2002. I think we all realized following the attacks on 9/11 that we needed to get more folks on board to help us with the FISA applications.

It still takes too long, in my judgment, to get FISAs approved. I described in my opening statement the process that is involved here. FISA applications are often an inch thick, and it requires a sign-off by analysts out at NSA, lawyers at NSA, lawyers at the Department, and finally me. And then it has got to be approved by the FISA Court.

I have got to tell you—I was going to try to make this point in response to a question from the Chairman—the members of the FISA Court are heroes, as far as I am concerned. They are available day or night. They are working on weekends and holidays because they want to make themselves available. They are killing themselves, quite frankly, making themselves available to be there, to sign off on a FISA application if it meets the requirements of the statute. But we still have some problems.

It is true that because of the procedures that are in FISA, it inherently is going to result in some kind of delay. And for that reason, the President made the determination that for certain very narrow circumstances, he is going to authorize the terrorist surveillance program.

But we continue to work at it, and I know you are very interested in this, and I continue to—and I look forward to continuing to have discussions with you about it.

Senator DEWINE. Well, I appreciate that, Mr. Attorney General. It is something that continues to trouble me. Putting aside the issue that we are here about today, FISA is a matter of national security, and I am still hearing things that, frankly, disturb me. And it is just a question of whether this can be sped up. Some things are inherent, as you say, but I get the impression that part of the problem is not inherent and I think could be fixed.

Attorney General GONZALES. Well, one of the things that hopefully will happen soon is the creation of a new national security division. As you know, the PATRIOT Act has a provision in it which creates a new Assistant Attorney General for the national security division. We believe that division will assist in the streamlining of the FISA process.

Senator DEWINE. Thank you, Mr. Attorney General.

Attorney General GONZALES. Senator? Mr. Chairman?

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein?

Attorney General GONZALES. Mr. Chairman?

Senator SESSIONS. Mr. Chairman, I think the Attorney General had a question.

Attorney General GONZALES. I am sorry. Could I make one point in response to Senator Kohl? I made this point, but I want to make sure that the Committee understands this in terms of domestic-to-

domestic al Qaeda communications. I said that we are using other authorities. To the extent we can engage in intercepting al Qaeda domestic-to-domestic calls, even under FISA, if we can do it, we are doing it. So I don't want the American people to believe that we are doing absolutely nothing about al Qaeda domestic-to-domestic calls. The President has made a determination this is where the line is going to be, and so we operate within those boundaries. And so we take advantage of the tools that are out there. And FISA isn't always the most efficient way to deal with that, but if that is all we have, that is what we use.

So I guess I want to make sure the American people understand that we are not simply ignoring domestic-to-domestic communications of al Qaeda. We are going after it.

Chairman SPECTER. Thank you, Attorney General Gonzales, for that clarification.

Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

I would like to make clear that, for me at least, this hearing is not about whether our Nation should aggressively combat terrorism. I think we all agree on that. And it is not about whether we should use sophisticated electronic surveillance to learn about terrorists' plans, intentions and capabilities. We all agree on that. And it is not about whether we should use those techniques inside the United States to guard against attacks. We all agree on that.

But this administration is effectively saying—and the Attorney General has said it today—it does not have to follow the law. And this, Mr. Attorney General, I believe is a very slippery slope. It is fraught with consequences. The Intelligence Committees have not been briefed on the scope and nature of the program. They have not been able to explore what is a link or an affiliate to al Qaeda or what minimization procedures are in place. We know nothing about the program other than what we have read in the newspapers.

And so it comes with huge shock, as Senator Leahy said, that the President of the United States in Buffalo, New York, in 2004, would say, and I quote, "Any time you hear the U.S. Government talking about wiretap, it requires—a wiretap requires a court order. Nothing is changed, by the way. When we are talking about chasing down terrorists, we are talking about getting a court order before we do so."

Mr. Attorney General, in light of what you and the President have said in the past month, this statement appears to be false. Do you agree?

Attorney General GONZALES. No, I don't, Senator. In fact, I take great issue with your suggestion that somehow the President of the United States was not being totally forthcoming with the American people. I have his statement, and in the sentence immediately before what you are talking about, he said he was referring to roving wiretaps. And so I think anyone who—I think—

Senator FEINSTEIN. So you are saying that statement only relates to roving wiretaps. Is that correct?

Attorney General GONZALES. Senator, that speech was about—that discussion was about the PATRIOT Act, and right before he uttered those words that you are referring to, he said, "Secondly,

there are such things as roving wiretaps. Now, by the way, any time you hear the U.S. Government talking about wiretaps, it requires—a wiretap requires a court order.”

So, as you know, the President is not a lawyer, but this was a discussion about the PATRIOT Act. This was a discussion about roving wiretaps, and I think people are—some people are trying to take part of his statement out of context, and I think that is unfair.

Senator FEINSTEIN. OK, fair enough. Let me move along.

In October 2002, at a public hearing of the Senate-House joint inquiry into NSA activities, the then-NSA Director General Michael Hayden told me, “If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions.”

As I mentioned, the Intelligence Committee has not been notified.

Let me ask you this: If the President determined that a truthful answer to questions posed by the Congress to you, including the questions I ask here today, would hinder his ability to function as Commander in Chief, does the authorization for use of military force or his asserted plenary powers authorize you to provide false or misleading answers to such questions?

Attorney General GONZALES. Absolutely no, Senator. Of course not. Nothing—

Senator FEINSTEIN. Thank you. I just asked the question. A yes or no—

Attorney General GONZALES [continuing]. Would excuse false statements before the Congress.

Senator FEINSTEIN. All right. You have advanced what I think is a radical legal theory here today. The theory compels the conclusion that the President’s power to defend the Nation is unchecked by law, that he acts alone and according to his own discretion, and that the Congress’s role at best is advisory. You say that the Authorization for Use of Military Force allows the President to circumvent the Foreign Intelligence Surveillance Act, and that if the AUMF doesn’t, then the Constitution does.

Senator Daschle has testified that when he was Majority Leader, the administration came to him shortly before the AUMF came to the floor and asked that the words “inside the United States” be added to the authorization, and that he said, “Absolutely not,” and it was withdrawn.

The question I have is: How do you interpret congressional intent from the passage of the AUMF that it gave the administration the authority to order electronic surveillance of Americans in contravention to the FISA law?

Attorney General GONZALES. Senator, it is not in contravention of the FISA law. We believe the authorization to use military force is the kind of congressional action that the FISA law anticipated. It has never been our position that somehow the AUMF amended FISA. It has never been our position that somehow FISA has been overridden. Quite the contrary, we believe that the President’s authorizations are fully consistent with the provisions of FISA. In terms of—

Senator FEINSTEIN. Now, let me stop you just for a second. I have read the FISA law. There are only two escape hatches: one is 15

days after a declaration of war, and the second is the 72-hour provision, which was actually amended by us in the PATRIOT Act from a lower number to 72 hours. Those are the only two escape hatches in FISA.

What in FISA specifically then allows you to conduct electronic intelligence—excuse me, electronic surveillance within America on Americans?

Attorney General GONZALES. I believe that in Section 109 it talks about persons not engaging in electronic surveillance under color of law except as authorized by statute. I may not have it exactly right. We believe that that is the provision in the statute which allows us to rely upon the authorization of the use of military force.

Now, you may say, well, I disagree with that construction. That may be so. There may be other constructions that may be fairly possible. We believe this is a fairly possible reading of FISA, and as the Supreme Court has said, under the Canon of Constitutional Avoidance, if you have two possible constructions of a statute and one would result in raising a constitutional issue, if the other interpretation is one that is fairly possible, that is the interpretation that must be applied. And if you reject our interpretation of FISA, Senator, then you have a situation where you have got an Act of Congress in tension with the President's constitutional authority as Commander in Chief. And the Supreme Court has said when that happens, you go with another interpretation if it is a fair application, and that is what we have done here.

Senator FEINSTEIN. Could you check your citation? I just read 109, and I do not believe it says that. We will talk about that after lunch.

Attorney General GONZALES. Yes, ma'am.

Senator FEINSTEIN. Let me go on and tell you why it is a slippery slope. Senator Kennedy asked you about first-class mail, has it been opened, and you declined answering. Let me ask this way: Has any other secret order or directive been issued by the President or any other senior administration official which authorizes conduct which would otherwise be prohibited by law? Yes or no will do.

Attorney General GONZALES. Senator, the President has not authorized any conduct that I am aware of that is in contravention of law.

Senator FEINSTEIN. Has the President ever invoked this authority with respect to any activity other than NSA surveillance?

Attorney General GONZALES. Again, Senator, I am not sure how to answer that question. The President has exercised his authority to authorize this very targeted surveillance of international communications of the enemy. I am sorry. Your question is?

Senator FEINSTEIN. Has the President ever invoked this authority with respect to any activity other than the program we are discussing, the NSA surveillance—

Attorney General GONZALES. Senator, I am not comfortable going down the road of saying yes or no as to what the President has or has not authorized. I am here—

Senator FEINSTEIN. OK. That is fine. I just want to ask some others. If you don't want to answer them, don't answer them.

Attorney General GONZALES. Yes, ma'am.

Senator FEINSTEIN. Can the President suspend the application of the Posse Comitatus Act?

Attorney General GONZALES. Of course, Senator, that is not what is at issue here.

Senator FEINSTEIN. I understand that.

Attorney General GONZALES. This is not about law enforcement. This is about foreign intelligence.

Senator FEINSTEIN. I am asking questions. You choose not to answer it?

Attorney General GONZALES. Yes, ma'am.

Senator FEINSTEIN. OK. Can the President suspend, in secret or otherwise, the application of Section 503 of the National Security Act, which states that no covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media? In other words, can he engage in otherwise illegal propaganda?

Attorney General GONZALES. Senator, let me respond to—this will probably be my response to all your questions of these kinds of hypotheticals. The question as to whether or not Congress can pass a statute that is in tension with a President's constitutional authority, those are very, very difficult questions. And for me to answer those questions sort of off the cuff I think would not be responsible. I think that, again, we have got—

Senator FEINSTEIN. OK. That is fine. I don't want to argue with you. All I am trying to say is this is a slippery slope. Once you do one, there are a whole series of actions that can be taken, and I suspect the temptations to take them are very great. We are either a Nation that practices our rule of law or we are not.

Has any Supreme Court case since FISA held that the President can wiretap Americans once Congress has passed a law forbidding this without warrant?

Attorney General GONZALES. I think the only case that comes to mind that is really pertinent would be the 2002 case, *In re Sealed Case*, by the FISA Court of Review where, while the court did not decide this issue, the court acknowledged that every case that has considered this has found that the President has the inherent authority. And assuming that to be true, that court said that FISA could not encroach upon those authorities, those constitutional inherent authorities.

Senator FEINSTEIN. My time is up. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator SESSIONS?

Senator SESSIONS. Thank you.

Attorney General Gonzales, I believe you have faithfully fulfilled your responsibility to give your best honest answers to the questions so far. I think they have been very effective. If people have listened, I think they will feel much better about the program that the President has authorized and that you are explaining, because some of the news articles in particular gave the impression that there is widespread wiretapping of American citizens in domestic situations, and in every instance there is an international call. Most of us by plain language would understand "international" to be different from "domestic," and the President has limited this to

international calls in which one or more parties are connected to al Qaeda. Is that correct?

Attorney General GONZALES. Sir, the program that I am talking about today, yes, is limited to international calls.

Senator SESSIONS. And I am sorry that there are those who would suggest that in previous testimony you may have not been truthful with the Committee. I don't believe that is your reputation. I don't believe that is fair. I think you have a good answer to any of those charges. And I also think it is unfortunate that we are in a position where, when the President is talking about the PATRIOT Act, just like we talked about the PATRIOT Act throughout the debate on the PATRIOT Act, we insisted that it did not authorize non-warrant wiretaps or searches. That is what we said about the PATRIOT Act, because it did not. So don't you think it is unfair to mix classified international surveillance issues with the PATRIOT Act debate?

Attorney General GONZALES. Well, Senator, I don't know if it is my place to characterize whether it is fair or unfair. I do believe that there is a difference, certainly in practice, and a difference recognizing the course between domestic surveillance and international surveillance.

Senator SESSIONS. Well, I think it is important for us to remember the world is hearing this, and so we have people suggesting that the Attorney General of the United States and the President of the United States are deliberately lying. And it is not fair. It is not accurate. It is not true. So I think that is important.

With regard to the briefing of Congress, the eight members that have been designated to receive highly secret information were briefed on this program, were they not, Attorney General Gonzales?

Attorney General GONZALES. Sir, from the outset, the bipartisan leadership of the Intel Committees have been briefed in great detail about this, and there have also, in addition, been fewer briefings with respect to the bipartisan congressional leadership.

Senator SESSIONS. I would just note that, of course, there are eight that hold those positions, but since the beginning of the program, at least 15 individuals have been in and out of those positions, including Tom Daschle, Bob Graham, and Dick Gephardt, who are no longer in Congress, but were presumably part of that process and were aware of it and participated in passing the FISA Act and believed that it was correct to go forward. I don't think they were hot-boxed or forced into this. I believe they weighed these issues based on what they thought the national interest was and what the law was, and they made their decision not to object to this program. And there has been no formal objection by any of those members to this program, and I think it is unfair to suggest that the President has acted in secret without informing key Members of Congress about this highly classified program.

Attorney General GONZALES. Senator, of course, I cannot speak for the Members of Congress, but to my knowledge, no one has asserted the program should be stopped.

Senator SESSIONS. I thought about the Super Bowl. There was some reference to the intense security around that event, that police and Secret Service and every available Federal and, I guess, State agency that could be brought into that were intensely aware

that there could be an attack on the Super Bowl or any other major public event like that. But the Super Bowl would be a prime target, would you not agree, of the al Qaeda types?

Attorney General GONZALES. Clearly, we would have concerns that events like the Super Bowl would be ones that would be attractive to al Qaeda.

Senator SESSIONS. And intelligence is valuable to that. I mean, that is the key to it, and that is what we are trying to gather, and everybody understood after 9/11 that our failure was not in the capability to stop people; it was our capability to identify them. This program seems to me to be a step forward in our ability to identify them, and I believe, as you have explained it, it is consistent with our laws.

With regard to statutory construction and how we should construe it, people have made the point that it is a general principle that a specific statute might control over a general statute. But isn't it true that if a general statute clearly contemplates certain actions, and it cannot be effective without those actions, then it will overrule the more specific earlier statute?

Attorney General GONZALES. Depending on the circumstances, that would certainly be true, Senator. I might just also remind people when you are talking about general statutes versus specific statutes, this same argument was raised in connection with the *Hamdi* case. We had a specific statute that said no American citizen could be detained except as otherwise authorized by statute. And the Supreme Court said the authorization to use military force, even though it may have been characterized by some as a broad grant of authority, nonetheless, that was sufficient to override the prohibition in 4001(a).

Senator SESSIONS. I think that is absolutely critical. I believe the *Hamdi* case is a pivotal authority here. After FISA, after the authorization of force against al Qaeda, an American citizen was detained without trial, and the Supreme Court of the United States held that since it was part of a military action in wartime, that person could be held without trial as an incident to the authorization of force. Would you not agree that listening in on a conversation is less intrusive than putting an American citizen in jail?

Attorney General GONZALES. It would certainly seem to me that it would be less intrusive. Just for the record, the language that I keep referring to, "fundamental incident of waging war," was from Justice O'Connor. It is part of a plurality. And, of course, Justice Thomas in essence would have felt the President had the inherent authority under the Constitution to detain an American citizen.

So I just want to make sure that we are accurate in the way we describe the decisions by the court.

Senator SESSIONS. Well, you have been very careful about those things, and we appreciate that.

With regard to history, you made reference to history. Isn't it true—of course—that President Washington instructed his army to find ways to intercept letters from British operatives? President Lincoln ordered warrantless tapping of telegraph lines, telegraph communications during the Civil War to try to identify troop movements of the enemy?

Is it true that President Wilson authorized the military to intercept all telephone and telegraph traffic going into and out of the United States?

Attorney General GONZALES. That is correct.

Senator SESSIONS. And that President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States and that he gave the military the authority to access, without review, without warrant, all telecommunications “passing between the United States and any foreign country.”

Attorney General GONZALES. That is correct, sir.

Senator SESSIONS. What I would say to my colleagues and to the American people is, under FISA and other standards that we are using today, we have far more restraints on our military and the executive branch than history has demonstrated. We have absolutely not—we are not going hog wild restraining American liberties. In fact, the trend has been to provide more and more protections, and there can be a danger that we go too far in that and allow sleeper cells in this country to operate in a way that they are successful in killing American citizens that could have been intercepted and stopped.

Attorney General GONZALES. Of course, Senator, we are doing everything we can to ensure that that does not happen.

Senator SESSIONS. But when you do domestic—well, I will not go into that.

I want to ask you this question about President Clinton’s administration ordering several warrantless searches on the home and property of an alleged spy, Aldrich Ames. Actually, he was convicted. Isn’t that true? It also authorized a warrantless search of the Mississippi home of a suspected terrorist financier. And the Deputy Attorney General, Jamie Gorelick, the second in command of the Clinton Department of Justice, said this: “[T]he President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes,” and “the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.”

Are those comments relevant to the discussion we are having today?

Attorney General GONZALES. As I understand it, that was her testimony, and I think there was an acknowledgment of the President’s inherent constitutional authority.

Now, of course, some would rightly say that in response to that, FISA was changed to include physical searches, and so the question is—again, that tees up, I think, a difficult constitutional issue, whether or not—can the Congress constitutionally restrict the ability of the President of the United States to engage in surveillance of the enemy during a time of war? And, fortunately, I don’t think we need to answer that question. I think in this case the Congress has authorized the President to use all necessary and appropriate force, which would include electronic surveillance of the enemy.

Senator SESSIONS. But Deputy Attorney General Gorelick in the Clinton administration defended these searches. She asserted it was a constitutional power of the President, and this was in a period of peace, not even in war. Isn’t that correct?

Attorney General GONZALES. That is correct.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

We will now take a luncheon break, and we will resume at 1:45. [Whereupon, at 12:35 p.m., the Committee recessed, to reconvene at 1:45 p.m., this same day.]

AFTERNOON SESSION [1:45 P.M.]

Chairman SPECTER. It is 1:45. The Committee prides itself on being prompt, and we thank you, Mr. Attorney General, for being prompt in coming back.

I think the hearings have been very productive. We've had full attendance, or almost full attendance, and I think the other Senators who could not be here early have an excuse—it is unusual to have Monday morning session for the U.S. Senate. And we have done that because this Committee has been so busy. We have asbestos reform legislation, which Senator Leahy and I are cosponsoring, which is coming to the floor later today and we have had a full platter with the confirmation of Justice Alito. We wanted to have this hearing at an early date and this was the earliest we could do, given the intervening holidays after the program was announced back on December 16th.

We anticipated a full day of hearings and at least two rounds, and it is apparent to me at this point that we are not going to be able to finish today within a reasonable time. Senator Feingold is nodding in the affirmative. That is the first time I have got him to nod in the affirmative today, so you see we are making some progress. But I do believe there will be a full second round. We don't function too well into the evening. If we have to, we do, but it is difficult for the witness. I have conferred with the Attorney General, who has graciously consented to come back on a second day. So we will proceed through until about 5 o'clock this afternoon and then we will reschedule for another day. By that time, everybody will have had a first round, and it will give us the time to digest what we have heard. Then we will continue on a second day.

Senator Feingold, you are recognized.

Senator FEINGOLD. Good afternoon, Mr. Attorney General and Mr. Chairman.

Let me say, of course, we have a disagreement, Mr. Chairman, about whether this witness should have been sworn, and that is a serious disagreement. But let me nod in an affirmative way about your Pittsburgh Steelers, first of all.

[Laughter.]

Chairman SPECTER. Green Bay—

Senator FEINGOLD. Green Bay will be back.

Senator SPECTER. With Green Bay out of it, why not root for the Steelers, Senator Feingold?

Senator LEAHY. That is why we didn't have the hearing last night.

Senator FEINGOLD. Well, I understood that. I was curious about that.

Chairman SPECTER. Reset the clock at 10 minutes.

[Laughter.]

Chairman SPECTER. I was only kidding.

Senator FEINGOLD. Let me also say, Mr. Chairman, despite our disagreement about the swearing-in issue, that I praise you for your candor and your leadership on this issue and for holding this hearing and the other hearings you may be holding.

I also want to compliment some of my colleagues on the other side of the aisle for their candor on this issue already, publicly. People like Senator DeWine, Senator Graham, Senator Brownback. Maybe they don't want me to mention their names, but the fact is they have publicly disputed this fantasy version of the justification of this based on the Afghanistan Resolution. It is a fantasy version that no Senator, I think, can actually believe that we authorized this wiretapping.

So the fact is, this can and should be a bipartisan issue. I see real promise for this being a bipartisan issue, and it should be. But the problem here is that what the administration has said is that when it comes to national security, the problem is that the Democrats have a pre-9/11 view of the world.

Well, let me tell you what I think the problem is. The real problem is that the President seems to have a pre-1776 view of the world. That is the problem here. All of us are committed to defeating the terrorists who threaten our country, Mr. Attorney General. It is, without a doubt, our top priority. In fact I just want to read again what you said: "As the President has said, if you are talking with al Qaeda, we want to know what you're saying." Absolutely right. No one on this Committee, I think no one in this body believes anything other than that. I want to state it as firmly as I can.

But I believe that we can and must do that without violating the Constitution or jeopardizing the freedoms on which this country was founded. Our forefathers fought a revolution, a revolution to be free from rulers who put themselves above the law. And I have to say, Mr. Chairman, I think this administration has been violating the law and is misleading the American people to try to justify it.

This hearing is not just a hearing about future possible solutions. That is fine to be part of the answer and part of the hearing. This hearing, Mr. Chairman, is also an inquiry into possible wrongdoing.

Mr. Attorney General, there have already been a few mentions today of your testimony in January of 2005, your confirmation hearing. I am going to ask you a few quick, simple and factual questions, but I want to make it clear that I don't think this hearing is about our exchange or about me or what you said to me in particular. I am concerned about your testimony at that time because I do believe it was materially misleading. But I am even more concerned about the credibility of your administration, and I am even more concerned than that about the respect for the rule of law in this country. So that is the spirit of my questions.

Mr. Attorney General, you served as White House Counsel from January 2001 until you became Attorney General in 2005. On January 6, 2005, you had a confirmation hearing for the Attorney General position before this Committee. Mr. Attorney General, you testified under oath at that hearing, didn't you?

Attorney General GONZALES. Yes, sir.

Senator FEINGOLD. And, sir, I don't mean to belabor the point, but just so the record is clear, did you or anyone in the administration ask Chairman Specter or his staff that you not be put under oath today?

Attorney General GONZALES. Senator, I have already indicated for the record, the Chairman asked my views about being sworn in and I said I had no objection.

Senator FEINGOLD. But did anyone, you or anyone in the administration, ask the Chairman to not have you sworn?

Attorney General GONZALES. Sir, not to my knowledge.

Chairman SPECTER. The answer is no.

Senator FEINGOLD. That's fine.

At the time you testified in January of 2005, you were fully aware of the NSA program, were you not?

Attorney General GONZALES. Yes, sir.

Senator FEINGOLD. You were also fully aware at the time you testified that the Justice Department had issued a legal justification for the program. Isn't that right?

Attorney General GONZALES. Yes, there had been legal analysis performed by the Department of Justice.

Senator FEINGOLD. And you as White House Counsel agreed with that legal analysis, didn't you?

Attorney General GONZALES. I agreed with the legal analysis, yes.

Senator FEINGOLD. And you had signed off on the program, right?

Attorney General GONZALES. Yes. I do believe the President—I did believe at the time that the President has the authority to authorize this kind of—

Senator FEINGOLD. And you had signed off on that legal opinion. And yet, when I specifically asked you at the January 2005 hearing whether in your opinion the President can authorize warrantless surveillance notwithstanding the foreign intelligence statutes of this country, you didn't tell us yes. Why not?

Attorney General GONZALES. Sir, I believe your question, the hypothetical you posed—and I do consider it a hypothetical—which is whether or not had the President authorized activity, and specifically electronic surveillance, in violation of the laws—and I have tried to make clear today that in the legal analysis in the white paper, the position of the administration is, is that we—the President has authorized electronic surveillance in a manner that is totally consistent, not in violation, not—not overriding provisions of FISA, but totally consistent with FISA.

Senator FEINGOLD. Mr. Attorney General, certainly it was not a hypothetical, as we now know.

Attorney General GONZALES. Your—Senator, your question was whether or not the President had authorized certain conduct in violation of law. That was a hypothetical.

Senator FEINGOLD. My question was whether the President could have authorized this kind of wiretapping.

Attorney General GONZALES. In violation of the criminal statutes. And our position is and has been, is that no, this is not in violation of the criminal statutes. FISA cannot be—

Senator FEINGOLD. You said the question was merely hypothetical and that—Look, this is what you said: It's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes. And when you said that, you knew about this program. In fact, you just told me that you had approved it and you were aware of the legal analysis to justify it. You wanted this Committee and the American people to think that this kind of program was not going on. But it was. And you knew that. And I think that is unacceptable.

Attorney General GONZALES. Senator, your question was whether or not the President had authorized conduct in violation of law, and I—

Senator FEINGOLD. The question was whether the President—

Attorney General GONZALES [continuing]. And I have laid out—I have—

Senator FEINGOLD. Mr. Attorney General, my question was whether the President would have the power to do that.

Attorney General GONZALES. And Senator, the President has not authorized conduct in violation of our criminal statutes. We have laid out a 42-page analysis of our legal position here. The authorities the President has exercised are totally consistent with the criminal provision. The primary criminal provision in FISA is Section 109.

Senator FEINGOLD. I have heard all your arguments. But I want to get back to your testimony, which frankly, Mr. Attorney General, anybody that reads it basically realizes you were misleading this Committee. You could have answered the question truthfully. You could have told the Committee that, yes, in your opinion, the President has that authority. By simply saying the truth, that you believe the President has the power to wiretap Americans without a warrant, would not have exposed any classified information.

My question wasn't whether such illegal wiretapping was going on. Like almost everyone in Congress, I didn't know, of course, about the program then. It wasn't even about whether the administration believed that the President has this authority. It was a question about your view of the law—about your view of the law—during a confirmation on your nomination to be attorney general.

So of course if you had told the truth, maybe that would have jeopardized your nomination. You wanted to be confirmed. And so you let a misleading statement about one of the central issues of your confirmation, your view of Executive power, stay on the record until the New York Times revealed the program.

Attorney General GONZALES. Senator, I told the truth then, I am telling the truth now. You asked about a hypothetical situation of the President of the United States authorizing electronic surveillance in violation of our criminal statutes. That has not occurred.

Senator FEINGOLD. Mr. Chairman, I think the witness has taken mincing words to a new high. No question in my mind that when you answered the question was a hypothetical, you knew it was not a hypothetical and you were under oath at the time.

Let me switch to some other misrepresentations.

Chairman SPECTER. Wait a minute. Do you care to answer that Attorney General Gonzales?

Attorney General GONZALES. Senator, as I have stated before, what I said was the truth then, it is the truth today. The President of the United States has not authorized electronic surveillance in violation of our criminal statutes. We have laid out in great detail our position that the activities are totally consistent with the criminal statute.

Senator FEINGOLD. All you had to do, Mr. Attorney General, was indicate that it was your view that it was legal. That was what my question was. I would have disagreed with your conclusion. But that is not what you said, and you referred to this as merely a hypothetical.

Mr. Attorney General, the administration officials have been very misleading in their claims in justifying the spying program. To make matters worse, last week in the State of the Union the President repeated some of these claims. For one thing, the President said that his predecessors have used the same constitutional authority that he has.

Isn't it true that the Supreme Court first found that phone conversations are protected by the Fourth Amendment in the 1967 *Katz* case?

Attorney General GONZALES. Yes, in the 1967 *Katz* case, the Supreme Court did find that telephone conversations are covered by the Fourth Amendment.

Senator FEINGOLD. So when the Justice Department points to Presidents Wilson and Roosevelt's actions, those are really irrelevant, aren't they?

Attorney General GONZALES. Absolutely not, Senator. I think that they are important in showing that Presidents have relied upon their constitutional authority to engage in warrantless surveillance of the enemy during a time of war. The fact that the Fourth Amendment may apply doesn't mean that a warrant is necessarily required in every case. As you know, there is jurisprudence of the Supreme Court regarding special needs—normally in the national security context, outside of the ordinary criminal law context, where, because of the circumstances, searches without warrants would be justified.

Senator FEINGOLD. Mr. Chairman, my time is up. I will continue this line of questioning later.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I would like to congratulate you also for having these hearings. I think what we are talking about is incredibly important for the country in terms of the future conduct of wars and how we relate constitutionally to each other, and personally how we relate. I find your testimony honest, straightforward. Your legal reasoning is well articulated. I don't agree with it all.

About hiding something about this program, is it not true that the Congress has been briefed extensively, at least a small group of Congressmen and Senators about this program?

Attorney General GONZALES. Senator, I have not been present, as I have testified before, at all of the briefings. But in the briefings that I have been present, the briefings were extensive, the briefings were detailed. Members—certain—members who were present at

the briefing were given an opportunity to ask questions, to voice concerns.

Senator GRAHAM. And if any member of this body believes that you have done something illegal, they could put in legislation to terminate this program, couldn't they? Isn't that our power?

Attorney General GONZALES. Certainly, Senator, it—

Senator GRAHAM. Well, I would think if you believed our President was breaking the law, you would have the courage of your convictions and you would bring—you would stop funding for it.

Now, it seems to me there are two ways we can do this. We can argue what the law is, we can argue if it was broken, we can play a political dance of shirts v. skins, or we can find consensus as to what the law should be—and I associate myself with Senator DeWine as to what I think it should be. In a dangerous and difficult time for our country, I choose inquiry versus inquisition, collaboration versus conflict.

To me, there are two big things that this Congress faces and this President faces. In all honesty, Mr. Attorney General, the statutory force resolution argument that you are making is very dangerous in terms of its application for the future. Because if you overly interpret the force resolution—and I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche.

And you are right, it is not my intent; it is the letter of the resolution. What I am saying is that if you came back next time, or the next President came back to this body, there would be a memory bank established here and I would suggest to you, Mr. Attorney General, it would be harder for the next President to get a force resolution if we take this too far and the exceptions may be a mile long. Do you share my concern?

Attorney General GONZALES. I understand your concern, Senator.

Senator GRAHAM. Thank you. I appreciate that.

So that is just a comment about the practical application of where we could go one day if we over-interpret. Because the offer is on the table. Let's make sure we have understanding, because if we have the same understanding between the executive, the legislative, and the judicial branch, our enemy is weaker and we are stronger.

Now to the inherent authority argument. Taken to its logical conclusion, it concerns me that it could basically neuter the Congress and weaken the courts. I would like to focus a minute on the inherent-authority-of-the-President-during-a-time-of-war concept. I will give you a hypothetical and you can answer it if you choose to, and I understand if you won't.

There is a detainee in our charge, an enemy prisoner, a high-value target. We believe, reasonably believe that this person possesses information that could save millions or thousands of American lives. The President as Commander in Chief tells the military authorities in charge you have my permission, my authority, I am ordering you to do all things necessary, and these five things I am authorizing. Do it because I am Commander in Chief and we have to protect the country.

There is a preexisting statute on the book, passed by the Congress, called the Uniform Code of Military Justice. And it tells our

troops that if you have a prisoner in your charge, you are not to do these things. And they are the same five things.

What do we do?

Attorney General GONZALES. Well, of course, Senator, the President has already said that we are not going to engage in torture. He has made that—that is a categorical statement by the President. As to whether or not the statute that you referred to would be constitutional, these kinds of questions are very, very difficult.

One could make the argument, for example, that the provision in the Constitution that talks about Congress under section 8 of Article I, giving Congress the specific authority to make rules regarding captures, that that would give Congress the authority to legislate in this area.

Now, there is some disagreement among scholars about what “captures” means—

Senator GRAHAM. And I will tell you, it is talking about ships. It is not talking about people. But it is clear to me that the Congress has the authority to regulate the military, to fund the military. And the Uniform Code of Military Justice is a statutory scheme providing guidance, regulation, and punishment to the military that the Congress passes.

Attorney General GONZALES. That would probably—I think most scholars would say that would fall under that—the clause in section 8 of Article I giving the Congress the authority to pass rules regarding Government and regulation of the Armed Forces.

Senator GRAHAM. And I would agree with those scholars. And the point I am trying to say is that we can tell our military don’t you do this to a detainee, and you as Commander in Chief can tell the military we have to win the war, we have to protect ourselves. Now, what I am trying to say is that I am worried about the person in the middle here. Because if we had adopted the reasoning of the Bybee memo—that has been repudiated, appropriately—the point I was trying to make at your confirmation hearing is that the legal reasoning used in determining what torture would be under the Convention of Torture or the torture statute not only was strained and made me feel uncomfortable, it violated an existing body of law that was already on the books called the Uniform Code of Military Justice. If a military member had engaged in the conduct outlined by the Bybee memo, they could have been prosecuted for abusing a detainee because it is a crime in the military, Mr. Attorney General, for a guard to slap a prisoner, much less have something short of major organ failure.

This is really a big deal for the people fighting the war. And if you take your inherent-authority argument too far, then I am really concerned that there is no check and balance. And when the Nation is at war, I would argue, Mr. Attorney General, you need checks and balances more than ever, because within the law we put a whole group of people in jail who just looked like the enemy.

Attorney General GONZALES. Senator, if I could just respond. I am not—maybe I haven’t been as precise with my words as I might have been. I don’t think I have talked about inherent exclusive authority. I have talked about inherent authority under the Constitution in the Commander in Chief. Congress, of course, and I have

said in response to other questions, they have a constitutional role to play also during a time of war.

Senator GRAHAM. We coexist.

Now, can I get to the FISA statute in 2 minutes here? And I hope we do have another round, because this is very important. I am not here to accuse anyone of breaking the law; I want to create law that will help people fighting the war know what they can and can't do.

The FISA statute, if you look at the legislative language, they made a conscious decision back in 1978 to resolve this two-lane debate. There are two lanes you can go down as Commander in Chief. You can act with the Congress and you can have inherent authority as Commander in Chief. The FISA statute said, basically, this is the exclusive means to conduct foreign surveillance where American citizens are involved. And the Congress, it seems to me, gave you a one-lane highway, not a two-lane highway. They took the inherent-authority argument, they thought about it, they debated it, and they passed a statute—if you look at the legislative language—saying this shall be the exclusive means. And it is different than 1401.

So I guess what I am saying, Mr. Attorney General, if I buy your argument about FISA, I can't think of a reason you wouldn't have the authority ability, if you chose to, to set aside the statute on torture if you believed it impeded the war effort.

Attorney General GONZALES. Well, Senator, whether or not we set aside a statute, of course, is not—

Senator GRAHAM. But inherent authority sets aside the statute.

Attorney General GONZALES. That is not what we are talking about here. We don't need to get to that tough question.

Senator GRAHAM. If you don't buy the force resolution argument, if we somehow magically took that off the table, that is all you are left with is inherent authority. And Congress could tomorrow change that resolution. And that is dangerous for the country if we get in a political fight over that.

All I am saying is the inherent-authority argument in its application, to me, seems to have no boundaries when it comes to executive decisions in a time of war. It deals the Congress out, it deals the courts out and, Mr. Attorney General, there is a better way. And in our next round of questioning we will talk about that better way.

Attorney General GONZALES. Sir, can I simply make one quick response, Mr. Chairman?

Chairman SPECTER. You may respond, Attorney General.

Attorney General GONZALES. Well, the fact that the President, again, may have inherent authority doesn't mean that Congress has no authority in a particular area. And we look at the words of the Constitution and there are clear grants of authority to the Congress in a time of war. And so if you are talking about competing constitutional interests, that is when you get into sort of the third part of the Jackson analysis.

Senator GRAHAM. That is where we are at right now.

Attorney General GONZALES. I don't believe that is where we are at right now, sir.

Senator GRAHAM. That is where you are at with me.

Attorney General GONZALES. Sir, even under the third part of the Jackson analysis—and I haven't done the detailed work that obviously these kinds of questions require. These are tough questions, but I believe that the President does have the authority under the Constitution.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

And General Gonzales, I just want to make a couple of points that are important to keep in mind as we ask you questions. First, we all support a strong, robust, and vigorous national security program. Like everyone else in this room, I want the President to have all the legal tools he needs as we work together to keep our Nation safe and free, including wiretapping. And I appreciate the difficult job you and the President have balancing security and liberty. That is not an easy one.

But I firmly believe that we can have both security and rule of law. And I am sure you agree with that, General Gonzales, don't you?

Attorney General GONZALES. Yes, Senator.

Senator SCHUMER. And that is what distinguishes us from so many other nations, including our enemies. Is that correct?

Attorney General GONZALES. That is correct.

Senator SCHUMER. Now, the first job of Government is to protect our security, and everyone on this Committee supports that. But another important job of Government is to enforce the rule of law, because the temptation to abuse the enormous power of the Government is very real. That is why we have checks and balances. They are at the fulcrum of our democracy. You agree with that?

Attorney General GONZALES. I agree with that, Senator.

Senator SCHUMER. I have to say, by the way, that is why I am disappointed that Chairman Specter wouldn't let us show the clip of the President's speech. Senator Specter said that the transcript speaks for itself. But seeing the speech with its nuances is actually very different from reading the record. And when you watch the speech, it seems clear that the President isn't simply talking about roving wiretaps, he is talking about all wiretaps. Because the fact that you don't wiretap citizens without a warrant has been a bedrock of American principles for decades.

Nonetheless, having said that, I am gratified that these hearings have been a lot less partisan than the previous ones we held in this room. And many Republican colleagues have voiced concerns about the administration policy. I want to salute my Republican colleagues for questioning some of these policies—Chairman Specter and Senator DeWine, Senator Brownback, Senator Graham, and others. But it is not just Republican Senators who seriously question the NSA program, but very high-ranking officials within the administration itself.

Now, you have already acknowledged that there were lawyers in the administration who expressed reservations about the NSA program. There was dissent. Is that right?

Attorney General GONZALES. Of course, Senator. This, as I indicated, these—this program implicates some very difficult issues.

The war on terror has generated several issues that are very, very complicated.

Senator SCHUMER. Understood.

Attorney General GONZALES. Lawyers disagree.

Senator SCHUMER. I concede all those points.

Let me ask you about some specific reports. It has been reported by multiple news outlets that the former number two man in the Justice Department, the premier terrorism prosecutor, Jim Comey, expressed grave reservations about the NSA program and at least once refused to give it his blessing. Is that true?

Attorney General GONZALES. Senator, here is a response that I feel that I can give with respect to recent speculation or stories about disagreements. There has not been any serious disagreement, including—and I think this is accurate—there has not been any serious disagreement about the program that the President has confirmed. There have been disagreements about other matters regarding operations, which I cannot get into. I will also say—

Senator SCHUMER. But there was some—I am sorry to cut you off, but there was some dissent within the administration, and Jim Comey did express at some point—that is all I asked you—some reservations.

Attorney General GONZALES. The point I want to make is that, to my knowledge, none of the reservations dealt with the program that we are talking about today. They dealt with operational capabilities that we are not talking about today.

Senator SCHUMER. I want to ask you again about them, just we have limited time.

Attorney General GONZALES. Yes, sir.

Senator SCHUMER. It has also been reported that the head of the Office of Legal Counsel, Jack Goldsmith, respected lawyer and professor at Harvard Law School, expressed reservations about the program. Is that true?

Attorney General GONZALES. Senator, rather than going individual by individual—

Senator SCHUMER. No, I think we are—this is—

Attorney General GONZALES [continuing]. By individual, let me just say that I think the differing views that have been the subject of some of these stories does not—did not deal with the program that I am here testifying about today.

Senator SCHUMER. But you are telling us that none of these people expressed any reservations about the ultimate program. Is that right?

Attorney General GONZALES. Senator, I want to be very careful here. Because of course I am here only testifying about what the President has confirmed. And with respect to what the President has confirmed, I believe—I do not believe that these DOJ officials that you are identifying had concerns about this program.

Senator SCHUMER. There are other reports—I am sorry to—I want to—you are not giving the yes-or-no answer here. I understand that. Newsweek reported that several Department of Justice lawyers were so concerned about the legal basis for the NSA program that they went so far as to line up private lawyers. Do you know if that is true?

Attorney General GONZALES. I do not know if that is true.

Senator SCHUMER. Now let me just ask you a question here. You mentioned earlier that you had no problem with Attorney General Ashcroft, someone else—I didn't want to ask you about him; he is your predecessor—people have said had doubts. But you said that you had no problem with him coming before this Committee and testifying when Senator Specter asked. Is that right?

Attorney General GONZALES. Senator, who the Chairman chooses to call as a witness is up to the Chairman.

Senator SCHUMER. The administration doesn't object to that, do they?

Attorney General GONZALES. Obviously, the administration, by saying that we would have no objection, doesn't mean that we would waive any privileges that might exist.

Senator SCHUMER. I understand. I got that.

Attorney General GONZALES. That is up to the Chairman.

Senator SCHUMER. But I assume the same would go for Mr. Comey, Mr. Goldsmith, and any other individuals: Assuming you didn't waive executive privilege, you wouldn't have an objection to them coming before this Committee.

Attorney General GONZALES. Attorney-client privilege, deliberative privilege—to the extent that there are privileges, it is up to the Chairman to decide who he wants to call as a witness. But let me just say, if we are engaged in a debate about what the law is and the position of the administration, that is my job and that is what I am doing here today.

Senator SCHUMER. I understand. And you are doing your job. And that is why I am requesting, as I have in the past but renewing it here today, reaffirmed even more strongly by your testimony and everything else, that we invite these people, that we invite former Attorney General Ashcroft, Deputy Attorney General Comey, OLC Chair Goldsmith to this hearing and actually compel them to come if they won't on their own. And as for privilege, I certainly—

Chairman SPECTER. If I might interrupt you for just one moment—

Senator SCHUMER. Please.

Chairman SPECTER [continuing]. And you will have extra time.

Senator SCHUMER. Yes. Thank you.

Chairman SPECTER. I think the record was in great shape where I left it. If you bring in Attorney General Ashcroft, that is a critical step.

Senator SCHUMER. Right.

Chairman SPECTER. It wasn't that I hadn't thought of Mr. Comey and Mr. Goldsmith and other people. But I sought to leave the record with the agreement of the Attorney General to bring in former Attorney General Ashcroft.

Senator SCHUMER. OK, well, Mr. Chairman, I respect that. I think others are important as well. But I want to get to the issue of privilege here.

Chairman SPECTER. I am not saying they aren't important. I am just saying what is the best way to get them here.

Senator SCHUMER. OK. Well, whatever way we can I would be all for.

On privilege. Because that is going to be the issue even if they come here, as I am sure you will acknowledge, Mr. Chairman.

I take it you would have no problem with them talking about their general views on the legality of this program, just as you are talking about those.

Attorney General GONZALES. Well—

Senator SCHUMER. Not to go into the specific details of what happened back then, but their general views on the legality of these programs. Do you have any problem with that?

Attorney General GONZALES. The general views of the program that the President has confirmed, Senator, that is—again, if we are talking about the general views of the—

Senator SCHUMER. I just want them to be able to testify as freely as you have testified here. Because it wouldn't be fair, if you're an advocate of administration policies, you have one set of rules, and if you are an opponent or a possible opponent of administration policies, you have another set of rules. That is not unfair, is it?

Attorney General GONZALES. Sir, it is up to the Chairman to—

Senator SCHUMER. No, but would you or the administration—you as the chief legal officer—have any problem with them testifying in the same way you did about general legal views of the program.

Attorney General GONZALES. I would defer to the Chairman.

Senator SCHUMER. I am not asking you, sir, in all due respect, I am not asking you what the Chairman thinks. He is doing a good job here, and I don't begrudge that one bit.

Attorney General GONZALES. So my answer is I defer—

Senator SCHUMER. I am asking you what the administration would think in terms of exercising any claim of privilege.

Attorney General GONZALES. And again—

Senator SCHUMER. You are not going to have—I am sorry here—you are not going to have different rules for yourself, an administration advocate, than for these people who might be administration dissenters in one way or another, are you?

Attorney General GONZALES. Sir, I don't know if you are asking me what are they going to say—

Senator SCHUMER. I am not asking you that. Would the rules be the same? I think you can answer that yes or no.

Attorney General GONZALES. If they came to testify?

Senator SCHUMER. Correct.

Attorney General GONZALES. Well, sir, the client here is the President of the United States. I am not sure it is in my place to offer—

Senator SCHUMER. Or his chief—

Attorney General GONZALES [continuing]. Offer a position or my recommendation to you about what I might recommend to the President of the United States.

Senator SCHUMER. But what would be—

Attorney General GONZALES. It would not be appropriate here.

Senator SCHUMER. I just am asking you as a very fine, well-educated lawyer: Should or could the rules be any different for what you are allowed to say with privilege hovering over your head, and what they are allowed to say with those same privileges hovering over their heads? Should the rules be any different? If you can't say yes to that, then we—you know, then that is fundamentally unfair.

It is saying that these hearings—or it is saying, really, that the administration doesn't have the confidence to get out the whole truth.

Attorney General GONZALES. Sir, my hesitation is, is quite frankly I haven't thought recently about the issue about former employees coming to testify about their legal analysis or their legal recommendations to their client. And that is the source of my hesitation.

Senator SCHUMER. I was just—my time—

Chairman SPECTER. Senator Schumer, take 2 more minutes, for my interruption.

Senator SCHUMER. Well, thank you, Mr. Chairman.

Chairman SPECTER. Providing you move to another subject.

Senator SCHUMER. Well, OK.

[Laughter.]

Senator SCHUMER. I just—again, I think this is very important, Mr. Chairman.

Chairman SPECTER. Oh, I do, too.

Senator SCHUMER. And I think you would agree.

Chairman SPECTER. If this were a court room, I would move to strike all your questions and his answers because the record was so much better off before.

Senator SCHUMER. Well, I don't buy that, Mr. Chairman.

Chairman SPECTER. But take 2 more minutes on the conditions stated.

Senator SCHUMER. I don't buy that. I think we have to try to tie down as much as we can here. OK?

Let me go to another bit of questions here.

You said, Mr. Attorney General, that the AUMF allowed the President—that is one of the legal justifications, the Constitution—to go ahead with this program. Now, under your legal theory, could the Government, without ever going to a judge or getting a warrant, search an American's home or office?

Attorney General GONZALES. Of course, Senator, any authorization or activity by the President would be subject to the Fourth Amendment. What you are talking about—I mean I presume you are talking about a law enforcement effort—

Senator SCHUMER. Let me interrupt for a minute. Aren't wiretaps subject to the Fourth Amendment as well?

Attorney General GONZALES. Of course they are.

Senator SCHUMER. So they are both subject. What would prevent the President's theory, your theory, given the danger, given maybe some of the difficulties, from going this far?

Attorney General GONZALES. Well, sir, it is hard to answer a hypothetical question the way that you have posed it in terms of how far do the President's authorities extend. However far they may extend, Senator, they clearly extend so far as to allow the President of the United States to engage in electronic surveillance of the enemy during a time of war.

Senator SCHUMER. Could he engage in electronic surveillance when the phones calls both originated and ended in the United States if there were al Qaeda suspects?

Attorney General GONZALES. I think that question was asked earlier. I have said that I do not believe that we have done the analysis on that.

Senator SCHUMER. I did not ask that. I asked what do you think the theory is?

Attorney General GONZALES. That is a different situation, Senator, and again, these kind of constitutional questions, I would—I could offer up a guess, but these are hard questions.

Senator SCHUMER. Has this come up? Has it happened?

Attorney General GONZALES. Sir, what the President has authorized is only international phone calls.

Senator SCHUMER. I understand. Has there been a situation brought to your attention where there were al Qaeda call—someone suspected of being part of al Qaeda or another terrorist group calling someone from the United States to the United States?

Attorney General GONZALES. Sir, now you are getting into sort of operations, and I am not going to respond to that.

Senator SCHUMER. I am not asking any specifics. I am asking ever.

Attorney General GONZALES. You are asking about how this program has operated, and I am not going to answer that question, sir.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I think your comments, Mr. Chairman, about this not being a court of law are apt, because I do not think we are going to get resolution about the disagreement among lawyers as to what the legal answer is. But I do believe it is important to have the hearing and to air the various points of view.

But I would hope, and I trust, on the lines of what Senator Schumer stated, that there would be a consensus on the Committee and throughout the Congress that we should use all legal means available to us to gather actionable intelligence that has to potential of saving American lives. You certainly would agree with that, wouldn't you, General Gonzales?

Attorney General GONZALES. Yes, Senator.

Senator CORNYN. Some have stated the question like this. They say, "Has the Foreign Intelligence Surveillance Act, which was passed in 1978, authorized the President to conduct this particular program?" I have a couple of problems with the question stated in that way.

Number one, the technology has surpassed what it was in 1978, so our capacity to gain actionable intelligence has certainly changed. And the very premise of the question suggests that the President can only exercise the authority that Congress confers. When people talk about the law, the law that pertains to this particular question is not just the Foreign Intelligence Surveillance Act, but it includes the Constitution and the Authorization for Use of Military Force; would you agree with that, General Gonzales?

Attorney General GONZALES. Senator, you raise a very important point. People focus on the Foreign Intelligence Surveillance Act and say, this is what the words say, and that is the end of it. If you are not following it in total, you are obviously in violation of the law. That is only the beginning of the analysis. You have to look to see what Congress has done subsequent to that, and then, of

course, you have to look at the Constitution. There have been many statements today about no one is above the law, and I would simply remind—and I know this does not need to be stated—but no one is above the Constitution either, not even the Congress.

Senator CORNYN. Clearly, the Supreme Court in the *Hamdi* case said what we all know to be the fact, that no President is above the law. No person in this country, regardless of how exalted their position may be, or how relatively modest their position may be, we are all governed by the Constitution and laws of the United States.

Attorney General GONZALES. During my confirmation hearings, I talked about Justice O'Connor's statement from *Hamdi*, that a state of war is not a blank check for the President of the United States. I said in my hearings that I agree with that.

Senator CORNYN. General Gonzales, I regret to say that just a few minutes ago I was watching the "crawler" on a cable news network. It referred to the NSA program as "domestic surveillance," which strikes me as a fundamental error in the accuracy of the reporting of what is going on here. You made clear that what has been authorized here is not "domestic surveillance," that is, starting from and ending in the United States. This is an international surveillance of known al Qaeda operatives, correct?

Attorney General GONZALES. I think people who call this a domestic surveillance program are doing a disservice to the American people. It would be like flying from Texas to Poland and saying that is a domestic flight. We know that is not true. That would be an international flight. And what we are talking about are international communications, and so I agree with your point, Senator.

Senator CORNYN. With regard to the Authorization for Use of Military Force, some have questioned whether it was actually discussed in Congress whether surveillance of international phone calls—between al Qaeda overseas and here—was actually in the minds of individual Members of Congress when they voted to support the force resolution. It strikes me as odd to say that Congress authorized the Commander in Chief to capture, to detail, to kill, if necessary, al Qaeda, but we can't listen to their phone calls and we can't gather intelligence to find out what they are doing in order to prevent future attacks against the American people.

You have explained the Department of Justice's legal analysis with regard to the *Hamdi* decision—that intelligence is a fundamental incident of war. I think that analysis makes good sense. Here again, I realize we have some very fine lawyers on the Committee, and there are a lot of lawyers around the country who have opined on this, some of whom have been negative, some whom have been positive. I was struck by the fact that John Schmidt, who was Associate Attorney General during the Clinton Justice Department, wrote what I thought was an eloquent op-ed piece for the Chicago Tribune, dated December 21, 2005, agreeing with the administration's point of view. But that is only to point out that lawyers, regardless of their party affiliation, have differing views on this issue. But again, I would hope that what we are engaged in is neither a partisan debate nor even an ideological debate, but a legal debate on what the Constitution and laws of the United States provide for.

Let me turn to another subject that has caused me a lot of concern, and that is our espionage laws, and the laws that criminalize the intentional leaking of classified information. It is my understanding from the news reports that the Department of Justice has undertaken an investigation to see whether those who actually leaked this program to the New York Times or any other media outlet might have violated our espionage laws. Is that correct?

Attorney General GONZALES. I can confirm, Senator, that investigation has been initiated.

Senator CORNYN. Does that investigation also include any potential violation for publishing that information?

Attorney General GONZALES. Senator, I am not going to get into specific laws that are being looked at, but, obviously, our prosecutors are going to look to see all of the laws that have been violated, and if the evidence is there, they are going to prosecute those violations.

Senator CORNYN. Well, you may give me the same answer to this next question, but I am wondering, is there any exclusion or immunity for the New York Times or any other person to receive information from a lawbreaker seeking to divulge classified information? Is there any explicit protection in the law that says if you receive it and you publish it, you are somehow immune from a criminal investigation?

Attorney General GONZALES. Senator, I am sure the New York Times has their own great set of lawyers, and I would hate in this public forum to provide them my views as to what would be a legitimate defense.

Senator CORNYN. There are a lot of very strange circumstances surrounding this initial report in the New York Times, including the fact that the New York Times apparently sat on this story for a year, and then, of course, the coincidence, some might say, that the story was broken on the date that the Senate was going to vote on reauthorization of the PATRIOT Act. But we will leave that perhaps for another day.

I will yield the rest of my time back. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman.

Thank you, Attorney General, for being here. During the course of this hearing you have referred to FISA several times as a useful tool, a useful tool in wiretapping and surveillance. I have thought about that phrase because it is a phrase that has been used by the White House too.

Referring to FISA as a useful tool in wiretapping is like referring to speed limits and troopers with radar guns as useful tools on a motoring trip. I think FISA is not there as a useful tool to the administration. It is there as a limitation on the power of a President when it comes to wiretapping. I think your use of that phrase, useful tool, captures the attitude of this administration toward this law. We will use it when it does not cause a problem; we will ignore it when we have to. I think that is why we are here today.

I am curious, Mr. Attorney General, as we get into this, and I look back on some of your previous testimony and what you said to this Committee in confirmation hearings and the like, how far

will this administration go under the theories which you stated today to ignore or circumvent laws like FISA. I asked you during the course of the last—your confirmation hearing, a question about this whole power of the Commander in Chief. I wish I could play it to you here, but there is a decision made by the Committee that we are not going to allow that sort of thing to take place, but I do believe that if I could play it, you would be asked to explain your answer to a question which I posed to you.

The question was this: “Mr. Attorney General, has this President ever invoked that authority as Commander in Chief or otherwise, to conclude that a law was unconstitutional and refuse to comply with it?”

Mr. Gonzales: “I believe that I stated in my June briefing about these memos that the President has not exercised that authority.”

You have said to us today several times that the President is claiming his power for this domestic spying, whatever you want to call it, terrorist surveillance program, because of the President’s inherent powers, his core constitutional authority of the executive branch. And so I have to ask you point blank, as Senator Feingold asked you earlier, you knew when you answered my question that this administration had decided that it was going to basically find a way around the FISA law based on the President’s, as you called it, inherent constitutional powers. So how can your response be valid today in light of what we now know?

Attorney General GONZALES. It is absolutely valid, Senator. The—and this is going to sound repetitious—but it has never been our position that we are circumventing or ignoring FISA. Quite the contrary. The President has authorized activities that are totally consistent with FISA, with what FISA contemplates. I have indicated that I believe that putting aside the question of the authorization to use military force, that while it is a tough legal question as to whether or not Congress has the authority under the Constitution to cabin or to limit the President’s constitutional authority to engage in electronic surveillance of the enemy, that is not a question that we even need to get to.

It has always been our position that FISA can be and must be read in a way that it doesn’t infringe upon the President’s constitutional authority.

Senator DURBIN. Let me read to you what your own Justice Department just issued with in the last few weeks in relation to the President’s authority, the NSA program and FISA. I quote, “Because the President also has determined that NSA activities are necessary to the defense of the United States from a subsequent terrorist attack or armed conflict with al Qaeda,” I quote, “FISA would impermissibly interfere with the President’s most solemn constitutional obligation to defend the United States against foreign attack.”

You cannot have it both ways.

Attorney General GONZALES. And that is why—

Senator DURBIN. You cannot tell me that you are not circumventing it and then publish this and say that FISA interferes with the President’s constitutional authority.

Attorney General GONZALES. And that is why you have to interpret FISA in a way where you do not tee up a very difficult constitutional question under the canons of constitutional avoidance.

Senator DURBIN. What you have to do is take out the express language in FISA which says it is the exclusive means, it is exclusive. The way you take it out is by referring to—and I think you have said it over and over here again—you just have to look to the phrase you say, “except as otherwise authorized by statute.”

Senator Feinstein and I were struggling. We were looking through FISA. Where is that phrase, “except as otherwise authorized by statute?” It is not in FISA. It is not in the FISA law. You may find it in the criminal statute and may want to adopt it by reference, but this FISA law, signed by a President and the law of the land, is the exclusive way that a President can wiretap.

I want to ask you, if this is exclusive, why didn’t you take advantage of the fact that you had and the President had such a strong bipartisan support for fighting terrorism that we gave the President the PATRIOT Act with only one dissenting vote? We have supported this President with every dollar he has asked for to fight terrorism. Why didn’t you come to this Congress and say, “There are certain things we need to change,” which you characterized as cumbersome and burdensome in FISA. Why didn’t you work with us to make the law better and stronger and more effective when you knew that you had a bipartisan consensus behind you?

Attorney General GONZALES. Senator, the primary criminal code, criminal provision in FISA, section 109, 50 U.S.C. 1809, it is page 179 if you have one of these books, provides that “a person is guilty of an offense if he intentionally engages in electronic surveillance under cover of law except as authorized by statute.” This provision means that you have to engage in electronic surveillance as provided here, except as otherwise provided by statute. And this is a provision that we were relying upon. It is in the Foreign Intelligence Surveillance Act.

Senator DURBIN. It is Title 18. But let me just tell you, what you do not want to read to us—

Attorney General GONZALES. Sir, it is not Title 18.

Senator DURBIN. The Foreign Intelligence Surveillance Act of 1978 “shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, interception of domestic wire or electronic communication may be conducted.”

And so what you said is, well, when you authorized the war, you must have known that we were going to really expand beyond FISA. I have the book here. You can look through it if you like. There is not a single reference in our passing this AUMF that we talk about, Authorized Use of Military Force, not a single reference to surveillance and intelligence in the manner that you have described it.

Attorney General GONZALES. Sir, there is probably not a single reference to detention of American citizens either, but the Supreme Court has said that that is exactly what you have authorized because it is a fundamental incident of waging war.

Senator DURBIN. Since you have quoted that repeatedly, let me read what that Court has said. *Hamdi* decision: “We conclude that detention of individuals falling into the limited category we are

considering for the duration of the particular conflict in which they are captured is so fundamental and accepted an incident to war to be an exercise of necessary and appropriate force.”

Attorney General GONZALES. No question. That case was not about electronic surveillance. I will concede that.

Senator DURBIN. I will tell you something else, Mr. Attorney General, if you then read, I think, the fine reasoning of Justice O'Connor, she comes to a point which brings us here today—and I thank the Chairman for allowing us to be here today—and this is what she says in the course of this decision. “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”

We have said repeatedly, as nominees for the Supreme Court have come here, do you accept the basis of *Hamdi*, that a war is not a blank check for a President? They have said, yes, that is consistent with Jackson and *Youngstown*. Now what we hear from you is that you were going to take this decision in *Hamdi* and build it into a way to avoid the most basic statute when it comes to electronic surveillance in America, a statute which describes itself as the exclusive means by which this Government can legally do this.

Attorney General GONZALES. Senator, I think that in reading that provision you just cited, you have to consider section 109. Section 109 contemplates an additional authorization by the Congress. Congress provided that additional authorization when it authorized the use of military force following the attacks of 9/11.

Senator DURBIN. The last thing I would like to say—and I only have a minute to go—is the greatest fear that we have is that what this President is now claiming is going to go far beyond what you have described today. What you have described today is something we would all join in on a bipartisan basis to support, use every wiretap capacity you have to stop dangerous terrorists from hurting Americans. If you came to Capitol Hill and asked us to change a law in a reasonable way to reach that goal, you would have the same bipartisan support. Our concern is what this President is asking for will allow this administration to comb through thousands of ordinary Americans’ e-mails and phone calls.

In the audience today is Richard Fleischer of Willow Brook, Illinois. I do not know if Mr. Fleischer is still here. Mr. Fleischer wrote to the NSA and asked if he had been wiretapped because he had had conversations with people overseas. And after several letters that he sent back and forth, the best he could get from the National Security Administration is that they would neither confirm nor deny the existence of records responsive to his request. Ordinary Americans wondering if their telephone calls, if their e-mails overseas have been wiretapped, and there is no safeguard for their liberty and freedom.

What we have today is your announcement that career professionals and experts will watch out for the freedoms of America. Career professionals and experts, sadly, in our Nation’s history, have done things in the past that we are not proud of. Career professionals have made bad decisions, Japanese internment camps, enemies list. What we really rely on is the rule of law and the Con-

stitution, safeguards we can trust by people we can see. When it comes to some person working at NSA, I don't think it gives us much comfort.

Chairman SPECTER. Thank you, Senator Durbin.

Before yielding to Senator Brownback, I want to announce that I am going to have to excuse myself for just a few minutes. We are starting on floor debate this afternoon at 3 o'clock on the Asbestos Reform Bill, which Senator Leahy and I are cosponsors of, and I am scheduled to start the debate at 3 o'clock. I will return as soon as I have made a floor statement. In the interim, Senator Hatch has agreed to chair the hearing.

Senator Brownback, you are recognized.

Senator BROWNBACK. Thank you, Mr. Chairman. I appreciate the hearing.

Attorney General, thank you for being here. I want to look at the reason we are in this war on terrorism. I want to talk about the length of time we may be in this war on terrorism, and then I went to look at FISA's use forward from this point in the war on terrorism.

I do not need to remind the Attorney General, but I certainly would my colleagues, that we are very actively engaged in a war on terrorism today. January 19th of this year, Osama bin Laden in a tape says this, quote, "The reason why we didn't have such an operation will take place and you will see such operations by the grace of God." And by that he is talking about more 9/11s, and that was January 19th, 2006.

Al-Zawahiri, number two person, January 30th of this year says this, "Bush, do you know where I am? Among the Muslim masses enjoying their care with God's blessings and sharing with them their holy war against you until we defeat you, God willing. The Lion of Islam, Sheik Osama bin Laden, may God protect him, offered you a decent exit from your dilemma, but your leaders who are keen to accumulate wealth insist on throwing you in battles and killing your souls in Iraq and Afghanistan, and God willing, on your own land."

I just want to remind people that as we get away from 9/11 and 2001, we not forget that we are still very much in a war on terrorism and people are very much at war against us.

We are talking about probably one of the lead techniques we can use in this war, which I would note, in recent testimony, General Hayden said this about the technique of the information you are using right now. He said, "Had this program been in effect prior to 9/11, it's my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."

Mr. Attorney General, I don't know if you have a different opinion from General Hayden on that, but—

Attorney General GONZALES. I never have a different opinion from General Hayden on the intel capabilities that we are talking about here. Both he and Director Mueller have recently testified about the importance of the terrorist surveillance program. General Hayden did say it has been very successful, and we have gotten information we would not have otherwise gotten, that it has helped us, I think he said deter and detect attacks here and abroad.

FBI Director Mueller said that it was a valuable tool, had helped identify would-be terrorists in the United States and helped identify individuals providing material support to terrorists. So those are experts saying how valuable this tool has been.

Senator BROWNBACK. Having said that, I have read through most of your white paper material, and I have looked at a great deal of it. I am struck and I think we have an issue we need to deal with. Part of what we are working off of is a war declaration dated September 18th, 2001, a war declaration on Afghanistan, and a war declaration, October 16th, 2002 on use of military force in Iraq, and all necessary force, and all necessary—the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks.

It strikes me that we are going to be in this war on terrorism possibly for decades. Maybe not, but this could be the cold war of our generation. Maybe it does not go that period of time, but it has the possibilities of going for some extended period of time. I share Senator DeWine's concern that we should look then at the FISA law and make sure that as we move forward on this, that we are not just depending upon these authorizations of war to say that that puts us in a superior position under the Article II powers, but that to maintain the support of the American public, to have another set of eyes also looking at this surveillance technique is an important thing in maintaining the public support for this.

I want to look and direct you to looking at the FISA law in particular. You have made some comments here this morning, today, that have been very well stated and thought through. You have to one point, the FISA law was not well structured to the needs of today's terrorist war effort. That law was passed, what, 27 years ago, or something of that nature, and certainly didn't contemplate a war on terrorism like we are in today.

I want to look specifically at how we could amend that FISA law, looking at a possible decades long war on terrorism.

One of the areas you have talked about that is cumbersome is the 72-hour provision within the law, if I am gathering what you are saying correctly. Congress extended this period from 24 to 72 hours in 2001. Just looking narrowly at what would need to be done to use the FISA authority more broadly and still be able to stop terrorists, if that is extended further, would it make it more likely that you would use the FISA process, if that is extended beyond 72 hours?

Attorney General GONZALES. It is hard to say, Senator, because, you know, whether it is 24, 72, whatever, I have got to make a determination under the law that at the time I grant emergency authorization, that all the requirements of FISA are met. I think General Hayden said it best yesterday, this is not a 72-hour sort of hall pass. I have got to know, when I grant that authorization, whether I then have 24 or 72 hours to submit a written application to the court, I have to know at the time I say, "Yes, go forward," that all the requirements of FISA are met. That is the problem.

If I could just also make one final point.

Senator BROWNBACK. Fair enough.

Attorney General GONZALES. There was not a war declaration either in connection with al Qaeda or in Iraq. It was an authorization to use military force. I only want to clarify that because there are implications—Obviously, when you talk about a war declaration, you are possibly talking about affecting treaties, diplomatic relations, and so there is a distinction in law and in practice, and we are not talking about a war declaration. This is an authorization only to use military force.

Senator BROWNBACk. Looking forward in the war on terrorism and the use of FISA and this Committee's desire, I believe, to have the administration wherever possible and more frequently use FISA—and you noted you have used it more this past year than the year before—what specific areas would make this decision on your part easier, more likely to use the FISA process?

Attorney General GONZALES. Well, Senator, if you are talking about domestic surveillance in a peacetime situation, for other kinds of terrorists beyond al Qaeda, I am not sure—

Senator BROWNBACk. No. I am talking about the war on terrorism.

Attorney General GONZALES. Senator, I would like the opportunity to think about that and maybe talk to the experts in the Department, I think would have a better sense about what kinds of specific things. I can say that the PATRIOT Act includes a provision which allows these orders to stay in place a longer period of time before they are renewed. It is quite burdensome, the fact that these things expire. We then have to go back and get a renewal. That just places an additional burden on our staff, but I would like to have the opportunity to get back to you about what other kinds of specific changes might be helpful.

Senator BROWNBACk. If you could, because I think we are going to be in this for a period of time, and we are going to be in it for succeeding administrations in this war on terrorism, and probably our most valuable tool that we have is information, early information, to be able to cut this off. So the American public, I think, clearly wants us to be able to get as much information as we can. And yet, I think we need to provide a process that has as much security to the American public that there is no abuse in this system. This is about us trying to protect people and protect people in the United States. I want to know too, Presidential authority that you are protecting. This has been talked about by the Clinton administration Attorney General before, many others. It is not just this administration at all, as others have specifically quoted. But I do think as this wears on, we really need to have those thoughts at how we can make the FISA system work better.

Attorney General GONZALES. Senator, we are likewise as concerned about ensuring that we protect the rights of all Americans.

Senator BROWNBACk. I am sure you are, and I appreciate that. I want you to protect us from security attacks, too, and bin Laden, to my knowledge, when he normally makes a threat, he has followed through on these. This is a very active and live area. I just want to see if we can make that law change where it can work for a long-term war on terrorism.

Thank you, Mr. Chairman.

Senator HATCH. [Presiding.] Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Incidentally, Senator Brownback rightly pointed out the date when FISA was enacted, but, of course, we have updated it five times since 9/11, two of those when I was Chairman. In the year 2000, the last year of the Clinton administration, they used the FISA Court 1,005 times. And in the year of September 11th, your administration there, they actually used it less times even than the Clinton administration used it before.

I am just curious. When I started this morning, I asked you a very straightforward question. I told you I would come back to it. I am sure you have had time to check for the answer during the lunch hour. So I come to you again with it. When did the Bush administration come to the conclusion that the congressional resolution authorizing the use of military force against al Qaeda also authorized warrantless wiretapping of Americans inside the United States?

Attorney General GONZALES. Sir, the authorization of this program began—

Senator LEAHY. I cannot hear you. Could you pull your mike a little bit closer?

Attorney General GONZALES. Pardon me. The authorization regarding the terrorist surveillance program occurred subsequent to the authorization to use military force and prior to the PATRIOT Act.

Senator LEAHY. OK. So what you call terrorist surveillance, some would call the breaking of the Foreign Intelligence Surveillance Act. I am asking when did you decide that the authorization for use of military force gave you the power to do this? I mean, you were White House Counsel then. What date did it give you the power?

Attorney General GONZALES. Well, sir, I can't give you specific dates about when—

Senator LEAHY. That is what I asked you this morning, and you had the time to go and look. You had to sign that or sign off on that before the President—when did you reach the conclusion that you didn't have to follow FISA?

Attorney General GONZALES. Sir, I am not going to give an exact date as to when the program actually commenced—

Senator LEAHY. Why not?

Attorney General GONZALES [continuing]. But it has always been the case—because that is an operational detail, sir. I have already indicated—the Chairman has invited me—the Committee has invited me here today to talk about the legal analysis of what the President authorized.

Senator LEAHY. We are asking for the legal analysis. I mean, obviously you had to make a determination that you had the right to do this. When did you make the determination that the AUMF gave you the right to do this?

Attorney General GONZALES. From the very outset, before the program actually commenced. It has always been the position that FISA cannot be interpreted in a way that infringes upon the President's constitutional authority, that FISA must be interpreted, can be interpreted in a way—

Senator LEAHY. Did you tell anybody that when you were up here seeking the PATRIOT Act and seeking the changes in FISA? Did you tell anybody you had already determined—I mean, it is your testimony here today that you made the determination virtually immediately that you had this power without using FISA.

Attorney General GONZALES. Well, sir, the fact that we were having discussions about the PATRIOT Act and there wasn't a specific mention about electronic surveillance with respect to this program, I would remind the Committee that there was also discussion about detention in connection with the PATRIOT Act discussions. Justice Souter in the *Hamdi* decision made that as an argument, that clearly Congress did not authorize—

Senator LEAHY. Judge Gonzales, I am not asking about what happens when you catch somebody on a battlefield and detain him. I am not asking about what you do on the battlefield in our failed attempt to catch Osama bin Laden, what we were actually asking the administration to do. I am not asking about what happens on that battlefield. I am asking why did you feel that this—now, your testimony is that virtually immediately you determined you had the power to do this warrantless wiretapping because of the AUMF. You did not ask anybody up here. Did you tell anybody that you needed something more than FISA?

Attorney General GONZALES. Sir, I don't recall—did I tell anyone in Congress or tell—

Senator LEAHY. Congress. Let's take Congress first.

Attorney General GONZALES. Sir, I don't recall having conversations with anyone in Congress about this.

Senator LEAHY. All right. Do you recall that anybody on this Committee, which actually is the one that would be amending FISA, was told?

Attorney General GONZALES. Sir, I have no personal knowledge that anyone on this Committee was told.

Senator LEAHY. Now, apparently, then, according to your interpretation, Congress—a lot of Republicans and a lot of Democrats—disagree with you on this—we were authorizing warrantless wiretapping. Were we authorizing you to go into people's medical records here in the United States by your interpretation?

Attorney General GONZALES. Senator, whatever the limits of the President's authority given under the authorization to use military force and his inherent authority as Commander in Chief in time of war, it clearly includes the electronic surveillance of the enemy.

Senator LEAHY. Well, I would just note that you did not answer my question, but here you also said, "We have had discussions with the Congress in the past, certain Members of Congress, as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat. We were advised that that would be difficult, if not impossible."

That is your statement. Who told you that?

Attorney General GONZALES. Senator, there was discussion with a bipartisan group of Congress, leaders in Congress, leaders of the Intel Committees, to talk about legislation, and the consensus was that obtaining such legislation—the legislative process is such that it could not be successfully accomplished without compromising the program.

Senator LEAHY. When did they give you that advice?

Attorney General GONZALES. Sir, that was some time in 2004.

Senator LEAHY. Three years later. I mean, you have been doing this wiretapping for 3 years, and then suddenly you come up here and say, "Oh, by the way, guys, could we have a little bit of authorization for this?" Is that what you are saying?

Attorney General GONZALES. Sir, it has always been our position that the President has the authority under the authorization to use military force and under the Constitution.

Senator LEAHY. It has always been your position, but, frankly, it flies in the face of the statute, Mr. Attorney General, and I doubt very much if one single person in Congress would have known that was your position, had you not known the newspapers were going to print what you were doing. Not that anybody up here knew it. When you found out the newspapers were going to print it, you came up here. Did you talk to any member of the Judiciary Committee that would actually write it? And let me ask you this: Did any member of this Committee, this Judiciary Committee that has to write the law, did anybody here tell you we could not write a law that would allow you to go after al Qaeda in the way you are talking about?

Attorney General GONZALES. Sir, I don't believe there were any discussions with any members of the Judiciary Committee about—

Senator LEAHY. Even though we are the ones that have to write the law, and you are saying that you were told by Members of Congress we couldn't write a law that would fit it. And now you tell us that the Committee that has to write the law never was asked. Does this sound like a CYA on your part? It does to me.

Attorney General GONZALES. We had discussions with the bipartisan leadership of the Congress about this program.

Senator LEAHY. But not from this Committee. We have both Republicans and Democrats on this Committee, you know.

Attorney General GONZALES. Yes, sir, I do know that.

Senator LEAHY. And this Committee has given you—twice under my chairmanship—we have given you five amendments to FISA because you requested it. But this you never came to us.

Mr. Attorney General, can you see why I have every reason to believe we never would have found out about this if the press hadn't? Now, there has been talk about, well let's go prosecute the press. Heavens. Thank God we have a press that at least tells us what the heck you guys are doing, because you are obviously not telling us.

Attorney General GONZALES. Sir, we have advised bipartisan leadership of the Congress and the Intel Committees about this program.

Senator LEAHY. Well, did you tell them that before the passage of the USA PATRIOT Act?

Attorney General GONZALES. Sir, I don't recall when the first briefing occurred, but it was shortly—my recollection is it was shortly after the program was initiated.

Senator LEAHY. OK. Well, let me ask you this then. You said several years after it started you came up here and talked to some group of Members of Congress. The press reports that the President's program of spying on Americans without warrants was shut

down for some time in 2004. That sounds like the time you were up here. If the President believed the program was necessary and legally justified, why did he shut it down?

Attorney General GONZALES. Sir, you are asking me about the operations of the program, and I am not going to—

Senator LEAHY. Of course. I am sorry, Mr. Attorney General. I forgot you can't answer any questions that might be relevant to this.

Well, if the President has that authority, does he also have the authority to wiretap Americans' domestic calls and e-mails under this—let me finish—under this authority if he feels it involved al Qaeda activity? I am talking about within this country, under this authority you have talked about, does he have the power to wiretap Americans within the United States if they are involved in al Qaeda activity?

Attorney General GONZALES. Sir, I have been asked this question several times—

Senator LEAHY. I know, and you have had somewhat of a vague answer, so I am asking it again.

Attorney General GONZALES. And I have said that that presents a different legal question, a possibly tough constitutional question, and I am not comfortable just off the cuff talking about whether or not such activity would, in fact, be constitutional.

I will say that that is not what we are talking about here. That is not what—

Senator LEAHY. Are you doing that?

Attorney General GONZALES [continuing]. The President has authorized.

Senator LEAHY. Are you doing that?

Attorney General GONZALES. I cannot give you assurances. That is not what the President has authorized—

Senator LEAHY. Are you doing that?

Attorney General GONZALES [continuing]. Through this program.

Senator LEAHY. Are you doing that?

Attorney General GONZALES. Senator, you are asking me again about operations, what are we doing.

Senator LEAHY. Thank you.

Senator HATCH. Throughout this process, you don't know when it began, but at least eight Members of Congress have been informed about what has been disclosed by people who have violated the law in disclosing it and by the media that has printed the disclosures. Is that correct?

Attorney General GONZALES. That is generally correct, sir. Yes, sir.

Senator HATCH. Did you have one complaint about the program from any of the eight—and that was bipartisan, by the way, those eight people. Four Democrats—

Attorney General GONZALES. They were not partisan briefings.

Senator HATCH. Four Democrat leaders in the Congress, four Republican leaders in the Congress. Is that right?

Attorney General GONZALES. It was a bipartisan briefing, yes, sir.

Senator HATCH. Did you have any gripes or complaints about what was disclosed to them, to the best of your recollection?

Attorney General GONZALES. Well, again, I want to be careful about speaking for Members, but—

Senator HATCH. I am not asking you to speak for Members. I am asking you if you had any gripes or complaints.

Attorney General GONZALES. Again, I wasn't present—

Senator HATCH. Or suggestions.

Attorney General GONZALES. I wasn't present at all the briefings. But for those briefings that I was present at, they received very detailed briefings about these operations. They were given ample opportunity to ask questions. They were given ample opportunity to express concerns.

Senator HATCH. Now, you were somewhat criticized here in some of the questions that your argument that the authorized use of military force is a faulty argument because the FISA Act does not really talk about except as authorized by statute. But you have pointed out that Section 109, or if you want to be more specific, Section 1809 of Title 50, Chapter 36, subchapter 1, 1809, does say that a person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute.

Attorney General GONZALES. That is the main criminal prohibition against engaging in electronic surveillance, except as otherwise provided for by statute or except—I mean, except as otherwise provided by FISA or except as otherwise provided by statute.

Senator HATCH. Now, this authorized use of military force enabled you “to use all necessary and appropriate force against the nations, organizations, or persons the President determines planned, authorized, committed, or aided the terrorist attacks.” Is that correct?

Attorney General GONZALES. This is a very important point, Senator. Think about it. The authorization does not identify specifically—it never mentions the word “al Qaeda.” It authorizes the President to engage in all necessary and appropriate force to identify those he determines, who the President determines, and the President is not able to do that without information, without intelligence, without the kind of electronic surveillance we are talking about today.

Senator HATCH. That is right. As someone who helped to write the PATRIOT Act, the original PATRIOT Act, I cannot help but express the awareness of those of us around here that here we are well over a month after the expiration of the PATRIOT Act, and we keep renewing it from month to month because we cannot get Congress to really agree on what the changes should be. Is that a fair assessment?

Attorney General GONZALES. Well, what I will say is I think the tools of the PATRIOT Act are important, and I hope that they are reauthorized quickly.

Senator HATCH. But the reason I am bringing that up is because at one time at least one report was that one of these eight Members was asked—who had the program disclosed to them, at least remarked that he didn't think that a statute could be passed to resolve these issues.

Attorney General GONZALES. I do not want to attribute to any particular Member that statement. What I will say is that—

Senator HATCH. You don't have to do that, but is that true?

Attorney General GONZALES. There was a consensus that pursuing the legislative process would likely result in compromising the program.

Senator HATCH. In other words, it is not easy to get things through 535 Members of Congress, 435 in the House and 100 in the Senate. Now, I know that you love the Congress and will not find any fault with any of us.

Attorney General GONZALES. Sir, you have been at this a little bit longer than I have, but it has certainly been my experience that it is sometimes difficult.

Senator HATCH. Yes, it is. Is it not true that one check on the President's power to operate the NSA surveillance program is the Congress's power over the purse, as listed in Article I, section 8 of the Constitution?

Attorney General GONZALES. Absolutely. I think even those who are sort of in the pro-executive camp in terms of the allocations of constitutional powers in a time of war would have to concede that the power of the purse is an extremely strong check on the President, on the Commander in Chief.

Senator HATCH. Well, I have noticed that while many in Congress have sharply criticized the President and the NSA program that we have been discussing here, I am not aware of any Member of Congress introducing legislation to end the program through either an authorization or an appropriations mechanism. But from what we know about the intent of the program today, I expect a few Members of either the House or the Senate would vote to eliminate this program or cutoff its funding. And the reason I state that is because all of us are concerned about this battle that we are waging, that this is not an easy battle. This is a war unlike any war we have ever had before. And it is a very secret war on their side. And I think the administration has taken the position that we have got to be very careful about disclosures on our side as well.

Is it not true that the disclosures that have occurred have very definitely hurt our ability to gather intelligence?

Attorney General GONZALES. The Director of the CIA, I believe, has publicly commented that it has hurt us.

Senator HATCH. It is important, General, to bring out that President Clinton's administration ordered several warrantless searches on the home and property of a domestic spy, Aldrich Ames. That is true, isn't it?

Attorney General GONZALES. That is correct, sir.

Senator HATCH. That was a warrantless set of searches.

Attorney General GONZALES. That is correct, sir.

Senator HATCH. And the Clinton administration also authorized a warrantless search of the Mississippi home of a suspected terrorist financier. Is that correct?

Attorney General GONZALES. I think that is correct, sir.

Senator HATCH. The Clinton Justice Department authorized these searches because it was the judgment of Deputy Attorney General Jamie Gorelick, somebody I have great admiration for—and let me quote her. It has been quoted before, but I think it is worth quoting it again. This is the Deputy Attorney General of the United States in the Clinton administration. She said, "The Presi-

dent has inherent authority to conduct warrantless physical searches for foreign intelligence purposes”—now, this is against domestic people—“and the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.” You are aware of that quote.

Attorney General GONZALES. I am aware of it, yes, sir.

Senator HATCH. If the President has inherent ability to surveil American citizens in national security cases during peacetime, I guess what is bothering me, how can it be that President Bush is precluded, as some have argued, from surveilling al Qaeda sources by intercepting foreign calls into this country to people who may be al Qaeda, affiliated with al Qaeda, or affiliated with somebody who is affiliated with al Qaeda? How can that be?

Attorney General GONZALES. Senator I think that the President’s authority as Commander in Chief obviously is stronger during a time of war. If the authorization to use military force did not exist or was repealed or was not interpreted in the way that we are advocating, then it seems to me you are teeing up a fairly difficult constitutional question as to whether or not Congress can constitutionally limit the President’s ability to engage in electronic surveillance of the enemy during a time of war.

Senator HATCH. We were aware of the Clinton’s administration approaches. I don’t know of any Republicans who raised Cain about that.

Walter Dellinger, the former head of the Office of Legal Counsel under President Clinton, in a final opinion published on July 14, 1994, wrote, “Specifically, we believe that the prohibition on destruction of aircraft would not apply to the actions of United States military forces acting on behalf of the United States during its state of hostilities. We know specifically that the application of the provision to acts of the United States military personnel in a state of hostilities could lead to absurdities. For example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution.”

General, do you believe that Walter Dellinger, who is now a critic of the President’s authorization of wartime surveillance of al Qaeda, was correct in 1994?

Attorney General GONZALES. Sir, I have not studied that opinion in a while, but it sounds like it would be correct in my judgment.

Senator HATCH. All right. Now, let me just bring up again, as I understand it, just so we can repeat it one more time, the administration takes the position that a further statute on top of Section 109 of the FISA Act would also complement the Act, and the authorized use of military force granted by Congress is an acceptable, legitimate statute that goes to the point that I made earlier, to use all necessary and appropriate force against nations, organizations, or persons the President determines planned, authorized, committed, or aided the terrorist attacks, and that that justifies doing what you can to interdict these foreign terrorists who are calling in to our country to people who may also be affiliated. Now, as I understand it, that is part of it.

The second part of it is the fact that you are citing that the President does have inherent powers under Article II of the Constitution to engage in these activities; and, third, that you have not violated the Fourth Amendment of the Constitution because the position you are taking under these circumstances with the obligation to protect this country are reasonable searches and seizures.

Attorney General GONZALES. I think clearly these searches are reasonable given the circumstances, the fact that we have been attacked by an enemy here within this country. I think it would fall within the special needs jurisprudence as something that would allow warrantless searches.

Let me just say that an important component of our argument relies upon the Canon of Constitutional Avoidance, because there are—I have heard some members of the Committee say they are not sure they buy the authorization to use military force analysis. If our interpretation is simply fairly possible, if it is only fairly possible, then the Court has held that that interpretation must be adopted if it means that we can avoid a tough constitutional issue.

Senator HATCH. Well, thank you, sir. My time is done.

Senator Feinstein?

Senator FEINSTEIN. Thank you, Mr. Chairman.

Mr. Chairman, I want to respond to you on the Jamie Gorelick-Aldrich Ames situation.

Senator HATCH. Sure.

Senator FEINSTEIN. Because, in fact, the law was changed directly after the Aldrich Ames case. I called because I heard you say this before, so I called Jamie Gorelick, and I asked her to put this in writing. She has done so, and I have it before me now. And she points out in this letter that her 1994 testimony arose in the context of congressional consideration of an extension of FISA to cover physical searches. And at the time FISA covered only electronic surveillance, such as wiretaps.

In 1993, the Attorney General had authorized foreign intelligence physical searches in the investigation of Aldrich Ames, whose counsel thereafter raised legal challenges to those searches. Point: There was no law at that time. And then she goes on to say that the Clinton administration believed “it would be better if there were congressional authorization and judicial oversight of such searches. My testimony did not address inherent Presidential authority to conduct electronic surveillance, which was already covered by FISA.”

I would ask that this letter and her testimony be entered into the record.

Senator HATCH. Without objection, it will be entered into the record.

Senator FEINSTEIN. Thank you. You know, I respect you greatly, but I think that is a bit of a red herring.

Senator HATCH. Well, but you need to also quote in the same letter where she said, “My testimony did not address whether there would be inherent authority to conduct physical searches if FISA were extended to cover physical searches.” And she goes on. We will put it into the record.

Senator FEINSTEIN. All right. Thank you.

Senator SESSIONS. Mr. Chairman, could I just—

Senator FEINSTEIN. If I—

Senator SESSIONS [continuing]. Say one point. Just one point.

Senator FEINSTEIN. If I have extra time, you can speak as long as you—

Senator HATCH. You will have extra time.

Senator SESSIONS. The Attorney General explained that when I asked him. He narrowed my question when I raised it and made that qualification. Perhaps you were not here when he did that.

Senator FEINSTEIN. All right. Mr. Attorney General, it is my view that the briefings of the Big 8 essentially violate the law as well. I believe that is a second violation of law, because I believe that Section 502, 5 U.S.C. 413(a)(1) and (2) and (b)(1) and (2) specifically say how the Intelligence Committee should be notified. I was present in the Intelligence Committee in December of 2001 when this was considered. And Senator Graham was Chairman of the Committee, and the Committee really wanted all sensitive intelligence reported in writing. And what this did was set up a mechanism for that.

So, in my view, it was very clear that what the Intelligence Committee wanted at that time was all sensitive intelligence outside of covert to be reported to the Committee, and this set up the format.

Now, let me just move on, if I can.

Attorney General GONZALES. Senator, could I respond to that?

Senator FEINSTEIN. Sure. Of course.

Attorney General GONZALES. Because I disagree. First of all, both Chairman Roberts and Chairman Hoekstra disagree. They believe that we have provided notice as required by the law to the Intel Committees, and they both take the position that nowhere in the law does it require that each individual member of the Intel Committee be briefed.

The section that I think you quoted to—and I must tell you sometimes it gets kind of confusing to read these (bb)'s and (ii)'s. It gets kind of confusing. I think you are referring to a section which imposes an obligation on the President to ensure that agencies within the administration meet the notice requirements. If you go to the actual notice requirements under 413a.(a) and 413b.(b), those impose the obligations to make sure that the Intel Committees are currently and fully informed. However, a.(a), which deals with non-covert action, and b.(b), which deals with covert action, both have a proviso that, to the extent it doesn't mean compromising—and I am paraphrasing here—sources and methods and especially sensitive matters. And so I think we have been acting consistent with the law based upon these provisions that I just cited. There has been a long practice of giving briefings only to the Chair and Ranking or a certain limited subset of the Intel Committees. And, again, I would just simply remind the Senator, I know Chairmen guard their prerogatives jealously, and both the Chairmen of the Intel Committees, Senate and House, both Chairmen have said we have met our obligations to provide briefings to the Intel Committee.

Senator FEINSTEIN. Well, my reading of the law, I disagree. I still disagree. I recognize we have a difference of opinion. I will propose an amendment to strengthen it in the next authorization bill. To

me—and I remember being there. I remember the discussion. And, anyway, I would like to move on.

I am puzzled, and I want to go back to why you did not come for a change in FISA. Let me just read off a few of the changes that we have made to FISA. We extended the emergency exemption from 24 to 72 hours. We lowered the legal standard for surveillance to the significant purpose test. We allowed for John Doe roving wiretaps. We lowered the standard for FISA pen traps. We expanded their scope to include Internet routing information. We extended the scope of business records that can be sought under FISA. We extended the duration of FISA warrants. We broadened FISA to enable the surveillance of lone wolf terrorists. And we made the Director of National Intelligence the lead authority.

Now, in view of the changes that we have made, I cannot understand why you did not come to the Committee unless the program was much broader and you believed it would not be authorized. That is the only reason I can figure you did not come to the Committee, because if the program is as the President has said and you have said, to this date you haven't briefed the Intelligence Committee. You haven't let us ask the question, What is a link? What is an affiliate? How many people are covered? What are the precise—and I don't believe in the briefings those questions were asked. What are the precise numbers? What happens to the data? How long is it retained in the data base? When are innocent people taken out of the data base?

Attorney General GONZALES. Senator, I—

Senator FEINSTEIN. I can only believe—and this is my honest view—that this program is much bigger and much broader than you want anyone to know.

Attorney General GONZALES. Well, Senator, of course, I cannot talk about aspects here that are beyond what the President has already confirmed. What I can say is that those Members of Congress who have received briefings know—I think they know, and, of course, I don't know what they actually know. But they have been briefed on all the details about all the activities. So they know what is going on.

Senator FEINSTEIN. I understand your point of view. This morning, I asked you whether there was any Supreme Court cases—this goes to precedent—that has held that the President can wiretap Americans since the Congress passed the FISA law, and you responded *In re Sealed Case*.

Attorney General GONZALES. Which, of course, is not a Supreme Court case.

Senator FEINSTEIN. That is right. I was going to bring that up, which is not a Supreme Court case.

Attorney General GONZALES. And I apologize if I was not clear.

Senator FEINSTEIN. I just wanted to come back at you. So it is pure dicta, and—

Attorney General GONZALES. It was not. Absolutely right, Senator.

Senator FEINSTEIN. I wanted to ask a question that you might not like, but I am going to ask it anyway. At the time of the *In re Sealed Case*, did the Department of Justice or other administra-

tion officials tell the FISA Court that warrantless domestic electronic wiretapping was going on?

Attorney General GONZALES. In connection with that litigation, not to my knowledge, Senator.

Senator FEINSTEIN. OK. And since the passage of FISA, has any court spoken specifically to the President's authority to conduct warrantless domestic electronic surveillance? Since the passage of FISA, any Supreme Court—

Attorney General GONZALES. The Supreme Court? I do not believe so. I think the last word on this by the Supreme Court is the *Keith* case, the 1972 case. And I think that year is right, and there the Court dealt with domestic security surveillance. And the Court was very clear, went out of its way, I believe, to make it clear that they were not talking about electronic surveillance for foreign intelligence purposes.

Senator FEINSTEIN. Was the program mentioned to the Court in the *Hamdi* case?

Attorney General GONZALES. I do not know the answer to that question, Senator.

Senator FEINSTEIN. I would appreciate it if you could find the answer and let us know.

Senator HATCH. Senator, take another 2 minutes because of our interruptions.

Senator FEINSTEIN. Oh, thank you very much.

This morning, you said, and I quote, "Presidents throughout our history have authorized the warrantless surveillance of the enemy during wartime." Has any President ever authorized warrantless surveillance in the face of a statute passed by the Congress which prohibits that surveillance?

Attorney General GONZALES. Actually, I think there was a statute on the books in connection with the order by President Roosevelt. I want to confirm that, but it is my recollection that that is, in fact, the case, that even though there was a statute on the books, and maybe even a Supreme Court case—I cannot remember now—President Roosevelt ordered electronic surveillance.

Senator FEINSTEIN. I would be very interested to know that.

As I understand your argument, it is that if one does not agree that the resolution to authorize military force provides a statutory exception to FISA, then FISA is unconstitutional—

Attorney General GONZALES. No—well, if that is the impression I gave, I don't want to leave you with that impression. That tees up, I think, a difficult constitutional issue. I think it is an easier issue for the executive branch side than the facts that were dealt with under *Youngstown v. Sawyer*, because there you were talking about the President of the United States exercising dominion over part of our domestic industry, the steel industry. Here you are talking about what I think is a much more core constitutional right of the Commander in Chief.

I believe that the President—that a statute that would infringe upon that I think would have some—there would be some serious constitutional questions there. But I am not prepared at this juncture to say absolutely that if the AUMF argument does not work here, that FISA is unconstitutional as applied. I am not saying that.

Senator FEINSTEIN. All right. But you sidestep FISA using the plenary authority as Commander in Chief. The problem there, as I see it, is that Article I, section 8 gives the Congress the authority to make the regulations for the military. NSA is part of DOD. Therefore, the Congress has the right to make those regulations.

Attorney General GONZALES. I think that the clause you are referring to is the clause in section 8 of Article I, which clearly gives to the Congress the authority and power to make rules regarding the Government and regulation of our Armed forces. And then the question is, well, electronic surveillance, is that part of the Government and regulation of our Armed Forces? There are many scholars who believe that there we are only talking about sort of the internal administration of our military, like court martials, like selective service.

And so I think there would be a question, a good debate and discussion about whether or not—what does that clause mean and does it give to the Congress under the Constitution the authority to impose regulations regarding electronic surveillance? I am not saying that it doesn't. I am just saying I think that is obviously a question that would have to be resolved.

Senator HATCH. Senator, your time is up.

Senator Grassley?

Senator FEINSTEIN. Thank you very much. Thanks, Mr. Attorney General.

Senator GRASSLEY. Thank you.

It appears to me that FISA generally requires that if surveillance is initiated under the emergency authorization provisions and an order is not obtained from the FISA Court, the judge must "cause to be served on any U.S. person named in the application and on such other U.S. persons subject to electronic surveillance as the judge" believes warranted: the fact of the application; two, the period of the surveillance; and, three, the fact that during the period information was or was not obtained.

So that brings these questions if that is a factual reading of the statute. Does this explain the caution and the care and the time that is used when deciding whether to authorize 72-hour emergency surveillance? And let me followup. And then the possibility that if you got it wrong, could you wind up tipping off an enemy? In this case, we are worried about al Qaeda terrorists. Would this interfere with the President's ability to establish this vital early warning system under FISA? And is this one of the reasons then—and this is the last question. Is this one of the reasons why FISA is not as nimble and quick a tool as you need to combat terrorist threats and that members of this Committee think ought to be used to a greater extent?

Attorney General GONZALES. Senator, those are all very good questions. The reason we are careful about our work in seeking a FISA is because we want to get it right. We absolutely want to get it right in every case, and we have career professionals working hard on these kinds of issues. And we want to get it right.

It is true that if I authorize an emergency—if I give an emergency authorization and an order is not obtained, my reading of the statute or my understanding of the statute is that the presumption is that the judge will then notify the target of that surveillance

during that 72-hour period. We would have the opportunity and make arguments as to why the judge should not do that. But in making those arguments, we may have to disclose information certainly to the judge, and if we fail, the judge may very well notify the target that they were under surveillance. And that would be damaging. That could possibly tip off a member of al Qaeda or someone working with al Qaeda that we have reasons to be concerned about their activities. And so it is one of the many reasons why we take such great care to ensure that when I grant an emergency authorization, that all the requirements of FISA are met.

The reason we have such a high approval rate at the FISA Court is not because the FISA Court is a rubber stamp. It is because we do our work in ensuring that those applications are going to meet the requirements of the statute.

Senator GRASSLEY. What we know about al Qaeda and their method of operation, which I think at the very least we think that it involves the placement of sleeper cells in our country for months or—they look way ahead—it could even be for years for a planned attack, and the need to rely upon an electronic communication network to convey instructions to those cells from command structures that would be located for al Qaeda outside the country. The surveillance program authorized by the President was tailored precisely to meet the natures of the threat that we face as a nation, particularly with sleeper cells; would that be right?

Attorney General GONZALES. It is a narrowly tailored program, and of course, that helps us in the Fourth Amendment analysis as to whether or not these are reasonable searches, and we believe that under the special needs jurisprudence, given the fact that we have been attacked from al Qaeda within our country, we believe that these would satisfy the requirements of the Fourth Amendment.

Senator GRASSLEY. I think in your opening statement, didn't you make a reference to bin Laden about his recent speech 2 weeks ago, and that is, obviously, a reiteration of the threat, and he said that these attacks, future attacks could dwarf the 9/11 magnitude? If that is true, is it in some sense incredible to you that we are sitting here having this discussion today about whether the President acted lawfully and appropriately in authorizing a program narrowly targeted an communication that could well lead to a disruption or prevention of such an attack?

Attorney General GONZALES. Senator, I think that we should all be concerned to ensure that all branches of Government are operating within the limits of the Constitution. And so I can't disagree with this hearing, the discussions, the questions in these hearings. I think we have a good story to tell from the administration viewpoint. I wish there were more that we could tell, because it is not simply a coincidence that the United States of America has not been hit again since 9/11. It is because of the brilliant and wonderful work of our men and women in the military overseas. It is because of tools like the PATRIOT Act. It is because of tools like the terrorist surveillance program.

Senator GRASSLEY. Howard Dean, the Chairman of the Democratic Party was quoted recently as equating the terrorist surveillance program authorized by President Bush to, quote, "abuses of

power during the dark days of the Nixon administration.” You are awful young, but does that have a fair comparison to you? And if it is not a fair comparison, why or why not?

Attorney General GONZALES. Well, it is not a fair comparison. I would direct you and the other members of the Committee to Chairman Roberts’s response to Mr. Dean in terms of making it clear that what is going on here is much more akin to the directive by President Roosevelt to his Attorney General Jackson in terms of authorizing the Department to—authorizing his administration to initiate warrantless surveillance of the enemy, and so this is—again, this is not domestic surveillance. This is not going after our political enemies. This is about international communications. This is about going after al Qaeda.

Senator GRASSLEY. I wonder if you would discuss the nature of the threat posed by al Qaeda to our country, because al Qaeda operates not under the rules of law, but with disregard and contempt for conventional warfare. In combatting al Qaeda, can we afford to rely purely upon conventional law enforcement techniques such as those traditionally used to combat organized crime groups and al Qaeda traffickers, and if we were to do that, what would be the result?

Attorney General GONZALES. The President expects us to use all the tools available under the Constitution. Obviously, we have strong law enforcement tools that we have been using and will continue to use. But this is also a very serious military campaign, and we are going to exercise and use all the tools, again, that are available to us in fighting this new kind of threat and this new kind of war.

Senator GRASSLEY. I think we had some discussion from you about the review that goes on every 45 days or approximately every 45 days, but the President himself said, quote, “carefully reviewed approximately every 45 days to ensure its ongoing propriety.” The surveillance is then reauthorized only after the President signs off on it.

So I want to ask you a few questions about this review process. I want to ask these questions because it is important that the American people know whether the President has instituted appropriate procedures to guard against abuses. In the 42-page legal memorandum from your Department, it is noted about the program, quote, “Reviewed for legality by the Department of Justice and are monitored by the General Counsel and the Inspector General of the NSA to ensure that civil liberties are being protected.”

I would like to give the opportunity to explain to the fullest extent possible, without compromising the programs, what, who, when, why, where and how of the periodic review. What can you tell us about the periodic review and reauthorization of the surveillance program? What assurances can you give the American people about their constitutional rights being zealously guarded against abuses?

Attorney General GONZALES. There is a lot there in that question, Senator. I will do my best to respond. Obviously, this is a periodic review, approximately every 45 days or so. We have people from the intelligence community evaluate whether or not al

al Qaeda—what is the level of threat that continues to be posed by al Qaeda.

During that period of time, we have monthly meetings out at NSA, where people who are involved in the program, senior officials, get together, sit down, talk about how the program is operating, ensuring that the program is being operated in a way that's consistent with the President's authorization.

In connection with each authorization, the Department does make an analysis with respect to the legal authority of the President of the United States to move forward. And so there are administration lawyers that are involved, looking to see whether or not the President does still have the authority to authorize the terrorist surveillance program that I have described here today.

Senator GRASSLEY. I think my time is up. I was going to have some followup questions on that point, but if it is necessary, I will submit it for answer in writing.

Senator HATCH. Thank you, Senator.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

General Gonzales, when my time ended last time, we were beginning to talk about the President's statements in the State of the Union that his predecessors used the same legal authority that he is asserting. Let me first ask, do you know of any other President who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?

Attorney General GONZALES. None come to mind, Senator, but maybe—I would be happy to look to see whether or not that is the case.

Senator FEINGOLD. I take it as a no unless you submit something.

Attorney General GONZALES. I can't answer that—I can't give you an answer.

Senator FEINGOLD. OK. Isn't it true that the only Federal courts to decide the President's authority to authorize warrantless national security wiretaps were considering wiretaps carried out before the enactment of FISA?

Attorney General GONZALES. I am sorry, Senator. I was thinking about your question and I—

Senator FEINGOLD. Would you like to answer the previous question?

Attorney General GONZALES. No, but I was trying to think of an answer, and I did not catch the first part of your second question.

Senator FEINGOLD. Isn't it true that the only Federal courts that decide the President's authority to authorize warrantless national security wiretaps were considering wiretaps that were carried out before the enactment of FISA?

Attorney General GONZALES. In which there were actual decisions? Actually, there was a Fourth Circuit decision, the *Truong* decision, which was decided after FISA. To be fair, I don't think they really got into an analysis.

Senator FEINGOLD. That case was about a Vietnam era wiretap before FISA was enacted, right?

Attorney General GONZALES. The collection occurred before FISA was enacted. The decision was made after FISA, and consequently,

my recollection is, is that case doesn't really get into a discussion about how the passage of FISA impacts—

Senator FEINGOLD. It was based in facts prior to FISA, then the law that controls is the law prior to FISA, right?

Attorney General GONZALES. That is right. And then, of course, *In re: Sealed Cases*, that did not—

Senator FEINGOLD. You covered that with Senator Feinstein. That was dicta, correct?

Attorney General GONZALES. Yes.

Senator FEINGOLD. Thank you. So when the President said that Federal courts have, quote, "approved the use of that authority," unquote, if he was trying to make people think that the courts had approved the authority he is invoking and the legal theory that you put forward here, that isn't really accurate, is it?

Attorney General GONZALES. The President was totally accurate in saying that in considering the question as to whether or not the President has inherent constitutional authority to authorize warrantless searches consistent with the Fourth Amendment to obtain foreign intelligence, the statement, I think, is perfectly accurate.

Senator FEINGOLD. But he said the Federal courts had said it was all right.

Attorney General GONZALES. That is right.

Senator FEINGOLD. And you were not able to give me anything here since FISA that indicates that.

Attorney General GONZALES. But, Senator, I don't believe that he was making a statement since or before—he was making the statement the courts who have considered the President's inherent constitutional authority, have—the Court of Appeals have said, and I think—there are five Court of Appeals decisions cited in the *In re: Sealed Case*. All of them have said, I believe, that the President does have the constitutional authority to engage in this kind of surveillance.

Senator FEINGOLD. That is why we just went over all this because all of that is based on pre-FISA law. Here is my concern. The President has somehow suggested that he could not wiretap terrorists before he authorized this program. He said, quote, "If there are people inside our country who are talking with al Qaeda, we want to know about it." Of course, I agree with that 100 percent, and we have a law that permits it. Isn't it true that FISA permits the NSA to wiretap people overseas without a court order even if they call into the United States?

Attorney General GONZALES. Well, of course, it depends, Senator.

Senator FEINGOLD. It does do that in some circumstances, does it not?

Attorney General GONZALES. It could do it in some circumstances depending on whether or not it is electronic surveillance as defined under FISA. As you know, they are very—I don't want to say convoluted—it is a very complicated definition of what kind of radio or wire communications would in fact be covered by FISA.

Senator FEINGOLD. General, I understand that, but clearly, FISA in part does permit that kind of activity in certain cases?

Attorney General GONZALES. Depending on the circumstances.

Senator FEINGOLD. To leave the impression that there is no law permitting that would be incorrect.

Attorney General GONZALES. Well, of course not. We use FISA whenever we can.

Senator FEINGOLD. That is what I am trying to get at, is the impression that the President left, I think in the State of the Union, was not completely accurate. Isn't it true that FISA permits the FBI to wiretap individuals inside the United States who are suspected of being terrorists or spies so long as the FBI gets secret approval from a judge?

Attorney General GONZALES. Senator, I think I have already said that with respect to even domestic communications involving members of al Qaeda, we use all the tools available to us including FISA. If we can get a FISA—

Senator FEINGOLD. So the fact is that when the President suggests that he doesn't have that, that power doesn't exist, that power does exist, at least in part, under FISA, under current law?

Attorney General GONZALES. Senator, I don't know whether or not that is what the President suggested, but clearly, the authority does exist for the FBI, assuming we can meet the requirements of FISA, assuming it is electronic surveillance covered by FISA, to engage in electronic surveillance of al Qaeda here in this country.

Senator FEINGOLD. Here is what the President said. He said, "If there are people inside our country who are talking with al Qaeda, we want to know about it," unquote. I was sitting in the room. He sure left me the impression that he was suggesting that without this NSA program, somehow he didn't have the power to do that. That is misleading. So when the President said that he authorized a program to, quote, "aggressively pursue the international communications of suspected al Qaeda operatives and affiliates to and from America," trying to suggest that without this program he could not do that under the law, that is not really right, is it?

Attorney General GONZALES. Senator, I believe what the President has said is accurate. It is not misleading. The day following the New York Times story, he came out to the American people and explained what he had authorized. We have given numerous briefings to Congress since that day. I am here today to talk about legal authorities for this program.

Senator FEINGOLD. I think the President's comments in the State of the Union were highly misleading. The American people need to know that you already have legal authority to wiretap anyone you suspect of helping al Qaeda, and every person on this Committee and the Senate supports your use of FISA to do just that.

Let me switch to another subject. Senator Feinstein sort of got at this, but I want to try a different angle. If you can answer this with a yes or no, I would, obviously, appreciate it. Has the President taken or authorized any other actions, any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

Attorney General GONZALES. Repeat your question, please, Senator.

Senator FEINGOLD. Has the President taken or authorized any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

Attorney General GONZALES. You mean in direct contradiction of a statute, and relying upon his commander in chief authority?

Senator FEINGOLD. Has he taken any other—yes, it would be a legal—

Attorney General GONZALES. Not to my knowledge, Senator.

Senator FEINGOLD. In other words, are there other actions under the use of military force for Afghanistan resolution that without the inherent power would not be permitted because of the FISA statute? Are there any other programs like that?

Attorney General GONZALES. Well, I guess what I would like to do, Senator, is I want to be careful about answering your question. I, obviously, cannot talk about operational matters that are not before this Committee today, and I don't want to leave you with the wrong impression. So I would like to get back to you with an answer to that question.

Senator FEINGOLD. I definitely prefer that to then being told that something is a hypothetical.

On September 10, 2002, Associate Attorney General David Kris testified before the Senate Judiciary Committee. His prepared testimony includes the following statement. "Thus, both before and after the PATRIOT Act, FISA can be used only against foreign powers and their agents, and only where there is at least a significant foreign intelligence purpose for the surveillance. Let me repeat for emphasis, we cannot monitor anyone today whom we could not have monitored at this time last year," unquote.

And this last sentence was actually underlined for emphasis in the testimony, so let me repeat it too. "We cannot monitor anyone today whom we could not have monitored at this time last year."

Now, I understand that Mr. Kris did not know about the NSA program and has been highly critical of the legal justifications offered by the Department. I also realize that you were not the Attorney General in 2002, so I know you won't know the direct answer to my question. But can you find out—and I would like if you can give me a response in writing—who in the White House had the Department of Justice reviewed and approved Mr. Kris's testimony, and of those people, which of them were aware of the NSA program and thus let, obviously, a highly misleading statement be made to the Congress of the United States. Will you provide me with that information?

Attorney General GONZALES. We will see what we can provide to you, Senator. My understanding is, is that Mr. Kris—I don't think it is fair to characterize his position as highly critical. I think he may disagree, but saying it's highly critical I think is unfair.

Senator FEINGOLD. We could debate that, but the point here is to get to the underlying information. I appreciate your willingness to get that for me if you can.

General Gonzales, I would like to explore a bit further the role of the telecommunications companies and Internet service providers in this program. As I understand it, surveillance often requires the assistance of these service providers, and the providers are protected from criminal and civil liability if they have been provided a court order from the FISA Court or criminal court, or if a high-ranking Justice Department official has certified in writing that, quote, "No warrant or court order is required by law that all

statutory requirements have been met and that the specified assistance is required.”

Am I accurately stating the law?

Attorney General GONZALES. I believe that is right, Senator, but—

Senator FEINGOLD. Have you or anyone at the Justice Department provided any telephone companies or ISPs with these certifications in the course of implementing the NSA’s program?

Attorney General GONZALES. Senator, that is an operational detail that I just can’t go into in this hearing.

Senator FEINGOLD. I look forward to an opportunity to pursue it in other venues. And thank you very much.

Attorney General GONZALES. Thank you, Senator.

Senator HATCH. Thank you, Senator.

Senator KYL?

Senator KYL. Thank you, Mr. Chairman. I hadn’t intended to ask any questions, but I think there are two areas that need to be cleared up, first with regard to two points that Senator Feingold said the President—in which the President made highly misleading statements, one in the State of the Union, allegedly leaving the impressions that the President had authority he did not have.

When he discussed the authority that he had that other Presidents had, or had exercised, what was he referring to there? Was he referring to FISA, or was he referring to something else?

Attorney General GONZALES. Senator, he was referring to the President’s inherent constitutional authority to engage in electronic surveillance of the enemy.

Senator KYL. Exactly. And second, Senator Feingold asked you if there was authority under FISA to conduct wiretaps, including of suspected al Qaeda terrorists, and that it was misleading for the President to infer otherwise. Is it possible to acknowledge that FISA authority exists while also making the point that it is not the optimal or maybe even workable method of collection of the kind that is done under the surveillance program at issue here?

Attorney General GONZALES. No question about it. It is one of the reasons for the terrorist surveillance program that while FISA ultimately may be used, it would be used in a way that has been less effective because of the procedures that are in FISA.

Senator KYL. Thank you. Now, let me clear up a concern expressed by Senator Feinstein that the reason that Congress had not been asked to statutorily authorize this surveillance program may be because it is much bigger than we have been led to believe. Is that the reason?

Attorney General GONZALES. Senator, the reason is because, quite frankly, we didn’t think we needed it under the Constitution, and also because we thought we had it with respect to the action by the Congress. We have believed from the outset that FISA has to be read in a way where it is not inconsistent with the President’s constitutional authority as Commander in Chief.

Senator KYL. Right. Now, there was also discussion about briefings by the intelligence community, General Hayden and perhaps others, to what has been called the Big 8, which are the 4 elected leaders, bipartisan, of the House and Senate, and 4 chairmen and ranking members of the two Intelligence Committees of the Con-

gress. Was that the group that you referred to when you said that there had been discussion about whether to seek an amendment of FISA in the Congress?

Attorney General GONZALES. Senator, it did include the leadership of the Congress and the leadership of the Intel Committees.

Senator KYL. In terms of evaluating—also Senator Leahy asked the question about why you did not come to the members of this Committee. Who would be in a better position to judge or to assess the impact on our intelligence with respect to compromise of the program? Would it be leadership and chairmen and ranking members of the Intelligence Committees or members of this Committee that had not been read into the program?

Attorney General GONZALES. Senator, the judgment was made that the conversation should occur with members of the Intel Committee and the leadership of the Congress, bipartisan.

Senator KYL. And in fact, if you came to this Committee to see amendments to cover the program at issue, the members of this Committee would have to be read into the program, would they not?

Attorney General GONZALES. Yes, sir.

Senator KYL. Senator Leahy also said thank goodness—I am paraphrasing now—thank goodness that we have the press to tell us what the administration is doing with this program because we would not know otherwise. And of course, the press did disclose the existence of this highly classified program, which you have indicated has compromised the program to some extent or has done damage to it. I forgot your exact phrase.

Attorney General GONZALES. Those, I believe, were the comments from the CIA Director.

Senator KYL. And it seems to me, Mr. Chairman, that the attitude that it is a good thing that this program was compromised validates the view of the bipartisan leadership that briefing Members of Congress further, or at least briefing members of this Committee would further jeopardize the program. It seems to me that those entrusted with knowledge of this program must be committed to its protection.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator.

Senator SCHUMER?

Senator SCHUMER. Thank you, Mr. Chairman.

I just want to go back to where we left off and then I will move forward, and thank you, General Gonzales. I know it has been a long day for you, especially with all that bobbing and weaving. It is not so easy.

We talked before about the legal theory that you have under AUMF, and I had asked you that under your legal theory can the Government, without ever going to a judge or getting a warrant, search an American's home or office? I am not saying—well, can you give me an answer to that? Why wouldn't the same exact legal theory apply, that the Congress, in the resolution gave the President power he needed to protect America? Why is one different than the other, both at Fourth Amendment?

Attorney General GONZALES. Senator, I am not suggesting that it is different. Quite frankly, I would like the opportunity simply to—

Senator SCHUMER. I am sorry, if you could pull the mic forward.

Attorney General GONZALES. I'm sorry. I am not saying that it would be different. I would simply like the opportunity to contemplate over it and give you an answer.

Senator SCHUMER. And you will be back here so we can ask that, right?

Attorney General GONZALES. According to the Chairman.

Senator SCHUMER. OK, good. If not, I would ask unanimous consent that Mr. Gonzales—General Gonzales be given time to answer that one in writing.

Senator HATCH. He said he would.

Senator SCHUMER. Good. Now, here is the next question I have. Has the Government done this? Has the Government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?

Attorney General GONZALES. Sir, to my knowledge, that has not happened under the terrorist surveillance program, and I am not going to go beyond that.

Senator SCHUMER. I do not know what—what you said, under the terrorist surveillance program. The terrorist surveillance program is about wiretaps. This is about searching someone's home. It is different. So it would not be done under this surveillance program. I am asking you has it be done?

Attorney General GONZALES. But now you are asking me questions about operations or possible operations, and I am not going to get into that, Senator.

Senator SCHUMER. I am not asking you about any operation. I am not asking you how many times. I am not asking you where.

Attorney General GONZALES. If you ask me has that been done.

Senator SCHUMER. Yes.

Attorney General GONZALES. Have we done something.

Senator SCHUMER. Yes.

Attorney General GONZALES. That is an operational question in terms of how we are using our capabilities.

Senator SCHUMER. So you will not answer whether it is allowed and you will not answer whether it has been done. I mean is not part of your—in all due respect, as somebody who genuinely likes you—but isn't this part of your job to answer a question like this?

Attorney General GONZALES. Of course it is, Senator, and—

Senator SCHUMER. But you are not answering it.

Attorney General GONZALES. Well, I am not saying that I will not answer the question. I am just not prepared to give you an answer at this time.

Senator SCHUMER. All right. I have another one, and we can go through the same thing. How about wiretap under the illegal theory, can the Government, without ever going to a judge, wiretap purely domestic phone calls?

Attorney General GONZALES. Again, Senator, give me an opportunity to think about that, but of course, that is not what this program is.

Senator SCHUMER. It is not. I understand. I am asking because under the AUMF theory, you were allowed to do it for these wiretaps. I just want to know what is going on now. Let me just—has the Government done this? You can get back to me in writing.

Attorney General GONZALES. Thank you, Senator.

Senator SCHUMER. And one other, same issue. Placed a listening device, has the Government, without ever going to a judge, placed a listening device inside an American home to listen to the conversations that go on there? Same answer?

Attorney General GONZALES. Same answer, Senator.

Senator SCHUMER. But now I have another one, and let's see if you give the same answer here. And that is, under your legal theory, can the Government, without going to a judge—this is legal theory, I am not asking you whether they do this—monitor private calls of its political enemies, people not associated with terrorism, but people who they don't like politically?

Attorney General GONZALES. We are not going to do that. That's not going to happen.

Senator SCHUMER. All right. Next, different issue. Last week in the hearing before the Intelligence Committee, General Hayden refused to state publicly how many wiretaps have been authorized under this NSA program since 2001. Are you willing to answer that question, how many have been authorized?

Attorney General GONZALES. I cannot—no, sir, I'm not at liberty to do that. I believe—and of course, I have not been at all the briefings for the congressional leaders, and the leaders of the Intel Committee. I believe that that number has been shared, however, with Members of Congress.

Senator SCHUMER. You mean the Chair of the Intelligence Committee or something? It is not a classified number, is it?

Attorney General GONZALES. It is a—I believe it is a classified number, yes, sir.

Senator SCHUMER. Here is the issue. FISA is also important to our national security, and you have praised the program, right?

Attorney General GONZALES. I couldn't agree more with you, Senator. It's very important.

Senator SCHUMER. Now, FISA makes public every year the number of applications. In 2004 there were 1,758 applications. Why can't we know how many under this program? Why should one be any more classified than the other?

Attorney General GONZALES. I don't know whether or not I have a good answer for you, Senator.

Senator SCHUMER. I do not think you do.

Attorney General GONZALES. The information is classified, and I certainly would not be at liberty to talk about it here in this public forum.

Senator SCHUMER. And I understand this isn't exactly your domain, but can you—I cannot even think of a rationale why one should be classified and one should be made routinely public. Both involve wiretaps. Both involve terrorism. Both involve protecting American security. And we have been doing the FISA one all along. I am sure if the—well, let me ask you this. If the administration thought that revealing the FISA number would damage security, wouldn't they move to classify it?

Attorney General GONZALES. I think maybe—of course, now I am just—I am going to give you an answer. Perhaps it has to do with the fact that with—FISA, of course, is much, much broader. We're talking about enemies beyond al Qaeda. We're talking about domestic surveillance. We are talking about surveillance that may exist in peacetime, not just in wartime. And so perhaps the equities are different in making that information available to Congress.

Senator SCHUMER. Would you support declassifying that number?

Attorney General GONZALES. Senator, I would have to think about that.

Senator SCHUMER. OK, we will wait for the next round. That is another. We have a lot of questions to followup on here.

Attorney General GONZALES. I look forward to our conversation.

Senator SCHUMER. Me too. Me too.

Abuses. This is when Frank Church was speaking at the hearing that Senator Kennedy, I think, talked about much earlier this morning, he said the NSA's, quote, capability at any time could be turned around on the American people and no American would have any privacy left. Such is the capability to monitor everything—telephone conversations, telegrams, it doesn't matter. There will be no place to hide.

Now it is 31 years later and we have even more technology. So there is the potential that Senator Church mentioned for abuse is greater.

So let me ask you these questions. I am going to ask a few of them so you can answer them together.

Have there been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?

Attorney General GONZALES. Senator, I think that—

Senator SCHUMER. Because—this gets to the nub of things—this is what we are worried about.

Attorney General GONZALES. Of course.

Senator SCHUMER. Most of us, I think all of us, want to give the President the power he needs to protect us. I certainly do. But we also want to make sure there are no abuses. So if there have been some abuses, we ought to know about it. And it might make your case to say, yeah, we found an abuse, or a potential abuse, and we snuffed it out.

Tell me what the story is.

Attorney General GONZALES. Well, I do not have answers to all of these questions. I would like to remind people that, of course, even in the area of criminal law enforcement, when you talk about probable cause, sometimes there are mistakes made, as you know.

Senator SCHUMER. No question. No one is perfect.

Attorney General GONZALES. The mistake has to be one that would be made by a reasonable man. And so when you ask have there been abuses, I can't—you know, these are all investigations, disciplinary action—

Senator SCHUMER. Yes, this is something you ought to know, if there has been any disciplinary action. Because I take it that would be taken—

Attorney General GONZALES. Not necessarily. I think the NSA has a regimen in place where they ensure that people are abiding by agency policies and regulations.

Senator SCHUMER. If I asked those two questions about the Justice Department, any investigations arising out of concerns about abuse of NSA surveillance or any disciplinary action taken against officials, in either case by the Justice Department, you would know the answer to that.

Attorney General GONZALES. I would probably know the answer to that, to my knowledge, no.

Senator SCHUMER. Could you commit, when we come back, to tell us if there have been—you know, you can then go broader than what you know—more broadly than what you know now—

Attorney General GONZALES. In terms of what is going on at NSA or Justice?

Senator SCHUMER. NSA.

Attorney General GONZALES. Well—

Senator SCHUMER. I mean, as the chief law enforcement officer, it is still your job to sort of know what is going on in other agencies.

Attorney General GONZALES. Well, sir, but if we are not talking about—Each agency has its own policies and procedures in place.

Senator SCHUMER. I am just asking you when you come back next time to try and find the answers.

Attorney General GONZALES. I will see what I can do about providing you additional information to your questions.

Senator SCHUMER. A little soft, but I will have to take it, I guess.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

Senator DeWine.

Senator DEWINE. Thank you, Mr. Chairman.

Long day, Mr. Attorney General. Let me just ask you a few questions. We have had a lot of discussion today and you have referenced a lot to this group of 8, report to this group of 8. I just want to make a point. It is a small point, I guess, but the statutory authorization for this group of 8 is 50 USC 413b. When you look at that section, the only thing that it references as far as what this group of 8 does is receive reports in regard to covert action. So that is really what all it is. There is no—it does not cover a situation like we are talking about here at all.

So I just want to make that point. We all have a great deal of respect for these eight people. It is a different group of 8 at different periods of time. We have elected them, we have selected them, they are leaders of the Congress. But there is no statutory authority for this group other than this section has to do with covert operations. And this is not a covert operation as defined in the specific section.

Attorney General GONZALES. Senator, can I respond to you?

Senator DEWINE. Sure.

Attorney General GONZALES. Because I had a similar question from Senator Feinstein and I don't know whether or not you were here.

First of all, again repeating for the record that of course the Chairman of the Senate Intel Committee and the Chairman of the House Intel Committee are both—

Senator DEWINE. And I was here when she—

Attorney General GONZALES. OK. Well, they both have communicated that we are meeting our statutory obligations. There is a provision that requires the President of the United States to ensure that agencies are complying with their notice requirements. The actual notice requirements, as I read it, are 413a(a) and 413b(b). And 413a(a) deals with non-covert action; 413b(b) deals with covert action. And both of them—

Senator DEWINE. Mr. Attorney General, I don't have much time. I don't mean to be impolite.

Attorney General GONZALES. That is all right.

Senator DEWINE. I listen to that and I respect your position on it. My only point was a small point.

Attorney General GONZALES. Yes, sir.

Senator DEWINE. And that point simply is that when we referenced a group of 8, there is no statutory authorization for the group of 8 other than for a covert operation. I guess I am just kind of a strict constructionist, a kind of conservative guy, and that is how I read the statute. That is my only point. And I understand your legal interpretation. I respect that. But, you know, that is it. I don't see it any other way on that.

Let me ask you a couple of other questions that I wonder if you could clarify for me. One is the legal standard that you are using, that is being used by the NSA under this program for deciding when to conduct surveillance of a suspected terrorist. In your December 19th press conference you said that you must have a, and I quote, "reasonable basis to conclude" that one party to the communication is affiliated with al Qaeda. Speaking on Fox TV yesterday, General Hayden referred to the standard as "in the probable cause range."

Could you just define it for me? I know you have talked about it today, but we are hearing a lot of different definitions.

Attorney General GONZALES. To the extent there is—

Senator DEWINE. You are the Attorney General. Just clarify it for me, pinpoint it, give me the definition that the people who are administering this every single day in the field are following.

Attorney General GONZALES. To the extent there is confusion, I must—we must take some of the credit for some of the confusion, because we have used different words. The standard is a probable cause standard. It is reasonable grounds to believe—

Senator DEWINE. A probable cause standard. That doesn't mean it is—is that different than probable cause as we would normally learn that in law school?

Attorney General GONZALES. Not in my judgment.

Senator DEWINE. OK. So that means—

Attorney General GONZALES. I think it is probable cause. But it is not probable cause as to guilt—

Senator DEWINE. I understand.

Attorney General GONZALES [continuing].—or probable cause as to a crime being committed. It is probable cause that a party to the communication is a member or agent of al Qaeda. The precise lan-

guage that I would like you to refer to is a reasonable grounds to believe. Reasonable grounds to believe that a party to the communication is a member or agent of al Qaeda or of an affiliated terrorist organization.

Senator DEWINE. So—

Attorney General GONZALES. It is a probable cause standard, in my judgment.

Senator DEWINE. So probable cause.

Attorney General GONZALES. It is probable cause.

Senator DEWINE. And so all the case law or anything else that we would learn throughout the years about probable cause, about that specific question, would be what we would look at and what the people are being instructed to follow.

Attorney General GONZALES. But again, it has nothing to do with probable cause of guilt or probable cause that a crime had been committed. It is about—

Senator DEWINE. I understand. We are extrapolating that traditional standard over to another question.

Attorney General GONZALES. And the reason that we use these words instead of “probable cause” is because people relying upon the standard are not lawyers.

Senator DEWINE. Let me followup. I don’t have much time. General Hayden described the standard as a softer trigger than the one that is used under FISA.

What does that mean?

Attorney General GONZALES. I think what General Hayden meant was that the standard is the same but the procedures are different, and that you have more procedures that have to be complied with under FISA. But the standards are the same in terms of probable cause. But there clearly are more procedures that have to be met under FISA, and that is what I believe General Hayden meant by “it’s a softer trigger.”

Senator DEWINE. So it is more—it is a procedure issue, then. In other words, I have to go through more hoops on one, loops on the other. I mean, it is a difference what I have to go through, but my legal standard is the same. Is that what you are saying?

Attorney General GONZALES. It is a probable cause standard for both and, yes, sir, the—what has to—

Senator DEWINE. It is the same standard.

Attorney General GONZALES. It is the same standard.

Senator DEWINE. Different question, but—

Attorney General GONZALES. Different procedures.

Senator DEWINE [continuing]. The same standard.

Final followup question on this. I believe you have said that the individual NSA analysts are the ones who are making these decisions. The people who are actually doing are making the decisions, obviously. What kind of training are these individuals given in regard to applying the standard?

Attorney General GONZALES. Well—

Senator DEWINE. Are you involved in that or are you not involved in that?

Attorney General GONZALES. This is primarily handled by the General Counsel’s Office at NSA. And as you know, they are very, very aware of the history of abuses. They care very much about en-

sure that all the activities that are ongoing out at NSA are consistent with the Constitution and certainly consistent with the authorization by the President for this terrorist surveillance program.

Senator DEWINE. So this is not something your Department is directly involved in?

Attorney General GONZALES. No, sir, I think it would be unfair to say that we are directly involved. We have provided some guidance, but I think it would be unfair to say that the Department of Justice has been intimately involved in providing training and guidance. This has been primarily—that, I think, aspect—I think it is fair to say that that responsibility has fallen primarily to the General Counsel's Office out at NSA.

Senator DEWINE. Well, Mr. Attorney General, I am going to conclude at this point. I just go back to what I said this morning, and that is, you know, we have heard a lot of debate, even more debate than we had this morning, about these legal issues. People on different sides of these legal issues. I just really believe it is in the country's best interest, the President's best interest to want—terrorism's best interest, which is what we are all concerned about—some 4 years or so after this program has been initiated for the President to come to Congress and to get—for us, the Intelligence Committee, which is the Committee that has jurisdiction, to take a look at this program, to get debriefing on the program, and then to see whatever changes in the law have to be made and to deal with it. I think you will be in a—the President will be in a much stronger position at this point to go forward, and it will be in the best interest of the country.

So I thank you.

Attorney General GONZALES. Thank you, Senator.

Senator HATCH. Thank you, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. And thank you, General Gonzales. I join all of those that paid tribute to you for your patience on this, and thank you for responding to these questions.

Just to pick up on what my friend and colleague, Senator DeWine, has mentioned. I am in strong agreement with that recommendation. It is bipartisan. I didn't have a chance to talk to Senator DeWine. I mentioned earlier in the course of our visit this morning that we had, I thought, extraordinary precedent with Attorney General Levi, and President Ford, where the members of this Committee, a number of us, went down to the Justice Department and worked with them. And they wanted to get it right on eavesdropping. And then General Levi had a day and a half where he listened to outside constitutional experts, because he wanted to get it right.

My very great concern is that we are not getting it right. Maybe the NSA thinks that they are getting the information, but what we are seeing now with the leaks and others is that there are many people out there that wonder whether they are going to face future prosecution, whether the court system is going to be tied up because of information that is gained as a result of the NSA taps that is not going to be permitted, and that we are going to have these known al Qaeda personnel that are going to be either freed or

given a lesser sentence or whatever, and that they are less inclined to sort of spill the beans because, if they know that they are going to get away or worse, they will be better prepared to make a deal with the law enforcement authorities than if they think they can tie up the courts.

So in the FISA Act, as you well know, the 15 days that were included in there were included, as the legislative history shows, so that if they needed to have a broader context—it was spelled out in the legislative history—the administration would have 7 days allegedly to make emergency recommendations and we would have 7 days to act. Maybe that was too precipitous, but it was certainly the intent at the time to recognize the time. And I believe very strongly that as Senator DeWine has said, we have uncertainty now. When you have those within your own department who wonder about the legality, the list of constitutional authorities that question the legality. When you have Professor Curtis Bradley, someone who had been part of the administration, the State Department, question the legality, I think this is a matter of concern.

I asked you, and I don't think I gave you a chance to answer, but you really didn't have a chance to test this out with outside constitutional authority, as I understand it.

Attorney General GONZALES. Sir, of course I wasn't at the Department when the program commenced. So certainly, from within the White House, I am not aware of any discussions generally or specifically. I don't think there would have been any specific discussions with outside experts. And I suspect, in fact I am fairly sure, there were not discussions with outside experts at the Department, although I don't know for sure.

Senator KENNEDY. Well, we will have our chance and opportunity, hopefully, to find that out in further hearings. But what was done previously and the coming together when the legislation was passed with virtual unanimity in the House and the Senate is impressive. And I think, as others have expressed, we want to give the President the power to do what is right in terms of protecting us, but we need, as we do on other issues, to have the kinds of checks and balance to make sure that it is done right.

I have just a couple of questions in other areas. I am not sure—you might have been asked about this, and if you can't answer it, you can't answer it, but since September 11th, has the President authorized any other surveillance program within the United States under his authority as Commander in Chief or under the authorization for use of military force in Afghanistan?

Attorney General GONZALES. Senator, I can't answer that question in terms of other operations.

Senator KENNEDY. All right. On another issue, and I have heard from staff—I apologize for not being here through the whole session; we are dealing with the asbestos legislation on the floor at the time—

Attorney General GONZALES. Yes. Of course.

Senator KENNEDY [continuing]. And I needed to go over to the floor. I understand that the telephone companies that assist the Government in engaging in electronic surveillance face potential criminal and civil penalties if they disclose consumer information unlawfully. But they are protected from such liability if they re-

ceive a written certification from the Attorney General or his designee saying that, and I quote, no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

So you understand that telephone companies can face criminal and civil liability if they provide wiretapping assistance in a way that is not authorized by statute?

Attorney General GONZALES. I do understand that, yes, sir.

Senator KENNEDY. Have you provided a certification to the telephone companies that all statutory requirements have been met?

Attorney General GONZALES. Senator, I can't provide that kind of information.

Senator KENNEDY. You can't answer that. And you couldn't even provide us with redacted copies.

So I guess we would assume that, since that is a requirement or otherwise that they would be held under the criminal code, and that is a requirement, one would have to assume that you have given them that kind of authority. But that—

Attorney General GONZALES. Sir, two points. There is a lot in the media about potentially what the President has authorized. Much of it is incomplete. Much of it is, quite frankly, wrong. And so you have this muddled picture that the President has authorized something that is much greater than what in fact he has authorized.

And I can't remember my second point.

Senator KENNEDY. But your response to the earlier question about the range of different—

Attorney General GONZALES. Oh, I remember my second—if I could just—My second point is, is that this—your question—again, I haven't—I think this is true; I don't want to give you the—Well, maybe I shouldn't make this statement. I am sorry. Go ahead, sir.

Senator KENNEDY. Well, we were looking at sort of the range of different programs.

I want to just mention, General, as someone that was here when we had the testimony, just quickly on the wiretaps, that prior to the time that J. Edgar Hoover used to appear, they used to lift all the wiretaps. They had 450 or 500 wiretaps, and they had 20 the day he testified, and then 500 the next day. No one is suggesting that that is what is happening, but many of us who have been on this Committee for some time have seen those abuses. No one is suggesting that, and we understand your reluctance in mentioning this, but this is an issue that has been around over some period of time.

I would just say in conclusion, Mr. Chairman, I am very hopeful. We want to have as much certainty on the program as possible. I think what we have seen out in the public now the information that has been out there, certainly weekly, is a result of concerned individuals in these agencies, hard-working Americans that are trying to do a job and are concerned about the legality of this job. And I think they are entitled to the protections that we ought to be able to provide for them. As someone who has been a member of this Committee, I think that this Committee has in the past and certainly would still recognize the extraordinary sensitivity and the importance of it, do the job, do it right, and do it well. And then done so, I think we would have a different atmosphere and a dif-

ferent climate. And I think we would be able to get the kind of information that is going to be so important to our national security.

I hope that will be a judgment that you will consider, as Senator DeWine has mentioned and others have mentioned. I appreciate your testimony.

Thank you, Mr. Chairman.

Chairman SPECTER. Before proceeding to Senator Sessions, who is next on the Republican side—I will defer my turn until after Senator Sessions has had his turn—I think this is a good time to make an announcement. Senator Kennedy made a suggestion earlier today about the Committee's intentions with respect to renewing the Voting Rights Act. This would be an especially appropriate action with the death of Coretta Scott King. We have been talking about hearings. We are going to move to renew the Voting Rights Act this year, if we possibly can, in advance of the 2007 date. We have been laboring under a very, very heavy workload, which everybody knows about, and we will be scheduling those hearings early on. They have to be very comprehensive and provide an evidentiary base. That is a matter of great concern, really, to everybody on the Committee.

Senator Kennedy?

Senator KENNEDY. I want to thank the Chair. We have had a chance to talk about this at other times. And I particularly appreciate his sensitivity, as many of us are going down to the funeral for Coretta Scott King. I think it is an important statement and comment that her legacy will continue. So I thank the Chair. I know we have broad support. My friend Senator Leahy has been a strong supporter. Others here, Senator Biden—I look around this Committee. It is a very, very important legislation. In the time that we inquired of General Gonzales, he had indicated the full support of the administration on this. We will look forward to working with you.

I thank the Chair for making that announcement.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I would like to offer for the record a letter from Mr. H. Brian Cunningham, who served for 6 years with the CIA and the Department of Justice in President Clinton's administration and for a time President Bush's administration, in which he defends the actions of the terrorist surveillance program.

I would also join with the Chairman in welcoming Ms. Deborah Burlingame here. She has been here all day. Her brother was a pilot who lost his life in the plane that crashed into the Pentagon. I think her presence today is a vivid reminder of the human cost that can occur as a result of negligence, or failure of will, or failure to utilize the capabilities that are constitutionally legal in this country. We have a responsibility to make sure that we do those things that are appropriate and legal to defend this country. It is not merely an academic matter. We have had some good discussions here today. But it is beyond academics. It is a matter of life and death. And we have lost a lot of people; nearly 3,000 people have no civil rights today. They are no longer with us as a result

of a terrorist attack. Thank you, Ms. Burlingame, for coming and being with us today.

We talked about the inherent power of the President. I think there has been a remarkable unanimity of support for the inherent power of the President to do these kind of things in the interest of national security. And I know, post-Aldrich Ames, as you pointed out when I asked you about it, Mr. Gonzales, Attorney General Gonzales, that laws were changed with regard to that. But in fact, Jamie Gorelick, the Deputy Attorney General in the Clinton administration, testified in defense of a warrantless search of Aldrich Ames's home and a warrantless search of the Mississippi home of a terrorist financier in the Aldrich Ames case. She testified that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes.

Now, that sounds to me like she was saying that that is an inherent constitutional power. I don't understand it any other way. Would you?

Senator BIDEN. Would the Senator yield for a question? What year is that? I am sorry.

Senator SESSIONS. This would have been after the Aldrich Ames case, 1994–1995.

Senator BIDEN. Thank you.

Senator SESSIONS. It was before the statute was changed by the Congress. But she did not discuss it in that context. Her context was that it is the inherent power of the President. And she went on to say, "that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities."

And in addition to that, Judge Griffin Bell, who served as a Federal judge for a number of years and was Attorney General under a Democratic President, Jimmy Carter, when the FISA Act was passed, acknowledged that while the bill did not recognize the President's inherent power to conduct electronic surveillance, he said this: "[T]his does not take away the power of the President under the Constitution. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is."

And he went on to say a little earlier, when asked about the inherent power of the President to order electronic surveillance without first obtaining a warrant, former Attorney General Griffin Bell testified, "We can't change the Constitution by agreement." Or by statute, I would add.

A little later, he said when asked if he thought the President has, quote—he was asked this question—Does the President have "the inherent right to engage in electronic surveillance of an American citizen in this country?", Judge Bell responded, "I do. I think he has a constitutional right to do that, and he has a concomitant constitutional duty to do it under certain circumstances."

So I don't know all the answers to what the powers are here. There are a lot of different opinions. I would say this. You have almost been criticized some today for not going further, not surveilling phone calls within our country. Some on the other side have criticized you—are apparently surprised you didn't assert that

authority. But the President, I think, acted narrowly and within what he thought would be appropriate, given the constitutional and statutory structure and after having informed eight of the top leaders in the U.S. Congress.

Would you comment on that?

Attorney General GONZALES. Well, it is a very narrow authorization. And again, I want to repeat what I said earlier in the hearings in terms of—I want to assure you that while domestic-to-domestic is not covered under the terrorist surveillance program, we are using all the tools available, including FISA, to get information regarding those kinds of communications. I mean, if there are other ways to do it that are permitted under the Constitution, we are going to try to get that information, so very, very important.

Senator SESSIONS. Well, thank you. I would just observe that I think this system was working. It was a narrow program that the President explained to congressional leaders. He had his top lawyers in the Department of Justice and the White House review its constitutionality and he was convinced that it was legal. He narrowly constrained it to international calls, not domestic calls, and al Qaeda-connected individuals. And he also did it with the one group that he has concluded was responsible for 9/11, al Qaeda, the group that this Congress has authorized him to engage in hostilities against, to go to war against. And they declared war on us even before 9/11. That is the one group, not other groups that might have hostile interests to the United States like Hizbollah, or a Colombian group, or terrorist group around the world. That is what he authorized to occur. So I think he showed respect for the Congress, not disrespect.

And General Gonzales, other groups that may have violent elements within them are not authorized to be surveilled through this terrorist surveillance program. Isn't that correct?

Attorney General GONZALES. Senator, under the President's terrorist surveillance program, again as I have indicated, what we are talking about today is people, members or agents of al Qaeda or related—of al Qaeda or related terrorist organizations. That is what we are talking about. And I think General Hayden, I believe, testified before the Intel Committee that there are professionals out at NSA and, I presume, from other branches of the intel community that provide input as to what does that mean to be sort of related or working with al Qaeda.

Senator SESSIONS. Well, let me just conclude with this point. I think the system was working in that way. We were conducting a highly classified, important operation that had the ability to prevent other people from being killed, as Ms. Burlingame's brother was killed and several thousand others on 9/11.

I believe that CIA Director Porter Goss recently—his statement that the revealing of this program resulted in severe damage to our intelligence capabilities, is important to note. And I would just like to followup on Senator Cornyn's questions, General Gonzales, and ask you to assure us that you will investigate this matter, and if people are found to have violated the law, that the Department of Justice will prosecute those cases when they reveal this highly secret, highly important program.

Attorney General GONZALES. Senator, of course we are going to investigate it. And we will make the appropriate decision regarding subsequent prosecution.

Senator SESSIONS. Will you prosecute if it is appropriate?

Attorney General GONZALES. We will prosecute when it is—if it is appropriate, yes, sir.

Senator SESSIONS. Thank you.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Biden.

Senator BIDEN. Thank you very much.

General, how has this revelation damaged the program? I am almost confused by it. I mean, it seems to presuppose that these very sophisticated al Qaeda folks didn't think we were intercepting their phone calls. I mean, I am a little confused. How did this revelation damage the program?

Attorney General GONZALES. Well, Senator, I would first defer to the experts in the Intel community who are making that statement, first of all. I am just a lawyer, and so when the Director of the CIA says this will really damage our intel capabilities, I would defer to that statement.

I think, based on my experience, it is true. You would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget, and you are amazed at some of the communications that exist. And so, but when you keep sticking it—putting it in their face that we are involved in some kind of surveillance, even if it is unclear in these stories, it can't help but make a difference, I think.

Senator BIDEN. Well, I hope you and my distinguished friend from Alabama are right that they are that stupid and naive, because we are much better off if that is the case. I got the impression from the work I have done in this area that they are pretty darned sophisticated. They pretty well know. It is a little like when we talk about—when I say you all haven't—not you personally—the administration has done very little for rail security. They have done virtually nothing. And people say, Oh, my lord, don't tell them, don't tell them there are vulnerabilities in the rail system. They'll know to use terror. Don't tell them that tunnel was built in 1860 and has no lighting, no ventilation.

I mean, I hope they are that stupid.

Attorney General GONZALES. Sir, I think you can be very, very smart and be careless.

Senator BIDEN. Well, OK, but if that is the extent of the damage, then I hope we focus on some other things, too.

Look, I would like to submit for the record a letter numerous people have already submitted this letter—it has probably already been done—to Senators Specter and Leahy from former Deputy Attorney General Jamie Gorelick. She makes a very basic point. I don't want to debate it at this time. She said the Aldrich Ames case is about physical search. FISA didn't cover physical searches, as my distinguished friend from Alabama knows. At the time they conducted the search, FISA did not cover physical searches.

And then she went on to say, My testimony did not address whether there would be inherent authority to conduct physical

searches if FISA were extended to cover physical searches. After FISA was extended to cover physical searches, to my knowledge FISA warrants were sought.

So, I mean, let's compare apples and apples, and oranges and oranges.

Let me ask a few other basic questions. Because for me, you know, I have real doubts about the constitutionality, as others have raised here. I used to have a friend who used to say, you have to know how to know. You have to know how to know. And we don't know.

Now, you are telling me and the rest of us that the Director of CIA says we have been damaged. Well, the former Director told us that we were going to be greeted with open arms. You know, that they had weapons of mass destruction. Those were honest mistakes. I mean, for me to accept the assertion made by a single person is something I would consider but is not dispositive.

Let me ask you this question. Do you know—and you may not—do you know how many of these wiretaps and/or e-mail intercepts have resulted in anything?

Attorney General GONZALES. Well—

Senator BIDEN. Any criminal referral, any—

Attorney General GONZALES. Without getting into specifics, Senator, I can say that the Director of the FBI said this has been a very valuable program. And it has helped identify would-be terrorists here in the United States, and it has helped identify individuals providing material support for terrorists. General Hayden has said this has been a very successful program, that but for this program we would not have discovered certain kinds of information. General Hayden also said that this program has helped detect and prevent—I think those were his words—attacks both here and abroad. These folks are the ones that are paid to make these kinds of assessments. I am not.

Senator BIDEN. Have we arrested those people? Have we arrested the people we have identified as terrorists in the United States?

Attorney General GONZALES. Sir, when we can use our law enforcement tools to go after the bad guys, we do that.

Senator BIDEN. No, that is not my question, General. You said that, you cited the assertions made by Defense Department, by General Hayden, by the FBI that this has identified al Qaeda terrorists. Have we arrested them?

Attorney General GONZALES. Senator, I am not going to go—I am not going to go into specific discussions about—

Senator BIDEN. I am not asking for specifics, with all due respect.

Attorney General GONZALES. Well, in terms of how that information has been used and the results of that information.

Senator BIDEN. Well, I hope we arrested them if you identified them. I mean, it kind of worries me because you all talk about how you identify these people and I have not heard anything about anybody being arrested. I hope they are not just hanging out there like we had these other guys hanging out prior to 9/11. I don't think you would make that mistake again.

Can I ask you, again. A suspected al Qaeda terrorist calls from Abu Dhabi to an American citizen in Selma, Alabama. Turns out

that when you do the intercept, the person on the other end, from Abu Dhabi, wasn't a terrorist. Understandable mistake. And it turns out the person in Selma wasn't talking to a terrorist. What do you do with that conversation that has now been recorded?

Attorney General GONZALES. What I can say, Senator, is that we do have—there are minimization procedures in place. You and I had this conversation before about the minimization procedures that may exist with respect to this program.

Senator BIDEN. That may exist?

Attorney General GONZALES. Meaning—

Senator BIDEN. Either they do or they don't. Do they exist?

Attorney General GONZALES. There are minimization procedures that do exist with this program, and they would govern what happens to that information.

Senator BIDEN. Does anybody know what they are?

Attorney General GONZALES. Yes, sir, the folks out at NSA who are actually administering this program.

Senator BIDEN. Have they told anybody in the Congress? Have they told any court?

Attorney General GONZALES. Sir, I do not know that, the answer to that question.

Senator BIDEN. I guess maybe you all don't have the same problem I have. If, in fact, there are minimization procedures and they are being adhered to, no problem. If, in fact, the people being intercepted are al Qaeda folks and they are talking to American citizens, no problem. But how do we know? I mean, doesn't anybody get to look at this ever? Doesn't a court retrospectively get to look at it? Doesn't, you know, the royalty within the Senate get to look at it, you know, these two, four, or eight people? I mean, doesn't somebody look at it? Or, you know, the cold war lasted 40 years. This war is likely to last 40 years. Is this for 40 years we have got to sit here and assume that every President is just, well, we know old Charlie, he is a good man, we are sure he wouldn't do anything wrong? And we know no one in the intelligence community would ever do anything wrong. We have a history of proving that never occurred. And we know no one in the FBI will ever do anything wrong. That is clear. That never occurred.

I mean, is there some place along the line that somebody other than an analyst, who we don't know but we know he is asserted to be an expert on al Qaeda, is there somebody other than that person who is ever going to know what happened? And whether or not there is, the next President may be less scrupulous. Maybe he or she will be engaged in data-mining.

Attorney General GONZALES. Senator, as I indicated in my opening remarks, of course, the Inspector General at NSA, he has the responsibility to ensure that the activities out of this program are done in a way that is consistent with the President's authorization, including the minimization requirements.

Senator BIDEN. OK. This reminds me of a Supreme Court hearing. What goes into the President making the decision on reauthorization every 45 days? Does anybody come and say, Mr. President, look, we have done 2,117 wiretaps or 219, 60 percent of them had some impact or only 1 percent has an impact, and we think—or is

it automatic? I mean, what kind of things does a President look at other than we still have al Qaeda out there?

Attorney General GONZALES. Sir, it is not automatic. As I also indicated in my opening statement, the President receives information from the intelligence community about the threat. The threat is carefully evaluated as to whether or not we believe al Qaeda continues to be a continuing threat to the United States of America.

Senator BIDEN. So as long as it is, the program, so that is the criteria, is al Qaeda a threat? Not is the program working, but is al Qaeda a threat? Is that the criteria?

Attorney General GONZALES. Well, of course not. If we do not have a tool, a lawful tool that is effective, why would we use it? We only use a tool if it is effective.

Senator BIDEN. Thank you, General.

Attorney General GONZALES. Mr. Chairman, could I ask for a short break?

Chairman SPECTER. Granted.

Attorney General GONZALES. Thank you, Mr. Chairman.

[Recess 4:44 p.m. to 4:52 p.m.]

Chairman SPECTER. The Judiciary Committee hearing will resume. We have four more Senators who have not completed their next round who are on the premises, so it may be that we can finish today. Other Senators have looked toward another round, so let me negotiate that between today and some date in the future to see if it is necessary to ask you to come back, Mr. Attorney General. And I had thought about limiting the time to 5-minute rounds, but we are going to be here at least until about 5:30. So let's go ahead with the full 10 minutes, and I will yield at this time to Senator Graham?

Senator BIDEN. Mr. Chairman, parliamentary inquiry. I do have other questions. I am not asking they be asked today or even tomorrow, but if we end today, which I think makes a lot of sense—the General has been very generous, and his physical constitution has been required to be pretty strong here today, too. Is it likely if after you survey us, after we close down today, that you may very well ask the General back for more questions from us in open session?

Chairman SPECTER. Senator Biden, I would like to leave that open. Senator Leahy said that he was looking forward to another round, which is where we were when he left.

Senator BIDEN. OK.

Chairman SPECTER. I thought we would have a number of Senators who wouldn't have finished a second round, so Attorney General Gonzales would have had to come back for a second round. But it may be that others will have further questions, or it may be that on some of our other hearings we will have matters that we want to take up with the Attorney General. And the Attorney General has stated to me his flexibility in coming back, so let's—is that correct, Mr. Attorney General?

Attorney General GONZALES. I try to be as helpful as I can to you, Mr. Chairman.

Chairman SPECTER. I take that to be a yes.

Senator BIDEN. Ten more seconds. The only reason I ask, I, like you, want to go to the floor and speak on the asbestos bill that is

up, and I didn't know whether I should stay here for a third round or—

Chairman SPECTER. I can answer that. You should stay here.

[Laughter.]

Senator BIDEN. I oppose the Chairman's position on asbestos. I shouldn't have asked that question. I withdraw the question, Mr. Chairman.

Chairman SPECTER. I expect to go to 9 o'clock, Senator Biden. You are going to miss very important materials if you leave.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Mr. Attorney General, we will see if we can talk a little more about this constitutional tension that is sort of my pet peeve, for lack of a better word.

I would just echo again what Senator DeWine said. Instead of another round at another time, I would love to engage in a collaborative process with the administration to see if we can resolve this tension. I want to talk to you exclusively about inherent power and your view of it and the administration's view of it, and share some thoughts about my view of it.

The signing statement issued by the administration on the McCain language prohibiting cruel, inhumane, and degrading treatment, are you familiar with the administration's signing statement?

Attorney General GONZALES. I am familiar with it, Senator.

Senator GRAHAM. What does that mean?

Attorney General GONZALES. The entirety of the statement, Senator?

Senator GRAHAM. Well, I guess to me I was taken back a bit by saying, notwithstanding, it was sort of an assertion that the President's inherent authority may allow him to ignore the dictates of the statute. Does it mean that, or did I misunderstand it?

Attorney General GONZALES. It may mean that this President—first of all, no President can waive constitutional authority of the executive branch.

Senator GRAHAM. My question is very simple but very important. Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane, and degrading treatment of a detainee intrudes on the inherent power of the President to conduct the war?

Attorney General GONZALES. Senator, I think—I don't know whether or not we have done that specific analysis.

Senator GRAHAM. Can I ask you this question then?

Attorney General GONZALES. Yes.

Senator GRAHAM. Is it the opinion of—your opinion and the administration's position without the force resolution that FISA is unconstitutional in the sense it intrudes on the power of the President to conduct surveillance at a time of war?

Attorney General GONZALES. I think that question has been raised a couple times today. I have indicated that that then puts us into the third part of the Jackson analysis. I have also indicated that these are difficult questions.

Senator GRAHAM. And I will accept that as an honest, sincere answer, because they are difficult.

Let's get back to my scenario about the military member who has a detainee under their charge. They get an order from the commander in chief or some higher authority to do certain techniques. The justification is that we need to know about what is going to happen in terms of battlefield developments. We believe this person possesses information. And those techniques are expressly prohibited by prior statute under the authority of the Congress to regulate the military. That is another classic moment of tension. What do we tell that troop? If they called you as a lawyer and they said, "I got the order from my commander," maybe even from the President, "to engage in five things, but I have been told there is a statute that says I cannot do that passed by Congress, what should I do?" what would your answer be to that person?

Attorney General GONZALES. I don't know if I can give that person an immediate answer. I think that is the point that you are making. To put our military in that kind of position, that is a very difficult place to be.

Senator GRAHAM. Thank you for that. That is absolutely the point I have been trying to make for a year and a half. I want to give that troop an answer that we all can live with, and let me take this just a little bit further.

The FISA statute in a time of war is a check and balance, but here is where I think I am your biggest fan. During the time of war, the administration has the inherent power, in my opinion, to surveil the enemy and to map the battlefield electronically, not just physical but to electronically map what the enemy is up to by seizing information and putting that puzzle together. And the administration has not only the right but the duty, in my opinion, to pursue fifth column movements. And let me tell folks who are watching what a fifth column movement is. It is a movement known to every war where Americans, citizens, will sympathize with the enemy and collaborate with the enemy. It has happened in every war. And President Roosevelt talked about we need to know about fifth column movements.

So to my friends on the other side, I stand by this President's ability inherent to being Commander in Chief to find out about fifth column movements. And I don't think you need a warrant to do that.

But here is my challenge to you, Mr. Attorney General. There will come a point in time where the information leads us to believe that citizen A may be involved in a fifth column movement. At that point in time, where we will need to know more about citizen A's activity on an ongoing basis, here is where I part. I think that is where the courts really come in. I would like you and the next Attorney General and the next President, if you have that serious information that you need to monitor this American citizen's conduct in the future, that they may be part of a fifth column movement to collaborate with the enemy. I want a check and a balance and here is why: Emotions run high in war, and we put a lot of people in prison who just look like the enemy and never did anything wrong, just as loyal an American as you or I. But it would be very easy in this war for an American citizens to be called up by the enemy and labeled as something they are not. It would be very easy, in my opinion, if you are a business person dealing in the

Mideast who happened to be an American citizen, the business deal goes bad, that bad things could happen to you.

I would just like the administration to entertain the idea of sitting down with Senator DeWine and others to see if we can find a way at some point in the process of monitoring fifth column movements to have a check and balance system that not only would strengthen the Commander in Chief's role, it will give guidance to the people fighting the war. You will have Congress on board. You will be stronger in courts, and the enemy will be weaker.

How does that proposition sit with you?

Attorney General GONZALES. Senator, the President has already said that we would be happy to listen to your ideas.

Senator GRAHAM. OK. But you do understand my inherent authority argument, my concern with that argument, because taken—the next President may not be as sensitive to this limited role of the Government. Really, Mr. Attorney General, you could use the inherent authority argument of a Commander in Chief at a time of war to almost wipe out anything Congress wanted to do.

Attorney General GONZALES. See, I disagree with that, Senator. I really meant it when I said earlier that in time—

Senator GRAHAM. Give me a situation where the Congress could regulate or trump the inherent power argument in time of war.

Attorney General GONZALES. I think Congress has a powerful check on the Commander in Chief. It is through the purse.

Senator GRAHAM. If the Congress decided to limit treatment or interrogation techniques of a detainee, would the President have to honor that? Is that part of our authority under the Constitution to regulate the military? Do we have the authority to tell the military you will not do the following things? Would that intrude on the inherent power of the President to run the military?

Attorney General GONZALES. The question is whether or not this is an interference with the day-to-day command functions of the Commander in Chief or does it fall within that clause of section 8 of Article I, which says that Congress—

Senator GRAHAM. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Attorney General GONZALES. I am not prepared to say that, Senator. I think that that is—I think you can make an argument that that is part of the rule the Government—

Senator GRAHAM. Mr. Attorney General, if we cannot do that, if we cannot during a time of war regulate the behavior of our troops, then really we have no power in a time of war. And that is the point here. I think we share power.

Attorney General GONZALES. I agree. I agree that power is shared in time of war.

Senator GRAHAM. I think we share a purpose of winning the war.

Attorney General GONZALES. No question about that.

Senator GRAHAM. But we need to get together so the people on the front lines who are pulled and torn—if the Bybee memo, Mr. Attorney General had become the policy, there would have been people subject to court martial. And in your good judgment, you repealed that. But I can assure you, Mr. Attorney General, if the

Bybee memo's view of how you handle a detainee and what is torture and what is not, if it had been implemented, it would have violated the Uniform Code of Military Justice, and our guys could have gone to jail. And in your good judgment, you repealed that.

I am asking for you to use that good judgment again and advise our President to come to this Congress and let us sit down and work through these constitutional tensions, because we do not need tension among ourselves. We need unanimity.

Thank you for your service to our country.

Attorney General GONZALES. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Durbin?

Senator DURBIN. Thank you.

Attorney General, you have said that the safeguards for this program, this terrorist surveillance or domestic spying program, include the fact that they are reviewed by career professionals—I believe you referred to the National Security Agency, perhaps other agencies—and that there is a 45-day review as to whether you will continue the program.

Where did the 45-day review requirement come from?

Attorney General GONZALES. Senator, that really sort of arose by, quite frankly, schedules in terms of having folks be in a position to provide recommendations and advice as to whether the program can continue. There is nothing magical about the 45 days.

Senator DURBIN. I am not worried about the magic so much as is there a statute that drives this? Is there a legal requirement of a 45-day review?

Attorney General GONZALES. We felt that it was—I think it helps us in the Fourth Amendment analysis in terms of is this a reasonable search, the fact that it is reviewed periodically, and I think it is more sort of by happenstance that it really has come out to be approximately every 45 days.

Let me just also mention that when I talked about the review out at NSA, there are monthly meetings, as I understand it, unconnected with this 45-day review, in which senior officials involved in this program sit down and evaluate how the program is being operated. That is a process that is totally independent of this 45-day review process.

Senator DURBIN. But who chooses the professionals that evaluate this program?

Attorney General GONZALES. Senator, I am led to believe—I don't know for sure, but I am led to believe that they are people—I am assuming senior officials at NSA identify people at NSA who have al Qaeda experience, al Qaeda expertise, knowledge about al Qaeda tactics and aims, and, therefore, are in the best position to evaluate whether or not a person who is on the call is, in fact, a member or agent of al Qaeda or an affiliated terrorist organization.

Senator DURBIN. Which gets to my point. This so-called safeguard—and it has been referred to as a check and balance—is literally the administration talking to itself. People within the administration meet within their offices and decide about the civil liberties and freedoms of those who are going to be subjected to this surveillance. That is a significant departure from the ordinary

checks and balances of our Government, is it not, that all of this is being decided within the same executive branch?

Attorney General GONZALES. I don't know if I would characterize it that way. I think that there is a lot of—there is intelligence that is collected by the National Security Agency where they have control over this information, they have internal rules and regulations, they are subject to minimization requirements. Those are classified. Those have been shared, as I understand it, with the Intel Committee, if you are talking about Executive Order 12333. And so I don't know that it is so unique to this program.

Senator DURBIN. Well, let me just say, if you want a wiretap, as Attorney General you know what you have to do.

Attorney General GONZALES. Yes, sir.

Senator DURBIN. You have to go to another branch of our Government. You have to get a warrant. That is in criminal cases—

Attorney General GONZALES. In criminal cases, Title III, that is right.

Senator DURBIN. Terrorist cases, you know that FISA applies. And now when it comes to these wiretaps, or whatever they may be, this surveillance, whatever it may be, you don't go to another branch of Government. You meet within your own branch of Government, and that I think is a significant difference.

Here is what it comes down to. You know, there is a general concern here as to whether or not the scope of what we are talking about, what it might be. And I know you are limited in what you can tell us. But I also know that Michael Chertoff, the Secretary of Homeland Security, recently said the NSA was "culling through literally thousands of phone numbers and trying to sift through an enormous amount of data very quickly." You have assured us that this is not a dragnet.

But I think the thing that it continues to come back to is whether innocent Americans, ordinary Americans are going to have their e-mails and their phone calls combed through. And you may shake your head and say, oh, we would never do that. But, Attorney General, no one is looking over your shoulder. You are not going to anyone, as you would with another wiretap request, to determine whether or not it is a reasonable request or it goes too far or, in fact, is targeted rather than random.

I talked to you about Mr. Fleischer, who is sitting out here, who asked the very basic question: Have I been victimized by this program? Have I been the subject of this program? He couldn't get an answer. He has had communications overseas. The fact that he is sitting here today is a suggestion that he is not worried about what the outcome might be, but he is worried about his freedoms and his liberties. There is no one for him to speak to. When he contacts your administration, they say, Neither confirm nor deny. So there is no check and balance here. There is nothing to protect his freedom or liberty or the freedom or liberty of a lot of innocent people who wonder if you are going too far. That I think is why many of us are absolutely stunned that this administration won't come to Capitol Hill and ask us on a bipartisan basis for help with this FISA Act, if, in fact, it does create a problem.

I voted for the PATRIOT Act. All but one of the Senators in the Senate voted for the PATRIOT Act. It isn't as if we are not ready

to cooperate with you. We would feel better about your conduct and the conduct of this administration if there was a law that you followed. We are not asking you to spell out the operational details, but we are asking you to have at least a FISA Court judge, someone from another branch of Government, taking a look at what you are doing. There is some assurance under that situation for 28 years that there is a check and balance.

Do you understand why the blank check that you have asked for causes so much heartburn?

Attorney General GONZALES. Senator, I do understand concern about a blank check. I don't believe that is what we have here. In your comments, you have talked about going around the law, going around FISA. That is not the case here. We believe we are acting consistent with the requirements of FISA.

I don't know about the comments that Secretary Chertoff made. General Hayden has been out very publicly talking about what this program is about, and it is not about—it doesn't sound like it is a kind of program that Secretary Chertoff is talking about. But I would be very interested in studying his remarks.

This is a very narrowly tailored program.

Senator DURBIN. But how do I know that? There is no one—other than your good word today, there is no one that can tell me: I have looked at this program, trust me, Senator, you can tell Mr. Fleischer and your constituents in Illinois not to worry; we are not going to comb through the records of innocent Americans. There is no one for me to turn to.

Attorney General GONZALES. I don't know if it is proper to ask you a question, Senator, but I am going to ask you a question.

Senator DURBIN. Go ahead.

Attorney General GONZALES. If we were to brief you into the program, how would anyone be assured that you would protect the rights of ordinary citizens? Because we have briefed congressional leaders, and so they know what we are doing and—

Senator DURBIN. They are sworn to secrecy, are they not?

Attorney General GONZALES. This is a very classified, highly classified program.

Senator DURBIN. They are sworn to secrecy.

Attorney General GONZALES. But they also—

Senator DURBIN. If they found the most egregious violation of civil rights taking place in this program, they are sworn not to say one word about it.

Attorney General GONZALES. Senator, I have got to believe that all of us—we take an oath of office, and if we honestly believe that a crime is being committed, then we would do something about it.

Senator DURBIN. How would they? I have been on the Intelligence Committee, and I can tell you that when you are briefed with classified material—I sat in briefings not far from here, just a few feet away, and listened to what I thought was very meager evidence about weapons of mass destruction before the invasion of Iraq. Based on that, I voted against it. But I couldn't walk outside that room, until it became public much later, and say this administration was at war within when it came to this issue.

Attorney General GONZALES. Senator, I think we are letting Members of Congress off the hook easily by saying that if they get

briefed into a secret program and they believe it is against the law, that they can't do anything about it. I think you have an obligation, quite frankly, when you take that oath of office, if you believe that conduct is, in fact, unlawful, I think you can do something about it.

Senator DURBIN. Well, let's talk about one Congressman—Congresswoman in this case, who has spoken out, Congresswoman Jane Harman. She has been briefed on the program, and she has said publicly you can use FISA, you don't need to do what you are doing, you don't need to go through this warrantless process.

So from her point of view, I think she has gone as far as she can go. That is it.

Attorney General GONZALES. Senator, I don't think we have ever said that we could not use FISA in particular cases. But the time it would take to get a FISA application approved would mean that we may lose access to valuable information.

Senator DURBIN. You will not come before us and tell us how to change the law to overcome that problem. That is what I find absolutely inexplicable.

The last thing I would like to do, Mr. Chairman, or whoever is now presiding, we have had several references to Mrs. Burlingame, who is here, and I thank her for joining us today and for her statements to the press. I would also like to acknowledge the presence of Monica Gabrielle and Mindy Kleinberg, who were also in the Families of Victims of 9/11. They are here today, and they have made a statement for the record. I will read the last sentence and ask that this be part of the record. "Retaining our civil liberties and our cherished democracy in the face of a looming terrorist threat is the only way we will win this war on terror." And I ask that this statement be made a part of the record.

Senator GRAHAM [Presiding.] Without objection.

[Laughter.]

Senator DURBIN. Thank you very much, Chairman Graham. Thank you, General.

Attorney General GONZALES. Thank you, Senator.

Senator CORNYN. Attorney General Gonzales, Chairman Specter had to step out, but he asked me to proceed after Senator Durbin, and I am happy to do that so we can move on.

If an employee of the National Security Agency has a concern about the legality of what they are being asked to do, are they authorized to have a press conference or to otherwise leak that information to outside sources?

Attorney General GONZALES. Senator, I think there are laws that prohibit the disclosure of classified information. I think there might be other ways that would certainly be more appropriate.

Senator CORNYN. Let me suggest one to you. In 1998, Congress passed the Intelligence Community Whistleblower Protection Act which provides, in part, that an employee of the DIA, the National Imagery and Mapping Agency, the National Reconnaissance Office, or the National Security Agency or a contractor of any of those agencies who intends to report to Congress a complaint about the legality of the program, that they can report that to the Inspector General of the Department of Defense or to the leadership of the Intelligence Committees in the U.S. Congress.

Would you consider that to be a more appropriate place for a so-called whistleblower to report their concerns?

Attorney General GONZALES. Yes, sir, I would.

Senator CORNYN. Well, at the very least, there would be an opportunity for those officials to evaluate the complaint of this individual, and we wouldn't risk the disclosure of highly classified information or programs that are collecting intelligence.

Attorney General GONZALES. No question about it. The danger or problem of going to the media as an initial matter is that you have some people, I think, whose motivation I think can be questioned in terms of why are they doing that. And when they go out and talk to the public about a highly classified program, they harm the national security of this country. I think Congress realized that when they passed the statute that you just described to try to provide an avenue for those people who legitimately are concerned about perhaps wrongdoing, that they have an avenue to pursue, to express their grievances, and to do so in a way that we don't jeopardize the Nation's secrets.

Senator CORNYN. Let me ask you—the last area I want to ask you about—you have endured through a long day, and I know we are trying to wrap up. I have read a lot about the debate on this program and trying to understand why it is the administration believed that it needed to exercise the authority that it was granted by Congress under the Authorization for Use of Military Force and perhaps the President's power under the Constitution, over and above what FISA would ordinarily provide.

First of all, if NSA wants to listen to communications between terrorists abroad that are wholly located in some other country, they can do that without a warrant, can they not?

Attorney General GONZALES. Whether or not FISA applies depends on the answer to basically four key questions: Who is the target? Primarily we are concerned about whether or not the communication involves a U.S. person. Where is the target? Primarily we are concerned about whether or not the person is in the United States. Where is the acquisition taking place? And then, finally, what are you trying to acquire? Is it wire communication? Is it radio communication?

And so the answer as to whether or not FISA would apply with respect to a particular communication primarily depends upon answering those kinds of questions.

Senator CORNYN. Thank you for the precise answer. But as a general matter, if the persons are located in a foreign country and they are not American citizens and the communications are taking place within that foreign country, then FISA does not require the issuance of a warrant.

Attorney General GONZALES. As a general matter, if you are talking about non-U.S. persons outside the United States, and certainly if the acquisition is outside the United States, we don't have to worry about FISA.

Senator CORNYN. Isn't it true that the problem that this program has tried to address, the gap in FISA that it tries to address, is that in order to get a warrant under FISA, the Government must have grounds to believe the U.S. person it wishes to monitor is a foreign spy or terrorist? And even if a person is here on a student

or tourist visa or no visa, the Government cannot get a warrant to find out whether they are a terrorist. It must already have reason to believe that they are one.

Attorney General GONZALES. Well, certainly to obtain an order from the FISA Court, the court has to be satisfied that there is probable cause to believe that the target is either a foreign power or an agent of a foreign power and probable cause to believe that the facility being targeted is actually being used or about to be used by a foreign power or an agent of a foreign power.

Senator CORNYN. Stated another way, the problem with FISA as written is that the surveillance it authorizes is unusable to discover who is a terrorist as distinct from eavesdropping on known terrorists. Would you agree with that?

Attorney General GONZALES. That would be a different way of putting it, yes, sir.

Senator CORNYN. You would agree with that statement?

Attorney General GONZALES. Yes, sir.

Senator CORNYN. So the particular program that has been debated here—and the authority that the National Security Agency has to conduct it—is filling a gap that exists in our intelligence-gathering capabilities. Is that an accurate description?

Attorney General GONZALES. I think we quickly realized after the attacks of 9/11 that the tools that we had traditionally been using were insufficient, and this was the opinion of the intelligence community, and that is why the President authorized this program, was because we did have vulnerabilities in our access to information about the enemy.

Senator CORNYN. Finally, with regard to exclusivity, there have been some on the Committee who have asked whether the statement that Congress has made in the FISA statute—that it is the exclusive means to gather foreign intelligence—is necessarily a binding obligation if it comes into conflict with the Constitution.

You have cited the doctrine of constitutional avoidance, is that correct?

Attorney General GONZALES. The canon of constitutional avoidance, yes, sir.

Senator CORNYN. Thank you.

This has more than just hypothetical applications. For example, are law enforcement authorities in this country authorized to shoot down a plane that they believe is carrying illegal drugs or committing some other crime?

Attorney General GONZALES. Well, Senator, I guess I would have to think about that. If you were asking whether the military had the authorization to shoot down an airplane—

Senator CORNYN. I am asking about law enforcement authorities other than the military.

Attorney General GONZALES. Well, let me just say that we do not expect our law enforcement officers to be perfect in their judgment when you are talking about the Fourth Amendment and searches. The standard is probable cause; it is the totality of the circumstances.

But it is very, very important to remember we are talking about the judgment from the eye of a professional officer, and this is what the courts have said. That is why in the terrorist surveillance

program we have the determination made by someone who is experienced regarding al Qaeda tactics and communications. He is making that decision from the view of—like the police officer on the beat in terms of what is reasonable, what satisfies a probable cause standard.

Senator CORNYN. Making this very personal and real, if a plane is heading toward the Capitol, don't you believe that the use of force resolution and Article II of the Constitution authorize the President to have United States military forces shoot that plane down, if necessary?

Attorney General GONZALES. I believe so, sir, and I quite frankly believe that the President had the authority prior to the authorization to use military force. I think even those proponents, pro-Congress scholars who believe very strongly in the power of Congress during a time of war—even they acknowledge that with respect to initiation of hostilities that only Congress can declare war, but, of course, military force can be initiated by the President if the United States has already been attacked or if there is an imminent threat to the United States.

And so I think there are strong arguments that would support the notion that the President of the United States, even before the authorization to use military force was passed by Congress, after we had been attacked already, of course, could then use military force to repel an additional attack.

And we have to remember, of course, that in the days and weeks following 9/11, there were combat air patrols. So the President was exercising his authority even before the authorization to use military force to have the military in place to protect us from another attack.

Senator CORNYN. Thank you.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Kohl.

Senator KOHL. Thank you very much.

Just a couple of questions, Mr. Attorney General. Can you tell us how many U.S. citizens have had communications intercepted, listened to or recorded by this program since it started?

Attorney General GONZALES. Senator, I wish I could share more information with you, but that information is classified and I can't disclose that.

Senator KOHL. How many Americans have had their phone conversations recorded or their e-mails intercepted without a court order? Any idea?

Attorney General GONZALES. Again, Senator, you are asking me about the operations of this program and I really can't get into it. I have outlined today that this is a very narrowly tailored program that has been authorized by the President of the United States, and we have taken great pains to try to protect the privacy interests of every American. But as the President has said, even if you are an American citizen, if you are talking to a member of al Qaeda, we would like to know why.

Senator KOHL. You have talked at length today and over the course of the past month about how the program has to be reauthorized every 45 days, and you have lauded that as a strong check

and a balance on the potential for abuse. News reports suggest that one of the authorizations has led to changes in the program.

Could you tell us what those changes were?

Attorney General GONZALES. Well, again, Senator, you are asking me about operational details of the program and I really can't get into operational details.

Senator KOHL. All right. The New York Times reported that in interviews with current and former law enforcement officials, the flood of NSA tips that came from this program led them to expend considerable resources in following leads and diverted some agents from work that they had viewed as more productive.

Law enforcement officials interviewed said that the program had uncovered no active plots in the United States. One said that, quote, "The information was so thin and connections were so remote that they never led to anything," unquote. Another said, quote, "It affected the FBI in the sense that they had to devote so many resources to tracking every single one of these leads, and in my experience they were all dry leads," unquote.

So is there a concern that this program is not collecting enough worthwhile information, and does this suggest that the net was perhaps too large and that you ensnared too many Americans who were not, in fact, involved in any terrorist activities?

Attorney General GONZALES. Thank you for that question, Senator. I am aware of these stories. First of all, it is true that Director Mueller feels very strongly that we cannot afford to not investigate one way or the other or to check out every particular tip. We have an obligation to do that.

I think General Hayden has already indicated publicly that immediately following the attacks of 9/11, he exercised his own independent authorities, which do exist for the NSA, to gather up information, gather up more information than he would normally do—again, these are under existing authorities, lawful authorities—and to share all that information with the FBI.

And so you had a situation where the NSA was gathering up more information than it normally does and then sharing more of that information with the FBI. We quickly discovered that that was not very efficient because of the fact that it required the FBI to utilize their resources. And so that process or that procedure stopped, and so I think the stories that you are referring to do not relate to the terrorist surveillance program about which I am testifying today.

Senator KOHL. I thank you very much, and I thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator BROWNBACK.

Senator BROWNBACK. Mr. Chairman, thank you.

General, an interesting line of questioning, and I want to pursue going after a FISA warrant with some specificity with you because I want to understand this process better. I think you have covered it in bits and pieces and today, and I have been in and out at times, but I want to go into it in some depth.

Before I do that, I want to note in the New York Post online edition of February 6th, just really in response to the last question here, "A 2004 NBC report graphically illustrated"—and I am read-

ing from this—“what not having the program cost us four-and-a-half years ago. In 1999, the NSA began monitoring a known al Qaeda switchboard in Yemen that relayed calls from Osama bin Laden to operatives all over the world. Surveillance picked up the phone number of a Khalid in the United States, but the NSA didn’t intercept those calls, fearing it would be accused of ‘domestic spying.’ After 9/11, investigators learned that Khalid was Khalid Al-Midhar, then living in San Diego under his own name, one of the hijackers who flew American Airlines Flight 77 into the Pentagon. He made more than a dozen calls to the Yemen house where his brother-in-law lived. NBC News called this, quote, ‘one of the missed clues that could have saved 3,000 lives.’” It was a very real thing and a very real thing for us today, and one that had we been operating it effectively prior to 9/11 could have possibly saved thousands of lives.

Mr. Attorney General, I certainly appreciate the need for expediency in carrying out electronic surveillance, and you mentioned that getting a FISA warrant is often a time-consuming procedure. Could you go into some specificity for me so I can hear this on how long that process generally takes? To the degree you can, without revealing information that is classified, how long does this process taken?

Attorney General GONZALES. Well, it varies. What I can say, Senator, is that we have, for a variety of reasons, some applications that have been pending for months, quite frankly. Sometimes, that results because we can’t get sufficient information from the FBI or NSA in order to satisfy the lawyers at the Department that, in fact, we can meet the requirements of the FISA Act.

Sometimes, it is a situation where priorities—with each passing day, renewals expire on very important programs, so we then have to prepare a renewal package to submit to the FISA court, and that means that other FISA applications that our lawyers have been working on kind of get pushed to the side as they work on the more important cases. So there are a variety of reasons why it takes some time to get a FISA application approved. If you want me to get into a more down-in-the-weeds discussion—

Senator BROWNBACK. I would.

Attorney General GONZALES. OK.

Senator BROWNBACK. I would like to get, you know, what is it that takes so much time in these FISA applications.

Attorney General GONZALES. Well, of course, we can’t begin surveillance just based on a whim by someone, say, at the FBI. There has to be a reason to believe that all of the standards of the FISA statute can be satisfied. We have to know that a FISA court judge is going to be absolutely convinced that this is an agent of a foreign power, that this facility is going to be a facility that is going to be used or is being used by an agent of a foreign power.

The things that I have to approve I have to—when I sign an application, we have to identify the target. We have to set forth the circumstances and the reasons that I believe that the target is a foreign power or an agent of a foreign power. I have to set forth the circumstances for why I believe that this facility is being used or is about to be used by a foreign power or agent of a foreign power.

We have to set forth in the application the minimization requirements that we intend to use. We have to set forth in the application with specificity the type of information we are hoping to get and the type of facilities or communications that we are targeting. So those are just some of the things that I have to include in the application.

The application has to be accompanied by a certification that is signed by a senior official of the administration who has national security responsibility. Normally, it is the FBI Director. It could be the Director of the CIA. So that person has to certify that, in fact, this is foreign intelligence information. That person has to certify that a significant purpose of the surveillance is for foreign intelligence purposes. That person has to certify that normal investigative techniques or means are not otherwise available, and there are some other provisions that have to be certified.

So all those conditions, requirements have to be met even before I authorize verbally an emergency authorization, and it takes time. Even in a perfect world, even in an ideal case, it is going to take a period of time. And I am not talking about hours. We are normally talking about days, weeks, on the more complicated cases sometimes months.

Senator BROWNBACK. And this would include even these sorts of operations we have read about—about data-mining operations? Would that include those sorts of operations, or are those totally a separate type of field?

Attorney General GONZALES. I am not here to talk about that. Again, let me just caution everyone that you need to read these stories with caution. There is a lot of mixing and mangling of activities that are totally unrelated to what the President has authorized under the terrorist surveillance program. So I am uncomfortable talking about other kinds of operations that are unrelated to the terrorist surveillance program.

Senator BROWNBACK. These would be strictly ones where you are going after a targeted set of individuals that have gone through—

Attorney General GONZALES. Under FISA?

Senator BROWNBACK. Yes, under the FISA applications.

Attorney General GONZALES. We have to remember, of course, this is—

Senator BROWNBACK. Along the lines of what you have just described in some detail, this is the sort of information you are seeking before you are going after anything under FISA.

Attorney General GONZALES. In every case—and, of course, we always have to remember that we are not just talking about al Qaeda when you are talking about FISA. You are talking about agents of other countries, and it is not limited only to international communications under FISA; it is domestic communications. So we want to get it right, of course.

As I said earlier in response to another question, the fact that we have such a high approval rate by the FISA court isn't an indication that the FISA court is a rubber stamp. It is more, I think—

Senator BROWNBACK. Your process internally.

Attorney General GONZALES [continuing]. Proof that we have got a legitimate process. We take this very seriously.

Senator BROWNBACK. Well, I don't want to drag on the questions. You have been here a long period of time. I do want to encourage us that as the war on terrorism wears on, because it is going to wear on for a period of time, that we do have a check and balance system in place that is workable so that you can get the type of information that you need and that we need to protect the country, but at the same time can protect the civil liberties of the Nation, and you are doing everything you can in that regard.

I just think as we look on forward, this is going to be a key policy factor of how we move forward and sustain support for the war on terrorism over the period of various administrations and possible length of time that this could well take.

Thank you for being here. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Brownback.

Mr. Attorney General, you have held up remarkably well for a long day. I have deferred my second round until everyone else has concluded a second round because, as Chairman, I have stay. So I thought I would go last in any event. So it is just you and me. When we came in today, there was a long line in the hallway waiting to get in, and now only a few people are here and the Senators' bench is pretty well cleared.

I want to come back to the issue as to whether the resolution authorizing the use of force of September 14 gives the President congressional authority to undertake electronic surveillance. I said candidly at the outset that I did not think that it did, and let me explore with you a number of questions I have that I am interested in the administration's response.

Let me start first with the signing statement of President Carter when he signed the Foreign Intelligence Surveillance Act of 1978 on October 25th. He said, in part, quote, "The bill requires for the first time a prior judicial warrant for all electronic surveillance for foreign intelligence or counter-intelligence purposes in the United States, in which communications of U.S. persons might be intercepted. It clarifies the executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism."

So when you talk about what happened in Washington's time on intercepting messages or unsealing envelopes, or what happened in Lincoln's time or what happened in Franklin Delano Roosevelt's time, or when you talk about a number of the circuit court opinions giving broad Presidential authority saying that the gathering of intelligence was his prerogative without respect to the Fourth Amendment, that is before Congress acted.

Now, a signing statement is subject to a number of limitations. If the President in a signing statement seeks to distinguish his view from what the Congress has passed, I think it is entitled to very little, if any, weight. Where the President, as President Carter did, squarely backs what the Congress has done, then you have a concurrence of the Congress and the President. You really have very forceful, very plain, very strict language in the Foreign Intelligence Surveillance Act.

How do you counter what President Carter has said that it applies to all U.S. persons and covers all foreign intelligence by electronic surveillance in the United States?

Attorney General GONZALES. Well, of course, I don't believe that it is possible for any President to waive for future Presidents any constitutional authority, any authority given to a President under the Constitution. I haven't read that statement in a while. I don't think in the statement President Carter says I have no inherent authority remaining in this area.

Finally, I would just simply remind the Chair—I think this was mentioned earlier by one of the Senators—his Attorney General in hearings in connection with the legislation—I think it was before a Committee of the House—talked about the fact that this is—and I am paraphrasing here—this in no way takes away from the President's inherent constitutional authority, this legislation. So that is how I would respond to your question.

Chairman SPECTER. Well, Mr. Attorney General, that is not the Jackson test which you have subscribed to, but I am going to come back to that in just a minute.

In your responses to my question about statutory interpretation—we have covered the doctrine that it is disfavored to have a repeal by implication. You have the statute of FISA that specifically says no interception of electronic communication without a warrant. And then you have the generalized statement of the September 14th resolution which, at best, would be a repeal by implication, which is disfavored.

But then we come upon another very important provision of statutory construction, and that is specific language takes precedence over more generalized pronouncements. And in your answer you said, quote, "It is not clear which provision is more specific," close quote. Well, that is false on its face.

If you have the statute saying no electronic surveillance without a warrant, there is no doubt that that is more specific than the September 14th resolution, is there? How can you disagree with those plain words?

Attorney General GONZALES. By that answer, I only meant to convey, Senator, that the resolution is more specific with respect to al Qaeda, certainly. And, of course, the FISA statute is not limited only to al Qaeda. As the answer also indicates, we had sort of this same—or this same discussion occurred in the *Hamdi* decision. We had the same situation. We had a specific statute, 18 U.S.C. 4001(a), and it said no American citizen could be detained, except as otherwise provided by Congress, or maybe otherwise provided by a statute by Congress.

And the Supreme Court said that, nonetheless, you had a broader authorization than the authorization to use military force and that would satisfy the statute, even though you had a specific statute with respect to detention and you had a broad authorization.

Chairman SPECTER. Did the Supreme Court deal with that statute?

Attorney General GONZALES. 4001(a)? That was the statute at issue, yes, sir, in the *Hamdi* decision, of course.

Chairman SPECTER. Did the Supreme Court deal with it specifically?

Attorney General GONZALES. Sir, in *Hamdi*, Mr. *Hamdi* was contesting that that statute prohibited the President of the United States from detaining him because he was an American citizen. And the Supreme Court said, well, OK, you are right, you have the specific statute. But you have also got this broad grant of authority by the Congress and that is sufficient to allow the President of the United States to detain you even as an American citizen.

Chairman SPECTER. Well, I think you are dealing with very different circumstances when you talk about a soldier on the field as opposed to a United States person whose conversations are being electronically surveilled, but let me move on here. It may very well be that you and I won't agree on this point.

The resolution of September 14th did not add the words "in the United States" after the words, quote, "appropriate force." That was rejected since it would give the President broad authority not just overseas, but also in the United States. Isn't that a clear indication of congressional intent not to give the President authority for interceptions in the United States?

Attorney General GONZALES. Sir, I don't know where that record is to reflect that that actually happened. I think the CRS, Congressional Research Service, said that in the legislative history—and I may be wrong; it is late, but I believe that they said that there is no record to indicate that that ever occurred, quite frankly.

As I indicated in my opening statement, I think the American public, I think our soldiers, I think our courts ought to be able to rely upon the plain language passed by the Congress. And there is no question that the resolution talked about the President of the United States protecting Americans both here and abroad.

And we have to put it in context. We were just attacked here in this country from folks within our country communicating within our country. It is hard to imagine, as smart as you are, that you wouldn't have provided the President of the United States the grant of authority to at least deal with a similar kind of threat to the one we just experienced.

Chairman SPECTER. The law involving wiretapping prior to the enactment of the Foreign Intelligence Surveillance Act had the preceding sentence, quote, "Nothing contained"—referring to the law—"shall limit the constitutional power of the President to obtain foreign intelligence information deemed essential to the security of the United States."

When the Foreign Intelligence Surveillance Act was passed, that language was stricken. So by all customary standards of statutory interpretation, FISA, the Foreign Intelligence Surveillance Act, changed that 180 degrees, didn't it?

Attorney General GONZALES. There is no question, if you look at the legislative history and the record, that Congress intended to try to limit whatever the President's inherent authority existed. But there is also from my review of the record a clear indication that some Members of Congress were concerned about the constitutionality of this effort.

I think the House conference report talked about the fact this is what we are trying to do. It may be the Supreme Court may have a different view of this. And I am paraphrasing here, but that is

a remarkable acknowledgement by a Member of Congress that, gee, is what we are doing here really constitutional?

No question about it that certainly Congress intended to cabin the President's authority, but also Congress when they passed FISA included Section 109, which is the main criminal provision in FISA that talks about you can't engage in electronic surveillance under color of law, except as otherwise provided by statute. And so I think we have to apply a fairly plausible reading of the statute in that way in order to avoid, in my judgment, a tough constitutional question as to whether or not the Congress does have the constitutional authority to pass a statute that infringes upon the President's inherent authority as Commander in Chief to engage in electronic surveillance of the enemy during a time of war.

Chairman SPECTER. I don't think you can use the principle of avoiding a tough constitutional conflict to disagree with the plain words of the statute.

Attorney General Gonzales, when Members of Congress heard about your contention that the resolution authorizing the use of force amended the Foreign Intelligence Surveillance Act, there was general shock.

Attorney General GONZALES. Sir, we have never asserted that FISA has been amended. We have always asserted that our interpretation of FISA which contemplates another statute—and we have that here in the authorization to use force—that those complement each other. This is not a situation where FISA has been overridden or FISA has been amended. That has never been our position.

Chairman SPECTER. Well, that just defies logic and plain English. FISA says squarely that you can't have electronic surveillance of any person without a warrant. And you are saying, when you tag on another statute which is in the penal provision, that those words in FISA are no longer applicable, that there has been a later statutory resolution by Congress which changes that.

Attorney General Gonzales, I think we come back to the Jackson formula, and my judgment, with some experience in the field. I was starting to tell you how shocked Congress was when we found out that you thought that we had used the resolution of September 14th to authorize electronic surveillance. Nobody else believed that.

Senator Graham has articulated in very forceful terms the consequence of the administration making this interpretation. Before you ever get the authority from Congress again, we are going to go through every conceivable exception we can think of. And we just may not give the authority, because you may come back to relying on inherent authority. And you may have the inherent authority, you may have the Article II authority. But I do not think that any fair, realistic reading of the September 14th resolution gives you the power to conduct electronic surveillance.

That brings me to what Jackson really said, and it is so wise it is worth reading again, quote, "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter."

Now, my reading of this situation legally is that there has been an express statement of Congress to the contrary and if the President seeks to rely on his own inherent power, then he is disregarding congressional constitutional power.

Then Jackson goes on, quote, "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." And I think that is what you are doing. You are disabling Congress from acting on the subject. Congress did act, and this legislation was signed by the President.

And then Justice Jackson goes on for really the critical language, "Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution." That is what we are doing here today. We are going to do it a lot more. And then these are the critical words more so than any of the others, quote, "For what is at stake is the equilibrium established by our constitutional system." And there is a very high value placed on the equilibrium of our constitutional system. That means everything.

Attorney General GONZALES. I agree, Senator.

Chairman SPECTER. OK. Well, finally, we found something to agree upon.

Now, on the issue of the inherent power of the President, I believe the President has very substantial Article II power; I believe he does. And we have to be concerned as a life-or-death matter about al Qaeda, we really do, and I subscribe to the good faith of the President as to what he has done here. I have said that publicly. And I subscribe to your good faith in what you have done here.

I just hope that there will be oversight somewhere along the line, perhaps in the Intelligence Committee. To get into the details, the interstices, the semicolons, as to what you are doing, because I know you can't do that here. But I don't think you can measure the President's inherent authority under Article II without knowing what you are doing. You just cannot do it, because that authority is not unlimited which you have admitted.

Attorney General GONZALES. I agree with that.

Chairman SPECTER. It is not a blank check.

Attorney General GONZALES. That is correct, sir.

Chairman SPECTER. So it has to be within the parameters of being reasonable. The cases and the circuit opinions all emphasize the reasonable parameters. And the Supreme Court hasn't ruled on this issue yet. It is an open question, and the circuit opinions are mostly, if not all, pre-dating the Foreign Intelligence Surveillance Act.

So I just hope the Intelligence Committee is going to come down to brass tacks here, and I hope it is the Committee and not just the Ranking Member and Chairman. Both Senator Roberts and Senator Rockefeller have expressed forcefully their concern about not being lawyers and not having an opportunity to present these issues to lawyers to get a legal interpretation to square the facts up to what the law is. They just have been very explicit in their own limitations.

So in conclusion—the two most popular words of any presentation—I hope you will give weighty thought to taking this issue to the Foreign Intelligence Surveillance Court, lock, stock and bar-

rel. Let them see the whole thing and let them pass judgment, because if they disagree with you, it is the equilibrium of our constitutional system which is disturbed.

The al Qaeda threat is very weighty, but so is the equilibrium of our constitutional system.

Attorney General GONZALES. I agree, Senator.

Chairman SPECTER. Security is very weighty, but so are civil rights.

Thank you very much, Attorney General Gonzales. You have established very forcefully your fortitude and stamina here today, even if we disagree with portions of your case.

Attorney General GONZALES. Thank you, Mr. Chairman.

Chairman SPECTER. That concludes the hearing.

[Whereupon, at 5:56 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

RESPONSES TO QUESTIONS FROM CHAIRMAN SPECTER

- (1) **In interpreting whether Congress intended to amend the Foreign Intelligence Surveillance Act (FISA) by the September 14, 2001 Resolution (Resolution) would it be relevant on the issue of Congressional intent that the Administration did not specifically ask for an expansion for Executive powers under FISA? Was it because you thought you couldn't get such an expansion as when you said: "That was not something that we could likely get?"**

I am pleased to respond to this question because it allows me to address two widespread misconceptions about the Department's position.

First, our position does not turn on whether Congress intended to amend FISA through the Resolution or on whether the Resolution effected such an amendment. Rather, FISA expressly contemplates that in a separate statute Congress may authorize electronic surveillance outside FISA procedures. *See* 50 U.S.C. § 1809(a)(1) (2000) (FISA § 109, prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*") (emphasis added). That is what Congress did in the Resolution. As *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), makes clear, a general authorization to use military force carries with it the authority to employ the traditional and accepted incidents of the use of force. That is so even if Congress did not specifically address each of the incidents of force; thus, a majority of the Court concluded that the Resolution authorized the detention of enemy combatants as a traditional incident of force and Justice O'Connor stated that "it is of no moment that the [Resolution] does not use specific language of detention." *Id.* at 519 (plurality opinion). As explained at length in our paper of January 19, 2006, signals intelligence is another traditional and accepted incident of the use of military force. Consistent with this traditional practice, other presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit warrantless surveillance to intercept suspected enemy communications.

Second, the decision not to seek further legislation was *not* because I either concluded or was advised that Congress would reject such legislation. Rather, members of Congress advised the Administration that more specific legislation could not be enacted without likely compromising the terrorist surveillance program by disclosing program details and operational limitations and capabilities to our enemies. Some critics of the terrorist surveillance program have misinterpreted or misconstrued a statement that I made on December 19, 2005, that we were advised that specific legislation "would be difficult, if not impossible" to mean that the Administration declined to seek a specific amendment to FISA because we believed we could not get it. As I clarified later in the December 19th briefing and on December 21, 2005, that is not the case. *See* Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act, *available at* <http://www.dhs.gov/dhspublic/>

display?content=5285. Rather, we were advised by members of Congress that it would be difficult, if not impossible to pass such legislation without revealing the nature of the program and the nature of certain intelligence capabilities. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take.

(2) If Congress had intended to amend FISA by the Resolution wouldn't Congress have specifically acted to as Congress did in passing the Patriot Act giving the Executive expanded powers and greater flexibility in using "roving" wiretaps?

Congress could have been more explicit if it had intended to amend FISA. But, as explained above, it is not our position that Congress amended FISA through the Resolution. Nor do we believe that Congress needed to be more specific in the Resolution in order for it to authorize electronic surveillance in an armed conflict. It is understandable why Congress did not attempt to catalog every specific aspect of the use of the forces it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress's judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalog in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President's core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

The Supreme Court rejected a similar argument that the Resolution could not be read to have implicitly authorized the detention of enemy combatants as a traditional incident of force because Congress had specifically authorized detention in certain USA PATRIOT Act provisions. Only Justices Souter and Ginsburg subscribed to that position, which was rejected by a majority of Justices. See *Hamdi*, 542 U.S. at 551 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

(3) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what is the impact of the rule of statutory construction that repeals or changes by implication are disfavored?

As I have explained, FISA contemplates that Congress can authorize electronic surveillance outside FISA without specifically amending FISA. Reading the Resolution to authorize the terrorist surveillance program, therefore, does not require any repeal by implication. But even if the text of FISA were clear that nothing other than an amendment to

FISA could authorize additional electronic surveillance, the Resolution would impliedly repeal as much of FISA as would prevent the President from using “all necessary and appropriate force” in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are “capable of co-existence.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). Under this standard, however, an implied repeal may be found where one statute would “unduly interfere with” the operation of another. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976).

In keeping with historical practice, the Resolution, to use Justice O’Connor’s language from *Hamdi*, “clearly and unmistakably” authorizes the President to use fundamental and accepted incidents of the use of military force, including signals intelligence (without prior judicial approval). Interpreting FISA to prohibit what the Resolution “clearly and unmistakably” authorizes would create a clear conflict between the Resolution and FISA. In that case, FISA’s restrictions on the use of electronic surveillance would preclude the President from doing what the Resolution “clearly and unmistakably” authorizes him to do: use all “necessary and appropriate force” to prevent al Qaeda from carrying out future attacks against the United States. And in that event, the ordinary restrictions in FISA could not continue to apply if the Resolution is to have its full effect; those constraints would “unduly interfere” with the operation of the Resolution.

Like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992); see also *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. See 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the presumption against implied repeals either would not apply at all or would apply with significantly reduced force. We explain this point in more detail in the paper of January 19, 2006. In addition, the Resolution was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. In such circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

- (4) **In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what would be the impact of the rule of statutory construction that specific statutory language, like that in FISA, trumps or takes precedence over more general pronouncements like those of the Resolution?**

We do not believe that this canon of construction applies here. As the Supreme Court has explained, “[s]tatutory construction is a holistic endeavor.” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quotation marks and citations omitted). And we read the Resolution and FISA together to allow the terrorist surveillance program. In any event, if one were to apply this canon of construction, it is not clear which provision is more specific. Although FISA deals specifically with electronic surveillance, the Resolution deals specifically with our current armed conflict with al Qaeda. In addition, as noted above, other, more compelling canons of construction—including the canon of constitutional avoidance—apply here and support the conclusion that the Resolution authorizes the terrorist surveillance program. Finally, in *Hamdi*, the Court found that the same general authorization satisfied the specific requirement in 18 U.S.C. § 4001(a) (2000) (prohibiting the detention of U.S. citizens “except pursuant to an Act of Congress”).

- (5) **Why did the Executive not ask for the authority to conduct electronic surveillance when Congress passed the Patriot Act and was predisposed, to the maximum extent likely, to grant the Executive additional powers which the Executive thought necessary?**

The Administration has worked quite successfully with Congress in the USA PATRIOT Act and in other legislation to help make FISA more effective. FISA is an essential and invaluable tool, not just in the armed conflict with al Qaeda but also to protect the national security against myriad threats. But the Administration did not seek additional legislation regarding the terrorist surveillance program for two reasons. First, the President’s constitutional authority as Commander in Chief, recognized and supplemented by Congress in the Resolution, amply supports the legality of the program. Second, as noted above, the legislative process may have revealed, and hence compromised, the program.

- (6) **Wasn’t President Carter’s signature on FISA in 1978, together with his signing statement, an explicit renunciation of any claim to inherent Executive authority under Article II of the Constitution to conduct warrantless domestic surveillance when the Act provided the exclusive procedures for such surveillance?**

We believe, and the courts have agreed, that the President has constitutional authority to conduct warrantless foreign intelligence surveillance even in times of peace. See *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.”) (emphasis added). A President cannot give away that authority or any other authority that the Constitution vests in the office of the President. See *New York v. United States*, 505 U.S. 144, 182 (1992) (“The constitutional authority of Congress

cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.”) (collecting authorities). Nor do we believe that President Carter attempted to do so. President Carter’s Attorney General testified at a hearing on FISA as follows: “[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution*. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. The President, by offering this legislation, is agreeing to follow the statutory procedure.” *Foreign Intelligence Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 95th Cong. 15 (Jan. 10, 1978) (emphasis added). Thus, in saying that President Carter agreed to follow the procedures, Attorney General Bell made clear that FISA could not take away the President’s Article II authority.

- (7) Why didn’t the President seek a warrant from the Foreign Intelligence Surveillance Court authorizing in advance the electronic surveillance in issue? (The FISA Court has the experience and authority to issue such a warrant. The FISA Court has a record establishing its reliability for non-disclosure or leaking contrasted with concerns that disclosures to members of Congress involved a high risk of disclosure or leaking. The FISA Court is at least as reliable, if not more so, than the Executive Branch on avoiding disclosure or leaks.)**

Let me stress that the FISA Court has been enormously valuable. And we routinely trust the FISA judges with many of the Nation’s most closely held secrets. As I have explained elsewhere, the President authorized the terrorist surveillance program strictly as an early warning system in our armed conflict with al Qaeda. The optimal way to achieve the necessary speed and agility to protect the Nation from another catastrophic al Qaeda attack is to leave the decisions about intercepting particular international communications to the judgment of professional intelligence officers, based on the best available intelligence information. The delay inherent in the FISA process is incompatible with the narrow purpose of this early warning system. As explained in response to the next question, it takes considerable time *to begin* coverage under FISA, even making full use of FISA’s emergency authorization procedures. Let me emphasize, however, that under the terrorist surveillance program, these intelligence officers, who are experts on al Qaeda and its tactics (including its use of communication systems) apply a probable cause standard (specifically, “reasonable grounds to believe”) before intercepting any communications. The critical advantage offered by the terrorist surveillance program compared to FISA is *who* makes the probable cause determination and how many layers of review must occur *before* surveillance begins. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these professionals to use their skills and knowledge to protect us.

- (8) Why did the Executive Branch not seek after-the-fact authorization from the FISA Court within the 72 hours as provided by the Act? At a minimum, shouldn't the Executive have sought authorization from the FISA Court for law enforcement individuals to listen to a reduced number of conversations which were selected out from a larger number of conversations from the mechanical surveillance?**

Like the first question, this question reflects several prevalent misimpressions regarding FISA and the terrorist surveillance program. Such misconceptions are, perhaps, an expected though unfortunate consequence of media reporting, which is often incorrect and confused and of our need to continue to protect intelligence sources and methods. I welcome this opportunity to clarify some points.

First, contrary to the speculation reflected in some media reporting, the terrorist surveillance program is not a dragnet that sucks in all conversations and uses computer searches to pick out calls of interest. No communications are intercepted unless first it is determined that one end of the call is outside of the country and professional intelligence experts have probable cause (that is, "reasonable grounds to believe") that a party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

Second, this is a wartime intelligence activity undertaken in the midst of a congressionally authorized armed conflict; it is not a law enforcement tool. "[L]aw enforcement individuals" do not monitor conversations under the terrorist surveillance program; intelligence professionals with the Department of Defense do.

Third, the emergency authorization provision in FISA, which allows 72 hours of surveillance before obtaining a court order, does not—as many believe—allow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General must personally "determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists." 50 U.S.C. § 1805(f)(2) (2000 & Supp. II 2002). FISA requires the Attorney General to determine that this condition is satisfied *in advance* of authorizing the surveillance to begin. The process needed to make that determination, in turn, takes precious time. By the time I am presented with the application, the information will have passed from intelligence officers at the National Security Agency ("NSA") to NSA attorneys for vetting. Once NSA attorneys are satisfied, they will pass the information along to Department of Justice attorneys. And once these attorneys are satisfied, they will present the information to me. And this same process takes the decision away from the intelligence officers best situated to make it during an armed conflict. We can afford neither of these consequences in this armed conflict with an enemy that has already proven its ability to strike within the United States.

- (9) **Was consideration given to the dichotomy between conversations by mechanical surveillance from conversations listened to by law enforcement personnel with the contention that the former was non-invasive and only the latter was invasive? Would this distinction have made it practical to obtain Court approval before the conversations were subject to human surveillance or after-the-fact approval within 72 hours?**

This question reflects the same misconceptions as question 8. As explained in my answer to that question, the terrorist surveillance program is narrowly targeted at the international communications of persons linked to al Qaeda. Moreover, it is a wartime intelligence activity, not a law enforcement operation. Finally, FISA's emergency authorization provision does not provide the Government with the necessary flexibility. As explained above, FISA requires a time-consuming process before even emergency surveillance can begin.

- (10) **Would you consider seeking approval from the FISA Court at this time for the ongoing surveillance program at issue?**

We use FISA where we can, and we always consider all of our legal options.

- (11) **How can the Executive justify disclosure to only the so-called "Gang of Eight" instead of the full intelligence committees when Title V of the National Security Act of 1947 provides:**

**SEC.501.[50 U.S.C. 413](a)(1) The President shall ensure that the congressional intelligence *committees* are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.
(Emphasis added)**

**(2)(e) Nothing in this Act shall be construed as authority to withhold information from the congressional intelligence *committees* on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.
(Emphasis added)**

The quoted provisions of the National Security Act must be read together with the two specific notification provisions: 50 U.S.C. § 413a(a) (Supp. II 2002) (notification for intelligence activities other than covert actions) and 50 U.S.C. § 413b(b) (2000 & Supp. II 2002) (notification for covert actions).

Section 413a(a): To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of National Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall--

(1) keep the congressional intelligence committees fully and currently informed of all intelligence activities, other than a covert action (as defined in section 413b(e) of this title), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and

(2) furnish the congressional intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

(Emphasis added.)

Section 413b(b): *To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters*, the Director of National Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action--

(1) shall keep the congressional intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

(2) shall furnish to the congressional intelligence committees any information or material concerning covert actions which is in the possession, custody, or control of any department, agency, or entity of the United States Government and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

(Emphasis added.)

Each of these notification requirements, in turn, requires that the Executive Branch keep the intelligence committees “fully and currently informed of all intelligence activities,” but *only* “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” This express exception gives the Executive Branch flexibility to brief only certain members of the intelligence committees where more widespread briefings would pose an unacceptable risk to the national security. Section 501(a)(1) of the National Security Act, quoted in the question, requires the President to ensure that the relevant intelligence officials comply with the appropriate notification requirements, sections 413a(a) and 413b(b).

Consistent with the statutory language, it has for decades been the practice of both Democratic and Republican administrations to inform only the Chair and Ranking Members of

the intelligence committees about certain exceptionally sensitive matters. Even the Congressional Research Service has acknowledged that the leaders of the intelligence committees “over time have accepted the executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees.” See Alfred Cumming, Congressional Research Service, *Re: Statutory Procedures Under Which Congress is to be Informed of U.S Intelligence Activities, Including Covert Actions* 10 (Jan. 18, 2006). The Administration followed this well-established practice by briefing only the leadership of the Intelligence Committees and, at a more general level, the leaders of both houses of Congress about the NSA activities.

(12) To the extent that it can be disclosed in a public hearing (or to be provided in a closed executive session), what are the facts upon which the Executive relies to assert Article II wartime authority over Congress’ Article I authority to establish public policy on these issues especially where legislation is approved by the President as contrasted with being enacted over a Presidential veto as was the case with the War Powers Act?

Congress itself expressly recognized in the Resolution that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” The Supreme Court has repeatedly reached the same conclusion. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 668-70 (1863). As explained in the Department’s paper of January 19, 2006, the Framers of the Constitution intended to place this authority in the President.

Our legal analysis, however, does not require that we assert any Article II authority over Congress’s Article I authority. Rather, Congress, in passing the Resolution, exercised its Article I authority *consistent with* the Executive Branch’s authority under Article II to authorize electronic surveillance as an incident of using military force to protect the Nation in an armed conflict. As explained in more detail in the Department’s paper of January 19, 2006, the Resolution thus places the President’s authority to use military force and the traditional incidents of the use of such force against al Qaeda at its maximum because he is acting with the express authorization of Congress. Under the three-part framework of Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), the President’s authority falls within Category I. He is acting “pursuant to an express or implied authorization of Congress,” and the President’s authority “includes all that he possesses in his own right [under the Constitution] plus all that Congress can” confer on him. *Id.* at 635.

In any event, it is not at all clear that our conclusions would be contrary to the policy choices made by Congress in 1978. First, as already explained, FISA contemplates that subsequent legislation, such as the Resolution, can authorize electronic surveillance outside FISA procedures. Second, it is notable that FISA defines “electronic surveillance” carefully and precisely. 50 U.S.C. § 1801(f) (2000 & Supp. 2002). And, as confirmed by another provision, 18 U.S.C. § 2511(2)(f) (Supp. II 2002) (carving out from statutory regulation the acquisition of intelligence information from “international or foreign communications” and “foreign intelligence activities . . . involving a foreign electronic communications system” as long as they are accomplished “utilizing a means other than electronic surveillance as defined” by FISA), and

by FISA's legislative history, Congress did *not* intend FISA to regulate certain communications intelligence activities of the NSA, including certain communications involving persons in the United States. *See, e.g.*, S. Rep. No. 95-604, at 64 (1978). Since FISA's enactment in 1978, however, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

Given the President's constitutional authority to protect the Nation from armed attack, whether and to what extent FISA may interfere with that authority is a difficult and serious constitutional question. The Supreme Court, however, has repeatedly counseled that such questions must be avoided "where an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Because FISA can be interpreted, together with the Resolution, to allow the President to authorize this necessary early warning system in the congressionally authorized armed conflict with al Qaeda, and because much of FISA's current reach is a result of technological changes rather than congressional intent, we need not address this constitutional question.

(13) What case law does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

The case law is set forth in detail in the Department's paper of January 19, 2006. With respect to the President's constitutional authority to conduct warrantless foreign intelligence surveillance, we rely on cases such as *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002), and *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). *In re Sealed Case* notes that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." 310 F.3d at 742. The court then "[l]ook[ed] for granted that the President does have that authority" and explained that "FISA could not encroach on the President's constitutional power." *Id.*

We also rely on the Supreme Court's interpretation of the Resolution in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which confirms that Congress in the Resolution gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all fundamental and accepted incidents of the use of military force in this current military conflict. Because the use of warrantless electronic surveillance aimed at the enemy's communications is, as explained in the paper of January 19th, a fundamental and accepted incident of the use of military force, under the reasoning of *Hamdi*, the Resolution "clearly and unmistakably authorize[s]" the terrorist surveillance program. *Id.* at 519 (plurality opinion).

More basically, a line of cases strongly supports the President's inherent authority to protect the Nation, *see, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and Americans abroad, *see Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). Other cases, including *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), make clear the President's preeminent role in conducting the Nation's foreign affairs.

(14) What academic or expert opinions does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

As explained above, our analysis does not require that we assert any Article II power over Congress's Article I powers. As to whether the President has constitutional authority to conduct foreign intelligence surveillance, we rely primarily upon the uniform case law summarized by the FISA Court of Review. *See In re Sealed Case*, 310 F.3d at 742. We do not believe that this point, which has generally been conceded even by those academics criticizing the terrorist surveillance program, is controversial. *See* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* at 6 (Jan. 9, 2006).

Our analysis of the Resolution is supported by several law review articles, notably one by Curtis Bradley and Jack Goldsmith. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2091 (2005) (explaining that "Congress intended to authorize the President to take at least those actions permitted by the laws of war"); *see also* Michael Stokes Paulsen, *Youngstown Goes to War*, 19 Const. Comment. 215 (2002).

Most importantly, our analysis is fully supported by those who best know this technical area of the law and who have access to all of the pertinent facts—career attorneys at the NSA and the Department of Justice.

(15) When foreign calls (whether between the caller and the recipient both being on foreign soil or one of the callers or recipients being on foreign soil and the other in the U.S.) were routed through switches which were physically located on U.S. soil, would that constitute a violation of law or regulation restricting NSA from conducting surveillance inside the United States, absent a claim of unconstitutionality on encroaching the powers under Article II?

As explained above, none of the intercepts at issue constitutes a violation of law or regulation. I cannot give a more complete answer here, because I cannot go into operational details.



The Attorney General
Washington, D.C.

February 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Specter:

I write to provide responses to several questions posed to me at the hearing on "Wartime Executive Power and the National Security Agency's Surveillance Authority," held Monday, February 6, 2006, before the Senate Committee on the Judiciary. I also write to clarify certain of my responses at the February 6th hearing.

Except when otherwise indicated, this letter will be confined to addressing questions relating to the specific NSA activities that have been publicly confirmed by the President. Those activities involve the interception by the NSA of the contents of communications in which one party is outside the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the "Terrorist Surveillance Program").

Additional Information Requested by Senators at February 6th Hearing

Senator Leahy asked whether the President first authorized the Terrorist Surveillance Program after he signed the Authorization for Use of Military Force of September 18, 2001 ("Force Resolution") and before he signed the USA PATRIOT Act. 2/6/06 Unofficial Hearing Transcript ("Tr.") at 50. The President first authorized the Program in October 2001, before he signed the USA PATRIOT Act.

Senator Brownback asked for recommendations on improving the Foreign Intelligence Surveillance Act ("FISA"). Tr. at 180-81. The Administration believes that it is unnecessary to amend FISA to accommodate the Terrorist Surveillance Program. The Administration will, of course, work with Congress and evaluate any proposals for improving FISA.

Senator Feinstein asked whether the Government had informed the Supreme Court of the Terrorist Surveillance Program when it briefed and argued *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Tr. at 207. The question presented in *Hamdi* was whether the military had validly detained Yaser Esam Hamdi, a presumed American citizen who was captured in Afghanistan during the combat operations in late 2001, whom the military had concluded to be an enemy combatant who should be detained in

connection with ongoing hostilities. No challenge was made concerning electronic surveillance and the Terrorist Surveillance Program was not a part of the lower court proceedings. The Government therefore did not brief the Supreme Court regarding the Terrorist Surveillance Program.

Senator Feinstein asked whether “any President ever authorized warrantless surveillance in the face of a statute passed by Congress which prohibits that surveillance.” Tr. at 208. I recalled that President Franklin Roosevelt had authorized warrantless surveillance in the face of a contrary statute, but wanted to confirm this. To the extent that the question is premised on the understanding that the Terrorist Surveillance Program conflicts with any statute, we disagree with that premise. The Terrorist Surveillance Program is entirely consistent with FISA, as explained in some detail in my testimony and the Department’s January 19th paper. As for the conduct of past Presidents, President Roosevelt directed Attorney General Jackson “to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States.” Memorandum from President Roosevelt (May 21, 1940), reproduced in *United States v. United States District Court*, 444 F.2d 651, 670 (6th Cir. 1971) (Appendix A). President Roosevelt authorized this activity notwithstanding the language of 47 U.S.C. § 605, a prohibition of the Communications Act of 1934, which, at the time, provided that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.” President Roosevelt took this action, moreover, despite the fact that the Supreme Court had, just three years earlier, made clear that section 605 “include[s] within its sweep federal officers.” *Nardone v. United States*, 302 U.S. 379, 384 (1937). It should be noted that section 605 prohibited interception followed by divulging or publishing the contents of the communication. The Department of Justice took the view that interception without “divulg[ing] or publish[ing]” was not prohibited, and it interpreted “divulge” narrowly to allow dissemination within the Executive Branch.

Senator Feingold asked, “[D]o you know of any other President who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?” Tr. at 217. The laws of the United States, both before and after FISA’s enactment, have long permitted various forms of foreign intelligence surveillance, including the use of wiretaps, outside the procedures of FISA. If the question is limited to “electronic surveillance” as defined in FISA, however, we are unaware of any such authorizations.

Senator Feingold asked, “[A]re there other actions under the use of military force for Afghanistan resolution that without the inherent power would not be permitted because of the FISA statute? Are there any other programs like that?” Tr. at 224. I understand the Senator to be referring to the Force Resolution, which authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons” responsible for the attacks of September 11th in order to prevent further terrorist attacks on the United States, and which by its terms is not limited to action

against Afghanistan or any other particular nation. I am not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefing of the oversight committees and congressional leadership.

Senator Feingold noted that, on September 10, 2002, then-Associate Deputy Attorney General David S. Kris testified before the Senate Judiciary Committee. Senator Feingold quoted Mr. Kris's statement that "[w]e cannot monitor anyone today whom we could not have monitored this time last year," and he asked me to provide the names of individuals in the Department of Justice and the White House who reviewed and approved Mr. Kris's testimony. Tr. at 225-26. Mr. Kris's testimony was addressing the Government's appeal in 2002 of decisions of the Foreign Intelligence Surveillance Court to the Foreign Intelligence Surveillance Court of Review. In the course of that discussion, Mr. Kris explained the effects of the USA PATRIOT Act's amendments to FISA, and, in particular, the amendment to FISA requiring that a "significant purpose" of the surveillance be the collection of foreign intelligence information. Mr. Kris explained that that amendment "will not and cannot change who the government may monitor." Mr. Kris emphasized that under FISA as amended, the Government still needed to show that there is probable cause that the target of the surveillance is an agent of a foreign power and that the surveillance has at least a significant foreign intelligence purpose. In context, it is apparent that Mr. Kris was addressing only the effects of the USA PATRIOT Act's amendments to FISA. In any event, his statements are also accurate with respect to the President's Terrorist Surveillance Program, because the Program involves the interception of communications only when there is probable cause ("reasonable grounds to believe") that at least one party to the communication is an agent of a foreign power (al Qaeda or an affiliated terrorist organization). Please note that it is Department of Justice policy not to identify the individual officials who reviewed and approved particular testimony.

Senators Biden and Schumer asked whether the legal analysis underlying the Terrorist Surveillance Program would extend to the interception of purely domestic calls. Tr. at 80-82, 233-34. The Department believes that the Force Resolution's authorization of "all necessary and appropriate force," which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only communications in which one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The Program is narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt ("*all . . . telecommunications traffic* in and out of the United States"), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. The Terrorist Surveillance Program fits comfortably within this historical precedent and tradition. The legal analysis set forth in the Department's January 19th paper does not address the interception of purely domestic communications.

The Department believes that the interception of the contents of domestic communications would present a different question from the interception of international communications, and the Department would need to analyze that question in light of all current circumstances before any such interception would be authorized.

Senator Schumer asked me whether the Force Resolution would support physical searches within the United States without complying with FISA procedures. Tr. at 159. The Terrorist Surveillance Program does not involve physical searches. Although FISA's physical search subchapter contains a provision analogous to section 109 of FISA, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"), physical searches conducted for foreign intelligence purposes present issues different from those discussed in the Department's January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Thus, we would need to consider that issue specifically before taking a position.

Senator Schumer asked, "Have there been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?" Tr. at 237-38. Although no complex program like the Terrorist Surveillance Program can ever be free from inadvertent mistakes, the Program is the subject of intense oversight both within the NSA and outside that agency to ensure that any compliance issues are identified and resolved promptly on recognition. Procedures are in place, based on the guidelines I approved under Executive Order 12333, to protect the privacy of U.S. persons. NSA's Office of General Counsel has informed us that the oversight process conducted both by that office and by the NSA Inspector General has uncovered no abuses of the Terrorist Surveillance Program, and, accordingly, that no disciplinary action has been needed or taken because of abuses of the Program.

Clarification of Certain Responses

I would also like to clarify certain aspects of my responses to questions posed at the February 6th hearing.

First, as I emphasized in my opening statement, in all of my testimony at the hearing I addressed—with limited exceptions—only the legal underpinnings of the Terrorist Surveillance Program, as defined above. I did not and could not address operational aspects of the Program or any other classified intelligence activities. So, for example, when I testified in response to questions from Senator Leahy, "Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized," Tr. at 53, I was confining my remarks to the Terrorist Surveillance Program as described by the President, the legality of which was the subject of the February 6th hearing.

Second, in response to questions from Senator Biden as to why the President's authorization of the Terrorist Surveillance Program does not provide for the interception of domestic communications within the United States of persons associated with al

Qaeda, I stated, “That analysis, quite frankly, had not been conducted.” Tr. at 82. In response to similar questions from Senator Kyl and Senator Schumer, I stated, “The legal analysis as to whether or not that kind of [domestic] surveillance—we haven’t done that kind of analysis because, of course, the President—that is not what the President has authorized,” Tr. at 92, and “I have said that I do not believe that we have done the analysis on that.” Tr. at 160. These statements may give the misimpression that the Department’s legal analysis has been static over time. Since I was testifying only as to the legal basis of the activity confirmed by the President, I was referring only to the legal analysis of the Department set out in the January 19th paper, which addressed that activity and therefore, of course, does not address the interception of purely domestic communications. However, I did not mean to suggest that no analysis beyond the January 19th paper had ever been conducted by the Department. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and the Department’s analysis of that question would always need to take account of all current circumstances before any such interception would be authorized.

Third, at one point in my afternoon testimony, in response to a question from Senator Feinstein, I stated, “I am not prepared at this juncture to say absolutely that if the AUMF argument does not work here, that FISA is unconstitutional as applied. I am not saying that.” Tr. at 209. As set forth in the January 19th paper, the Department believes that FISA is best read to allow a statute such as the Force Resolution to authorize electronic surveillance outside FISA procedures and, in any case, that the canon of constitutional avoidance requires adopting that interpretation. It is natural to approach the question whether FISA might be unconstitutional as applied in certain circumstances with extreme caution. But if an interpretation of FISA that allows the President to conduct the NSA activities were not “fairly possible,” and if FISA were read to impede the President’s ability to undertake actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict against an enemy that has already staged the most deadly foreign attack in our Nation’s history, there would be serious doubt about the constitutionality of FISA as so applied. A statute may not “impede the President’s ability to perform his constitutional duty,” *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); see also *id.* at 696-97, particularly not the President’s most solemn constitutional obligation—the defense of the Nation. See also *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (explaining that “FISA could not encroach on the President’s constitutional power”). I did not mean to suggest otherwise.

Fourth, in response to questions from Senator Leahy about when the Administration first determined that the Force Resolution authorized the Terrorist Surveillance Program, I stated, “From the very outset, before the program actually commenced.” Tr. at 184. I also stated, “Sir, it has always been our position that the President has the authority under the authorization to use military force and under the Constitution.” Tr. at 187. These statements may give the misimpression that the Department’s legal analysis has been static over time. As I attempted to clarify more generally, “[i]t has always been the [Department’s] position that FISA cannot be

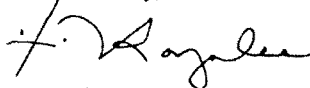
interpreted in a way that infringes upon the President's constitutional authority, that FISA must be interpreted, can be interpreted" to avoid that result. Tr. at 184; *see also* Tr. at 164 (Attorney General: "It has always been our position that FISA can be and must be read in a way that it doesn't infringe upon the President's constitutional authority."). Although the Department's analysis has always taken account of both the Force Resolution and the Constitution, it is also true, as one would expect, that the Department's legal analysis has evolved over time.

Fifth, Senator Cornyn suggested that the Terrorist Surveillance Program is designed to address the problem that FISA requires that we already know that someone is a terrorist before we can begin coverage. Senator Cornyn asked, "[T]he problem with FISA as written is that the surveillance it authorizes is unusable to discover who is a terrorist, as distinct from eavesdropping on known terrorists. Would you agree with that?" I responded, "That would be a different way of putting it, yes, sir." Tr. at 291. I want to be clear, however, that the Terrorist Surveillance Program targets the contents of communications in which one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Although the President has authorized the Terrorist Surveillance Program in order to provide the early warning system we lacked on September 11th, I do not want to leave the Committee with the impression that it does so by doing away with a probable cause determination. Rather, it does so by allowing intelligence experts to respond agilely to all available intelligence and to begin coverage as quickly as possible.

Finally, in discussing the FISA process with Senator Brownback, I stated, "We have to know that a FISA Court judge is going to be absolutely convinced that this is an agent of a foreign power, that this facility is going to be a facility that is going to be used or is being used by an agent of a foreign power." Tr. at 300. The approval of a FISA application requires only probable cause to believe that the target is an agent of a foreign power and that the foreign power has used or is about to use the facility in question. 50 U.S.C. § 1805(a)(3). I meant only to convey how cautiously we approach the FISA process. It is of paramount importance that the Department maintain its strong and productive working relationship with the Foreign Intelligence Surveillance Court, one in which that court has come to know that it can rely on the representations of the attorneys that appear before it.

I hope that the Committee will find this additional information helpful.

Sincerely,



Alberto R. Gonzales

cc: The Honorable Patrick Leahy
Ranking Member

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 24, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

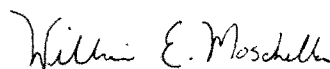
Dear Mr. Chairman:

This responds to your letter, dated February 13, 2006, transmitting questions for the record posed to Attorney General Gonzales following his appearance before the Senate Committee on the Judiciary on February 6, 2006. The subject of the hearing was, "Wartime Executive Power and the National Security Agency's Surveillance Authority."

The enclosed document responds to the 35 combined Minority questions for the record. We can assure you we are continuing to work on additional answers to questions submitted by individual Committee Senators.

We trust you will find this information helpful. If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,


William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

**“Wartime Executive Power
And The National Security Agency’s Surveillance Authority”
Hearing Before The Senate Committee On The Judiciary
Written Questions From All Democratic Senators**

- 1. On January 27, 2006, members of this Committee wrote to you and asked that you provide relevant information and documents in advance of this hearing, including formal legal opinions of the Office of Legal Counsel (“OLC”) and contemporaneous communications regarding the 2001 Authorization for Use of Military Force (“AUMF”). Please provide those materials with your answers to these questions.**

The first item in the January 27th letter asks for “communications from the Administration to Congress during the period September 11 through September 14, 2001,” relating to language to be included in the Authorization for Use of Military Force (“Force Resolution”) and the Administration’s understanding of that language. Any such communications would presumably be in the possession of Congress. We have not identified any Department of Justice documents reflecting such communications.

You have also requested “all documents that are or reflect internal Administration communications during” the same period regarding the meaning of the language being considered for inclusion in the Force Resolution. It would be inappropriate for us to reveal the confidential and privileged internal deliberations of the Executive Branch.

You have also requested “copies of all memoranda and legal opinions rendered by the Department of Justice during the past 30 years that address the constitutionality of government practices and procedures with respect to electronic surveillance.” That is potentially an extraordinarily broad request, both because of the length of the period covered (which would encompass a period before enactment of the Foreign Intelligence Surveillance Act of 1978 (“FISA”)) and the sweeping terms of the request: the reference to “memoranda” could include hundreds or thousands of informal memoranda written in individual cases between 1976 and the present that are in the files of the various litigating branches of the Department. We understand your request to seek only formal memoranda and legal opinions issued by the Attorney General or the Office of Legal Counsel (“OLC”) during that time involving constitutional issues arising from the interception of electronic communications or wiretapping. Many such opinions and memoranda have been published and are readily available through online databases or the Office of Legal Counsel website. In addition, some opinions responsive to your request previously have been released in response to past requests under the Freedom of Information Act (“FOIA”). Citations to relevant opinions are set forth in the margin.¹

¹ Memorandum for Frances Fragos Townsend, Counsel, Office of Intelligence Policy and Review, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Sharing Title III Electronic Surveillance Material with the Intelligence Community* (Oct. 17, 2000), available at <http://www.usdoj.gov/olc/titleIIIfinal.htm>; *Bureau of Prisons Disclosure of Recorded Inmate Conversations*, 21 Op. O.L.C. 11 (Jan.

Copies of unpublished opinions that do not reflect the deliberative process, or that are otherwise appropriate for release, will be provided to you in response to this request. Some more recent memoranda and opinions, though unclassified, reflect the deliberative process and are privileged, and therefore are not appropriate for release. At the time they are issued, most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices and to avoid interference with federal law enforcement efforts.

Your request appears to seek internal memoranda addressing the National Security Agency (“NSA”) electronic surveillance activities confirmed by the President. Those activities involve targeting for interception by the NSA of communications where one party is outside the United States and there is probable cause (“reasonable grounds”) to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the “Terrorist Surveillance Program” or the “Program”). Any written legal opinions that the Department may have produced regarding the Terrorist Surveillance Program would constitute the confidential internal deliberations of the Executive Branch, and it would be inappropriate for us to reveal them. In addition, the release of any document discussing the operational details of this

14, 1997); *Fourth Amendment Implications of Military Use of Forward Looking Infrared Radars Technology for Civilian Law Enforcement*, 16 Op. O.L.C. 41 (Mar. 4, 1992); *Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies*, 15 Op. O.L.C. 36 (Feb. 19, 1991); *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (June 21, 1989); *Applicability of Fourth Amendment to Use of Beepers in Tracking Bank Robbery Bait Money*, 10 Op. O.L.C. 138 (Dec. 5, 1986); *Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission*, 4A Op. O.L.C. 174 (Jan. 8, 1980); *Foreign Intelligence Surveillance Act (50 U.S.C. § 1801)—Interception of Radio Communication—Constitutional Law—Fourth Amendment—Privacy*, 3 Op. O.L.C. 240 (May 29, 1979); *Constitutional Law—Fourth Amendment—Interception of Oral Communications—Legality of Television Surveillance in Government Offices*, 3 Op. O.L.C. 64 (Feb. 2, 1979); *National Security Mail Covers—Constitutional Challenge—Federal Bureau of Investigation (39 CFR 233.2(d)(2)(ii))*, 2 Op. O.L.C. 290 (Dec. 15, 1978); *Intelligence—Warrantless Electronic Surveillance—Common Carriers (18 U.S.C. §§ 2510-2520, 47 U.S.C. § 605)*, 2 Op. O.L.C. 123 (June 5, 1978); *Warrantless Foreign Intelligence Surveillance—Use of Television—Beepers*, 2 Op. O.L.C. 14 (Jan. 25, 1978). The following opinions previously have been released in response to past FOIA requests: Memorandum for Michael Vatis, Deputy Director, Executive Office for National Security, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Standards for Searches under the Foreign Intelligence Surveillance Act* (Feb. 14, 1995); Memorandum for Anthony A. Lapham, General Counsel, Central Intelligence Agency, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: MKULTRA Drug-testing Program* (July 17, 1978). Copies of those two opinions are attached.

highly classified and sensitive program would risk compromising the Program and could help terrorists avoid detection. As you know, on January 19, 2006, the Department of Justice released a 42-page paper setting out a comprehensive explanation of the legal authorities supporting the Program. See *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006). That paper reflects the substance of the Department's legal analysis of the Terrorist Surveillance Program.

Finally, you also have requested "any documents by which the President has, prior to and after September 11, 2001, authorized the NSA surveillance programs, including all underlying legal opinions authored by the White House." Such documents would reflect sensitive operational details of the program, and any such legal opinions would constitute confidential internal deliberations of the Executive Branch. Accordingly, it would be inappropriate to release such documents.

2. **Since September 11, 2001, how many OLC memoranda or opinions have discussed the authority of the President to take or authorize action under either the AUMF or the Commander-in-Chief power, or both, that one could argue would otherwise be prohibited or restricted by another statute? Will you provide copies of those memoranda or opinions to the Committee? If not, please provide the titles and dates of those memoranda and opinions.**

Any such opinions would constitute the confidential legal advice of the Executive Branch and would reflect the deliberative process. We are not able to discuss the contents of confidential legal advice.

3. **When did the President first authorize warrantless electronic surveillance of U.S. persons in the United States outside the parameters of the Foreign Intelligence Surveillance Act ("FISA")? What form did that authorization take?**

As explained in the January 19th paper, the Terrorist Surveillance Program is not "outside the parameters of [FISA]." Rather, FISA contemplates that Congress may enact a subsequent statute, such as the Force Resolution, that authorizes the President to conduct electronic surveillance without following the specific procedures of FISA.

The President first authorized the Terrorist Surveillance Program in October 2001.

4. **When did the NSA commence activities under this program?**

The NSA commenced the Terrorist Surveillance Program soon after the President authorized it in October 2001.

5. **When did the Administration first conclude that the AUMF authorized warrantless electronic surveillance of U.S. persons in the United States?**

What contemporaneous evidence supports your answer, and will you provide it to the Committee? What legal objections were raised to that theory and by whom?

The Department has reviewed the legality of the Terrorist Surveillance Program on multiple occasions. Your questions regarding the content of confidential Executive Branch legal advice, the identity of those who provided that advice, and whether any legal objections were raised during internal discussions, implicate the confidential internal deliberations of the Executive Branch. We are not able to address those issues.

6. How many U.S. persons have had their calls or e-mails monitored or have been subjected to any type of surveillance under the NSA's warrantless electronic surveillance program?

Operational details about the scope of the Terrorist Surveillance Program are classified and sensitive, and cannot be discussed in this setting. Openly revealing information about the scope of the Program could compromise its value by facilitating terrorists' attempts to evade it. We note, however, that consistent with the notification provisions of the National Security Act, certain Members of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have been briefed on the operational details of the Program.

7. General Hayden has said that the NSA program does not involve data mining tools or other automated analysis of large volumes of domestic communications. Can you confirm that? Has the NSA program ever involved data mining or other automated analysis of large volumes of communications of any sort?

As General Hayden correctly indicated, the Terrorist Surveillance Program is *not* a "data-mining" program. He stated that the Terrorist Surveillance Program is not a "drift net out there where we're soaking up everyone's communications"; rather, under the Terrorist Surveillance Program, NSA targets for interception "very specific [international] communications" for which, in NSA's professional judgment, there is probable cause to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist group—people "who want to kill Americans." See Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html.

8. Are there other programs that rely on data mining or other automated analysis of large volumes of communications that feed into or otherwise facilitate either the warrantless surveillance program or the FISA warrant process?

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified

intelligence activities of the United States through appropriate briefings of the oversight committees and congressional leadership.

- 9. Has the Justice Department issued any legal advice with regard to the legality or constitutionality of the NSA or other agencies in the Intelligence Community conducting data mining or other automated analysis of large volumes of domestic communications? If so, please provide copies.**

We cannot reveal confidential legal advice delivered within the Executive Branch or its internal deliberations. If legal advice from Executive Branch officers or entities were subject to disclosure, those who need legal advice would be reluctant to seek it, and those responsible for providing candid legal advice might be discouraged from giving it. That would increase the risk of legal errors. Nor can we discuss the existence (or non-existence) of any specific intelligence activities.

- 10. What is the longest duration of a surveillance carried out without a court order under this warrantless electronic surveillance program? What is the average length?**

This question calls for classified and sensitive operational details of the Terrorist Surveillance Program that cannot be discussed here. Openly revealing information about the operational details of the Program could compromise its value by facilitating terrorists' attempts to evade it. As noted above, consistent with the notification provisions of the National Security Act, certain Members of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have been briefed on the operational details of the Program.

- 11. Did we understand correctly from your testimony that the NSA is only authorized to intercept communications when a "probable cause" standard is satisfied, and that it is "the same standard" as the one used under FISA? Has that been true since the inception of this program?**

As we have said, the Terrorist Surveillance Program targets for interception communications only where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This "reasonable grounds to believe" standard is a "probable cause" standard of proof. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt."). FISA also employs a "probable cause" standard.

- 12. What standard for intercepting communications without a warrant was the NSA applying when the program was first authorized? What standard was the NSA applying in January 2004?**

The Terrorist Surveillance Program targets communications for interception only where one party is outside the United States and there is probable cause (“reasonable grounds”) to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. We can discuss only the Terrorist Surveillance Program. We cannot discuss the operational history or details of the Terrorist Surveillance Program or any other intelligence activities.

- 13. Did the standard change after there were objections from the FISA Court? Did the standard change after there were objections from senior Justice Department officials?**

We cannot discuss the operational details or history of the Terrorist Surveillance Program. Nor can we divulge the internal deliberations of the Executive Branch or the content of our discussions with the Foreign Intelligence Surveillance Court.

- 14. Who decides whether the “probable cause” standard has been satisfied? Who if anyone reviews this decision? Are records kept as to the satisfaction of this condition for each surveillance?**

Under the Terrorist Surveillance Program, decisions about what communications to intercept are made by professional intelligence officers at the NSA who are experts on al Qaeda and its tactics, including its use of communications systems. Relying on the best available intelligence and subject to appropriate and rigorous oversight by the NSA Inspector General and General Counsel, among others, these officers determine whether there is probable cause to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Steps are taken to enable appropriate oversight of interception decisions.

- 15. Did we understand correctly from your testimony that, under this program, the NSA is authorized to intercept communications only when one party to the communication is outside the United States? Has that always been true? Describe the history and legal significance of that limitation.**

The Terrorist Surveillance Program targets communications for interception only where one party is outside the United States. It does not target domestic communications—that is, communications that both originate and terminate within the United States. The targeting of international communications for interception fits comfortably within this Nation’s traditions. Other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force authorizations such as the Force Resolution enacted by Congress to permit warrantless surveillance of international

communications. *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, “Congress intended to authorize the President to take at least those actions permitted by the laws of war”). We are not able to discuss further the history or operational details of the Program.

- 16. What does this limitation mean with respect to e-mail communications? Must either the person sending the e-mail or one of persons to whom the e-mail is addressed be physically located outside the United States? Has that always been true?**

As the President has stated, the Terrorist Surveillance Program targets for interception communications only where one party is outside the United States. We cannot openly reveal operational details about how the NSA determines that a communication meets that standard, which could compromise the Program’s value by facilitating terrorists’ attempts to evade it.

- 17. Who decides whether one party to a communication is outside the United States? Who if anyone reviews this decision? Are records kept as to the satisfaction of this condition for each surveillance?**

Professional intelligence officers at the NSA determine whether an international communication meets the standards of the Terrorist Surveillance Program—that is, that there is probable cause to believe that at least one party is a member of al Qaeda or an affiliated terrorist organization. Appropriate records are kept and procedures are in place to ensure that decisions can be reviewed by the NSA Office of General Counsel and the NSA Inspector General.

- 18. Does FISA under any circumstances require the government to obtain a court order to target and wiretap an individual who is overseas? Does it make a difference whether that targeted person who is overseas calls someone in the United States?**

FISA defines “electronic surveillance” to include the acquisition of the contents of “any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States.” 50 U.S.C. § 1801(f)(2). Thus, if the procedures of FISA applied, and if the actual acquisition of a wire communication occurred in the United States, FISA would require a court order to intercept wire communications between a person in the United States and a person overseas. Likewise, the installation or use of a surveillance device inside the United States to acquire information could, under some circumstances, require a FISA order, regardless of the location of the target of the surveillance. *See* 50 U.S.C. § 1801(f)(4).

- 19. Did we understand correctly from your testimony that under this program the NSA is authorized to intercept communications only when at least one party to the communication is “a member or agent of al Qaeda**

or an affiliate terrorist organization”? Has that always been true? Describe the history of that standard and if and how it has changed over time.

Under the Terrorist Surveillance Program, the NSA is authorized to target for interception communications where one party is outside the United States and where there is probable cause to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. We cannot discuss operational details or history of the Terrorist Surveillance Program.

- 20. Who decides whether at least one party to a communication is “a member or agent of al Qaeda or an affiliate terrorist organization”? Who decides whether an organization is “an affiliate terrorist organization”? Who if anyone reviews these decisions? Are records kept as to the satisfaction of these conditions for each surveillance?**

Professional intelligence officers at the NSA who are experts on al Qaeda and its tactics (including its use of communications systems) decide whether there is probable cause to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Those decisions are subject to appropriate and rigorous oversight, and appropriate records are kept and procedures are in place to ensure that decisions are able to be reviewed by the NSA Office of General Counsel and the NSA Inspector General. There is also an extensive interagency review process as to what constitutes a terrorist organization affiliated with al Qaeda.

- 21. Are the above standards and limitations (probable cause; one party is outside the United States; one party is al Qaeda or al Qaeda affiliate) contained in the President’s authorizations? Has that been true since the inception of the program? If these limitations have not always been contained in the President’s authorizations, how have they been communicated to the NSA?**

We cannot discuss the operational details or history of the Program or any other intelligence activities.

- 22. What percentage of the communications intercepted pursuant to this program generate foreign intelligence information that is disseminated outside the NSA? How does that compare to the percentage of disseminable communications intercepted pursuant to FISA?**

As we have explained above and elsewhere, this type of operational information about the Terrorist Surveillance Program is classified and sensitive, and cannot be discussed here.

- 23. Under your interpretation of FISA’s Authorization During Time of War provision [50 U.S.C. § 1811], if Congress in September 2001 had not only**

authorized the use of “all necessary and appropriate force” against al Qaeda, but also formally declared war, would the 15-day limit on warrantless electronic surveillance have applied?

Section 111 of FISA, 50 U.S.C. § 1811, provides an exception from FISA procedures for a 15-day period following a congressional declaration of war. As discussed in the January 19th paper, FISA’s legislative history makes clear that Congress provided this period to give Congress and the President an opportunity to produce legislation authorizing electronic surveillance during the war. And that is precisely what the Force Resolution does—it authorizes the use of electronic surveillance outside traditional FISA procedures.

There is no reason why section 109(a) of FISA, 50 U.S.C. §1809(a)—which contemplates that future statutes might authorize further electronic surveillance—could not be satisfied by legislation authorizing the use of force. In response to your question, we believe that both 50 U.S.C. § 1811 and the Force Resolution would authorize the Terrorist Surveillance Program during the 15-day period after a declaration of war, and that the Force Resolution would authorize the Program thereafter.

24. **Your analysis relies heavily on section 109(a)(1) of FISA, which provides criminal penalties for someone who intentionally “engages in electronic surveillance under color of law *except as authorized by statute.*” According to the legislative history of this provision, the term “except as authorized by statute” referred specifically to FISA and the criminal wiretap provisions commonly known as “title III”. The House Intelligence Committee report (p.96) states, “Section 109(a)(1) carries forward the criminal provisions of chapter 119 [title III] and makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law *except as specifically authorized in chapter 119 of title III and this title.*” Similarly, both the Senate Intelligence Committee report (p.68) and the Senate Judiciary Committee report (p.61) explain that section 109 was “designed to establish the same criminal penalties for violations of this chapter [FISA] as apply to violations of chapter 119 [title III]. ... [T]hese sections will make it a criminal offense to engage in electronic surveillance *except as otherwise specifically provided in chapters 119 [title III] and 120 [FISA].*” In interpreting what Congress intended by the term “except as authorized by statute,” did the Justice Department know of the existence of this Committee Report language? If so, why did the Justice Department not feel compelled to discuss this clarifying language?**

The Department’s January 19th paper discussed the most pertinent authorities bearing on the legality of the Terrorist Surveillance Program, such as the Constitution, the language of FISA, and the *Hamdi* decision. The legislative history you reference not only does not undermine the Department’s conclusion, it supports it.

To begin with, those passages of legislative history cannot be taken at face value because, as detailed at pages 22 and 23 of the Department's January 19th paper, at the time of FISA's enactment, provisions of law besides FISA and chapter 119 of title 18 authorized the use of "electronic surveillance" and there is no indication that FISA purported to outlaw that practice. For example, in 1978, use of a pen register or trap and trace device constituted "electronic surveillance" under FISA. While FISA could have been used to authorize the installation and use of pen registers, Chapter 119 of Title 18 could not. Thus, if the passages of legislative history cited in your question were to be taken at face value, the use of pen registers other than to collect foreign intelligence would have been illegal. That cannot have been the case, and no court has held that pen registers could not have been authorized outside the foreign intelligence context. Moreover, it is perfectly natural that the legislative history would mention only FISA and chapter 119, since they were the principal statutes in 1978 that authorized electronic surveillance as defined in FISA.

What this legislative history demonstrates is that Congress knew how to make section 1809(a)(1)'s reference to "statute" more limited if it had wished to do so. Indeed, it appears that Congress deliberately chose not to mimic the restrictive language of former 18 U.S.C. § 2511(1). By using the term "statute," Congress made clear that not only the existing authorizations for electronic surveillance in chapter 119 of title 18 and in title 50, but also those that might come in future statutes, would satisfy FISA. Congress was wise to include that flexibility, in light of the fact that it was legislating for the first time with respect to constitutional authority that the President previously had exercised alone.

25. The Administration has argued that the NSA's activities do not violate the Fourth Amendment because they are reasonable. Are the intelligence officers who are deciding what calls to monitor the final arbiters of what is "reasonable" under the Fourth Amendment? Who makes the final determination as to what is constitutionally "reasonable"?

The President has indicated that the Terrorist Surveillance Program is limited to targeting for interception communications where one party is outside the United States and there is probable cause to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization. In light of the paramount government interest in avoiding another catastrophic terrorist attack resulting in massive civilian deaths, this narrowly tailored program is clearly reasonable for purposes of the Fourth Amendment. That conclusion is underscored by the fact that the Terrorist Surveillance Program is subject to review every 45 days to determine whether it continues to be necessary. Intelligence officers are not making the determination of what is "reasonable" under the Fourth Amendment; instead, they make a factual determination that the "probable cause" standard is met in a particular instance. That is quite appropriate, as the courts have stressed that probable cause determinations are not technical, legal conclusions, but rather are conclusions based on the practical considerations of everyday life on which reasonable persons act.

26. **You indicated that “career attorneys” at NSA and Justice approved the program. It has been reported that non-career attorneys at these agencies did not agree. Please identify those who you say approved the program, those who did not approve of it, and the nature of the disagreement.**

This question asks for details about the internal deliberations of and the confidential legal advice delivered within the Executive Branch, and we are not in a position to provide such information.

27. **How many people within the NSA, DOJ, the White House, or any other federal agency have been involved in the authorization, implementation, and review of the NSA program?**

The President, Vice President, General Hayden, and the Attorney General have stated publicly that they were involved in the authorization, implementation, and/or review of the Terrorist Surveillance Program. We have also explained that the NSA Office of General Counsel and Office of Inspector General are involved in the oversight and review of the program, and that professional intelligence officers at the NSA are involved in the day-to-day implementation of the program. Lawyers at the Department of Justice and officials at the Office of the Director of National Intelligence are also involved in the review. We cannot provide further information, as it concerns internal deliberations of the Executive Branch and classified and sensitive information about the Program.

28. **You have mentioned various people in the Intelligence Community who approved of these activities, including the NSA Inspector General. But you have not mentioned the person in that community statutorily assigned to review and assess all such programs -- the Civil Liberties Protection Officer for the Office of the Director of National Intelligence. Does your failure even to mention him mean that you were not aware of his role, that a decision was made not to inform him of the program, or that he was familiar with the program but did not approve of it?**

It may provide some context for this question to note that the Director of National Intelligence was created by statute in December 2004, and the Director position was filled only in April 2005. The Civil Liberties Protection Officer was filled on an interim basis only in June 2005, and that interim appointment was made permanent in early December 2005. As stated above, we cannot reveal further details about who was cleared into this Program or the internal deliberations of the Executive Branch.

- 29. You have said that the NSA program is subject to internal safeguards and said it is reviewed approximately every 45 days. Who conducts those reviews? What are the questions they are asked to review and answer? Do they produce any written products? If so, please provide copies.**

General Hayden has stated that the Terrorist Surveillance Program is “overseen by the most intense oversight regime in the history of the National Security Agency,” Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html, and is subject to extensive review in other departments as well. While some of those procedures cannot be described in this setting, the oversight program includes review by lawyers at the National Security Agency and the Department of Justice. In addition, with the participation of the Office of the Director of National Intelligence and the Department of Justice, the Program is reviewed every 45 days and the President decides whether to reauthorize it. This review includes an evaluation of the Terrorist Surveillance Program’s effectiveness, a thorough assessment of the current threat to the United States posed by al Qaeda, and assurances that safeguards continue to protect civil liberties. We cannot disclose documents generated by these reviews, which involve the internal deliberations and confidential legal advice of the Executive Branch and classified and sensitive information.

- 30. Do the 45-day reviews include any determination of the effectiveness of the program and whether it has yielded results sufficiently useful to justify the intrusions on privacy? If so, are such determinations based on quantitative assessments of third parties or subjective impressions of the people involved in the surveillance activities?**

As noted above, the 45-day review does account for the effectiveness of the Terrorist Surveillance Program and considers privacy interests.

- 31. As part of this program, have any certifications been provided to telecommunications companies and Internet Service Providers that “no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,” as set out in 18 U.S.C. § 2511(2)(a)(ii)? If yes, how many were issued and to which companies?**

As we have explained above, operational information about the Terrorist Surveillance Program is classified and sensitive, and therefore we cannot confirm or deny operational details of the program in this setting. Revealing information about the operational details of the Program could compromise its value by facilitating terrorists’ attempts to evade it. Consistent with the notification provisions of the National Security Act, certain Members of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have been briefed on the operational details of the Program.

- 32. Can information obtained through this warrantless surveillance program legally be used to obtain a warrant from the FISA Court or any court for wiretapping or other surveillance authority? Can it legally be used as evidence in a criminal case? Has it been used in any of these ways? Has the FISA court or any court ever declined to consider information obtained from this program and if so, why?**

The purpose of the Terrorist Surveillance Program is not to bring criminals to justice. Instead, the Program is directed at protecting the Nation from foreign attack by detecting and preventing plots by a declared enemy of the United States. Because the Program is directed at a “special need, beyond the normal need for law enforcement,” the warrant requirement of the Fourth Amendment does not apply. *See, e.g., Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). Because collecting foreign intelligence information without a warrant does not violate the Fourth Amendment and because the Terrorist Surveillance Program is lawful, there appears to be no legal barrier against introducing this evidence in a criminal prosecution. *See* 50 U.S.C. § 1806(f), (g). Past experience outside the context of the Terrorist Surveillance Program indicates, however, that operational considerations, such as the potential for disclosing classified information, must be considered in using intelligence information in criminal trials.

- 33. Are you aware of any other Presidents having authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?**

The laws of the United States, both before and after FISA’s enactment, have long permitted various forms of foreign intelligence surveillance, including the use of wiretaps, outside the procedures of FISA. If the question is limited to “electronic surveillance” as defined by FISA, however, we are unaware of such authorizations.

- 34. During the hearing, you have repeatedly qualified your testimony as limited to, e.g., “those facts the President has publicly confirmed,” “the kind of electronic surveillance which I am discussing here today,” “the program I am talking about,” “the program which I am testifying about today,” “the program that we are talking about today,” “the program that I am here testifying about today,” and “the terrorist surveillance program about which I am testifying today.” Please explain what you meant by these qualifications. Aside from the program that you testified about on February 6, 2006, has the President secretly authorized any additional expansions or modifications of government surveillance authorities with respect to U.S. persons since September 11, 2001? If so, please describe them and the legal basis for their authorization.**

The decision to reveal classified information about the Terrorist Surveillance Program rests with the President. *See Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988). The quoted statements reflect the fact that the Attorney General was authorized to discuss only the Terrorist Surveillance Program and the legal authorities supporting the Program. He was not authorized to discuss any operational details of the

Program or any other intelligence activity of the United States in an open hearing, though our inability to respond should not be taken to suggest that there are such activities.

- 35. Has the President taken or authorized any other actions that would violate a statutory prohibition and therefore be illegal if not, under your view of the law, otherwise permitted by his constitutional powers or the Authorization for Use of Military Force? If so, please list and describe those actions, and provide a chronology for each.**

Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)'s prohibition on detention of U.S. citizens "except pursuant to an Act of Congress," and thereby authorizes the detention of Americans who are enemy combatants. FISA contains a similar provision indicating that it contemplates that warrantless electronic surveillance could be authorized in the future "by statute." Specifically, section 109 of FISA prohibits persons from "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*" 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the statutory authorization requirement of 18 U.S.C. § 4001(a), it also satisfies the comparable requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution or the Constitution might satisfy a statutory prohibition contained in another statute, other than FISA and section 4001(a), the provision at issue in *Hamdi*. We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the Terrorist Surveillance Program.

We are not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program, though our inability to respond should not be taken to suggest that there are such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 17, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

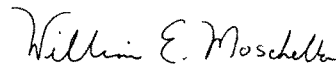
Dear Mr. Chairman:

This responds to your letter, dated February 13, 2006, following Attorney General Gonzales' appearance before the Senate Committee on the Judiciary on February 6, 2006. The subject of the hearing was, "Wartime Executive Power and the NSA's Surveillance Authority." Please find attached responses to questions for the record posed to the Attorney General following his appearance before the Committee.

With this letter we are pleased to transmit the remaining portion of our responses. This transmittal supplements our earlier letter, dated March 24, 2006, which transmitted responses to 35 Minority questions for the record.

We trust you will find this information helpful. If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,


William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

**Answers to Questions for the Record
Posed to Attorney General Alberto Gonzales
Following the Senate Judiciary Committee
Hearing on “Wartime Executive Power
and the National Security Agency’s Surveillance Authority”
February 6, 2006**

Questions from Senator Feingold

1. **You said at the hearing that the minimization procedures that the National Security Agency (“NSA”) follows with regard to information obtained through the NSA program authorized by the President are “basically” the same as those required by the Foreign Intelligence Surveillance Act (FISA). How do they differ? Are they binding? Please provide copies of the minimization procedures used as part of the program.**

ANSWER: The terrorist surveillance program described by the President targets for interception communications where at least one party is outside the United States and there are reasonable grounds (*i.e.*, probable cause) to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (the “Terrorist Surveillance Program”). As we have previously explained, procedures are in place to protect U.S. privacy rights under the Terrorist Surveillance Program, including applicable procedures required by Executive Order 12333 and approved by the Attorney General, that govern acquisition, retention, and dissemination of information relating to U.S. persons. Executive orders are binding on the Executive Branch, as are the particular procedures promulgated to implement Executive Order 12333 when and where they apply. Department of Defense Regulation 5240.1-R (and its classified annex) are the guidelines approved by the Attorney General that are referred to in Executive Order 12333. Those guidelines generally govern NSA’s handling of U.S. person information. United States Signals Intelligence Directive 18 provides NSA more detailed guidance. In addition, special minimization procedures, approved by the Foreign Intelligence Surveillance Court, govern NSA handling of U.S. person information acquired pursuant to FISA-authorized surveillance.

Executive Order 12333, DoD Directive 5240.1-R (and its classified annex), and USSID 18 will be provided to the Committee.

2. **Other than minimization procedures, are NSA employees given any other written guidelines with instructions on how to implement this program? Have those instructions changed since the program began? Please provide copies of all versions of any written instructions provided to NSA employees.**

ANSWER: Beyond the guidance in the documents described in answer to question 1, NSA employees are provided with detailed instructions on how to implement the Terrorist Surveillance Program. It is not appropriate to discuss or disclose those instructions in this setting. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the Intelligence Committees.

3. **During the course of the NSA program authorized by the President, have any telecommunications companies or Internet Service Providers refused to comply with requests for assistance or raised questions about your authority to authorize surveillance without a court order?**

ANSWER: As we repeatedly have explained, operational information about the Terrorist Surveillance Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists' attempts to evade it. Accordingly, we cannot confirm or deny operational details of the Program in this setting, including whether any such companies play any role in the Program. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the oversight committees and, in certain circumstances, congressional leadership.

4. **Since the information about this program has become public, have any telecommunications companies or Internet Service Providers raised concerns about whether they should be assisting the government with wiretaps under the program?**

ANSWER: Again, for the reasons explained above, we cannot confirm or deny in this setting whether such companies have played any role in the Terrorist Surveillance Program.

5. **Have you sought the assistance of any telecommunications companies or Internet Service Providers in implementing any data mining tools or other automated analysis of large volumes of communications? Have any telecommunications companies or Internet Service Providers raised questions or concerns about assisting with such projects?**

ANSWER: We cannot confirm or deny in this setting any asserted intelligence activities beyond the Terrorist Surveillance Program described above in response to question 1, including the sorts of asserted activities described in this question. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the Intelligence Committees.

6. **Please respond to the question I asked at the hearing about the September 10, 2002, testimony of then-Associate Attorney General David Kris before the Senate Judiciary Committee. Specifically, who in the White House and at the Department of Justice reviewed and approved Mr. Kris's testimony? Of those people, which of them were aware of the NSA program?**

ANSWER: This question of Sen. Feingold's was addressed in the enclosed letter, dated February 28, 2006, from the Attorney General to Chairman Specter. Please see page 3 of that letter for the Department's response.

7. **On what date was the presiding judge of the FISA Court first told about this program? Was the briefing a result of a request by the judge, or at the initiation of the executive branch? Prior to the program becoming public, were any other FISA judges made aware of any aspect of the program?**

ANSWER: As we previously have made clear, we cannot reveal the internal deliberations of the Executive Branch or the content of our confidential discussions with the Foreign Intelligence Surveillance Court.

8. **According to a February 9, 2006, *Washington Post* story, information gathered through the NSA's surveillance program is "tagged" and no FISA warrant can be approved based on that information.**
- a. **Is that accurate?**
 - b. **If so, when was that process put in place?**
 - c. **How many FISA applications has the government submitted based on information obtained through the NSA program?**

ANSWER: As we repeatedly have explained, operational information about the Terrorist Surveillance Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists' attempts to evade it. Accordingly, we cannot comment on the operational details of the Terrorist Surveillance Program in this setting. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the Intelligence Committees.

9. **Was the NSA program shut down temporarily in 2004, or at any other time? If so, why and for how long? What changes were made when the program was resumed?**

ANSWER: The Terrorist Surveillance Program as described in response to question 1 has never been suspended; it has been in operation since its inception in October 2001. Indeed, the President explained that he intends to reauthorize that Program as long as the threat posed by al Qaeda and its allies justifies it. Beyond that, for the reasons noted above, we cannot discuss the operational details or history of the Terrorist Surveillance Program in this setting.

10. **Has the President authorized physical searches without obtaining a warrant, either before or after the fact, pursuant to FISA?**

ANSWER: The Terrorist Surveillance Program does not, of course, involve physical searches, and such searches would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss intelligence operations in this setting should not be taken to confirm the existence of such operations. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

11. **In October 1994, Congress amended FISA to cover physical searches. Those provisions went into effect in 1995. Are you aware of any other Presidents having authorized warrantless physical searches outside of FISA since 1995 when FISA's physical search provisions went into effect?**

ANSWER: As we have stated on several occasions, the Terrorist Surveillance Program does not involve physical searches. As a more general matter, FISA does not address physical searches conducted outside the United States, and such searches have occurred outside of FISA since 1995. See *United States v. bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000). We are not aware of other Presidents authorizing physical searches for intelligence purposes inside the United States without a court order since FISA's physical search provisions took effect in 1995.

12. **Has the President authorized the warrantless installation of listening devices (often called a "black bag job") outside of FISA?**

ANSWER: The Terrorist Surveillance Program does not involve the warrantless installation of listening devices, and the installation and use of such devices would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss intelligence operations in this setting should not be taken to confirm the existence of such operations. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees.

13. **In response to questions from Senator Schumer, you acknowledged that there was some dissent among lawyers in the Administration about the NSA program. But you then went on to say that "none of the reservations dealt**

with the program that we're talking about today. They dealt with operational capabilities that we're not talking about today."

- a. Please describe any legal reservations expressed by Administration lawyers about the NSA program.
- b. Please describe any legal reservations expressed by Administration lawyers about any other surveillance programs being conducted by the NSA or other agencies in the Intelligence Community.

ANSWER: The Department of Justice encourages the free and candid exchange of views among its lawyers, which improves the quality of legal advice rendered. To promote the candid exchange of views, we will not comment on the internal deliberations of the Executive Branch.

14. **You have argued that electronic surveillance is a fundamental incident of war. You have also argued that writing the rules for electronic surveillance is not part of Congress' power to "make Rules for the Government and Regulation of the land and naval Forces" set out in Article 1, Section 8, of the U.S. Constitution. How do you square those two arguments?**

ANSWER: As explained in the Department of Justice's paper of January 19, 2006, *see Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*Legal Authorities*"), intercepting the communications of a declared enemy of the United States is a fundamental incident of the use of military force and is thus included in Congress's authorization of the President to use to undertake "all necessary and appropriate force" against the perpetrators of the September 11th attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2004) ("*Force Resolution*"). The Supreme Court has explained that the Force Resolution authorizes use of the "fundamental incidents to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting).

That Congress statutorily authorized the Terrorist Surveillance Program obviates the need to demarcate the precise boundaries of the constitutional authority of the President and that of Congress in this situation. The inherent authority of the President to conduct warrantless foreign intelligence surveillance is well established, and every federal court of appeals to have reached the question has determined that the President has such authority, even during peacetime. On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review "[o]ok" for granted that the President does have that authority" and concluded that, assuming that is so, "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). Importantly, even if Congress had not authorized the use of fundamental incidents to war, the issue would not be whether Congress has any authority to "writ[e] the rules for electronic surveillance." The question would concern regulations that restrict the President from undertaking necessary

signals intelligence activities against the declared enemy of the Nation during a time of armed conflict.

In addition, the scope of Congress's authority to make rules for the regulation of the land and naval forces is not entirely clear. The Supreme Court traditionally has construed this authority to provide for military discipline of members of the Armed Forces by, for example, "grant[ing] the Congress power to adopt the Uniform Code of Military Justice" for offenses committed by servicemembers, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960), and by providing for the establishment of military courts to try such cases, see *Ryder v. United States*, 515 U.S. 177, 186 (1995); *Madsen v. Kinsella*, 343 U.S. 341, 347 (1952); see also *McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981) (noting enactment of military retirement system pursuant to power to make rules for the regulation of land and naval forces). That reading is consistent with the Clause's authorization to regulate "Forces," rather than the *use* of force. Whatever the scope of Congress's authority, however, it is well established that Congress may not "impede the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988); see also *id.* at 696-97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. See also *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (Congress may not "*interfere[] with the command of forces and the conduct of campaigns*." That power and duty belong to the President as commander-in-chief.") (emphasis added).

15. **On December 20, 2005, Vice President Cheney claimed that the NSA program "has saved thousands of lives." Is that statement by the Vice President supported by any intelligence assessment that has examined the facts and concluded that "thousands of lives" have been saved as a result of this program? Has any such assessment been presented to anyone in Congress or to the FISA court? When and in what form?**

ANSWER: Other persons who are familiar with available intelligence and knowledgeable about the program have confirmed that the program has prevented terrorist attacks on this country. During the February 2 Worldwide Threat Briefing, General Hayden stated that "the [P]rogram has been successful; . . . we have learned information that would not otherwise have been available" and that "[t]his information *has helped detect and prevent terrorist attacks in the United States and abroad.*" (Emphasis added.) The Terrorist Surveillance Program has provided the Government with crucial information about the activities of al Qaeda and is indispensable to preventing another attack on the United States. The President, in his periodic reevaluations and reauthorizations of the program, reviews intelligence assessments to evaluate the program's effectiveness and necessity. Details about those intelligence assessments, including their content and timing, are classified and sensitive and it would not be appropriate to discuss them in this setting.

Questions from Senator Schumer

16. **What other programs has the President authorized based on the power he believes has been given to him through the Authorization for the Use of Military Force (“AUMF”)?**

ANSWER: The President has, of course, ordered numerous activities that are authorized by the Force Resolution, among other sources, including military operations against al Qaeda and the Taliban in Afghanistan and throughout the world. As the Supreme Court recognized, the President’s order to detain certain enemy combatants was authorized by the Force Resolution. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

To the extent that your question seeks information about other intelligence activities, we are not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program. Of course, our inability to respond here should not be taken to suggest that there are such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

17. **You were very careful, in your testimony, to limit your remarks to “those facts the president has publicly confirmed: nothing more.”**
- a. **How long has the NSA surveillance program operated in its current form with the current protections in place?**
 - b. **How many other iterations of the NSA surveillance program have there been?**
 - c. **How many times was this NSA surveillance program – or any of its predecessor programs -- suspended based on concerns by administration lawyers and/or FISA judges?**

ANSWER: The quoted statement reflects the fact that the Attorney General was authorized to discuss only the Terrorist Surveillance Program during the February 6 hearing and the legal authorities supporting the Program. He was not authorized to discuss any operational details of the Program in that open hearing. Revelation of operational details could further jeopardize this critical intelligence tool. For these reasons, questions such as these would be more appropriately discussed in briefings before the Senate Select Committee on Intelligence.

The Terrorist Surveillance Program was first authorized in October 2001 and has never been suspended.

18. Similarly, in response to my question about whether there was any dissent within the Administration, you said (emphasis added):

“And with respect to what the president has confirmed, I do not believe that these DOJ officials that you’re identifying had concerns about this program.”

- a. Do I correctly infer from this formulation that DOJ or other Administration officials objected to other surveillance programs the President has authorized?
- b. Do I correctly infer from this that this program has existed in different forms in the past, and that there was objection to the past iterations of the program?

ANSWER: The Attorney General’s statement should not be understood to imply anything whatever about any intelligence activities other than the Terrorist Surveillance Program that was the subject of the February 6 hearing. The Attorney General repeatedly noted that, in the setting of an open hearing, he could speak only about the Terrorist Surveillance Program. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

19. You testified that you believed that the negative public reaction to purely domestic surveillance might have been “twice as great” as the reaction that has arisen to the program the President “has confirmed,” and that therefore the Administration decided that limiting this program to communications where one party was outside the United States was the “appropriate line to draw.”
- a. What role did anticipated “public reaction” play in the development and implementation of the NSA surveillance program?
 - b. What role should anticipated “public reaction” play in the development and implementation of programs designed to protect America from terrorism?

ANSWER: The President determined that an early warning system was essential in the aftermath of September 11th. The Terrorist Surveillance Program was developed to serve this function and not because of any assessment of public reaction. The President is committed to taking all lawful action necessary to protect the Nation from foreign attack, and his decisions to take such actions are based on his strategic judgment and legal advice. His decisions are not based on opinion polls.

The Terrorist Surveillance Program does not target domestic communications for interception. As the President has recently affirmed, we do not intercept such communications without court orders. The President's decision to target for interception international communications is strongly supported by the long history of conducting surveillance of international communications during time of war, which was undertaken by both Presidents Wilson and Franklin Roosevelt based on inherent constitutional authority and general language in force resolutions. The interception of domestic communications raises different legal issues, and we think it prudent to refrain from addressing that separate issue absent a need to do so.

20. **Will the administration assert executive privilege, attorney client privilege, deliberative privilege, or any other privilege if any of the following witnesses are called to testify before this Committee:**
- a. **Former Attorney General John Ashcroft**
 - b. **Former Deputy Attorney General James B. Comey**
 - c. **Former Assistant Attorney General Jack Goldsmith**
 - d. **Former National Security Aide to the Deputy Attorney General Patrick Philbin**
 - e. **Director of the Office of Intelligence and Policy Review, James Baker**
 - f. **Vice President Cheney's former Counsel, now his Chief of Staff, David Addington**
 - g. **Former Deputy Attorney General Larry Thompson**

For each, please explain the scope of that privilege, and its legal basis.

ANSWER: The Attorney General personally has testified at length to provide the Judiciary Committee a definitive and exhaustive explanation of the legal authorities supporting the Terrorist Surveillance Program. By letter dated February 15, 2006, the Department responded to the Committee's request that the Department authorize former Attorney General John Ashcroft and former Deputy Attorney General James Comey also to testify before the Committee about the program. In that letter, we noted that "when the Attorney General . . . testified before the Committee on February 6, 2006, he was careful not to disclose internal deliberations or other confidential Executive Branch information, and he did not in fact do so," and we informed the Committee that "if they were called to testify before the Committee, Messrs. Ashcroft and Comey would not be authorized to disclose confidential Executive Branch information, which would include discussions at meetings." That response applies fully to this question, both with respect to Messrs. Ashcroft and Comey and with respect to the other individuals identified in the question.

21. **You testified that this program is “only focused on international communications where one part of the communication is Al Qaida. That’s what this program is all about.” To be clear, however, have you, the President, or anyone else in the Administration, under this or any other program, done the following since the passage of the AUMF:**
- a. **Authorized the warrantless opening of mail of private citizens or residents in the United States?**
 - b. **Authorized the warrantless search of a home or office in the United States?**
 - c. **Authorized the warrantless placement of a listening device within a home or office in the United States?**

The above are questions I asked you at the hearing last week which you refused to answer at the time. You did, however, promise to consider the questions and to respond to them at a later point. Please respond to them now.

ANSWER: During the hearing, the Attorney General was authorized to address only the Terrorist Surveillance Program. He was not authorized to address any other intelligence activity of the United States in an open hearing. The Terrorist Surveillance Program does not involve the warrantless opening of mail, warrantless physical searches, or warrantless placement of listening devices, and each of those would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities, though our inability to respond more fully should not be taken to suggest that such activities exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

22. **In addition, please answer the following questions which you refused to answer at the hearing. You also promised to consider these questions and to provide me a response at a later point.**
- a. **Have there ever been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?**
 - b. **FISA makes public every year the number of applications. In 2004, there were 1,758 applications. Why can't we know how many wiretaps have been authorized under this program? Why should one be any more classified than the other?**

ANSWER: To begin with, it is not accurate to say that the Attorney General “refused to answer” the question whether there had been any abuses of the NSA surveillance program at the hearing. The Attorney General testified that “the NSA has a regimen in place where they ensure that people are abiding by agency policies and regulations.” Consistent with how you used the term during the February 6 hearing, we understand your use of the term “abuses” to mean the knowing interception of calls other than those that are legitimately authorized for interception for foreign intelligence surveillance purposes in connection with the conflict against al Qaeda and affiliated terrorist organizations (*i.e.*, calls for which one party is outside the country and for which there are reasonable grounds to believe at least one party is a member or agent of al Qaeda or an affiliated terrorist organization). We are not aware of alleged “abuses” of the Terrorist Surveillance Program. As General Hayden has stated, the Terrorist Surveillance Program is “overseen by the most intense oversight regime in the history of the National Security Agency.” *See* Remarks by Gen. Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html.

It is true that the Government has publicly released the total number of FISA applications for various years, but we have never broken those statistics down by the persons, organizations, or nations that are targeted. There is a simple reason for that—providing such numbers would reveal to those subjects the likelihood that they are being monitored and would give them crucial information with which to adjust their behavior and to evade detection. Because the Terrorist Surveillance Program is targeted at a single threat—al Qaeda and affiliated terrorist organizations—providing comparable information about its operation would reveal to the world, and thereby to al Qaeda, the number of communications intercepted, and thereby would provide information that our adversary could use to defeat our surveillance efforts.

23. **When I asked at the hearing if, under the legal theory you claim justifies this program, the government could “monitor private calls of its political enemies, people not associated with terrorism but people who they don't like politically,” you responded “We're not going to do that. That's not going to happen.” To be clear, have you, the President, or anyone else in the Administration, under this or any other program, engaged in warrantless surveillance of political opponents of the President?**

ANSWER: Under the Terrorist Surveillance Program, NSA targets for interception “very specific [international] communications” for which, in NSA’s professional judgment, there are reasonable grounds to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist group—people “who want to kill Americans.” Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html. The targeting process does not include, and never has included, consideration of whether a potential target is a political opponent of the President.

24. **Will you confirm that the program was suspended at one point in 2004, as has been reported in the media? When exactly was it suspended? When was it reinstated? Why the suspension? Why the subsequent reinstatement? What additional protections or corrections were made?**

ANSWER: The Terrorist Surveillance Program has never been suspended; it has been in operation since its inception in October 2001. Indeed, the President explained that he intends to reauthorize that Program as long as the threat posed by al Qaeda and its allies justifies it.

25. **Did you ever consult legal or national security experts not employed within the executive branch prior to your determination that the NSA domestic surveillance program was legal and constitutional?**

ANSWER: Your question calls for information involving the confidential internal deliberations of the Executive Branch and the identity of persons with knowledge about the Program. We will not comment on the internal deliberations of the Executive Branch, and as a general matter, the identity of persons outside of Congress who have been briefed on the Program is classified and sensitive. We note, however, that it would be extraordinary to seek advice outside the Government on such a highly classified issue, especially given the concentration of expertise on national security law within the Government.

26. **Has any information collected under this program ever been presented in court in connection with the prosecution of a suspected terrorist or for any other reason?**

ANSWER: Because the Terrorist Surveillance Program serves a “special need, beyond the normal need for law enforcement,” the warrant requirement of the Fourth Amendment does not apply. *See, e.g., Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). And, in view of the narrowly targeted nature of the Program, the essential government interest it serves, and the careful and frequent review by high-level Executive Branch officials, the Program meets the Fourth Amendment’s reasonableness requirement. For this reason, there appears to be no legal barrier against introducing information collected under the Program into evidence in a criminal prosecution.

Although we cannot discuss operational details of the Terrorist Surveillance Program, several considerations would weigh strongly against use of such information in a criminal prosecution. First, the purpose of the Terrorist Surveillance Program is not to bring criminals to justice. Rather, it is a critical military intelligence program that provides the United States with an early warning system to protect the Nation from foreign attack by a declared enemy of the United States—al Qaeda. Second, the use of such information would carry a substantial risk of disclosing classified information and impairing critical sources and methods.

27. **You have said that even the 72 hours provided by FISA for emergency warrant applications is insufficient time to allow the “speed and agility” necessary to properly monitor the communications of suspected terrorists. How much time would be sufficient? One week? One month?**

ANSWER: The emergency authorization provision in FISA, which allows 72 hours of surveillance without obtaining a court order, does not—as many believe—allow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General first must personally “determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists.” 50 U.S.C. § 1805(f). FISA requires the Attorney General to determine that this condition is satisfied *before* authorizing the surveillance to begin. Great care must be exercised in reviewing requests for emergency surveillance, because if the Attorney General authorizes emergency surveillance and the FISA Court later declines to permit surveillance, the surveillance must cease within only 72 hours and there is a risk that the court would order disclosure of information regarding the surveillance. *See* 50 U.S.C. § 1806(j). To reduce those risks, the Attorney General follows a multi-layered procedure before authorizing interception under the “emergency” exception to help to ensure that any eventual application will be acceptable to the Foreign Intelligence Surveillance Court. For surveillance requested by NSA, that process ordinarily entails review by intelligence officers at the NSA, NSA attorneys, and Department of Justice attorneys, each of whom must be satisfied that the standards have been met before the matter proceeds to the next group for review. Compared to that multilayered process, the Terrorist Surveillance Program affords a critical advantage in terms of speed and agility.

And the lengthy review process takes even the *initial* surveillance decision away from the professional intelligence officers best situated and trained to make such decisions during an armed conflict, all of whom are experts on al Qaeda and its communications techniques. We can afford neither the delay nor the loss of expertise in this armed conflict with an enemy that has already proven its ability to strike within the United States. These harms have principally to do with the extensive internal procedures that must be completed *before* electronic surveillance can be initiated, even under this “emergency” provision. Simply extending the period for which an emergency authorization would run thus would not address the issues that prevent FISA from serving as an effective early warning system.

28. **You also testified that with respect to the President’s potential authority to engage in purely domestic warrantless wiretapping without a warrant (i.e., communications between “members of Al Qaida talking to each [other] in America”), “[t]hat analysis, quite frankly, has not been conducted.”**
- a. **Why has that analysis not been conducted?**

- b. Are there plans to conduct such an analysis?**
- c. Do you believe that the President has the Constitutional authority to wiretap, without a warrant, members or affiliates of Al Qaida speaking with each other within the United States?**

ANSWER: The quoted statement is addressed at pages 4-5 of the Attorney General's February 28, 2006 letter to Chairman Specter. Please refer to that letter for a further discussion of that statement. During the hearing, the Attorney General was discussing only the legal basis of the surveillance activity confirmed by the President, and accordingly he was referring only to the legal analysis of the Department set out in the January 19, 2006 paper. His statements during the hearing should not be read to suggest that the Department's legal analysis has been static over time. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and any analysis of that question would need to take account of all current circumstances before any such interception would be authorized. As the Attorney General noted during the hearing, however, domestic surveillance "is not what the President has authorized." Tr. 92. There is a long history, however, of Presidents authorizing the interception of *international* electronic communications during a time of armed conflict. President Wilson, for example, relying only on his constitutional powers and a general congressional authorization for use of force, authorized the interception of *all* telephone, telegraph, and cable communications into and out of the United States during World War I. *See* Exec. Order 2604 (Apr. 28, 1917). Similarly, President Roosevelt authorized the interception of "*all . . . telecommunications traffic* in and out of the United States." As explained in the Justice Department's paper of January 19, 2006, that historical foundation lends significant support to the President's authority to undertake the Terrorist Surveillance Program under the Force Resolution and the Constitution; indeed, the Program is much narrower than the interceptions authorized by either President Wilson or President Roosevelt.

- 29. You testified that the minimization requirements under the NSA surveillance program are "basically consistent" with the minimization requirements that exist under FISA. More specifically, how are the minimization procedures employed under the NSA program different from those required under FISA?**

ANSWER: This question is substantively identical to one asked by Sen. Feingold. Please see our response to question 1, above.

- 30. You have argued that the FISA law and the Military Force Authorization can be read consistently with each other. But you have also acknowledged that they are not necessarily consistent and that FISA and the AUMF may not be reconcilable. In your Department's White Paper,**

you argue that in this case, the “AUMF would impliedly repeal as much of FISA as would prevent the President” from using all necessary and appropriate force to prevent attack. (White Paper, page 36, fn. 21). In other words, the AUMF would necessarily allow the President to ignore portions of that duly enacted law.

You also said that because the AUMF was “enacted during an acute national emergency,” Congress could not have been expected to “work through every potential implication of the U.S. Code” to determine, effectively, what else was repealed by implication because of the AUMF. (White Paper, page 36, fn. 21).

You are the chief law enforcement officer in the land and more than four years have passed since passage of the AUMF. You have now no doubt had time to consider the implications for the rest of the U.S. Code.

- a. Therefore, please list every other U.S. law that, in your view, has been repealed in whole or in part because of the Military Force Resolution? What other laws, in your view, can the President ignore because of that resolution?
- b. Put another way, which other preexisting statutory limitations on the President’s power no longer apply, in your view, as a consequence of the Military Force Resolution?
- c. Are there any legal opinions within the Government that rely on the AUMF to argue that other laws on the books are no longer applicable or may have been repealed in whole or in part?

ANSWER: As an initial matter, your question mistakenly suggests that the Force Resolution is not a “duly enacted law.” The Force Resolution has just as much statutory force as any other law passed by Congress, and just as much power to alter previously enacted statutes. Thus, the Force Resolution does not “allow the President to *ignore* the portions of [any] duly enacted law.” Rather, the Force Resolution constitutes authorization to take that action.

You ask us to identify laws other than FISA that have been affected by the Force Resolution. Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)’s prohibition on detention of U.S. citizens “except pursuant to an Act of Congress,” and thereby authorizes the detention of Americans who are enemy combatants. FISA contains a similar provision indicating that it contemplates that warrantless electronic surveillance could be authorized in the future “by statute.” Specifically, section 109 of FISA prohibits persons from “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*” 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the

statutory authorization requirement of 18 U.S.C. § 4001(a), it also satisfies the comparable requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution or the Constitution might satisfy a statutory prohibition contained in another statute, other than FISA and section 4001(a). We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the Terrorist Surveillance Program. The Justice Department does not determine the outer limits of statutes in the abstract, divorced from factual circumstance or specific policy proposals.

Follow up Questions from Senator Biden

31. **The plurality opinion in *Hamdi v. Rumsfeld* stated, “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized,” even with respect to enemy combatants. 542 U.S. at 521 (emphasis added). How do you square this part of Justice O’Connor’s opinion with your Department’s argument that the Administration can surveill, potentially for decades, American citizens on U.S. soil who are not even alleged to be enemy combatants for the purposes of gaining information?**

ANSWER: Five Justices (the plurality plus Justice Thomas) *rejected* Hamdi’s argument that, because the war on terror might continue indefinitely, the Force Resolution did not authorize his detention for the duration of the war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004) (plurality opinion); *id.* at 592, 594 (Thomas, J., dissenting). The plurality agreed that the laws of war generally permit the detention of enemy combatants for purposes of preventing their return to battle until the end of hostilities. *See id.* at 520. Although the plurality acknowledged that the duration of the conflict with al Qaeda may *in the future* raise difficult questions about the propriety of extended detention of combatants, it expressly declined to confront those questions because “that is not the situation we face as of this date.” *Id.* Instead, Justice O’Connor’s opinion concluded that the United States *may* detain enemy combatants “for the duration of these hostilities.” *Id.* at 521. The plurality recognized that the laws of war and the Force Resolution do not authorize “indefinite detention *for the purpose of interrogation*,” as opposed to prevent return to the conflict. *Id.* at 521 (emphasis added); *see also id.* (“Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”). The plurality based its conclusion on the lack of precedent supporting such conduct under the “law of war.” *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, “Congress intended to authorize the President to take at least those actions permitted by the laws of war”).

As noted in the Justice Department’s paper of January 19, 2006, the laws of war clearly support the use of intelligence collection during a time of armed conflict. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 14; *see, e.g.,* Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) (“Every belligerent has a right . . . to discover the signals of the enemy and . . . to seek to procure information regarding the enemy through the aid of secret agents.”) (emphasis added). Just as we have not begun to approach issues of “indefinite detention” with regard to the detention of enemy combatants, no one can reasonably dispute that we continue to be in an armed conflict and that our enemies continue to seek to execute

catastrophic attacks on the United States. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And in January, Osama bin Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God’s permission.

Quoted at <http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html> (Jan. 19, 2006) (emphasis added).

In addition, of course, the Terrorist Surveillance Program targets for interception international communications *only* where there are reasonable grounds to believe that one of the parties to the communication *is a member or agent of al Qaeda or an affiliated terrorist organization*. That is, the Program targets the communications of the enemy.

32. **In reciting the holding from the plurality opinion in *Hamdi*, you and your Department appear to have excluded any reference to the fact that Mr. Hamdi was detained abroad – in Afghanistan. See, e.g., White Paper at 12 (“a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization ‘known to have supported’ al Qaeda ‘is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”; Gonzales, Opening Statement, at 4, “There, the question was whether the President had authority to detain an American citizen as an enemy combatant for the duration of hostilities.”). Yet, Justice O’Connor relied heavily on the fact that Mr. Hamdi was detained in Afghanistan and was engaged in armed conflict against the United States there and explicitly limited the reach of her plurality opinion to only cover this situation. 542 U.S. at 516 (“[The Government] has made clear ... that for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individuals who, it alleges, was ‘part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.” (emphasis added)); See also *id.* at 523 (“Justice Scalia ... ignores the context of this case: a United States citizen captured in a foreign combat zone.” (emphasis in original)).**

- Do you agree that the *Hamdi* plurality limited its holding to U.S. citizens who “engaged in armed conflict against the United States” in the active battle zone in Afghanistan?
- Is this an important factor in assessing whether the *Hamdi* precedent should apply in the circumstances of the NSA surveillance program?

ANSWER: Your question is based on the mistaken premise that “Mr. Hamdi was detained abroad.” Although Hamdi was captured abroad, he was being detained in the United States.

Justice O’Connor did limit her opinion by considering only the question presented: the legality of detaining *within the United States*, a U.S. citizen who had allied himself with forces hostile to the United States or its allies and had “engaged in armed conflict against the United States.” 542 U.S. at 516 (plurality opinion) (quoting Brief for the United States). Justice O’Connor sensibly did not attempt to reach issues not before the Court. Although the location of a capture *might* be relevant to whether the President’s detention of a U.S. citizen approaches constitutional limits, there is no analogous argument with respect to the interception of international communications. Indeed, courts have held that the Constitution does not require warrants for the interception, for foreign intelligence purposes, of *purely domestic* communications during times of peace—let alone international communications during an armed conflict. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 35-43 (Jan. 19, 2006); *see also In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973).

Instead, the relevance of *Hamdi* concerns the scope and proper interpretation of the Force Resolution and its effect on other statutes. There, Justice O’Connor was clear. The Force Resolution authorizes the “fundamental and accepted [] incident[s] to war,” 542 U.S. at 518 (plurality opinion); *see also id.* at 587 (Thomas, J., concurring). As we explained at length in the January 19th paper, surveillance of the enemy is clearly one of the fundamental and accepted incidents of war. *Hamdi* also demonstrates that authorization of conduct by the Force Resolution satisfies a statutory regime materially identical to FISA. In *Hamdi*, the relevant statute was 18 U.S.C. § 4001, prohibiting detention of U.S. citizens “except pursuant to an Act of Congress.” *See Hamdi*, 542 U.S. at 517. Here, the relevant statute is 50 U.S.C. § 1809(a), barring the conducting of electronic surveillance “except as authorized by statute.” Just as the Force Resolution’s general language satisfied the requirements of section 4001, it satisfies FISA’s statutory-authorization requirement.

33. **You and your Department have drawn analogies between FISA and the anti-detention statute at issue in *Hamdi* (18 U.S.C. 4001(a)).**
- **Does the anti-detention statute at issue in *Hamdi* claim that it was the “exclusive” legal measure dealing with detention of U.S. citizens?**
 - **Does the anti-detention statute at issue in *Hamdi* make any distinction for treating detention of American citizens differently during peacetime versus during wartime?**

ANSWER: Section 4001(a) states that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a). Section 4001 does not state that it is the exclusive mechanism for authorization of detentions. We do not, however, believe that the provision in FISA stating that Chapter 119 of title 18 and FISA are “the exclusive means by which electronic surveillance . . . may be conducted,” 18 U.S.C. § 2511(2)(f), somehow renders the *Hamdi* analysis irrelevant here. As explained in the January 19th paper, *see Legal Authorities, supra*, at 21-23 & n.8, FISA’s exclusivity language cannot be understood to trump the commonsense approach of section 109 of FISA and preclude a subsequent Congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)’s reference to “exclusive means” reflected the state of statutory authority for electronic surveillance by the Executive Branch in 1978. It is implausible to think that, in attempting to limit the *Executive Branch’s* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent Congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that “one legislature cannot abridge the powers of a succeeding legislature”). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way. Rather, section 2511(2)(f), in light of FISA section 109 (which prohibits surveillance “*except as authorized by statute*,” 50 U.S.C. § 1809(a)(1)), is best read simply to require statutory authorization for surveillance. As explained in *Hamdi*, that is what the Force Resolution provides.

Indeed, even at the time section 2511(2)(f) was enacted, it could not reasonably be read to preclude all electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence

information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. New York Tel. Co.*, 434 U.S. 159, 165-68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the “exclusive” procedures of section 2511(2)(f), *i.e.*, FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context.

You also ask whether section 4001(a) distinguishes between detention of American citizens during peacetime and during wartime. It does not. It is true that FISA does have a provision specifically authorizing electronic surveillance for 15 days after a congressional declaration of war. *See* 50 U.S.C. § 1811. As the Department has explained, however, Congress intended this provision to provide across-the-board relief from FISA procedures while Congress and the Executive Branch could enact legislation providing for the use of force (and its incidents) in the war. Of course, this provision has no application to the armed conflict with al Qaeda because Congress has not declared war. But even if that were not so, Congress through the Force Resolution enacted just the sort of legislation contemplated by section 1811. It specifically authorizes the President to undertake “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The Force Resolution recognizes and affirms the President’s authority to employ the “fundamental and accepted” incidents of the use of military force in our armed conflict with al Qaeda. *Hamdi*, 542 U.S. at 518 (plurality opinion). As we have explained at length, the interception of the international communications of a declared enemy is a quintessential incident of the use of military force and is therefore authorized by the Force Resolution.

34. **Justice O’Connor cautioned in *Hamdi*: “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organization in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake?”** 542 U.S. at 536.
- **How do you square your reading of the *Hamdi* case with this statement by Justice O’Connor?**
 - **Is the President’s NSA wiretapping program a program in which “individual liberties are at stake”?**

ANSWER: Our reading of *Hamdi* is entirely consistent with that statement. A majority of the Court concluded that the Legislative Branch performed its “role” there by enacting the Force Resolution and thus authorizing the Executive’s action at issue. At issue in *Hamdi* was the detention of an American citizen

within the United States. Clearly, as Justice O'Connor stated, individual liberty was at stake—indeed, individual liberty interests were *more clearly* implicated there than in the context of the Terrorist Surveillance Program because, as the *Hamdi* plurality noted, “the interest in being free from physical detention by one’s own government” is the “*most elemental* of liberty interests.” 542 U.S. 507, 529 (plurality opinion) (emphasis added). The plurality concluded that the Executive Branch had the authority to detain Hamdi precisely because the Force Resolution implicitly had authorized such action.

But the historical and constitutional considerations at issue in *Hamdi* are wholly different from those implicated by the Terrorist Surveillance Program. With regard to searches, the Fourth Amendment expressly addresses the role of the Judicial Branch in approving such executive actions through the Warrant Clause. Every court to consider the question has held that the President has inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes. See *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. Bin Laden*, 126 F. Supp.2d 264, 271-77 (S.D.N.Y. 2000). Specifically, these courts held that the Fourth Amendment does not require warrants in the context of foreign intelligence surveillance.

35. Do you agree that the *Hamdi* plurality rejected some of the arguments made by the government in that case (see, e.g., 542 U.S. at 535 (“we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.”))?

ANSWER: The *Hamdi* plurality did not accept every argument made by the Government in that case. The *Hamdi* plurality did not, however, reject any of the positions set forth in the Department of Justice’s paper of January 19, 2006. As noted above, the “circumstances” at issue in *Hamdi* involved the detention of an American in the United States, and Justice O’Connor’s statement must be understood in that light. Further, the Fourth Amendment jurisprudence is well established, and it provides that courts need not issue warrants or orders for foreign intelligence searches and, more generally, for searches in service of “special needs beyond the normal need for law enforcement.” *Veronia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). Indeed, before the passage of FISA, it was undisputed that the President had the inherent constitutional authority to conduct foreign intelligence searches without prior judicial approval.

36. Under your Department’s legal reasoning, can a President circumvent the Uniform Code of Military Justice or is he wholly and completely bound by it?

ANSWER: The President is not above the law and cannot “circumvent” the Uniform Code of Military Justice. Whether the UCMJ might be unconstitutional as applied in some exceptional circumstances is a difficult constitutional question—one that we would not resolve unless it were necessary to do so, and which should not be addressed in the abstract.

37. **Under the legal reasoning laid out in your Department’s 42-page White Paper, could the President have been able to unilaterally undertake the FISA-related changes that were subsequently and legislatively enacted in the PATRIOT Act and other post September 11 legislation?**

ANSWER: FISA remains an essential and invaluable tool for foreign intelligence collection both in the armed conflict with al Qaeda and in other contexts. In contrast to surveillance conducted pursuant to the Force Resolution, FISA is not limited to al Qaeda and affiliated terrorist organizations. In addition, FISA has procedures that specifically allow the Government to use evidence in criminal prosecutions and, at the same time, protect intelligence sources and methods. The Justice Department’s paper of January 19, 2006 addresses only the Terrorist Surveillance Program (which targets for interception only the international communications of members or agents of al Qaeda and affiliated terrorist organizations). The analysis set forth in the paper does not address the very different questions presented by the FISA amendments you reference. For example, the Force Resolution would not supplement and confirm the President’s traditional foreign surveillance authority outside the context of the armed conflict against al Qaeda.

38. **In your opening statement, you stated that this program “*targets communications where one party to the communication is outside the U.S. and the government has ‘reasonable grounds to believe’ that at least one party to the communication is a member or agent of al Qaeda, or an affiliated organization.*” The Department of Justice’s 42-page White Paper speaks of “*persons linked to al Qaeda or related terrorist organizations.*” See White Paper at 1, 2, and 27. Previously you have also included individuals “*affiliated with Al Qaeda ... or working in support of al Qaeda.*” (December 19, 2005, press conference). Which of these is the operative standard for the program?**

ANSWER: The Terrorist Surveillance Program targets for interception international communications where there are reasonable grounds (*i.e.*, probable cause) to believe that at least one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

39. **Please explain to me the legal or factual flaws, if any, in the following assertions and arguments made by a group of esteemed law professors (February 2, 2006, letter by Professor Curtis A. Bradley et al.):**

- a. ***“Every time the Supreme Court has confronted a statute limiting the Commander-in-Chief’s authority, it has upheld that statute.”*** (emphasis in original).
- b. ***“The [Justice Department’s] reading would require interpreting a statute that is entirely silent on the subject to have implicitly repealed and wholly overridden the carefully constructed and criminally enforced ‘exclusive means’ created by Congress for the regulation of electronic surveillance.”***
- c. ***“No precedent holds that the President, when acting as a Commander in Chief, is free to disregard and Act of Congress, much less a criminal statute enacted by Congress, that was designed specifically to restrain the President as such.”*** (emphasis in original).

ANSWER: To be clear, the constitutional questions raised in the first and third assertions above need not be confronted here. As we have explained, the Force Resolution statutorily authorizes the Terrorist Surveillance Program and satisfies section 109(a) of FISA. Thus, there is no need to address whether there are constitutional limits on Congress’s ability to constrain the President’s actions with respect to the exercise of core constitutional powers. Nevertheless, the implication of the first and third assertions is that no statutory provision could ever unconstitutionally intrude on the President’s constitutional powers, even with respect to national security and foreign affairs. But the few Supreme Court cases remotely on point do not begin to stand for such a proposition. Indeed, in numerous cases the Supreme Court specifically has acknowledged the limitations on Congress’s ability to regulate the President’s conduct both of foreign affairs generally and his authority to conduct military campaigns in particular. *See, e.g., Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that “the President alone” is “constitutionally invested with the entire charge of hostile operations”); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not “interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief”); *cf. In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) (“We take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, FISA could not encroach on the President’s constitutional power.”). Moreover, perhaps the most salient reason that the Court has not struck down statutes that might appear to interfere with the President’s constitutional authority over national security is that it has applied an exceedingly strong avoidance canon. *See, e.g., Jama v. ICE*, 543 U.S. 335, 348 (2005) (rejecting interpretation not clearly required by text of statute where adopting it “would run counter to our customary policy of deference to the President in matters of foreign affairs”); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption that Congress does not legislate extraterritorially “has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility”); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (“unless Congress specifically has

provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”) (collecting authorities); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing “[s]uper-strong rule against congressional interference with the President’s authority over foreign affairs and national security”).

With regard to the second proposition, it is important to be clear about our legal position. Congress could have been more explicit if it had intended to repeal FISA. But we do not believe that Congress needed to be more specific in the Force Resolution in order for it to authorize electronic surveillance in an armed conflict. First and foremost, section 109(a) of FISA expressly contemplates that future statutes may authorize electronic surveillance in specific circumstances. And, as explained at length elsewhere, FISA fits directly into that mold. In addition, it is neither necessary nor appropriate for Congress to attempt to catalog every specific aspect of the use of the force it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress’s judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.” *Dames & Moore*, 453 U.S. 654, 678 (1981). Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalog in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President’s core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”). In the context of authorizing the powers attendant to the President in an armed conflict, it is not remarkable that the Force Resolution was not more specific. It is noteworthy in this regard that Presidents Wilson and Roosevelt both undertook programs of international surveillance based on inherent presidential authority and similarly general congressional force authorizations. In light of section 109(a) of FISA and the historical context of congressional actions to authorize military force, it is not our position that the Force Resolution repealed FISA.

40. **In *Rasul v. Bush*, 542 U.S. 466 (2004), the Administration argued that interpreting the habeas corpus statute to allow suits by detainees at Guantanamo Bay “would directly interfere with the Executive’s conduct of the military campaign against al Qaeda and its supporters,” and thereby raise “grave constitutional problems.”**

- **Did the Supreme Court in this case agree with the government’s arguments and position?**
- **Did the Supreme Court invoke the canon of constitutional avoidance in this case?**
- **Does your Department’s White Paper address this conclusion of the *Rasul* Court?**
- **If not, why not?**

ANSWER: Your selective quotation of the Government’s brief in *Rasul v. Bush* fails to note what the Government was contending in that case. The Government’s main contention in *Rasul* was that the *Constitution* did not confer on U.S. courts jurisdiction over the habeas corpus petitions of alien enemies detained abroad, and that the Supreme Court had correctly held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the Fifth Amendment does not apply to aliens abroad. The Government also noted that the *Eisentrager* Court had held that the federal habeas statute did not extend jurisdiction to such claims, and that subsequently “Congress has not amended the habeas statutes to confer the jurisdiction that this Court held was absent in *Eisentrager*.” U.S. Br. 11, *Rasul v. Bush*, Nos. 03-334, 03-343. The Court did not disagree with the Government’s arguments, but essentially avoided them by holding that a subsequent decision of the Court, *Braden v. 30th Judicial Circuit Ct. of Ky.*, 410 U.S. 484, 495 (1973), which had not even been mentioned in the Government’s brief, had extended jurisdiction over such claims as a matter of *statutory* law. As the majority concluded in *Rasul*, “[b]ecause subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals,’ persons detained outside the territorial jurisdiction of any federal district court *no longer need to rely on the Constitution* as a source of their right to federal habeas review.” *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (emphasis added); *see also id.* at 478 n.8 (contending that *Eisentrager* had been a constitutional ruling, not a statutory one). Although the Court did not invoke the canon of constitutional avoidance, *the Government did not argue* that canon should be employed in that case because the Government was not principally arguing about the construction of a statute, *see* U.S. Br. at 27 (“[T]here is no constitutional problem to ‘avoid’ here.”), but rather arguing for a particular construction of the Constitution—an issue the Court did not confront because it resolved the case on statutory grounds.

Because *Rasul* simply involved the construction of 28 U.S.C. § 2241—the federal habeas statute—it was not relevant to the question analyzed in the Department’s January 19th paper. That paper mentioned *Rasul* only to note, as evidence that Congress is presumptively aware of court decisions, the fact that Congress had amended the habeas statute in an apparent effort to overrule *Rasul*. *See Legal Authorities, supra*, at 13.

Follow up Questions from Senator Feinstein

41. I have been informed by former Majority Leader Senator Tom Daschle that the Administration asked that language be included in the “*Joint Resolution to Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*” (P.L. 107-40) (hereinafter “the Authorization” or “AUMF”) which would add the words “in the United States” to its text, after the words “appropriate force.”
- a. Who in the Administration contacted Senator Daschle with this request?
 - b. Please provide copies of any communication reflecting this request, as well as any documents reflecting the legal reasoning which supported this request for additional language.

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 1 in the set of questions we returned to you on February 28 of this year.

42. Did any Administration representative communicate to any Member of Congress the view that the language of the Authorization as approved would provide legal authority for what otherwise would be a violation of the criminal prohibition of domestic electronic collection within the United States?
- a. If so, who in the Administration made such communications?
 - b. Are there any contemporaneous documents which reflect that view within the Administration?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 2 in the set of questions we returned to you on February 28 of this year.

43. According to Assistant Attorney General William Moschella’s letter of December 22, 2005, and the subsequent “White Paper,” it is the view of the Department of Justice that the Authorization “satisfies section [FISA section] 109’s requirement for statutory authorization of electronic surveillance.”¹
- a. Are there other statutes which, in the view of the Department, have been similarly affected by the passage of the Authorization?

¹ Letter, Assistant Attorney General William Moschella to Senator Pat Roberts, et al., December 22, 2005, at p. 3 (hereinafter “Moschella Letter”)

b. If so, please provide a comprehensive list of these statutes.

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 3 in the set of questions we returned to you on February 28 of this year.

- 44. A number of Senators asked questions during the hearing about intelligence activities that may be part of, or logical extensions of, your legal argument supporting the NSA warrantless domestic electronic surveillance. In response to Senator Kohl, for example, you said that "... it is beyond the bound of the program which I am testifying about today."**
- a. Are there any other intelligence programs or activities, including, but not limited to, monitoring internet searches, emails and online purchases, international or domestic, which have been authorized by the President, although kept secret from some members of the authorizing committee?**
 - b. If so, please provide a comprehensive list of such programs and the legal authority for each.**

ANSWER: It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss such programs in this setting should not be taken as an indication that any such program or programs exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. The National Security Act of 1947 contemplates that the Intelligence Committees of both Houses would be appropriately notified of intelligence activities and the Act specifically contemplates more limited disclosure in the case of exceptionally sensitive matters. Title 50 of the U.S. Code provides that the Director of National Intelligence and the heads of all departments, agencies, and other entities of the Government involved in intelligence activities shall keep the Intelligence Committees fully and currently informed of intelligence activities "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C. §§ 413a(a), 413b(b). It has long been the practice of both Democratic and Republican administrations to inform the Chair and Ranking Members of the Intelligence Committees about exceptionally sensitive matters. The Congressional Research Service has acknowledged that the leaders of the Intelligence Committees "over time have accepted the executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees." See Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions*, Congressional Research Service Memorandum at 10 (Jan. 18, 2006). This Administration has followed this well-

established practice by notifying the leadership of the Intelligence Committees about the most sensitive intelligence programs or activities, in accordance with the National Security Act of 1947. Every member of both of the Intelligence Committees has now been briefed about the Terrorist Surveillance Program.

45. **At a White House press briefing, on December 19, 2005, you stated that that the Administration did not seek authorization in law for this NSA surveillance program because “you were advised that that was notsomething [you] could likely get” from Congress.**
- a. **What were your sources of this advice?**
 - b. **As a matter of constitutional law, is it the view of the Department that the scope of the President’s authority increases when he believes that the legislative branch will not pass a law he approves of?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 8 in the set of questions we returned to you on February 28 of this year.

46. **The AUMF authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”**
- a. **What do you believe are the conditions under which the President’s authority to conduct the NSA program pursuant to the Authorization would expire?**
 - b. **You have told the Committee that, in order for the program to be reauthorized, “there must be a determination that Al Qaeda continues to pose a continuing threat to America.” Does the AUMF likewise expire when Al Qaeda is no longer a threat?**
 - c. **What are the criteria used to determine the ongoing threat posed by Al Qaeda, and who makes the determination?**

ANSWER: We answered part “a” of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 14 in the set of questions we returned to you on February 28 of this year.

As you know, al Qaeda leaders repeatedly have announced their intention to attack the United States again. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And in January, Osama bin

Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God's permission.

Quoted at <http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html> (Jan. 19, 2006) (emphasis added). The threat from Al Qaeda continues to be real. Thus, the necessity for the President to take these actions continues today.

As a general matter, the authorization for the Terrorist Surveillance Program that is provided by the Force Resolution would expire when the "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," no longer pose a threat to the United States or when Congress repeals that statute. In addition, the Program by its own terms expires approximately every 45 days unless it is reauthorized after a review process that includes a review of the current threat to the United States posed by al Qaeda and its affiliates.

For purposes of the Terrorist Surveillance Program, the President makes the determination whether al Qaeda poses a continuing threat based on the best available intelligence. We cannot, however, discuss the details of this process in this setting.

47. **Based on the Moschella Letter and the subsequent White Paper, I understand that it is the position of the Department of Justice that the National Security Agency, with respect to this program of domestic electronic surveillance, is functioning as an element of the Department of Defense generally, and as one of a part of the "Armed Forces of the United States," as referred to in the AUMF.**

a. **Is this an accurate understanding of the Department's position?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 10 in the set of questions we returned to you on February 28 of this year.

48. **Article I Section 8 of the Constitution provides that the Congress "shall make Rules for the Government and Regulation of the land and naval forces." It appears that the Foreign Intelligence Surveillance Act (FISA), as applied to the National Security Agency, is precisely the type of "Rule" provided for in this section.**

- a. **Is it the position of the Department of Justice that the President's Commander-in-Chief power is superior to the Article I Section 8 powers of Congress?**
- b. **Does the Department of Justice believe that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 11 in the set of questions we returned to you on February 28 of this year.

49. **In a December 17, 2005, radio address the President stated, "I authorized the National Security Agency...to intercept the international communications of people with known links to al Qaeda and related terrorist organizations."**
- a. **In your statement before the Committee, you said: "even if we assume that the terrorist surveillance program qualifies as electronic surveillance under FISA..." Does the program involve "electronic surveillance" as defined in FISA (50 U.S.C. 1801 (f))?**
 - b. **How many such communications have been intercepted during the life of this program? How many disseminated intelligence reports have resulted from this collection?**
 - c. **Has the NSA intercepted under this program any communications by journalists, clergy, non-governmental organizations (NGOs) or family members of U.S. military personnel? If so, for what purpose, and under what authority?**

ANSWER: We answered parts "b" and "c" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 20 in the set of questions we returned to you on February 28 of this year.

It would not be appropriate in this setting to discuss in detail whether the Terrorist Surveillance Program constitutes "electronic surveillance" under the definition set forth in FISA, 50 U.S.C. § 1801(f). Confirming whether or not the surveillance in question meets that statutory definition would provide information about the operational details of the program and could facilitate efforts to circumvent it. All of the members of the Intelligence Committees have, however, been fully briefed on the Terrorist Surveillance Program.

50. **The Department of Justice White Paper states that the program is used when there is a "reasonable basis" to conclude that one party is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.**

- a. Can the program be used against a person who is a member of an organization affiliated with al Qaeda, but where the organization has no connection to the 9/11 attacks themselves?
- b. Can the program be used to prevent terrorist attacks by an organization other than al Qaeda?
- c. What are the organizations currently "known to be affiliated with" AQ?

ANSWER: We answered parts "a" and "b" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 15 in the set of questions we returned to you on February 28 of this year.

We cannot in this setting provide a list of the groups that are known affiliates of al Qaeda because it would facilitate circumvention of the Program by announcing which groups are being monitored and would alert our adversaries as to what we know of them.

51. **The DOJ White Paper relies on broad language in the preamble that is contained in both the AUMF and the *Authorization for the Use of Military Force Against Iraq* as a source of the President's authority.**
 - a. Does the Iraq Resolution provide similar authority to the President to engage in electronic surveillance? For instance, would it have been authorized to conduct surveillance of communications between an individual in the U.S. and someone in Iraq immediately after the invasion?
 - b. If so, was it so authorized?
 - c. If so, is such surveillance still authorized, or when did any such authorization expire?

ANSWER: We answered part "a" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 19 in the set of questions we returned to you on February 28 of this year. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss such programs in this setting should not be taken as an indication that any such program or programs exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence or military activities of the United States through appropriate briefings of the relevant committees.

52. **In addition to open combat, the detention of enemy combatants and electronic surveillance, what else do you consider being "incident to" the use of military force? Please provide a comprehensive list.**
 - a. Specifically, are interrogations of captives "incident to" the use of military force?

ANSWER: We answered part “a” of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 16 in the set of questions we returned to you on February 28 of this year.

- 53. FISA has safeguard provisions for the destruction of information that is not foreign intelligence. For instance, albeit with some specific exceptions, if no FISA order is obtained within 72 hours, material gathered without a warrant is destroyed. In response to Senator Biden, you indicated that this program has minimization procedures “generally comparable” to and “basically consistent” with those in FISA and Executive Order 12333.**
- a. Are there procedures in place for the destruction of information collected under the NSA program that is not foreign intelligence?**
 - b. If so, what are the procedures and under what authority are they established?**
 - c. Who determines whether the information is retained?**

ANSWER: Procedures are in place to protect U.S. privacy rights, including applicable Attorney General guidelines issued pursuant to Executive Order 12333, that govern acquisition, retention, and dissemination of information relating to U.S. persons. More detail is provided in the answer to question 1. Beyond that we cannot provide more detail in this setting.

- 54. On January 25th, in response to a question from “Sean from Michigan” on the online forum “Ask the White House,” you wrote that “it is overwhelmingly unlikely that the terrorist surveillance program would ever affect an ordinary American. And if this ever were to happen, the information would be destroyed as quickly as possible.”**
- a. What did you mean by an “ordinary American?”**
 - b. Have the communications of an “ordinary American” ever been intercepted by this program?**
 - c. If so, how many times?**
 - d. Was the collected information destroyed, and according to what procedures?**

ANSWER: The answer to part “a” of our question is reflected in the Attorney General’s answer to the question you reference. The Terrorist Surveillance Program targets for interception communications where there are reasonable grounds to believe that at least “one party is a member or agent of al Qaeda or an affiliated terrorist group.” See <http://www.whitehouse.gov/ask/20060125.html>. By the “ordinary American,” we mean the vast majority of the population that does not engage in international communications with “a member or agent of al Qaeda or an affiliated terrorist group.” Ordinary Americans are very unlikely to communicate internationally with members or agents of al Qaeda or an affiliated terrorist organization.

As the Attorney General said in his day of testimony before the Committee, if a communication that does not meet the strict criteria of the Terrorist Surveillance Program is inadvertently intercepted, it is destroyed according to the procedures outlined above. It would not be appropriate to indicate the number of communications that have been inadvertently intercepted, but we can say that it is exceedingly tiny. As General Hayden has stated, the Terrorist Surveillance Program is “overseen by the most intense oversight regime in the history of the National Security Agency.” See Remarks by Gen. Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html.

55. **With regard to minimization requirements, you testified that “we have an obligation to try to minimize intrusion into the privacy interests of Americans.” Do you infer that obligation from the 4th Amendment? And would you agree that 4th Amendment jurisprudence requires some form of judicial oversight into any search and seizure directed against an American citizen?**

ANSWER: We have undertaken efforts to minimize any intrusion into privacy consistent with Executive Order 12333, § 2.4 (1981), and the Fourth Amendment.

The basic command of the Fourth Amendment is that searches be “reasonable.” It is well established that the Fourth Amendment does not require judicial oversight or prior court approval of searches in a variety of contexts, including the specific context at issue—searches authorized by the President for foreign intelligence purposes. See *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. Bin Laden*, 126 F. Supp.2d 264, 271-77 (S.D.N.Y. 2000). That conclusion follows from a straightforward application of the principle that the warrant requirement is inapplicable where a search is directed at “special needs” that go beyond a routine interest in law enforcement. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (there are circumstances ““when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable””) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); see also *McArthur*, 531 U.S. at 330 (“When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.”). Accordingly, the Fourth Amendment does not require judicial oversight in the context of the Terrorist Surveillance Program.

56. **The program is reportedly defined as where one party is in the U.S. and one party in a foreign country. Regardless of how this particular**

program is actually used, does the AUMF authorize the President to intercept communications entirely within the U.S.?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 17 in the set of questions we returned to you on February 28 of this year.

57. **Senator Roberts has stated that the program is limited to: “when we know within a terrorist cell overseas that there is a plot and that plot is very close to its conclusion or that plot is very close to being waged against America -- now, if a call comes in from an al Qaida cell and it is limited to that where we have reason to believe that they are planning an attack, to an American phone number, I don't think we're violating anybody's Fourth Amendment rights in terms of civil liberties.”²**
- a. **Is the program limited to such imminent threats against the United States, or where an attack is being planned? Is this an accurate description of the program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 26 in the set of questions we returned to you on February 28 of this year.

58. **In a speech given in Buffalo, New York by the President, in April 2004, he said: “Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think PATRIOT Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.”³**
- a. **Is this statement accurate?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 27 in the set of questions we returned to you on February 28 of this year.

59. **According to press reports, members of the Administration at some point determined that the authorities provided in the FISA were, in their view, inadequate to support the President's Commander-in-Chief responsibilities.**

² Senator Pat Roberts, CNN Late Edition with Wolf Blitzer, January 29, 2006

³ Information Sharing, Patriot Act Vital to Homeland Security, Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004

- a. At what point was this determination reached?
- b. Who reached this determination?
- c. If such a determination had been reached, why did the Administration conceal the view that existing law was inadequate from the Congress?

ANSWER: We answered this question in response to an earlier set of questions or the record you submitted to DOJ. Please see our response to question 28 in the set of questions we returned to you on February 28 of this year.

- 60. **General Hayden has said that he separately consulted with NSA's top three lawyers early in the consideration of this program. When did Justice Department lawyers first analyze this program?**
 - a. On what legal theory was the program first upheld?
 - b. What are the names and positions of the NSA attorneys in question?

ANSWER: Justice Department lawyers first analyzed legal questions relating to the Terrorist Surveillance Program at the time that the Program was first authorized in October 2001. It would not be appropriate to provide details about internal legal advice provided within the Executive Branch. As demonstrated by our extensive answers to the many oral and written questions that have been posed to us, we are available to address questions about the substance of the Executive Branch's legal position.

- 61. **In a Press Briefing on December 19, 2005, you said that you "believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity [domestic surveillance]." This authority is further asserted in the Department of Justice White Paper of January 19, 2005.**
 - a. On this theory, can the President suspend (in secret or otherwise) the application of Section 503 of the National Security Act of 1947 (50 U.S.C. 413(b)), which states that "no covert action may be conducted which is intended to influence United States political processes, public opinion, policies or media?"
 - 1. If so, has such authority been exercised?
 - b. Can the President suspend (in secret or otherwise) the application of the Posse Comitatus Act (18 U.S.C 1385)?
 - 1. If so, has such authority been exercised?
 - c. Can the President suspend (in secret or otherwise) the application of 18 U.S.C. 1001, which prohibits "the making of false statements within the executive, legislative, or judicial branch of the Government of the United States."
 - 1. If so, has such authority been exercised?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 22 in the set of questions we returned to you on February 28 of this year.

- 62. In your testimony you stated that if Congress were to pass a law forbidding the type of surveillance currently being conducted by the NSA, that would place the NSA program in the third category of Justice Jackson’s three prong test. However you have also stated that if Congress passed a law authorizing the same type of program that you would worry that this would “restrict upon the President’s inherent constitutional authority.” Do you believe that Congress does not have the power to regulate the President’s surveillance of U.S. citizens on U.S. soil?**

ANSWER: It is emphatically not our position that Congress lacks the power to regulate the surveillance of U.S. citizens on U.S. soil. As the Attorney General’s testimony indicated, however, the Terrorist Surveillance Program reflects the exercise of the President’s powers as Commander in Chief and his foreign affairs power at their constitutional zenith, in the defense of the United States from attack—indeed, during a time of congressionally authorized conflict. Courts have long held that the President has inherent authority to conduct warrantless foreign intelligence surveillance. The Foreign Intelligence Surveillance Court of Review wrote that it “[t]ook for granted that the President does have that authority.” *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). The Attorney General’s testimony simply indicated that steps that Congress took to restrict the President’s authority at its zenith might, under certain circumstances, be constitutionally suspect. *See id.* (assuming the President has the authority to engage in warrantless foreign intelligence surveillance, “FISA could not encroach on the President’s constitutional power”). That testimony in no way questioned Congress’s authority to regulate surveillance as a general matter, or in other contexts.

- 63. It is my understanding that Scott Muller was General Counsel to the CIA at the time the Bybee Memo was written and that the memo was written by the Department of Justice in response to a CIA request for legal guidance. According to the Intelligence Authorization Act for Fiscal Year 1997 the General Counsel serves as the chief legal adviser to the Central Intelligence Agency.**
- a. Do you think as chief legal advisor to the intelligence community, the General Counsel’s responsibilities include providing legal interpretations of statutes, regulations, or Executive Orders relevant to the NSA?**
 - b. Did you ever discuss the surveillance program with Mr. Muller?**
 - c. How did Mr. Muller view the argument that the President could authorize the use of unwarranted domestic surveillance?**

ANSWER: It is not appropriate to discuss the internal deliberations of the Executive Branch. Please note that the Attorney General is by law the chief legal adviser to the Executive Branch. *See* 28 U.S.C. § 511; Exec. Order No. 12146 (1979).

64. **Jeffrey Smith, former CIA General Counsel, recently wrote a memo to the House Intelligence Committee concluding that Authority for Use of Military Force did not give the President the right to order domestic wiretaps without a court order.**
- a. **Have you read this memo?**
 - b. **Do you agree with the analysis of legal precedent and the Constitution discussed in this memo?**

ANSWER: We are familiar with the memorandum. We do not agree with its analysis.

65. **In response to Senator Schumer, you stated that “none of the reservations” or “serious disagreements” by the lawyers in the Justice Department discussed recently in the media were in regard to “the program that the President has confirmed.” Is it your position that there was were “no serious disagreements” among lawyers (e.g., James Comey, Jack Goldsmith) in the Justice Department with the regard to the NSA surveillance program?**
- a. **Serious disagreements were recently reported in Newsweek⁴. Are these reports inaccurate?**

ANSWER: The Department of Justice encourages the free and candid exchange of views among its lawyers, which improves the quality of legal advice rendered. To promote the candid exchange of views, we will not comment on the internal deliberations of the Executive Branch. As the Attorney General correctly noted in his testimony before the Senate Judiciary Committee, contrary to news accounts, “there has not been any serious disagreement about” the Terrorist Surveillance Program.

66. **Had the Department of Justice adopted the interpretation of the AUMF asserted in the Moschella letter and subsequent White Paper at the time it discussed the USA-PATRIOT Act with members of Congress? That act substantially altered FISA, and yet, to my knowledge, there was no discussion of the legal conclusions you now assert – that the AUMF has triggered the “authorized by other statute” wording of FISA.**

⁴“Palace Revolt” Newsweek, February 8, 2006

- a. **Please provide any communications, internal or external, which are contemporaneous to the negotiation of the USA-PATRIOT Act, which contain information regarding this question.**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 23 in the set of questions we returned to you on February 28 of this year.

67. **The USA-PATRIOT Act reauthorization bill is currently being considered by the Congress. Among the provisions at issue is Section 215, which governs the physical search authorization under FISA. Does the legal analysis proposed by the Department also apply to this section of FISA? If so, is the Department's position that, regardless of whether the Congress adopts the pending Conference Report, the Senate bill language, or some other formulation, the President may order the application of a different standard or procedure based on the AUMF or his Commander-in-Chief authority?**

- a. **If so, is there any need to reauthorize those sections of the USA-PATRIOT Act which authorize domestic surveillance?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 24 in the set of questions we returned to you on February 28 of this year.

68. **If the President determined that a truthful answer to questions posed by the Congress to you, including the questions asked here, would hinder his ability to function as Commander-in-Chief, or would damage national security, does the AUMF, or his inherent powers, authorize him to direct you to provide false or misleading answers to such questions?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 32 in the set of questions we returned to you on February 28 of this year.

69. **On January 24, 2006, during an interview with CNN, you said that "[a]s far as I'm concerned, we have briefed the Congress... [t]hey're aware of the scope of the program."**

- a. **Please explain the basis for the assertion that I was briefed on this program, or that I was "aware of the scope of the program."**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 12 in the set of questions we returned to you on February 28 of this year.

70. **It appears from recent press reports that Mr. Rove has been briefed about this program, which, as I understand it, was long considered too sensitive to brief to Senators who are members of the Senate Intelligence Committee.**
- a. **Who decided that Mr. Rove was to be briefed about the program, and what is his need-to-know?**
 - b. **Is the program classified pursuant to Executive Order 12958, and if so, who was the classifying authority, and under what authority provided in Executive Order 12958 was the classification decision made?**
 - c. **How many executive branch officials have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**
 - d. **How many individuals outside the executive branch have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 13 in the set of questions we returned to you on February 28 of this year.

71. **Based upon press reports, it does not appear that the NSA surveillance program at issue makes use of any intelligence sources and methods which have not been briefed (in a classified setting) to the Intelligence Committees. Other than the adoption of a legal theory which allows the NSA to undertake surveillance which on its face would otherwise be prohibited by law, what about this program is secret or sensitive?**
- a. **Is there any precedent for developing a body of secret law such as has been revealed by last month's *New York Times* article about the NSA surveillance program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 29 in the set of questions we returned to you on February 28 of this year.

72. **At a public hearing of the Senate/House Joint Inquiry, then-NSA Director Hayden said: "My goal today is to provide you and the American people with as much insight as possible into three questions: (a) What did NSA know prior to September 11th, (b) what have we learned in retrospect, and (c) what have we done in response? I will be as candid as prudence and the law allow in this open session. If at times I seem indirect or incomplete, I hope that you and the public understand that I have**

discussed our operations fully and unreservedly in earlier closed sessions” (emphasis added).⁵

- a. Under what, if any, legal authority did General Hayden make this inaccurate statement to the Congress (and to the public)?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 30 in the set of questions we returned to you on February 28 of this year.

73. **The National Security Act of 1947, as amended, provides that “[a]ppropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if... (1) those funds were specifically authorized by the Congress for use for such activities...”⁶ It appears that the domestic electronic surveillance conducted within the United States by the National Security Agency was not “specifically authorized,” and thus may be prohibited by the National Security Act of 1947.**

- a. What legal authority would justify expending funds in support of this program without the required authorization?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 4 in the set of questions we returned to you on February 28 of this year.

74. **The Constitution provides that “[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law.”⁷ Title 31, Section 1341 (the Anti-Deficiency Act) provides that “[a]n officer or employee of the United States Government... may not— make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” and Section 1351 of the same Title adds that “an officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating sections 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” In sum, the Constitution prohibits, and the law makes criminal, the spending of funds except those funds appropriated in law.**

⁵ Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National Security Agency/Chief, Central Security Service, Before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, available at <http://intelligence.senate.gov/0210hr/021017/hayden.pdf>

⁶ National Security Act of 1947, as amended, Section 504, codified at 50 U.S.C. 414.

⁷ U.S. Constitution, Article I, Section 7.

- a. **Were the funds expended in support of this program appropriated?**
- b. **If yes, which law appropriated the funds?**
- c. **Please identify, by name and title, what “officer or employee” of the United States made or authorized the expenditure of the funds in support of this program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 5 in the set of questions we returned to you on February 28 of this year.

75. **Are there any other expenditures which have been made or authorized which have not been specifically appropriated in law, and which have been kept secret from members of the Appropriations Committee?**
- a. **If so, please list and describe such programs.**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 6 in the set of questions we returned to you on February 28 of this year.

76. **Public statements made by you, as well as the President, imply that this program is used to identify terrorist operatives within the United States. Have any such operatives in fact been identified? If so, have these individuals been detained, and if so, where, and under what authority? Have any been killed?**
- a. **The arrest and subsequent detention of Jose Padilla is, to my knowledge, the last public acknowledgment of the apprehension of an individual classified as an “enemy combatant” within the United States. Have there been any other people identified as an “enemy combatant” and detained within the United States, and if so, what has been done with these individuals?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 25 in the set of questions we returned to you on February 28 of this year.

77. **Were any collection efforts undertaken pursuant to this program based on information obtained by torture?**
- a. **Was the possibility that information obtained by torture would be rejected by the FISA court as a basis for granting a FISA warrant a reason for undertaking this program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 31 in the set of questions we returned to you on February 28 of this year.

78. **In response to Senator Hatch, you said that “when you are talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite reasonable.” In a time of peace, would FISA prohibit the activities carried out under the program?**

ANSWER: That presents a different legal question from that analyzed in the Department’s paper of January 19, 2006. Nevertheless, as we have explained, the Terrorist Surveillance Program is based in part on the statutory authority provided by the Force Resolution, and that authorization satisfies section 109(a) of FISA, which prohibits electronic surveillance under color of law that is not authorized by statute. In addition, the Program also rests on a long tradition of the Executive Branch intercepting international communications during periods of armed conflict. Outside of the context of an armed conflict, those two legal authorities may not apply. On the other hand, courts of appeals uniformly have “held that the President d[oes] have inherent authority to conduct warrantless searches to obtain foreign intelligence information.” *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review has concluded that, assuming that the President has that authority, “*FISA could not encroach on the President’s constitutional power.*” *Id.* (emphasis added). Similarly, President Carter’s Attorney General, Griffin Bell, testified at a hearing on FISA as follows: “[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution.*” Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence (Jan. 10, 1978) (emphasis added). Without a specific factual circumstance in which such a decision would be made, speculating about such possibilities in the abstract is not productive. As Justice Jackson has written, the division of authority between the President and Congress should not be delineated in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context).

79. **The Washington Post has reported that only Presiding Judges Lamberth and Kollar-Kotelly knew of the program before it was made public⁸. Yet in a response to Senator Specter, you said that “the members of the [FISA] court understand the existence of this program.” When were the members of the FISA Court informed of the program?**

ANSWER: As a general matter, it is not appropriate to discuss the details of our confidential communications with the FISA court. As you note, Attorney General Gonzales testified on February 6, 2006 that the members of the FISC “understand the existence of the [Terrorist Surveillance] [P]rogram.”

⁸ “Chief FISA judge warned about misuse of NSA spy data” Washington Post, February 10, 2006

80. **Senator Biden and Senator Kyl asked you whether the President has the authority, under the Constitution, to order purely domestic surveillance. You responded that “that analysis had not been conducted.” The President, however, has directed that all legal means at his disposal should be used in the struggle against violent extremism. It seems to me that this order cannot be carried out without knowing the full range of the President’s legal authority in this arena.**
- a. **Has the Constitutional analysis of this question not been carried out because some other analysis, perhaps based on the AUMF, decided the question?**
 - b. **In your opinion, does the President have the authority to conduct purely domestic warrantless surveillance of American citizens?**

ANSWER: The quoted statement is addressed at pages 4-5 of the Attorney General’s February 28, 2006 letter to Chairman Specter. Please refer to that letter, and to our answer to question 28 above, for a further discussion of that statement. During the hearing, the Attorney General was discussing only the legal basis of the surveillance activity confirmed by the President, and accordingly he was referring only to the legal analysis of the Department set out in the January 19, 2006 paper. His statements during the hearing should not be read to suggest that the Department’s legal analysis has been static over time. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and any analysis of that question would need to take account of all current circumstances before any such interception would be authorized. The Force Resolution’s authorization of “all necessary and appropriate force,” which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only communications where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Indeed, the Program is much narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt (“*all . . . telecommunications traffic* in and out of the United States”), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. In this historical context, it is clear that the interception of international communications to which the enemy is a party is a “fundamental and accepted incident of military force” and within the scope of the Force Resolution. Interception of the contents of domestic communications would thus present a different legal question under both the Constitution *and* the Force Resolution.

81. **In response to a news report calling the NSA program “domestic surveillance”, you stated that this was “doing a disservice to the American people. It would be like flying from Texas to Poland and**

saying that is a domestic flight. We know that is not true. That would be an international flight.” It seems to me that flying from San Francisco to Los Angeles via Paris would also be an international trip. Would domestic to domestic phone calls or emails that are routed through international centers/servers would therefore be considered international communications?

ANSWER: As we have noted repeatedly, the Terrorist Surveillance Program targets for interception only international communications—communications for which one party is outside the United States (and where there are reasonable grounds to believe at least one party is a member or agent of al Qaeda or an affiliated terrorist organization). We therefore continue to believe it is inaccurate to describe it as a program of “domestic surveillance.”

- 82. In response to a question from Senator Leahy, you said that “whatever the limits of the President’s authority given under the authorization to use military force and his inherent authority as Commander-in-Chief in time of war, it clearly includes the electronic surveillance of the enemy.”**
- a. Has the Administration investigated any possible authorities only to conclude that they are beyond the President’s power? In other words, have the limits of the President’s authority been mapped? If so, please provide the relevant legal memoranda.**
 - b. If not, how can you assure us that the President is using all legal means at his disposal to prosecute the war on terror?**

ANSWER: The Department of Justice evaluates the legality of strategies and operations when they are deemed by the President and his advisers to be critical to the War on Terror. As we have stated previously, it is not appropriate to provide details on the internal policy deliberations and confidential legal advice of the Executive Branch.

- 83. On February 6th in your opening statement to the Committee, you quoted the Supreme Court as writing: “[the President’s inherent constitutional authorities expressly include] the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns.” Please provide a citation.**

ANSWER: The Supreme Court repeatedly has noted the President’s authority in this regard. In *Totten v. United States*, 92 U.S. 105 (1876), the Court stated that the President “was undoubtedly authorized during the war, as commander-in-chief, . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.” *Id.* at 106. In *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court said that “[t]he President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.” *Id.* at 111. And in *Johnson v.*

Eisentrager, 339 U.S. 763 (1950), the Court said “[t]he first of the enumerated powers of the President is the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, *grant of war power includes all that is necessary and proper for carrying these powers into execution.*” *Id.* at 788 (emphasis added). See also *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[The President’s] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (“[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials.”).

84. **At the hearing, I asked you whether the Supreme Court had ever addressed the constitutionality of FISA. You replied that the FISA Court of Review wrote, in *In Re Sealed Case*, that “All the other courts to have decided the issue have held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information.” You also quoted this passage in your opening statement. In fact, the Court of Review specifically noted: “We reiterate that *Truong* dealt with a pre-FISA surveillance,” as did all the other cases cited. Furthermore, one of the holdings in *In Re Sealed Case* was that FISA is constitutional. I ask again: has the Supreme Court ever addressed this question?**

ANSWER: The Supreme Court has never addressed the constitutionality of FISA. In *United States v. United States District Court*, 407 U.S. 297 (1972) (the “*Keith*” case), the Supreme Court concluded that the Fourth Amendment’s warrant requirement applies to investigations of wholly domestic threats to security—such as domestic political violence and other crimes. But the Court in *Keith* made clear that the President’s authority to conduct foreign intelligence surveillance without a warrant was an entirely different question and one that it was expressly reserving: “[T]he instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.” *Id.* at 308; *see also id.* at 321-22 & n.20 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to the activities of foreign powers or their agents.”); *see also Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (noting that “Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”); *id.* at 363 (White, J., concurring) (noting that “the Court points out that today’s decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. . . . We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”).

To this day, only the courts of appeals have squarely discussed the interaction of the President's authority to conduct warrantless foreign surveillance and FISA. After reviewing the decisions of the courts of appeals (which, as you know, uniformly have held that the President has constitutional authority to undertake warrantless foreign intelligence surveillance), the Foreign Intelligence Surveillance Court of Review wrote that “[w]e take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) (emphasis added).

- 85. In response to Senator Feingold, you said: “I do believe the President—I did believe at that time that the President has the authority to authorize [this program].” Do you still believe, today, that he has this authority?**

ANSWER: The considered judgment of the Attorney General and the Department of Justice is that the President has ample authority to authorize the Terrorist Surveillance Program.

- 86. Executive Order 12333 governing the conduct of intelligence activities by all intelligence agencies inside the United States is still in effect. Since January, 2001, has that Order been amended?**
- a. If so, please supply a copy of any such amendment.**
 - b. Has the President issued any non-public statements or directives interpreting or pertaining to the provisions of that Order concerning the conduct of intelligence agencies inside the United States or their collection of information about US persons?**
 - c. If so, please supply a copy of any such statements or directives.**

ANSWER: Executive Order 12333 has been amended on two occasions. Executive Order 13284, *Amendment of Executive Orders and Other Actions in Connection with the Establishment of the Department of Homeland Security* (Jan. 23, 2003), transferred certain function under Executive Order 12333 to officials within the Department of Homeland Security. Executive Order 13355, *Strengthened Management of the Intelligence Community* (Aug. 27, 2004), transferred certain functions to the Director of National Intelligence. Both amendments are publicly available, but copies are attached for your convenience.

To the extent that the President has issued any non-public directives regarding the collection of intelligence, it would not be appropriate to share them in this setting.

- 87. Do the procedures established by Executive Order 13356 or 13388 apply to NSA activities within the United States or concerning US persons?**
- i. If so, please supply a copy of any such procedures.**

ANSWER: The procedures required to be established by Executive Order 13356 or 13388 are still under development. It is our understanding that they will apply to NSA activities within the United States or concerning U.S. persons and that they will, of course, be consistent with the requirements of the Constitution and laws of the United States.

As described in the answers to Questions 91-94, NSA's procedures for the collection, retention, and dissemination of information concerning U.S. persons are required by Executive Order 12333 and implement DoD directives.

Information sharing by the Intelligence Community is governed by Director of Central Intelligence Directive (DCID) 8/1, which pre-dates Executive Order 13356. DCID 8/1 became effective on June 4, 2004. NSA implemented DCID 8/1 with NSA Policy 1-9 on 'Information Sharing,' which was issued in May 2005. NSA Policy 1-9 applies to all NSA activities, including those within the United States or concerning U.S. persons. It states that dissemination of SIGINT information shall be made in accordance with the type of SIGINT data and the degree to which the SIGINT data has been minimized and/or assessed for foreign intelligence value, consistent with all applicable U.S. SIGINT System policies and directives.

- 88. Has the Department of Justice issued any legal opinions concerning EO 12333 since January 2001 pertaining to the provisions of that order concerning the conduct of intelligence agencies inside the United States or their collection of information about US persons?**

ANSWER: The Justice Department has issued one publicly available opinion since January 2001 on Executive Order 12333. The Department of Justice released a memorandum entitled *Authority of the Deputy Attorney General Under Executive Order 12333* (Nov. 5, 2001), available at <http://www.usdoj.gov/olc/25.htm>, which concerns the authority of the Deputy Attorney General to make certain decisions under Executive Order 12333. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most opinions of the Department of Justice constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

- 89. Executive Order 12333 provides that intelligence agencies are only authorized to collect information on U.S. persons consistent with the provisions of that Executive Order and procedures established by the head of the agency and approved the Attorney General (Sec. 2.3). Have there been any statements or directives issued by the President or the Attorney General since January 2001, concerning that section pertaining to the Attorney General's responsibility?**

- i. **If so, please supply a copy of any such statements or directives.**

ANSWER: The answer to this question involves sensitive classified information that pertains to ongoing intelligence activities. These activities have been fully briefed to the intelligence oversight committees.

90. **Have there been any legal opinions issued by members of the Executive Branch since January 2001 concerning that section pertaining to the Attorney General's responsibility?**

ANSWER: As noted above, the Justice Department has issued one publicly available opinion since January 2001 on Executive Order 12333, entitled *Authority of the Deputy Attorney General Under Executive Order 12333* (Nov. 5, 2001), available at <http://www.usdoj.gov/olc/25.htm>, which concerns the authority of the Deputy Attorney General to make certain decisions under Executive Order 12333. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most DOJ opinions constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

91. **Since January 2001, has the Attorney General approved any changes to existing procedures concerning US persons or information about them?**
- a. **If so, please supply a copy of any such changes and any supporting documentation regarding any procedures applicable to the NSA or to information originally obtained by the NSA.**
 - b. **Has the Attorney General approved any changes to existing procedures concerning US persons or information about them applicable to the Defense Department?**
 - c. **If so, please supply a copy of any such changes and supporting documentation concerning such changes.**

ANSWER: Executive Order 12333 calls for Attorney General approved procedures for the collection, retention, and dissemination of information concerning U.S. persons. The Secretary of Defense issued the current version of those procedures, which are applicable to all Department of Defense intelligence agencies, in December 1982. The Attorney General signed those procedures in October 1982. A classified annex to those procedures dealing specifically with signals intelligence was promulgated by the Deputy Secretary of Defense in April 1988 and approved by the Attorney General in May 1988. NSA has internal procedures that are derivative of those procedures that were last updated in 1993. The annex that specifically governs FISA procedures was modified, with Attorney General Reno's approval, in 1997.

92. **Have the Defense Department regulations concerning intelligence activities affecting US persons, Department of Defense Directive 5240.1, "Activities of DoD Intelligence Components that Affect U.S. Persons" (Apr. 25, 1988) or Directive 5240.1R been changed in any way since January 2001?**

i. **Please supply a copy of any such changes and any supporting documentation concerning any such changes.**

ANSWER: DoD Directives 5240.1 and 5240.1-R have not been changed since January 2001.

93. **Has United States Signals Intelligence Directive [USSID] 18, "Legal Compliance and Minimization Procedures," July 27, 1993, applicable to the NSA been changed since January 2001?**

a. **Please supply a copy of any such changes and any supporting documentation concerning such changes.**

ANSWER: USSID 18 has not been changed since January 2001.

94. **Please state when each document referred to above was first supplied to any Member or Committee of the Congress and as to each such document, which Members or Committees it was supplied to.**

ANSWER: NSA has briefed the Intelligence Committees in both Houses of Congress extensively on minimization procedures over the past several years. In addition, NSA answered questions from these committees about the rules for handling U.S. person information during recent briefings on the Terrorist Surveillance Program. NSA's records indicate that copies of DoD Regulation 5240.1-R, with its classified annex, and USSID 18 were provided to the Intelligence and Judiciary Committees of both Houses in January 2000. NSA records also indicate that NSA provided the Senate Intelligence Committee with USSID 18, DoD Regulation 5240.1-R, and its annex in July 2005. Six months later, NSA provided that Committee with DoD Regulation 5240.1-R and its classified annex. Finally, it is important to note that much of this material is freely available. USSID 18 (1993) has been made publicly available in redacted form (*available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm>). In addition, DoD Regulation 5240.1-R (1982) (but not its annex) has been declassified and made publicly available (*available at* <http://www.dtic.mil/whs/directives/corres/pdf2/p52401r.pdf>).

Follow up Questions from Senator Durbin

95. “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,” a Justice Department memo issued on January 19, 2006 (hereinafter “DOJ White Paper”), appears to conclude that the Foreign Intelligence Surveillance Act (“FISA”) would be unconstitutional if it conflicted with the President’s authorization of the NSA’s warrantless spying program. The DOJ White Paper says, “Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President’s most solemn constitutional obligation – to defend the United States against foreign attack.”

You also suggested several times during the hearing that FISA would be unconstitutional if it conflicted with the NSA program. For example, you told Senator Grassley, “My judgment is, while these are always very hard cases, and there is very little precedent in this matter, I believe that even under the third part [of Justice Jackson’s three-part test in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)], that the President does have the constitutional authority.”

- a. Do you believe FISA is unconstitutional to the extent it conflicts with the President’s authorization of the NSA program?
- b. Has any court ever held that FISA is unconstitutional?

ANSWER: As explained in the Justice Department’s paper of January 19, 2006, the Force Resolution fully authorizes the Terrorist Surveillance Program. Even if the Force Resolution or FISA were ambiguous about whether they allow the President to make tactical military decisions to authorize surveillance (and neither is ambiguous), any such ambiguity must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise. See Legal Authorities, *supra*, at 28-36.

Every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. See *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information; *accord, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be

required even in a foreign intelligence investigation). The Foreign Intelligence Surveillance Court of Review—the specialized court that Congress established to hear appeals from the Foreign Intelligence Surveillance Court—has recognized the potential tension between FISA and the President’s inherent constitutional power, including his authority as Commander in Chief. Reviewing this extensive precedent, that court recognized that “all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.” *In re Sealed Case*, 310 F.3d at 742. The court then added, “We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President’s constitutional power.*” *Id.* (emphasis added).

96. **The DOJ White Paper also says, “the source and scope of Congress’s power to restrict the President’s inherent authority to conduct foreign intelligence surveillance is unclear.” The Constitution provides that Congress has power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any other Department or Officer thereof.” Article I, Section 8, U.S. Constitution. The Constitution requires the President to “take care that the Laws be faithfully executed.” Article II, Section 3, U.S. Constitution.**

What is the basis for the conclusion that the source of Congress’s power to restrict the President’s inherent authority to conduct foreign intelligence surveillance is unclear?

ANSWER: The Necessary and Proper Clause is not a sufficient basis for asserting plenary congressional authority over foreign intelligence surveillance, particularly during wartime. The President’s role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. *See, e.g., The Federalist No. 64*, a 435 (John Jay) (Jacob E. Cooke ed. 1961) (“The [constitutional] convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.”). The Foreign Intelligence Surveillance Court of Review—which Congress created specifically to hear appeals from the Foreign Intelligence Surveillance Court—has noted that “all the . . . courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.” *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). Foreign intelligence surveillance during a time of congressionally authorized conflict undertaken to prevent further hostile attacks on the United States lies at the very core of the Commander in Chief power. As the Supreme Court has long noted, “the President alone” is “constitutionally invested with the entire charge of hostile operations.” *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874). There are

certainly limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution of the United States. The Foreign Intelligence Surveillance Court of Review, for example, stated that "We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power.*" *In re Sealed Case*, 310 F.3d at 742 (emphasis added). As Chief Justice Chase observed, Congress may not "*interfere[] with the command of forces and the conduct of campaigns.*" That power and duty belong to the President as commander-in-chief." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

97. **If a law was enacted to regulate or eliminate the NSA program, would it be unconstitutional because it conflicts with the President's authorization of the program?**

ANSWER: As explained in the Justice Department's paper of January 19, 2006, "whether Congress may interfere with the President's constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question." *Legal Authorities, supra*, at 29. Legislation that significantly interfered with or "eliminate[d]" the Terrorist Surveillance Program during the conflict would raise that difficult constitutional question. As indicated in the Department's January 19th paper, FISA would be unconstitutional as applied if construed to "purport to prohibit the President from undertaking actions necessary to fulfill his constitutional obligation to protection the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history." *Id.* at 35. We do not believe it is useful, however, to engage in speculation about the precise contours of Congress's and the President's authority in the abstract. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our government does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

98. **The Justice Department's position seems to be that the President's actions pursuant to his Commander-in-Chief power trump any law with which such actions conflict. "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," a memo issued by the Office of Legal Counsel on September 21, 2001, concludes that the War Powers Resolution and the Authorization to Use Military Force cannot "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make" (Emphasis added). This seems to suggest that the President has unlimited wartime powers.**

- a. **Can Congress place any limits on the President's exercise of his Commander-in-Chief power?**
- b. **For example, can the President, pursuant to his Commander-in-Chief power, authorize actions that would otherwise violate the War Crimes Act of 1996, 18 U.S.C. Sec. 2441, if he determines such actions are necessary to combat a terrorist threat?**

ANSWER: It is emphatically *not* the position of the Justice Department, as you say, that “the President’s actions pursuant to his Commander-in-Chief power trump any law with which such actions conflict.” The Office of Legal Counsel (“OLC”) memorandum you cite, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) (“*Military Operations*”), is not to the contrary. That memo solely concerns the President’s authority to initiate “military action in response to the terrorist attacks on the United States of September 11, 2001.” *Id.* at 1. OLC concluded that the President had constitutional authority to respond with military force to those attacks. As the memorandum noted, the Force Resolution enacted by Congress *itself* recognized that constitutional authority, stating that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”

In the context of the limited question whether the President has constitutional authority “to initiate military hostilities” absent prior congressional action, OLC explained that the President did have that authority. *Military Operations* at 13. Indeed, the existence of that authority had been confirmed by prior congressional enactments. Nevertheless, regarding this decision to initiate military action, the memorandum concluded that a statute could not prospectively limit the President’s discretion, including decisions about the existence of “terrorist threats, the amount of military force to be used in response, or the method, timing, or nature of the response.” *Military Operations* at 23.

Limited as the *Military Operations* memorandum was to the question of initiating military hostilities, it did not address other issues concerning the Commander in Chief power. We have not examined the interaction between the President’s constitutional Commander in Chief power and the War Crimes Act of 1996, and we need not do so, as the President has examined the obligations of the United States under the international conventions enumerated in 18 U.S.C. § 2441(c) and has required that his subordinates abide by those obligations. As noted above, we do not believe it would be productive to engage in speculation about the precise contours of Congress’s and the President’s respective authority in the abstract.

99. **In an interview on *CBS Evening News* on January 27, 2006, President Bush was asked, “Do you believe that there is anything that a President cannot do if he – if he considers it necessary in an emergency like this?” The President responded, “I don’t think a President could order torture. For example, I don’t think a President can order assassination of a leader**

of another country with which we're not at war. Yes, there are clear red lines."

- a. Is the President correct in stating that he does not have the authority to order torture?
- b. Is the President correct in stating that he does not have the authority to order the assassination of a leader of another country with which we're not at war?
- c. Please provide other examples of "clear red lines," i.e., actions that the President does not have the authority to take, even during wartime.
- d. Please provide examples of actions that would otherwise be illegal which the President can take during wartime pursuant to his Commander-in-Chief power.

ANSWER: The President has made clear on several occasions that the United States does not torture anyone, anywhere in the world. *See, e.g.,* Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."). Given this firm policy of the United States, the President would not order torture. Moreover, as the Justice Department has stated, "consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." *See Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, available at* http://www.usdoj.gov/olc/18usc23402340a2.htm#N_7_.

It is also the policy of the United States not to assassinate foreign leaders outside of an armed conflict. That policy is memorialized in Executive Order 12333. Because it would be imprudent and unproductive to speculate about the limits of *any* Branch's authority in the abstract, we will not do so here.

100. **Senator Graham asked you, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" You responded, "I am not prepared to say that, Senator."**

Please respond to Senator Graham's question.

ANSWER: The Attorney General *did* respond to that question during the hearing, noting that Congress and the President share authority to regulate the conduct of troops even during time of war. Certainly Congress has the authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. As the Attorney General made clear in the hearing, however, it is not prudent to comment on the constitutionality of legislation described only in abstract terms.

- 101. Senator Graham asked you, “Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane, and degrading treatment of a detainee intrudes on the inherent power of the President to conduct the war?” You responded, “Senator, I think – I don’t know whether or not we have done that specific analysis.”**
- a. Since September 11, 2001, has the Justice Department conducted an analysis to determine whether the cruel, inhumane, and degrading treatment of a detainee is legally prohibited? If so, what was the conclusion of this analysis?**
 - b. Since September 11, 2001, has the Justice Department conducted an analysis to determine whether a legal prohibition on cruel, inhumane, and degrading treatment of a detainee would intrude on the inherent power of the President to conduct the war? If so, what was the conclusion of this analysis?**

ANSWER: The Detainee Treatment Act of 2005 (“DTA”) provides that “no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” The statute defines “cruel, inhuman or degrading treatment” as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” The President signed legislation containing the DTA on December 31, 2005. On that day, the President reiterated the long-standing policy of the United States not to subject any person, whether in the U.S. or abroad, to cruel, inhuman, or degrading treatment, as defined in the DTA. *See* President’s Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html> (“Our policy has also been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute.”).

The President’s policy clearly prohibited such treatment, and that policy has now been codified by statute. The DTA unequivocally prohibits the “cruel, inhuman, or degrading treatment,” as defined by reference to the U.S. constitutional standards incorporated into the U.S. reservation to the Convention Against Torture, of any individual in the custody or under the physical control of the United States Government. The Administration is fully committed to the DTA, which represents an important statement about national consensus on this issue.

As we have stated previously, it is not appropriate to provide details about the confidential legal advice of the Executive Branch. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most DOJ opinions constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

102. **On February 2, 2006, a bipartisan group of legal scholars and former government officials sent a letter to Congressional leaders taking issue with the Justice Department's position. They conclude, "Every time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute."**

Do you agree?

ANSWER: There are exceptionally few such cases of which we are aware. Moreover, that statement fails to acknowledge the *numerous* cases in which the Supreme Court specifically has acknowledged the limitations on Congress's ability to regulate the President's conduct both of foreign affairs generally and military campaigns specifically. *See, e.g., Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that "the President alone" is "constitutionally invested with the entire charge of hostile operations"); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not "interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief"); *see also In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002) ("We take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, FISA could not encroach on the President's constitutional power."). Congress only rarely has attempted to legislate in areas involving the President's core Commander in Chief power, and there have thus been few conflicts. Finally, the quoted statement overlooks the fact that the courts have a very robust canon of construing statutes in these areas narrowly for the specific purpose of avoiding encroachment on executive power. *See, e.g., Jama v. ICE*, 543 U.S. 335, 348 (2005) (rejecting interpretation not clearly required by text of statute where adopting it "would run counter to our customary policy of deference to the President in matters of foreign affairs"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption that Congress does not legislate extraterritorially "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility"); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs") (collecting authorities); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*

325 (1994) (describing “[s]uper-strong rule against congressional interference with the President’s authority over foreign affairs and national security”).

- 103. The legal scholars and former government officials also conclude, “No precedent holds that the President, when acting as Commander-in-Chief, is free to disregard an Act of Congress, much less a *criminal statute* enacted by Congress that was designed specifically to restrain the President.”**

Do you agree?

ANSWER: That statement does not appropriately reflect limitations that the courts repeatedly have noted on Congress’s authority to legislate in the fields of military and foreign affairs. As explained above, the Supreme Court and the courts of appeals have acknowledged the limits on Congress’s ability to regulate the President’s conduct in these areas. *See, e.g., Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that “the President alone” is “constitutionally invested with the entire charge of hostile operations”); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not “interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief”); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (noting that the President “*makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it”).

The scope of Congress’s legislative authority is established by the Constitution and is not expanded simply because Congress has enacted “a criminal statute . . . that was designed specifically to restrain the President.” In that regard, it is particularly worth noting the words of the Foreign Intelligence Surveillance Court of Review, which Congress specifically created to hear appeals from the Foreign Intelligence Surveillance Court. It has concluded that “[w]e take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, *FISA could not encroach on the President’s constitutional power.*” *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) (emphasis added).

- 104. You have argued that the administration did not seek Congressional authorization for the NSA program because “the legislative process may have revealed, and hence compromised, the program.” In “Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information,” a memo issued on January 5, 2006 (hereinafter CRS NSA program memo), the non-partisan Congressional Research Service states, “No legal precedent appears to have been presented that would support the President’s authority to bypass the statutory route when legislation is required, based on an asserted need for**

secrecy.”

Can you cite any legal precedent for refusing to seek legislation because of the need for secrecy?

ANSWER: There was no attempt to “bypass the statutory route when legislation is required, based on an asserted need for secrecy.” As explained in great detail in the Department’s January 19, 2006 paper, the Force Resolution provides ample statutory authority for the President to conduct the Terrorist Surveillance Program. That statute confirmed and supplemented the President’s constitutional powers to authorize the Program. Members of Congress advised the Administration, however, that *more specific* legislation could not be enacted without likely compromising the Terrorist Surveillance Program by disclosing program details and operational limitations and capabilities to our enemies. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take.

105. In your written responses to Chairman Specter, you state, “the terrorist surveillance program is not a dragnet that sucks in all conversations and uses computer searches to pick out calls of interest.”

In “NSA Datamining is Legal, Necessary, Sec. Chertoff Says,” a *Roll Call* column published on January 19, 2006, Morton Kondracke quotes Department of Homeland Security Secretary Michael Chertoff describing the NSA’s activities. He suggests the NSA is “culling through literally thousands of phone numbers” and “trying to sift through an enormous amount of data very quickly”

- a. Are there other NSA programs or activities, aside from the so-called “terrorist surveillance program,” that cull through phone calls and/or e-mails of innocent Americans?**
- b. Since September 11, 2001, has the Justice Department issued any legal opinions regarding NSA surveillance activities other than the “terrorist surveillance program”? If so, please provide all such opinions.**
- c. Would it be legal for the NSA, or any other government agency, to cull through the phone calls and/or e-mails of innocent Americans in the United States where there are no reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization?**

ANSWER: As General Hayden has made clear, the Terrorist Surveillance Program is *not* a “data-mining” program. He stated that the Terrorist Surveillance Program is not a “drift net out there where we’re soaking up everyone’s communications”; rather, under the Terrorist Surveillance Program, NSA targets for interception “very specific [international] communications” for which, in NSA’s professional judgment, there are reasonable grounds to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated

terrorist group—people “who want to kill Americans.” See Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html. As the President has stated, “[w]e’re not mining or trolling through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda and their known affiliates.” The President also outlined four basic principles of the Government’s efforts to create an early warning system to protect America from another catastrophic terrorist attack: “First, our international activities strictly target al Qaeda and their known affiliates. Al Qaeda is our enemy, and we want to know their plans. Second, the government does not listen to domestic phone calls without court approval. Third, the intelligence activities I have authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. Fourth, the privacy of ordinary Americans is fiercely protected in all our activities.”

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. For similar reasons, we do not think it appropriate in these circumstances to discuss the potential legality of asserted surveillance techniques that are the subject of unconfirmed newspaper accounts. Similarly, if such opinions existed, it would not be appropriate to discuss or release any memoranda or opinions that would reflect the deliberative process. At the time they are issued, most DOJ legal opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of such opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Department and other executive agencies.

- 106. You have argued that the government’s internal process for preparing and authorizing a FISA application is too burdensome and slow to monitor suspected terrorists effectively. The CRS NSA program memo concluded:**

To the extent that a lack of speed and agility is a function of internal Department of Justice procedures and practices under FISA, it may be argued that the President and the Attorney General could review these procedures and practices in order to introduce more streamlined procedures to address such needs.”

Have you changed the Justice Department’s internal procedures to speed the process for preparing and authorizing a FISA application since September 11, 2001? If so, please describe these changes.

ANSWER: The Department of Justice did take steps after September 11, 2001, to attempt to streamline the process of preparing FISA applications. Since September 11, the Department continually has sought out and implemented ways further to improve and maximize the efficiency and effectiveness of the FISA process consistent with the requirements of the statute. For example, on April 16, 2004, the Attorney General issued a memorandum directing certain changes in the Department's FISA procedures that included detailing a number of Department attorneys to the Office of Intelligence and Policy Review (which, among other things, makes FISA applications) to augment the resources devoted to processing requests and creating a task force to address and resolve pending requests on a group of terrorism cases. OIPR itself reorganized in November 2004 into sections that reflect the current nature of its work and mirror to a significant degree the FBI's internal units that use FISA. OIPR also comprehensively applies sophisticated technology tools to support and manage its workload, including a Top Secret/codeword database unique to it that gives OIPR the ability to communicate with others throughout the Intelligence Community. New technology initiatives under development that are now being implemented will help further automate the process and enhance connectivity with the FBI. While FISA's operation can be—and has been—improved through such streamlining, the fact remains that traditional FISA procedures, however streamlined, do not allow for the speed and agility that are so critical in this context.

The FISA statute sets forth many requirements for applications made, and orders issued, under the Act. Each statutory requirement must be included in each application to ensure the application is approved. For example, the statute requires that each application contain a statement of facts supporting the application, a certification from a high-ranking official with national security responsibilities, and the signature of the Attorney General. Thus, it is not uncommon for FISA applications to be an inch thick. The Act also requires the FISA court to issue detailed orders when approving an application.

Even the emergency authorization provision in FISA, which allows 72 hours of surveillance before obtaining a court order, does not—as many believe—allow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General first must personally “determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists.” 50 U.S.C. § 1805(f). FISA requires the Attorney General to determine that this condition is satisfied *before* authorizing the surveillance to begin. Great care must be exercised in reviewing requests for emergency surveillance, because if the Attorney General authorizes emergency surveillance and the FISA court later declines to permit surveillance, the surveillance must cease after 72 hours from its initial authorization and there is a risk that the court would disclose the surveillance publicly. *See* 50 U.S.C. § 1806(j). To reduce those risks, the Attorney General follows a multilayered procedure before authorizing interception under the “emergency” exception to help to ensure that any eventual application will be acceptable to the Foreign Intelligence Surveillance Court. That process ordinarily entails review by

intelligence officers at the relevant agency, the agency's attorneys, and Department of Justice attorneys, each of whom must be satisfied that the standards have been met before the matter proceeds to the next group for review. Compared to that multilayered process, the Terrorist Surveillance Program affords a critical advantage in terms of speed and agility. Although the process has been streamlined, the fact remains that FISA does not permit even emergency surveillance to *begin* until the Attorney General has personally determined that all the requirements of FISA have been met, which places inherent limits on its suitability to serve as an early warning mechanism.

107.

- a. **Are there any rules governing what information may be used by the NSA to make a probable cause determination under the NSA program?**
- b. **For example, could the NSA rely on information obtained from torture to make a probable cause determination?**

ANSWER: As we have previously indicated, determinations about whether there is probable cause (*i.e.*, reasonable grounds) to believe that at least one party to an international communication is a member or agent of al Qaeda or an affiliated terrorist organization is based on the best available intelligence. It is not appropriate to discuss in this setting operational details about the Terrorist Surveillance Program; the members of SSCI and HPSCI have been briefed in detail about the operation of the program. As the President has repeatedly made clear, however, the United States does not engage in torture and does not condone or encourage any acts of torture by anyone under any circumstances.

Follow up Questions from Senator Leahy

- 108. Do other programs of warrantless electronic surveillance exist? Do other programs of warrantless physical searches or mail searches exist? Which agencies run these programs how long have they been in operation? What legal standards apply to these other programs?**

ANSWER: The Terrorist Surveillance Program does not involve physical searches or searches of mail. FISA's physical search subchapter contains a provision analogous to section 109, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"). Physical searches conducted for foreign intelligence purposes and searches of mail would present questions different from those discussed in the January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Those issues are not implicated here.

As the President has stated, "[w]e're not mining or trolling through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda and their known affiliates." The President also outlined four basic principles of the Government's efforts to create an early warning system to protect America from another catastrophic terrorist attack: "First, our international activities strictly target al Qaeda and their known affiliates. Al Qaeda is our enemy, and we want to know their plans. Second, the government does not listen to domestic phone calls without court approval. Third, the intelligence activities I have authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. Fourth, the privacy of ordinary Americans is fiercely protected in all our activities."

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. Our inability to respond in this setting should not be taken to suggest that such activities are occurring.

- 109. Also please clarify your clarification of the repeated assertion you made on February 6 that the Department of Justice had not done the legal analysis as to whether it could intercept purely domestic communications of persons associated with al Qaeda. Has the Department done such an analysis since September 11, 2001? If so, what did the Department conclude?**

ANSWER: As we noted at pages 4-5 of the Attorney General's February 28, 2006 letter, the Department's legal analysis has not been static over time. While, as we have noted, there is a long tradition of Presidents interpreting general force resolutions such as the Force Resolution to authorize the interception of *international* communications during armed conflicts, we are not aware of a similar tradition respecting *domestic* communications.

SUBMISSIONS FOR THE RECORD

PROXY

FEB. 6, 2006

HEARING
~~Executive Session~~ scheduled for FEB. 6, 2006

I authorize Senator SPECTER to cast my vote by proxy at said Executive Session, or at any continuation or rescheduling thereof, on any motion, procedural matter, items reflected on the written final agenda prepared for said session, including nominations, items which may be taken up by unanimous consent, and on any amendment pertaining to any of the above.

I authorize the above mentioned Senator to cast my vote(s) by proxy as he/she sees fit, unless advised by my staff to cast a specific vote pursuant to my instructions, or as I have indicated below.

MY CHIEF COUNSEL, AJIT PAI, ALSO IS AUTHORIZED TO RECOMMEND TO THE CHAIRMAN MY POSITION ON ANY PARTICULAR VOTE.

Sam Brownback

Signature

BY: AJIT PAI, CHIEF COUNSEL

~~TOP SECRET~~THE WHITE HOUSE
WASHINGTON

March 15, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN *P*

SUBJECT: Legislation on Electronic
Surveillance for Foreign
Intelligence Purposes

Attached is a memorandum (Tab II) to you from the Attorney General on the above subject. It deals with the three remaining issues which, along with my summary of pros and cons for each, are listed at Tab I.

In an effort to resolve these differences, Jack Marsh and I held a meeting on Friday, March 12 with Henry Kissinger, Don Rumsfeld, Ed Levi, Brent Scowcroft and George Bush. After a lengthy discussion, the others had a better understanding as to why Ed Levi, Jack Marsh and I favor the legislation as it is now drafted (which applies the warrants to foreign installations and diplomats and which reflects option #1 on the second issue and option #2 on the third issue). As a result, I detect no adamant opposition to the legislation as now drafted. Those who had previously questioned aspects of the proposed legislation declined to register any votes on the issues. Therefore, I recommend that you deal with the three issues on the Levi memorandum (Tab II) as follows:

1. By approving applications of warrants to foreign installations and diplomats (page at Tab II);
2. By approving option #1 (page 6 of Tab II); and
3. By approving option #2 (page 7 of Tab II).

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E.O. 12958 Sec. 3.3

M294-154, #61 NSC #4 5/15/98

By KAH/NARA, Date 7/22/98

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- 2 -

The main concern was whether this legislative initiative would succeed or whether, as some feared, the legislation which is actually passed would depart in objectionable ways from the present draft. On this point, the Attorney General feels confident that the matter can be effectively handled through a meeting by you with members of the Senate and House Judiciary Committees and the top leadership of the two Houses.

Already, the Attorney General has found the key members of the Senate Judiciary Committee receptive to the legislation as drafted, and he has had favorable preliminary reactions from Congressmen Rodino and Hutchinson of the House Judiciary Committee. Senators Eastland, McClellan, and Hruska recommended to the Attorney General that he make a special point of enlisting strong support from Senator Kennedy, who, in turn, has now indicated he wants to sponsor the bill in the Senate. Senator Kennedy will be joined in sponsoring the bill by other key members of the Senate Judiciary Committee, and no opposition from any member of the Committee is expected.

The Attorney General is strongly of the opinion that you should support the legislation as drafted, and if you should feel any hesitancy, he would like to discuss the matter with you personally before you make a final decision.

You had earlier indicated to the Congress that you intend to meet with key members to develop acceptable legislation on this subject. Therefore, as soon as you have indicated your decisions which are sought in the Attorney General's memo to you, we will make arrangements to schedule the contemplated meeting.

Attachments

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THE WHITE HOUSE
WASHINGTON

TALKING POINTS

MEETING: March 12, 1976, at 10:30 a.m. in
White House Situation Room

SUBJECT: Legislation on Electronic Surveillance
for Foreign Intelligence Purposes

1. Requirement of warrant for surveillance of.....
.....

(a) Pros:

- (i) Avoids likelihood that in absence of legislation, courts will eventually decide a warrant is required in such cases.
- (ii) Eliminates question of validity of evidence obtained
- (iii) Protects cooperating communications carriers and landlords and protects against charges of criminal trespasses when otherwise communications carriers can decline cooperation and render surveillance impossible. (One carrier has already declined such cooperation.)
- (iv) Avoids having legislation which is designed solely to permit
-when such activities are relatively a minor portion of the electronic surveillance program and key members of the Senate Judiciary Committee want the legislation to include.....surveillance.
- (v) The stated tests for obtaining a warrant are not of a kind which will materially inhibit surveillance of these kinds of targets.

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With PORTIONS EXEMPTED
E.O. 12958 Sec. 1.5 (A)

MR 94-152, # 62, NSC 64HA 9/8/98

By llr, NARA, Date 6/2000

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(b) Cons:

- (i) Unnecessarily requires resort to the judiciary for exercise of an inherent Executive power, especially in cases where only communications of are involved.
- (ii) Makes warrants mandatory even in the area of communications that are not of significant concern to the Congress, when warrants in cases might better be made optional in the discretion of the Executive.
- (iii) Could result in troublesome delays or even a denial of authority in particular cases.

2. Requirement for information sought to be that "which because of its importance is deemed essential to the security or national defense of the Nation or to the conduct of the foreign affairs of the United States."

(a) Pros:

- (i) Test is not materially inhibiting because meeting the test depends on the judgment of knowledgeable Executive officials and relates to their reasonable expectations of what information may result from the planned surveillance.
- (ii) Committee report will indicate that "importance" is the controlling word.
- (iii) Any lesser test will not be acceptable to members of Congress whose support is needed to obtain passage of the legislation; and it might result in a successful court challenge of the legislation

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(b) Cons:

- (i) "Essential" rather than "importance" appears to be the controlling word in the test, notwithstanding what the Committee report may say.
- (ii) While the legislation appears to contemplate no second-guessing by a Judge on whether the test has been met, it is still possible that a Judge on learning the identity of a particular target might question whether it could possibly have been met.

3. Failure to include

(a) Pros:

- (i) The included words
.....
.....
fit within the purposes of the legislation.
- (ii) Senate Judiciary Committee wants to avoid singling out for special mention

(b) Cons:

- (i) Without a straightforward reference an ambiguity exists that is better over-
come directly than by reliance on legislative history.

PROXY

02/06, 2006

Executive Session scheduled for 02/6, 2006

I authorize Senator Specter to cast my vote by proxy at said Executive Session, or at any continuation or rescheduling thereof, on any motion, procedural matter, items reflected on the written final agenda prepared for said session, including nominations, items which may be taken up by unanimous consent, and on any amendment pertaining to any of the above.

I authorize the above mentioned Senator to cast my vote(s) by proxy as he/she sees fit, unless advised by my staff to cast a specific vote pursuant to my instructions, or as I have indicated below.

Aye on the upholding of the chairman's
ruling.

Tom Coburn
Signature

Statement of Senator John Cornyn

The last time the Judiciary Committee gathered together we were considering the President's nomination of Judge Samuel Alito to the Supreme Court. Justice Alito has since taken his well-deserved seat on our nation's highest court. I thank the chairman for his efforts to conduct those confirmation hearings in a fair and dignified manner.

Justice Alito's nomination is now in the Senate's rear view mirror. But sadly, after listening to some of my colleagues' remarks, it is clear that we haven't left behind the divisive, partisan rhetoric that tainted the Alito hearings. The American people have voiced their disgust with this divisiveness and partisanship. They were repulsed by the unfair treatment of Judge Alito. This hearing presents an opportunity to rehabilitate the Senate's reputation—an opportunity to tone down the rhetoric and restore some civility.

Several members have asked why the President has been reluctant to make the Congress a full partner in waging the War on Terror. While I disagree with their premise, I submit that those who are unhappy with the President's cooperation need only look at the behavior exhibited during the Alito nomination hearings. If my colleagues sincerely want the President's cooperation, then they should be willing to meet him halfway—with sincerity, civility, and seriousness.

This hearing should be focused on complex legal issues. This is neither the time nor the place for partisan posturing and point-scoring. We are in the midst of a global war against an enemy who not only opposes our cherished freedoms, but opposes our very existence. That should be the starting point for our discussion of the legal authorities for the NSA's warrantless surveillance of al Qaeda.

On September 14, 2001, just three days after al Qaeda waged war in the American skies and on American soil, Congress passed a joint resolution authorizing the President to use all necessary force against the responsible terrorist organizations. The use of force resolution, styled as the Authorization for the Use of Military Force ("AUMF"), was signed by the President on September 18, 2001.

From a legal perspective, the AUMF is a key document bearing upon the President's authority to direct the NSA to conduct warrantless surveillance against al Qaeda. The AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001). History and current practice demonstrate that Congress fully empowers the President to conduct war within the terms of force authorizations like the AUMF. Through the AUMF, the political branches of our government provided clear indication that the conflict with those parties responsible for the 9/11 attacks—which we later concluded was al Qaeda—is a war demanding a full military response by the President, who is the Commander-in-Chief of our armed forces.

The Supreme Court recognized the importance of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the Court recognized that the AUMF authorized the President to take such actions against al Qaeda which are “fundamental incidents of waging war.” 542 U.S. at 519. Gathering critical battlefield intelligence against the enemy at which the AUMF is directed—namely, al Qaeda—is undoubtedly a fundamental incident of waging war. Signals intelligence, which today includes the NSA’s electronic surveillance activities, has been a critical part of military conflicts throughout our nation’s history. Some examples of wartime signals intelligence include the interception of British mail during the Revolutionary War, the wiretapping of telegraph communications during the Civil War, and the interception of Axis communications during World War II that helped the Allies destroy the German U-Boat fleet and win the Battle of Midway.

Ironically, some of the President’s critics contend that when Congress, through the AUMF, authorized the President to kill, capture, or confine al Qaeda, it somehow prevented him from intercepting al Qaeda phone calls or emails—whenever they contact someone inside the United States or contact someone from within this country. These critics contend that the President must strictly adhere to the procedural requirements of the Foreign Surveillance Intelligence Act of 1978 (“FISA”). FISA was designed to provide a way to gather foreign surveillance in a way that would allow the admittance of evidence in a criminal prosecution. One thing is certain: FISA may be adequate for law enforcement, but it is clearly not designed for battlefield surveillance.

Finally, it must be noted that the AUMF supplemented the President’s inherent authority to conduct warrantless surveillance for foreign intelligence purposes. Numerous presidents have utilized that inherent authority, which cannot be destroyed by statute. The FISA Court of Review, created by FISA in 1978 to oversee the FISA Court, made clear in its first appellate decision that the President has inherent authority to conduct warrantless surveillance outside of the confines of that statute. According to the FISA Court of Review, “all the other courts to decide the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority, and assuming that is so, FISA could not encroach on the President’s constitutional power.” In *re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). FISA could not possibly have imagined all of the technological advancements and potential scenarios that implicate warrantless surveillance for foreign intelligence purposes, and, indeed, it obviously did not. It is crucial that the President as Commander-in-Chief has inherent authority in this arena in order to act with speed and decisiveness when necessary.

In sum, I have taken a long and serious look at the legal authorities governing the NSA program that is the focus of this hearing. It is misleading to characterize the NSA program as some sort of broad-based ‘domestic’ spying on U.S. citizens. The NSA program is narrowly focused. It targets the international communications of al Qaeda in an effort to connect the dots and prevent another 9/11. Thus, the program is entirely consistent with the terms of the AUMF and the directive it gave the President to wage war against al Qaeda.

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February 3, 2006

The Hon. Arlen Specter
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

The Hon. Patrick Leahy
Ranking Minority Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

*Re: Additional Constitutional Authorities Relevant to NSA Electronic Surveillance
Activities of International Terrorist Communications*

Dear Chairman Specter and Senator Leahy:

I am a former career national security lawyer and Central Intelligence Agency officer, now in private practice, after serving more than six years in the CIA and Department of Justice under President Clinton and, from May 2002 – August 2004, as Deputy Legal Adviser to President George W. Bush's National Security Council ("NSC").¹ I write to provide additional perspective, and to identify several important constitutional principles not yet widely discussed in published legal analyses, with regard to the recently disclosed National Security Agency ("NSA") program to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations (the "NSA Program").² Because of the importance of these constitutional principles, I urge Congress to consider the analysis, and legal authorities identified, in the remainder of this letter as you debate this critical issue.

Executive Summary

Even assuming, though we do not yet know all the facts, that at least some aspects of the NSA Program were not consistent with the procedural strictures laid down by Congress in FISA, published legal analyses to date by the Commentators (as defined in endnote 8) are fatally flawed, as follows:

- Two centuries of Supreme Court and other legal precedent strongly suggests that the National Security Agency program to intercept international communications of foreign terrorists is consistent with the Constitution and, therefore, lawful;
- The Commentators generally argue that that the President is *completely foreclosed* from exercising the "core" of his "plenary" constitutional foreign affairs authority -- that is, the collection of foreign intelligence -- except when complying with each and every provision of FISA, even if, as applied to the narrow facts and circumstances of the NSA

Program, FISA itself violates the Constitution;

- The Commentators' arguments fail because they:
 - ignore completely two entire lines of well-established Supreme Court cases relating to: (a) the President's "core," "plenary" constitutional authority over foreign intelligence operations; and (b) the separation-of-powers doctrine; and
 - overly rely on – and misinterpret – a single case relating to primarily "domestic" actions by a President, in which foreign intelligence operations like those at issue here were not implicated.
- The Commentators' fundamental mistake is the assertion that, if the NSA Program falls into "Zone 3" (where the President's authority is at its "lowest ebb," *though not extinguished*) of Supreme Court Justice Jackson's famous 1952 analysis in *Youngstown Sheet & Tube*, the constitutional analysis ends there and the President is compelled to follow every dictate of FISA;
- Taken to its logical extreme, the Critics' position would fundamentally alter the system of separation of powers and checks and balances created by our Constitution, transforming our governmental system into one in which Congress alone reigns supreme in virtually all spheres of governmental action;
- The better constitutional analysis in areas of shared Executive and Congressional authority, and one more consistent with recent Supreme Court separation-of-powers opinions, and with *Youngstown* itself, balances the relative constitutional authorities of the President and Congress. Even where, in Justice Jackson's terminology, the President's authority is at its "lowest ebb," it obviously is not extinguished, as recognized by the very next words of Justice Jackson's opinion, conceding that the President still can rely "upon his own constitutional powers minus any constitutional powers of Congress;"
- Under this more appropriate analysis, the President's powers over the conduct of foreign intelligence operations appear significantly stronger than those of Congress, since Supreme Court decisions place control of foreign intelligence operations at the "core" of the President's "plenary" foreign affairs powers;
- The conduct of foreign intelligence operations, such as the NSA Program, is a "constitutional function" of the President, and within the President's "central prerogatives," which Congress may not constitutionally impair. Therefore, if FISA is interpreted to prohibit the NSA program, FISA itself violates our Constitution (as narrowly applied to the NSA program);

- The Commentators' assertion that the President, in authorizing the NSA Program, engaged in criminal behavior falls under the weight of legal advice, based on Supreme Court precedent, propounded by the Clinton Administration as well as other administrations of both political parties, that the President has the authority, if not the duty, to decline to follow portions of statutes reasonably believed to be unconstitutional and, further, that the President may do so without public announcement, except in the time, manner, and form he chooses; and
- Whether FISA is unconstitutional as applied to the NSA Program will turn on facts and circumstances we do not yet know. Assuming the facts as I have in this letter, however, the President could reasonably have concluded that FISA, as applied, would impermissibly impede his ability to carry out his constitutional responsibility to collect foreign intelligence and protect the Nation from attack and, therefore, the President was constitutionally entitled to decline to adhere to FISA's requirements in the narrow circumstances of the NSA Program. In so doing, the President would have, in every sense, acted lawfully and constitutionally.

Detailed discussion, and United States Supreme Court and other legal precedent, supporting the points made above, are contained in Sections II through V, below.

I. Introduction

This analysis sets forth certain Constitutional arguments supported by Supreme Court and other federal court precedent, historical practice, and my first-hand understanding of the interpretation of national security law over at least two administration, that of President Clinton and of President George W. Bush. In order to focus on these important constitutional issues, this letter does not address certain other arguments, including those based on the September 18, 2001 Authorization to Use Military Force ("AUMF"), or on Congress' intent in passing the Foreign Intelligence Surveillance Act of 1978 ("FISA").

Before proceeding, it must be acknowledged that, in the debate over the constitutional separation of powers between the Executive and Congress -- a debate that has raged from the founding of the Nation -- there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves" as Justice Jackson famously put it.³ Further, because the full details of the NSA Program are unknown -- and may never be known outside of classified hearings given the highly sensitive nature of the methods likely employed -- I make certain assumptions for purposes of this letter about the facts, based on publicly reported descriptions as of February 3, 2006, as set out below:

For purposes of this letter, then, I assume the following facts:

- Following the single deadliest attack against civilians on US soil by a foreign enemy (al Qaeda) in our history, facilitated, at least in part, by electronic communications between al Qaeda operatives physically located within the United States and those overseas, the

President authorized the NSA to intercept international communications of individuals where there is a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, without first obtaining an order under FISA;

- The NSA Program targets, for interception of content, communications in which at least one party to the communication is reasonably believed to be physically located overseas, but at least some of this activity falls within FISA's definition of "electronic surveillance;"⁴
- The President reasonably considered the NSA Program an important component of what he had determined, and announced – with Congressional support in the form of an authorizing resolution – to be a global military campaign against al Qaeda and related terrorist organizations; and
- The President, advised by appropriate intelligence and national security law experts, reasonably concluded that the communications targeted by the NSA Program could not be collected in a fashion sufficiently timely to carry out, under the bureaucratically demanding strictures of FISA, his constitutional responsibilities to collect foreign intelligence and protect the Nation from attack.

II. *The Critical Gap in Published Constitutional Analyses of the NSA Program*

Most of the published legal analyses to date examining the constitutionality of the President's authorization of the NSA Program begin and end roughly as follows:⁵

- Congress has certain enumerated constitutional authorities related to electronic surveillance within the United States, and it passed FISA pursuant to those authorities;
- FISA "comprehensively regulates" electronic surveillance for foreign intelligence purposes within the United States; Congress intended FISA to be the "exclusive means" for such electronic surveillance; and FISA criminalizes all other electronic surveillance (with the exception of Title III surveillance for criminal investigations);
- Whatever the President's inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes (which numerous federal court decisions have upheld, and even most of the Commentators concede, the President possessed prior to FISA), FISA was intended to fully cabin that authority;

Therefore (and here is where these analyses go fatally off course):

- The Commentators asserting the illegality of the NSA Program conclude that, where Congress has any constitutional role whatsoever in a particular area, and intends to make its mandated procedures "exclusive," the President is *completely foreclosed* from exercising the

“core”⁶ of his “plenary”⁷ constitutional foreign affairs authority -- that is, the collection of foreign intelligence -- except when complying with each and every provision of FISA.

- These Commentators appear to contend that this is so even if FISA, as applied to the narrow facts and circumstances of the NSA Program, is, itself, unconstitutional. That is, at least some of the Commentators seem to believe the President commits a crime by declining to execute a law that, itself, violates the United States Constitution.⁸

Such conclusions are unwarranted as a matter of law, unwise and unworkable as a matter of practice, and, most importantly, are themselves constitutionally suspect. Although, of course, “no one is above the law,” the United States Constitution is the highest law in our Nation, and statutes inconsistent with the Constitution cannot stand or be enforced by courts.⁹

As Walter Dellinger (today a signatory of the *Cole-Dellinger Letter*,¹⁰ which opines that the NSA Program is illegal), President Clinton’s then-Assistant Attorney General for the Office of Legal Counsel (OLC),¹¹ advised the Clinton Administration in 1994:

[W]here the President believes that an enactment unconstitutionally limits his powers, he has the authority to . . . *decline to abide by it*, unless he is convinced that the [Supreme] Court would disagree with his assessment.¹²

*A. The Commentators’ Misreading and Attempted Overextension of Youngstown*¹³

In the 1952 case of *Youngstown Sheet & Tube v. Sawyer*, Supreme Court Justice Robert Jackson’s concurring opinion famously articulated a three-part analysis for assessing the constitutionality of a President’s actions.¹⁴ In so-called “Zone 1,” where a President acts pursuant to authorization by Congress (express or implied), the President is in his most powerful constitutional position, because he exercises not only his own constitutional powers, but “all that Congress can delegate.”¹⁵ In “Zone 2,” where Congress has not spoken in a particular area, the President must rely upon his constitutional powers alone.¹⁶ In Zone 3, where Congress, by statute, has attempted to foreclose or regulate the President’s actions, his power is at its “lowest ebb,” because he can “rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁷

The Commentators assert that the NSA Program must fall into Zone 3, based on their reading of FISA’s exclusivity provision, and their rejection of the Administration’s argument that the AUMF is a statutory augmentation of the President’s own constitutional powers in the area of foreign intelligence electronic surveillance. The Administration argues that passage of the AUMF places the NSA Program into Justice Jackson’s Zone 1 which, if correct, would eliminate the need for the constitutional analysis put forward in this letter, for the NSA Program then would be clearly constitutional without needing to rely on the President’s inherent constitutional authority. For purposes of this letter, while acknowledging the legitimacy of the Administration’s position, I assume that the NSA Program falls into Justice Jackson’s Zone 3.

As noted above, the Commentators assert that, if the NSA Program falls into Zone 3, the constitutional analysis ends, and the President's authorization of the NSA Program must be illegal. Beyond one sentence in *Youngstown* itself, the Commentators cite virtually no judicial authority for this position, however, and my research has identified none.

To the contrary, the Commentators' position is undermined by:

1. Justice Jackson's *Youngstown* opinion itself;
2. The vast difference between the facts and circumstances at issue in *Youngstown*, and those in the current debate;
3. Supreme Court jurisprudence establishing the primary position of the President in foreign affairs and, particularly, in foreign intelligence operations, such as the NSA Program;
4. Decades of Supreme Court and other federal court decisions, as well as Executive Branch legal opinions under both political parties, concerning the constitutional separation of powers between Congress and the Executive; and
5. Longstanding legal precedent establishing a President's authority, if not duty, to decline to execute statutory provisions the President reasonably believes violate our Constitution.

1. *Misreading of Justice Jackson's Opinion*

Some of the Commentators' analysis simply end their analysis with a reference to the statement by Justice Jackson that the President's power is at its "lowest ebb" in Zone 3, moving on to assert the illegality of the NSA Program. Those that cite any legal authority for this position appear to rely solely on Justice Jackson's statement that "[c]ourts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."¹⁸

I have been unable to find a single Supreme Court case in the more than 50 years since *Youngstown* in which this principle asserted by the Commentators has been used to strike down any President's decision to decline to abide by a part of a statute the President believed violated our Constitution. Furthermore, a moment's reflection on this proposition demonstrates that it could not possibly have been intended to carry the decisional weight the Commentators place on it.

To cite just a few examples of actions that, if the Commentators' arguments were correct, may well have been lawful exercises of Congress' power,:

- Congress could, by virtue of its power to ratify treaties, control negotiations with foreign governments;¹⁹
- Congress could, by virtue of its authority to declare war, prevent a President from using military force to respond to an overseas attack on Americans, a power which Congress itself appears to have conceded it does not have;²⁰

- Congress could, by virtue of its authority to make rules for the Army and Navy, completely foreclose the President, as Commander in Chief, from holding courts martial for military personnel;²¹ or
- Congress could, by virtue of its power to make and support armies and make all laws necessary and proper to that end, prevent the President from placing U.S. troops under United Nations Command (viewed as an unconstitutional act by Congress, at least in the opinion of Clinton Administration Assistant Attorney General Dellinger).²²

In each of these cases, however, as demonstrated by the legal authorities cited in the endnotes, our Courts and/or Executive Branch legal opinions (under both political parties) have rejected such exercises of Congress' power as unconstitutional.

Put another way, the Commentators' position, taken to its logical extreme, would fundamentally alter the system of separation of powers and checks and balances created by our Constitution, transforming our governmental system into one in which Congress alone reigns supreme in virtually all spheres of governmental action. This is likely one reason why, as discussed in Section IV.B., OLC opinions under Presidents of both political parties, are fundamentally incompatible with the Commentators' reading of Justice Jackson's opinion.

Clearly, as the Commentators point out, Congress has multiple constitutionally enumerated powers directly related to the President's Commander-in-Chief power. If the single *Youngstown* sentence on which the Commentators rely were interpreted as the Commentators urge, Mr. Dellinger's advice, to President Clinton, *supra* note 22, as well as many other legal opinions provided to Presidents of both political parties, would be fatally flawed.

The better constitutional analysis in areas of shared Executive and Congressional authority is a more nuanced, balancing approach, taking into account the relative constitutional authorities of the President and Congress.²³ Even where, in Justice Jackson's terminology, the President's authority is at its "lowest ebb," it obviously is not *extinguished*, as recognized by the very next words of Justice Jackson's opinion, which concede that a President may still rely "upon his own constitutional powers minus any constitutional powers of Congress over the matter."²⁴ This statement would make no sense unless Justice Jackson contemplated circumstances in which powers at this "lowest ebb" still were enough to sustain a President's action (or, put conversely, invalidate Congress' action as unconstitutional).

2. *The Commentators Apply Justice Jackson's Concurrence Beyond Its Reach*²⁵

Courts and commentators have long recognized that separation-of-powers conflicts between Congress and the President, such as that underway today with regard to the NSA Program, must be analyzed quite differently in foreign affairs/national security cases than in cases involving principally domestic issues.²⁶ In primarily foreign affairs/national security cases, much greater

deference must be given to the President's authority, and expressions of Congressional will are treated as far less dispositive, than in primarily domestic cases.²⁷

Even a cursory analysis of *Youngstown* shows that, although the Executive/Congressional conflict at issue in that case unfolded against the backdrop of the Korean War, the issues at stake were far more "domestic" in nature than those involved in the NSA Program. *Youngstown* involved President Truman ordering the seizure and control by the U.S. Government of U.S. steel mills due to the failure of the steel industry and unions to reach a collective bargaining agreement.²⁸ In striking down President Truman's seizure by Executive Order, the majority in *Youngstown* recited the following powers of Congress:

It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy.²⁹

The *Youngstown* majority also relies more generally upon Congress' authority to "make all laws which shall be necessary and proper,"³⁰ but, tellingly, does *not* rely on Congress' enumerated powers to raise and support an Army or to provide and maintain a Navy. Although Justice Jackson's concurring opinion (one of five in the case) discusses these powers, he couples them with Congress' exclusive power over the "raising of revenues and their appropriation."³¹

Moreover, Justice Jackson himself, noting that Congress could directly "take over war supply," then asked the rhetorical question: "[I]f Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces can the Executive . . . seize the facility for operation upon Government-imposed terms?"³² Justice Jackson, then, saw the *Youngstown* steel seizure as an activity encompassing powers over our domestic economy and labor relations overwhelmingly vested by the Constitution and court decisions in the Congress, albeit with some limited authority in related areas committed to the President.

As discussed in detail in Section III, the *Youngstown* situation stands in stark contrast to the President's foreign intelligence/foreign affairs power at issue in the context of the NSA Program. The Commentators' failure to recognize this fundamental difference between *Youngstown* and the NSA Program weakens, to the point of collapse, the force of their constitutional analysis. Whatever the precise constitutional contours of Congressional and Executive power where regulation of our domestic economy intersects with the supply of our armed forces, even during active hostilities, the vastly greater constitutional power of the President in the field of foreign affairs, national security and, particularly, the conduct of foreign intelligence operations, as discussed below, is clear. Moreover, it is decisive, even assuming, *arguendo*, that the words of FISA place the President at the "lowest ebb" of those powers in this current separation-of-powers conflict with the Congress.

III. *The President's Plenary Foreign Affairs Power and Foreign Intelligence Operations*

A. *Primary Responsibility for Protecting National Security and Conducting Foreign Intelligence Operations Rests With the President Due, in Significant Measure, to His "Plenary" Foreign Affairs Authority*

Both the Administration and the Commentators discuss the President's authority to authorize the NSA Program principally in the context of the power committed to the President under Article II, Section 2, of the Constitution to be "the Commander in Chief of the Army and Navy of the United States." This focus is understandable, given the apparent recognition by both sides of the debate that the NSA Program is part of the ongoing global military campaign against terror announced by the President in response to al Qaeda's attacks on our homeland, and recognized by Congress in the AUMF. This focus is incomplete, however, because it fails to give due weight to a critical series of Supreme Court decisions and Executive Branch legal opinions analyzing the power to control foreign intelligence operations such as the NSA Program. This power falls principally under the President's constitutional *foreign affairs* authority.³³

The United States Constitution, in its text, places the duty on the President – and *only* the President – to "preserve, protect, and defend the Constitution."³⁴ At least since 1898, Supreme Court authority, and Executive Branch opinions under both political parties relying on such authority, has recognized that the President has the first, strongest, and most direct authority and responsibility for the protection of our national security, and that this authority and responsibility flows, at least in significant part, from the President's "plenary" authority over the conduct of our foreign affairs.³⁵

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the Commander in Chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.³⁶

Supreme Court decisions over many decades strongly support this view, including, importantly, a number of cases decided *after Youngstown*. For example, in *Department of the Navy v. Egan*, Justice Harry Blackmun, writing for the majority, reiterated that the "Court . . . has recognized 'the generally accepted view that foreign policy was the province and responsibility of the

Executive.”³⁷ The same Justice Robert Jackson who wrote the 1952 *Youngstown* concurrence in the primarily domestic context, several years earlier, in *Johnson v. Eisenrager*, wrote for the majority of the Supreme Court that the issues in that case involved “a challenge to [the] conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.”³⁸

Perhaps most famously, the Supreme Court forcefully affirmed, in its 1936 decision in *U.S. v. Curtiss-Wright Export*, the:

delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.³⁹

Not only has the Supreme Court never reversed its holding in *Curtiss-Wright*, but a Westlaw search indicates it has been cited well over 150 times, including, as indicated above and below, in numerous cases decided well *after Youngstown*. As noted in Section III.B., Justice O’Connor specifically relied on *Curtiss-Wright* in 1989 to support her view that the President’s foreign intelligence authority lies at the “core” of the “plenary” Presidential power over foreign affairs.

Moreover, the *Curtiss-Wright* line of precedent is consistent with a proper construction of Justice Jackson’s *Youngstown* concurrence outlined herein, i.e., one that recognizes, as argued herein, that being in Zone 3 does not eviscerate the constitutional authority of the President. Rather, the outcome then, depends, in significant part, upon the relative constitutional authorities of the President and Congress in a particular area.

B. Foreign Intelligence Operations Lie at the “Core” of the President’s Plenary Powers

Our courts, including the Supreme Court, have clearly and repeatedly linked the President’s inherent foreign affairs power and the power to protect national security to his authority over foreign intelligence collection operations, and, specifically, electronic surveillance for foreign intelligence purposes.

For example, as noted above, in reaffirming that the “authority to protect [classified] information falls on the President”, the Supreme Court in 1988 relied on its longstanding recognition of “the generally accepted view that foreign policy was the province and responsibility of the Executive.”⁴⁰ One particularly relevant federal appeals court decision is *United States v. Brown*, upholding the President’s inherent constitutional power to authorize warrantless wiretaps for foreign intelligence purposes. There, the Court of Appeals for the Fifth Circuit, held:

[B]ecause of the President’s constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm [that] the President may constitutionally authorize warrantless

wiretaps for the purpose of gathering foreign intelligence. *Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere.* Our holding . . . is buttressed by a thread which runs through the Federalist Papers: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations. See e.g., The Federalist No. 64, at 434-36 (Jay); The Federalist No. 70, at 471 (Hamilton); The Federalist No. 74 at 500 (Hamilton) (J. Cooke ed. 1961).⁴¹

In addition to Supreme Court and other federal court precedent, and Executive Branch legal opinions under administrations of both political parties, significant work by legal scholars, including the writings of a former Principal Deputy Solicitor General to President Clinton, also support this "Executive Primacy" view of the foreign affairs power.⁴²

As firmly established is the President's plenary constitutional position in foreign affairs generally, however, it is even stronger in the conduct of foreign intelligence operations.

In a 1988 decision upholding the authority of the President's senior intelligence official to terminate the authority of a CIA employee on sexual preference grounds, Justice O'Connor stated:

The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie *at the core of* "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."⁴³

Thus, even conceding, for the sake of argument, that the NSA Program falls within Justice Jackson's Zone 3, it is beyond serious contention, based on the cases cited herein, as well as numerous other federal court decisions, that the President's authority over foreign intelligence operations lies at or near the zenith of the President's constitutional powers.⁴⁴

IV. The Commentators Ignore Fundamental Principles of Constitutional Separation-of-Powers Analysis

A. *Separation of Powers as a Bedrock Constitutional Principle*⁴⁵

In concluding that the combination of a Congressional declaration of exclusivity and the existence of any Congressional power in an area ends the constitutional analysis, the Commentators completely ignore fundamental principles, reaffirmed by the Supreme Court well after *Youngstown*, for deciding the extent to which Congress can tie the President's hands in an area of his constitutional responsibility. A proper separation-of-powers analysis must be a critical component in determining whether the President's authorization of the NSA Program is constitutional and, therefore, lawful, notwithstanding FISA.

Despite the implication in the Commentators' writings to the contrary, not every statute passed by Congress can, merely by using words of "exclusivity," completely extinguish the constitutional prerogatives of another co-equal branch of our government. If Congress could do so, we would not need a judicial branch to decide constitutionality/separation-of-powers issues. Congress' word, whether constitutional or not, would simply be final in all cases.

As attractive as that may be to some, it simply is not the constitutional system our framers designed. Rather, although the Commentators' fail to discuss this central tenet of our constitutional system, the actions of all three branches of our government are limited by separation-of-powers principles that have structured our constitutional arrangement since the founding.⁴⁶

As the Supreme Court reminded us in 1996: "Even before the birth of this country, separation of powers was known to be a defense against tyranny . . . [and] it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. . . ."⁴⁷ Similarly, in *William Jefferson Clinton v. Paula Corbin Jones*, a seminal recent separation-of-powers case, the Supreme Court held:

The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government Thus, for example, the Congress may not exercise . . . the executive power to manage an airport.⁴⁸

In reaffirming this fundamental constitutional principle, and the "unique position in the constitutional scheme" occupied by the President, it is no accident that the Supreme Court -- some 45 years after *Youngstown* -- chose to use the President's foreign affairs authorities as an example of where separation-of-powers, in some cases, must trump authorities of another co-equal branch of government. The Court thus reminded us that the conduct of foreign affairs is "a realm in which the Court has recognized that [i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."⁴⁹ Interestingly, the original source of this 1997 Supreme Court statement was a previous Supreme Court case that made note of the President's core authority over foreign intelligence activities.⁵⁰

The Supreme Court has provided some guidance for the admittedly difficult task of determining whether particular attempts by one of our three co-equal branches of government to tie the hands of another branch are unconstitutional and, therefore, without legal effect. As recently as 1997, the Supreme Court reaffirmed that one branch of government may not, consistent with our Constitution, "impair another in the performance of its constitutional duties."⁵¹ In *Clinton v. Jones*, the Supreme Court unanimously rejected President Clinton's claim to temporary immunity from any civil legal proceedings against him, which claim was based in significant part on President Clinton's separation-of-powers assertion that his powers were "so vast and important" as to "place limits on the authority of the Federal Judiciary."⁵²

Although the Court rejected President Clinton's claim of immunity, it unanimously reaffirmed the important place of separation-of-powers analysis in our constitutional system of government. Relying on decades of its own precedent, the Supreme Court's separation-of-powers analysis appeared to turn on the "possibility that the [actions of one co-equal branch of government, in that case, the Federal Judiciary] will curtail the scope of the official powers of the Executive Branch."⁵³ Put another way, the Supreme Court's test for whether one branch of government has violated our constitutional principle of separation of powers and, therefore, acted unconstitutionally, is whether the action rises "to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."⁵⁴

As discussed in Section III.B, the conduct of foreign intelligence operations is a "constitutional function" of the President, and is within one of the President's "central prerogatives," which Congress may not constitutionally impair. Recognition of this may have led the Congress that passed FISA to state, even as it was passing the law, that:

The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance *does not foreclose a different decision by the Supreme Court*. The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the [*Youngstown*] case."⁵⁵

Surprisingly, the Commentators generally either ignore, or pay only brief lip service to, this extraordinary admission accompanying the original passage of FISA. This statement, by the Congress that passed FISA, is significant for several reasons. First, it acknowledges that Congress itself had some doubt about the constitutionality of FISA's attempt to completely control the President's authority to conduct electronic surveillance for foreign intelligence purposes. Second, it suggests that Congress understood that, even within Justice Jackson's Zone 3, there are limits to the degree to which Congress may constitutionally restrict the President in the area of foreign intelligence collection.

Finally, the statement by the Congress enacting FISA indicates that Congress specifically contemplated that the degree to which FISA might constitutionally tie the President's hands could one day reach the Supreme Court. This makes sense if, but only if, Congress contemplated that then-President Carter, or a future President, might be required to act outside the FISA statute, exercising the very inherent authority that Congress was attempting to limit.

As discussed above, then, the weight of Supreme Court authority, as well as more than 200 years of Executive practice, provide ample support for the view that, if construed to foreclose the type of NSA foreign intelligence collection assumed herein, FISA is unconstitutional as applied to the NSA Program to the extent it impermissibly impedes the President's ability to carry out his constitutional responsibilities to collect foreign intelligence and protect our Nation from attack.

Just as the *Youngstown* analysis does not end the inquiry, however, neither does a conclusion of unconstitutionality. The question then becomes, what is a President permitted or compelled to do once reasonably reaching such a conclusion?

B. *The President's Constitutional Authority to Decline to Follow Unconstitutional Statutes*

The Commentators charge that the President, in authorizing the NSA Program, acted illegally because, Congress having spoken definitively through FISA, the President had no lawful option except to follow the statute to the letter, even if FISA itself was in violation of our Constitution. This conclusion, while perhaps politically appealing in the short term, defies decades of Supreme Court and other legal precedent, as well as Executive Branch legal opinions by Administrations of both political parties, holding that Presidents have the constitutional prerogative – if not the constitutional duty – to decline to follow provisions of statutes they reasonably believe to be unconstitutional.

As noted above, one of the most thoughtful and persuasive enunciations of this conclusion was drafted, interestingly enough, by one of the signatories of the aforementioned Cole-Dellinger letter, sharply critical of the President's authorization of the NSA Program. Then-Assistant Attorney General Walter Dellinger advised President Clinton's counsel of the "general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."⁵⁶

Dellinger cited "significant judicial approval" of this proposition, including:

the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring); see also *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).⁵⁷

Dellinger further opined that:

consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. See, e.g., *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer).⁵⁸

After wisely cautioning that the President should decline to enforce a statute he or she considers unconstitutional only where he or she believes the Supreme Court would agree, and then only in rare cases, Dellinger advised President Clinton, through his counsel, as follows, at least

implicitly suggesting that the President has a constitutional duty to decline to execute unconstitutional statutory provisions:

The President has *enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency*. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. . . . If the President does not challenge such provisions (*i.e.*, by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.⁵⁹

Finally, consistent with the view of Presidential authority in foreign and military affairs discussed in prior sections of this letter, Dellinger advised that a President's responsibility to decline to execute unconstitutional statutory provisions is:

usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.⁶⁰

Moreover, contrary to the assertion by some that the President acted criminally by failing either to seek legislative relief from, or publicly declare his belief in, the unconstitutionality of, FISA, as applied, then-Assistant Attorney General Dellinger advised President Clinton, through his counsel, he not only could decline to enforce an unconstitutional provision without any public statement whatsoever, but he could even do so with regard to a statute he himself signed into law. Because this advice is so relevant to the charges now leveled against the President, I quote Mr. Dellinger's 1994 advice to President Clinton's counsel at some length:

The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. Moreover, every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions. . . . As we noted in our memorandum on Presidential signing statements, the President "may properly *announce* to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority." (*Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.*) Finally, the Supreme Court recognized this practice in *INS v. Chadha*, . . . [stating]: "*it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds*" and then

cited the example of President Franklin Roosevelt's memorandum to Attorney General Jackson, in which he indicated his intention not to implement an unconstitutional provision in a statute that he had just signed. . . . These sources suggest that the President's signing of a bill does not affect his authority to decline to enforce constitutionally objectionable provisions thereof.⁶¹

Though the title of this opinion diplomatically describes the President's constitutional authority as one to "decline to execute" unconstitutional statutes, it is clear, from this and other OLC opinions, that the intent was to confirm the President's authority, in rare cases, to act in contravention of provisions reasonably believed unconstitutionally to intrude on the President's constitutional responsibilities and authorities.

To cite one particularly pertinent example that this constitutional authority empowers the President not only to refuse to execute a statute requiring some affirmative act on the President's part, but also to act inconsistently with a statutory requirement or prohibition, is a 2000 OLC opinion for the Clinton Administration, ironically concerning electronic surveillance exclusively regulated by Congress. That opinion advised that "extraordinary circumstances" could arise in which "the President's constitutional powers permit disclosure of [criminal wiretap] . . . information to the intelligence community *notwithstanding the restrictions of Title III*."⁶² In other words, President Clinton's Administration was advised, correctly in my view, that the President could act *in direct contravention of a criminal statute*, because limiting "the access of the President and his aides to information critical to national security or foreign relations . . . would be unconstitutional as applied in those circumstances."⁶³

This OLC Opinion, prepared for President Clinton's Office of Intelligence Policy and Review by then-Assistant Attorney General Randolph D. Moss, advised that the President could disregard statutory restrictions on sharing criminal wiretap information with intelligence officers, notwithstanding that the statute at issue carried criminal penalties. OLC advised that:

[I]n extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. . . . [T]he Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including, where necessary, *the collection and dissemination of national security information*. Because "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," *Haig [v. Agee]*, 453 U.S. at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)), the President has a powerful claim, under the Constitution, to receive information critical to the national security or foreign relations and to authorize its disclosure to the intelligence community. Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "*subject to an implied exception* in deference to such Presidential

powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). *We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.*⁶⁴

Of course, even if FISA, as applied, is unconstitutional and, therefore, the President has full constitutional authority to decline to execute FISA as such, the NSA Program still must comport with the reasonableness requirements of the Fourth Amendment. Whether it does will depend completely on the precise facts and circumstances of how the program actually is being executed, and we simply do not know enough yet (and the public may never know enough) about the program to reach a definitive judgment on that question. Based on what has been said publicly, however, it appears likely that the Supreme Court would find the NSA Program "reasonable," in light of: (a) the magnitude of the threat to our Nation, and the nature of the targets of the NSA Program; (b) the use of "minimization" procedures; and (c) initial internal review by multiple legal officials, along with regular legal – and, apparently, Presidential – review of the program.

V. *Application of These Principles to the Assumed Facts of NSA Program*

I do not assert in this letter that FISA is unconstitutional in all, or even most, respects. Whether or not it is unconstitutional *as applied* to the NSA Program also will turn on facts and circumstances we do not yet know. Assuming the facts as I have in this letter, however, the President could have reasonably concluded that FISA, as applied, would impermissibly impede his ability to carry out his constitutional responsibility to collect foreign intelligence and protect the Nation from attack.

It is difficult to predict accurately what the Supreme Court would do, particularly without knowing the facts of a particular case, or whether the Court would decline to intervene at all in what it might judge to be a separation-of-powers dispute over the NSA Program best left to the two "political" branches of government. That said, based on previous separation-of-powers decisions and Fourth Amendment decisions concerning "reasonability," I would expect the key factors to be:

- Whether the President, advised by intelligence professionals, reasonably concluded that the information collected by the NSA Program was important to identifying, and preventing, terrorist activities directed against the United States, here or abroad;
- If so, whether abiding by all provisions of FISA would negate or significantly impede the President's ability to gather such information in a sufficiently timely way to thwart such activities; and
- Whether the President reasonably concluded there was no reasonable alternative to the NSA Program, consistent with FISA's requirements, available to the Executive Branch.

If the President could reasonably answer all three of these questions in the affirmative, I believe the President would have been justified in anticipating that the Supreme Court would find the NSA Program constitutional or, put conversely, an interpretation of FISA foreclosing the NSA Program unconstitutional. Armed with that reasonable anticipation of the Supreme Court's ultimate decision, the President would have been constitutionally empowered, if not obligated, to decline to carry out FISA's requirements. As legal advice given to President Clinton indicates, the President was not required to make any announcement of his decision, except in the time, manner, and form of his choosing. In declining to carry out FISA's requirements under these circumstances, far from acting criminally, the President would have, in every sense, acted lawfully and constitutionally.⁶⁵

It is my hope that the perspectives raised, and authorities cited, in this letter will assist the Congress in the separation-of-powers debate already underway.⁶⁶

Sincerely,



H. Bryan Cunningham

¹ See *curriculum vitae*, attached hereto. I currently practice information and homeland security law in Denver, Colorado. www.morgancunningham.net.

² I note that I had no knowledge of the NSA program while in government, and have received no classified information about it.

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952). Today, there is a good deal more Supreme Court law, and Executive Branch interpretation of it, than was available to Justice Jackson in 1952, the vast majority of it supportive of the views articulated in this letter.

⁴ Although at least one press report has suggested that some small percentage of the electronic surveillance under the NSA Program may have involved communications where both parties were physically located in the United States, to my knowledge, there has been no allegation that any such interceptions were deliberate, but only that they were done, if at all, mistakenly.

⁵ I take no position in this letter on the following issues widely discussed to date: (a) the degree to which FISA foreclosed reliance on statutes other than FISA and Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("Title III") to conduct the NSA Program; (b) whether the AUMF in any way augmented to conduct the NSA Program or otherwise altered, FISA; (c) the general scope of the constitutional powers and responsibilities of the President as Commander-in-Chief versus Congress under its enumerated authorities; or (d) the reasonableness of the NSA Program under the Fourth Amendment. While I have views on each of these issues, I believe that they have been sufficiently discussed, on both sides of each issue and that, in contrast to the issues discussed in this letter, I have little to add to the debate.

⁶ See *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J. concurring).

⁷ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

⁸ See, e.g., January 9, 2006 *Letter to Members of Congress*, from 14 law professors and others currently in private sector, including Curtis A. Bradley, David Cole, and Walter Dellinger, former Assistant Attorney General, Office of Legal Counsel to President Clinton ("the Cole-Dellinger Letter"), ("Where Congress has . . . [regulated electronic surveillance] the President can act in contravention of statute only if his authority is *exclusive*, and not subject to the check of statutory regulation." at 2); January 5, 2006 Congressional Research Service Memorandum entitled "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information ("CRS Surveillance Memo"); January 3, 2006 Letter from Jeffrey H. Smith to Members of the House Permanent Select Committee on Intelligence ("Smith Letter") ("[Because] Congress has the authority to 'make rules for the Government and regulation of the land and naval forces,' [and other enumerated constitutional powers], [and because] Congress intended FISA to be the exclusive means by which electronic surveillance of U.S. persons within the United States may be conducted, . . . the President lacks the residual constitutional authority to conduct [it].") at 10 (emphasis added)) available at <http://www.rawstory.com/exclusives/nsaspymemo.pdf>; January 26, 2006 Internet posting by Peter P. Swire, entitled "Legal FAQs on NSA Wiretaps" ("Swire Memorandum") ("In short, it is a crime to conduct wiretaps in the United States, of U.S. citizens, unless there is a statutory basis for doing so. There was no statutory basis [for the NSA Program].") at 2) available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=1389573>; and "A Legal Analysis of the NSA Warrantless Surveillance Program," Morton H. Halperin, January 5, 2006 ("Halperin Letter") ("[T]he Administration's] claim of inherent authority might have some plausibility had Congress not acted so decisively to prohibit warrantless surveillance of US persons in the United States when it enacted FISA." at 5), available at www.soros.org. I refer to these published legal analyses collectively as "the Commentators". There is, of course, some variation between the articulation of these fundamental points between and among the Commentators quoted here, as well as in the degree of certainty and stridency (i.e., accusing the President of deliberate criminal behavior) expressed in each of the individual sources cited. Except as directly quoted, I do not mean to ascribe my specific formulation to any particular source cited. However, I believe the immediately preceding summary to be a fair representation of the general thrust of the Commentators' argument.

⁹ Not all who have previously published legal analyses believe the President's actions violated the Constitution or were illegal, and the critiques do not break down easily along partisan lines. See, e.g., December 21, 2005 editorial by former Associate Attorney General to President Clinton John Schmidt asserting the legality, and consistency with

past practice in other Administrations, of the NSA Program. Available at http://www.weeklystandard.com/weblogs/TWSFP/2005/12/clinton_associate_attorney_gen.html.

¹⁰ *supra* note 8.

¹¹ Opinions of the DOJ Office of Legal Counsel are widely recognized as legally binding across the Executive Branch. See, e.g., Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318 (Fall 2000) (“In the overwhelming majority of cases, when the views of the Attorney General or the Office of Legal Counsel are sought, all understand that those views will conclusively resolve the legal question presented, short of subsequent judicial review”).

¹² Reaffirming this constitutional authority apparently was sufficiently important to President Clinton’s Administration that Assistant Attorney General Dellinger wrote an entire opinion about it, even though the opinion does not identify any particular statute at issue at the time. *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 4A U.S. Op. OLC 55, November 2, 1994. The cited quote is from page 2 of that opinion (emphasis added).

¹³ I personally have worked with or for a number of the lawyers I describe in note 8 as “the Commentators.” Those whom I know are honorable individuals, and talented and experienced lawyers, and, no doubt, are articulating the law as they honestly believe it to be. I take no issue with any of them personally. I simply believe that, in the case of the NSA Program, their constitutional analysis is incomplete and flawed, and I feel it important to make Congress aware of additional, relevant, constitutional and legal authority.

¹⁴ *Supra* note 3, at 635-38.

¹⁵ *Id.* at 635.

¹⁶ *Id.* at 637.

¹⁷ *Id.*

¹⁸ *Id.* at 637-38.

¹⁹ Such a result has been flatly rejected by a number of federal court decisions, e.g., *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (citing *Curtiss-Wright* and holding: “The district court correctly ruled that the section 609(a) claims relate to ‘the foreign affairs function, which rests within the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution.’ The statute’s requirement that the Executive initiate discussions with foreign nations violates the separation of powers, and this court cannot enforce it”).

²⁰ 50 U.S.C. § 1541(c) (recognizing, in the War Powers Act, the President’s constitutional authority to respond militarily, without statutory authorization, to a “national emergency created by attack upon the United States, its territories or possessions, or its armed forces”); In any event, “[t]he Executive Branch has traditionally taken the position that the President’s power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the [War Powers] Resolution. *Proposed Deployment of United States Armed Forces Into Bosnia*, 19 U.S. Op. OLC 327 (1995), at 7 (citing *Overview of the War Powers Resolution*, 8 Op. OLC 271, 274-75 (1984); *War Powers: A Test of Compliance: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. 90 (1975) (statement of Monroe Leigh, Legal Adviser, Department of State)).

²¹ “The power of the executive to establish rules and regulations for the government of the army, is undoubted.” *United States v. Eliason*, 41 U.S. 291, 301 (1842) (cited with approval in *Loving v. United States*, *infra* note 47 at 767 (“Congress . . . exercises a power of precedence over, not exclusion of, Executive authority”).

²² *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 U.S. Op. OLC 182, *2 (1996), 1996 WL 942457.

²³ This type of more nuanced, balancing approach was explicitly endorsed, as a description of Supreme Court separation-of-powers analysis, by Justice Kennedy’s concurring opinion in a 1989 separation-of-powers case. In *Public Citizen v. Department of Justice*, Justice Kennedy, citing a number of Supreme Court cases decided well after *Youngstown*, opined: “In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President ‘from accomplishing [his] constitutionally assigned functions’ . . . and whether the extent of the intrusion on the President’s powers ‘is justified by an overriding need to promote objectives within the constitutional authority of Congress.’” 491 U.S. 440, 484 (1989) (citations omitted).

²⁴ *Youngstown*, *supra* note 3, at 637.

²⁵ Influential as Justice Jackson's opinion has been in helping judges make sense out of complex constitutional questions, it was not the majority opinion in *Youngstown* and, as such, its effect as binding precedent is not as great as it might be. The Supreme Court, in 1981, did cite *Youngstown* approvingly in a majority opinion, enhancing its status. The Court there, however, in *Dames & Moore v. Regan*, only quoted the part of Justice Jackson's analysis discussing Zone 1. It is unclear, therefore, how much of the analysis is binding. 453 U.S. 654, 678 (1981).

²⁶ See, e.g., *United States v. Brown*, in which the Court of Appeals for the Fifth Circuit, in upholding the President's inherent constitutional authority to order warrantless foreign intelligence wiretaps, articulated the longstanding constitutional principle that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere." 484 F.2d 418, 426 (5th Cir. 1973).

²⁷ See, e.g., *infra* note 42, at 540-41 ("[t]he great bulk of the substantive powers wielded by the executive branch in the domestic arena stems from acts of Congress, and as long as Congress refrains from interfering with the President's constitutional duties of appointment and supervision it has substantial freedom to grant, withhold, and condition domestic authority to the executive. Other than issuing pardons and making state of the union addresses, the President can do very little domestically without congressional authorization. In the areas of foreign affairs and national security, by contrast, constitutional text and structure vest the President with substantive constitutional authority not dependent on congressional enactments, while Congress itself, of course, possesses a variety of relevant powers. When separation of powers questions arise in these areas, therefore, their resolution requires the interpreter to give due weight and proper respect to executive and legislative powers of equal constitutional dignity").

²⁸ *Youngstown*, *supra* note 3, at 582-84.

²⁹ *Id.* at 588.

³⁰ *Id.*

³¹ *Id.* at 643 (though Justice Jackson notes also Congress' power to raise and support armies and establish and maintain a Navy, his is not the majority opinion in the case and, thus, not controlling on this point).

³² *Id.*

³³ Admittedly, treating the Commander in Chief and foreign affairs powers as completely separate authorities would be inaccurate and artificial. Any serious assessment of the President's constitutional authority to authorize the NSA Program, however, must include an understanding of the foreign affairs power, and how the Supreme Court and Administrations of both political parties, over decades, have viewed that power, and Congressional attempts to regulate its use.

³⁴ *U.S. Constitution*, art. II, section 1, clause 8.

³⁵ Indeed, the founders of our republic specifically recognized the primary position of the President in the field of foreign affairs. For an excellent discussion of this history, see Powell, H. Jefferson, *The Founders and the President's Authority over Foreign Affairs*. William & Mary Law Review, Vol. 40, pp. 1471-1537 (May 1999).

³⁶ 22 U.S. Op. Atty. Gen. 13, 25-26, *Foreign Cables*, (1898) (citing, *inter alia*, *Cunningham v. Neagle*, 135 U.S. 1 (1890)) (emphasis added).

³⁷ 484 U.S. 518, 527, 530 (1988).

³⁸ 339 U.S. 763, 789 (1950) (emphasis added).

³⁹ 299 U.S. 304, 320 (1936) (emphasis added)

⁴⁰ *Egan*, *supra* note 37 at 527, 530.

⁴¹ *Supra* note 26 (emphasis added) (citations omitted). The Commentators argue that the numerous federal appeals court decisions prior to the passage of FISA reiterating the President's inherent constitutional authority to authorize warrantless electronic surveillance for foreign intelligence/national security purposes are not dispositive today because of the intervening passage of FISA. As conceded by the Congressional Research Service in its memorandum expressing doubt about the legality of the NSA Program, however, because "the [Foreign Intelligence Surveillance] Court of Review is a court of appeals and is the highest court with express authority over FISA to address the issue, its reference to inherent constitutional authority for the President to conduct warrantless foreign intelligence surveillance might be interpreted to carry great weight." *CRS Surveillance Memo*, *supra* note 8, at 30. The FISA Court of Review decision was issued in 2002, more than 20 years after the passage of FISA and is, of itself, strongly supportive of the constitutionality (and, therefore, legality) of the NSA Program. Whatever the merit of the Commentators' position on the relevance of pre-FISA court of appeals decisions regarding the issue of the

legality of warrantless electronic surveillance for foreign intelligence purposes, however, neither the passage of FISA, nor any other intervening event, undermines the authority of pre-FISA court of appeals decisions on the Presidents foreign affairs and foreign intelligence authorities generally.

⁴² Particularly notable in this area is the body of work of Professor H. Jefferson Powell of Duke University Law School. While I do not claim to know whether Professor Powell would agree with any views expressed in this letter, I am indebted, for much of the legal analysis presented herein, to Professor Powell's exhaustive 1999 article *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527. In addition to the exhaustive research that underlies it, Professor Powell's article is additionally interesting due to his previous government service. Professor Powell served in senior legal positions under President Clinton, as Principal Deputy Solicitor General from July 1996 through September 1996, and as Deputy Assistant Attorney General in the Office of Legal Counsel from June 1993 through June 1994, and January 1996 through September 1996.

⁴³ *Webster v. Doe*, *supra* note 6, 605-06 (emphasis added) (citing prior Supreme Court decisions in *United States v. Curtiss-Wright Export Corp.*; *Department of Navy v. Egan*; and *Totten v. United States*, 92 U.S. 105 (1876)).

⁴⁴ To be sure, what Professor Powell has called the "Executive Branch Perspective" concerning the President's constitutional foreign affairs authority is not universally shared. According to Professor Powell, as of 1999, "the conventional wisdom in recent scholarship" rejected "any interpretation of the Constitution that accords the President primary constitutional responsibility for the formulation of United States foreign policy. Powell, *supra* note 35 at 1 (Professor Powell cites several examples of what he calls the "congressional primacy" view in his William and Mary Law Review article, *supra* note 35). The problem, as Professor Powell notes, for those espousing this "congressional-primacy" view of constitutional foreign affairs authority, is that, to do so requires one to "repudiate or distinguish away most of what the Supreme Court appears to have said on the subject. *Id.*

⁴⁵ For important elements of the separation-of-powers analysis in this letter, I am indebted to the excellent work of David S. Kris, a former senior Department of Justice attorney in the Administrations of Presidents Clinton and George W. Bush, though I do not know whether he would agree with any of the views expressed herein.

⁴⁶ *Clinton v. Jones*, 520 U.S. 681, 697 (1997).

⁴⁷ *Loving v. United States*, 517 U.S. 748, 757 (1996).

⁴⁸ *Supra* note 46, at 699-700.

⁴⁹ *Id.* at 699.

⁵⁰ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1947) The Supreme Court, in *Clinton v. Jones*, directly cited *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). Decades after *Youngstown*, this same Supreme Court decision – *Chicago & Southern Air Lines* – was cited by one of the several federal courts of appeals to uphold the President's inherent constitutional authority to order warrantless electronic surveillance for foreign intelligence purposes. *United States v. Brown*, *supra* note 26, at 426 (relying in part on *Chicago & Southern Airlines*, the court held that "because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm . . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence").

⁵¹ *Clinton v. Jones*, *supra* note 46, at 701.

⁵² *Id.* at 697-98 (I do not by any means suggest here, as President Clinton's counsel seemed to in *Clinton v. Jones*, that any President is temporarily "immune" from the actions of a co-equal branch of government. Rather, as discussed below, I believe our Constitution requires that, when one branch of government unconstitutionally encroaches on another, the other branch is constitutionally empowered to resist such encroachment).

⁵³ *Id.* at 701.

⁵⁴ *Id.* at 702.

⁵⁵ *H.R. Conf. Rep. No. 95-1720*, at 35, reprinted in *U.S.C.C.A.N.*, 4048, 4064.

⁵⁶ *Supra* note 12.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.* at 2 (emphasis added) (the opinion went on to say that “[s]ome legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency”).

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 3-4 (emphasis added) (citations omitted). To conclude that a President is constitutionally permitted not to seek court approval for an activity where Congress has directed that he do so, or to not discuss publicly a decision to decline to execute an unconstitutional statute does not, of course, suggest that these are the best course of action in any particular case. Generally speaking, I believe that the greater the involvement of all three co-equal branches of government, and awareness by the public, of significant national security decisions, the better. Without knowing all the operational and security considerations involved with the NSA Program, it is impossible to say what the best course of action would have been in this case. In any event, the purpose of this letter is neither to condemn or endorse how the NSA Program has been handled, but only to bring to the debate additional constitutional and legal perspective.

⁶² *Infra*, note 64.

⁶³ *Id.* Much has been made in public discussions about the NSA Program about the criminal penalties for violations of FISA, with some even suggesting current government officials have committed criminal acts. In that context, it is worth noting that Title III, which President Clinton was advised he could disregard as unconstitutional if applied in a particular way, carries precisely the same criminal penalty – five years’ imprisonment – as FISA. *Compare* 18 U.S.C. § 2511 with 50 U.S.C. § 1809.

⁶⁴ *Sharing Title III Electronic Surveillance Material With the Intelligence Community*, 2000 WL 33716983 (OLC), October 17, 2000, at 9 (emphasis added) (citing *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986)).

⁶⁵ The bipartisan leadership of both houses of Congress, as well as the bipartisan leadership of both Congressional intelligence oversight committees, agree that they were briefed repeatedly by the Administration on the NSA Program, though there is, based on media reports, some disagreement about the scope and effect of those briefings. Based on media reports, succeeding Chief Judges of the Foreign Intelligence Surveillance Court also were briefed about the NSA Program.

⁶⁶ I am indebted to three exceptional lawyers, Diane Lewis Waters, Esq., Amanda M. Hubbard, Esq., Fulbright Scholar, Norwegian Research Center for Computers and Law,; and Andrew C. McCarthy, Senior Fellow, Foundation for the Defense of Democracies for their insight and long hours of review and editing assistance. The views expressed herein, as well as any errors, are mine alone.

cc: The Hon. Bill Frist
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Washington, D.C. 20510

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Speaker
U.S. House of Representatives
Washington, DC 20515

 The Hon. F. James Sensenbrenner, Jr.
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February 6, 2006

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The Honorable Patrick J. Leahy
Ranking Minority Member
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Dear Mr. Chairman and Mr. Ranking Member:

I am writing to respond to the February 3, 2006 letter submitted by the Honorable Pat Roberts, Chairman, Senate Select Committee on Intelligence, defending the legality of warrantless electronic surveillance by the National Security Agency that targets United States citizens on American soil. I wish to amplify reasons that would suggest the Chairman's defense is unconvincing.

The law has never required the Executive Branch to obtain a warrant to conduct electronic surveillance against Al Qaeda or other terrorist operatives or sympathizers abroad. The United States Supreme Court in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) held that the Fourth Amendment has no application to searches and seizures targeting aliens outside the United States. Accordingly, President Bush has always enjoyed unconstrained authority to search the homes or offices of suspected terrorists in foreign countries or to monitor their communications via interceptions effectuated outside the United States. Even if an American in the United States is at the other end of the conversation, the NSA is not required to stop listening.

The Foreign Intelligence Surveillance Act does not disturb that conclusion. Under 50 U.S.C. 1801(f)(2), the NSA is unrestricted in intercepting international wire communications to or from a person in the United States who is not the surveillance target if the acquisition occurs outside the United States. On the other hand, FISA does

apply when the electronic surveillance targets a United States citizen or permanent resident alien in the country in circumstances in which they enjoy a reasonable expectation of privacy. President Bush's concession that the NSA's eavesdropping falls within FISA crystallizes the legal question addressed by Chairman Roberts: whether the President is crowned with inherent constitutional power to disregard FISA's wartime regulation of domestic spying that targets citizens in the United States (or any other legal restraint he finds irksome) in combating international terrorism, i.e., whether FISA is unconstitutional.

No court has ever held that FISA subverts the President's wartime prerogatives. The statute fits comfortably within congressional power to enact laws "necessary and proper" to the execution of any power entrusted to the United States or any department or agency thereof. Article I, section 8, clause 18.

Constitutionally protected liberties have been regularly compromised by the Commander-in-Chief during wartime, whether during the Civil War, World War I, World War II or the Cold War. In 1975-1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), disclosed 30 years of illegal mail-openings by the CIA and FBI; Operation Shamrock, in which three international telegraph companies for 30 years were enlisted by the NSA to turn over certain international telegraph traffic, including the messages of United States citizens; and, the misuse of the NSA's foreign intelligence mission for law enforcement purposes. The short-lived Huston plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating that, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." FISA was thus a rational response to prevent unjustified Executive Branch encroachments on the civil liberties of United States citizens.

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

Chairman Roberts declares (p. 13): "...I believe the Supreme Court would recognize (and arguably has recognized) the President's constitutional authority to conduct warrantless electronic surveillance and, even after FISA, determine that Congress cannot define the 'exclusive means' for the conduct of that authority." The Chairman further reasons: "Having assumed a constitutional responsibility to protect the United States from attack...the President exercised his inherent constitutional authority as Commander-in-Chief to prevent further attacks." (Id.).

If those assertions are accepted, then the President also enjoys inherent constitutional power to break and enter the homes of American citizens in search of foreign intelligence contrary to FISA. He enjoys the right to open the mail of United States citizens in search of foreign intelligence contrary to the postal statutes. He enjoys the right to torture or otherwise mistreat detainees in a quest for foreign intelligence, notwithstanding the McCain amendment. And he may send citizens to concentration camps if he suspects them of terrorist affiliations contrary to federal law. If sum, if the Chairman's assertions are accepted, then checks and balances during war would be crippled and the measure of our civil liberties would be the President's "trust me" refrain.

The Chairman's insistence that FISA is unworkable in a post-9/11 world is counterfactual. His letter asserts (p. 14): "FISA does not provide an effective alternative to [the NSA's domestic spying] to authorize the 'hot pursuit' of terrorists operating in this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility impossible to achieve...Attorney General approval of 'emergency' surveillance under FISA must meet a probable cause standard, is limited to 'foreign powers' or 'agents of a foreign power' as defined in FISA, and is similarly encumbered by a bureaucratic approval process."

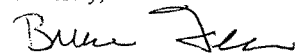
President Bush, speaking through the Department of Justice, disputed every word of the Chairman in testimony presented to the Senate Intelligence Committee on July 31, 2002, long after the NSA's domestic spying had commenced. James A. Baker, Counsel for Intelligence Policy, glowingly praised FISA amendments in the USA PATRIOT ACT: "The reforms...have affected every single application made by the Department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening the time period for emergency FISAs] has allowed us ...to ensure that the government acts swiftly to respond to terrorist threats."

Even if the Chairman's indictment of FISA was correct, his letter fails to address why the shortcomings should not have been cured with further amendments in lieu of lacerating the Constitution's checks and balances. Chairman Roberts does not suggest that a Republican-controlled Congress would have balked, or that legislative deliberations would have exposed state secrets.

The war against international terrorism is historically unique in an important constitutional sense. It has no end point. It will be permanent. All previous assertions of inherent presidential war powers had some natural stopping point—when the enemy nation surrendered. The presidential war powers defended by Chairman Roberts, in contrast, would permanently shift the political and constitutional landscape towards one-branch government contrary to the intent of the Founding Fathers.

Accordingly, I submit that the Chairman's challenge to the constitutionality of FISA is unpersuasive.

Sincerely,



Bruce Fein

Former associate deputy attorney general under President Ronald Reagan

STATEMENT OF FORMER GOVERNMENT OFFICIALS**February 8, 2006**

As former government officials with substantial experience in national security matters, we believe that it is essential that our career intelligence officers have all the tools they need to act quickly and effectively against spies and terrorists who threaten our nation's security. We also believe that domestic surveillance must be undertaken in a manner that reassures American citizens that their privacy is protected and that surveillance is being conducted in a prudent and supervised manner.

The Foreign Intelligence Surveillance Act (FISA), enacted in 1978 and updated periodically since then, established special procedures for achieving both of these objectives. FISA established a special judicial procedure that authorizes government surveillance of American citizens and non-citizens residing in the United States. In essence, FISA ensures that this crucial security function is conducted consistent with the transcendent American values embodied in the rule of law.

The FISA statute has been amended on several occasions, most recently after the terrorist attacks on 9/11. The statute has been revised as American security organizations struggle to stay ahead of emerging technologies such as cell phones and internet connections. We believe that the statute may again need reassessment and potential amendment to ensure that these judicial proceedings might be adapted to reflect changing technical conditions.

We strongly believe that our security is enhanced if clandestine surveillance is undertaken within a legal framework that reflects a broad consensus in American society. America's law enforcement and intelligence officers want and need the widespread support of American citizens. The FISA process, amended if necessary, ensures that America's constitutional principles and the rule of law can be preserved while we still undertake crucial surveillance.

It has been four years since 9/11. It is time to act. Congress must, on a bipartisan basis, undertake an in-depth inquiry to obtain the critical facts needed to determine whether amendments to FISA might be necessary and appropriate to strengthen our capacity to monitor dangerous activity while ensuring effective oversight.

Kenneth C. Bass, III
Former Counsel for Intelligence Policy, Department of Justice

Mary DeRosa
Former Special Assistant to the President
Former Legal Advisor, National Security Council

John Deutch
Former Director, Central Intelligence Agency
Former United States Deputy Secretary, Defense of Defense

John Hamre
Former United States Deputy Secretary, Department of Defense

Philip Heymann
Former Deputy Attorney General

David Kay
Former Head of the Iraq Survey Group and Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

Juliette Kayyem
Former Member, National Commission on Terrorism (The Bremer Commission)
Former Legal Advisor to the Attorney General, Department of Justice

James Lewis
Former Diplomat and Intelligence Advisor to the United States Military

N. John MacGaffin III
Former Deputy Director for Operations, Central Intelligence Agency
Former Senior Advisor to the Director, Federal Bureau of Investigation

Thurgood Marshall, Jr.
Former Cabinet Secretary and White House Liaison to Continuity of Government Program

Elizabeth Rindskopf Parker
Former General Counsel, National Security Agency
Former General Counsel, Central Intelligence Agency

William S. Sessions
Former Chief United States District Judge for the Western District of Texas
Former Director, Federal Bureau of Investigation

Michael A. Smith
Former Assistant General Counsel, National Security Agency

Suzanne E. Spaulding
Former Assistant General Counsel, Central Intelligence Agency
Former Chief Counsel, House and Senate Intelligence Committees

Michael A. Vatis
Former Director, National Infrastructure Protection Center
Former Associate Deputy Attorney General

Michael J. Woods
Former Chief, National Security Law Unit in the Office of General Counsel, Federal Bureau of Investigation

**PREPARED STATEMENT OF HON. ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES**

We cannot forget the threat that the al Qaeda terrorist network poses to our Nation. Long before September 11th, al Qaeda promised to attack the United States. In 1998, Osama bin Laden declared a jihad against our country, and incited “every Muslim who can do it” “[t]o kill the Americans and their allies—civilians and military” “in any country in which it is possible to do it.” Statement of Osama bin Laden, Ayman al-Zawahiri, et al., *Fatwah Urging Jihad Against Americans*, published in *Al-Quds al-’Arabi* (Feb. 23, 1998). Al Qaeda members and agents have carried out bin Laden’s orders with a vengeance; al Qaeda attacked the U.S.S. Cole in Yemen, the United States Embassies in Kenya and Tanzania, and then, of course, the United States itself on September 11, 2001.

On September 11th, the al Qaeda terrorist network executed the most deadly foreign attacks on this Nation’s soil in history. Al Qaeda planners and operatives carefully selected and hijacked four commercial jetliners, each fully loaded with fuel for a transcontinental flight. Within hours, the Twin Towers of the World Trade Center lay in ruin. The terrorists also managed to strike the headquarters of the Nation’s Armed Forces, the Pentagon. And it is believed that the target of the fourth plane, United Flight 93, was either the White House or the Capitol Building, suggesting that al Qaeda had sought to decapitate the federal Government. The attacks of September 11th resulted in approximately 3,000 deaths—the highest single-day death toll from a foreign attack on the United States in the Nation’s history. These attacks shut down air travel in the United States, disrupted the Nation’s financial markets and government operations, and caused billions of dollars in damage.

Our Nation responded by taking up arms against al Qaeda, affiliated terrorist networks, and the governments that sheltered them. A coalition of our allies has supported the United States in this war. Indeed, shortly after the attacks, NATO—for the first time in its 46-year history—invoked article 5 of the North Atlantic Treaty, which provides that an “armed attack against one or more of [the parties] shall be considered an attack against them all.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

It has become more clear in the days, weeks, and years since September 11th that our enemy in this war is no ordinary terrorist organization. Al Qaeda demonstrated on September 11th that it could execute a highly sophisticated operation, one that required al Qaeda operatives to live in our midst for years, to transfer money into the country, to arrange training, and to communicate with planners overseas. And it has promised similar attacks in the future.

Al Qaeda is not content with the damage it inflicted on September 11th. Since that day, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. *See, e.g.*, Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 24, 2004) (warning United States citizens of further attacks and asserting that “your security is in your own hands”); Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 18, 2003) (“God willing, we will continue to fight you and will continue martyrdom operations inside and outside the United States”); Ayman Al-Zawahiri, videotape released on the Al-Jazeera television network (Oct. 9, 2002) (“I promise you

[addressing the ‘citizens of the United States’] that the Islamic youth are preparing for you what will fill your hearts with horror.”).

As recently as December 7, 2005, Ayman al-Zawahiri professed that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And less than three weeks ago, we heard Osama bin Laden warn that the United States could not prevent attacks on the homeland. He continued:

The proof of that is the explosions you have seen in the capitals of European nations. . . . The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you will see them in your homes the minute they are through (with preparations), with God’s permission.

Quoted at <http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html> (Jan. 19, 2006).

Al Qaeda poses as much of a threat as a traditional nation state, and in many ways, a greater threat. Indeed, in the time since September 11th, al Qaeda and its allies have staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people. Al Qaeda’s leaders have repeatedly made good on their threats, and al Qaeda has demonstrated its ability to insert foreign agents into the United States to execute attacks.

In confronting this new and deadly enemy, President Bush promised that “[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every tool of law enforcement, every financial influence, and every weapon of war—to the disruption of and to the defeat of the global terror network.” President Bush Address to a Joint Session of Congress (Sept. 20, 2001). The terrorist surveillance program described by the President is one such tool and one indispensable aspect of this defense of our Nation.

The terrorist surveillance program targets communications where one party to the communication is outside the U.S. and the government has “reasonable grounds to believe” that at least one party to the communication is a member or agent of al Qaeda, or an affiliated terrorist organization. This program is reviewed and reauthorized by the President approximately every 45 days. The Congressional leadership, including the leaders of the Intelligence Committees of both Houses of Congress, has been briefed about this program more than a dozen times since 2001. The program provides the United States with the early warning system we so desperately needed on September 10th.

The terrorist surveillance program remains highly classified, as it should be. We must protect this tool, which has proven so important to protecting America. An open discussion of the operational details of this program would put the lives of Americans at risk. The need to protect national security also means that I must confine my discussion of the legal analysis to those activities confirmed publicly by the President; I cannot and will not address operational

aspects of the program or other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confused, or wrong.

Congress and the American people are interested in two fundamental questions: is this program necessary and is it lawful. The answer to both questions is yes.

The question of necessity rightly falls to our Nation's military leaders, because the terrorist surveillance program is an essential element of our military campaign against al Qaeda. I therefore address it only briefly. The attacks of September 11th placed the Nation in a state of armed conflict. In this armed conflict, our military employs a wide variety of tools and weapons to defeat the enemy. General Michael Hayden, Principal Deputy Director of National Intelligence and former Director of the NSA, recently explained why a terrorist surveillance program that allows us quickly to collect important information about our enemy is so vital and necessary to the War on Terror.

The conflict against al Qaeda is, in fundamental respects, a war of information. We cannot build walls thick enough, fences high enough, or systems strong enough to keep our enemies out of our open and welcoming country. Instead, as the bipartisan 9/11 and WMD Commissions have urged, we must understand better who the enemy is and what he is doing. We have to collect the right dots before we can "connect the dots." The terrorist surveillance program allows us to collect more information regarding al Qaeda's plans, and, critically, it allows us to locate al Qaeda operatives, especially those already in the United States and poised to attack. We cannot defend the Nation without such information, as we painfully learned on September 11th.

As Attorney General, I am primarily concerned with the legal basis for these necessary military activities. The Attorney General of the United States is the chief legal adviser for the President and the Executive Branch. Accordingly, the Department of Justice has thoroughly examined this program and concluded that the President is acting within his power in authorizing it. The Department of Justice is not alone in concluding that the program is lawful. Career lawyers at NSA and its Inspector General office have been intimately involved in the oversight of the program. The lawyers have found the program to be lawful and reviewed its conduct. The Inspector General's office has exercised vigorous reviews of the program to provide assurance that it is carried out within the terms of the President's authorization.

The terrorist surveillance program is firmly grounded in the President's constitutional authorities. The Constitution charges the President with the primary responsibility for protecting the safety of all Americans, and the Constitution gives the President the authority necessary to fulfill this solemn duty. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). It has long been recognized that the President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States. Presidents have repeatedly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military, and the federal courts have consistently upheld this longstanding practice. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).

If this authority is available in ordinary times, it is even more vital in the present circumstances of our armed conflict with al Qaeda. The President authorized the terrorist surveillance program in response to the deadliest foreign attack on American soil, and it is designed solely to prevent the next al Qaeda attack. After all, the goal of our enemy is to blend in with our civilian population in order to plan and carry out future attacks within America. We cannot forget that the September 11th hijackers were in our country, living in our communities.

The President's authority to take military action—including the use of communications intelligence targeted at the enemy—does not come merely from his constitutional powers. It comes directly from Congress as well. Just a few days after the attacks of September 11th, Congress enacted a joint resolution to support and authorize the military response to the attacks on American soil. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (“AUMF”). In the AUMF, Congress did two important things. First, it expressly recognized the President's “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Second, it supplemented that authority by authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” in order to prevent further attacks on the United States.

Accordingly, the President's authority to use military force against those terrorist groups is at its maximum because he is acting with the express authorization of Congress. Thus, under the three-part framework of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), the President's authority falls within Category I, and is at its highest. He is acting “pursuant to an express or implied authorization of Congress,” and the President's authority “includes all that he possesses in his own right [under the Constitution] plus all that Congress can” confer on him.

In 2004, the Supreme Court considered the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). There, the question was whether the President had the authority to detain an American citizen as an enemy combatant for the duration of the hostilities. The Supreme Court confirmed that the expansive language of the AUMF —“all necessary and appropriate force”—ensures that the congressional authorization extends to traditional incidents of waging war. See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2092 (2005). And, just like the detention of enemy combatants approved in *Hamdi*, the use of communications intelligence to prevent enemy attacks is a fundamental and accepted incident of military force.

This fact is amply borne out by history. This Nation has a long tradition of wartime enemy surveillance—a tradition that can be traced to George Washington, who made frequent and effective use of secret intelligence. One source of Washington's intelligence was intercepted British mail. See Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his Generals “contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on.” *Id.* at 32 (“From that point on, Washington was privy to British intelligence pouches between New York and Canada.”). And for as long as electronic communications have existed, the United States has intercepted those communications during wartime, and done so, not

surprisingly, without judicial warrants. In the Civil War, for example, telegraph wiretapping was common and provided important intelligence for both sides. In World War I, President Wilson authorized the military to intercept all telegraph, telephone, and cable communications into and out of the United States; he inferred the authority to do so from the Constitution and from a general congressional authorization to use military force that did not mention anything about such surveillance. *See* Exec. Order No. 2604 (Apr. 28, 1917). So too in World War II; the day after the attack on Pearl Harbor, President Roosevelt authorized the interception of *all* communications traffic into and out of the United States. The terrorist surveillance program, of course, is far more focused, since it involves the interception only of international communications that are linked to al Qaeda.

Some have suggested that the AUMF did not authorize intelligence collection inside the United States. That contention cannot be squared with the reality of the September 11th attacks on our soil, launched from within the country, and carried out by sleeper agents who had lived amongst us. Given this background, Congress certainly intended to support the President's use of force to repel an unfolding attack within the United States. Congress also must be understood to have authorized the traditional means by which the military detects and responds to such attacks. Nor can this contention be squared with the language of the AUMF itself, which calls on the President to protect Americans both "*at home* and abroad," to take action to prevent further terrorist attacks "against the United States," and directs him to determine who was responsible for the attacks. Such a contention is also contrary to the long history of wartime surveillance, which has often involved the interception of enemy communications into and out of the United States.

Against this backdrop, the NSA's focused terrorist surveillance program falls squarely within the broad authorization of the AUMF even though, as some have argued, the AUMF does not expressly mention surveillance. The AUMF also does not mention detention of enemy combatants. But we know from the Supreme Court's decision in *Hamdi* that such detention is authorized even for U.S. citizens. Justice O'Connor reasoned: "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." 542 U.S. at 519 (plurality opinion).

As Justice O'Connor recognized, "it is of no moment that the AUMF does not use specific language of detention" or even refer to the detention of U.S. citizens as enemy combatants at all. *Id.* Nor does it matter that individual Members of Congress may not have specifically intended to authorize such detention. The same is true of electronic surveillance. It is a traditional incident of war, and, thus, as Justice O'Connor said, it is "of no moment" that the AUMF does not explicitly mention this activity. Congress has "clearly and unmistakably authorized" it.

These omissions are not at all surprising. In enacting the AUMF, Congress made no attempt to catalog every aspect of the use of force it was authorizing. Instead, following the model of past military force authorizations, Congress—in general, but broad, terms—confirmed the President's authority to use traditional and accepted incidents of military force to identify and

defeat the enemy. In doing so, Congress must be understood to have endorsed the use of so fundamental an aspect of the use of military force as electronic surveillance.

Some contend that even if the President has constitutional authority to engage in the surveillance of our enemy during an armed conflict, that authority has been constrained by Congress with the passage in 1978 of the Foreign Intelligence Surveillance Act ("FISA"). Generally, FISA requires the Government to obtain an order from a special FISA court before conducting "electronic surveillance." 50 U.S.C. §§ 1803-1805 (2000 and Supp. II 2002). FISA defines "electronic surveillance" carefully and precisely. *Id.* § 1801(f). And, as confirmed by another provision, 18 U.S.C. § 2511(2)(f) (Supp. II 2002) (carving out from statutory regulation the acquisition of intelligence information from "international or foreign communications" and "foreign intelligence activities . . . involving a foreign electronic communications system" as long as they are accomplished "utilizing a means other than electronic surveillance as defined" by FISA), and by FISA's legislative history, Congress did *not* intend FISA to regulate certain communications intelligence activities of the NSA, including certain communications involving persons in the United States. *See, e.g.*, S. Rep. No. 95-604, at 64 (1978). Because I cannot discuss operational details, for purposes of this discussion, I will assume that intercepts of international al Qaeda communications under the terrorist surveillance program fall within the definition of "electronic surveillance" in FISA.

Even with FISA's careful carve out for certain NSA signals intelligence activities as they existed in 1978, the legislative history makes clear that there were concerns among Members of Congress about the constitutionality of FISA itself if construed to be an exclusive means for electronic surveillance. *See, e.g.*, H.R. Conf. Rep. No. 95-1720, at 35 ("The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court."). The FISA Court of Review, the special court of appeals charged with hearing appeals of decisions by the FISA court, stated in 2002 that "[w]e take for granted that the President does have that [inherent] authority" and, "assuming that is so, FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d at 742.

It is a serious question whether, consistent with the Constitution, FISA may encroach upon the President's Article II powers during the current armed conflict with al Qaeda by prohibiting the terrorist surveillance program. Fortunately, for the reasons that follow, we need not address that difficult question.

FISA allows Congress to respond to new threats through separate legislation. FISA prohibits persons from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*" 50 U.S.C. § 1809(a)(1) (2000) (emphasis added). For the reasons I have already discussed, the AUMF provides the relevant statutory authorization for the terrorist surveillance program. *Hamdi* makes clear that the broad language in the AUMF can satisfy a requirement for specific statutory authorization set forth in another law.

Hamdi involved a statutory prohibition on all detention of U.S. citizens except as authorized "pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). Even though the detention of a U.S. citizen involves a deprivation of liberty, and even though the AUMF says

nothing on its face about detention of U.S. citizens, a majority of the members of the Supreme Court nevertheless concluded that the AUMF satisfied the statutory requirement. *See Hamdi*, 542 U.S. at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). The same is true for the prohibition on warrantless electronic surveillance in FISA.

FISA also expressly allows the President to conduct warrantless surveillance for 15 days following a congressional declaration of war. 50 U.S.C. § 1811 (2000). That provision shows that Congress understood that warrantless surveillance would be essential in wartime. But no one could reasonably suggest that all such critical military surveillance in a time of war would end after only 15 days. Instead, the legislative history of this provision makes clear that Congress elected *not to decide* how surveillance might need to be conducted in the event of a particular armed conflict. Congress expected that it would revisit the issue in light of events and likely would enact a special authorization during that 15-day period. H.R. Conf. Rep. No. 95-1720, at 34. That is exactly what happened three days after the attacks of September 11th, when Congress passed the AUMF, authorizing the President to employ “all necessary and appropriate” incidents of military force—including the use of communications intelligence activities targeted at the enemy.

Some have argued that Title III (the domestic law-enforcement wiretap provisions) and FISA are the “exclusive means” for conducting electronic surveillance as defined by FISA. It is true that section 2511(2)(f) of title 18, U.S. Code, provides that the “procedures in [Title III] . . . and [FISA] shall be the exclusive means by which electronic surveillance . . . may be conducted.” But, as I have said before, FISA itself prohibits the Government from engaging in electronic surveillance “except as authorized by statute.” 50 U.S.C. § 1809(a)(1). It is noteworthy that FISA does not say that “the Government cannot engage in electronic surveillance ‘except as authorized by FISA and Title III.’” Instead, FISA allows electronic surveillance that is authorized by statute—any statute. And, in this case, that other statute is the AUMF.

Even if some might think this is not the only possible reading of FISA and the AUMF, in accordance with long recognized canons of construction, FISA must be interpreted in harmony with the AUMF to allow the President, as Commander in Chief during a congressionally authorized armed conflict, to take the actions necessary to protect the country from another catastrophic attack. So long as such an interpretation is “fairly possible,” the Supreme Court has made clear that it must be adopted in order to avoid the serious constitutional issues that would otherwise be raised. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). Application of the canon of constitutional avoidance is particularly appropriate here. As noted, Congress recognized in 1978 that FISA might approach or exceed its constitutional authority. Since FISA’s enactment, the means of transmitting communications has undergone extensive transformation. This technological change substantially altered the effects of FISA’s careful definition of “electronic surveillance” and has resulted in increased and unintended interference with some of the activities Congress decided to exclude from regulation in 1978.

Many people ask why the President elected not to use FISA’s procedures for securing court orders for the terrorist surveillance program. We have to remember that what is at issue is a wartime intelligence program designed to protect our Nation from another attack in the middle

of an armed conflict. It is an “early warning system” with only one purpose: to detect and prevent the next attack on the United States from foreign agents hiding in our midst. It is imperative for national security that we can detect reliably, immediately, and without delay whenever communications associated with al Qaeda enter or leave the United States. That may be the only way to alert us to the presence of an al Qaeda agent in our country and to the existence of an unfolding plot.

The optimal way to achieve the speed and agility necessary to this military intelligence program during the present armed conflict with al Qaeda is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. These officers are best situated to make decisions quickly and accurately. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of delay, and there would be critical holes in our early warning system. Importantly, as explained below, these intelligence officers apply a probable cause standard. The critical advantage offered by the terrorist surveillance program compared to FISA is *who* makes the probable cause determination and how many layers of review must occur *before* surveillance begins.

Some have pointed to the provision in FISA that allows for so-called “emergency authorizations” of surveillance for 72 hours without a court order. There is a serious misconception about these emergency authorizations. We do not and cannot approve emergency surveillance under FISA without knowing that we meet FISA’s normal requirements. In order to authorize emergency surveillance under FISA, the Attorney General must personally “determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists.” 50 U.S.C. § 1805(f). FISA requires the Attorney General to determine *in advance* that this condition is satisfied. That review process can, of necessity, take precious time. And that same process takes the decision away from the officers best situated to make it during an armed conflict.

Thus, to initiate surveillance under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers. Those intelligence officers would have to get the sign-off of lawyers at the NSA, and then lawyers in the Department of Justice would have to be satisfied that the statutory requirements for emergency authorization are met, and finally as Attorney General, I would have to be satisfied that the proposed surveillance meets the requirements of FISA. Finally, the emergency application must be filed “as soon as practicable,” but within 72 hours.

A typical FISA application involves a substantial process in its own right: The work of several lawyers; the preparation of an application and related legal papers; the approval of a designated Cabinet-level officer; a certification from a designated Senate-confirmed officer; and, finally, of course, the approval of an Article III judge who sits on the FISA Court. *See* 50 U.S.C. § 1804. Needless to say, even under the very best of circumstances, this process consumes valuable resources and results in significant delay. We all agree that there should be appropriate checks and balances on the Branches of our Government. The FISA process makes perfect sense in almost all cases of foreign intelligence monitoring in the United States. Although technology has changed dramatically since FISA was enacted, FISA remains a vital tool in the War on

Terror, and one that we are using to its fullest and will continue to use against al Qaeda and other foreign threats. But as the President has explained, the terrorist surveillance program operated by the NSA requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail.

Finally, the NSA's terrorist surveillance program fully complies with the Fourth Amendment, which prohibits unreasonable searches and seizures. The Fourth Amendment has never been understood to require warrants in all circumstances. The Supreme Court has upheld warrantless searches at the border and has allowed warrantless sobriety checkpoints. *See, e.g., Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *see also Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (stating that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). Those searches do not violate the Fourth Amendment because they involve "special needs" beyond routine law enforcement. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995). To fall within the "special needs" exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary general crime control. *See, e.g., Ferguson v. Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000).

The terrorist surveillance program fits within this "special needs" category. This conclusion is by no means novel. During the Clinton Administration, Deputy Attorney General Jamie Gorelick testified before Congress in 1994 that the President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant, and that such warrantless searches are permissible under the Fourth Amendment. *See Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence*, 103d Cong. 2d Sess. 61, 64 (1994) (statement of Deputy Attorney General Jamie S. Gorelick). *See also In re Sealed Case*, 310 F.3d at 745-46.

The key question under the Fourth Amendment is not whether there was a warrant, but whether the search was *reasonable*. Determining the reasonableness of a search for Fourth Amendment purposes requires balancing privacy interests with the Government's interests and ensuring that we maintain appropriate safeguards. *United States v. Knights*, 534 U.S. 112, 118-19 (2001). Although the terrorist surveillance program may implicate substantial privacy interests, the Government's interest in protecting our Nation is compelling. Because the need for the program is reevaluated every 45 days and because of the safeguards and oversight, the al Qaeda intercepts are reasonable.

No one takes lightly the concerns that have been raised about the interception of domestic communications inside the United States. But this terrorist surveillance program involves intercepting the *international* communications of persons reasonably believed to be members or agents of al Qaeda or affiliated terrorist organizations. This surveillance is narrowly focused and fully consistent with the traditional forms of enemy surveillance found to be necessary in all previous armed conflicts. The need for the program is reviewed at the highest levels of government approximately every 45 days to ensure that the al Qaeda threat to the national security of this Nation continues to exist. Moreover, although the Fourth Amendment does not

require application of a probable cause standard in this context, the “reasonable grounds to believe” standard employed in this program is the traditional Fourth Amendment probable cause standard. As the Supreme Court has stated, “The substance of all the definitions of probable cause is a *reasonable ground for belief* of guilt.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotation marks omitted) (emphasis added).

This Administration has chosen to act now to prevent the next attack with every lawful tool at its disposal, rather than wait until it is too late. It is hard to imagine a President who would not elect to use these tools in defense of the American people—in fact, it would be irresponsible to do otherwise. The terrorist surveillance program is both necessary and lawful. Accordingly, as the President has explained, he intends to continue to exercise this authority as long as al Qaeda poses such a grave threat to the national security. If we conduct this reasonable surveillance—while taking special care to preserve civil liberties as we have—we can all continue to enjoy our rights and freedoms for generations to come.

I am attaching for the record both the Department of Justice’s paper of January 19, 2006, setting forth the Department’s analysis of the legal basis for the terrorist surveillance program, and the previous Letter for Hon. Pat Roberts, Chairman, Senate Select Committee on Intelligence, from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs (Dec. 22, 2005). I am also attaching my detailed responses to questions previously posed by Chairman Specter.



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Vice Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jane Harman
Ranking Minority Member
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman:

As you know, in response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after September 11, 2001. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks, and the NSA activities the President described are part of that effort. Leaders of the Congress were briefed on these activities more than a dozen times.

The purpose of this letter is to provide an additional brief summary of the legal authority supporting the NSA activities described by the President.

As an initial matter, I emphasize a few points. The President stated that these activities are "crucial to our national security." The President further explained that "the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country." These critical national security activities remain classified. All United States laws and policies governing the protection and nondisclosure of national security information, including the information relating to the

activities described by the President, remain in full force and effect. The unauthorized disclosure of classified information violates federal criminal law. The Government may provide further classified briefings to the Congress on these activities in an appropriate manner. Any such briefings will be conducted in a manner that will not endanger national security.

Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty. *See, e.g., Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (stressing that if the Nation is invaded, “the President is not only authorized but bound to resist by force . . . without waiting for any special legislative authority”); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (“[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.”); *id.* at 40 (Tatel, J., concurring). The Congress recognized this constitutional authority in the preamble to the Authorization for the Use of Military Force (“AUMF”) of September 18, 2001, 115 Stat. 224 (2001) (“[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”), and in the War Powers Resolution, *see* 50 U.S.C. § 1541(c) (“The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities[] . . . [extend to] a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”).

This constitutional authority includes the authority to order warrantless foreign intelligence surveillance within the United States, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority”). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished *foreign* threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972). As Justice Byron White recognized almost 40 years ago, Presidents have long exercised the authority to conduct warrantless surveillance for national security purposes, and a warrant is unnecessary “if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.” *Katz v. United States*, 389 U.S. 347, 363-64 (1967) (White, J., concurring).

The President’s constitutional authority to direct the NSA to conduct the activities he described is supplemented by statutory authority under the AUMF. The AUMF authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States.” § 2(a). The AUMF clearly contemplates action within the United States, *see also id.* pmb1. (the attacks of September 11 “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad”). The AUMF cannot be read as limited to authorizing the use of force against Afghanistan, as some

have argued. Indeed, those who directly “committed” the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court addressed the scope of the AUMF. At least five Justices concluded that the AUMF authorized the President to detain a U.S. citizen in the United States because “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war” and is therefore included in the “necessary and appropriate force” authorized by the Congress. *Id.* at 518-19 (plurality opinion of O’Connor, J.); *see id.* at 587 (Thomas, J., dissenting). These five Justices concluded that the AUMF “clearly and unmistakably authorize[s]” the “fundamental incident[s] of waging war.” *Id.* at 518-19 (plurality opinion); *see id.* at 587 (Thomas, J., dissenting).

Communications intelligence targeted at the enemy is a fundamental incident of the use of military force. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the United States intercepted telegrams into and out of the country. The AUMF cannot be read to exclude this long-recognized and essential authority to conduct communications intelligence targeted at the enemy. We cannot fight a war blind. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President’s “authority is at its maximum.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *cf. Youngstown*, 343 U.S. at 585 (noting the absence of a statute “from which [the asserted authority] could be fairly implied”).

The President’s authorization of targeted electronic surveillance by the NSA is also consistent with the Foreign Intelligence Surveillance Act (“FISA”). Section 2511(2)(f) of title 18 provides, as relevant here, that the procedures of FISA and two chapters of title 18 “shall be the exclusive means by which electronic surveillance . . . may be conducted.” Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance, “except as authorized by statute.” 50 U.S.C. § 1809(a)(1). Importantly, section 109’s exception for electronic surveillance “authorized by statute” is broad, especially considered in the context of surrounding provisions. *See* 18 U.S.C. § 2511(1) (“Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . .”) (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals “conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*”) (emphasis added).

By expressly and broadly excepting from its prohibition electronic surveillance undertaken “as authorized by statute,” section 109 of FISA permits an exception to the “procedures” of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f). The AUMF satisfies section 109’s requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that it satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained by the United States “except pursuant to an Act of Congress.” *See Hamdi*, 542

U.S. at 519 (explaining that “it is of no moment that the AUMF does not use specific language of detention”); *see id.* at 587 (Thomas, J., dissenting).

Some might suggest that FISA could be read to require that a subsequent statutory authorization must come in the form of an amendment to FISA itself. But under established principles of statutory construction, the AUMF and FISA must be construed in harmony to avoid any potential conflict between FISA and the President’s Article II authority as Commander in Chief. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). Accordingly, any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the conflict with al Qaeda without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President’s long-recognized authority.

The NSA activities described by the President are also consistent with the Fourth Amendment and the protection of civil liberties. The Fourth Amendment’s “central requirement is one of reasonableness.” *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (internal quotation marks omitted). For searches conducted in the course of ordinary criminal law enforcement, reasonableness generally requires securing a warrant. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Outside the ordinary criminal law enforcement context, however, the Supreme Court has, at times, dispensed with the warrant, instead adjudging the reasonableness of a search under the totality of the circumstances. *See United States v. Knights*, 534 U.S. 112, 118 (2001). In particular, the Supreme Court has long recognized that “special needs, beyond the normal need for law enforcement,” can justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (striking down checkpoint where “primary purpose was to detect evidence of ordinary criminal wrongdoing”).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the “special needs” exception to the warrant requirement. Foreign intelligence collection undertaken to prevent further devastating attacks on our Nation serves the highest government purpose through means other than traditional law enforcement. *See In re Sealed Case*, 310 F.3d at 745; *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (recognizing that the Fourth Amendment implications of foreign intelligence surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution).

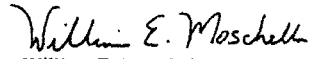
Intercepting communications into and out of the United States of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is clearly *reasonable*. Reasonableness is generally determined by “balancing the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.” *Earls*, 536 U.S. at 829. There is undeniably an important and legitimate privacy interest at stake with respect to the activities described by the President. That must be balanced, however, against the Government’s compelling interest in the security of the Nation, *see, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”) (citation and quotation marks omitted). The fact that the NSA activities are reviewed and

reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate further demonstrates the reasonableness of these activities.

As explained above, the President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities. Nevertheless, I want to stress that the United States makes full use of FISA to address the terrorist threat, and FISA has proven to be a very important tool, especially in longer-term investigations. In addition, the United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

We hope this information is helpful.

Sincerely,


William E. Moschella
Assistant Attorney General



U.S. Department of Justice

Washington, D.C. 20530

January 19, 2006

**LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE
NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT**

As the President has explained, since shortly after the attacks of September 11, 2001, he has authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. This paper addresses, in an unclassified form, the legal basis for the NSA activities described by the President ("NSA activities").

SUMMARY

On September 11, 2001, the al Qaeda terrorist network launched the deadliest foreign attack on American soil in history. Al Qaeda's leadership repeatedly has pledged to attack the United States again at a time of its choosing, and these terrorist organizations continue to pose a grave threat to the United States. In response to the September 11th attacks and the continuing threat, the President, with broad congressional approval, has acted to protect the Nation from another terrorist attack. In the immediate aftermath of September 11th, the President promised that "[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every tool of law enforcement, every financial influence, and every weapon of war—to the destruction of and to the defeat of the global terrorist network." President Bush Address to a Joint Session of Congress (Sept. 20, 2001). The NSA activities are an indispensable aspect of this defense of the Nation. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, these activities provide the United States with an early warning system to help avert the next attack. For the following reasons, the NSA activities are lawful and consistent with civil liberties.

The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility. The President has made clear that he will exercise all authority available to him, consistent with the Constitution, to protect the people of the United States.

In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland. In its first legislative response to the terrorist attacks of September 11th, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th in order to prevent "any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541) ("AUMF"). History conclusively demonstrates that warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF. The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.

The AUMF places the President at the zenith of his powers in authorizing the NSA activities. Under the tripartite framework set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), Presidential authority is analyzed to determine whether the President is acting in accordance with congressional authorization (category I), whether he acts in the absence of a grant or denial of authority by Congress (category II), or whether he uses his own authority under the Constitution to take actions incompatible with congressional measures (category III). Because of the broad authorization provided in the AUMF, the President's action here falls within category I of Justice Jackson's framework. Accordingly, the President's power in authorizing the NSA activities is at its height because he acted "pursuant to an express or implied authorization of Congress," and his power "includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635.

The NSA activities are consistent with the preexisting statutory framework generally applicable to the interception of communications in the United States—the Foreign Intelligence Surveillance Act ("FISA"), as amended, 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002), and relevant related provisions in chapter 119 of title 18.¹ Although FISA generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA. *See* 50 U.S.C. § 1809(a) (prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized

¹ Chapter 119 of title 18, which was enacted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2521 (2000 & West Supp. 2005), is often referred to as "Title III."

by statute”). The AUMF, as construed by the Supreme Court in *Hamdi* and as confirmed by the history and tradition of armed conflict, is just such a statute. Accordingly, electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA and falls within category I of Justice Jackson’s framework.

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 in harmony 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. Indeed, were FISA and Title III interpreted to impede the President’s ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt. In fact, if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context. Importantly, the FISA Court of Review itself recognized just three years ago that the President retains constitutional authority to conduct foreign surveillance apart from the FISA framework, and the President is certainly entitled, at a minimum, to rely on that judicial interpretation of the Constitution and FISA.

Finally, the NSA activities fully comply with the requirements of the Fourth Amendment. The interception of communications described by the President falls within a well-established exception to the warrant requirement and satisfies the Fourth Amendment’s fundamental requirement of reasonableness. The NSA activities are thus constitutionally permissible and fully protective of civil liberties.

BACKGROUND

A. THE ATTACKS OF SEPTEMBER 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Two of the jetliners were targeted at the Nation’s financial center in New York and were deliberately flown into the Twin Towers of the World Trade Center. The third was targeted at the headquarters of the Nation’s Armed Forces, the Pentagon. The fourth was apparently headed toward Washington, D.C., when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow on the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11th resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation’s history. These attacks shut down air travel in the United States, disrupted the Nation’s financial markets and government operations, and caused billions of dollars in damage to the economy.

On September 14, 2001, the President declared a national emergency “by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The same day, Congress passed a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11th, which the President signed on September 18th. AUMF § 2(a). Congress also expressly acknowledged that the attacks rendered it “necessary and appropriate” for the United States to exercise its right “to protect United States citizens both at home and abroad,” and in particular recognized that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” *Id.* pmb1. Congress emphasized that the attacks “continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States.” *Id.* The United States also launched a large-scale military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda’s base of operations in Afghanistan. Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the assistance of the Northern Alliance, toppled the Taliban regime.

As the President made explicit in his Military Order of November 13, 2001, authorizing the use of military commissions to try terrorists, the attacks of September 11th “created a state of armed conflict.” Military Order § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO—for the first time in its 46-year history—invoked article 5 of the North Atlantic Treaty, which provides that an “armed attack against one or more of [the parties] shall be considered an attack against them all.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *see also* Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), *available at* <http://www.nato.int/docu/speech/2001/s011002a.htm> (“[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . .”). The President also determined in his Military Order that al Qaeda and related terrorists organizations “possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government,” and concluded that “an extraordinary emergency exists for national defense purposes.” Military Order, § 1(c), (g), 66 Fed. Reg. at 57,833-34.

B. THE NSA ACTIVITIES

Against this unfolding background of events in the fall of 2001, there was substantial concern that al Qaeda and its allies were preparing to carry out another attack within the United States. Al Qaeda had demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks, and it was suspected that additional agents were

likely already in position within the Nation's borders. As the President has explained, unlike a conventional enemy, al Qaeda has infiltrated "our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan and elsewhere." Press Conference of President Bush (Dec. 19, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> ("President's Press Conference"). To this day, finding al Qaeda sleeper agents in the United States remains one of the paramount concerns in the War on Terror. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September the 11th." *Id.*

The President has acknowledged that, to counter this threat, he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The same day, the Attorney General elaborated and explained that in order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (Dec. 19, 2005) (statement of Attorney General Gonzales). The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." President's Press Conference.

The President has explained that the NSA activities are "critical" to the national security of the United States. *Id.* Confronting al Qaeda "is not simply a matter of [domestic] law enforcement"—we must defend the country against an enemy that declared war against the United States. *Id.* To "effectively detect enemies hiding in our midst and prevent them from striking us again . . . we must be able to act fast and to detect conversations [made by individuals linked to al Qaeda] so we can prevent new attacks." *Id.* The President pointed out that "a two-minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives." *Id.* The NSA activities are intended to help "connect the dots" between potential terrorists. *Id.* In addition, the Nation is facing "a different era, a different war . . . people are changing phone numbers . . . and they're moving quick[ly]." *Id.* As the President explained, the NSA activities "enable[] us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to detect and prevent." *Id.* "This is an enemy that is quick and it's lethal. And sometimes we have to move very, very quickly." *Id.* FISA, by contrast, is better suited "for long-term monitoring." *Id.*

As the President has explained, the NSA activities are "carefully reviewed approximately every 45 days to ensure that [they are] being used properly." *Id.* These activities are reviewed for legality by the Department of Justice and are monitored by the General Counsel and Inspector General of the NSA to ensure that civil liberties are being protected. *Id.* Leaders in Congress from both parties have been briefed more than a dozen times on the NSA activities.

C. THE CONTINUING THREAT POSED BY AL QAEDA

Before the September 11th attacks, al Qaeda had promised to attack the United States. In 1998, Osama bin Laden declared a “religious” war against the United States and urged that it was the moral obligation of all Muslims to kill U.S. civilians and military personnel. *See* Statement of Osama bin Laden, Ayman al-Zawahiri, et al., *Fatwah Urging Jihad Against Americans*, published in *Al-Quds al-‘Arabi* (Feb. 23, 1998) (“To kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.”). Al Qaeda carried out those threats with a vengeance; they attacked the U.S.S. Cole in Yemen, the United States Embassy in Nairobi, and finally the United States itself in the September 11th attacks.

It is clear that al Qaeda is not content with the damage it wrought on September 11th. As recently as December 7, 2005, Ayman al-Zawahiri professed that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). Indeed, since September 11th, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. *See, e.g.*, Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 24, 2004) (warning United States citizens of further attacks and asserting that “your security is in your own hands”); Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 18, 2003) (“We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . .”); Ayman Al-Zawahiri, videotape released on the Al-Jazeera television network (Oct. 9, 2002) (“I promise you [addressing the ‘citizens of the United States’] that the Islamic youth are preparing for you what will fill your hearts with horror”). Given that al Qaeda’s leaders have repeatedly made good on their threats and that al Qaeda has demonstrated its ability to insert foreign agents into the United States to execute attacks, it is clear that the threat continues. Indeed, since September 11th, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people.

ANALYSIS

I. THE PRESIDENT HAS INHERENT CONSTITUTIONAL AUTHORITY TO ORDER WARRANTLESS FOREIGN INTELLIGENCE SURVEILLANCE

As Congress expressly recognized in the AUMF, “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” AUMF pmb1., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces, *see* U.S. Const. art. II, § 2, and authority over the conduct of the Nation’s foreign affairs. As the Supreme Court has explained, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with

foreign nations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

To carry out these responsibilities, the President must have authority to gather information necessary for the execution of his office. The Founders, after all, intended the federal Government to be clothed with all authority necessary to protect the Nation. *See, e.g., The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (explaining that the federal Government will be “cloathed with all the powers requisite to the complete execution of its trust”); *id.* No. 41, at 269 (James Madison) (“Security against foreign danger is one of the primitive objects of civil society The powers requisite for attaining it must be effectually confided to the federal councils.”). Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs. *See, e.g., The Federalist* No. 70, at 471-72 (Alexander Hamilton); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (“this [constitutional] grant of war power includes all that is necessary and proper for carrying these powers into execution”) (citation omitted). Thus, it has been long recognized that the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns. *See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.”); *Curtiss-Wright*, 299 U.S. at 320 (“He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.”); *Totten v. United States*, 92 U.S. 105, 106 (1876) (President “was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy”).

In reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes. Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. *See, e.g., United States v. United States District Court*, 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). In a Memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as

possible to aliens.

Id. at 670 (appendix A). President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Attorney General advised that “it is as necessary as it was in 1940 to take the investigative measures” authorized by President Roosevelt to conduct electronic surveillance “in cases vitally affecting the domestic security.” *Id.* Indeed, while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that “the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution.*” Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (emphasis added); *see also Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring) (“Wiretapping to protect the security of the Nation has been authorized by successive Presidents.”); *cf.* Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence, 103d Cong. 2d Sess. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) (“[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . .”).

The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*”) (emphasis added); *accord, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation).

In *United States v. United States District Court*, 407 U.S. 297 (1972) (the “*Keith*” case), the Supreme Court concluded that the Fourth Amendment’s warrant requirement applies to investigations of wholly *domestic* threats to security—such as domestic political violence and other crimes. But the Court in the *Keith* case made clear that it was not addressing the President’s authority to conduct *foreign* intelligence surveillance without a warrant and that it was expressly reserving that question: “[T]he instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.” *Id.* at 308; *see also id.* at 321-22 & n.20 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”). That *Keith* does not apply in the context of protecting against a foreign attack has been confirmed by the lower courts. After *Keith*, each of the three courts of appeals

that have squarely considered the question have concluded—expressly taking the Supreme Court’s decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g., Truong Dinh Hung*, 629 F.2d at 913-14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425-26.

From a constitutional standpoint, foreign intelligence surveillance such as the NSA activities differs fundamentally from the domestic security surveillance at issue in *Keith*. As the Fourth Circuit observed, the President has uniquely strong constitutional powers in matters pertaining to foreign affairs and national security. “Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs.” *Truong*, 629 F.2d at 914; *see id.* at 913 (noting that “the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities”); *cf. Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).²

The present circumstances that support recognition of the President’s inherent constitutional authority to conduct the NSA activities are considerably stronger than were the circumstances at issue in the earlier courts of appeals cases that recognized this power. All of the cases described above addressed inherent executive authority under the foreign affairs power to conduct surveillance in a peacetime context. The courts in these cases therefore had no occasion even to consider the fundamental authority of the President, as Commander in Chief, to gather intelligence in the context of an ongoing armed conflict in which the United States already had suffered massive civilian casualties and in which the intelligence gathering efforts at issue were specifically designed to thwart further armed attacks. Indeed, intelligence gathering is particularly important in the current conflict, in which the enemy attacks largely through clandestine activities and which, as Congress recognized, “pose[s] an unusual and extraordinary threat,” AUMF pmb1.

Among the President’s most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President’s inherent authority to take action to protect Americans abroad, *see, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g., The Prize Cases*, 67 U.S. at 668. *See generally Ex parte Quirin*, 317 U.S. 1, 28 (1942) (recognizing that

² *Keith* made clear that one of the significant concerns driving the Court’s conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained: “Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’” *Keith*, 407 U.S. at 314; *see also id.* at 320 (“Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.”). Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents.

the President has authority under the Constitution “to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war,” including “important incident[s] to the conduct of war,” such as “the adoption of measures by the military command . . . to repel and defeat the enemy”). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is “bound to resist force by force”; “[h]e must determine what degree of force the crisis demands” and need not await congressional sanction to do so. *The Prize Cases*, 67 U.S. at 670; see also *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (“[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.”); *id.* at 40 (Tatel, J., concurring) (“[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval.”). Indeed, “in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted). In exercising his constitutional powers, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation’s enemies in a time of armed conflict.

II. THE AUMF CONFIRMS AND SUPPLEMENTS THE PRESIDENT’S INHERENT POWER TO USE WARRANTLESS SURVEILLANCE AGAINST THE ENEMY IN THE CURRENT ARMED CONFLICT

In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President’s constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its allies. The broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force. The history of the President’s use of warrantless surveillance during armed conflicts demonstrates that the NSA surveillance described by the President is a fundamental incident of the use of military force that is necessarily included in the AUMF.

A. THE TEXT AND PURPOSE OF THE AUMF AUTHORIZE THE NSA ACTIVITIES

On September 14, 2001, in its first legislative response to the attacks of September 11th, Congress gave its express approval to the President’s military campaign against al Qaeda and, in the process, confirmed the well-accepted understanding of the President’s Article II powers. See AUMF § 2(a).³ In the preamble to the AUMF, Congress stated that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” AUMF pmb., and thereby acknowledged the President’s inherent constitutional authority to defend the United States. This clause “constitutes an extraordinarily

³ America’s military response began before the attacks of September 11th had been completed. See *The 9/11 Commission Report* 20 (2004). Combat air patrols were established and authorized “to engage inbound aircraft if they could verify that the aircraft was hijacked.” *Id.* at 42.

sweeping recognition of independent presidential *constitutional* power to employ the war power to combat terrorism.” Michael Stokes Paulsen, *Youngstown Goes to War*, 19 Const. Comment. 215, 252 (2002). This striking recognition of presidential authority cannot be discounted as the product of excitement in the immediate aftermath of September 11th, for the same terms were repeated by Congress more than a year later in the Authorization for Use of Military Force Against Iraq Resolution of 2002. Pub. L. No. 107-243, pmb1., 116 Stat. 1498, 1500 (Oct. 16, 2002) (“[T]he President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States . . .”). In the context of the conflict with al Qaeda and related terrorist organizations, therefore, Congress has acknowledged a broad executive authority to “deter and prevent” further attacks against the United States.

The AUMF passed by Congress on September 14, 2001, does not lend itself to a narrow reading. Its expansive language authorizes the President “to use *all necessary and appropriate force* against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” AUMF § 2(a) (emphases added). In the field of foreign affairs, and particularly that of war powers and national security, congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the Executive Branch. *See, e.g., Haig v. Agee*, 453 U.S. 280, 293-303 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-45 (1950); *cf. Loving v. United States*, 517 U.S. 748, 772 (1996) (noting that the usual “limitations on delegation [of congressional powers] do not apply” to authorizations linked to the Commander in Chief power); *Dames & Moore v. Regan*, 453 U.S. 654, 678-82 (1981) (even where there is no express statutory authorization for executive action, legislation in related field may be construed to indicate congressional acquiescence in that action). Although Congress’s war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress’s endorsement of the President’s use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called “a zone of twilight,” in which the President and the Congress may have concurrent powers whose “distribution is uncertain,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President’s authority is at its maximum because “it includes all that he possesses in his own right plus all that Congress can delegate,” *id.* at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President’s authority at its zenith under *Youngstown*.

It is also clear that the AUMF confirms and supports the President’s use of those traditional incidents of military force against the enemy, wherever they may be—on United States soil or abroad. The nature of the September 11th attacks—launched on United States soil by foreign agents secreted in the United States—necessitates such authority, and the text of the AUMF confirms it. The operative terms of the AUMF state that the President is authorized to use force “in order to prevent any future acts of international terrorism against the United States,” *id.*, an objective which, given the recent attacks within the Nation’s borders and the continuing use of air defense throughout the country at the time Congress acted, undoubtedly

contemplated the possibility of military action within the United States. The preamble, moreover, recites that the United States should exercise its rights “to protect United States citizens both *at home* and abroad.” *Id.* pmb1. (emphasis added). To take action against those linked to the September 11th attacks involves taking action against individuals within the United States. The United States had been attacked on its own soil—not by aircraft launched from carriers several hundred miles away, but by enemy agents who had resided in the United States for months. A crucial responsibility of the President—charged by the AUMF and the Constitution—was and is to identify and attack those enemies, especially if they were in the United States, ready to strike against the Nation.

The text of the AUMF demonstrates in an additional way that Congress authorized the President to conduct warrantless electronic surveillance against the enemy. The terms of the AUMF not only authorized the President to “use all necessary and appropriate force” against those responsible for the September 11th attacks; it also authorized the President to “determine[]” the persons or groups responsible for those attacks and to take all actions necessary to prevent further attacks. AUMF § 2(a) (“the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons”) (emphasis added). Of vital importance to the use of force against the enemy is locating the enemy and identifying its plans of attack. And of vital importance to identifying the enemy and detecting possible future plots was the authority to intercept communications to or from the United States of persons with links to al Qaeda or related terrorist organizations. Given that the agents who carried out the initial attacks resided in the United States and had successfully blended into American society and disguised their identities and intentions until they were ready to strike, the necessity of using the most effective intelligence gathering tools against such an enemy, including electronic surveillance, was patent. Indeed, Congress recognized that the enemy in this conflict poses an “unusual and extraordinary threat.” AUMF pmb1.

The Supreme Court’s interpretation of the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), strongly supports this reading of the AUMF. In *Hamdi*, five members of the Court found that the AUMF authorized the detention of an American within the United States, notwithstanding a statute that prohibits the detention of U.S. citizens “except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a). See *Hamdi*, 542 U.S. at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Drawing on historical materials and “longstanding law-of-war principles,” *id.* at 518-21, a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization “known to have supported” al Qaeda “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 518; see also *id.* at 587 (Thomas, J., dissenting) (agreeing with the plurality that the joint resolution authorized the President to “detain those arrayed against our troops”); accord *Quirin*, 317 U.S. at 26-29, 38 (recognizing the President’s authority to capture and try agents of the enemy in the United States even if they had never “entered the theatre or zone of active military operations”). Thus, even though the AUMF does not say anything expressly about detention, the Court nevertheless found that it satisfied section 4001(a)’s requirement that detention be congressionally authorized.

The conclusion of five Justices in *Hamdi* that the AUMF incorporates fundamental “incidents” of the use of military force makes clear that the absence of any specific reference to signals intelligence activities in the resolution is immaterial. See *Hamdi*, 542 U.S. at 519 (“[I]t is of no moment that the AUMF does not use specific language of detention.”) (plurality opinion). Indeed, given the circumstances in which the AUMF was adopted, it is hardly surprising that Congress chose to speak about the President’s authority in general terms. The purpose of the AUMF was for Congress to sanction and support the military response to the devastating terrorist attacks that had occurred just three days earlier. Congress evidently thought it neither necessary nor appropriate to attempt to catalog every specific aspect of the use of the forces it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress’s judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.” *Dames & Moore*, 453 U.S. at 678. Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalogue in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President’s core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”).

Hamdi thus establishes the proposition that the AUMF “clearly and unmistakably” authorizes the President to take actions against al Qaeda and related organizations that amount to “fundamental incident[s] of waging war.” *Hamdi*, 542 U.S. at 519 (plurality opinion); see also *id.* at 587 (Thomas, J., dissenting). In other words, “[t]he clear inference is that the AUMF authorizes what the laws of war permit.” Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2092 (2005) (emphasis added). Congress is presumed to be aware of the Supreme Court’s precedents. Indeed, Congress recently enacted legislation in response to the Court’s decision in *Rasul v. Bush*, 542 U.S. 466 (2004)—which was issued the same day as the *Hamdi* decision—removing habeas corpus jurisdiction over claims filed on behalf of confined enemy combatants held at Guantanamo Bay. Congress, however, has not expressed any disapproval of the Supreme Court’s commonsense and plain-meaning interpretation of the AUMF in *Hamdi*.⁴

⁴ This understanding of the AUMF is consistent with Justice O’Connor’s admonition that “a state of war is not a blank check for the President,” *Hamdi*, 542 U.S. at 536 (plurality opinion). In addition to constituting a fundamental and accepted incident of the use of military force, the NSA activities are consistent with the law of armed conflict principle that the use of force be necessary and proportional. See Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 115 (1995). The NSA activities are proportional because they are minimally invasive and narrow in scope, targeting only the international communications of persons reasonably believed to be linked to al Qaeda, and are designed to protect the Nation from a devastating attack.

B. WARRANTLESS ELECTRONIC SURVEILLANCE AIMED AT INTERCEPTING ENEMY COMMUNICATIONS HAS LONG BEEN RECOGNIZED AS A FUNDAMENTAL INCIDENT OF THE USE OF MILITARY FORCE

The history of warfare—including the consistent practice of Presidents since the earliest days of the Republic—demonstrates that warrantless intelligence surveillance against the enemy is a fundamental incident of the use of military force, and this history confirms the statutory authority provided by the AUMF. Electronic surveillance is a fundamental tool of war that must be included in any natural reading of the AUMF’s authorization to use “all necessary and appropriate force.”

As one author has explained:

It is *essential* in warfare for a belligerent to be as fully informed as possible about the enemy—his strength, his weaknesses, measures taken by him and measures contemplated by him. This applies not only to military matters, but . . . anything which bears on and is material to his ability to wage the war in which he is engaged. *The laws of war recognize and sanction this aspect of warfare.*

Morris Greenspan, *The Modern Law of Land Warfare* 325 (1959) (emphases added); *see also* Memorandum for Members of the House Permanent Select Comm. on Intel., from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* 6 (Jan. 3, 2006) (“Certainly, the collection of intelligence is understood to be necessary to the execution of the war.”). Similarly, article 24 of the Hague Regulations of 1907 expressly states that “the employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible.” *See also* L. Oppenheim, *International Law* vol. II § 159 (7th ed. 1952) (“War cannot be waged without all kinds of information, about the forces and the intentions of the enemy To obtain the necessary information, it has always been considered lawful to employ spies”); Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) (“Every belligerent has a right . . . to discover the signals of the enemy and . . . to seek to procure information regarding the enemy through the aid of secret agents.”); *cf.* J.M. Spaight, *War Rights on Land* 205 (1911) (“[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever. . . . Spies . . . are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service.”) (internal quotation marks omitted).

In accordance with these well-established principles, the Supreme Court has consistently recognized the President’s authority to conduct intelligence activities. *See, e.g., Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President’s authority to hire spies); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (The President “has his confidential sources of information. He has his agents in the form of diplomatic,

consular, and other officials.”). Chief Justice John Marshall even described the gathering of intelligence as a military duty. *See Tatum v. Laird*, 444 F.2d 947, 952-53 (D.C. Cir. 1971) (“As Chief Justice John Marshall said of Washington, ‘A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information’”) (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), *rev’d on other grounds*, 408 U.S. 1 (1972).

The United States, furthermore, has a long history of wartime surveillance—a history that can be traced to George Washington, who “was a master of military espionage” and “made frequent and effective use of secret intelligence in the second half of the eighteenth century.” Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence* 11 (2002); *see generally id.* at 11-23 (recounting Washington’s use of intelligence); *see also Haig v. Agee*, 471 U.S. 159, 172 n.16 (1981) (quoting General Washington’s letter to an agent embarking upon an intelligence mission in 1777: “The necessity of procuring good intelligence, is apparent and need not be further urged.”). As President in 1790, Washington obtained from Congress a “secret fund” to deal with foreign dangers and to be spent at his discretion. Jeffreys-Jones, *supra*, at 22. The fund, which remained in use until the creation of the Central Intelligence Agency in the mid-twentieth century and gained “longstanding acceptance within our constitutional structure,” *Halperin v. CIA*, 629 F.2d 144, 158-59 (D.C. Cir. 1980), was used “for all purposes to which a secret service fund should or could be applied for the public benefit,” including “for persons sent publicly and secretly to search for important information, political or commercial,” *id.* at 159 (quoting Statement of Senator John Forsyth, Cong. Debates 295 (Feb. 25, 1831)). *See also Totten*, 92 U.S. at 107 (refusing to examine payments from this fund lest the publicity make a “secret service” “impossible”).

The interception of communications, in particular, has long been accepted as a fundamental method for conducting wartime surveillance. *See, e.g., Greenspan, supra*, at 326 (accepted and customary means for gathering intelligence “include air reconnaissance and photography; ground reconnaissance; observation of enemy positions; *interception of enemy messages, wireless and other*; examination of captured documents; . . . and interrogation of prisoners and civilian inhabitants”) (emphasis added). Indeed, since its independence, the United States has intercepted communications for wartime intelligence purposes and, if necessary, has done so within its own borders. During the Revolutionary War, for example, George Washington received and used to his advantage reports from American intelligence agents on British military strength, British strategic intentions, and British estimates of American strength. *See Jeffreys-Jones, supra*, at 13. One source of Washington’s intelligence was intercepted British mail. *See Central Intelligence Agency, Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his Generals “contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on.” *Id.* at 32 (“From that point on, Washington was privy to British intelligence pouches between New York and Canada.”); *see generally* Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (the “Church Committee”), S. Rep. No. 94-755, at Book VI, 9-17 (Apr. 23, 1976) (describing Washington’s intelligence activities).

More specifically, warrantless electronic surveillance of wartime communications has been conducted in the United States since electronic communications have existed, *i.e.*, since at least the Civil War, when “[t]elegraph wiretapping was common, and an important intelligence source for both sides.” G.J.A. O’Toole, *The Encyclopedia of American Intelligence and Espionage* 498 (1988). Confederate General J.E.B. Stuart even “had his own personal wiretapper travel along with him in the field” to intercept military telegraphic communications. Samuel Dash, et al., *The Eavesdroppers* 23 (1971); *see also* O’Toole, *supra*, at 121, 385-88, 496-98 (discussing Civil War surveillance methods such as wiretaps, reconnaissance balloons, semaphore interception, and cryptanalysis). Similarly, there was extensive use of electronic surveillance during the Spanish-American War. *See* Bruce W. Bidwell, *History of the Military Intelligence Division, Department of the Army General Staff: 1775-1941*, at 62 (1986). When an American expeditionary force crossed into northern Mexico to confront the forces of Pancho Villa in 1916, the Army “frequently intercepted messages of the regime in Mexico City or the forces contesting its rule.” David Alvarez, *Secret Messages* 6-7 (2000). Shortly after Congress declared war on Germany in World War I, President Wilson (citing only his constitutional powers and the joint resolution declaring war) ordered the censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines. *See* Exec. Order No. 2604 (Apr. 28, 1917). During that war, wireless telegraphy “enabled each belligerent to tap the messages of the enemy.” Bidwell, *supra*, at 165 (quoting statement of Col. W. Nicolai, former head of the Secret Service of the High Command of the German Army, *in* W. Nicolai, *The German Secret Service* 21 (1924)).

As noted in Part I, on May 21, 1940, President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities, including spying, against the United States. In addition, on December 8, 1941, the day after the attack on Pearl Harbor, President Roosevelt gave the Director of the FBI “temporary powers to direct all news censorship and to *control all other telecommunications traffic* in and out of the United States.” Jack A. Gottschalk, “*Consistent with Security*” . . . *A History of American Military Press Censorship*, 5 *Comm. & L.* 35, 39 (1983) (emphasis added). *See* Memorandum for the Secretaries of War, Navy, State, and Treasury, the Postmaster General, and the Federal Communications Commission from Franklin D. Roosevelt (Dec. 8, 1941). President Roosevelt soon supplanted that temporary regime by establishing an office for conducting such electronic surveillance in accordance with the War Powers Act of 1941. *See* Pub. L. No. 77-354, § 303, 55 Stat. 838, 840-41 (Dec. 18, 1941); Gottschalk, 5 *Comm. & L.* at 40. The President’s order gave the Government of the United States access to “communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country.” *Id.* *See also* Exec. Order No. 8985, § 1, 6 Fed. Reg. 6625, 6625 (Dec. 19, 1941). In addition, the United States systematically listened surreptitiously to electronic communications as part of the war effort. *See* Dash, *Eavesdroppers* at 30. During World War II, signals intelligence assisted in, among other things, the destruction of the German U-boat fleet by the Allied naval forces, *see id.* at 27, and the war against Japan, *see* O’Toole, *supra*, at 32, 323-24. In general, signals intelligence “helped to shorten the war by perhaps two years, reduce the loss of life, and make inevitable an eventual Allied victory.” Carl Boyd, *American Command of the Sea Through Carriers, Codes, and the Silent Service: World War II and Beyond* 27 (1995); *see also* Alvarez, *supra*, at 1 (“There can be little doubt that signals intelligence contributed significantly to the

military defeat of the Axis.”). Significantly, not only was wiretapping in World War II used “extensively by military intelligence and secret service personnel in combat areas abroad,” but also “by the FBI and secret service in this country.” Dash, *supra*, at 30.

In light of the long history of prior wartime practice, the NSA activities fit squarely within the sweeping terms of the AUMF. The use of signals intelligence to identify and pinpoint the enemy is a traditional component of wartime military operations—or, to use the terminology of *Hamdi*, a “fundamental and accepted . . . incident to war,” 542 U.S. at 518 (plurality opinion)—employed to defeat the enemy and to prevent enemy attacks in the United States. Here, as in other conflicts, the enemy may use public communications networks, and some of the enemy may already be in the United States. Although those factors may be present in this conflict to a greater degree than in the past, neither is novel. Certainly, both factors were well known at the time Congress enacted the AUMF. Wartime interception of international communications made by the enemy thus should be understood, no less than the wartime detention at issue in *Hamdi*, as one of the basic methods of engaging and defeating the enemy that Congress authorized in approving “*all* necessary and appropriate force” that the President would need to defend the Nation. AUMF § 2(a) (emphasis added).

* * *

Accordingly, the President has the authority to conduct warrantless electronic surveillance against the declared enemy of the United States in a time of armed conflict. That authority derives from the Constitution, and is reinforced by the text and purpose of the AUMF, the nature of the threat posed by al Qaeda that Congress authorized the President to repel, and the long-established understanding that electronic surveillance is a fundamental incident of the use of military force. The President’s power in authorizing the NSA activities is at its zenith because he has acted “pursuant to an express or implied authorization of Congress.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

III. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The President’s exercise of his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy, as confirmed and supplemented by statute in the AUMF, is fully consistent with the requirements of the Foreign Intelligence Surveillance Act (“FISA”).⁵ FISA is a critically important tool in the War on Terror. The United States makes full use of the authorities available under FISA to gather foreign intelligence information, including authorities to intercept communications, conduct physical searches, and install and use pen registers and trap and trace devices. While FISA establishes certain procedures that must be followed for these authorities to be used (procedures that usually involve applying for and obtaining an order from a special court), FISA also expressly contemplates that a later legislative enactment could

⁵ To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute “electronic surveillance,” as defined by FISA, 50 U.S.C. § 1801(f).

authorize electronic surveillance outside the procedures set forth in FISA itself. The AUMF constitutes precisely such an enactment. To the extent there is any ambiguity on this point, the canon of constitutional avoidance requires that such ambiguity be resolved in favor of the President's authority to conduct the communications intelligence activities he has described. Finally, if FISA could not be read to allow the President to authorize the NSA activities during the current congressionally authorized armed conflict with al Qaeda, FISA would be unconstitutional as applied in this narrow context.

A. THE REQUIREMENTS OF FISA

FISA was enacted in 1978 to regulate "electronic surveillance," particularly when conducted to obtain "foreign intelligence information," as those terms are defined in section 101 of FISA, 50 U.S.C. § 1801. As a general matter, the statute requires that the Attorney General approve an application for an order from a special court composed of Article III judges and created by FISA—the Foreign Intelligence Surveillance Court ("FISC"). *See* 50 U.S.C. §§ 1803-1804. The application must demonstrate, among other things, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. *See id.* § 1805(a)(3)(A). It must also contain a certification from the Assistant to the President for National Security Affairs or an officer of the United States appointed by the President with the advice and consent of the Senate and having responsibilities in the area of national security or defense that the information sought is foreign intelligence information and cannot reasonably be obtained by normal investigative means. *See id.* § 1804(a)(7). FISA further requires the Government to state the means that it proposes to use to obtain the information and the basis for its belief that the facilities at which the surveillance will be directed are being used or are about to be used by a foreign power or an agent of a foreign power. *See id.* § 1804(a)(4), (a)(8).

FISA was the first congressional measure that sought to impose restrictions on the Executive Branch's authority to engage in electronic surveillance for foreign intelligence purposes, an authority that, as noted above, had been repeatedly recognized by the federal courts. *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Penn. L. Rev. 793, 810 (1989) (stating that the "status of the President's inherent authority" to conduct surveillance "formed the core of subsequent legislative deliberations" leading to the enactment of FISA). To that end, FISA modified a provision in Title III that previously had disclaimed any intent to have laws governing wiretapping interfere with the President's constitutional authority to gather foreign intelligence. Prior to the passage of FISA, section 2511(3) of title 18 had stated that "[n]othing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3) (1970). FISA replaced that provision with an important, though more limited, preservation of authority for the President. *See* Pub. L. No. 95-511, § 201(b), (c), 92 Stat. 1783, 1797 (1978), codified at 18 U.S.C. § 2511(2)(f) (West Supp. 2005) (carving out from statutory regulation only the acquisition of intelligence information from "international or foreign communications" and

“foreign intelligence activities . . . involving a foreign electronic communications system” as long as they are accomplished “utilizing a means other than electronic surveillance as defined in section 101” of FISA). Congress also defined “electronic surveillance,” 50 U.S.C. § 1801(f), carefully and somewhat narrowly.⁶

In addition, Congress addressed, to some degree, the manner in which FISA might apply after a formal declaration of war by expressly allowing warrantless surveillance for a period of fifteen days following such a declaration. Section 111 of FISA allows the President to “authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.” 50 U.S.C. § 1811.

The legislative history of FISA shows that Congress understood it was legislating on fragile constitutional ground and was pressing or even exceeding constitutional limits in regulating the President’s authority in the field of foreign intelligence. The final House Conference Report, for example, recognized that the statute’s restrictions might well impermissibly infringe on the President’s constitutional powers. That report includes the extraordinary acknowledgment that “[t]he conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court.” H.R. Conf. Rep. No. 95-1720, at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. But, invoking Justice Jackson’s concurrence in the *Steel Seizure* case, the Conference Report explained that Congress intended in FISA to exert whatever power Congress constitutionally had over the subject matter to restrict foreign intelligence surveillance and to leave the President solely with whatever inherent constitutional authority he might be able to invoke against Congress’s express wishes. *Id.* The Report thus explains that “[t]he intent of the conferees is to apply the standard set forth in Justice Jackson’s concurring opinion in the *Steel Seizure* Case: ‘When a President takes measures incompatible with the express or implied

⁶ FISA’s legislative history reveals that these provisions were intended to exclude certain intelligence activities conducted by the National Security Agency from the coverage of FISA. According to the report of the Senate Judiciary Committee on FISA, “this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States.” S. Rep. No. 95-604, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of “electronic surveillance” was crafted for the same reason. *See id.* at 33-34, 1978 U.S.C.C.A.N. at 3934-36. FISA thereby “adopts the view expressed by the Attorney General during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation.” *Id.* at 64, 1978 U.S.C.C.A.N. at 3965. Such legislation placing limitations on traditional NSA activities was drafted, but never passed. *See* National Intelligence Reorganization and Reform Act of 1978: Hearings Before the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 999-1007 (1978) (text of unenacted legislation). And Congress understood that the NSA surveillance that it intended categorically to exclude from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The report specifically referred to the Church Committee report for its description of the NSA’s activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965-66 n.63, which stated that “the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans” S. Rep. 94-755, at Book II, 308 (1976). Congress’s understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures is notable.

will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.” *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Rep. No. 95-604, at 64, *reprinted in* 1978 U.S.C.C.A.N. at 3966 (same); *see generally* Elizabeth B. Bazem et al., Congressional Research Service, *Re: Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 28-29 (Jan. 5, 2006). It is significant, however, that Congress did not decide conclusively to continue to push the boundaries of its constitutional authority in wartime. Instead, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA’s express procedures and during which Congress would have the opportunity to revisit the issue. *See* 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to “allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency”).

B. FISA CONTEMPLATES AND ALLOWS SURVEILLANCE AUTHORIZED “BY STATUTE”

Congress did not attempt through FISA to prohibit the Executive Branch from using electronic surveillance. Instead, Congress acted to bring the exercise of that power under more stringent congressional control. *See, e.g.*, H. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. Congress therefore enacted a regime intended to supplant the President’s reliance on his own constitutional authority. Consistent with this overriding purpose of bringing the use of electronic surveillance under *congressional* control and with the commonsense notion that the Congress that enacted FISA could not bind future Congresses, FISA expressly contemplates that the Executive Branch may conduct electronic surveillance outside FISA’s express procedures if and when a subsequent statute authorizes such surveillance.

Thus, section 109 of FISA prohibits any person from intentionally “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*” 50 U.S.C. § 1809(a)(1) (emphasis added). Because FISA’s prohibitory provision broadly exempts surveillance “authorized by statute,” the provision demonstrates that Congress did not attempt to regulate through FISA electronic surveillance authorized by Congress through a subsequent enactment. The use of the term “statute” here is significant because it strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA’s standard procedural requirements. *Compare* 18 U.S.C. § 2511(1) (“Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished”) (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals “conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*”) (emphasis added). In enacting FISA, therefore, Congress contemplated the possibility that the President might be permitted to conduct electronic surveillance pursuant to a later-enacted statute that did not

incorporate all of the procedural requirements set forth in FISA or that did not expressly amend FISA itself.

To be sure, the scope of this exception is rendered less clear by the conforming amendments that FISA made to chapter 119 of title 18—the portion of the criminal code that provides the mechanism for obtaining wiretaps for law enforcement purposes. Before FISA was enacted, chapter 119 made it a criminal offense for any person to intercept a communication except as specifically provided in that chapter. *See* 18 U.S.C. § 2511(1)(a), (4)(a). Section 201(b) of FISA amended that chapter to provide an exception from criminal liability for activities conducted pursuant to FISA. Specifically, FISA added 18 U.S.C. § 2511(2)(e), which provides that it is not unlawful for “an officer, employee, or agent of the United States . . . to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.” *Id.* § 2511(2)(e). Similarly, section 201(b) of FISA amended chapter 119 to provide that “procedures in this chapter [or chapter 121 (addressing access to stored wire and electronic communications and customer records)] and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.” *Id.* § 2511(2)(f) (West Supp. 2005).⁷

The amendments that section 201(b) of FISA made to title 18 are fully consistent, however, with the conclusion that FISA contemplates that a subsequent statute could authorize electronic surveillance outside FISA’s express procedural requirements. Section 2511(2)(e) of title 18, which provides that it is “not unlawful” for an officer of the United States to conduct electronic surveillance “as authorized by” FISA, is best understood as a safe-harbor provision. Because of section 109, the protection offered by section 2511(2)(e) for surveillance “authorized by” FISA extends to surveillance that is authorized by any other statute and therefore excepted from the prohibition of section 109. In any event, the purpose of section 2511(2)(e) is merely to make explicit what would already have been implicit—that those authorized by statute to engage in particular surveillance do not act unlawfully when they conduct such surveillance. Thus, even if that provision had not been enacted, an officer conducting surveillance authorized by statute (whether FISA or some other law) could not reasonably have been thought to be violating Title III. Similarly, section 2511(2)(e) cannot be read to require a result that would be manifestly unreasonable—exposing a federal officer to criminal liability for engaging in surveillance authorized by statute, merely because the authorizing statute happens not to be FISA itself.

Nor could 18 U.S.C. § 2511(2)(f), which provides that the “procedures in this chapter . . . and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . may be conducted,” have been intended to trump the commonsense approach of section 109 and preclude a subsequent Congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as

⁷ The bracketed portion was added in 1986 amendments to section 2511(2)(f). *See* Pub. L. No. 99-508 § 101(b)(3), 100 Stat. 1848, 1850.

authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)'s reference to "exclusive means" reflected the state of statutory authority for electronic surveillance in 1978 and cautioned the President not to engage in electronic surveillance outside congressionally sanctioned parameters. It is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent Congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "one legislature cannot abridge the powers of a succeeding legislature"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); *Lockhart v. United States*, 126 S. Ct. 699, 703 (2005) (Scalia, J., concurring) (collecting precedent); 1 W. Blackstone, *Commentaries on the Laws of England* 90 (1765) ("Acts of parliament derogatory from the power of subsequent parliaments bind not"). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way.

Far from a clear statement of congressional intent to bind itself, there are indications that section 2511(2)(f) cannot be interpreted as requiring that *all* electronic surveillance and domestic interception be conducted under FISA's enumerated procedures or those of chapter 119 of title 18 until and unless those provisions are repealed or amended. Even when section 2511(2)(f) was enacted (and no subsequent authorizing statute existed), it could not reasonably be read to preclude all electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. New York Tel. Co.*, 434 U.S. 159, 165-68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the "exclusive" procedures of section 2511(2)(f), *i.e.*, FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context. Indeed, FISA appears to have recognized this issue by providing a defense to liability for any official who engages in electronic surveillance under a search warrant or court order. *See* 50 U.S.C. § 1809(b). (The practice when FISA was enacted was for law enforcement officers to obtain search warrants under the Federal Rules of Criminal Procedure authorizing the installation and use of pen registers. *See S. 1667, A Bill to Amend Title 18, United States Code, with Respect to the Interception of Certain Communications, Other Forms of Surveillance, and for Other Purposes: Hearing Before the Subcomm. On Patents, Copyrights and Trademarks of the Senate*

Comm. on the Judiciary, 99th Cong. 57 (1985) (prepared statement of James Knapp, Deputy Assistant Attorney General, Criminal Division)).⁸

In addition, section 2511(2)(a)(ii) authorizes telecommunications providers to assist officers of the Government engaged in electronic surveillance when the Attorney General certifies that “no warrant or court order is required by law [and] that all statutory requirements have been met.” 18 U.S.C. § 2511(2)(a)(ii).⁹ If the Attorney General can certify, in good faith, that the requirements of a subsequent statute authorizing electronic surveillance are met, service providers are affirmatively and expressly authorized to assist the Government. Although FISA does allow the Government to proceed without a court order in several situations, *see* 50 U.S.C. § 1805(f) (emergencies); *id.* § 1802 (certain communications between foreign governments), this provision specifically lists only Title III’s emergency provision but speaks generally to Attorney General certification. That reference to Attorney General certification is consistent with the historical practice in which Presidents have delegated to the Attorney General authority to approve warrantless surveillance for foreign intelligence purposes. *See, e.g., United States v. United States District Court*, 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). Section 2511(2)(a)(ii) thus suggests that telecommunications providers can be authorized to assist with warrantless electronic surveillance when such surveillance is authorized by law outside FISA.

In sum, by expressly and broadly excepting from its prohibition electronic surveillance undertaken “as authorized by statute,” section 109 of FISA permits an exception to the “procedures” of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f).

C. THE AUMF IS A “STATUTE” AUTHORIZING SURVEILLANCE OUTSIDE THE CONFINES OF FISA

The AUMF qualifies as a “statute” authorizing electronic surveillance within the meaning of section 109 of FISA.

First, because the term “statute” historically has been given broad meaning, the phrase “authorized by statute” in section 109 of FISA must be read to include joint resolutions such as

⁸ Alternatively, section 109(b) may be read to constitute a “procedure” in FISA or to incorporate procedures from sources other than FISA (such as the Federal Rules of Criminal Procedure or state court procedures), and in that way to satisfy section 2511(2)(f). But if section 109(b)’s defense can be so read, section 109(a) should also be read to constitute a procedure or incorporate procedures not expressly enumerated in FISA.

⁹ Section 2511(2)(a)(ii) states:

Notwithstanding any other law, providers of wire or electronic communication service, . . . are authorized by law to provide information, facilities, or technical assistance to persons authorized by law to intercept . . . communications or to conduct electronic surveillance, as defined [by FISA], if such provider . . . has been provided with . . . a certification in writing by [specified persons proceeding under Title III’s emergency provision] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

the AUMF. See *American Fed'n of Labor v. Watson*, 327 U. S. 582, 592-93 (1946) (finding the term “statute” as used in 28 U.S.C. § 380 to mean “a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction”); Black’s Law Dictionary 1410 (6th ed. 1990) (defining “statute” broadly to include any “formal written enactment of a legislative body,” and stating that the term is used “to designate the legislatively created laws in contradistinction to court decided or unwritten laws”). It is thus of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill. See, e.g., *Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (joint resolutions are to be construed by applying “the rules applicable to legislation in general”); *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889) (joint resolution had “all the characteristics and effects” of statute that it suspended); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002) (in analyzing the AUMF, finding that there is “no relevant constitutional difference between a bill and a joint resolution”), *rev’d sub nom. on other grounds, Rumsfeld v. Padilla*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 542 U.S. 426 (2004); see also Letter for the Hon. John Conyers, Jr., U.S. House of Representatives, from Prof. Laurence H. Tribe at 3 (Jan. 6, 2006) (term “statute” in section 109 of FISA “of course encompasses a joint resolution presented to and signed by the President”).

Second, the longstanding history of communications intelligence as a fundamental incident of the use of force and the Supreme Court’s decision in *Hamdi v. Rumsfeld* strongly suggest that the AUMF satisfies the requirement of section 109 of FISA for statutory authorization of electronic surveillance. As explained above, it is not necessary to demarcate the outer limits of the AUMF to conclude that it encompasses electronic surveillance targeted at the enemy. Just as a majority of the Court concluded in *Hamdi* that the AUMF authorizes detention of U.S. citizens who are enemy combatants without expressly mentioning the President’s long-recognized power to detain, so too does it authorize the use of electronic surveillance without specifically mentioning the President’s equally long-recognized power to engage in communications intelligence targeted at the enemy. And just as the AUMF satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained “except pursuant to an Act of Congress,” so too does it satisfy section 109’s requirement for statutory authorization of electronic surveillance.¹⁰ In authorizing the President’s use of force in response to the September 11th attacks, Congress did not need to comb through the United States Code looking for those restrictions that it had placed on national security operations during times of peace and designate with specificity each traditional tool of military force that it sought to authorize the President to use. There is no historical precedent for such a requirement: authorizations to use

¹⁰ It might be argued that Congress dealt more comprehensively with electronic surveillance in FISA than it did with detention in 18 U.S.C. § 4001(a). Thus, although Congress prohibited detention “except pursuant to an Act of Congress,” it combined the analogous prohibition in FISA (section 109(n)) with section 2511(2)(f)’s exclusivity provision. See Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* at 5 n.6 (Jan. 9, 2006) (noting that section 4001(a) does not “attempt[] to create an exclusive mechanism for detention”). On closer examination, however, it is evident that Congress has regulated detention far more meticulously than these arguments suggest. Detention is the topic of much of the Criminal Code, as well as a variety of other statutes, including those providing for civil commitment of the mentally ill and confinement of alien terrorists. The existence of these statutes and accompanying extensive procedural safeguards, combined with the substantial constitutional issues inherent in detention, see, e.g., *Hamdi*, 542 U.S. at 574-75 (Scalia, J., dissenting), refute any such argument.

military force traditionally have been couched in general language. Indeed, prior administrations have interpreted joint resolutions declaring war and authorizing the use of military force to authorize expansive collection of communications into and out of the United States.¹¹

Moreover, crucial to the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack is the fact that the Executive can act quickly, decisively, and flexibly as needed. For Congress to have a role in that process, it must be able to act with similar speed, either to lend its support to, or to signal its disagreement with, proposed military action. Yet the need for prompt decisionmaking in the wake of a devastating attack on the United States is fundamentally inconsistent with the notion that to do so Congress must legislate at a level of detail more in keeping with a peacetime budget reconciliation bill. In emergency situations, Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force. That is precisely what Congress did when it passed the AUMF on September 14, 2001—just three days after the deadly attacks on America. The Capitol had been evacuated on September 11th, and Congress was meeting in scattered locations. As an account emerged of who might be responsible for these attacks, Congress acted quickly to authorize the President to use “all necessary and appropriate force” against the enemy that he determines was involved in the September 11th attacks. Under these circumstances, it would be unreasonable and wholly impractical to demand that Congress specifically amend FISA in order to assist the President in defending the Nation. Such specificity would also have been self-defeating because it would have apprised our adversaries of some of our most sensitive methods of intelligence gathering.¹²

Section 111 of FISA, 50 U.S.C. § 1811, which authorizes the President, “[n]otwithstanding any other law,” to conduct “electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress,” does not require a different reading of the AUMF. *See also id.* § 1844 (same provision for pen registers); *id.* § 1829 (same provision for physical searches). Section 111 cannot reasonably be read as Congress's final word on electronic surveillance during wartime, thus permanently limiting the President in all

¹¹ As noted above, in intercepting communications, President Wilson relied on his constitutional authority and the joint resolution declaring war and authorizing the use of military force, which, as relevant here, provided “that the President [is] authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.” Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1. The authorization did not explicitly mention interception of communications.

¹² Some have suggested that the Administration declined to seek a specific amendment to FISA allowing the NSA activities “because it was advised that Congress would reject such an amendment,” Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* 4 & n.4 (Jan. 9, 2005), and they have quoted in support of that assertion the Attorney General's statement that certain Members of Congress advised the Administration that legislative relief “would be difficult, if not impossible.” *Id.* at 4 n.4. As the Attorney General subsequently indicated, however, the difficulty with such specific legislation was that it could not be enacted “without compromising the program.” *See* Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act (Dec. 21, 2005), available at <http://www.dhs.gov/dhspublic/display?content=5285>.

circumstances to a mere fifteen days of warrantless military intelligence gathering targeted at the enemy following a declaration of war. Rather, section 111 represents Congress's recognition that it would likely have to return to the subject and provide additional authorization to conduct warrantless electronic surveillance outside FISA during time of war. The Conference Report explicitly stated the conferees' "inten[t] that this [fifteen-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063. Congress enacted section 111 so that the President could conduct warrantless surveillance while Congress considered supplemental wartime legislation.

Nothing in the terms of section 111 disables Congress from authorizing such electronic surveillance as a traditional incident of war through a broad, conflict-specific authorization for the use of military force, such as the AUMF. Although the legislative history of section 111 indicates that in 1978 some Members of Congress believed that any such authorization would come in the form of a particularized amendment to FISA itself, section 111 does not require that result. Nor could the Ninety-Fifth Congress tie the hands of a subsequent Congress in this way, at least in the absence of far clearer statutory language expressly requiring that result. *See supra*, pp. 21-22; *compare, e.g.*, War Powers Resolution, § 8, 50 U.S.C. § 1547(a) ("Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes [such] introduction . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter."); 10 U.S.C. § 401 (stating that any other provision of law providing assistance to foreign countries to detect and clear landmines shall be subject to specific limitations and may be construed as superseding such limitations "only if, and to the extent that, such provision specifically refers to this section and specifically identifies the provision of this section that is to be considered superseded or otherwise inapplicable"). An interpretation of section 111 that would disable Congress from authorizing broader electronic surveillance in that form can be reconciled neither with the purposes of section 111 nor with the well-established proposition that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 135; *see supra* Part II.B. For these reasons, the better interpretation is that section 111 was not intended to, and did not, foreclose Congress from using the AUMF as the legal vehicle for supplementing the President's existing authority under FISA in the battle against al Qaeda.

The contrary interpretation of section 111 also ignores the important differences between a formal declaration of war and a resolution such as the AUMF. As a historical matter, a formal declaration of war was no longer than a sentence, and thus Congress would not expect a declaration of war to outline the extent to which Congress authorized the President to engage in various incidents of waging war. Authorizations for the use of military force, by contrast, are typically more detailed and are made for the *specific purpose* of reciting the manner in which Congress has authorized the President to act. Thus, Congress could reasonably expect that an authorization for the use of military force would address the issue of wartime surveillance, while a declaration of war would not. Here, the AUMF declares that the Nation faces "an unusual and extraordinary threat," acknowledges that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and

provides that the President is authorized “to use all necessary and appropriate force” against those “he determines” are linked to the September 11th attacks. AUMF pmbl., § 2. This sweeping language goes far beyond the bare terms of a declaration of war. *Compare, e.g.*, Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (“First. That war be, and the same is hereby declared to exist . . . between the United States of America and the Kingdom of Spain.”).

Although legislation that has included a declaration of war has often also included an authorization of the President to use force, these provisions are separate and need not be combined in a single statute. *See, e.g., id.* (“Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, *to such extent as may be necessary to carry this Act into effect.*”) (emphasis added). Moreover, declarations of war have legal significance independent of any additional authorization of force that might follow. *See, e.g.*, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 75 (2d ed. 1996) (explaining that a formal state of war has various legal effects, such as terminating diplomatic relations, and abrogating or suspending treaty obligations and international law rights and duties); *see also id.* at 370 n.65 (speculating that one reason to fight an undeclared war would be to “avoid the traditional consequences of declared war on relations with third nations or even . . . belligerents”).

In addition, section 111 does not cover the vast majority of modern military conflicts. The last declared war was World War II. Indeed, the most recent conflict prior to the passage of FISA, Vietnam, was fought without a formal declaration of war. In addition, the War Powers Resolution, enacted less than five years before FISA, clearly recognizes the distinctions between formal declarations of war and authorizations of force and demonstrates that, if Congress had wanted to include such authorizations in section 111, it knew how to do so. *See, e.g.*, 50 U.S.C. § 1544(b) (attempting to impose certain consequences 60 days after reporting the initiation of hostilities to Congress “unless the Congress . . . has declared war *or has enacted a specific authorization for such use*” of military force) (emphasis added). It is possible that, in enacting section 111, Congress intended to make no provision for even the temporary use of electronic surveillance without a court order for what had become the legal regime for most military conflicts. A better reading, however, is that Congress assumed that such a default provision would be unnecessary because, if it had acted through an authorization for the use of military force, the more detailed provisions of that authorization would resolve the extent to which Congress would attempt to authorize, or withhold authorization for, the use of electronic surveillance.¹³

¹³ Some have pointed to the specific amendments to FISA that Congress made shortly after September 11th in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 204, 218, 115 Stat. 272, 281, 291 (2001), to argue that Congress did not contemplate electronic surveillance outside the parameters of FISA. *See Memorandum for Members of the House Permanent Select Comm. on Intel. from Jeffrey H. Smith, Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons 6-7* (Jan. 3, 2006). The USA PATRIOT Act amendments, however, do not justify giving the AUMF an unnaturally narrow reading. The USA PATRIOT Act amendments made important corrections in the general application of FISA; they were not intended to define the precise incidents of military force that would be available to the President in prosecuting the current armed conflict against al Qaeda and its allies. Many removed long-standing impediments to the effectiveness of FISA that had contributed to the

* * *

The broad text of the AUMF, the authoritative interpretation that the Supreme Court gave it in *Hamdi*, and the circumstances in which it was passed demonstrate that the AUMF is a statute authorizing electronic surveillance under section 109 of FISA. When the President authorizes electronic surveillance against the enemy pursuant to the AUMF, he is therefore acting at the height of his authority under *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

D. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES RESOLVING IN FAVOR OF THE PRESIDENT'S AUTHORITY ANY AMBIGUITY ABOUT WHETHER FISA FORBIDS THE NSA ACTIVITIES

As explained above, the AUMF fully authorizes the NSA activities. Because FISA contemplates the possibility that subsequent statutes could authorize electronic surveillance without requiring FISA's standard procedures, the NSA activities are also consistent with FISA and related provisions in title 18. Nevertheless, some might argue that sections 109 and 111 of FISA, along with section 2511(2)(f)'s "exclusivity" provision and section 2511(2)(e)'s liability exception for officers engaged in FISA-authorized surveillance, are best read to suggest that FISA requires that subsequent authorizing legislation specifically amend FISA in order to free the Executive from FISA's enumerated procedures. As detailed above, this is not the better reading of FISA. But even if these provisions were ambiguous, any doubt as to whether the AUMF and FISA should be understood to allow the President to make tactical military decisions to authorize surveillance outside the parameters of FISA must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise.

It is well established that the first task of any interpreter faced with a statute that may present an unconstitutional infringement on the powers of the President is to determine whether the statute may be construed to avoid the constitutional difficulty. "[I]f an otherwise acceptable

maintenance of an unnecessary "wall" between foreign intelligence gathering and criminal law enforcement; others were technical clarifications. See *In re Sealed Case*, 310 F.3d 717, 725-30 (Foreign Int. Surv. Ct. Rev. 2002). The "wall" had been identified as a significant problem hampering the Government's efficient use of foreign intelligence information well before the September 11th attacks and in contexts unrelated to terrorism. See, e.g., *Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* 710, 729, 732 (May 2000); General Accounting Office, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited* (GAO-01-780) 3, 31 (July 2001). Finally, it is worth noting that Justice Souter made a similar argument in *Hamdi* that the USA PATRIOT Act all but compelled a narrow reading of the AUMF. See 542 U.S. at 551 ("It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil [in the USA PATRIOT Act] would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado."). Only Justice Ginsburg joined this opinion, and the position was rejected by a majority of Justices.

Nor do later amendments to FISA undermine the conclusion that the AUMF authorizes electronic surveillance outside the procedures of FISA. Three months after the enactment of the AUMF, Congress enacted certain "technical amendments" to FISA which, *inter alia*, extended the time during which the Attorney General may issue an emergency authorization of electronic surveillance from 24 to 72 hours. See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314, 115 Stat. 1394, 1402 (2001). These modifications to FISA do not in any way undermine Congress's previous authorization in the AUMF for the President to engage in electronic surveillance outside the parameters of FISA in the specific context of the armed conflict with al Qaeda.

construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Moreover, the canon of constitutional avoidance has particular importance in the realm of national security, where the President’s constitutional authority is at its highest. See *Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing “[s]uper-strong rule against congressional interference with the President’s authority over foreign affairs and national security”). Thus, courts and the Executive Branch typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President’s Commander in Chief powers.

Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President’s exercise of his constitutionally assigned duties as Commander in Chief. Constitutional avoidance principles require interpreting FISA, at least in the context of the military conflict authorized by the AUMF, to avoid these questions, if “fairly possible.” Even if Congress intended FISA to use the full extent of its constitutional authority to “occupy the field” of “electronic surveillance,” as FISA used that term, during peacetime, the legislative history indicates that Congress had not reached a definitive conclusion about its regulation during wartime. See H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to “allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency”). Therefore, it is not clear that Congress, in fact, intended to test the limits of its constitutional authority in the context of wartime electronic surveillance.

Whether Congress may interfere with the President’s constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question. As explained in Part I, it had long been accepted at the time of FISA’s enactment that the President has inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes. Congress recognized at the time that the enactment of a statute purporting to eliminate the President’s ability, even during peacetime, to conduct warrantless electronic surveillance to collect foreign intelligence was near or perhaps beyond the limit of Congress’s Article I powers. The NSA activities, however, involve signals intelligence performed in the midst of a congressionally authorized armed conflict undertaken to prevent further hostile attacks on the United States. The NSA activities lie at the very core of the Commander in Chief power, especially in light of the AUMF’s explicit authorization for the President to take *all* necessary and appropriate military action to stop al Qaeda from striking again. The constitutional principles at stake here thus involve not merely the President’s well-established inherent

authority to conduct warrantless surveillance for foreign intelligence purposes during peacetime, but also the powers and duties expressly conferred on him as Commander in Chief by Article II.

Even outside the context of wartime surveillance of the enemy, the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear. As explained above, the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. The source of this authority traces to the Vesting Clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The Vesting Clause "has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers." *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160-61 (1986) ("*Timely Notification Requirement Op.*").

Moreover, it is clear that some presidential authorities in this context are beyond Congress's ability to regulate. For example, as the Supreme Court explained in *Curtiss-Wright*, the President "*makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.*" 299 U.S. at 319. Similarly, President Washington established early in the history of the Republic the Executive's absolute authority to maintain the secrecy of negotiations with foreign powers, even against congressional efforts to secure information. *See id.* at 320-21. Recognizing presidential authority in this field, the Executive Branch has taken the position that "congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and . . . statutes infringing the President's inherent Article II authority would be unconstitutional." *Timely Notification Requirement Op.*, 10 Op. O.L.C. at 164.

There are certainly constitutional limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution, within the United States. As explained above, intelligence gathering is at the heart of executive functions. Since the time of the Founding it has been recognized that matters requiring secrecy—and intelligence in particular—are quintessentially executive functions. *See, e.g., The Federalist No. 64*, at 435 (John Jay) (Jacob E. Cooke ed. 1961) ("The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."); *see also Timely Notification Requirement Op.*, 10 Op. O.L.C. at 165; *cf. New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) ("[I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense.").

Because Congress has rarely attempted to intrude in this area and because many of these questions are not susceptible to judicial review, there are few guideposts for determining exactly where the line defining the President's sphere of exclusive authority lies. Typically, if a statute is in danger of encroaching upon exclusive powers of the President, the courts apply the constitutional avoidance canon, if a construction avoiding the constitutional issue is "fairly possible." *See, e.g., Egan*, 484 U.S. at 527, 530. The only court that squarely has addressed the relative powers of Congress and the President in this field suggested that the balance tips decidedly in the President's favor. The Foreign Intelligence Surveillance Court of Review recently noted that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, "assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*¹⁴ Although the court did not provide extensive analysis, it is the only judicial statement on point, and it comes from the specialized appellate court created expressly to deal with foreign intelligence issues under FISA.

But the NSA activities are not simply exercises of the President's general foreign affairs powers. Rather, they are primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue. The NSA activities, moreover, have been undertaken specifically to prevent a renewed attack at the hands of an enemy that has already inflicted the single deadliest foreign attack in the Nation's history. The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874); *The Federalist* No. 74, at 500 (Alexander Hamilton). "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not "*interfere[] with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

The Executive Branch uniformly has construed the Commander in Chief and foreign affairs powers to grant the President authority that is beyond the ability of Congress to regulate. In 1860, Attorney General Black concluded that an act of Congress, if intended to constrain the President's discretion in assigning duties to an officer in the army, would be unconstitutional:

As commander-in chief of the army it is your right to decide according to your

¹⁴ In the past, other courts have declined to express a view on that issue one way or the other. *See, e.g., Butenko*, 494 F.2d at 601 ("We do not intimate, at this time, any view whatsoever as the proper resolution of the possible clash of the constitutional powers of the President and Congress.").

own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have the power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.

Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 468 (1860). Attorney General Black went on to explain that, in his view, the statute involved there could probably be read as simply providing “a recommendation” that the President could decline to follow at his discretion. *Id.* at 469-70.¹⁵

Supreme Court precedent does not support claims of congressional authority over core military decisions during armed conflicts. In particular, the two decisions of the Supreme Court that address a conflict between asserted wartime powers of the Commander in Chief and congressional legislation and that resolve the conflict in favor of Congress—*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—are both distinguishable from the situation presented by the NSA activities in the conflict with al Qaeda. Neither supports the constitutionality of the restrictions in FISA as applied here.

Barreme involved a suit brought to recover a ship seized by an officer of the U.S. Navy on the high seas during the so-called “Quasi War” with France in 1799. The seizure had been based upon the officer’s orders implementing an act of Congress suspending commerce between the United States and France and authorizing the seizure of American ships bound to a French port. The ship in question was suspected of sailing from a French port. The Supreme Court held that the orders given by the President could not authorize a seizure beyond the terms of the

¹⁵ Executive practice recognizes, consistent with the Constitution, some congressional control over the Executive’s decisions concerning the Armed Forces. See, e.g., U.S. Const. art. I, § 8, cl. 12 (granting Congress power “to raise and support Armies”). But such examples have not involved congressional attempts to regulate the actual conduct of a military campaign, and there is no comparable textual support for such interference. For example, just before World War II, Attorney General Robert Jackson concluded that the Neutrality Act prohibited President Roosevelt from selling certain armed naval vessels and sending them to Great Britain. See *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att’y Gen. 484, 496 (1940). Jackson’s apparent conclusion that Congress could control the President’s ability to transfer war material does not imply acceptance of direct congressional regulation of the Commander in Chief’s control of the means and methods of engaging the enemy in conflict. Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Truman Administration readily conceded that, if Congress had prohibited the seizure of steel mills by statute, Congress’s action would have been controlling. See Brief for Petitioner at 150, *Youngstown*, 343 U.S. 579 (1952) (Nos. 744 and 745). This concession implies nothing concerning congressional control over the methods of engaging the enemy.

Likewise, the fact that the Executive Branch has, at times, sought congressional ratification after taking unilateral action in a wartime emergency does not reflect a concession that the Executive lacks authority in this area. A decision to seek congressional support can be prompted by many motivations, including a desire for political support. In modern times, several administrations have sought congressional authorization for the use of military force while preserving the ability to assert the unconstitutionality of the War Powers Resolution. See, e.g., *Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq*, 1 Pub. Papers of George Bush 40 (1991) (“[M]y request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.”). Moreover, many actions for which congressional support has been sought—such as President Lincoln’s action in raising an Army in 1861—quite likely fall primarily under Congress’s core Article I powers.

statute and therefore that the seizure of the ship not in fact bound to a French port was unlawful. See 6 U.S. at 177-78. Although some commentators have broadly characterized *Barreme* as standing for the proposition that Congress may restrict by statute the means by which the President can direct the Nation's Armed Forces to carry on a war, the Court's holding was limited in at least two significant ways. First, the operative section of the statute in question applied only to *American* merchant ships. See *id.* at 170 (quoting Act of February 9, 1799). Thus, the Court simply had no occasion to rule on whether, even in the limited and peculiar circumstances of the Quasi War, Congress could have placed some restriction on the orders the Commander in Chief could issue concerning direct engagements with enemy forces. Second, it is significant that the statute in *Barreme* was cast expressly, not as a limitation on the conduct of warfare by the President, but rather as regulation of a subject within the core of Congress's enumerated powers under Article I—the regulation of foreign commerce. See U.S. Const., art. I, § 8, cl. 3. The basis of Congress's authority to act was therefore clearer in *Barreme* than it is here.

Youngstown involved an effort by the President—in the face of a threatened work stoppage—to seize and to run steel mills. Congress had expressly considered the possibility of giving the President power to effect such a seizure during national emergencies. It rejected that option, however, instead providing different mechanisms for resolving labor disputes and mechanisms for seizing industries to ensure production vital to national defense.

For the Court, the connection between the seizure and the core Commander in Chief function of commanding the Armed Forces was too attenuated. The Court pointed out that the case did not involve authority over “day-to-day fighting in a theater of war.” *Id.* at 587. Instead, it involved a dramatic extension of the President's authority over military operations to exercise control over an industry that was vital for producing equipment needed overseas. Justice Jackson's concurring opinion also reveals a concern for what might be termed foreign-to-domestic presidential bootstrapping. The United States became involved in the Korean conflict through President Truman's unilateral decision to commit troops to the defense of South Korea. The President then claimed authority, based upon this foreign conflict, to extend presidential control into vast sectors of the domestic economy. Justice Jackson expressed “alarm[]” at a theory under which “a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.” *Id.* at 642.

Moreover, President Truman's action extended the President's authority into a field that the Constitution predominantly assigns to Congress. See *id.* at 588 (discussing Congress's commerce power and noting that “[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control”); see also *id.* at 643 (Jackson, J., concurring) (explaining that Congress is given express authority to “raise and support Armies” and “to provide and maintain a Navy”) (quoting U.S. Const. art. I, § 8, cls. 12, 13). Thus, *Youngstown* involved an assertion of executive power that not only stretched far beyond the

President's core Commander in Chief functions, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.¹⁶

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. As explained above, it is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress. Moreover, the theme that appeared most strongly in Justice Jackson's concurrence in *Youngstown*—the fear of presidential bootstrapping—does not apply in this context. Whereas President Truman had used his inherent constitutional authority to commit U.S. troops, here Congress expressly provided the President sweeping authority to use “all necessary and appropriate force” to protect the Nation from further attack. AUMF § 2(a). There is thus no bootstrapping concern.

Finally, *Youngstown* cannot be read to suggest that the President's authority for engaging the enemy is less extensive inside the United States than abroad. To the contrary, the extent of the President's Commander in Chief authority necessarily depends on where the enemy is found and where the battle is waged. In World War II, for example, the Supreme Court recognized that the President's authority as Commander in Chief, as supplemented by Congress, included the power to capture and try agents of the enemy in the United States, even if they never had “entered the theatre or zone of active military operations.” *Quirin*, 317 U.S. at 38.¹⁷ In the present conflict, unlike in the Korean War, the battlefield was brought to the United States in the most literal way, and the United States continues to face a threat of further attacks on its soil. In short, therefore, *Youngstown* does not support the view that Congress may constitutionally prohibit the President from authorizing the NSA activities.

The second serious constitutional question is whether the particular restrictions imposed by FISA would impermissibly hamper the President's exercise of his constitutionally assigned duties as Commander in Chief. The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA.¹⁸ Because the President also has determined that the NSA activities are necessary to the defense of

¹⁶ *Youngstown* does demonstrate that the mere fact that Executive action might be placed in Justice Jackson's category III does not obviate the need for further analysis. Justice Jackson's framework therefore recognizes that Congress might impermissibly interfere with the President's authority as Commander in Chief or to conduct the Nation's foreign affairs.

¹⁷ It had been recognized long before *Youngstown* that, in a large-scale conflict, the area of operations could readily extend to the continental United States, even when there are no major engagements of armed forces here. Thus, in the context of the trial of a German officer for spying in World War I, it was recognized that “[w]ith the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations” during the war, particularly in the port of New York, and that a spy in the United States might easily have aided the “hostile operation” of U-boats off the coast. *United States ex rel. Wessels v. McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920).

¹⁸ In order to avoid further compromising vital national security activities, a full explanation of the basis for the President's determination cannot be given in an unclassified document.

the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation—to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not “fairly possible,” FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. In that event, FISA would purport to *prohibit* the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history. A statute may not “*impede* the President's ability to perform his constitutional duty,” *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); *see also id.* at 696-97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. *See also In re Sealed Case*, 310 F.3d at 742 (explaining that “FISA could not encroach on the President's constitutional power”).

Application of the avoidance canon would be especially appropriate here for several reasons beyond the acute constitutional crises that would otherwise result. First, as noted, Congress did not intend FISA to be the final word on electronic surveillance conducted during armed conflicts. Instead, Congress expected that it would revisit the subject in subsequent legislation. Whatever intent can be gleaned from FISA's text and legislative history to set forth a comprehensive scheme for regulating electronic surveillance during peacetime, that same intent simply does not extend to armed conflicts and declared wars.¹⁹ Second, FISA was enacted during the Cold War, not during active hostilities with an adversary whose mode of operation is to blend in with the civilian population until it is ready to strike. These changed circumstances have seriously altered the constitutional calculus, one that FISA's enactors had already recognized might suggest that the statute was unconstitutional. Third, certain technological changes have rendered FISA still more problematic. As discussed above, when FISA was enacted in 1978, Congress expressly declined to regulate through FISA certain signals intelligence activities conducted by the NSA. *See supra*, at pp. 18-19 & n.6.²⁰ These same factors weigh heavily in favor of concluding that FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the Branches.

¹⁹ FISA exempts the President from its procedures for fifteen days following a congressional declaration of war. *See* 50 U.S.C. § 1811. If an adversary succeeded in a decapitation strike, preventing Congress from declaring war or passing subsequent authorizing legislation, it seems clear that FISA could not constitutionally continue to apply in such circumstances.

²⁰ Since FISA's enactment in 1978, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

* * *

As explained above, FISA is best interpreted to allow a statute such as the AUMF to authorize electronic surveillance outside FISA's enumerated procedures. The strongest counterarguments to this conclusion are that various provisions in FISA and title 18, including section 111 of FISA and section 2511(2)(f) of title 18, together require that subsequent legislation must reference or amend FISA in order to authorize electronic surveillance outside FISA's procedures and that interpreting the AUMF as a statute authorizing electronic surveillance outside FISA procedures amounts to a disfavored repeal by implication. At the very least, however, interpreting FISA to allow a subsequent statute such as the AUMF to authorize electronic surveillance without following FISA's express procedures is "fairly possible," and that is all that is required for purposes of invoking constitutional avoidance. In the competition of competing canons, particularly in the context of an ongoing armed conflict, the constitutional avoidance canon carries much greater interpretative force.²¹

IV. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOURTH AMENDMENT

The Fourth Amendment prohibits "unreasonable searches and seizures" and directs that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

²¹ If the text of FISA were clear that nothing other than an amendment to FISA could authorize additional electronic surveillance, the AUMF would impliedly repeal as much of FISA as would prevent the President from using "all necessary and appropriate force" in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are "capable of co-existence." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). Under this standard, an implied repeal may be found where one statute would "unduly interfere with" the operation of another. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976). The President's determination that electronic surveillance of al Qaeda outside the confines of FISA was "necessary and appropriate" would create a clear conflict between the AUMF and FISA. FISA's restrictions on the use of electronic surveillance would preclude the President from doing what the AUMF specifically authorized him to do: use all "necessary and appropriate force" to prevent al Qaeda from carrying out future attacks against the United States. The ordinary restrictions in FISA cannot continue to apply if the AUMF is to have its full effect; those constraints would "unduly interfere" with the operation of the AUMF.

Contrary to the recent suggestion made by several law professors and former government officials, the ordinary presumption against implied repeals is overcome here. Cf. Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley et al. at 4 (Jan. 9, 2006). First, like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992); see also *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. See 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the implied repeal canon either would not apply at all or would apply with significantly reduced force. Second, the AUMF was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. As discussed above, in these circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The touchstone for review of government action under the Fourth Amendment is whether the search is “reasonable.” *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

As noted above, *see* Part I, all of the federal courts of appeals to have addressed the issue have affirmed the President’s inherent constitutional authority to collect foreign intelligence without a warrant. *See In re Sealed Case*, 310 F.3d at 742. Properly understood, foreign intelligence collection in general, and the NSA activities in particular, fit within the “special needs” exception to the warrant requirement of the Fourth Amendment. Accordingly, the mere fact that no warrant is secured prior to the surveillance at issue in the NSA activities does not suffice to render the activities unreasonable. Instead, reasonableness in this context must be assessed under a general balancing approach, “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The NSA activities are reasonable because the Government’s interest, defending the Nation from another foreign attack in time of armed conflict, outweighs the individual privacy interests at stake, and because they seek to intercept only international communications where one party is linked to al Qaeda or an affiliated terrorist organization.

A. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT DOES NOT APPLY TO THE NSA ACTIVITIES

In “the criminal context,” the Fourth Amendment reasonableness requirement “usually requires a showing of probable cause” and a warrant. *Board of Educ. v. Earls*, 536 U.S. 822, 828 (2002). The requirement of a warrant supported by probable cause, however, is not universal. Rather, the Fourth Amendment’s “central requirement is one of reasonableness,” and the rules the Court has developed to implement that requirement “[s]ometimes . . . require warrants.” *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also, e.g., Earls*, 536 U.S. at 828 (noting that the probable cause standard “is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions”) (internal quotation marks omitted).

In particular, the Supreme Court repeatedly has made clear that in situations involving “special needs” that go beyond a routine interest in law enforcement, the warrant requirement is inapplicable. *See Vernonia*, 515 U.S. at 653 (there are circumstances “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable”) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also McArthur*, 531 U.S. at 330 (“When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.”). It is difficult to encapsulate in a nutshell all of the different circumstances the Court has found to qualify as “special needs” justifying warrantless searches. But one application in which the Court has found the warrant requirement inapplicable is in circumstances in which the Government faces

an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement. One important factor in establishing “special needs” is whether the Government is responding to an emergency that goes beyond the need for general crime control. *See In re Sealed Case*, 310 F.3d at 745-46.

Thus, the Court has permitted warrantless searches of property of students in public schools, *see New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (noting that warrant requirement would “unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools”), to screen athletes and students involved in extracurricular activities at public schools for drug use, *see Vernonia*, 515 U.S. at 654-55; *Earls*, 536 U.S. at 829-38, to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 634 (1989), and to search probationers’ homes, *see Griffin*, 483 U.S. 868. Many special needs doctrine and related cases have upheld *suspicionless* searches or seizures. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (implicitly relying on special needs doctrine to uphold use of automobile checkpoint to obtain information about recent hit-and-run accident); *Earls*, 536 U.S. at 829-38 (suspicionless drug testing of public school students involved in extracurricular activities); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990) (road block to check all motorists for signs of drunken driving); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (road block near the border to check vehicles for illegal immigrants); *cf. In re Sealed Case*, 310 F.3d at 745-46 (noting that suspicionless searches and seizures in one sense are a greater encroachment on privacy than electronic surveillance under FISA because they are not based on any particular suspicion, but “[o]n the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning”). To fall within the “special needs” exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary general crime control. *See, e.g., Ferguson v. Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of “special needs, beyond the normal need for law enforcement” where the Fourth Amendment’s touchstone of reasonableness can be satisfied without resort to a warrant. *Vernonia*, 515 U.S. at 653. The Executive Branch has long maintained that collecting foreign intelligence is far removed from the ordinary criminal law enforcement action to which the warrant requirement is particularly suited. *See, e.g., Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence*, 103d Cong. 2d Sess. 62, 63 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) (“[I]t is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities. . . . [W]e believe that the warrant clause of the Fourth Amendment is inapplicable to such [foreign intelligence] searches.”); *see also In re Sealed Case*, 310 F.3d 745. The object of foreign intelligence collection is securing information necessary to protect the national security from the hostile designs of foreign powers like al Qaeda and affiliated terrorist organizations, including the possibility of another foreign attack on the United States. In foreign intelligence investigations, moreover, the targets of surveillance

often are agents of foreign powers, including international terrorist groups, who may be specially trained in concealing their activities and whose activities may be particularly difficult to detect. The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation.²²

In particular, the NSA activities are undertaken to prevent further devastating attacks on our Nation, and they serve the highest government purpose through means other than traditional law enforcement.²³ The NSA activities are designed to enable the Government to act quickly and flexibly (and with secrecy) to find agents of al Qaeda and its affiliates—an international terrorist group which has already demonstrated a capability to infiltrate American communities without being detected—in time to disrupt future terrorist attacks against the United States. As explained by the Foreign Intelligence Surveillance Court of Review, the nature of the “emergency” posed by al Qaeda “takes the matter out of the realm of ordinary crime control.” *In re Sealed Case*, 310 F.3d at 746. Thus, under the “special needs” doctrine, no warrant is required by the Fourth Amendment for the NSA activities.

B. THE NSA ACTIVITIES ARE REASONABLE

As the Supreme Court has emphasized repeatedly, “[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Knights*, 534 U.S. at 118-19 (quotation marks omitted); see also *Earls*, 536 U.S. at 829. The Supreme Court has found a search reasonable when, under the totality of the circumstances, the importance of the governmental interests outweighs the nature and quality of the intrusion on the individual’s Fourth Amendment interests. See *Knights*, 534 U.S. at 118-22. Under the standard

²² Even in the domestic context, the Supreme Court has recognized that there may be significant distinctions between wiretapping for ordinary law enforcement purposes and domestic national security surveillance. See *United States v. United States District Court*, 407 U.S. 297, 322 (1972) (“*Keith*”) (explaining that “the focus of domestic [security] surveillance may be less precise than that directed against more conventional types of crime” because often “the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government’s preparedness for some possible future crisis or emergency”); see also *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (reading *Keith* to recognize that “the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations”). Although the Court in *Keith* held that the Fourth Amendment’s warrant requirement does apply to investigations of purely domestic threats to national security—such as domestic terrorism, it suggested that Congress consider establishing a lower standard for such warrants than that set forth in Title III. See *id.* at 322-23 (advising that “different standards” from those applied to traditional law enforcement “may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens”). *Keith*’s emphasis on the need for flexibility applies with even greater force to surveillance directed at foreign threats to national security. See S. Rep. No. 95-701, at 16 (“Far more than in domestic security matters, foreign counterintelligence investigations are ‘long range’ and involve ‘the interrelation of various sources and types of information.’”) (quoting *Keith*, 407 U.S. at 322). And flexibility is particularly essential here, where the purpose of the NSA activities is to prevent another armed attack against the United States.

²³ This is not to say that traditional law enforcement has no role in protecting the Nation from attack. The NSA activities, however, are not directed at bringing criminals to justice but at detecting and preventing plots by a declared enemy of the United States to attack it again.

balancing of interests analysis used for gauging reasonableness, the NSA activities are consistent with the Fourth Amendment.

With respect to the individual privacy interests at stake, there can be no doubt that, as a general matter, interception of telephone communications implicates a significant privacy interest of the individual whose conversation is intercepted. The Supreme Court has made clear at least since *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a substantial and constitutionally protected reasonable expectation of privacy that their telephone conversations will not be subject to governmental eavesdropping. Although the individual privacy interests at stake may be substantial, it is well recognized that a variety of governmental interests—including routine law enforcement and foreign-intelligence gathering—can overcome those interests.

On the other side of the scale here, the Government's interest in engaging in the NSA activities is the most compelling interest possible—securing the Nation from foreign attack in the midst of an armed conflict. One attack already has taken thousands of lives and placed the Nation in state of armed conflict. Defending the Nation from attack is perhaps the most important function of the federal Government—and one of the few express obligations of the federal Government enshrined in the Constitution. See U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion . . .*”) (emphasis added); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (“If war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.”). As the Supreme Court has declared, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981).

The Government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting one-end foreign communications where there is “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.” Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (Dec. 19, 2005) (statement of Attorney General Gonzales); *cf. Edmond*, 531 U.S. at 44 (noting that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack” because “[t]he exigencies created by th[at] scenario[] are far removed” from ordinary law enforcement). The United States has already suffered one attack that killed thousands, disrupted the Nation's financial center for days, and successfully struck at the command and control center for the Nation's military. And the President has stated that the NSA activities are “critical” to our national security. Press Conference of President Bush (Dec. 19, 2005). To this day, finding al Qaeda sleeper agents in the United States remains one of the preeminent concerns of the war on terrorism. As the President has explained, “[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September 11th.” *Id.*

Of course, because the magnitude of the Government's interest here depends in part upon the threat posed by al Qaeda, it might be possible for the weight that interest carries in the balance to change over time. It is thus significant for the reasonableness of the NSA activities that the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days. This process of reauthorization ensures a periodic review to evaluate whether the threat from al Qaeda remains sufficiently strong that the Government's interest in protecting the Nation and its citizens from foreign attack continues to outweigh the individual privacy interests at stake.

Finally, as part of the balancing of interests to evaluate Fourth Amendment reasonableness, it is significant that the NSA activities are limited to intercepting international communications where there is a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This factor is relevant because the Supreme Court has indicated that in evaluating reasonableness, one should consider the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663; *see also Earls*, 536 U.S. at 834 ("Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."). That consideration does not mean that reasonableness requires the "least intrusive" or most "narrowly tailored" means for obtaining information. To the contrary, the Supreme Court has repeatedly rejected such suggestions. *See, e.g., Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") (internal quotation marks omitted); *Vernonia*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."). Nevertheless, the Court has indicated that some consideration of the efficacy of the search being implemented—that is, some measure of fit between the search and the desired objective—is relevant to the reasonableness analysis. The NSA activities are targeted to intercept international communications of persons reasonably believed to be members or agents of al Qaeda or an affiliated terrorist organization, a limitation which further strongly supports the reasonableness of the searches.

In sum, the NSA activities are consistent with the Fourth Amendment because the warrant requirement does not apply in these circumstances, which involve both "special needs" beyond the need for ordinary law enforcement and the inherent authority of the President to conduct warrantless electronic surveillance to obtain foreign intelligence to protect our Nation from foreign armed attack. The touchstone of the Fourth Amendment is reasonableness, and the NSA activities are certainly reasonable, particularly taking into account the nature of the threat the Nation faces.

CONCLUSION

For the foregoing reasons, the President—in light of the broad authority to use military force in response to the attacks of September 11th and to prevent further catastrophic attack expressly conferred on the President by the Constitution and confirmed and supplemented by Congress in the AUMF—has legal authority to authorize the NSA to conduct the signals intelligence activities he has described. Those activities are authorized by the Constitution and by statute, and they violate neither FISA nor the Fourth Amendment.

JAMIE S. GORELICK

February 2, 2006

The Honorable Arlen Specter
The Honorable Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

I am unable to attend the Committee's hearing on February 6, 2006, but I appreciate the opportunity to comment for the record on the context and relevance of my 1994 testimony on foreign intelligence searches, which has been cited on various sides of the debate over the President's authorization of certain searches by the National Security Agency.

My 1994 testimony arose in the context of Congressional consideration of an extension of the Foreign Intelligence Surveillance Act (FISA) to cover foreign intelligence physical searches. At the time, FISA covered only electronic surveillance, such as wiretaps. In 1993, the Attorney General had authorized foreign intelligence physical searches in the investigation of Aldrich Ames, whose counsel thereafter raised legal challenges to those searches.

Testifying in support of an extension of FISA to physical searches, I said that the President had inherent authority to authorize foreign intelligence physical searches such as those we had undertaken in the Ames case, but the Administration believed that it would be better if there were Congressional authorization and judicial oversight of such searches. My testimony did not address inherent Presidential authority to conduct electronic surveillance, which was already covered by FISA. My testimony did not address whether there would be inherent authority to conduct physical searches if FISA were extended to cover physical searches. After FISA was extended to cover physical searches, to my knowledge, FISA warrants were sought for such searches.

To the extent that the current debate focuses on whether the President has inherent authority to authorize searches if such searches would otherwise be prohibited by an Act of Congress, my 1994 testimony – which was about Presidential authority to approve searches in the absence of legislation – does not address that question.

A Legal Analysis of the NSA Warrantless Surveillance Program

Morton H. Halperin and Jerry Berman¹

January 31, 2006

The warrantless NSA surveillance program is an illegal and unnecessary intrusion into the privacy of all Americans and undermines our true national security interests. Congress must act swiftly to determine the scope of the program and insist that all electronic surveillance in the United States be conducted pursuant to the Foreign Intelligence Surveillance Act (FISA).

The government's defense of the NSA program rests on both a claim of inherent powers and a claim of statutory authorization. This memorandum examines these arguments and concludes that they lack serious merit. It also explains why the administration's end-run around FISA has not served the national security interests of the country and has undermined the civil liberties of the American people.

The precise details of the NSA program, first reported by the *New York Times*² and then confirmed by the administration, are still not known. What is known is that the NSA program the President authorized after September 11, 2001 is conducted without judicial warrants and intercepts conversations of American citizens in the United States, at least when the other party is abroad and one or both are suspected of having ties to al Qaeda or an organization affiliated with or supporting al Qaeda.³ FISA's warrant requirement covers such surveillance targets even in time of war. This program is a flagrant violation of FISA.

¹ Mort Halperin is the Director of US Advocacy, Open Society Institute and Senior Fellow, Center for American Progress. Mr. Halperin brings to this task not only a review of the history but also a deep personal involvement as the target of a warrantless wiretap during the Nixon Administration. Mr. Halperin, together with Jerry Berman, represented the ACLU during enactment of FISA. Mr. Berman, who has testified before Congress on FISA several times, is now the President of the Center for Democracy & Technology. We are grateful to Diane Orentlicher, Kate Martin, and Nancy Libin for comments on an earlier draft.

² James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, A1.

³ See press briefing by Attorney General Alberto Gonzales and General Michael V. Hayden, Principal Deputy Director of National Intelligence, December 19, 2005. (Hereinafter "Press Briefing.") (<http://www.fas.org/irp/news/2005/12/ag121905.html>).

FISA Is The Exclusive Framework For Conducting Electronic Surveillance

The flaws in the Administration's arguments are best understood against the backdrop of Congress's enactment of FISA in 1978. FISA was the product of exhaustive hearings conducted by the Church Committee, which uncovered a decades-long record of abuses resulting from unchecked government surveillance conducted in the name of national security.⁴

The Church Committee discovered that in the absence of any judicial or external check, the executive branch had for years aimed its surveillance power not only against legitimate national security threats, but also against government employees, journalists, anti-war activists and others for political purposes, even though its purported purpose was to detect and monitor "subversive activities." The loose standard the executive branch used to justify wiretaps allowed administrations, from Roosevelt to Nixon, to wiretap American citizens who posed no threat to national security. It also allowed the NSA, through a program called Operation SHAMROCK, to intercept telegrams sent not only to and from foreign targets, but also between Americans in the United States and Americans or foreign persons abroad.⁵ The targets were often individuals who opposed U.S. government policy, but posed no threat to national security.⁶ The Committee heard many accounts of such civil liberties abuses committed in the name of national security.

It was in this environment that the Ford and Carter Administrations, working with Congress, determined to create a complete statutory framework for national security wiretapping.⁷ By doing so, they acted to resolve the issue

⁴ The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities was known as the "Church Committee" after its chairman, Senator Frank Church.

⁵ Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans, Book II*, Sen. R. No. 94-755 (94th Cong., 2d Sess.), Apr. 24, 1976 at 169.

⁶ *Id.*

⁷ The FISA Conferees included Senators Ted Kennedy, Joe Biden, and Charles Mathias in the Senate and Representatives Edward Boland and Robert Kastenmeier in the House.

left open by the Supreme Court of whether the Constitution requires judicial warrants for wiretaps directed at citizens for national security purposes.⁸

Congress knew that FISA had to be exhaustive in order to resolve the unanswered issues and to ensure that—regardless of any “inherent” power the President has to order warrantless surveillance—FISA would be the exclusive framework for the conduct of government electronic surveillance. Indeed, the Senate Judiciary Committee Report on FISA made clear that “even if the President has ‘inherent’ constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.”⁹ (Emphasis added.)

To further emphasize this point, FISA repealed the section of the 1968 law on criminal wiretaps (known as Title III) that had explicitly stated that Title III was not intended to limit the President’s power in national security cases. In FISA’s legislative history, Congress stated that “the bill recognizes no inherent power of the President in this area” and it intended to make clear that “the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States....”¹⁰ To make this clear, Congress also amended Title III to provide that Title III and FISA “shall be the exclusive means by which electronic surveillance ... may be conducted.”¹¹

Further, FISA made it a crime to conduct electronic surveillance under color of law except as authorized by statute. It provided an affirmative defense for government officials only if the surveillance was conducted pursuant to a warrant from the FISA Court. And finally, Congress insisted on removing

⁸ See *United States v. United States District Court*, 407 U.S. 297 (1972) (expressly leaving open the question of whether warrantless wiretapping of someone who posed a national security threat, as opposed to a domestic security threat, was constitutional).

⁹ Report of Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act of 1977, S. Rep. No. 95-604, 95th Cong., 1st Sess., at 16.

¹⁰ S. Rep. No. 95-604 at 6, 7.

¹¹ 18 U.S.C. § 2511(2)(f) (stating that “procedures in this chapter or chapter 121 and [FISA] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted”).

from a draft of the FISA statute a provision that would have left open the possibility that the President could continue to conduct warrantless wiretaps.

That Congress and the Ford and Carter Administrations intended FISA to be the sole authority for conducting electronic surveillance is evidenced by the effort of the statute's drafters to anticipate every contingency to ensure the statute would be comprehensive. They addressed the need for secrecy by providing for a secret court authorized to examine classified information and issue secret wiretap orders. They recognized the need for more flexible standards to obtain a warrant in the context of counterterrorism by allowing a judge to issue a warrant on a showing of probable cause that the target of surveillance is a foreign power or an agent of a foreign power, including foreign terrorist groups, rather than the more stringent criminal standard applicable to law enforcement wiretaps. They also recognized that surveillance technology was evolving rapidly and that the adequacy of privacy safeguards had to be measured against technological advances.¹² They anticipated the government's need to act quickly to protect national security by providing an emergency exception that allows the government to begin electronic surveillance as long as it files a warrant application with the court within 24 hours. (After 9/11, Congress, at the request of the Bush Administration, extended the emergency period to 72 hours.)¹³

Furthermore, because Congress and the Ford and Carter Administrations intended that FISA would be the sole authority for the conduct of electronic surveillance, they included a wartime provision that suspends the warrant requirement for 15 days after a declaration of war. The FISA Conference Report made clear that Congress expected the President to come to the Congress if he needed additional authority during a war.

This legislative history makes it clear beyond any reasonable doubt that only an explicit amendment of FISA could authorize warrantless wiretaps beyond 72 hours in peacetime or 15 days after a declaration of war.

¹² S. Rep. No. 95-604 at 44.

¹³ Intelligence Authorization Act for FY02, Pub. L. No. 107-108, 115 Stat. 1393, 2001.

The Administration's Arguments Are Fatally Flawed

The administration's argument in defense of the NSA program is two-pronged. It is set out most clearly in a letter from Assistant Attorney General William Moschella sent on December 22, 2005 to the leaders of the House and Senate Intelligence Committees (Moschella Letter),¹⁴ and in the Press Briefing.¹⁵

First, the administration argues that “under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further [terrorist] attacks, and the Constitution gives him all necessary authority to fulfill that duty,” including “the authority to order warrantless foreign intelligence surveillance within the United States.” (Moschella Letter, at p. 2.)

Second, “the authorization to use force, which was passed by the Congress in the days following September 11th,” authorizes the administration “to engage in this kind of signals intelligence.” (Statement of Attorney General Gonzales, Press Briefing, at p. 1.)

FISA Regulates The President's Constitutional Authority

The first claim—that the program is legal because the President has inherent authority to authorize warrantless wiretaps—might have had some plausibility if Congress had not acted so decisively to prohibit warrantless surveillance in the United States when it enacted FISA. As Justice Jackson explained in his influential concurring opinion in the *Steel Seizure* case, the scope of the President's constitutional authority in a particular area is affected by whether Congress has acted in that area.¹⁶ The President's power is greatest when he acts with the support of the Congress and is weakest when he acts directly contrary to the will of Congress.¹⁷ The record is clear that Congress intended to prohibit warrantless intercepts in the

¹⁴ <http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf>.

¹⁵ See supra, note 3.

¹⁶ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=343&invol=579>).

¹⁷ *Id.*

United States. Indeed, the FISA Conference Report states expressly that, by making FISA the “exclusive means” for conducting electronic surveillance, Congress intended “to apply the standard set forth in Justice Jackson’s concurring opinion in the Steel Seizure Case.”¹⁸ Therefore, whatever authority the President has to conduct such surveillance is not exclusive and is necessarily circumscribed by FISA.

Of course, the President has some inherent authorities under the Constitution, including his powers as Commander in Chief of the armed forces. Since, as already noted, Congress has not only legislated an alternative means to conduct electronic surveillance of Americans in the United States, but has sought to prevent the President from conducting warrantless surveillance, we must ask whether the President nonetheless retains authority to conduct such surveillance.

No court has decided this question in the context of FISA. To support its argument, the administration relies on four circuit court opinions that have held that the President has inherent authority to conduct warrantless searches in the United States when agents of a foreign power are the targets. However, all of these cases were decided before FISA was enacted and hence are simply not on point. Although the FISA Appeals Court in 2002 stated that it “took for granted” that the President has such authority, it made this comment in passing, providing no analysis, and its actual holding in the case did not depend on this assumption

Well-established jurisprudence in this area is fatal to the administration’s claim of unrestricted authority. The courts have been most reluctant to recognize unlimited and unchecked presidential power when the executive branch threatens or tramples on individual rights in the name of national security.¹⁹ If anything, the claim that warrantless searches are constitutional seems to have been furthered weakened by *Hamdi v. Rumsfeld*, where

¹⁸ FISA Conference Report at 35.

¹⁹ There is a substantial question whether warrantless wiretaps are constitutional. Before the adoption of FISA in 1978, the government carried out warrantless wiretaps in non-emergency cases, but the Supreme Court never addressed the issue, and the government was at risk that the Court would hold its warrantless eavesdropping unconstitutional. After FISA created a judicial process for wiretapping, there continued to be doubt as to whether the President had the power to order without judicial approval physical searches, which were not covered by FISA when first enacted. That uncertainty led Attorney General Janet Reno to ask that FISA be extended to physical searches, which Congress did in the early 90’s.

Justice O'Connor wrote last year in the very opinion on which the government now relies:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. It was the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty. The war power is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

The Supreme Court correctly states that all three branches of government should be involved in the development and implementation of any government policies that affect Americans' civil liberties. If the administration needed additional surveillance powers to deal with the terrorist threat, the President should have come to the Congress seeking to amend FISA. In a constitutional democracy, governmental activities that interfere with individual liberty should be publicly debated so that citizens can have meaningful input and elected officials can be held accountable for their actions. The administration's decision to tell a few members of Congress, who were sworn to secrecy and had no ability to consult with their staff or other members, does not constitute congressional involvement, let alone congressional authorization or oversight. To cut out the courts entirely and to render Congress impotent in this manner is an insult to our democratic institutions.

Notably, in the case that gave rise to Justice Jackson's framework for assessing the constitutionality of presidential action, Congress had provided an alternative means to deal with strikes during wartime, but, significantly, had not explicitly made that the *sole means* to deal with the problem. Nevertheless, the Supreme Court held that the president's constitutional powers did not give him the right to create on his own a separate process to

seize steel mills, even though the United States was at war with Korea and President Truman asserted that his action was necessary to support our war effort. In enacting FISA, Congress emphasized repeatedly throughout the legislative history and in the criminal wiretap statute itself that FISA was the exclusive means to conduct warrantless surveillance. Therefore, President Bush's power is at an even lower ebb than President Truman's was in the Steel Seizure case.

Under the framework enunciated by Justice Jackson and repeatedly applied since then, to survive constitutional scrutiny, presidential measures that flout congressional will must derive from the President's "own constitutional powers minus any constitutional powers of Congress over the matter."²⁰ Only by prohibiting Congress from acting in the matter--in effect, by claiming that Congress exceeded its constitutional authority when it enacted FISA--can the administration's flagrant violations of the law be sustained. The Justice Department has not so far publicly made such an extravagant claim, but such a claim is implicit in other Justice Department memos and there could well be a still secret DOJ memo in which they make the claim.

Recall that we have been given only post-facto justifications, some of which rely on a case (*Hamdi*) that was not yet decided when the President authorized the program. We do not know what legal justification led President Bush to conclude that he had this authority. Certainly Congress should insist on seeing all of the memos that were relied upon in creating and perpetuating the program and should make them public with any necessary redactions.

The Congressional Resolution Authorizing the Use of Military Force After 9/11 Did Not Amend FISA

The administration's second claim—that after 9/11, Congress's resolution authorizing the use of force also authorized the President to conduct a warrantless surveillance program in the United States—is utterly specious.

Seeking to surmount the legal barriers that FISA erected against unfettered use of warrantless surveillance within the United States, the administration argues that Congress in effect amended FISA through the Authorization for

²⁰ 343 U.S. at 637.

the Use of Military Force (AUMF), which authorized the administration to use military force in response to the 9/11 attacks.²¹ The administration argues that the AUMF included an implicit grant of authority to the President to conduct warrantless surveillance if he concluded that it was essential to combating al Qaeda. Neither the text nor the legislative history of the AUMF supports this claim.

The AUMF only authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” It does not mention wiretaps or the exercise of force in the United States.

The administration also argues that the Supreme Court decision in 2004 in *Hamdi* supports its argument that the AUMF gives the President the power to conduct warrantless surveillance in the United States.²² The petitioner in the *Hamdi* case, an American citizen, had been captured on the battlefield in Afghanistan and later brought to the United States, where he was detained in a military facility as an “enemy combatant.” In *Hamdi*, the Supreme Court concluded that the AUMF authorized the administration to detain Hamdi to prevent him from returning to the battlefield in Afghanistan because such a detention is “a fundamental incident of waging war.”²³

The government goes on to argue that “communications intelligence targeted at the enemy” is also a “fundamental incident of waging war.”²⁴ This is certainly true when it comes to surveillance on the battlefield. But it strains logic and, more important, the delicate system of checks and balances that defines our constitutional democracy to suggest that conducting warrantless electronic surveillance in the United States--surveillance that captures the

²¹ S.J. Res. 23 (Sept. 18, 2001), The Avalon Project: S.J. Resolution 23 - Authorization for Use of Military Force (Enrolled Bill) September 18, 2001.

²² *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), <http://straylight.law.cornell.edu/supct/html/03-6696.ZO.html>.

²³ *Id.*

²⁴ Moschella Letter at 3.

conversations of American citizens--is likewise a fundamental incident of war.

Congress certainly intended no such thing. Former Senator Tom Daschle who was Majority Leader of the Senate when Congress passed the AUMF, confirmed this. He reports that the administration at the last minute sought to get a reference to activities in the United States into the resolution and that the Congress refused.²⁵

Moreover, even if Congress believed that electronic surveillance in the United States was a necessary part of the war it had just authorized against al Qaeda, it had no reason to authorize a new electronic surveillance program since it had already provided under FISA a procedure for the President to conduct warrantless searches for 15 days and then return to Congress if he needed additional authority.

The legislative history of FISA and the text of the AUMF make clear that Congress intended to require the President to use FISA to conduct electronic surveillance in the United States and did not in the AUMF authorize the current NSA program.²⁶

The argument that the President could not ask Congress for an amendment to FISA without revealing sensitive intelligence information is specious. Terrorists no doubt assume that their conversations are monitored. That, after all, was the argument for giving the government roving wiretap authority in the Patriot Act. Moreover, it is possible to explain the need for greater authority without revealing sensitive intelligence information. Indeed, when Congress first considered the need for FISA and when it subsequently amended FISA on several occasions, including in the Patriot

²⁵ Tom Daschle, Power We Didn't Grant, *Washington Post*, Dec. 23, 2005, p. A21.
<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html>

²⁶ The Moschella Letter points out that the section of FISA creating the crime of wiretapping under color of law used the qualifying phrase "except as authorized by statute" rather than, say, "except as authorized by FISA and Title III." According to the administration, this language means that Congress could authorize warrantless wiretaps in another statute. But the legislative history of FISA makes clear that Congress intended the "except authorized by statute" language to mean "except as authorized by" FISA or Title III. See Report of the House Permanent Select Committee on Intelligence, Foreign Intelligence Surveillance Act, H.R. 95-1283, I at 96 (stating that FISA "makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law except as specifically authorized in chapter 119 of Title III and this title").

Act, it followed procedures that Congress has in place to deal with the sensitivity of such information and the need to maintain secrecy.

Also specious is the claim that the administration had to bypass FISA's carefully crafted procedures for obtaining warrants because the Congress that enacted FISA did not have today's terrorist threat in mind. From the start, FISA provided for surveillance of suspected international terrorists. Congress even loosened the "agent of a foreign power" standard to account for surveillance of terrorists. It recognized that in determining under FISA whether someone was a terrorist, the government would have to rely on "circumstantial evidence, such as concealment of one's true identity or affiliation with the [terrorist] group, or other facts and circumstances...."²⁷ Moreover, after 9/11, the President asked for additional authority to combat terrorism and Congress amended FISA in the Patriot Act to provide it.

The Administration's End-Run Around FISA Undermines National Security

Far from protecting our national security, the administration's extra-judicial eavesdropping program actually makes us less safe. By operating this secret and illegal NSA spying program, the administration created the environment that prompted the leaks from government officials, who were concerned about the rights of Americans and the administration's possible violations of criminal law. The administration would prefer that criminal charges be brought against the whistleblowers, but whistleblowers are often the only check on unlawful conduct when an administration defies our system of checks and balances and refuses to allow meaningful congressional or judicial oversight of its activities.

The administration would also like to blame the whistleblowers for harming national security. But it is because of the administration's unlawful conduct that sources and methods used to collect intelligence have been revealed, jeopardizing our national security and undermining the government's ability to successfully prosecute alleged terrorists. Indeed, defense attorneys representing alleged terrorists now are challenging the legality of the evidence against their clients, asserting that evidence must be excluded if it was the fruit of an unlawful wiretap under the NSA program.

²⁷ FISA Conference Report at 20.

Furthermore, far from helping the government track down terrorists, overbroad surveillance can distract from more focused efforts. It has been reported that a flood of information that NSA has sent the FBI has been a dangerous distraction for FBI agents who should be pursuing real threats.²⁸ According to current and former FBI officials, NSA's decision to disseminate information about US persons only remotely connected to terrorism has frustrated hundreds of FBI agents who have been forced to check out thousands of false leads, many of which have led to innocent Americans.²⁹

Moreover, the administration's audacious claim of executive authority to eavesdrop on American citizens without a warrant and without oversight has undermined the American people's trust and the bipartisan consensus that is crucial to forging a strong policy to combat terrorism.

Congress must conduct hearings to determine exactly what is being done in the new NSA program and why the administration concluded that it could not use FISA. Congress should then take the necessary action to restore the public trust and to ensure that the current president and all future presidents obey the law.

January 31, 2006

²⁸ Lowell Bergman, et al., *Spy Agency Data After Sept. 11 Led F.B.I. To Dead Ends*, N.Y. TIMES, Jan. 17, 2006.

²⁹ *Id.*

**Joint Statement of John M. Harmon, Assistant Attorney General,
Office of Legal Counsel, Department of Justice 1977-1981
and**

**Larry L. Simms, Deputy Assistant Attorney General,
Office of Legal Counsel, Department of Justice 1979-1985**

**submitted to the
Senate Committee on the Judiciary
for its hearing on
Wartime Executive Power and the NSA's Surveillance Authority
February 6, 2006**

**Chairman Specter, Ranking Minority Member Leahy and Members
of the Committee:**

It is a distinct privilege to assist the Judiciary Committee in its efforts to come to grips with the many ramifications of what we will refer to as the warrantless surveillance program or "program." As you are aware, public knowledge of this program came as the direct result of a series of articles published by The New York Times beginning on December 16, 2005. A serious debate about the policy implications of, and the legal questions raised by, this program is underway, as it should be in our free and open society.

Before discussing a very discrete aspect of the program, We should first acknowledge that as a former head of the Office of Legal Counsel and Deputy Assistant Attorney General in the Office of Legal Counsel, our review of the publicly available material related to the program convinces us that the program is unlawful. To be specific, (1) the President has transgressed the specific prohibitions of the Foreign Intelligence Surveillance Act of 1978 ("FISA") at issue; (2) the FISA is constitutional and has not been amended or suspended by any act of Congress; and (3) the Fourth Amendment rights of an unknown number of our fellow citizens have been violated since the implementation of the program after the 9\11 tragedy.

There can be no doubt that Congress and its Committees have broad power under the Constitution to investigate and determine for themselves whether the warrantless surveillance program is within the

law—both as a matter of Executive and Legislative power and as a matter of the limitations on the exercise of governmental power imposed by the Fourth Amendment. There is, however, an issue raised here that is, in context, perhaps as profound as the substantive issues implicated. The President has asserted that he has the authority to choose clandestinely to ignore FISA. The President has stated, and the Attorney General and General Hayden have confirmed, that the President has received legal advice purporting to establish that he has such authority. Curiously, neither the President nor the Attorney General has made public any legal opinion provided to the President contemporaneously with the implementation of the program. Indeed, it is quite unclear from the Administration's various factual assertions whether any written legal advice was received by the President or his then Counsel, now the Attorney General, before the program was implemented. The President has stated that he was acting on advice of his legal counselors. Congress has a right to understand what advice the President acted upon in 2001 when the program was implemented—not just recent and obviously post hoc justifications of the program that themselves are the subject of intense debate and disagreement.

The issues now before the Committee do not stand in isolation. Interrogations at Guantanamo and elsewhere were apparently undertaken based on legal opinions that incorrectly defined "torture," including one memorandum opinion that has been repudiated by the Administration. It now appears that the same modus operandi may have been followed in the creation and implementation of the warrantless surveillance program. Only the Administration is in possession of many of the facts that would enable Congress to answer definitively the many questions pertaining to the quality and correctness of the legal advice rendered to the President at the time the program was implemented or thereafter. Some of the questions that should be explored by this Committee are:

1. Was a written, signed legal opinion delivered to the President before or contemporaneously with the implementation of the program and, if so, what government lawyers were involved in the drafting and

approval of that legal opinion. For example, to what extent was Attorney General Ashcroft directly involved in the formulation of that opinion and did he approve that opinion on a full understanding of the facts? If a legal opinion was prepared prior to the implementation of the program or shortly thereafter, what does it say?

2. Did any government lawyers, within or without the Department of Justice, express any doubts about the lawfulness of the program or the correctness of any legal opinions issued in connection with the implementation of the program? Was the President ever apprised of the existence of such doubts?

3. Did any non-lawyer government officials express doubts about the propriety or utility of the program on any grounds either before or after the implementation of the program? Was the President made privy to any such doubts?

4. If no legal opinion was prepared prior to the implementation of the program, when were any legal opinions prepared, and by whom, after the implementation of the program?

5. In the course of preparing the opinion(s) issued either before or after implementation of the program, were prior legal opinions in this general area of the law that may have been prepared by government lawyers in the Department of Justice (or other departments) taken into consideration? If not, why not? Did the government lawyers involved in the preparation of legal advice to the President in 2001 have intimate knowledge of how the program was, from a technical standpoint, to be implemented?

6. General Hayden of the NSA has asserted that three NSA lawyers provided "independent" opinions that the program was legal. When were these "independent" opinions issued? What did General Hayden mean by the use of the word "independent"? Will the Administration make those opinions public? Did Attorney General Ashcroft adopt those three opinions as his own?

7. Recognizing the immediacy of the situation confronted by the Administration after the 9/11 attacks and the accompanying time pressures on government officials (lawyers and non-lawyers), was any effort made in the intervening years to re-visit the legal issues that had surfaced in connection with the implementation of the program?

8. Was the legal advice rendered to the President on the legality of the program ever shared with Congress or any of its committees before December 16, 2005? Were any of the pertinent committees ever told of any dissension within the government regarding the legality or utility of the program? When was this Committee first told that the Executive Branch believed that the Authorization for the Use of Military Force effectively suspended or overrode the FISA as the FISA would otherwise have been applicable to the program?

As this Committee is aware, OLC exists to provide to the President and the Attorney General legal advice on a broad range of issues—including the President's exercise of his inherent constitutional powers. In a functional sense, OLC does not render its advice as an advocate. Rather, OLC renders its legal advice by predicting, to the best of its ability, the result that the Supreme Court would reach were the issue being considered by OLC to come before the Court in an appropriate case. The work of OLC becomes of particular importance to the proper functioning of the Executive Branch and our constitutional system of checks and balances when complex and difficult issues of constitutional law arise that are not readily adjudicated by the courts because of standing, political question and other similar doctrines.

About 1978, OLC was tasked with preparing a legal opinion addressing the statutory legality and the constitutionality of certain operations of the National Security Agency. OLC, of course, had no stake in the outcome of its analysis. During the course of developing the draft of an opinion, Mr. Simms, then an attorney-adviser in OLC, made one and probably several trips to NSA headquarters, where he was

educated at length by NSA lawyers and operations personnel regarding the important facts that would inform the legal analysis that would eventually work its way into the final OLC opinion. The intervening 27 or so years have dulled our memories a bit, but one thing that still stands out in our memories of that project is that from the first to the last moment of our contact with NSA personnel, every one of them wanted OLC to reach the correct legal result in a way that would satisfy them that they were operating within statutory and constitutional law.

Our recollection is that the final opinion, once signed by Mr. Harmon, was reviewed and approved by Attorney General Griffin Bell and that it thereby became the law of the Executive Branch unless and until overruled by a subsequent Attorney General or by the courts. We find disturbing the suggestion of General Hayden that the Administration may have been content to rely on opinions prepared by NSA lawyers—all of whom owed a duty of loyalty to the NSA and its programs. This is not to say that the devolution on OLC in 2001 of the responsibility to determine the legality of the program would have guaranteed a truly independent analysis of the very substantial issues involved. OLC, like any institution, depends on its leadership to appreciate and adhere to the unique role that OLC plays within the Executive Branch. The presence and involvement of career lawyers in OLC and elsewhere in the Department of Justice, however, tends to preserve the historical perspective and independence of OLC and the Department in such matters. The President has stated that he got legal advice regarding the program from "all kinds of lawyers." That was, in our judgment, part of, not a solution to, the problem of keeping the Executive within the four corners of the law.

As indicated above, we are not privy to all of the facts that might help to explain with greater accuracy what went wrong when government lawyers and NSA officials sat down after 9/11 to consider what the President might or might not be able to do legally in the area of electronic eavesdropping to deal more effectively with terrorism. Of what we are certain, however, is that something went badly wrong and that the process by which the legality of the program was considered warrants a careful look by the Committee.

**STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, SENATE JUDICIARY COMMITTEE
HEARING ON
“WARTIME EXECUTIVE POWER AND THE NSA’S SURVEILLANCE AUTHORITY”
FEBRUARY 6, 2006**

The question for this hearing is the illegality of the Government’s domestic spying on ordinary Americans without a warrant.

The question facing us is not whether the Government should have all the tools it needs to protect the American people. Of course it should. The terrorist threat to America’s security remains very real, and it is vital that we be armed with the tools needed to protect Americans’ security. That is why I co-authored the PATRIOT Act five years ago and why it passed with such broad, bipartisan support. That is why we have amended the Foreign Intelligence Surveillance Act five times since 9/11 to provide more flexibility.

We all agree that we should be wiretapping al Qaeda terrorists – of course we should. Congress has given the President authority to monitor these messages legally, with checks to guard against abuses when Americans’ conversations and email are being monitored. But instead, the President has chosen to do it illegally, without those safeguards.

A judge from the special court Congress created to monitor domestic spying would grant any request to wiretap an al Qaeda terrorist. Of the approximately 20,000 foreign intelligence warrant applications over the past 28 years, only a handful have been turned down.

I thank the Chairman for convening today’s hearing. The Chairman and I have a long history of conducting vigorous bipartisan oversight investigations. If the Senate is to serve its constitutional role as a real check on the Executive, thoroughgoing oversight is essential.

The domestic spying programs into emails and telephone calls apparently conducted by the National Security Agency were first reported by the *New York Times* on December 16, 2005. The next day, President Bush admitted that secret, domestic wiretapping has been conducted without warrants since late 2001, and that he has issued secret orders in this regard more than 30 times since then. We have asked for the presidential orders, but they have not been provided.

We have asked for the official legal opinions of the Government that the Administration says justify and limit this program. They, too, have been withheld from us.

This hearing is expressly about the legality of these programs, not about their operational details. In order for us to conduct effective oversight, we clearly need the official documents that answer these basic questions. We are an oversight Committee of the

United States Senate – the oversight committee with jurisdiction over the Department of Justice and over its enforcement of the laws of the United States. We are the duly elected representatives of the people of the United States, and it is our duty to determine whether the laws of the United States have been violated. The President and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write them. They do not pass them. They do not have unchecked power to decide what laws to follow and what laws to ignore. They cannot violate the law or the rights of ordinary Americans. In America no one, not even the President, is above the law.

The President's Domestic Spying Programs

There is much that we do not know about the President's secret spying programs. I hope that we will begin to get some real answers from the Administration today — not simply more self-serving characterizations. Let's start with what we do know.

Point One -- The President's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act ["FISA"].

That law expressly states that it provides the "exclusive" source of authority for wiretapping for intelligence purposes. Wiretapping that is not authorized under that statute is a federal crime. That is what the law says, and that is what the law means. This law was enacted to define how domestic surveillance for intelligence purposes may be conducted while protecting the fundamental liberties of Americans. Two or more generations of Americans are too young to know this from their experience, but there's a reason we have the FISA law.

It was enacted after decades of abuses by the Executive, including the wiretapping of Dr. Martin Luther King Jr. and other political opponents of earlier government officials, and the White House "horrors" of the Nixon years, during which another President asserted that whatever he did was legal because he was the President.

The law has been updated five times since September 11, 2001, in order to keep pace with intelligence needs and technological developments. It provides broad and flexible authority. On July 31, 2002, the Justice Department testified that this law "is a highly flexible statute that has proven effective" and noted: "When you are trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind."

The Bush Administration now concedes that this President knowingly created a program involving thousands of wiretaps of Americans in the United States over the period of the last four to five years without complying with FISA. Legal scholars and former Government officials have been almost unanimous in stating the obvious: This is against the law.

Point Two -- The Authorization for the Use of Military Force that Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11 attacks did not give the President the authority to go around the FISA law to wiretap Americans illegally.

That resolution authorized the military action of sending military troops into Afghanistan to kill or capture Osama bin Laden and those acting with him -- in the words of the statute, "to use the United States Armed Forces against those responsible for the recent attacks launched against the United States."

It did not authorize domestic surveillance of United States citizens without a warrant from a judge. Nothing in the Authorization for the Use of Military Force was intended secretly to undermine the liberties and rights of Americans. Rather, it was to defend our liberties and rights that Congress authorized the President to use our Armed Forces against those responsible for the 9/11 attacks.

Let me be clear: It is only Republican Senators who are talking about "special rights for terrorists." I have no interest in that. I wish the Bush Administration had done a better job with the vast powers Congress has given it to destroy al Qaeda and kill or capture Osama bin Laden. But it has not.

My concern is for peaceful Quakers who are being spied upon and other law-abiding Americans and babies and nuns who are placed on terrorist watch lists.

Point Three -- The President never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which the NSA has been secretly engaged for the last several years.

After September 11, 2001, I helped lead a bipartisan effort to provide tools and legal authorities to improve our capabilities to prevent terrorist attacks. We enacted amendments to FISA in the USA PATRIOT ACT in October 2001 and four additional times subsequently. Ironically, when a Republican Senator proposed a legal change to the standard needed for a FISA warrant, the Bush Administration did not support that effort but raised questions about its constitutionality and testified that it was not needed.

This Administration told the Senate that FISA was working just fine and that it did not seek additional adjustments. Attorney General Gonzales has said that the Administration did not ask for legislation authorizing warrantless wiretapping of Americans and did not think such legislation would pass.

Not only did the Bush Administration not seek broader legal authority, it kept the very existence of its domestic wiretapping program without warrants completely secret from 527 of the 535 Members of Congress, including Members on this Committee and on the Intelligence Committee, and placed limits and restrictions on what the eight Members who *were* told anything could know or say.

The Administration had not suggested to Congress and the American people that FISA was inadequate, outmoded or irrelevant until it was caught violating the statute with a secret program of wiretapping Americans without warrants. Indeed, in 2004, two years after he authorized the secret warrantless wiretapping program, the President told the American people:

“Anytime you hear the United States government talking about wiretap, a wiretap requires a court order.” He continued: “Nothing has changed ... When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so.” In light of what we now know, that statement was, at best, misleading.

The Rule Of Law

I have many questions for the Attorney General. But first, I have a message to give him and the President. It is a message that should be unanimous, from every Member of Congress regardless of party and ideology. Under our Constitution, Congress is the co-equal branch of Government that makes the laws. If you believe we need new laws, you can come to us and tell us. If Congress agrees, we will amend the law. If you do not even attempt to persuade Congress to amend the law, you must abide by the law as written. That is as true for this President as it is for any other American. That is the rule of law, on which our Nation was founded, and on which it endures and prospers.

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Palace Revolt

They were loyal conservatives, and Bush appointees. They fought a quiet battle to rein in the president's power in the war on terror. And they paid a price for it. A NEWSWEEK investigation.

By Daniel Klaidman, Stuart Taylor Jr. and Evan Thomas
Newsweek

Feb. 6, 2006 issue - James Comey, a lanky, 6-foot-8 former prosecutor who looks a little like Jimmy Stewart, resigned as deputy attorney general in the summer of 2005. The press and public hardly noticed. Comey's farewell speech, delivered in the Great Hall of the Justice Department, contained all the predictable, if heartfelt, appreciations. But mixed in among the platitudes was an unusual passage. Comey thanked "people who came to my office, or my home, or called my cell phone late at night, to quietly tell me when I was about to make a mistake; they were the people committed to getting it right—and to doing the right thing—whatever the price. These people," said Comey, "know who they are. Some of them did pay a price for their commitment to right, but they wouldn't have it any other way."

One of those people—a former assistant attorney general named Jack Goldsmith—was absent from the festivities and did not, for many months, hear Comey's grateful praise. In the summer of 2004, Goldsmith, 43, had left his post in George W. Bush's Washington to become a professor at Harvard Law School. Stocky, rumped, genial, though possessing an enormous intellect, Goldsmith is known for his lack of pretense; he rarely talks about his time in government. In liberal Cambridge, Mass., he was at first snubbed in the community and mocked as an atrocity-abetting war criminal by his more knee-jerk colleagues. ICY WELCOME FOR NEW LAW PROF, headlined *The Harvard Crimson*.

They had no idea. Goldsmith was actually the opposite of what his detractors imagined. For nine months, from October 2003 to June 2004, he had been the central figure in a secret but intense rebellion of a small coterie of Bush administration lawyers. Their insurrection, described to NEWSWEEK by current and former administration officials who did not wish to be identified discussing confidential deliberations, is one of the most significant and intriguing untold stories of the war on terror.

These Justice Department lawyers, backed by their intrepid boss Comey, had stood up to the hard-liners, centered in the office of the vice president, who wanted to give the president virtually unlimited powers in the war on terror. Demanding that the White House stop using what they saw as farfetched rationales for riding rough-shod over the law and the Constitution, Goldsmith and the others fought to bring government spying and interrogation methods within the law. They did so at their peril; ostracized, some were denied promotions, while others left for more comfortable climes in private law firms and academia. Some went so far as to line up private lawyers in 2004, anticipating that the president's eavesdropping program would draw scrutiny from Congress, if not prosecutors. These government attorneys

did not always succeed, but their efforts went a long way toward vindicating the principle of a nation of laws and not men.

The rebels were not whistle-blowers in the traditional sense. They did not want—indeed avoided—publicity. (Goldsmith confirmed public facts about himself but otherwise declined to comment. Comey also declined to comment.) They were not downtrodden career civil servants. Rather, they were conservative political appointees who had been friends and close colleagues of some of the true believers they were fighting against. They did not see the struggle in terms of black and white but in shades of gray—as painfully close calls with unavoidable pitfalls. They worried deeply about whether their principles might put Americans at home and abroad at risk. Their story has been obscured behind legalisms and the veil of secrecy over the White House. But it is a quietly dramatic profile in courage. (For its part the White House denies any internal strife. "The proposition of internal division in our fight against terrorism isn't based in fact," says Lea Anne McBride, a spokeswoman for Vice President Dick Cheney. "This administration is united in its commitment to protect Americans, defeat terrorism and grow democracy.")

The chief opponent of the rebels, though by no means the only one, was an equally obscure, but immensely powerful, lawyer-bureaucrat. Intense, workaholic (even by insane White House standards), David Addington, formerly counsel, now chief of staff to the vice president, is a righteous, ascetic public servant. According to those who know him, he does not care about fame, riches or the trappings of power. He takes the Metro to work, rather than use his White House parking pass, and refuses to even have his picture taken by the press. His habitual lunch is a bowl of gazpacho, eaten in the White House Mess. He is hardly anonymous inside the government, however. Presidential appointees quail before his volcanic temper, backed by assiduous preparation and acid sarcasm.

Addington, 49, has worked as an adviser to Dick Cheney off and on since Cheney was a member and Addington a staffer on the House Intelligence Committee in the mid-'80s. When Cheney became secretary of Defense in the Bush 41 administration, Addington served at the Pentagon as general counsel. When Cheney became vice president to Bush 43, he brought Addington into the White House as his lawyer. Counsel to the vice president is, in most administrations, worth less than the proverbial bucket of warm spit, but under Prime Minister Cheney, it became a vital power center, especially after 9/11.

Like his boss, Addington has long believed that the executive branch was pitifully weakened by the backlash from Vietnam and the Watergate scandal. Fearful of investigative reporters and congressional subpoenas, soldiers and spies had become timid—"risk averse" in bureaucratic jargon. To Addington and Cheney, the 9/11 attacks—and the threat of more and worse to come—were perfect justification for unleashing the CIA and other long-blunted weapons in the national-security arsenal. Secretary of Defense Donald Rumsfeld, who disdains lawyers, was ready to go. So, too, was CIA Director George Tenet—but only if his spooks had legal cover, so they wouldn't be left holding the bag if things went wrong.

Addington and a small band of like-minded lawyers set about providing that cover—a legal argument that the power of the president in time of war was virtually untrammelled. One of Addington's first jobs had been to draft a presidential order establishing military commissions to try unlawful combatants—terrorists caught on

the global battlefield. The normal "interagency process"—getting agreement from lawyers at Defense, State, the intelligence agencies and so forth—proved glacial, as usual. So Addington, working with fellow conservative Deputy White House Counsel Timothy Flanigan, came up with a solution: cut virtually everyone else out. Addington is a purist, not a cynic; he does not believe he is in any way ignoring or twisting the law. It is also important to note that Addington was not sailing off on some personal crusade; he had the full backing of the president and vice president, who shared his views. But, steeped in bureaucratic experience and clear in his purpose, Addington was a ferocious infighter for his cause. (Addington declined to comment. But McBride, the vice president's spokeswoman, said, "David Addington has a long, distinguished record of public service. He's committed to the president's agenda.")

Inexperienced in national-security law, White House Counsel Alberto Gonzales was steered by more-expert lawyers like Addington and Flanigan. Others, like John Bellinger, the National Security Council's top lawyer, were simply not told what was going on. Addington and the hard-liners had particular disregard for Bellinger, who was considered a softie—mocked by Addington because he had lunch once a month or so with a pillar of the liberal-leaning legal establishment, the late Lloyd Cutler. When Addington and Flanigan produced a document—signed by Bush—that gave the president near-total authority over the prosecution of suspected terrorists, Bellinger burst into Gonzales's office, clearly upset, according to a source familiar with the episode. But it was too late.

Addington was just getting started. Minimizing dissent by going behind the backs of bureaucratic rivals was how he played the game. A potentially formidable obstacle, however, was the Justice Department's Office of Legal Counsel. The OLC is the most important government office you've never heard of. Among its bosses—before they went on the Supreme Court—were William Rehnquist and Antonin Scalia. Within the executive branch, including the Pentagon and CIA, the OLC acts as a kind of mini Supreme Court. Its carefully worded opinions are regarded as binding precedent—final say on what the president and all his agencies can and cannot legally do.

Addington found an ally in an OLC lawyer whose name—John Yoo—would later become synonymous with the notion that power is for the president to use as he sees fit in a time of war. Shortly after 9/11, Yoo wrote, in a formal OLC opinion, that Congress may not "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."

The brainy, pleasant and supremely self-confident Yoo became Addington's main man at Justice, a prolific author of legal opinions granting the president maximum power during wartime. In the winter of 2002, the CIA began catching top Qaeda terrorists—so-called High Value Targets—like Abu Zubaydah. These hard-case jihadists proved resistant to normal methods of interrogation. In the fevered atmosphere of the time, the Bush administration feared a "second wave" attack from Qaeda sleeper cells still inside the United States. The CIA wanted legal permission to use "coercive methods."

An August 2002 OLC memo, signed by the then head of the OLC—Jay Bybee—but drafted by Yoo, gave the agency what it needed. The controversial document, which became famous as the "torture memo" when it leaked two years later, defined

torture so narrowly that, short of maiming or killing a prisoner, interrogators had a free hand. What's more, the memo claimed license for the president to order methods that would be torture by anyone's definition—and to do it wholesale, and not just in specific cases. A very similar Yoo memo in March 2003 was even more expansive, authorizing military interrogators questioning terror suspects to ignore many criminal statutes—as well as the strict interrogation rules traditionally used by the military. Secretary of Defense Rumsfeld put some limits on interrogation techniques, and they were intended to be used only on true terror suspects. Perhaps inevitably, however, "coercive interrogation methods" spread from Guantanamo Bay, which housed terror suspects, into prisons like Abu Ghraib, where detainees could be almost anyone. (Poor leadership in the chain of command and on the ground was partly to blame, as well as loose or fuzzy legal rules.) The result: those grotesque images of Iraqis being humiliated by poorly trained and sadistic American prison guards, not to mention prisoners who have been brutalized and in some cases killed by interrogators in Afghanistan and elsewhere.

In the summer of 2003, Yoo, who stands by his body of work, left the Justice Department and returned to teaching law. His departure came in the midst of a critical power struggle. Addington and Gonzales had both wanted to make Yoo head of the OLC when Bybee went off to take a federal judgeship in March 2003, but Attorney General John Ashcroft balked. Ashcroft's reasons were apparently bureaucratic. (He declined to speak for this story.) According to colleagues, he resented Yoo's going behind his back to give the White House a private pipeline into the OLC. Yoo denied circumventing Ashcroft. "OLC kept the attorney general or his staff fully informed of all of its work in the war on terrorism," he said.

Jack Goldsmith, a law professor who was working in the general counsel's office at the Pentagon, was the eventual compromise choice to head the OLC. Goldsmith seemed like a natural fit. He was brilliant, a graduate of Oxford and Yale Law School, and he was conservative. Like Yoo, he was tagged a "New Sovereigntist" for his scholarly argument that international laws including prohibitions on human-rights abuses should not be treated as binding law by the U.S. courts.

But somehow, in the vetting of Goldsmith, one of his important views was overlooked. Goldsmith is no executive-power absolutist. What's more, his friends say, he did not intend to be a patsy for Addington and the hard-liners around Cheney. Goldsmith was not the first administration lawyer to push back against Addington & Co. At the CIA, general counsel Scott Muller had caused a stir by ruling that CIA agents could not join with the military in the interrogation of Iraqi prisoners. But Goldsmith became a rallying point for Justice Department lawyers who had legal qualms about the administration's stance.

Goldsmith soon served notice of his independence. Shortly after taking over the OLC in October 2003, he took the position that the so-called Fourth Geneva Convention—which bars the use of physical or moral coercion on prisoners held in a militarily occupied country—applied to all Iraqis, even if they were suspected of belonging to Al Qaeda.

Addington soon suffered pangs of buyer's remorse over Goldsmith. There was no way to simply ignore the new head of the OLC. Over time, Addington's heartburn grew much worse. In December, Goldsmith informed the Defense Department that Yoo's March 2003 torture memo was "under review" and could no longer be relied

upon. It is almost unheard-of for an administration to overturn its own OLC opinions. Addington was beside himself. Later, in frequent face-to-face confrontations, he attacked Goldsmith for changing the rules in the middle of the game and putting brave men at risk, according to three former government officials, who declined to speak on the record given the sensitivity of the subject.

Addington's problems with Goldsmith were just beginning. In the jittery aftermath of 9/11, the Bush administration had pushed the top-secret National Security Agency to do a better and more expansive job of electronically eavesdropping on Al Qaeda's global communications. Under existing law—the Foreign Intelligence Surveillance Act, or FISA, adopted in 1978 as a post-Watergate reform—the NSA needed (in the opinion of most legal experts) to get a warrant to eavesdrop on communications coming into or going out of the United States. Reasoning that there was no time to obtain warrants from a secret court set up under FISA (a sometimes cumbersome process), the Bush administration justified going around the law by invoking a post-9/11 congressional resolution authorizing use of force against global terror. The eavesdropping program was very closely held, with cryptic briefings for only a few congressional leaders. Once again, Addington and his allies made sure that possible dissenters were cut out of the loop.

There was one catch: the secret program had to be reapproved by the attorney general every 45 days. It was Goldsmith's job to advise the A.G. on the legality of the program. In March 2004, John Ashcroft was in the hospital with a serious pancreatic condition. At Justice, Comey, Ashcroft's No. 2, was acting as attorney general. The grandson of an Irish cop and a former U.S. attorney from Manhattan, Comey, 45, is a straight arrow. (It was Comey who appointed his friend—the equally straitlaced and dogged Patrick Fitzgerald—to be the special prosecutor in the Valerie Plame leak-investigation case.) Goldsmith raised with Comey serious questions about the secret eavesdropping program, according to two sources familiar with the episode. He was joined by a former OLC lawyer, Patrick Philbin, who had become national-security aide to the deputy attorney general. Comey backed them up. The White House was told: no reauthorization.

The angry reaction bubbled up all the way to the Oval Office. President Bush, with his penchant for put-down nicknames, had begun referring to Comey as "Cuomey" or "Cuomo," apparently after former New York governor Mario Cuomo, who was notorious for his Hamlet-like indecision over whether to seek the Democratic presidential nomination in the 1980s. A high-level delegation—White House Counsel Gonzales and chief of staff Andy Card—visited Ashcroft in the hospital to appeal Comey's refusal. In pain and on medication, Ashcroft stood by his No. 2.

A compromise was finally worked out. The NSA was not compelled to go to the secret FISA court to get warrants, but Justice imposed tougher legal standards before permitting eavesdropping on communications into the United States. It was a victory for the Justice lawyers, and it drove Addington to new levels of vexation with Goldsmith.

Addington is a hard man to cross. Flanigan, his former White House colleague, described his M.O.: "David could go from zero to 150 very quickly. I'm not sure how much is temper and how much is for effect. At a meeting with government bureaucrats he might start out very calm. Then he would start with the sarcasm. He could say, 'We could do that, but that would give away *all* of the president's power.'

All of a sudden here comes David Addington out of his chair. I'd think to myself we're not just dancing a minuet, there's a little slam dancing going on here." But Addington "usually had the facts, the law and the precedents on his side," says Flanigan. He had another huge advantage. He never needed to invoke Cheney's name, but everyone knew that he spoke for the vice president.

Addington was particularly biting with Goldsmith. During a long struggle over the legality of the August 2002 torture memo, Addington confronted Goldsmith, according to two sources who had heard accounts of the conversation: "Now that you've withdrawn legal opinions that the president of the United States has been relying on, I need you to go through all of OLC's opinions [relating to the war on terror] and let me know which ones you still stand by," Addington said.

Addington was taking a clever dig at Goldsmith—in effect, accusing him of undermining the entire edifice of OLC opinions. But he was not making a rhetorical point. Addington began keeping track of opinions in which he believed Goldsmith was getting wobbly—carrying a list inside his suit pocket.

Goldsmith was not unmoved by Addington's arguments, say his friends and colleagues. He told colleagues he openly worried that he might be putting soldiers and CIA officers in legal jeopardy. He did not want to weaken America's defenses against another terrorist attack. But he also wanted to uphold the law. Goldsmith, known for putting in long hours, went to new extremes as he reviewed the OLC opinions. Colleagues received e-mails from him at all hours of the night. His family—his wife, 3-year-old son and newborn baby boy—saw him less and less often. Sometimes he would take his older boy down to the Justice Department's Command Center on Saturdays, just to be near him.

By June 2004, the crisis came to a head when the torture memo leaked to The Washington Post. Goldsmith was worn out but still resolute. He told Ashcroft that he was formally withdrawing the August 2002 torture memo. With some prodding from Comey, Ashcroft again backed his DOJ lawyers—though he was not happy to engage in another battle with the White House. Comey, with Goldsmith and Philbin at his side, held a not-for-attribution background briefing to announce that the Justice Department was disavowing the August 2002 torture memo. At the same time, White House officials held their own press conference, in part to counter what they saw as Comey's grandstanding. A fierce behind-the-scenes bureaucratic fight dragged on until December, when the OLC issued a new memo that was hardly to the taste of human-rights activists but contained a much more defensible (and broader) definition of torture and was far less expansive about the power of the president to authorize coercive interrogation methods. The author of the revised memo, senior Justice Department lawyer Daniel Levin, fought pitched battles with the White House over its timing and contents; yet again, Comey's intervention was crucial in helping Levin and his allies carry the day.

By then, Goldsmith was gone from Justice. He and his wife (who is a poet) and two children had moved to Cambridge, where Goldsmith had taken a job on the Harvard Law faculty. Other dissenting lawyers had also moved on. Philbin, who had been the in-house favorite to become deputy solicitor general, saw his chances of securing any administration job derailed when Addington, who had come to see him as a turncoat on national-security issues, moved to block him from promotion, with Cheney's blessing; Philbin, who declined to comment, was planning a move into the

private sector. Levin, whose battles with the White House took their toll on his political future as well, left for private practice. (Levin declined to comment.) Comey was working for a defense contractor.

But the national security/civil liberties pendulum was swinging. Bellinger, who had become legal adviser to Secretary of State Condoleezza Rice, began pushing, along with lawyers in the Pentagon, to roll back unduly harsh interrogation and detention policies. After the electronic eavesdropping program leaked in *The New York Times* in December 2005, Sen. Arlen Specter announced that the Senate Judiciary Committee would hold hearings that will start next week. The federal courts have increasingly begun resisting absolutist assertions of executive authority in the war on terror. After Cheney's chief of staff, Scooter Libby, pleaded not guilty to perjury charges in the Plame leak case, Addington took Libby's place. He is still a force to be reckoned with in the councils of power. And he still has the ear of the president and vice president; last week Bush was out vigorously defending warrantless eavesdropping. But, thanks to a few quietly determined lawyers, a healthy debate has at last begun.

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HEADLINE: Bush Lets U.S. Spy on Callers Without Courts

BYLINE: By JAMES RISEN and ERIC LICHTBLAU; Barclay Walsh contributed research for this article.

DATELINE: WASHINGTON, Dec. 15

BODY:

Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the National Security Agency, whose mission is to spy on communications abroad. As a result, some officials familiar with the continuing operation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

"This is really a sea change," said a former senior official who specializes in national security law. "It's almost a mainstay of this country that the N.S.A. only does foreign searches."

Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for The New York Times because of their concerns about the operation's legality and oversight.

According to those officials and others, reservations about aspects of the program have also been expressed by Senator John D. Rockefeller IV, the West Virginia Democrat who is the vice chairman of the Senate Intelligence Committee, and a judge presiding over a secret court that oversees intelligence matters. Some of the questions about the agency's new powers led the administration to temporarily suspend the operation last year and impose more restrictions, the officials said.

The Bush administration views the operation as necessary so that the agency can move quickly to monitor communications that may disclose threats to the United States, the officials said. Defenders of the program say it has been a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.

Administration officials are confident that existing safeguards are sufficient to protect the privacy and civil liberties of Americans, the officials say. In some cases, they said, the Justice Department eventually seeks warrants if it wants to expand the eavesdropping to include communications confined within the United States. The officials said the administration had briefed Congressional leaders about the program and notified the judge in charge of the Foreign Intelligence Surveillance Court, the secret Washington court that deals with national security issues.

The White House asked The New York Times not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.

Dealing With a New Threat

While many details about the program remain secret, officials familiar with it say the N.S.A. eavesdrops without warrants on up to 500 people in the United States at any given time. The list changes as some names are added and others dropped, so the number monitored in this country may have reached into the thousands since the program began, several officials said. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time, according to those officials.

Several officials said the eavesdropping program had helped uncover a plot by Iyman Faris, an Ohio trucker and naturalized citizen who pleaded guilty in 2003 to supporting Al Qaeda by planning to bring down the Brooklyn Bridge with blowtorches. What appeared to be another Qaeda plot, involving fertilizer bomb attacks on British pubs and train stations, was exposed last year in part through the program, the officials said. But they said most people targeted for N.S.A. monitoring have never been charged with a crime, including an Iranian-American doctor in the South who came under suspicion because of what one official described as dubious ties to Osama bin Laden.

The eavesdropping program grew out of concerns after the Sept. 11 attacks that the

nation's intelligence agencies were not poised to deal effectively with the new threat of Al Qaeda and that they were handcuffed by legal and bureaucratic restrictions better suited to peacetime than war, according to officials. In response, President Bush significantly eased limits on American intelligence and law enforcement agencies and the military.

But some of the administration's antiterrorism initiatives have provoked an outcry from members of Congress, watchdog groups, immigrants and others who argue that the measures erode protections for civil liberties and intrude on Americans' privacy.

Opponents have challenged provisions of the USA Patriot Act, the focus of contentious debate on Capitol Hill this week, that expand domestic surveillance by giving the Federal Bureau of Investigation more power to collect information like library lending lists or Internet use. Military and F.B.I. officials have drawn criticism for monitoring what were largely peaceful antiwar protests. The Pentagon and the Department of Homeland Security were forced to retreat on plans to use public and private databases to hunt for possible terrorists. And last year, the Supreme Court rejected the administration's claim that those labeled "enemy combatants" were not entitled to judicial review of their open-ended detention.

Mr. Bush's executive order allowing some warrantless eavesdropping on those inside the United States -- including American citizens, permanent legal residents, tourists and other foreigners -- is based on classified legal opinions that assert that the president has broad powers to order such searches, derived in part from the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups, according to the officials familiar with the N.S.A. operation.

The National Security Agency, which is based at Fort Meade, Md., is the nation's largest and most secretive intelligence agency, so intent on remaining out of public view that it has long been nicknamed "No Such Agency." It breaks codes and maintains listening posts around the world to eavesdrop on foreign governments, diplomats and trade negotiators as well as drug lords and terrorists. But the agency ordinarily operates under tight restrictions on any spying on Americans, even if they are overseas, or disseminating information about them.

What the agency calls a "special collection program" began soon after the Sept. 11 attacks, as it looked for new tools to attack terrorism. The program accelerated in early 2002 after the Central Intelligence Agency started capturing top Qaeda operatives overseas, including Abu Zubaydah, who was arrested in Pakistan in March 2002. The C.I.A. seized the terrorists' computers, cellphones and personal phone directories, said the officials familiar with the program. The N.S.A. surveillance was intended to exploit those numbers and addresses as quickly as possible, they said.

In addition to eavesdropping on those numbers and reading e-mail messages to and from the Qaeda figures, the N.S.A. began monitoring others linked to them, creating an expanding chain. While most of the numbers and addresses were overseas, hundreds were

in the United States, the officials said.

Under the agency's longstanding rules, the N.S.A. can target for interception phone calls or e-mail messages on foreign soil, even if the recipients of those communications are in the United States. Usually, though, the government can only target phones and e-mail messages in the United States by first obtaining a court order from the Foreign Intelligence Surveillance Court, which holds its closed sessions at the Justice Department.

Traditionally, the F.B.I., not the N.S.A., seeks such warrants and conducts most domestic eavesdropping. Until the new program began, the N.S.A. typically limited its domestic surveillance to foreign embassies and missions in Washington, New York and other cities, and obtained court orders to do so.

Since 2002, the agency has been conducting some warrantless eavesdropping on people in the United States who are linked, even if indirectly, to suspected terrorists through the chain of phone numbers and e-mail addresses, according to several officials who know of the operation. Under the special program, the agency monitors their international communications, the officials said. The agency, for example, can target phone calls from someone in New York to someone in Afghanistan.

Warrants are still required for eavesdropping on entirely domestic-to-domestic communications, those officials say, meaning that calls from that New Yorker to someone in California could not be monitored without first going to the Federal Intelligence Surveillance Court.

A White House Briefing

After the special program started, Congressional leaders from both political parties were brought to Vice President Dick Cheney's office in the White House. The leaders, who included the chairmen and ranking members of the Senate and House intelligence committees, learned of the N.S.A. operation from Mr. Cheney, Lt. Gen. Michael V. Hayden of the Air Force, who was then the agency's director and is now a full general and the principal deputy director of national intelligence, and George J. Tenet, then the director of the C.I.A., officials said.

It is not clear how much the members of Congress were told about the presidential order and the eavesdropping program. Some of them declined to comment about the matter, while others did not return phone calls.

Later briefings were held for members of Congress as they assumed leadership roles on the intelligence committees, officials familiar with the program said. After a 2003 briefing, Senator Rockefeller, the West Virginia Democrat who became vice chairman of the Senate Intelligence Committee that year, wrote a letter to Mr. Cheney expressing concerns about the program, officials knowledgeable about the letter said. It could not be determined if he received a reply. Mr. Rockefeller declined to comment. Aside from the

Congressional leaders, only a small group of people, including several cabinet members and officials at the N.S.A., the C.I.A. and the Justice Department, know of the program.

Some officials familiar with it say they consider warrantless eavesdropping inside the United States to be unlawful and possibly unconstitutional, amounting to an improper search. One government official involved in the operation said he privately complained to a Congressional official about his doubts about the program's legality. But nothing came of his inquiry. "People just looked the other way because they didn't want to know what was going on," he said.

A senior government official recalled that he was taken aback when he first learned of the operation. "My first reaction was, 'We're doing what?'" he said. While he said he eventually felt that adequate safeguards were put in place, he added that questions about the program's legitimacy were understandable.

Some of those who object to the operation argue that is unnecessary. By getting warrants through the foreign intelligence court, the N.S.A. and F.B.I. could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting longstanding rules, they say.

The standard of proof required to obtain a warrant from the Foreign Intelligence Surveillance Court is generally considered lower than that required for a criminal warrant -- intelligence officials only have to show probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups -- and the secret court has turned down only a small number of requests over the years. In 2004, according to the Justice Department, 1,754 warrants were approved. And the Foreign Intelligence Surveillance Court can grant emergency approval for wiretaps within hours, officials say.

Administration officials counter that they sometimes need to move more urgently, the officials said. Those involved in the program also said that the N.S.A.'s eavesdroppers might need to start monitoring large batches of numbers all at once, and that it would be impractical to seek permission from the Foreign Intelligence Surveillance Court first, according to the officials.

The N.S.A. domestic spying operation has stirred such controversy among some national security officials in part because of the agency's cautious culture and longstanding rules.

Widespread abuses -- including eavesdropping on Vietnam War protesters and civil rights activists -- by American intelligence agencies became public in the 1970's and led to passage of the Foreign Intelligence Surveillance Act, which imposed strict limits on intelligence gathering on American soil. Among other things, the law required search warrants, approved by the secret F.I.S.A. court, for wiretaps in national security cases. The agency, deeply scarred by the scandals, adopted additional rules that all but ended domestic spying on its part.

After the Sept. 11 attacks, though, the United States intelligence community was

criticized for being too risk-averse. The National Security Agency was even cited by the independent 9/11 Commission for adhering to self-imposed rules that were stricter than those set by federal law.

Concerns and Revisions

Several senior government officials say that when the special operation began, there were few controls on it and little formal oversight outside the N.S.A. The agency can choose its eavesdropping targets and does not have to seek approval from Justice Department or other Bush administration officials. Some agency officials wanted nothing to do with the program, apparently fearful of participating in an illegal operation, a former senior Bush administration official said. Before the 2004 election, the official said, some N.S.A. personnel worried that the program might come under scrutiny by Congressional or criminal investigators if Senator John Kerry, the Democratic nominee, was elected president.

In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it.

For the first time, the Justice Department audited the N.S.A. program, several officials said. And to provide more guidance, the Justice Department and the agency expanded and refined a checklist to follow in deciding whether probable cause existed to start monitoring someone's communications, several officials said.

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the Federal Intelligence Surveillance Court, helped spur the suspension, officials said. The judge questioned whether information obtained under the N.S.A. program was being improperly used as the basis for F.I.S.A. wiretap warrant requests from the Justice Department, according to senior government officials. While not knowing all the details of the exchange, several government lawyers said there appeared to be concerns that the Justice Department, by trying to shield the existence of the N.S.A. program, was in danger of misleading the court about the origins of the information cited to justify the warrants.

One official familiar with the episode said the judge insisted to Justice Department lawyers at one point that any material gathered under the special N.S.A. program not be used in seeking wiretap warrants from her court. Judge Kollar-Kotelly did not return calls for comment.

A related issue arose in a case in which the F.B.I. was monitoring the communications of a terrorist suspect under a F.I.S.A.-approved warrant, even though the National Security Agency was already conducting warrantless eavesdropping.

According to officials, F.B.I. surveillance of Mr. Faris, the Brooklyn Bridge plotter, was dropped for a short time because of technical problems. At the time, senior Justice

Department officials worried what would happen if the N.S.A. picked up information that needed to be presented in court. The government would then either have to disclose the N.S.A. program or mislead a criminal court about how it had gotten the information.

Several national security officials say the powers granted the N.S.A. by President Bush go far beyond the expanded counterterrorism powers granted by Congress under the USA Patriot Act, which is up for renewal. The House on Wednesday approved a plan to reauthorize crucial parts of the law. But final passage has been delayed under the threat of a Senate filibuster because of concerns from both parties over possible intrusions on Americans' civil liberties and privacy.

Under the act, law enforcement and intelligence officials are still required to seek a F.I.S.A. warrant every time they want to eavesdrop within the United States. A recent agreement reached by Republican leaders and the Bush administration would modify the standard for F.B.I. wiretap warrants, requiring, for instance, a description of a specific target. Critics say the bar would remain too low to prevent abuses.

Bush administration officials argue that the civil liberties concerns are unfounded, and they say pointedly that the Patriot Act has not freed the N.S.A. to target Americans. "Nothing could be further from the truth," wrote John Yoo, a former official in the Justice Department's Office of Legal Counsel, and his co-author in a Wall Street Journal opinion article in December 2003. Mr. Yoo worked on a classified legal opinion on the N.S.A.'s domestic eavesdropping program.

At an April hearing on the Patriot Act renewal, Senator Barbara A. Mikulski, Democrat of Maryland, asked Attorney General Alberto R. Gonzales and Robert S. Mueller III, the director of the F.B.I., "Can the National Security Agency, the great electronic snooper, spy on the American people?"

"Generally," Mr. Mueller said, "I would say generally, they are not allowed to spy or to gather information on American citizens."

President Bush did not ask Congress to include provisions for the N.S.A. domestic surveillance program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution on the campaign against terrorism provided ample authorization, officials said.

The Legal Line Shifts

Seeking Congressional approval was also viewed as politically risky because the proposal would be certain to face intense opposition on civil liberties grounds. The administration also feared that by publicly disclosing the existence of the operation, its usefulness in tracking terrorists would end, officials said.

The legal opinions that support the N.S.A. operation remain classified, but they appear to

have followed private discussions among senior administration lawyers and other officials about the need to pursue aggressive strategies that once may have been seen as crossing a legal line, according to senior officials who participated in the discussions.

For example, just days after the Sept. 11, 2001, attacks on New York and the Pentagon, Mr. Yoo, the Justice Department lawyer, wrote an internal memorandum that argued that the government might use "electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses."

Mr. Yoo noted that while such actions could raise constitutional issues, in the face of devastating terrorist attacks "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties."

The next year, Justice Department lawyers disclosed their thinking on the issue of warrantless wiretaps in national security cases in a little-noticed brief in an unrelated court case. In that 2002 brief, the government said that "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

Administration officials were also encouraged by a November 2002 appeals court decision in an unrelated matter. The decision by the Foreign Intelligence Surveillance Court of Review, which sided with the administration in dismantling a bureaucratic "wall" limiting cooperation between prosecutors and intelligence officers, cited "the president's inherent constitutional authority to conduct warrantless foreign intelligence surveillance."

But the same court suggested that national security interests should not be grounds "to jettison the Fourth Amendment requirements" protecting the rights of Americans against undue searches. The dividing line, the court acknowledged, "is a very difficult one to administer."

CORRECTION-DATE: December 28, 2005

CORRECTION: Because of an editing error, a front-page article on Dec. 16 about a decision by President Bush to authorize the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without warrants ordinarily required for domestic spying misstated the name of the court that would normally issue those warrants. It is the Foreign -- not Federal -- Intelligence Surveillance Court.

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SECTION: Section A; Column 6; National Desk; DOMESTIC SURVEILLANCE: THE PROGRAM; Pg. 1

LENGTH: 1357 words

HEADLINE: SPY AGENCY MINED VAST DATA TROVE, OFFICIALS REPORT

BYLINE: By ERIC LICHTBLAU and JAMES RISEN

DATELINE: WASHINGTON, Dec. 23

BODY:

The National Security Agency has traced and analyzed large volumes of telephone and Internet communications flowing into and out of the United States as part of the eavesdropping program that President Bush approved after the Sept. 11, 2001, attacks to hunt for evidence of terrorist activity, according to current and former government officials.

The volume of information harvested from telecommunication data and voice networks, without court-approved warrants, is much larger than the White House has acknowledged, the officials said. It was collected by tapping directly into some of the American telecommunication system's main arteries, they said.

As part of the program approved by President Bush for domestic surveillance without warrants, the N.S.A. has gained the cooperation of American telecommunications companies to obtain backdoor access to streams of domestic and international communications, the officials said.

The government's collection and analysis of phone and Internet traffic have raised questions among some law enforcement and judicial officials familiar with the program. One issue of concern to the Foreign Intelligence Surveillance Court, which has reviewed some separate warrant applications growing out of the N.S.A.'s surveillance program, is whether the court has legal authority over calls outside the United States that happen to pass through American-based telephonic "switches," according to officials familiar with the matter.

"There was a lot of discussion about the switches" in conversations with the court, a Justice Department official said, referring to the gateways through which much of the communications traffic flows. "You're talking about access to such a vast amount of communications, and the question was, How do you minimize something that's on a switch that's carrying such large volumes of traffic? The court was very, very concerned about that."

Since the disclosure last week of the N.S.A.'s domestic surveillance program, President Bush and his senior aides have stressed that his executive order allowing eavesdropping without warrants was limited to the monitoring of international phone and e-mail communications involving people with known links to Al Qaeda.

What has not been publicly acknowledged is that N.S.A. technicians, besides actually eavesdropping on specific conversations, have combed through large volumes of phone and Internet traffic in search of patterns that might point to terrorism

suspects. Some officials describe the program as a large data-mining operation.

The current and former government officials who discussed the program were granted anonymity because it remains classified.

Bush administration officials declined to comment on Friday on the technical aspects of the operation and the N.S.A.'s use of broad searches to look for clues on terrorists. Because the program is highly classified, many details of how the N.S.A. is conducting it remain unknown, and members of Congress who have pressed for a full Congressional inquiry say they are eager to learn more about the program's operational details, as well as its legality.

Officials in the government and the telecommunications industry who have knowledge of parts of the program say the N.S.A. has sought to analyze communications patterns to glean clues from details like who is calling whom, how long a phone call lasts and what time of day it is made, and the origins and destinations of phone calls and e-mail messages. Calls to and from Afghanistan, for instance, are known to have been of particular interest to the N.S.A. since the Sept. 11 attacks, the officials said.

This so-called "pattern analysis" on calls within the United States would, in many circumstances, require a court warrant if the government wanted to trace who calls whom.

The use of similar data-mining operations by the Bush administration in other contexts has raised strong objections, most notably in connection with the Total Information Awareness system, developed by the Pentagon for tracking terror suspects, and the Department of Homeland Security's Capps program for screening airline passengers. Both programs were ultimately scrapped after public outcries over possible threats to privacy and civil liberties.

But the Bush administration regards the N.S.A.'s ability to trace and analyze large volumes of data as critical to its expanded mission to detect terrorist plots before they can be carried out, officials familiar with the program say. Administration officials maintain that the system set up by Congress in 1978 under the Foreign Intelligence Surveillance Act does not give them the speed and flexibility to respond fully to terrorist threats at home.

A former technology manager at a major telecommunications company said that since the Sept. 11 attacks, the leading companies in the industry have been storing information on calling patterns and giving it to the federal government to aid in tracking possible terrorists.

"All that data is mined with the cooperation of the government and shared with them, and since 9/11, there's been much more active involvement in that area," said the former manager, a telecommunications expert who did not want his name or that of his former company used because of concern about revealing trade secrets.

Such information often proves just as valuable to the government as eavesdropping on the calls themselves, the former manager said.

"If they get content, that's useful to them too, but the real plum is going to be the transaction data and the traffic analysis," he said. "Massive amounts of traffic

analysis information -- who is calling whom, who is in Osama Bin Laden's circle of family and friends -- is used to identify lines of communication that are then given closer scrutiny."

Several officials said that after President Bush's order authorizing the N.S.A. program, senior government officials arranged with officials of some of the nation's largest telecommunications companies to gain access to switches that act as gateways at the borders between the United States' communications networks and international networks. The identities of the corporations involved could not be determined.

The switches are some of the main arteries for moving voice and some Internet traffic into and out of the United States, and, with the globalization of the telecommunications industry in recent years, many international-to-international calls are also routed through such American switches.

One outside expert on communications privacy who previously worked at the N.S.A. said that to exploit its technological capabilities, the American government had in the last few years been quietly encouraging the telecommunications industry to increase the amount of international traffic that is routed through American-based switches.

The growth of that transit traffic had become a major issue for the intelligence community, officials say, because it had not been fully addressed by 1970's-era laws and regulations governing the N.S.A. Now that foreign calls were being routed through switches on American soil, some judges and law enforcement officials regarded eavesdropping on those calls as a possible violation of those decades-old restrictions, including the Foreign Intelligence Surveillance Act, which requires court-approved warrants for domestic surveillance.

Historically, the American intelligence community has had close relationships with many communications and computer firms and related technical industries. But the N.S.A.'s backdoor access to major telecommunications switches on American soil with the cooperation of major corporations represents a significant expansion of the agency's operational capability, according to current and former government officials.

Phil Karn, a computer engineer and technology expert at a major West Coast telecommunications company, said access to such switches would be significant. "If the government is gaining access to the switches like this, what you're really talking about is the capability of an enormous vacuum operation to sweep up data," he said.

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LENGTH: 2354 words

HEADLINE: SPY AGENCY DATA AFTER SEPT. 11 LED F.B.I. TO DEAD ENDS

BYLINE: This article is by Lowell Bergman, Eric Lichtblau, Scott Shane and Don Van Natta Jr.; William K. Rashbaum contributed reporting from New York for this article.

DATELINE: WASHINGTON, Jan. 16

BODY:

In the anxious months after the Sept. 11 attacks, the National Security Agency began sending a steady stream of telephone numbers, e-mail addresses and names to the F.B.I. in search of terrorists. The stream soon became a flood, requiring hundreds of agents to check out thousands of tips a month.

But virtually all of them, current and former officials say, led to dead ends or innocent Americans.

F.B.I. officials repeatedly complained to the spy agency that the unfiltered information was swamping investigators. The spy agency was collecting much of the data by eavesdropping on some Americans' international communications and conducting computer searches of phone and Internet traffic. Some F.B.I. officials and prosecutors also thought the checks, which sometimes involved interviews by agents, were pointless intrusions on Americans' privacy.

As the bureau was running down those leads, its director, Robert S. Mueller III, raised concerns about the legal rationale for a program of eavesdropping without warrants, one government official said. Mr. Mueller asked senior administration officials about "whether the program had a proper legal foundation," but deferred to Justice Department legal opinions, the official said.

President Bush has characterized the eavesdropping program as a "vital tool" against terrorism; Vice President Dick Cheney has said it has saved "thousands of lives."

But the results of the program look very different to some officials charged with tracking terrorism in the United States. More than a dozen current and former law enforcement and counterterrorism officials, including some in the small circle who knew of the secret program and how it played out at the F.B.I., said the torrent of tips led them to few potential terrorists inside the country they did not know of from other sources and diverted agents from counterterrorism work they viewed as more productive.

"We'd chase a number, find it's a schoolteacher with no indication they've ever been involved in international terrorism -- case closed," said one former F.B.I. official, who was aware of the program and the data it generated for the bureau. "After you get a thousand numbers and not one is turning up anything, you get some frustration."

Intelligence officials disagree with any characterization of the program's results as

modest, said Judith A. Emmel, a spokeswoman for the office of the director of national intelligence. Ms. Emmel cited a statement at a briefing last month by Gen. Michael V. Hayden, the country's second-ranking intelligence official and the director of the N.S.A. when the program was started.

"I can say unequivocally that we have gotten information through this program that would not otherwise have been available," General Hayden said. The White House and the F.B.I. declined to comment on the program or its results.

The differing views of the value of the N.S.A.'s foray into intelligence-gathering in the United States may reflect both bureaucratic rivalry and a culture clash. The N.S.A., an intelligence agency, routinely collects huge amounts of data from across the globe that may yield only tiny nuggets of useful information; the F.B.I., while charged with fighting terrorism, retains the traditions of a law enforcement agency more focused on solving crimes.

"It isn't at all surprising to me that people not accustomed to doing this would say, 'Boy, this is an awful lot of work to get a tiny bit of information,' " said Adm. Bobby R. Inman, a former N.S.A. director. "But the rejoinder to that is, Have you got anything better?"

Several of the law enforcement officials acknowledged that they might not know of arrests or intelligence activities overseas that grew out of the domestic spying program. And because the program was a closely guarded secret, its role in specific cases may have been disguised or hidden even from key investigators.

Still, the comments on the N.S.A. program from the law enforcement and counterterrorism officials, many of them high level, are the first indication that the program was viewed with skepticism by key figures at the Federal Bureau of Investigation, the agency responsible for disrupting plots and investigating terrorism on American soil.

All the officials spoke on condition of anonymity because the program is classified. It is coming under scrutiny next month in hearings on Capitol Hill, which were planned after members of Congress raised questions about the legality of the eavesdropping. The program was disclosed in December by The New York Times.

The law enforcement and counterterrorism officials said the program had uncovered no active Qaeda networks inside the United States planning attacks. "There were no imminent plots -- not inside the United States," the former F.B.I. official said.

Some of the officials said the eavesdropping program might have helped uncover people with ties to Al Qaeda in Albany; Portland, Ore.; and Minneapolis. Some of the activities involved recruitment, training or fund-raising.

But, along with several British counterterrorism officials, some of the officials questioned assertions by the Bush administration that the program was the key to uncovering a plot to detonate fertilizer bombs in London in 2004. The F.B.I. and other law enforcement officials also expressed doubts about the importance of the program's role in another case named by administration officials as a success in the fight against terrorism, an aborted scheme to topple the Brooklyn Bridge with a blow torch.

Some officials said that in both cases, they had already learned of the plans through interrogation of prisoners or other means.

Immediately after the Sept. 11 attacks, the Bush administration pressed the nation's intelligence agencies and the F.B.I. to move urgently to thwart any more plots. The N.S.A., whose mission is to spy overseas, began monitoring the international e-mail messages and phone calls of people inside the United States who were linked, even indirectly, to suspected Qaeda figures.

Under a presidential order, the agency conducted the domestic eavesdropping without seeking the warrants ordinarily required from the secret Foreign Intelligence Surveillance Court, which handles national security matters. The administration has defended the legality of the program, pointing to what it says is the president's inherent constitutional power to defend the country and to legislation passed by Congress after the Sept. 11 attacks.

Administration officials told Mr. Mueller, the F.B.I. director, of the eavesdropping program, and his agency was enlisted to run down leads from it, several current and former officials said.

While he and some bureau officials discussed the fact that the program bypassed the intelligence surveillance court, Mr. Mueller expressed no concerns about that to them, those officials said. But another government official said Mr. Mueller had questioned the administration about the legal authority for the program.

Officials who were briefed on the N.S.A. program said the agency collected much of the data passed on to the F.B.I. as tips by tracing phone numbers in the United States called by suspects overseas, and then by following the domestic numbers to other numbers called. In other cases, lists of phone numbers appeared to result from the agency's computerized scanning of communications coming into and going out of the country for names and keywords that might be of interest. The deliberate blurring of the source of the tips caused some frustration among those who had to follow up.

F.B.I. field agents, who were not told of the domestic surveillance programs, complained that they often were given no information about why names or numbers had come under suspicion. A former senior prosecutor who was familiar with the eavesdropping programs said intelligence officials turning over the tips "would always say that we had information whose source we can't share, but it indicates that this person has been communicating with a suspected Qaeda operative." He said, "I would always wonder, what does 'suspected' mean?"

"The information was so thin," he said, "and the connections were so remote, that they never led to anything, and I never heard any follow-up."

In response to the F.B.I. complaints, the N.S.A. eventually began ranking its tips on a three-point scale, with 3 being the highest priority and 1 the lowest, the officials said. Some tips were considered so hot that they were carried by hand to top F.B.I. officials. But in bureau field offices, the N.S.A. material continued to be viewed as unproductive, prompting agents to joke that a new bunch of tips meant more "calls to Pizza Hut," one official, who supervised field agents, said.

The views of some bureau officials about the value of the N.S.A.'s domestic

surveillance offers a revealing glimpse of the difficulties law enforcement and intelligence agencies have had cooperating since Sept. 11.

The N.S.A., criticized by the national Sept. 11 commission for its "avoidance of anything domestic" before the attacks, moved aggressively into the domestic realm after them. But the legal debate over its warrantless eavesdropping has embroiled the agency in just the kind of controversy its secretive managers abhor. The F.B.I., meanwhile, has struggled over the last four years to expand its traditional mission of criminal investigation to meet the larger menace of terrorism.

Admiral Inman, the former N.S.A. director and deputy director of C.I.A., said the F.B.I. complaints about thousands of dead-end leads revealed a chasm between very different disciplines. Signals intelligence, the technical term for N.S.A.'s communications intercepts, rarely produces "the complete information you're going to get from a document or a witness" in a traditional F.B.I. investigation, he said.

Some F.B.I. officials said they were uncomfortable with the expanded domestic role played by the N.S.A. and other intelligence agencies, saying most intelligence officers lacked the training needed to safeguard Americans' privacy and civil rights. They said some protections had to be waived temporarily in the months after Sept. 11 to detect a feared second wave of attacks, but they questioned whether emergency procedures like the eavesdropping should become permanent.

That discomfort may explain why some F.B.I. officials may seek to minimize the benefits of the N.S.A. program or distance themselves from the agency. "This wasn't our program," an F.B.I. official said. "It's not our mess, and we're not going to clean it up."

The N.S.A.'s legal authority for collecting the information it passed to the F.B.I. is uncertain. The Foreign Intelligence Surveillance Act requires a warrant for the use of so-called pen register equipment that records American phone numbers, even if the contents of the calls are not intercepted. But officials with knowledge of the program said no warrants were sought to collect the numbers, and it is unclear whether the secret executive order signed by Mr. President Bush in 2002 to authorize eavesdropping without warrants also covered the collection of phone numbers and e-mail addresses.

Aside from the director, F.B.I. officials did not question the legal status of the tips, assuming that N.S.A. lawyers had approved. They were more concerned about the quality and quantity of the material, which produced "mountains of paperwork" often more like raw data than conventional investigative leads.

"It affected the F.B.I. in the sense that they had to devote so many resources to tracking every single one of these leads, and, in my experience, they were all dry leads," the former senior prosecutor said. "A trained investigator never would have devoted the resources to take those leads to the next level, but after 9/11, you had to."

By the administration's account, the N.S.A. eavesdropping helped lead investigators to Iyman Faris, an Ohio truck driver and friend of Khalid Shaikh Mohammed, who is believed to be the mastermind of the Sept. 11 attacks. Mr. Faris spoke of toppling the Brooklyn Bridge by taking a torch to its suspension cables, but concluded that it would not work. He is now serving a 20-year sentence in a federal prison.

But as in the London fertilizer bomb case, some officials with direct knowledge of the Faris case dispute that the N.S.A. information played a significant role.

By contrast, different officials agree that the N.S.A.'s domestic operations played a role in the arrest of an imam and another man in Albany in August 2004 as part of an F.B.I. counterterrorism sting investigation. The men, Yassin Aref, 35, and Mohammed Hossain, 49, are awaiting trial on charges that they attempted to engineer the sale of missile launchers to an F.B.I. undercover informant.

In addition, government officials said the N.S.A. eavesdropping program might have assisted in the investigations of people with suspected Qaeda ties in Portland and Minneapolis. In the Minneapolis case, charges of supporting terrorism were filed in 2004 against Mohammed Abdullah Warsame, a Canadian citizen. Six people in the Portland case were convicted of crimes that included money laundering and conspiracy to wage war against the United States.

Even senior administration officials with access to classified operations suggest that drawing a clear link between a particular source and the unmasking of a potential terrorist is not always possible.

When Michael Chertoff, the homeland security secretary, was asked last week on "The Charlie Rose Show" whether the N.S.A. wiretapping program was important in deterring terrorism, he said, "I don't know that it's ever possible to attribute one strand of intelligence from a particular program."

But Mr. Chertoff added, "I can tell you in general the process of doing whatever you can do technologically to find out what is being said by a known terrorist to other people, and who that person is communicating with, that is without a doubt one of the critical tools we've used time and again."

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SECTION: Section 4; Column 1; Editorial Desk; Pg. 15

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HEADLINE: Spies, Lies and Wiretaps

BODY:

A bit over a week ago, President Bush and his men promised to provide the legal, constitutional and moral justifications for the sort of warrantless spying on Americans that has been illegal for nearly 30 years. Instead, we got the familiar mix of political spin, clumsy historical misinformation, contemptuous dismissals of civil liberties concerns, cynical attempts to paint dissents as anti-American and pro-terrorist, and a couple of big, dangerous lies.

The first was that the domestic spying program is carefully aimed only at people who are actively working with Al Qaeda, when actually it has violated the rights of countless innocent Americans. And the second was that the Bush team could have prevented the 9/11 attacks if only they had thought of eavesdropping without a warrant.

Sept. 11 could have been prevented. This is breathtakingly cynical. The nation's guardians did not miss the 9/11 plot because it takes a few hours to get a warrant to eavesdrop on phone calls and e-mail messages. They missed the plot because they were not looking. The same officials who now say 9/11 could have been prevented said at the time that no one could possibly have foreseen the attacks. We keep hoping that Mr. Bush will finally lay down the bloody banner of 9/11, but Karl Rove, who emerged from hiding recently to talk about domestic spying, made it clear that will not happen -- because the White House thinks it can make Democrats look as though they do not want to defend America. "President Bush believes if Al Qaeda is calling somebody in America, it is in our national security interest to know who they're calling and why," he told Republican officials. "Some important Democrats clearly disagree."

Mr. Rove knows perfectly well that no Democrat has ever said any such thing -- and that nothing prevented American intelligence from listening to a call from Al Qaeda to the United States, or a call from the United States to Al Qaeda, before Sept. 11, 2001, or since. The 1978 Foreign Intelligence Surveillance Act simply required the government to obey the Constitution in doing so. And FISA was amended after 9/11 to make the job much easier.

Only bad guys are spied on. Bush officials have said the surveillance is tightly focused only on contacts between people in this country and Al Qaeda and other terrorist groups. Vice President Dick Cheney claimed it saved thousands of lives by preventing attacks. But reporting in this paper has shown that the National Security Agency swept up vast quantities of e-mail messages and telephone calls and used computer searches to generate thousands of leads. F.B.I. officials said virtually all of these led to dead ends or to innocent Americans. The biggest fish the administration has claimed so far has been a crackpot who wanted to destroy the Brooklyn Bridge with a blowtorch -- a case that F.B.I. officials said was not connected to the spying operation anyway.

The spying is legal. The secret program violates the law as currently written. It's that simple. In fact, FISA was enacted in 1978 to avoid just this sort of abuse. It said that the government could not spy on Americans by reading their mail (or now their e-mail) or listening to their telephone conversations without obtaining a warrant from a special court created for this purpose. The court has approved tens of thousands of warrants over the years and rejected a handful.

As amended after 9/11, the law says the government needs probable cause, the constitutional gold standard, to believe the subject of the surveillance works for a foreign power or a terrorist group, or is a lone-wolf terrorist. The attorney general can authorize electronic snooping on his own for 72 hours and seek a warrant later. But that was not good enough for Mr. Bush, who lowered the standard for spying on Americans from "probable cause" to "reasonable belief" and then cast aside the bedrock democratic principle of judicial review.

Just trust us. Mr. Bush made himself the judge of the proper balance between national security and Americans' rights, between the law and presidential power. He wants Americans to accept, on faith, that he is doing it right. But even if the United States had a government based on the good character of elected officials rather than law, Mr. Bush would not have earned that kind of trust. The domestic spying program is part of a well-established pattern: when Mr. Bush doesn't like the rules, he just changes them, as he has done for the detention and treatment of prisoners and has threatened to do in other areas, like the confirmation of his judicial nominees. He has consistently shown a lack of regard for privacy, civil liberties and judicial due process in claiming his sweeping powers. The founders of our country created the system of checks and balances to avert just this sort of imperial arrogance.

The rules needed to be changed. In 2002, a Republican senator -- Mike DeWine of Ohio -- introduced a bill that would have done just that, by lowering the standard for issuing a warrant from probable cause to "reasonable suspicion" for a "non-United States person." But the Justice Department opposed it, saying the change raised "both significant legal and practical issues" and may have been unconstitutional. Now, the president and Attorney General Alberto Gonzales are telling Americans that reasonable suspicion is a perfectly fine standard for spying on Americans as well as non-Americans -- and they are the sole judges of what is reasonable.

So why oppose the DeWine bill? Perhaps because Mr. Bush had already secretly lowered the standard of proof -- and dispensed with judges and warrants -- for Americans and non-Americans alike, and did not want anyone to know.

War changes everything. Mr. Bush says Congress gave him the authority to do anything he wanted when it authorized the invasion of Afghanistan. There is simply nothing in the record to support this ridiculous argument.

The administration also says that the vote was the start of a war against terrorism and that the spying operation is what Mr. Cheney calls a "wartime measure." That just doesn't hold up. The Constitution does suggest expanded presidential powers in a time of war. But the men who wrote it had in mind wars with a beginning and an end. The war Mr. Bush and Mr. Cheney keep trying to sell to Americans goes on forever and excuses everything.

Other presidents did it. Mr. Gonzales, who had the incredible bad taste to begin his defense of the spying operation by talking of those who plunged to their deaths from the flaming twin towers, claimed historic precedent for a president to authorize warrantless surveillance. He mentioned George Washington, Woodrow Wilson and Franklin D. Roosevelt. These precedents have no bearing on the current situation, and Mr. Gonzales's timeline conveniently ended with F.D.R., rather than including Richard Nixon, whose surveillance of antiwar groups and other political opponents inspired FISA in the first place. Like Mr. Nixon, Mr. Bush is waging an unpopular war, and his administration has abused its powers against antiwar groups and even those that are just anti-Republican.

The Senate Judiciary Committee is about to start hearings on the domestic spying. Congress has failed, tragically, on several occasions in the last five years to rein in Mr. Bush and restore the checks and balances that are the genius of American constitutional democracy. It is critical that it not betray the public once again on this score.

ROLL CALL

NSA Data Mining Is Legal, Necessary, Sec. Chertoff Says

January 19, 2006

By Morton M. Kondracke,
Roll Call Executive Editor

"I think it's important to point out," Homeland Security Secretary Michael Chertoff told me in an interview, "that there's no evidence that this is a program designed to achieve political ends or do something nefarious."



He was talking about the National Security Agency's warrantless "domestic spying" program, and I couldn't agree with him more. Despite the alarms sounded by the American Civil Liberties Union, former Vice President Al Gore and various Members of Congress, "there hasn't even been a hint" that the program is targeted at domestic dissidents or innocent bystanders, Chertoff said. It's designed to find and stop terrorists.

"If you go back to the post-Sept. 11 analyses and the 9/11 commission, the whole message was that we were inadequately sensitive to the need to identify the dots and connect them," he said.

"Now, what we're trying to do is gather as many dots as we can, figure out which are the ones that have to be connected and we're getting them connected," he said.

While refusing to discuss how the highly classified program works, Chertoff made it pretty clear that it involves "data mining" —collecting vast amounts of international communications data, running it through computers to spot key words and honing in on potential terrorists. A former prosecutor, federal judge and head of the Justice Department's criminal division, he convincingly defended the program's legal basis and intelligence value.

I asked him why the Bush administration can't comply with the 1978 Foreign Intelligence Surveillance Act, which allows the government to conduct "emergency" wiretaps for 72 hours. "It's hard to talk about classified stuff," he said, "but suffice it to say that if you have a large volume of data, a large number of [phone] numbers you're intercepting, the typical model for any kind of warrant requires you to establish probable cause [that one party is a foreign agent] on an individual number."

FISA warrant applications are inches thick, he said, and "if you're trying to sift through an enormous amount of data very quickly, I think it would be impractical." He said that getting an ordinary FISA warrant is "a voluminous, time-consuming process" and "if you're culling

through literally thousands of phone numbers ... you could wind up with a huge problem managing the amount of paper you'd have to generate."

What I understood Chertoff to be saying is that when data mining produces evidence of a terrorist contact, the government will then seek a FISA warrant to actually tap the person's phones or "undertake other kinds of activity in order to disrupt something."

As legal authority for the program, Chertoff cited a 2002 decision of the FISA Court of Review, which is one level down from the U.S. Supreme Court, holding that a president has "inherent [constitutional] authority to conduct warrantless searches to obtain foreign intelligence information."

"We take it for granted that the president does have that authority," the court said, "and, assuming it is so, FISA could not encroach on the president's constitutional powers." Chertoff also said that the courts have given wide latitude to the government in controlling and monitoring activity across international borders. All reports on the NSA activity assert that it's limited to international communications.

What about the assertion in The New York Times on Tuesday that virtually all of the thousands of NSA leads sent to the FBI in the months after the Sept. 11, 2001, terrorist attacks led to dead ends or innocent persons?

Chertoff said, "You're going to bat well below .100 any time you do intelligence gathering. That's true even in conventional law enforcement. If you get even a small percentage of things to pan out, you've succeeded to a significant degree.

"What I can tell you is this," Chertoff said. "The technique of electronic surveillance, which is gathering information about who calls whom or intercepting actual conversation, is the most significant tool in the war against terrorism.

"If we didn't have it, I'm quite sure we'd have disrupted fewer attacks and identified fewer [terrorists]."

Buried at the bottom of the Times story were a number of cases where actual terrorist operations had been disrupted, apparently as a result of NSA eavesdropping, including efforts to smuggle a missile launcher into the United States, to cut Brooklyn Bridge cables with a blowtorch and an attempt to blow up a fertilizer bomb in London.

"I would rather move quickly and remove somebody when we've got a legal basis to do so, charge them with a lesser offense [than terrorism] or deport them, than wait till I have a big case with a big press conference. If we wait until people get operational, it's a failure. Somebody could get killed."

The idea that someone could bring down the Brooklyn Bridge with a blowtorch has been ridiculed, but Chertoff said, "People kid about the shoe bomber, but had the bomb gone off and 150 people were killed, I don't think a lot of families would be laughing about it."

Civil libertarians seem to fear that the government is collecting huge quantities of data that it can later use politically, but Chertoff said, "I don't think anybody has an interest in accumulating a lot of information. We can barely manage the stuff we care about for avoiding terrorism. "I can actually make the case that the more intelligence we've got, the more we actually protect civil liberties. In a world without intelligence, where we don't have a good idea where the threats are, it means searching people, screening names, barriers and checkpoints, questioning people when they get on an airplane."

To me, the bottom line of the NSA spying case is this: Congress should investigate whether President Bush has authority to conduct anti-terrorist data mining. And, if he doesn't, Congress should give it to him — with legislative oversight.

As Chertoff told me, "the name of the game here is trying to figure out, with all the billions of pieces of data that float around the world, what data do you need to focus on? What is the stuff you need to worry about?"

"If you don't use all the tools of gathering these kinds of leads, then you're leaving very valuable tools on the table." And, if and when another 9/11 occurs, the first question that will be asked is: Why?

January 9, 2006

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The Hon. J. Dennis Hastert
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The Hon. Jane Harman
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Dear Members of Congress:

We are scholars of constitutional law and former government officials. We write in our individual capacities as citizens concerned by the Bush Administration's National Security Agency domestic spying program, as reported in the New York Times, and in particular to respond to the Justice Department's December 22, 2005 letter to the majority and minority leaders of the House and Senate Intelligence Committees setting forth the administration's

defense of the program.¹ Although the program's secrecy prevents us from being privy to all of its details, the Justice Department's defense of what it concedes was secret and warrantless electronic surveillance of persons within the United States fails to identify any plausible legal authority for such surveillance. Accordingly the program appears on its face to violate existing law.

The basic legal question here is not new. In 1978, after an extensive investigation of the privacy violations associated with foreign intelligence surveillance programs, Congress and the President enacted the Foreign Intelligence Surveillance Act (FISA). Pub. L. 95-511, 92 Stat. 1783. FISA comprehensively regulates electronic surveillance within the United States, striking a careful balance between protecting civil liberties and preserving the "vitaly important government purpose" of obtaining valuable intelligence in order to safeguard national security. S. Rep. No. 95-604, pt. 1, at 9 (1977).

With minor exceptions, FISA authorizes electronic surveillance only upon certain specified showings, and only if approved by a court. The statute specifically allows for warrantless *wartime* domestic electronic surveillance—but only for the first fifteen days of a war. 50 U.S.C. § 1811. It makes criminal any electronic surveillance not authorized by statute, *id.* § 1809; and it expressly establishes FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigation) as the "*exclusive* means by which electronic surveillance ... may be conducted," 18 U.S.C. § 2511(2)(f) (emphasis added).²

The Department of Justice concedes that the NSA program was not authorized by any of the above provisions. It maintains, however, that the program did not violate existing law because Congress implicitly authorized the NSA program when it enacted the Authorization for Use of Military Force (AUMF) against al Qaeda, Pub. L. No. 107-40, 115 Stat. 224 (2001). But the AUMF cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance to the first fifteen days of war.

The DOJ also invokes the President's inherent constitutional authority as Commander in Chief to collect "signals intelligence" targeted at the enemy, and maintains that construing FISA to prohibit the President's actions would raise constitutional questions. But even conceding that the President in his role as Commander in Chief may generally collect signals intelligence on the enemy abroad, Congress indisputably has authority to regulate electronic surveillance within the United States, as it has done in FISA. Where Congress has so regulated, the President can act in contravention of statute only if his authority is *exclusive*, and not subject to the check of statutory regulation. The DOJ letter pointedly does not make that extraordinary claim.

¹ The Justice Department letter can be found at www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

² More detail about the operation of FISA can be found in Congressional Research Service, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information" (Jan. 5, 2006). This letter was drafted prior to release of the CRS Report, which corroborates the conclusions drawn here.

Moreover, to construe the AUMF as the DOJ suggests would itself raise serious constitutional questions under the Fourth Amendment. The Supreme Court has never upheld warrantless wiretapping within the United States. Accordingly, the principle that statutes should be construed to avoid serious constitutional questions provides an additional reason for concluding that the AUMF does not authorize the President's actions here.

I. CONGRESS DID NOT IMPLICITLY AUTHORIZE THE NSA DOMESTIC SPYING PROGRAM IN THE AUMF, AND IN FACT EXPRESSLY PROHIBITED IT IN FISA

The DOJ concedes (Letter at 4) that the NSA program involves “electronic surveillance,” which is defined in FISA to mean the interception of the *contents* of telephone, wire, or email communications that occur, at least in part, in the United States. 50 U.S.C. §§ 1801(f)(1)-(2), 1801(n). NSA engages in such surveillance without judicial approval, and apparently without the substantive showings that FISA requires—e.g., that the subject is an “agent of a foreign power.” *Id.* § 1805(a). The DOJ does not argue that FISA itself authorizes such electronic surveillance; and, as the DOJ letter acknowledges, 18 U.S.C. § 1809 makes criminal any electronic surveillance not authorized by statute.

The DOJ nevertheless contends that the surveillance is authorized by the AUMF, signed on September 18, 2001, which empowers the President to use “all necessary and appropriate force against” al Qaeda. According to the DOJ, collecting “signals intelligence” on the enemy, even if it involves tapping U.S. phones without court approval or probable cause, is a “fundamental incident of war” authorized by the AUMF. This argument fails for four reasons.

First, and most importantly, the DOJ's argument rests on an unstated general “implication” from the AUMF that directly contradicts *express* and *specific* language in FISA. Specific and “carefully drawn” statutes prevail over general statutes where there is a conflict. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). In FISA, Congress has directly and specifically spoken on the question of domestic warrantless wiretapping, including during wartime, and it could not have spoken more clearly.

As noted above, Congress has comprehensively regulated all electronic surveillance in the United States, and authorizes such surveillance only pursuant to specific statutes designated as the “*exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.*” 18 U.S.C. § 2511(2)(f) (emphasis added). Moreover, FISA *specifically* addresses the question of domestic wiretapping during wartime. In a provision entitled “Authorization during time of war,” FISA dictates that “[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information *for a period not to exceed fifteen calendar days following a declaration of war by the Congress.*” 50 U.S.C. § 1811 (emphasis added). Thus, even where Congress has declared war—a more formal step than an authorization such as the AUMF—the law limits warrantless wiretapping to the first fifteen days of the conflict. Congress explained that if the President needed further warrantless surveillance during wartime, the fifteen days would be sufficient for

Congress to consider and enact further authorization.³ Rather than follow this course, the President acted unilaterally and secretly in contravention of FISA's terms. The DOJ letter remarkably does not even *mention* FISA's fifteen-day war provision, which directly refutes the President's asserted "implied" authority.

In light of the specific and comprehensive regulation of FISA, especially the fifteen-day war provision, there is no basis for finding in the AUMF's general language implicit authority for unchecked warrantless domestic wiretapping. As Justice Frankfurter stated in rejecting a similar argument by President Truman when he sought to defend the seizure of the steel mills during the Korean War on the basis of implied congressional authorization:

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

Second, the DOJ's argument would require the conclusion that Congress implicitly and *sub silentio* repealed 18 U.S.C. § 2511(2)(f), the provision that identifies FISA and specific criminal code provisions as "the *exclusive* means by which electronic surveillance . . . may be conducted." Repeals by implication are strongly disfavored; they can be established only by "overwhelming evidence," *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001), and "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," *id.* at 141-142 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). The AUMF and § 2511(2)(f) are not irreconcilable, and there is *no* evidence, let alone overwhelming evidence, that Congress intended to repeal § 2511(2)(f).

Third, Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because it was advised that Congress would reject such an amendment.⁴ The administration cannot argue on the one hand that

³ "The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. . . . The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." H.R. Conf. Rep. No. 95-1720, at 34 (1978).

⁴ Attorney General Gonzales stated, "We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

Congress authorized the NSA program in the AUMF, and at the same time that it did not ask Congress for such authorization because it feared Congress would say no.⁵

Finally, the DOJ's reliance upon *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to support its reading of the AUMF, *see* DOJ Letter at 3, is misplaced. A plurality of the Court in *Hamdi* held that the AUMF authorized military detention of enemy combatants captured on the battlefield abroad as a "fundamental incident of waging war." *Id.* at 519. The plurality expressly limited this holding to individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Id.* at 516 (emphasis added). It is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked warrantless domestic spying as included in that authorization, especially where an existing statute specifies that other laws are the "exclusive means" by which electronic surveillance may be conducted and provides that even a declaration of war authorizes such spying only for a fifteen-day emergency period.⁶

II. CONSTRUING FISA TO PROHIBIT WARRANTLESS DOMESTIC WIRETAPPING DOES NOT RAISE ANY SERIOUS CONSTITUTIONAL QUESTION, WHEREAS CONSTRUING THE AUMF TO AUTHORIZE SUCH WIRETAPPING WOULD RAISE SERIOUS QUESTIONS UNDER THE FOURTH AMENDMENT

The DOJ argues that FISA and the AUMF should be construed to permit the NSA program's domestic surveillance because otherwise there might be a "conflict between FISA and the President's Article II authority as Commander-in-Chief." DOJ Letter at 4. The statutory scheme described above is not ambiguous, and therefore the constitutional avoidance doctrine is not even implicated. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (the "canon of constitutional avoidance has no application in the absence of statutory ambiguity"). But were it implicated, it would work against the President, not in his favor.

⁵ The administration had a convenient vehicle for seeking any such amendment in the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, enacted in October 2001. The Patriot Act amended FISA in several respects, including in sections 218 (allowing FISA wiretaps in criminal investigations) and 215 (popularly known as the "libraries provision"). Yet the administration did not ask Congress to amend FISA to authorize the warrantless electronic surveillance at issue here.

⁶ The DOJ attempts to draw an analogy between FISA and 18 U.S.C. § 4001(a), which provides that the United States may not detain a U.S. citizen "except pursuant to an act of Congress." The DOJ argues that just as the AUMF was deemed to authorize the detention of Hamdi, 542 U.S. at 519, so the AUMF satisfies FISA's requirement that electronic surveillance be "authorized by statute." DOJ Letter at 3-4. The analogy is inapt. As noted above, FISA specifically limits warrantless domestic wartime surveillance to the first fifteen days of the conflict, and 18 U.S.C. § 2511(2)(f) specifies that existing law is the "exclusive means" for domestic wiretapping. Section 4001(a), by contrast, neither expressly addresses detention of the enemy during wartime nor attempts to create an exclusive mechanism for detention. Moreover, the analogy overlooks the carefully limited holding and rationale of the *Hamdi* plurality, which found the AUMF to be an "explicit congressional authorization for the detention of individuals in the narrow category we describe . . . who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network," and whom "Congress sought to target in passing the AUMF" 542 U.S. at 518. By the government's own admission, the NSA program is by no means so limited. *See* Gonzales/Hayden Press Briefing, *supra* note 4.

Construing FISA and the AUMF according to their plain meanings raises no serious constitutional questions regarding the President's duties under Article II. Construing the AUMF to *permit* unchecked warrantless wiretapping without probable cause, however, would raise serious questions under the Fourth Amendment.

A. FISA's Limitations Are Consistent with the President's Article II Role

We do not dispute that, absent congressional action, the President might have inherent constitutional authority to collect "signals intelligence" about the enemy abroad. Nor do we dispute that, had Congress taken no action in this area, the President might well be constitutionally empowered to conduct domestic surveillance directly tied and narrowly confined to that goal—subject, of course, to Fourth Amendment limits. Indeed, in the years before FISA was enacted, the federal law involving wiretapping specifically provided that "[n]othing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States." 18 U.S.C. § 2511(3) (1976).

But FISA specifically *repealed* that provision. FISA § 201(c), 92 Stat. 1797, and replaced it with language dictating that FISA and the criminal code are the "exclusive means" of conducting electronic surveillance. In doing so, Congress did not deny that the President has constitutional power to conduct electronic surveillance for national security purposes; rather, Congress properly concluded that "even if the President has the inherent authority *in the absence of legislation* to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted." H.R. Rep. No. 95-1283, pt. 1, at 24 (1978) (emphasis added). This analysis, Congress noted, was "supported by two successive Attorneys General." *Id.*

To say that the President has inherent authority does not mean that his authority is exclusive, or that his conduct is not subject to statutory regulations enacted (as FISA was) pursuant to Congress's Article I powers. As Justice Jackson famously explained in his influential opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring), the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." For example, the President in his role as Commander in Chief directs military operations. But the Framers gave Congress the power to prescribe rules for the regulation of the armed and naval forces, Art. I, § 8, cl. 14, and if a duly enacted statute prohibits the military from engaging in torture or cruel, inhuman, and degrading treatment, the President must follow that dictate. As Justice Jackson wrote, when the President acts in defiance of "the expressed or implied will of Congress," his power is "at its lowest ebb." 343 U.S. at 637. In this setting, Jackson wrote, "Presidential power [is] most vulnerable to attack and in the least favorable of possible constitutional postures." *Id.* at 640.

Congress plainly has authority to regulate domestic wiretapping by federal agencies under its Article I powers, and the DOJ does not suggest otherwise. Indeed, when FISA was enacted, the Justice Department agreed that Congress had power to regulate such conduct, and

could require judicial approval of foreign intelligence surveillance.⁷ FISA does not prohibit foreign intelligence surveillance, but merely imposes reasonable regulation to protect legitimate privacy rights. (For example, although FISA generally requires judicial approval for electronic surveillance of persons within the United States, it permits the executive branch to install a wiretap immediately so long as it obtains judicial approval within 72 hours. 50 U.S.C. § 1805(f).)

Just as the President is bound by the statutory prohibition on torture, he is bound by the statutory dictates of FISA.⁸ The DOJ once infamously argued that the President as Commander in Chief could ignore even the criminal prohibition on torture,⁹ and, more broadly still, that statutes may not “place *any* limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”¹⁰ But the administration withdrew the August 2002 torture memo after it was disclosed, and for good reason the DOJ does not advance these extreme arguments here. Absent a serious question about FISA's constitutionality, there is no reason even to consider construing the AUMF to have implicitly overturned the carefully designed regulatory regime that FISA establishes. *See, e.g., Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (constitutional avoidance canon applicable only if the constitutional question to be avoided is a serious one, “not to eliminate all possible contentions that the statute *might* be unconstitutional”) (emphasis in original; citation omitted).¹¹

⁷ *See, e.g.*, S. Rep. No. 95-604, pt. I, at 16 (1977) (Congress's assertion of power to regulate the President's authorization of electronic surveillance for foreign intelligence purposes was “concurrent in by the Attorney General”); Foreign Intelligence Electronic Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess., at 31 (1978) (Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978)) (“it seems unreasonable to conclude that Congress, in the exercise of its powers in this area, may not vest in the courts the authority to approve intelligence surveillance”).

⁸ Indeed, Article II imposes on the President the general *obligation* to enforce laws that Congress has validly enacted, including FISA: “he *shall* take Care that the Laws be faithfully executed.” (emphasis added). The use of the mandatory “shall” indicates that under our system of separated powers, he is duty-bound to execute the provisions of FISA, not defy them.

⁹ *See* Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), at 31.

¹⁰ Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President, Re: *The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them* (Sept. 25, 2001), available at www.usdoj.gov/olc/warpowers925.htm (emphasis added).

¹¹ Three years ago, the FISA Court of Review suggested in dictum that Congress cannot “encroach on the President's constitutional power” to conduct foreign intelligence surveillance. *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam). The FISA Court of Review, however, did not hold that FISA was unconstitutional, nor has any other court suggested that FISA's modest regulations constitute an impermissible encroachment on presidential authority. The FISA Court of Review relied upon *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980)—but that court did not suggest that the President's powers were beyond congressional control. To the contrary, the *Truong* court indicated that FISA's restrictions *were* constitutional. *See* 629 F.2d at 915 n.4 (noting that “the imposition of a warrant requirement, beyond the constitutional minimum described in this

B. Construing the AUMF to Authorize Warrantless Domestic Wiretapping Would Raise Serious Constitutional Questions

The principle that ambiguous statutes should be construed to avoid serious constitutional questions works against the administration, not in its favor. Interpreting the AUMF and FISA to permit unchecked domestic wiretapping for the duration of the conflict with al Qaeda would certainly raise serious constitutional questions. The Supreme Court has never upheld such a sweeping power to invade the privacy of Americans at home without individualized suspicion or judicial oversight.

The NSA surveillance program permits wiretapping within the United States without *either* of the safeguards presumptively required by the Fourth Amendment for electronic surveillance—individualized probable cause and a warrant or other order issued by a judge or magistrate. The Court has long held that wiretaps generally require a warrant and probable cause. *Katz v. United States*, 389 U.S. 347 (1967). And the only time the Court considered the question of national security wiretaps, it held that the Fourth Amendment prohibits domestic security wiretaps without those safeguards. *United States v. United States Dist. Court*, 407 U.S. 297 (1972). Although the Court in that case left open the question of the Fourth Amendment validity of warrantless wiretaps for foreign intelligence purposes, its precedents raise serious constitutional questions about the kind of open-ended authority the President has asserted with respect to the NSA program. *See id.* at 316-18 (explaining difficulty of guaranteeing Fourth Amendment freedoms if domestic surveillance can be conducted solely in the discretion of the executive branch).

Indeed, serious Fourth Amendment questions about the validity of warrantless wiretapping led Congress to enact FISA, in order to “provide the secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation’s commitment to privacy and individual rights.” S. Rep. No. 95-604, pt. 1, at 15 (1977) (citing, *inter alia*, *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), in which “the court of appeals held that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of, nor acting in collaboration with, a foreign power”).

Relying on *In re Sealed Case No. 02-001*, the DOJ argues that the NSA program falls within an exception to the warrant and probable cause requirement for reasonable searches that serve “special needs” above and beyond ordinary law enforcement. But the existence of “special needs” has never been found to permit warrantless wiretapping. “Special needs” generally excuse the warrant and individualized suspicion requirements only where those requirements are impracticable and the intrusion on privacy is minimal. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Wiretapping is not a minimal intrusion on privacy, and the experience of FISA shows that foreign intelligence surveillance can be carried out through warrants based on individualized suspicion..

opinion, *should be left to the intricate balancing performed in the course of the legislative process by Congress and the President*”) (emphasis added).

The court in *Sealed Case* upheld FISA itself, which requires warrants issued by Article III federal judges upon an individualized showing of probable cause that the subject is an “agent of a foreign power.” The NSA domestic spying program, by contrast, includes none of these safeguards. It does not require individualized judicial approval, and it does not require a showing that the target is an “agent of a foreign power.” According to Attorney General Gonzales, the NSA may wiretap any person in the United States who so much as receives a communication from anyone abroad, if the administration deems either of the parties to be affiliated with al Qaeda, a member of an organization affiliated with al Qaeda, “working in support of al Qaeda,” or “part of” an organization or group “that is supportive of al Qaeda.”¹² Under this reasoning, a U.S. citizen living here who received a phone call from another U.S. citizen who attends a mosque that the administration believes is “supportive” of al Qaeda could be wiretapped without a warrant. The absence of meaningful safeguards on the NSA program at a minimum raises serious questions about the validity of the program under the Fourth Amendment, and therefore supports an interpretation of the AUMF that does not undercut FISA’s regulation of such conduct.

* * *

In conclusion, the DOJ letter fails to offer a plausible legal defense of the NSA domestic spying program. If the Administration felt that FISA was insufficient, the proper course was to seek legislative amendment, as it did with other aspects of FISA in the Patriot Act, and as Congress expressly contemplated when it enacted the wartime wiretap provision in FISA. One of the crucial features of a constitutional democracy is that it is always open to the President—or anyone else—to seek to change the law. But it is also beyond dispute that, in such a democracy, the President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable.¹³

We hope you find these views helpful to your consideration of the legality of the NSA domestic spying program.

¹² See Gonzales/Hayden Press Briefing, *supra* note 4.

¹³ During consideration of FISA, the House of Representatives noted that “the decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted is and should be a political decision, in the best sense of the term, because it involves the weighing of important public policy concerns—civil liberties and national security. Such a political decision is one properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other. Under our Constitution legislation is the embodiment of just such political decisions.” H. Rep. 95-1283, pt. I, at 21-22. Attorney General Griffin Bell supported FISA in part because “no matter how well intentioned or ingenious the persons in the Executive branch who formulate these measures, the crucible of the legislative process will ensure that the procedures will be affirmed by that branch of government which is more directly responsible to the electorate.” Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. On Intelligence, 95th Cong., 2d Sess. 12 (1977).

Sincerely,

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February 2, 2006

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Dear Members of Congress:

On January 9, 2006, we wrote you a letter setting forth our view that the Department of Justice (DOJ)'s December 19, 2005 letter to the leaders of the Intelligence Committees had failed to assert any plausible legal defense for the National Security Agency's domestic spying program. On January 19, 2006, the DOJ submitted a more

extensive memorandum further explicating its defense of the program.¹ This letter supplements our initial letter, and replies to the DOJ's January 19 memorandum. The administration has continued to refuse to disclose the details of the program, and therefore this letter, like our initial letter, is confined to responding to the DOJ's arguments. The DOJ Memo, while much more detailed than its initial letter, continues to advance the same flawed arguments, and only confirms that the NSA program lacks any plausible legal justification.

In our initial letter, we concluded that the Authorization to Use Military Force against al Qaeda (AUMF) could not reasonably be understood to authorize unlimited warrantless electronic surveillance of persons within the United States, because Congress had clearly denied precisely such authority in the Foreign Intelligence Surveillance Act (FISA), and had specifically addressed the question of electronic surveillance during wartime. We also found unpersuasive the DOJ's contentions that the AUMF and FISA should be construed to authorize such surveillance in order to avoid constitutional concerns. FISA is not ambiguous on this subject, and therefore the constitutional avoidance doctrine does not apply. And even if it did apply, the constitutional avoidance doctrine would confirm FISA's plain meaning, because the Fourth Amendment concerns raised by *permitting* warrantless domestic wiretapping are far more serious than any purported concerns raised by subjecting domestic wiretapping to the reasonable regulations established by FISA. The Supreme Court has never upheld warrantless domestic wiretapping, and has never held that a President acting as Commander in Chief can violate a criminal statute limiting his conduct.

As explained below, these conclusions are only confirmed by the more extended explication provided in the DOJ Memo. To find the NSA domestic surveillance program statutorily authorized on the ground advocated by the DOJ would require a radical rewriting of clear and specific legislation to the contrary. And to find warrantless wiretapping constitutionally permissible in the face of that contrary legislation would require even more radical revisions of established separation-of-powers doctrine.

I. THE AUMF DOES NOT AUTHORIZE DOMESTIC ELECTRONIC SURVEILLANCE

The DOJ Memo, like the DOJ's initial letter, continues to place primary reliance on an argument that the AUMF silently authorized what Congress had in FISA clearly and specifically forbidden—unlimited warrantless wiretapping during wartime. In our view, the statutory language is dispositive on this question. The AUMF says nothing whatsoever about wiretapping in the United States during wartime, while FISA expressly addresses the subject, limiting authorization for warrantless surveillance to the first

¹ U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (hereinafter "DOJ Memo").

fifteen days after war has been declared. 50 U.S.C. § 1811.² Since Congress specifically provided that even a declaration of war—a more formal step than an authorization to use military force—would authorize only fifteen days of warrantless surveillance, one cannot reasonably conclude that the AUMF provides the President with *unlimited and indefinite* warrantless wiretapping authority.

Moreover, such a notion ignores any reasonable understanding of legislative intent. An amendment to FISA of the sort that would presumably be required to authorize the NSA program here would be a momentous statutory development, undoubtedly subject to serious legislative debate. It is decidedly *not* the sort of thing that Congress would enact *inadvertently*. As the Supreme Court recently noted, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (quoting *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

The existence of 50 USC § 1811 also plainly distinguishes this situation from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), on which the DOJ heavily relies. The DOJ argues that since the Supreme Court in *Hamdi* construed the AUMF to provide sufficient statutory authorization for detention of American citizens captured on the battlefield in Afghanistan, the AUMF may also be read to authorize the President to conduct “signals intelligence” on the enemy, even if that includes electronic surveillance targeting U.S. persons within the United States, the precise conduct regulated by FISA. But in addition to the arguments made in our initial letter, a critical difference in *Hamdi* is that Congress had not specifically regulated detention of American citizens during wartime. Had there been a statute on the books providing that when Congress declares war, the President may detain Americans as “enemy combatants” *only* for the first fifteen days of the conflict, the Court could not reasonably have read the AUMF to authorize silently what Congress had specifically sought to limit. Yet that is what the DOJ’s argument would require here.³

² Congress reaffirmed the approach set forth by 50 U.S.C. § 1811 for wartime authorities in 1994 and 1998 when it added similar fifteen-day provisions for warrantless physical searches and pen registers in the event of a declaration of war. Pub. L. No. 103-359, title VIII, § 807(a)(3) (1994), codified as 50 U.S.C. § 1829 (physical searches); Pub. L. No. 105-272, title VI, § 601(2) (1998), codified as 50 U.S.C. § 1844 (pen registers).

³ The DOJ argues that signals intelligence, like detention, is a “fundamental incident of waging war,” and therefore is authorized by the AUMF. DOJ Memo at 12-13. But what is properly considered an implied incident of conducting war is affected by the statutory landscape that exists at the time the war is authorized. Thus, even if warrantless electronic surveillance *of Americans* for foreign intelligence purposes were a traditional incident of war when that subject was unregulated by Congress—which is far from obvious, at least in cases where the Americans targeted are not themselves suspected of being foreign agents or in league with terrorists—it can no longer be an implied incident after the enactment of FISA, which expressly addresses the situation of war, and which precludes such conduct beyond the first fifteen days of the conflict.

The DOJ Memo argues that 50 U.S.C. § 1811 is not dispositive because the AUMF might convey *more* authority than a declaration of war, noting that a declaration of war is generally only a single sentence. DOJ Memo at 26-27. But that distinction blinks reality. Declarations of war have always been accompanied, in the same enactment, by an authorization to use military force.⁴ It would make no sense, after all, to declare war without authorizing the President to use military force in the conflict. In light of that reality, § 1811 necessarily contemplates a situation in which Congress has *both* declared war *and* authorized the use of military force—and even that double authorization permits only fifteen days of warrantless electronic surveillance. Where, as here, Congress has seen fit only to authorize the use of military force—and not to declare war—the President cannot assert that he has been granted *more* authority than when Congress declares war as well.⁵

Finally, 18 U.S.C. § 2511 confirms that Congress intended electronic surveillance to be governed by FISA and the criminal code, and precludes the DOJ’s argument that the AUMF somehow silently overrode that specific intent. As we pointed out in our opening letter, 18 U.S.C. § 2511(2)(f) specifies that FISA and the criminal code are the “exclusive means” by which electronic surveillance is to be conducted. Moreover, 18 U.S.C. § 2511 makes it a crime to conduct wiretapping except as “*specifically provided in this chapter*,” § 2511(1), or as authorized by FISA, § 2511(2)(e). The AUMF is neither “in this chapter” nor an amendment to FISA, and therefore 18 U.S.C. § 2511 provides compelling evidence that the AUMF should not be read to implicitly provide authority for electronic surveillance.

The DOJ concedes in a footnote that its reading of the AUMF would require finding this language from § 2511 to have been implicitly repealed. DOJ Memo at 36 n.21. But as we noted in our initial letter, statutes may not be implicitly repealed absent “overwhelming evidence” that Congress intended such a repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 137 (2001). Here, there is literally *no such* evidence. Moreover, “the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.” *Id.* at 141-142 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Section 2511 and the AUMF, however, are fully

⁴ See Declaration against the United Kingdom, 2 Stat. 755 (June 18, 1812) (War of 1812); Recognition of war with Mexico, 9 Stat. 9-10 (May 13, 1846) (Mexican-American War); Declaration against Spain, 30 Stat. 364 (Apr. 25, 1898) (Spanish-American War); Declaration against Germany, 40 Stat. 1 (Apr. 6, 1917) (World War I); Declaration against the Austro-Hungarian Empire, 40 Stat. 429 (Dec. 7, 1917) (same); Declaration against Japan, 55 Stat. 795 (Dec. 8, 1941) (World War II); Declaration against Germany, 55 Stat. 796 (Dec. 11, 1941) (same); Declaration against Italy, 55 Stat. 797 (Dec. 11, 1941) (same); Declarations against Bulgaria, Hungary, and Rumania, 56 Stat. 307 (June 5, 1942) (same).

⁵ It is noteworthy that one of the amendments the DOJ was contemplating seeking in 2002, in a draft bill leaked to the press and popularly known as “Patriot II,” would have amended 50 U.S.C. § 1811 to extend its fifteen-day authorization for warrantless wiretapping to situations where Congress had not declared war but only authorized use of military force, or where the nation had been attacked. If, as the DOJ now contends, the AUMF gave the President unlimited authority to conduct warrantless wiretapping of the enemy, it would make no sense to seek such an amendment. See Domestic Security Enhancement Act of 2003, § 103 (Strengthening Wartime Authorities Under FISA) (draft Justice Dept bill), available at <http://www.pbs.org/now/politics/patriot2-hi.pdf>.

reconcilable. The former makes clear that specified existing laws are the “exclusive means” for conducting electronic surveillance, and that conducting wiretapping outside that specified legal regime is a crime. The AUMF authorizes only such force as is “necessary and *appropriate*.” There is no evidence that Congress considered tactics violative of express statutory limitations “appropriate force.” Accordingly, there is no basis whatsoever for overcoming the strong presumption against implied repeals.

The DOJ is correct, of course, that Congress contemplated that it might authorize the President to engage in wiretapping during wartime that would not otherwise be permissible. But Congress created a clear statutory mechanism for addressing that possibility—a fifteen-day window in which warrantless wiretapping was permissible—for the precise purpose that the President could seek amendments to FISA to go further if he deemed it necessary to do so. The President in this case sidestepped that statutory process, but in doing so appears to have contravened two clear and explicit criminal provisions—18 U.S.C. § 2511 and 50 U.S.C. § 1809.

In short, the DOJ Memo fails to offer any plausible argument that Congress authorized the President to engage in warrantless domestic electronic surveillance when it enacted the AUMF. The DOJ’s reading would require interpreting a statute that is entirely silent on the subject to have implicitly repealed and wholly overridden the carefully constructed and criminally enforced “exclusive means” created by Congress for the regulation of electronic surveillance.

II. THE PRESIDENT’S COMMANDER IN CHIEF ROLE DOES NOT AUTHORIZE HIM TO OVERRIDE EXPRESS CRIMINAL PROHIBITIONS ON DOMESTIC ELECTRONIC SURVEILLANCE

In its initial letter to Congress defending the NSA spying program, the DOJ suggested that its reading of the AUMF should be adopted to avoid a possible “conflict between FISA and the President’s Article II authority as Commander-in-Chief.” DOJ Letter at 4. The DOJ Memorandum goes further, arguing that the President has exclusive constitutional authority over “the means and methods of engaging the enemy,” and that therefore if FISA prohibits warrantless “electronic surveillance” deemed necessary by the President, FISA is unconstitutional. DOJ Memo at 6-10, 28-36.

The argument that conduct undertaken by the Commander in Chief that has some relevance to “engaging the enemy” is immune from congressional regulation finds no support in, and is directly contradicted by, both case law and historical precedent. *Every* time the Supreme Court has confronted a statute limiting the Commander-in-Chief’s authority, it has upheld the statute. No precedent holds that the President, when acting as Commander in Chief, is free to disregard an Act of Congress, much less a *criminal statute* enacted by Congress, that was designed specifically to restrain the President as such.

The DOJ Memo spends substantial energy demonstrating the unremarkable fact that Presidents in discharging the role of Commander in Chief have routinely collected

signals intelligence on the enemy during wartime. As we noted in our initial letter, that conclusion is accurate but largely irrelevant, because for most of our history Congress did not regulate foreign intelligence gathering in any way. As Justice Jackson made clear in his influential opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), to say that a President may undertake certain conduct *in the absence of contrary congressional action* does not mean that he may undertake that action *where Congress has addressed the issue and disapproved of executive action*. Here, Congress has not only disapproved of the action the President has taken, but made it a crime.

The Supreme Court has addressed the propriety of executive action contrary to congressional statute during wartime on only a handful of occasions, and each time it has required the President to adhere to legislative limits on his authority. In *Youngstown Sheet & Tube*, as we explained in our initial letter, the Court invalidated the President's seizure of the steel mills during the Korean War, where Congress had "rejected an amendment which would have authorized such governmental seizures in cases of emergency." 343 U.S. 579, 586 (1952); *see also id.* at 597-609 (Frankfurter, J., concurring); *id.* at 656-660 (Burton, J., concurring); *id.* at 662-666 (Clark, J., concurring in the judgment).

In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Court held unlawful a seizure pursuant to Presidential order of a ship during the "Quasi War" with France. The Court found that Congress had authorized the seizure only of ships going *to* France, and therefore the President could not unilaterally order the seizure of a ship coming *from* France. Just as in *Youngstown*, the Court invalidated executive action taken during wartime, said to be necessary to the war effort, but implicitly disapproved by Congress.

If anything, President Bush's unilateral executive action is more sharply in conflict with congressional legislation than in either *Youngstown* or *Barreme*. In those cases, Congress had merely failed to give the President the authority in question, and thus the statutory limitation was *implicit*. Here, Congress went further, and expressly *prohibited* the President from taking the action he has taken. And it did so in the strongest way possible, *by making the conduct a crime*.

The Supreme Court recently rejected a similar assertion of wartime authority in *Rasul v. Bush*, 542 U.S. 466 (2004), not even discussed in the DOJ's Memo. In that case, the Bush administration argued, just as it does now, that it would be unconstitutional to interpret a statute to infringe upon the President's powers as Commander in Chief. It argued that construing the habeas corpus statute to encompass actions filed on behalf of Guantanamo detainees "would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and would raise "grave constitutional problems." Brief for Respondents at 42, 44, *Rasul v. Bush* (Nos. 03-334, 03-343). Refusing to accept this argument, the Court held that Congress had conferred habeas jurisdiction on the federal courts to entertain the detainees' habeas actions. Even Justice Scalia, who dissented, agreed that Congress could have extended habeas jurisdiction to the Guantanamo detainees. *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting).

Thus, not a single Justice accepted the Bush administration's contention that the President's role as Commander in Chief could not be limited by congressional and judicial oversight.⁶

If it were unconstitutional for Congress in any fashion to restrict the "means and methods of engaging the enemy," *Rasul* should have come out the other way. Surely detaining enemy foreign nationals captured on the battlefield is far closer to the core of "engaging the enemy" than is warrantless wiretapping of U.S. persons within the United States. Yet the Court squarely held that the habeas corpus statute did apply to the detentions, and that the detainees had unquestionably stated a claim for relief based on their allegations. 542 U.S. at 484 n. 15. Thus, *Rasul* refutes the DOJ's contention that Congress may not enact statutes that regulate and limit the President's options as Commander in Chief.

And in *Hamdi v. Rumsfeld*, the Court exercised the power to review the President's detention of a U.S. citizen enemy combatant, and expressly rejected the President's argument that courts may not inquire into the factual basis for such a detention. As Justice O'Connor wrote for the plurality, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. 507, 536 (2004).

In fact, as cases such as *Hamdi* and *Rasul* demonstrate, Congress has routinely enacted statutes regulating the Commander-in-Chief's "means and methods of engaging the enemy." It has subjected the Armed Forces to the Uniform Code of Military Justice, which expressly restricts the means they use in "engaging the enemy." It has enacted statutes setting forth the rules for governing occupied territory. See *Santiago v. Noguerras*, 214 U.S. 260, 265-266 (1909). And most recently, it has enacted statutes prohibiting torture under all circumstances, 18 U.S.C. §§ 2340-2340A, and prohibiting the use of cruel, inhuman, and degrading treatment. Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2739-2740 (2005). These limitations make ample sense in light of the overall constitutional structure. Congress has the explicit power "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14. The President has the explicit constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3—including FISA. And Congress has the explicit power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., art. I, § 18.

⁶ Similarly, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court unanimously held that the Executive violated the Habeas Corpus Act of March 3, 1863, 12 Stat. 696, by failing to discharge from military custody a petitioner held by order of the President and charged with, inter alia, affording aid and comfort to rebels, inciting insurrection, and violation of the laws of war. See *id.* at 115-117, 131 (majority opinion); *id.* at 133-136 (Chase, C.J., concurring); see also *id.* at 133 (noting that "[t]he constitutionality of this act has not been questioned and is not doubted," even though the act "limited this authority [of the President to suspend habeas] in important respects").

If the DOJ were correct that Congress cannot interfere with the Commander in Chief's discretion in "engaging the enemy," all of these statutes would be unconstitutional. Yet the President recently conceded that Congress may constitutionally bar him from engaging in torture.⁷ Torturing a suspect, no less than wiretapping an American, might provide information about the enemy that could conceivably help prevent a future attack, yet the President has now conceded that Congress can prohibit that conduct. Congress has as much authority to regulate wiretapping of Americans as it has to regulate torture of foreign detainees.⁸ Accordingly, the President cannot simply contravene Congress's clear criminal prohibitions on electronic surveillance.

The DOJ argues in the alternative that even if Congress may regulate "signals intelligence" during wartime to some degree, construing FISA to preclude warrantless wiretapping of Americans impermissibly intrudes on the President's exercise of his Commander-in-Chief role. DOJ Memo at 29, 34-35. This argument is also unsupported by precedent and wholly unpersuasive.

In considering the extent of the "intrusion" FISA imposes on the President, it is important first to note what FISA does and does not regulate. Administration defenders have repeatedly argued that if the President is wiretapping an al Qaeda member in Afghanistan, it should not have to turn off the wiretap simply because he happens to call someone within the United States. The simple answer is that *nothing in FISA would compel that result*. FISA does not regulate electronic surveillance acquired abroad and targeted at non-U.S. persons, even if the surveillance happens to collect information on a communication with a U.S. person. Thus, the hypothetical tap on the al Qaeda member abroad is not governed by FISA at all. FISA's requirements are triggered only when the surveillance is "targeting [a] United States person who is in the United States," or the surveillance "acquisition occurs in the United States." 50 U.S.C. § 1801(f)(1)-(2).

Second, even when the target of surveillance is a U.S. person, or the information is acquired here, FISA does not require that the wiretap be turned off, but merely that it be approved by a judge, based on a showing of probable cause that the target is a member of a terrorist organization or a "lone wolf" terrorist. *See id.* §§ 1801(a)-(b), 1805(a)-(b). Such judicial approval may be obtained *after* the wiretap is put in place, so long as it is approved within 72 hours. *Id.* § 1805(f). Accordingly, the notion that FISA bars wiretapping of suspected al Qaeda members is a myth.

⁷ In an interview on CBS News, President Bush said "I don't think a president can order torture, for example.... There are clear red lines." Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. Times, Jan. 28, 2006, at A13.

⁸ The DOJ Memo oddly suggests that Congress's authority to enact FISA is less "clear" than was the power of Congress to act in *Youngstown* and *Little v. Barreme*, both of which involved congressional action at what the DOJ calls the "core" of Congress's enumerated Article I powers—regulating commerce. DOJ Memo at 33. But FISA was also enacted pursuant to "core" Article I powers—including the same foreign commerce power at issue in *Little*, and, as applied to the NSA, Congress's powers under the Rules for Government and Necessary and Proper Clauses.

Because FISA leaves unregulated electronic surveillance conducted outside the United States and not targeted at U.S. persons, it leaves to the President's unfettered discretion a wide swath of "signals intelligence." Moreover, it does not actually prohibit *any* signals intelligence regarding al Qaeda, but merely requires judicial approval where the surveillance targets a U.S. person or is acquired here. As such, the statute cannot reasonably be said to intrude impermissibly upon the President's ability to "engage the enemy," and certainly does not come anywhere close to "prohibit[ing] the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack." DOJ Memo at 35. Again, if, as President Bush concedes, Congress can absolutely prohibit certain methods of "engaging the enemy," such as torture, surely it can impose reasonable regulations on electronic surveillance of U.S. persons.

As in its earlier letter, the DOJ Memo invokes the decision of the Foreign Intelligence Surveillance Court in *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam). The court in that case suggested in dictum that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance. But this statement cannot bear the weight the DOJ would assign to it. First, the court in that case *upheld* FISA's constitutionality, so its holding precludes the conclusion that *any regulation* of foreign intelligence gathering amounts to impermissible "encroachment." (The court did not even attempt to define what sorts of regulations would constitute impermissible "encroachment.") Second, as noted in our initial letter, the court cited only a decision holding that *before FISA was enacted*, the President had inherent authority to engage in certain foreign intelligence surveillance, and that acknowledged the propriety of FISA (*see United States v. Truong Dinh Hung*, 629 F.2d 908, 915 n.4 (4th Cir. 1980)). As explained above, the President's authority after FISA is enacted is very different from his authority in the absence of any statutory guidance.

III. WARRANTLESS WIRETAPPING RAISES SERIOUS CONSTITUTIONAL QUESTIONS UNDER THE FOURTH AMENDMENT

As we noted in our initial letter, the NSA spying program not only violates a specific criminal prohibition and the separation of powers, but also raises serious constitutional questions under the Fourth Amendment. In dealing with this issue, we address only the arguments advanced by the DOJ regarding the current initiative of the President, and express no opinion on whether any future legislation that Congress might pass on the issues now covered by FISA would satisfy the requirements of the Fourth Amendment. Most relevant to the present situation, however, is the simple fact that the Supreme Court has never upheld warrantless wiretapping within the United States, for any purpose. The Court has squarely held that individuals have a reasonable expectation of privacy in telephone calls, and that probable cause and a warrant are necessary to authorize electronic surveillance of such communications. *Katz v. United States*, 389 U.S. 347 (1967). And it has specifically rejected the argument that domestic security concerns justify warrantless wiretapping. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

Although the Court in *United States Dist. Court* did not address whether warrantless wiretapping for foreign intelligence purposes would be permissible, the only rationale put forward by the DOJ for squaring such conduct with the Fourth Amendment is unpersuasive. The DOJ contends that the NSA program can be justified under a line of Fourth Amendment cases permitting searches without warrants and probable cause in order to further “special needs” above and beyond ordinary law enforcement. DOJ Memo at 36-41. But while it is difficult to apply the Fourth Amendment without knowing the details of the program, the “special needs” doctrine, which has sustained automobile drunk driving checkpoints and standardized drug testing in schools, does not appear to support warrantless wiretapping of this kind.

While the need to gather intelligence on the enemy surely qualifies as a “special need,” that is only the beginning, not the end, of the inquiry. The Court then looks to a variety of factors to assess whether the search is reasonable, including the extent of the intrusion, whether the program is standardized or allows for discretionary targeting, and whether there is a demonstrated need to dispense with the warrant and probable cause requirements. The Court has upheld highway drunk driving checkpoints, for example, because they are standardized, the stops are brief and minimally intrusive, and a warrant and probable cause requirement would defeat the purpose of keeping drunk drivers off the road. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990). Similarly, it has upheld school drug testing programs because students have diminished expectations of privacy in school, the programs are limited to students engaging in extracurricular programs (so students have advance notice and the choice to opt out), and the drug testing is standardized and tests only for the presence of drugs. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

The NSA spying program has *none* of the safeguards found critical to upholding “special needs” searches in other contexts. It consists not of a minimally intrusive brief stop on a highway or urine test, but of the wiretapping of private telephone and email communications. It is not standardized, but subject to discretionary targeting under a standard and process that remain secret. Those whose privacy is intruded upon have no notice or choice to opt out of the surveillance. And it is neither limited to the environment of a school nor analogous to a brief stop for a few seconds at a highway checkpoint. Finally, and most importantly, the fact that FISA has been used successfully for almost thirty years demonstrates that a warrant and probable cause regime is *not* impracticable for foreign intelligence surveillance.

Accordingly, to extend the “special needs” doctrine to the NSA program, which authorizes unlimited warrantless wiretapping of the most private of conversations without statutory authority, judicial review, or probable cause, would be to render that doctrine unrecognizable. The DOJ’s efforts to fit the square peg of NSA surveillance into the round hole of the “special needs” doctrine only underscores the grave constitutional concerns that this program raises.

In sum, we remain as unpersuaded by the DOJ’s 42-page attempt to find authority for the NSA spying program as we were of its initial five-page version. The DOJ’s more

extended discussion only reaffirms our initial conclusion, because it makes clear that to find this program statutorily authorized would require rewriting not only clear and specific federal legislation, but major aspects of constitutional doctrine. Accordingly, we continue to believe that the administration has failed to offer any plausible legal justification for the NSA program.

Sincerely,

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* Affiliations are noted for identification purposes only.

Cc: Judge Colleen Kollar-Kotelly
Chief Judge, Foreign Intelligence Surveillance Court
U.S. Courthouse
333 Constitution Ave., NW
Washington, DC 20001

**For Immediate Release
January 4, 2006**

**Statement of September 11th Advocates
Regarding NSA Surveillance**

As a group of women whose husbands were killed by terrorists on 9/11, we strongly believe that all available means should be utilized to stop terrorists in their tracks. It is for this reason that we lobbied and fought for the creation of a 9/11 Independent Commission.

While fighting for this Commission, we learned that *prior* to September 11th our intelligence apparatus held all of the puzzle pieces (the proverbial dots) needed to prevent 9/11. The problem was *not* that we didn't have and use enough of the right tools, but rather that our intelligence community failed to connect the dots and puzzle pieces that it already had. Therefore, the terrorists were able to achieve their goal by murdering 3,000 innocent people on 9/11.

Recently, President Bush has stated that his NSA surveillance program is a tool that was lacking in our government's arsenal prior to 9/11. He repeatedly argues that such a program will prevent another 9/11. Moreover, President Bush justifies his breach of our constitutional laws by arguing that following the FISA law would cause our intelligence community to be too clumsy and slow while dealing with a nimble enemy.

Respectfully, we call President Bush's attention to two points of fact that negate his position.

One: Our government intercepted two al Qaeda communications, *during routine monitoring*, on September 10, 2001 - "*tomorrow is zero hour*" and "*the match begins tomorrow*."

Unfortunately, those crucial intercepts were reportedly not translated until September 12, 2001. It was certainly not any FISA court issue that delayed such translation. Rather, the delay was ostensibly due to NSA's overwhelming workload created by its voluminous influx of information that needed to be translated and analyzed on a daily basis.

Nevertheless, our government was able to routinely and effortlessly gather such sensitive communications well before the 9/11 attacks.

Two: The "need for speed" with regard to eavesdropping on potential terrorists is *already* built into the FISA court system, *as it currently exists*. For example, the President can start eavesdropping immediately on anyone he deems it necessary to eavesdrop on and take 72 hours to subsequently ask for a FISA warrant. Moreover, in a time of war, the President is given a full fifteen days to retroactively ask for such a warrant.

Thus, why is there any need for the President to circumvent the law?

Additionally, with no formalized FISA court approval, there is no paper trail as to what our government knows and when it knows it. In truth, the FISA court provides an excellent repository that not only provides the necessary "checks and balances" with regard to civil liberties, but it also yields accountability that can be borne out in the days after the next terrorist attack.

Such circumvention of our nation's laws by our very own President raises grave concerns. His action is unfounded, illegal and unnecessary. Moreover, it threatens the very principles of democracy that our military is so courageously defending overseas.

Our nation must not, *under the guise of national security and protecting citizens*, allow **any** person holding the office of President of the United States to trample the sacred Constitution that this great country was founded on.

Retaining *our* civil liberties and *our* cherished democracy in the face of a looming terrorist threat is the only way we will win this "war on terror".

#####

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MEMORANDUM

TO: Members of the House Permanent Select Committee on Intelligence
FR: Jeffrey H. Smith¹
RE: Legal authorities regarding warrantless surveillance of U.S. persons
DA: January 3, 2006

I. Overview

This memorandum addresses the legal arguments invoked by the Administration to justify the NSA program involving warrantless wiretapping of United States persons described by President Bush on December 17, 2005. This is a preliminary analysis, provided without the benefit of any facts regarding the program other than those that have been reported in the media. A court reviewing the legality of the NSA program would be greatly influenced by the specific facts, which are largely unknown to the public at this time. Further, courts will likely give significant deference to the President with respect to actions taken to protect our national security. It is also important to recognize the essential need to collect vital intelligence to protect our nation.

The Administration, in a briefing for the press on December 19, 2005 by Attorney General Gonzales and in a subsequent letter to the Intelligence Committees, has provided two legal justifications for the NSA program.

First, they argue that authorization is inherent in the 2001 Congressional Authorization for the Use of Military Force in response to the 9/11 attacks. Specifically, the Foreign Intelligence Surveillance Act (FISA) requires a court order for electronic surveillance of U.S. persons “unless otherwise authorized by statute.” They argue the Authorization for the Use of Military Force is such a statute.

Second, they argue that, as Gonzales also said, “the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.”

II. Analysis

A. Summary

On the statutory argument, it is not credible that the 2001 authorization to use force provides authority for the President to ignore the requirements of FISA. It is very doubtful that the courts would sustain the President on this basis.

¹ The author is a former General Counsel of the Central Intelligence Agency and a former General Counsel of the Senate Armed Services Committee.

On the constitutional point, the President can make a case, although it is very weak, that he does have constitutional authority to conduct warrantless wiretaps of American citizens in the U.S. for national security purposes. Because the Supreme Court has never said he does not have this power, some scholars regard it as an open question. However, passage of FISA seriously undermines this argument.

B. Background

In 1972, the U.S. Supreme Court decided United States v. United States District Court² (the “Keith” case), in which a unanimous Court held that in cases of domestic security investigations, compliance with the warrant provisions of the Fourth Amendment was required.

Justice Powell, writing for the Court, held that the President’s responsibilities to protect national security did not trump the 4th Amendment’s requirement that the government present to a neutral magistrate evidence sufficient to support issuance of a warrant before the government could invade the privacy of its citizens.

The target of the government’s surveillance in Keith was a U.S. citizen with no alleged ties to a foreign power. The Court specifically left open the question of whether a warrant was required “with respect to activities of foreign powers or their agents.”³

The uncertainty that followed Keith, coupled with grave concerns about abuses in the past, led Congress in 1978 to enact FISA. FISA provides specific exceptions allowing the President to authorize warrantless searches in emergencies.

FISA established the Foreign Intelligence Surveillance Court and the procedures by which the government may obtain a court order authorizing electronic surveillance (commonly referred to as a FISA warrant) for foreign intelligence collection in the U.S.

FISA also states: “Notwithstanding any other law, the President ... may authorize electronic surveillance without a court order ... [if] there is *no substantial likelihood* that the surveillance will acquire the ... communications to which a United States person is a party.” 18 U.S.C. § 1802 (*emphasis added*). Thus, if there is a substantial likelihood that the surveillance will acquire communications of a U.S. person, then the President may not authorize electronic surveillance inside the U.S. without a court order.

Section 2511(2)(f) of title 18 provides that the procedures of two chapters of title 18 and FISA “shall be *the exclusive means* by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted.”⁴ The law imposes criminal penalties on anyone who “intentionally intercepts . . . any wire, oral, or electronic communication” except as authorized by those chapters of title

² United States v. United States District Court, 407 U.S. 297 (1972).

³ Id. at 322 n.20.

⁴ “[P]rocedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.” 18 U.S.C. § 2511.

18 or FISA. See 18 U.S.C. § 2511. Section 109 of FISA makes it unlawful to conduct electronic surveillance, “except as authorized by statute.” 50 U.S.C. § 1809(a)(1).

C. *Statutory Authority*

FISA requires court orders in all cases “unless otherwise authorized by statute.”⁵ The administration’s position is that the Authorization for the Use of Military Force (“AUMF”) constitutes the “other statute” authorizing warrantless wiretapping of U.S. persons. The AUMF authorized the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001.”

In support of this argument, the administration points to the Supreme Court’s plurality opinion in *Hamdi v. Rumsfeld* (2004).⁶ In *Hamdi*, a U.S. citizen who was a member of Al Qaida challenged his detention on the grounds that 18 U.S.C. § 4001(a) prohibited detaining a U.S. citizen unless authorized by an Act of Congress. Justice O’Connor wrote that the AUMF, which authorized the President to deploy all “necessary and appropriate” force against Al Qaida, provided the statutory authority for detaining Mr. Hamdi. The Court reasoned that the detention of individuals “who fought against the United States in Afghanistan as part of the Taliban, . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”⁷ Because detention is a fundamental aspect of military force, the Court concluded, the detention of Al Qaida members (even U.S. citizens) was authorized by Congress through passage of the AUMF.

Although the Court agreed that the President could detain U.S. citizens, it ruled he could not do so without adhering to some fundamental principles. Thus, the Administration’s reliance on *Hamdi* raises several concerns.

The Administration argues that *Hamdi* supports the position that the AUMF provides the Executive branch with plenary power in targeting Al Qaida. Gonzales’s argument strongly suggests that the President is not bound by any statute, as long as he deems his action to be “necessary and appropriate” in attacking Al Qaida. They also argue that the ability to collect intelligence, including from American citizens, is a “fundamental incident of war” and thus is inherent in Congress’ grant of authority to the President.

However, in *Hamdi*, the Supreme Court did not agree with this expansive view of Presidential powers. Justice O’Connor wrote: **“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”**⁸

⁵ 50 U.S.C. § 1809(a)(1).

⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁷ *Hamdi*, 542 U.S. at 518.

⁸ *Id.* at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

As discussed below, the Courts are disposed to supporting broad assertions for President authority in areas where Congress has not acted. Whether or not the electronic surveillance of U.S. persons is a “fundamental incident of war” that could be interpreted to fall under the AUMF, the existence of FISA strongly undercuts the administration’s position that the AUMF authorizes the NSA wiretapping program. In Hamdi, Congress had not established a preexisting statutory scheme governing the detention of enemy combatants. As a result, Congressional intent could be gleaned from the AUMF alone. With respect to the NSA surveillance program, Congress has established a complex statutory scheme, through FISA and its amendments, governing wiretapping and electronic surveillance of U.S. persons for the purposes of gathering foreign intelligence information. There is no indication in the AUMF that Congress intended to authorize the President to ignore an existing statute that established a comprehensive scheme for conducting domestic electronic surveillance.

Indeed, it is hard to believe that Congress had any idea at all that they were authorizing such sweeping Presidential powers affecting the rights of American citizens. As Tom Daschle, the Senate Majority Leader at the time Congress passed the AUMF, has noted, the administration sought to add language to the resolution that would have explicitly authorized the use of force “in the United States.” Congress refused, strongly suggesting that they did not intend the AUMF as a grant of plenary powers to the President.

The administration’s argument is further weakened by the fact that the President sought, and obtained, amendments to FISA as part of the Patriot Act in 2001, at almost the exact time the AUMF was passed. That authority was designed to make FISA orders easier to obtain, but it did not authorize the sort of wide scale domestic surveillance now reportedly underway. The President did not inform the Congress at the time of the 2001 AUMF that he intended to use it as authority to conduct widespread electronic surveillance in the United States without a FISA order. Nor did Congress amend FISA to grant the authority to conduct warrantless surveillance of U.S. persons. If the President wanted this authority he should have forthrightly asked for it at the time he sought amendment of FISA in 2001. His argument that the AUMF authorizes this surveillance does not hold because he failed to ask for the authority when he should have - at the time FISA was amended.

Finally, in signing FISA, President Carter made clear that the Act was designed to be the exclusive legal authority for wiretapping U.S. persons. At the bill signing, President Carter stated: “The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive’s authority to gather foreign intelligence by electronic surveillance in the United States.” (emphasis in original)

Accordingly, the administration’s argument that the AUMF provides statutory authority to bypass the requirements of FISA in conducting electronic surveillance of U.S. persons is undermined by the existence of an exclusive legislative framework for conducting electronic surveillance of U.S. persons for foreign intelligence purposes,

Congress' failure to amend FISA to grant the authority to conduct warrantless surveillance of U.S. persons, and Congress' refusal to include language in the AUMF that would have authorized the use of force in the United States.

D. Constitutional Authority

The Administration's only viable argument to justify the NSA program is the President's executive authority under Article II, including his role as Commander-in-Chief of the armed forces. The President has broad authority under the Constitution with respect to foreign affairs and to actions necessary to protect national security. The argument in reliance on this power would have been at the apex of its strength in the weeks following 9/11. Four years later it is hard to justify conducting warrantless searches of U.S. persons, particularly when FISA has provisions authorizing emergency surveillance and obtaining a FISA warrant is relatively easy.⁹

In addition, the President's inherent authority is considered greatest in areas where Congress has not legislated. Under the well-known principle enunciated by the Supreme Court in the *Steel Seizure Case*,¹⁰ where Congress has legislated – as it has with FISA – the President's inherent authority is at its weakest. In what has become the leading analysis from that case, Justice Jackson's concurring opinion stated:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive executive Presidential control in such a case only by disabling the Congress from acting upon the subject.¹¹

Jackson determined that the steel plant seizure at issue fell within this category and that to sustain the President's action, the court must find that the seizure was "within [the President's] domain and beyond control by Congress."¹² Jackson ultimately ruled that the President's residual authority under the Commander-in-Chief clause did not extend to the seizure of persons or property even when such seizure was "important or even essential for the military and naval establishment."¹³ Jackson reasoned that because Congress had the power to "raise and support armies" under the Constitution, Congress could determine the means by which such materials, including steel, would be supplied.

⁹ Under FISA, the Executive branch may act *unilaterally* in an emergency. FISA gives the Attorney General the authority to approve an emergency surveillance order. The Attorney General must simply notify (not seek a warrant from) a judge. The Executive branch must request a warrant within 72 hours from authorization of the surveillance. 50 U.S.C. § 1805(f).

¹⁰ *Youngstown*, 343 U.S. at 609.

¹¹ *Youngstown*, 343 U.S. at 637-38 (Jackson, J. concurring).

¹² *Id.* at 640.

¹³ *Id.*

Since a court will likely find that the NSA wiretapping program is not authorized by the AUMF for the reasons stated above, the NSA wiretapping program also likely falls into this category of Jackson's analysis. With respect to the NSA program, the President's actions are incompatible with FISA's express provisions barring warrantless surveillance of U.S. persons. According to Jackson's analysis, in order to sustain Executive power to contravene an Act of Congress, a court would be required to rule that Congress could not legislate controls on surveillance of United States persons for national security purposes.

Congress has the authority to "make rules for the Government and regulation of the land and naval forces," to "regulate commerce" and to "make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof." U.S. Const. Art. I Sec. 8. It is under this authority that Congress acted when it passed FISA. Accordingly, under Jackson's analysis, the President lacks the residual constitutional authority to conduct warrantless surveillance on U.S. persons in contravention of an existing statute. He might have had such authority in the period of time between the *Keith* case and the passage of FISA, but there is not a strong case to be made that he has such power today.

In Mr. Moschella's December 22, 2005 letter to the Chairs and Ranking Members of the House and Senate Select Committees on Intelligence, the administration asserts the position that the President has the authority under the Constitution to "order warrantless foreign intelligence surveillance within the United States." In support of that argument, Mr. Moschella cites the FISA Court of Review's 2002 decision reversing the lower FISA court's denial of the government's application for a FISA warrant,¹⁴ in which the court stated: "[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority." This statement is pure dicta. The issue of whether the President possesses inherent authority under the constitution to conduct warrantless surveillance was not before the FISA review court. Rather, the issue determined by the court was whether surveillance, pursuant to a warrant obtained in accordance with FISA, was reasonable under the Fourth Amendment. The FISA review court, applying the balancing test set forth in the *Keith* case and determining that the procedures and government showings required under FISA were close to the minimum Fourth Amendment warrant standards, held that such surveillance, conducted in accordance with the warrant requirements of FISA, was reasonable and therefore constitutional.¹⁵

In sum, without express statutory authority, and particularly when acting in contravention of existing statutory law, the President's residual constitutional authority is at its lowest level. Although the President has some support for his view, it is not widely endorsed. Moreover, should the President's view be sustained it would be a

¹⁴ *In re Sealed Case*, 310 F.3d 717 (FISA Ct. of Review 2002).

¹⁵ *Id.* at 746.

breathtakingly expansive claim of Presidential authority affecting the rights of our fellow citizens and undermining the checks and balances of our system, which lie at the very heart of the constitution.

III. Questions

To be fair to the President, the attacks of 9/11 presented great challenges to our government. FISA was adopted over 28 years ago and technology has changed vastly. The President was correct in concluding that many of our laws were not adequate to deal with this new threat. He was wrong, however, to conclude that he is therefore free to follow the laws he agrees with and ignore those with which he disagrees.

This program raises a host of factual, legal and operational questions. These include the following:

- 1) What is the purpose of the program? The press has reported that initial operations in Afghanistan collected considerable data, including phone numbers and email addresses in the U.S., is this correct? If so, why could the Administration not obtain FISA warrants or use other techniques, such as "pen registers" to collect the necessary intelligence?
- 2) Who are the targets of the collection? Are they known individuals or organizations? Or are they merely telephone numbers, websites and email addresses?
- 3) What intelligence has been obtained and what is its value?
- 4) What controls are in place and why has it been necessary to seek so many Presidential re-authorizations?
- 5) The press has reported that the operation was shut down in 2004 because of concerns about the legality and breadth of the collection. What were those concerns and how were they resolved? The press has also reported that the then Deputy Attorney General refused to authorize the program, requiring a visit to the hospital bed of Attorney General Ashcroft. What were the Deputy Attorney General's objections and why did the Attorney General authorize it over those objections?
- 6) Can the Administration gather the same intelligence by using the FISA court? Is bypassing FISA the only option?
- 7) Why can't the Administration use the "hot pursuit" exception in FISA, which allows the government to begin the surveillance on a U.S. target and then seek a court order within 72 hours?
- 8) Are there other intelligence programs the Administration believes are justified by the AUMF resolution that it has not briefed to Congress? For example, are there physical searches being conducted in the United States without a warrant?

IV. Conclusion

The 2001 AUMF does not, in my view, justify warrantless electronic surveillance of United States persons in the United States. Such surveillance may only be conducted under FISA.

The President does have an argument, although I believe it to be very weak, that his responsibilities under the Constitution authorize such surveillance. This argument is seriously undermined by the enactment of FISA in 1978 and its prohibitions against warrantless surveillance of U.S. persons. Where the President acts in contravention of an existing statute, particularly one with criminal penalties attached, his constitutional authority is at its "lowest ebb."

As with all such issues, much depends on the facts. I therefore strongly urge the Committee to be briefed on the facts of the program. It should then be possible to make a judgment as to whether this program complied with the law or whether any changes to the law are necessary to accomplish the nation's national security objectives.

WashingtonPost.com

Why Didn't He Ask Congress?

By George F. Will
Tuesday, December 20, 2005; A31

The president's authorization of domestic surveillance by the National Security Agency contravened a statute's clear language. Assuming that urgent facts convinced him that he should proceed anyway and on his own, what argument convinced him that he lawfully could?

Presumably the argument is that the president's implied powers as commander in chief, particularly with the nation under attack and some of the enemy within the gates, are not limited by statutes. A classified legal brief probably makes an argument akin to one Attorney General John Ashcroft made in 2002: "The Constitution vests in the president inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

Perhaps the brief argues, as its author, John Yoo -- now a professor of law at Berkeley but then a deputy assistant attorney general -- argued 14 days after Sept. 11, 2001, in a memorandum on "the president's constitutional authority to conduct military operations against terrorists and nations supporting them," that the president's constitutional power to take "military actions" is "plenary." The Oxford English Dictionary defines "plenary" as "complete, entire, perfect, not deficient in any element or respect."

The brief should be declassified and debated, beginning with this question: Who decides which tactics -- e.g., domestic surveillance -- should be considered part of taking "military actions"?

Without more information than can be publicly available concerning threats from enemies operating in America, the executive branch deserves considerable discretion in combating terrorist conspiracies using new technologies such as cell phones and the Internet. In September 2001, the president surely had sound reasons for desiring the surveillance capabilities at issue.

But did he have sound reasons for seizing them while giving only minimal information to, and having no formal complicity with, Congress? Perhaps. But Congress, if asked, almost certainly would have made such modifications of law as the president's plans required. Courts, too, would have been compliant. After all, on Sept. 14, 2001, Congress had unanimously declared that "the president has authority under the Constitution to take action to deter and prevent acts of international terrorism," and it had authorized "all necessary and appropriate force" against those involved in Sept. 11 or threatening future attacks.

For more than 500 years -- since the rise of nation-states and parliaments -- a preoccupation of Western political thought has been the problem of defining and confining executive power. The problem is expressed in the title of a brilliant book, "Taming the Prince: The Ambivalence of Modern Executive Power," by Harvey Mansfield, Harvard's conservative.

Particularly in time of war or the threat of it, government needs concentrated decisiveness -- a capacity for swift and nimble action that legislatures normally cannot manage. But the inescapable corollary of this need is the danger of arbitrary power.

Modern American conservatism grew in reaction against the New Deal's creation of the regulatory state, and the enlargement of the executive branch power that such a state entails. The intellectual vigor of conservatism was quickened by reaction against the Great Society and the aggrandizement of the modern presidency by Lyndon Johnson, whose aspiration was to complete the project begun by Franklin Roosevelt.

Because of what Alexander Hamilton praised as "energy in the executive," which often drives the growth of government, for years many conservatives were advocates of congressional supremacy. There were, they said, reasons why the Founders, having waged a revolutionary war against overbearing executive power, gave the legislative branch pride of place in Article I of the Constitution.

One reason was that Congress's cumbersomeness, which is a function of its fractiousness, is a *virtue* because it makes the government slow and difficult to move. But conservatives' wholesome wariness of presidential power has been a casualty of conservative presidents winning seven of the past 10 elections.

On the assumption that Congress or a court would have been cooperative in September 2001, and that the cooperation could have kept necessary actions clearly lawful without conferring any benefit on the nation's enemies, the president's decision to authorize the NSA's surveillance without the complicity of a court or Congress was a mistake. Perhaps one caused by this administration's almost metabolic urge to keep Congress unnecessarily distant and hence disgruntled.

Charles de Gaulle, a profound conservative, said of another such, Otto von Bismarck -- de Gaulle was thinking of Bismarck not pressing his advantage in 1870 in the Franco-Prussian War -- that genius sometimes consists of knowing when to stop. In peace and in war, but especially in the latter, presidents have pressed their institutional advantages to expand their powers to act without Congress. This president might look for occasions to stop pressing.

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LENGTH: 773 words
HEADLINE: Power We Didn't Grant
BYLINE: Tom Daschle
BODY:

In the face of mounting questions about news stories saying that President Bush approved a program to wiretap American citizens without getting warrants, the White House argues that Congress granted it authority for such surveillance in the 2001 legislation authorizing the use of force against al Qaeda. On Tuesday, Vice President Cheney said the president "was granted authority by the Congress to use all means necessary to take on the terrorists, and that's what we've done."

As Senate majority leader at the time, I helped negotiate that law with the White House counsel's office over two harried days. I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance.

On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to "deter and pre-empt any future acts of terrorism or aggression against the United States." Believing the scope of this language was too broad and ill defined, Congress chose instead, on Sept. 14, to authorize "all necessary and appropriate force against those nations, organizations or persons [the president] determines planned, authorized, committed or aided" the attacks of Sept. 11. With this language, Congress denied the president the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al Qaeda.

Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words "in the United States and" after "appropriate force" in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas -- where we all understood he wanted authority to act -- but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

The shock and rage we all felt in the hours after the attack were still fresh. America was reeling from the first attack on our soil since Pearl Harbor. We suspected

thousands had been killed, and many who worked in the World Trade Center and the Pentagon were not yet accounted for. Even so, a strong bipartisan majority could not agree to the administration's request for an unprecedented grant of authority.

The Bush administration now argues those powers were inherently contained in the resolution adopted by Congress -- but at the time, the administration clearly felt they weren't or it wouldn't have tried to insert the additional language.

All Americans agree that keeping our nation safe from terrorists demands aggressive and innovative tactics. This unity was reflected in the near-unanimous support for the original resolution and the Patriot Act in those harrowing days after Sept. 11. But there are right and wrong ways to defeat terrorists, and that is a distinction this administration has never seemed to accept. Instead of employing tactics that preserve Americans' freedoms and inspire the faith and confidence of the American people, the White House seems to have chosen methods that can only breed fear and suspicion.

If the stories in the media over the past week are accurate, the president has exercised authority that I do not believe is granted to him in the Constitution, and that I know is not granted to him in the law that I helped negotiate with his counsel and that Congress approved in the days after Sept. 11. For that reason, the president should explain the specific legal justification for his authorization of these actions, Congress should fully investigate these actions and the president's justification for them, and the administration should cooperate fully with that investigation.

In the meantime, if the president believes the current legal architecture of our country is insufficient for the fight against terrorism, he should propose changes to our laws in the light of day.

That is how a great democracy operates. And that is how this great democracy will defeat terrorism.

The writer, a former Democratic senator from South Dakota, was Senate majority leader in 2001-02. He is now distinguished senior fellow at the Center for American Progress.

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Surveillance Net Yields Few Suspects

NSA's Hunt for Terrorists Scrutinizes Thousands of Americans, but Most Are Later Cleared

By Barton Gellman, Dafna Linzer and Carol D. Leonnig
Washington Post Staff Writers
Sunday, February 5, 2006; A01

Intelligence officers who eavesdropped on thousands of Americans in overseas calls under authority from President Bush have dismissed nearly all of them as potential suspects after hearing nothing pertinent to a terrorist threat, according to accounts from current and former government officials and private-sector sources with knowledge of the technologies in use.

Bush has recently described the warrantless operation as "terrorist surveillance" and summed it up by declaring that "if you're talking to a member of al Qaeda, we want to know why." But officials conversant with the program said a far more common question for eavesdroppers is whether, not why, a terrorist plotter is on either end of the call. The answer, they said, is usually no.

Fewer than 10 U.S. citizens or residents a year, according to an authoritative account, have aroused enough suspicion during warrantless eavesdropping to justify interception of their domestic calls, as well. That step still requires a warrant from a federal judge, for which the government must supply evidence of probable cause.

The Bush administration refuses to say -- in public or in closed session of Congress -- how many Americans in the past four years have had their conversations recorded or their e-mails read by intelligence analysts without court authority. Two knowledgeable sources placed that number in the thousands; one of them, more specific, said about 5,000.

The program has touched many more Americans than that. Surveillance takes place in several stages, officials said, the earliest by machine. Computer-controlled systems collect and sift basic information about hundreds of thousands of faxes, e-mails and telephone calls into and out of the United States before selecting the ones for scrutiny by human eyes and ears.

Successive stages of filtering grow more intrusive as artificial intelligence systems rank voice and data traffic in order of likeliest interest to human analysts. But intelligence officers, who test the computer judgments by listening initially to brief fragments of conversation, "wash out" most of the leads within days or weeks.

The scale of warrantless surveillance, and the high proportion of bystanders swept in, sheds new light on Bush's circumvention of the courts. National security lawyers, in and out of government, said the washout rate raised fresh doubts about the program's lawfulness under the Fourth Amendment, because a search cannot be judged "reasonable" if it is based on evidence that experience shows to be unreliable. Other officials said the disclosures might shift the terms of public debate, altering perceptions about the balance between privacy lost and security gained.

Air Force Gen. Michael V. Hayden, the nation's second-ranking intelligence officer, acknowledged in a news briefing last month that eavesdroppers "have to go down some blind alleys to find the tips that pay off." Other officials, nearly all of whom spoke on the condition of anonymity because they are not permitted to discuss the program, said the prevalence of false leads is especially pronounced when U.S. citizens or residents are surveilled. No intelligence agency, they said, believes that "terrorist . . . operatives inside our country," as Bush described the surveillance targets, number anywhere near the thousands who have been subject to eavesdropping.

The Bush administration declined to address the washout rate or answer any other question for this article about the policies and operations of its warrantless eavesdropping.

Vice President Cheney has made the administration's strongest claim about the program's intelligence value, telling CNN in December that eavesdropping without warrants "has saved thousands of lives." Asked about that Thursday, Hayden told senators he "cannot personally estimate" such a figure but that the program supplied information "that would not otherwise have been available." FBI Director Robert S. Mueller III said at the same hearing that the information helped identify "individuals who were providing material support to terrorists."

Supporters speaking unofficially said the program is designed to warn of unexpected threats, and they argued that success cannot be measured by the number of suspects it confirms. Even unwitting Americans, they said, can take part in communications -- arranging a car rental, for example, without knowing its purpose -- that supply "indications and warnings" of an attack. Contributors to the technology said it is a triumph for artificial intelligence if a fraction of 1 percent of the computer-flagged conversations guide human analysts to meaningful leads.

Those arguments point to a conflict between the program's operational aims and the legal and political limits described by the president and his advisers. For purposes of threat detection, officials said, the analysis of a telephone call is indifferent to whether an American is on the line. Since Sept. 11, 2001, a former CIA official said, "there is a lot of discussion" among analysts "that we shouldn't be dividing Americans and foreigners, but terrorists and non-terrorists." But under the Constitution, and in the Bush administration's portrait of its warrantless eavesdropping, the distinction is fundamental.

Valuable information remains valuable even if it comes from one in a thousand intercepts. But government officials and lawyers said the ratio of success to failure matters greatly when eavesdropping subjects are Americans or U.S. visitors with constitutional protection. The minimum legal definition of probable cause, said a government official who has studied the program closely, is that evidence used to support eavesdropping ought to turn out to be "right for one out of every two guys at least." Those who devised the surveillance plan, the official said, "knew they could never meet that standard -- that's why they didn't go through" the court that supervises the Foreign Intelligence Surveillance Act, or FISA.

Michael J. Woods, who was chief of the FBI's national security law unit until 2002, said in an e-mail interview that even using the lesser standard of a "reasonable basis" requires evidence "that would lead a prudent, appropriately experienced person" to believe the American is a terrorist

agent. If a factor returned "a large number of false positives, I would have to conclude that the factor is not a sufficiently reliable indicator and thus would carry less (or no) weight."

Bush has said his program covers only overseas calls to or from the United States and stated categorically that "we will not listen inside this country" without a warrant. Hayden said the government goes to the intelligence court when an eavesdropping subject becomes important enough to "drill down," as he put it, "to the degree that we need all communications."

Yet a special channel set up for just that purpose four years ago has gone largely unused, according to an authoritative account. Since early 2002, when the presiding judge of the federal intelligence court first learned of Bush's program, he agreed to a system in which prosecutors may apply for a domestic warrant after warrantless eavesdropping on the same person's overseas communications. The annual number of such applications, a source said, has been in the single digits.

Many features of the surveillance program remain unknown, including what becomes of the non-threatening U.S. e-mails and conversations that the NSA intercepts. Participants, according to a national security lawyer who represents one of them privately, are growing "uncomfortable with the mountain of data they have now begun to accumulate." Spokesmen for the Bush administration declined to say whether any are discarded.

New Imperatives

Recent interviews have described the program's origins after Sept. 11 in what Hayden has called a three-way collision of "operational, technical and legal imperatives."

Intelligence agencies had an urgent mission to find hidden plotters before they could strike again.

About the same time, advances in technology -- involving acoustic engineering, statistical theory and efficient use of computing power to apply them -- offered new hope of plucking valuable messages from the vast flow of global voice and data traffic. And rapidly changing commercial trends, which had worked against the NSA in the 1990s as traffic shifted from satellites to fiber-optic cable, now presented the eavesdroppers with a gift. Market forces were steering as much as a third of global communications traffic on routes that passed through the United States.

The Bush administration had incentive and capabilities for a new kind of espionage, but 23 years of law and White House policy stood in the way.

FISA, passed in 1978, was ambiguous about some of the president's plans, according to current and retired government national security lawyers. But other features of the eavesdropping program fell outside its boundaries.

One thing the NSA wanted was access to the growing fraction of global telecommunications that passed through junctions on U.S. territory. According to former senator Bob Graham (D-Fla.), who chaired the Intelligence Committee at the time, briefers told him in Cheney's office in October 2002 that Bush had authorized the agency to tap into those junctions. That decision,

Graham said in an interview first reported in The Washington Post on Dec. 18, allowed the NSA to intercept "conversations that . . . went through a transit facility inside the United States."

According to surveys by TeleGeography Inc., nearly all voice and data traffic to and from the United States now travels by fiber-optic cable. About one-third of that volume is in transit from one foreign country to another, traversing U.S. networks along its route. The traffic passes through cable landing stations, where undersea communications lines meet the East and West coasts; warehouse-size gateways where competing international carriers join their networks; and major Internet hubs known as metropolitan area ethernet.

Until Bush secretly changed the rules, the government could not tap into access points on U.S. soil without a warrant to collect the "contents" of any communication "to or from a person in the United States." But the FISA law was silent on calls and e-mails that began and ended abroad.

Even for U.S. communications, the law was less than clear about whether the NSA could harvest information about that communication that was not part of its "contents."

"We debated a lot of issues involving the 'metadata,' " one government lawyer said. Valuable for analyzing calling patterns, the metadata for telephone calls identify their origin, destination, duration and time. E-mail headers carry much the same information, along with the numeric address of each network switch through which a message has passed.

Intelligence lawyers said FISA plainly requires a warrant if the government wants real-time access to that information for any one person at a time. But the FISA court, as some lawyers saw it, had no explicit jurisdiction over wholesale collection of records that do not include the content of communications. One high-ranking intelligence official who argued for a more cautious approach said he found himself pushed aside. Awkward silences began to intrude on meetings that discussed the evolving rules.

"I became aware at some point of things I was not being told about," the intelligence official said.

'Subtly Softer Trigger'

Hayden has described a "subtly softer trigger" for eavesdropping, based on a powerful "line of logic," but no Bush administration official has acknowledged explicitly that automated filters play a role in selecting American targets. But Sen. Arlen Specter (R-Pa.), who chairs the Judiciary Committee, referred in a recent letter to "mechanical surveillance" that is taking place before U.S. citizens and residents are "subject to human surveillance."

Machine selection would be simple if the typical U.S. eavesdropping subject took part in direct calls to or from the "phone numbers of known al Qaeda" terrorists, the only criterion Bush has mentioned.

That is unusual. The NSA more commonly looks for less-obvious clues in the "terabytes of speech, text, and image data" that its global operations collect each day, according to an

unclassified report by the National Science Foundation soliciting research on behalf of U.S. intelligence.

NSA Inspector General Joel F. Brenner said in 2004 that the agency's intelligence officers have no choice but to rely on "electronic filtering, sorting and dissemination systems of amazing sophistication but that are imperfect."

One method in use, the NSF report said, is "link analysis." It takes an established starting point -- such as a terrorist just captured or killed -- and looks for associated people, places, things and events. Those links can be far more tenuous than they initially appear.

In an unclassified report for the Pentagon's since-abandoned Total Information Awareness program, consultant Mary DeRosa showed how "degrees of separation" among the Sept. 11 conspirators concealed the significance of clues that linked them.

Khalid Almihdhar, one of the hijackers, was on a government watch list for terrorists and thus a known suspect. Mohamed Atta, another hijacker, was linked to Almihdhar by one degree of separation because he used the same contact address when booking his flight. Wail M. Alshehri, another hijacker, was linked by two degrees of separation because he shared a telephone number with Atta. Satam M.A. Al Suqami, still another hijacker, shared a post office box with Alshehri and, therefore, had three degrees of separation from the original suspect.

'Look for Patterns'

Those links were not obvious before the identity of the hijackers became known. A major problem for analysts is that a given suspect may have hundreds of links to others with one degree of separation, including high school classmates and former neighbors in a high-rise building who never knew his name. Most people are linked to thousands or tens of thousands of people by two degrees of separation, and hundreds of thousands or millions by three degrees.

Published government reports say the NSA and other data miners use mathematical techniques to form hypotheses about which of the countless theoretical ties are likeliest to represent a real-world relationship.

A more fundamental problem, according to a high-ranking former official with firsthand knowledge, is that "the number of identifiable terrorist entities is decreasing." There are fewer starting points, he said, for link analysis.

"At that point, your only recourse is to look for patterns," the official said.

Pattern analysis, also described in the NSF and DeRosa reports, does not depend on ties to a known suspect. It begins with places terrorists go, such as the Pakistani province of Waziristan, and things they do, such as using disposable cell phones and changing them frequently, which U.S. officials have publicly cited as a challenge for counterterrorism.

"These people don't want to be on the phone too long," said Russell Tice, a former NSA analyst, offering another example.

Analysts build a model of hypothetical terrorist behavior, and computers look for people who fit the model. Among the drawbacks of this method is that nearly all its selection criteria are innocent on their own. There is little precedent, lawyers said, for using such a model as probable cause to get a court-issued warrant for electronic surveillance.

Jeff Jonas, now chief scientist at IBM Entity Analytics, invented a data-mining technology used widely in the private sector and by the government. He sympathizes, he said, with an analyst facing an unknown threat who gathers enormous volumes of data "and says, 'There must be a secret in there.' "

But pattern matching, he argued, will not find it. Techniques that "look at people's behavior to predict terrorist intent," he said, "are so far from reaching the level of accuracy that's necessary that I see them as nothing but civil liberty infringement engines."

'A Lot Better Than Chance'

Even with 38,000 employees, the NSA is incapable of translating, transcribing and analyzing more than a fraction of the conversations it intercepts. For years, including in public testimony by Hayden, the agency has acknowledged use of automated equipment to analyze the contents and guide analysts to the most important ones.

According to one knowledgeable source, the warrantless program also uses those methods. That is significant to the public debate because this kind of filtering intrudes into content, and machines "listen" to more Americans than humans do. NSA rules since the late 1970s, when machine filtering was far less capable, have said "acquisition" of content does not take place until a conversation is intercepted and processed "into an intelligible form intended for human inspection."

The agency's filters are capable of comparing spoken language to a "dictionary" of key words, but Roger W. Cressey, a senior White House counterterrorism official until late 2002, said terrorists and other surveillance subjects make frequent changes in their code words. He said, " 'Wedding' was martyrdom day and the 'bride' and 'groom' were the martyrs." But al Qaeda has stopped using those codes.

An alternative approach, in which a knowledgeable source said the NSA's work parallels academic and commercial counterparts, relies on "decomposing an audio signal" to find qualities useful to pattern analysis. Among the fields involved are acoustic engineering, behavioral psychology and computational linguistics.

A published report for the Defense Advanced Research Projects Agency said machines can easily determine the sex, approximate age and social class of a speaker. They are also learning to look for clues to deceptive intent in the words and "paralinguistic" features of a conversation, such as pitch, tone, cadence and latency.

This kind of analysis can predict with results "a hell of a lot better than chance" the likelihood that the speakers are trying to conceal their true meaning, according to James W. Pennebaker, who chairs the psychology department at the University of Texas at Austin.

"Frankly, we'll probably be wrong 99 percent of the time," he said, "but 1 percent is far better than 1 in 100 million times if you were just guessing at random. And this is where the culture has to make some decisions."

Researcher Julie Tate and staff writer R. Jeffrey Smith contributed to this report.

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LENGTH: 965 words

HEADLINE: If men were angels

BYLINE: By Bruce Fein, SPECIAL TO THE WASHINGTON TIMES

BODY:

The Founding Fathers would be alarmed by President George W. Bush's "trust me" defense for collecting foreign intelligence in violation of the Foreign Intelligence Surveillance Act (FISA) and the Constitution's separation of powers.

The president insists that the National Security Agency (NSA) has been confined to spying on American citizens who are "known" al Qaeda sympathizers or collaborators. Mr. Bush avows that he knows the eavesdropping targets are implicated in terrorism because his subordinates have said so; and, they are honorable men and women with no interest in persecuting or harassing the innocent. Presidential infallibility and angelic motives should be taken on faith alone, like a belief in salvation.

But the Founding Fathers fashioned sterner stuff to protect individual liberties and to forestall government oppression, i.e., a separation of powers between the legislative, executive and judicial branches. James Madison elaborated in Federalist 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices are necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

The separation of powers does not guarantee against government overreaching in wartime or otherwise. Congress, the president and the Supreme Court may all succumb to exaggerated fears or prejudices. Thus, Japanese Americans were held in concentration camps during World War II with the approval of all three branches. But requiring a consensus militates in favor of measured and balanced war policies. The commander in chief is inclined to inflate claims of military necessity, as the Japanese American injustice exemplifies.

Approximately 112,000 were evacuated to concentration camps to thwart sabotage or espionage on the West Coast. President Franklin D. Roosevelt, acting through commanding Gen. John L. DeWitt, maintained that Japanese ancestry, simpliciter, made them suspect. DeWitt relied on racist thinking outside the domain of military expertise.

In his Final Report on the evacuation from the Pacific Coast area, the commanding general refers to individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies." But he summoned no plausible evidence to support the indictment. During the nearly four months that elapsed between Pearl Harbor and the concentration camps, not a single person of Japanese ancestry was either accused or convicted of espionage or sabotage. Enlisting the "Who stole the tarts" precedent in Alice in Wonderland, DeWitt obtusely maintained that unwavering

loyalty proved imminent treason: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It was said that case-by-case vetting of Japanese Americans for disloyalty was infeasible. But it was done for persons of German and Italian ancestry. The British government established tribunals to determine the loyalties of 74,000 German and Austrian aliens. Approximately 64,000 were freed from internment and from any special restrictions.

The maltreatment of Japanese Americans probably impaired the war effort. Despite the concentration camps, 33,000 served in the United States military. The famed 100th Battalion earned 900 Purple Hearts fighting its way through Italy. A greater number would have joined the armed forces if they not been wrongly suspected and degraded.

Like Roosevelt and DeWitt, President Bush claims military necessity for the NSA's eavesdropping on the international communications of Americans without adherence to FISA. The hope is to establish an early warning system to detect and prevent new editions of September 11, 2001. In a Dec. 22, 2005 letter to Congress, the Department of Justice asserted: "FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change . . . that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities."

But FISA crowns the president with electronic surveillance powers without a court warrant for 15 days after a congressional declaration of war. That duration could have been indefinitely extended by Congress without alerting terrorists to anything new. Further, Congress might have been asked to lower the threshold of suspicion required to initiate surveillance without compromising intelligence sources or methods. Indeed, President Bush's continuation of the NSA's spying despite the disclosure by the New York Times discredits the argument that secrecy was indispensable to its effectiveness. On the other hand, congressional involvement in the early warning system would provide an outside check on whether the commander in chief is targeting only persons linked to al Qaeda or an affiliated terrorist organization.

To borrow from Justice Robert Jackson's dissent in *Korematsu v. United States* (1944), the chilling danger created by President Bush's claim of wartime omnipotence to justify the NSA's eavesdropping is that the precedent will lie around like a loaded weapon ready for the hand of the incumbent or any successor who would reduce Congress to an ink blot.

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Data-mining doubts

By Bruce Fein

Published January 24, 2006

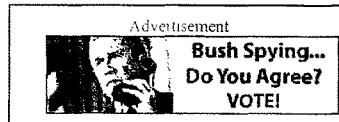
President Richard M. Nixon maintained that anything the White House ordered was constitutional, for example, breaking and entering offices or homes. Nixon's scorn for the law led to crimes and ultimately to resignation when it appeared the Senate would unanimously vote to convict him of impeachable offenses.

President George W. Bush should learn from the Nixon example. He should concede that his secret order to the National Security Agency to eavesdrop on American citizens present on American soil without judicial warrants in contravention of the Foreign Intelligence Surveillance Act (FISA) violated the Constitution's separation of powers. He should acknowledge that a president cannot flout federal statutes because he would have struck a different balance between civil liberties and national security. He should renounce the idea that in wartime only the executive branch rules, which means forever, since the war against international terrorism has no endpoint. And the commander in chief should request Congress to amend FISA if it is thought a different balance between liberty and security should be struck in the aftermath of September 11, 2001.

What is demanded is not a pound of flesh or self-flagellation. What is urged is an unreluctant embrace by President Bush of keystone constitutional principles to which so many have given that last full measure of devotion to secure freedom for the living and those yet to be born. On that score, the slabs of legal argument featured in Attorney General Alberto R. Gonzales' 42-page submission to Senate Majority Leader Bill Frist, Tennessee Republican, last Thursday to justify the NSA's warrantless spying on Americans are disappointing. The justifications oscillate between the risible and the chilling.

Section 111 of FISA addresses the president's electronic surveillance powers during wartime to gather foreign intelligence. It was supported both by the incumbent President Jimmy Carter and Congress as a judicious trade-off between national security and reasonable expectations of privacy in communications. Accordingly, the section authorizes eavesdropping on Americans without a customary court warrant "for a period not to exceed 15 calendar days following a declaration of war by Congress." A one-year window was initially contemplated. But Congress and the White House concluded that a shorter period would still afford the president time to ask for a legislative extension if national security concerns remained acute.

President Bush's eavesdropping order issued secretly in the aftermath of September 11 was not confined to 15 days, but has been continued for more than four years. Mr. Bush did not seek a statutory extension, although the request could have been considered in secrecy by Congress under Article I, section 5, clause 3. (The Manhattan Project during World War II was funded by Congress without compromising secrecy).



On September 18, 2001, Congress enacted the Authorization for Use of Military Force (AUMF). It succinctly provides, "[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Attorney General Gonzales' White Paper fatuously insists that the AUMF trumps the limitations of section 111 because it does not declare war. The attorney general maintains that war declarations are characteristically no more than a single sentence and cryptic on presidential war powers, whereas authorizations for the use of military force are ordinarily expansive "and are made for the specific purpose of reciting the manner in which Congress has authorized the president to act." But that contention is counterfactual.

The AUMF says absolutely nothing about the "manner" in which President Bush is to employ "necessary and appropriate" force. It is indistinguishable on that score from the declaration of war against Spain in 1898, which provided: "First. That war be, and the same is hereby declared to exist ... between the United States of America and the Kingdom of Spain. Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several states, to such an extent as may be necessary to carry this Act into effect." Neither the declaration nor the AUMF address war tactics, for example, eavesdropping, concentration camps, breaking and entering homes, or enjoining news disclosures like the Pentagon Papers thought injurious to the war effort.

The AUMF reticence over tactics is no aberration. With regard to the current war in Iraq, for instance, Congress similarly declared without elaboration: "The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to -- (1) defend the national security of the United States against the continuing threat posed by Iraq, and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

While the suggestion that the AUMF vanquishes FISA's limits on electronic surveillance during war is laughable, the attorney general's assertion of unchecked commander in chief powers to conduct war is chilling. According to Mr. Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, for example, a law forbidding concentration camps reminiscent of World War II, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a withholding of federal funds sought to extend the war in Iraq into Iran to destroy its nuclear facilities. Under that unprecedented and insidious theory, the stream of federal statutes during the Vietnam War ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos were all unconstitutional.

A president above separation of powers might help to defeat the terrorist enemy. But the nation's constitutional dispensation and bulwarks against tyranny would be destroyed. As Secretary of State Condoleezza Rice might put it, to bow to President Bush's usurpations would be a reprise of Napoleon's 18th of Brumaire in the French Revolution.

Bruce Fein is a constitutional lawyer and international consultant with Bruce Fein & Associates and The Lichfield Group.

WARTIME EXECUTIVE POWER AND THE NSA'S SURVEILLANCE AUTHORITY

TUESDAY, FEBRUARY 28, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Leahy, Kennedy, Biden, Kohl, Feingold, and Schumer.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Senate Judiciary Committee will now proceed with our second hearing on the administration's electronic surveillance program.

It is our practice to start right on time. We have a very distinguished panel of witnesses, and we have a great deal of ground to cover. This morning the PATRIOT Act is on the floor of the U.S. Senate on a vote to cutoff debate. And that will require the attendance of members of this Committee on the floor, so we are targeting a conclusion of this hearing at 11:30. We can run a little over but not too much, so we need to start on time, and we need to progress with the 5-minute statements by each witness and the 5-minute rounds of questioning by all the Senators.

I have delayed making any substantive comment until the arrival of our distinguished Ranking Member, Senator Leahy.

We will be inquiring today about the President's authority to institute the electronic surveillance program, will be focusing significantly on the President's inherent power under Article II of the United States Constitution. We will also take up the issue of the Foreign Intelligence Surveillance Act, and whether the resolution to authorize the use of force on September 14th modifies that statute. I have already expressed my opinion that it does not for a variety of reasons, but that still leaves open the issue of constitutional authority. If the President has constitutional authority, as we all know, that would trump the statutory limitation which allows electronic surveillance only with a court order.

Legislation has been circulated—we have asked the witnesses to be prepared to comment on it—which would make the Foreign Intelligence Surveillance Court the unit to make a determination of constitutionality. Notwithstanding the statutory requirements that the Intelligence Committees in full would have access to programs

of this sort, this administration and previous administrations have chosen not to utilize the committees because Congress has a well-established record for leaking. Of course, so does the White House. This town leaks like a sieve, in the vernacular. So the President has been reluctant to take these matters to the Congress, limiting it only to the so-called Gang of 8.

The thinking has been that the Foreign Intelligence Surveillance Court has the expertise, the record for maintaining secrecy and can appropriately be entrusted with the job of making a determination of constitutionality. The legislation which I have circulated sets forth criteria for the FISA court to make a determination on the scope of the intrusions, and the steps taken to minimize results.

There has been some concern as to whether there is a general warrant involved here. We think the authorities are strong, that it is not. There has been concern as to whether there is an advisory opinion here, and we think the authorities, again, are strong that it is not an advisory opinion in derogation of the Case in Controversy Clause of the United States Constitution.

When judges of the Foreign Intelligence Surveillance Court are asked to issue a search warrant, they do so on in *ex parte* proceeding. That has direct analogy to the kind of determination we are asking the court to make here on a broader basis for the entire program. There are other statutory ideas being circulated. One would involve congressional approval of the program, which seems difficult, really impossible to meet, unless we know what the program is, and we do not have that information. But the Foreign Intelligence Surveillance Court has the standing, the expertise, and the record for secrecy to make a determination of constitutionality for this program.

The existence of the President's program was disclosed rather dramatically on Friday morning, December 16th, the day we were in final arguments on the PATRIOT Act. It had quite an impact on our discussion that day, and cloture was not invoked. A number of Senators raised the point that there was special concern about privacy as a result of the disclosure of the administration's program in the context of what the PATRIOT Act should provide.

We have since worked through the issues. I think the chances are good that there will be cloture imposed today, although you never know what the Senate is going to do until the final vote is tallied.

I said yesterday on the Senate floor that I would introduce supplementary legislation which would bring back the standards that the Senate bill had, which passed this Committee unanimously and which passed the Senate by unanimous consent. But we have structured a compromise with the House of Representatives. We have a bicameral legislative branch, as we all know, and we have reached very significant compromises. One very important one by the House was a sunset in 4 years, which was a concession from 10-7. But my view is we ought to strive for the best bill we can. We have an acceptable bill, in my judgment, on the current state of the record, but we can improve it.

On this Committee, Senator Leahy and I are committed to have vigorous oversight. The FBI Director will be before this Committee on March 29th, and we will be asking him all of the tough ques-

tions about the provisions of the PATRIOT Act which were excluded in the conference report.

I am down to 4 seconds. I now yield to Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. In fact, I will be co-sponsoring that legislation you just spoke about to emphasize that it is a bipartisan effort, as the legislation that originally passed this Committee was.

Our hearing today is the second to explore the legality of President Bush's warrantless domestic spying program. On December 17th, one day after the program was revealed in the New York Times, the President admitted that the administration engaged in secret wiretapping of ordinary Americans without warrants for more than 4 years. Then 7 weeks later, Attorney General Gonzales came before this Committee to talk about this.

Now, that testimony of the Attorney General was far from complete. It left many important questions unanswered. As the chief legal officer of the United States, the Attorney General is not the President's legal adviser; he is the American people's lawyer. His sworn duty is to uphold the Constitution and the laws enacted by Congress. So it seemed reasonable to ask him how his Department of Justice will interpret these laws, how are they interpreting them. And by starting with legal questions, we were not asking any operational issues that could implicate national security or would require a closed hearing.

So I asked him a very simple question: When did the administration come up with its current theory that the congressional resolution authorizing the use of force against al Qaeda—a resolution, incidentally, that says absolutely nothing about wiretapping—also authorized secret, warrantless wiretapping of Americans inside the United States? He was asked that question repeatedly, and at every opportunity the Attorney General failed, he refused to answer what is a basic factual question.

He was asked several times to clarify the scope of the Bush-Cheney administration's legal theory of Executive power. If, as they claim, they can ignore the Foreign Intelligence Surveillance Act's express prohibition of warrantless wiretapping, could they also eavesdrop on purely domestic phone calls? Could they search or electronically bug an American's home or office? Can they comb through Americans' medical records and open first-class mail? Can they suspend the Posse Comitatus Act?

Now, these are questions to which I believe Congress, but especially the American people, deserve some answers. And based on his testimony and his persistent refusal to answer responsively, it appears the Attorney General has a radically different understanding of the laws than those of us who are the people's representatives here in Congress. He limited his appearance to confirming "those facts the President has publicly confirmed, nothing more." Again, we were not asking about operation. We were asking what is the law. What is the law? You are the Attorney General. What is the law? In a last-minute change to his prepared testimony, he also followed the path of his predecessor by playing poli-

tics on security matters, hoping to intimidate Senators who sought to get the facts.

I think we can confirm that every single Member of the U.S. Senate, Republican and Democrat, are patriots and believe in the security of this country, and asking questions does not mean that we do not believe in the security of our Nation. In fact, sometimes in asking questions, you might improve the security of Americans.

Senators from both parties took great care to ask straightforward questions that could be answered without danger to national security. When did the program begin? How many Americans have had their calls and e-mails intercepted? Has the program led to any arrests? Of these thousands of intercepts, has there been even one arrest? What involvement, if any, has the FISA court had with the program? Why was the program shut down in 2004 and its scope changed? Once again, we got no answers. Whatever we asked was either too relevant or not relevant enough, and either way, we were getting no answers from the Attorney General.

Now, there was one crack in the stone wall he erected. It has been reported that senior Department of Justice officials concluded in 2004 that the President's program was illegal and, backed by former Attorney General Ashcroft, they insisted its scope be narrowed. So Chairman Specter asked the Attorney General whether he objected to his predecessor testifying before the Committee on this issue. Attorney General Gonzales said, "I would not." But then, one week later, in a carefully worded about-face, he had an assistant write to the Chairman that the administration would not permit any former officials to provide any information to the Committee, and the stone wall went right back up.

Now, his conduct has made the administration's position crystal clear: It claims there is no place for congressional or judicial oversight of any of its activities related to national security in the post-9/11 world. Through stonewalling, steamrolling, and intimidation, I believe they are running roughshod over the Constitution and hiding behind inflammatory rhetoric demanding Americans blindly trust their decisions, whether it is this, reports, or anything else.

Last week, we were reminded again they hold to that position even when bipartisan Members of Congress raise national security concerns about the approval of a deal allowing a government-owned Dubai company to take over major port operations in the United States. Now, in both cases, this obsessively secretive administration proceeded with action that it must have known would face strong bipartisan opposition, and did so without informing Congress or the American people. They made no attempt to follow specifically expressed Federal statutes. In both cases, the Bush-Cheney administration has responded to congressional oversight efforts with bellicose political threats.

So it is up to the Congress, even though it is controlled by the same party as the White House, to fulfill its constitutional duty of providing the checks and balances by engaging in real oversight, or it can abdicate that role in deference to the other end of Pennsylvania Avenue.

Now, Chairman Specter has a history of engaging in meaningful, bipartisan oversight, and I appreciate his efforts. I am glad we are having this hearing. But we should know what this hearing is. This

hearing will go into some questions, but it is not oversight in the sense that we are asking the administration. There are no former officials who are allowed by the administration to come forward and answer questions. I think to get them we may have to go to subpoenas.

I have gone over my time, Mr. Chairman. I appreciate your courtesy, and I will put my full statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator KYL, would you care to make an opening statement?

Senator KYL. Mr. Chairman, in view of what I just heard, I am tempted to, but I think it is more important for us to hear the witnesses, so I will defer.

Chairman SPECTER. Succinct and well said. Thank you, Senator KYL.

I want to especially acknowledge the work on this Committee of Ms. Carolyn Short, our General Counsel, who is serving her last day on a 14-month stint. Ms. Short came here from a very prestigious law firm at a substantial cut in salary, and she has contributed very extensively to this Committee. In fact her contributions include the lion's share of the preparation for this hearing today.

We have been joined by the distinguished former Chairman of the Committee, Senator Hatch. Would you care to make an opening statement?

Senator HATCH. No, Mr. Chairman. I am just happy to be here, and we want to welcome all of you here. I am looking forward to hearing what you have to say.

Chairman SPECTER. Thank you very much, Senator Hatch.

We have had an issue raised before the Committee on swearing witnesses, and after some consideration, the judgment has been made that we are going to make it a regular practice to swear all witnesses. And in so doing we won't have any issue as to whether there is any special concern about witnesses or whether any witnesses are being targeted. We are just going to swear all the witnesses. That may not be totally necessary in circumstances where expert opinions are given, but if we have a uniform rule, I think it will facilitate the work of the Committee.

So if you will all rise, I will administer the oath to you in a group. Raise your right hands. Do you each of you solemnly swear that the evidence and testimony that you give before this Committee will be the truth, the whole truth, so help you God?

Mr. WOOLSEY. I do.

Mr. KOH. I do.

Mr. GORMLEY. I do.

Mr. KMIEC. I do.

Mr. FEIN. I do.

Mr. TURNER. I do.

Mr. LEVY. I do.

Chairman SPECTER. Thank you all very much.

Our first witness is the distinguished former Director of Central Intelligence, Hon. James Woolsey, a graduate of Stanford University with great distinction, Phi Beta Kappa, Oxford University, Yale Law School, managing editor of the Yale Law Journal. We

may be a little heavy with Yale Law representation here today, but we have other distinguished schools represented. We are going to make Senator Leahy an honorary Yale Law grad, except he would probably reject the offer.

Director Woolsey, thank you very much for joining us today, and we look forward to your testimony.

Let me repeat that the clock is set at 5 minutes, and we ask you to adhere to the rules so we can have the maximum amount of time for dialog, questions and answers.

The floor is yours, Director Woolsey.

STATEMENT OF R. JAMES WOOLSEY, VICE PRESIDENT, GLOBAL STRATEGIC SECURITY DIVISION, BOOZ ALLEN HAMILTON, MCLEAN, VIRGINIA

Mr. WOOLSEY. Thank you, Mr. Chairman. It is an honor to be asked to be with you.

Since we are in a war, I would start with the enemy, and I will summarize briefly the first several pages of my testimony to say that two fanatic theocratic totalitarian movements in the Middle East have chosen in the last few years to be at war with us—one from the Shi'ite side of Islam, one from the Sunni side of Islam. They are manifested in tactically shifting alliances, doctrinal differences that can sometimes be submerged in alliances of convenience. They have two somewhat different objectives: one wishes to kill as many people as possible in order to bring the Mahdi back and hopefully have an end of the world as soon as possible. The other would only like to fold us into a caliphate someday that would rule the world under Shariya. We may shake our heads in puzzlement at these types of objectives, but we have learned with the Thousand Year Reich and with world communism that we need to take totalitarianism and its views seriously.

Unlike the cold war, we have a number of assumptions that we have to operate under today that are fundamentally different. Far from fighting a single rigid empire, our enemies have a host of different relationships with government. Containment and deterrence have very little to do with them. Unlike the Soviets in the cold war, they are fantastically wealthy from oil. Unlike the Soviets in the cold war, their ideology is not dead. It is religiously rooted. It is central to their behavior.

Unlike the Cold War, we are not safe behind our shores. The chief of strategy for Mr. Ahmadinejad, who is close to Hezbollah, says that he knows of the 29 sensitive sites in the U.S. and the West which he has spied out and is ready to attack in order to “end Anglo-Saxon civilization.”

Unlike the Cold War, our intelligence requirements are not just overseas. We live on the battlefield, and we need to be able to map electronically that battlefield.

Unlike the cold war, domestic terrorism in this country cannot solely be dealt with by criminal law. It is difficult to understand how one deters through the criminal law individuals who want to die themselves while killing thousands of us.

Unlike the cold war, security can come more into conflict with liberty than we wish would be the case.

And unlike the cold war, and perhaps most importantly, the operation of Moore's law over the course of the last two to three decades has fundamentally changed our world. Throw-away cell phones and Internet websites and chat rooms are now available to terrorists. This is no longer 1978 when phones plugged into the wall and the Internet was just a gleam in the eye of a few people at the Defense Advanced Research Projects Agency.

I believe that the inherent authority of the President under Article II, under these circumstances, permits the types of intercepts that are being undertaken. I believe that is true because the country has been invaded, albeit, of course, not occupied, and defending against invasion was at the heart of the President's Article II authority from the Founders.

We run a serious risk of being attacked again. Both bin Laden and Ahmadinejad and Abbassi and, indirectly, Hezbollah have so threatened. The threat from bin Laden is augmented by a fatwah from a Saudi religious leader that threatens the use of nuclear weapons.

Since the battlefield is in part, sadly, here at home, I believe that what we have to do is think very hard about how to have a system that can provide a check and balance against the type of electronic mapping of the battlefield that I believe is necessary. The one-spy-at-a-time surveillance systems of the Cold War, including FISA, through courts, are not designed to deal with fast-moving battlefield electronic mapping, in which an al Qaeda or a Hezbollah computer might be captured which contains a large number of e-mail addresses and phone numbers, which would have to be checked out very promptly.

An Attorney General on a 72-hour basis, or a FISA court, simply cannot go through the steps that are set out on pages 9 and 10 of my testimony in time to deal with this type of a problem. In my judgment, oversight is needed. I generally endorse the support that Judge Posner submitted to the Wall Street Journal in an op-ed a couple of weeks ago, with one modification, which is in the testimony and which I do not have time to describe.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Woolsey appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Director Woolsey.

We now turn to the Dean of the Yale Law School, Smith Professor of International Law, Dean Harold Koh. Summa cum laude graduate of Harvard, cum laude of the Law School, Oxford, and a clerk to Justice Harry Blackmun.

Thank you very much for coming from New Haven today, Dean Koh, and we look forward to your testimony.

**STATEMENT OF HAROLD HONGJU KOH, DEAN, YALE LAW
SCHOOL, NEW HAVEN, CONNECTICUT**

Mr. KOH. Thank you, Mr. Chairman and members of the Committee. In my career, I have had the privilege of serving our Government in both Republican and Democratic administrations, and I have also sued both Republican and Democratic administrations when I thought their conduct was unlawful.

In my professional opinion, the NSA domestic surveillance program is as blatantly illegal a program as I have seen, and my reasons are given not just in my written testimony, but also in two letters that were sent to you by myself and a number of constitutional law scholars and former Government officials, as well as in the ABA Task Force Report, for which I served as an adviser.

Now, I say this fully aware of the ongoing threat from al Qaeda and the need for law enforcement officials to gather vital information. And, of course, in time of war, our Constitution recognizes the President as Commander in Chief. But the same Constitution requires that the Commander in Chief obey the Fourth Amendment, which requires that any Government surveillance be reasonable, statutorily authorized, supported, except in emergencies, by court-ordered warrants, and based on probable cause.

The current NSA program is blatantly illegal because it lacks all of these standards, and the Supreme Court has never upheld such a sweeping, unchecked power of Government to invade the privacy of Americans without individualized suspicion, congressional authorization, or judicial oversight.

For nearly 30 years, the FISA, the Foreign Intelligence Surveillance Act, has provided a comprehensive, constitutional, and, using its words, exclusive framework for electronic State and local. Under FISA, executive officials can conduct electronic surveillance of Americans, but they can do so without a warrant for only 3 days, or in case of wartime, for 15 days after a declaration of war. After that, they must either go to the special court for an order or come to Congress for an amendment or stand in violation of the criminal law.

This was based on a simple logic. Before the President launches an extended domestic spying program, his lawyers must get approval from someone who does not work for him. Yet that is precisely what has happened here—what has not happened here.

Now, of course, I agree with Director Woolsey that we can and should aggressively fight terrorism, but fighting terrorism outside the law is deeply counterproductive. Under the ongoing program, NSA analysts are increasingly caught between following orders and carrying out electronic surveillance that is facially illegal; and, moreover, evidence collected under the program will almost surely be challenged, and it may prove inadmissible, making it far more difficult to prosecute terrorists.

With respect, none of the program's defenders has identified any convincing defense for conducting such a sweeping program without congressional authorization and oversight and judicial review. And in my testimony, I review and reject those defenses, including the extraordinary claim that you here in Congress enacted the use of force resolution to repeal the FISA, which had, in fact, criminalized unauthorized, indefinite, warrantless domestic wiretapping 23 years earlier.

Most fundamentally, my testimony rejects the radical view of unchecked executive authority that is offered by some of my fellow witnesses. That unilateral vision offends the vision of shared national security power that is central to what Justice Jackson called "the equilibrium established by our constitutional system." Read literally, the President's reading of the Constitution would turn

this body into a pointless rubber stamp whose limited role in the war on terror would be enacting laws that the President could ignore at will and issuing black checks that the President can redefine at will.

Finally, Mr. Chairman, I have had a chance to look at the proposed bill to refine and amend the FISA. I don't think it will improve the situation. First, as you say, it is radically premature. Congress simply does not have enough information to conduct such a broad revision at this time. Second, remember that the President has refused for 4 years to operate within the FISA framework. Unless the President acknowledges that he must obey the FISA amendments and agrees to operate within it, any new congressional action will be equally meaningless. And, third, the proposal pre-authorizes programs, not particular searches, and as a result it gives a general warrant to a significant number of unreasonable searches and seizures. This resembles the statutory version of the British general warrant that was used in the 1700s by the King. But it was precisely because English law did not protect our privacy that our colonial ancestors said that, even when the President in wartime is our Commander in Chief, we have a right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and no warrant shall issue, except on probable cause, and the persons or things to be seen being stated with particularity.

In sum, Mr. Chairman, for 4 years our Government has been conducting an illegal program and now wants to rewrite the Constitution to say that that program is lawful. This Committee should reject those claims.

Thank you.

[The prepared statement of Mr. Koh appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Dean Koh.

Our next witness is Mr. Robert Levy, who is a Senior Fellow in Constitutional Studies at the Cato Institute. He has a bachelor's degree from American University, a Ph.D. from American University, and a law degree from George Mason University. He is an adjunct professor at Georgetown University Law School and is a member of the Board of Visitors of the Federalist Society.

Thank you for joining us today, Mr. Levy, and the floor is yours.

STATEMENT OF ROBERT A. LEVY, SENIOR FELLOW IN CONSTITUTIONAL STUDIES, CATO INSTITUTE, WASHINGTON, D.C.

Mr. LEVY. Thank you, Mr. Chairman, and members. Thank you very much for inviting me to testify.

I would like to discuss four legal questions related to the surveillance program. First, do NSA warrantless domestic wiretaps necessarily violate Fourth Amendment protections against unreasonable searches? My answer to that is no, they do not, not necessarily. There are numerous exceptions to the warrant requirement, including hot pursuit, search incident to arrest, stop-and-frisk and others. And as for national security, that is an open issue as to whether there is an exception.

Under the *Keith* case in 1972, the Court indicated that the administration could conduct some types of warrantless wiretaps

without violating the Fourth Amendment if a foreign power were involved.

The second question though, what about the FISA statute; does not the NSA program violate its express terms? My answer to that question is yes. The text is unambiguous. A person is guilty of an offense if he intentionally engages in electronic surveillance except as authorized by statute. Now, to be sure, FISA was drafted to deal with peacetime intelligence, but that does not mean that it is inapplicable in the post-9/11 war on terror. In fact, Congress expressly contemplated warrantless wiretaps during wartime, and limited them to the first 15 days after war is declared, and furthermore, FISA was amended by the PATRIOT Act, passed in response to 9/11 and signed by President Bush. So if 9/11 triggered wartime as the administration has repeatedly argued, then the amended FISA statute is clearly a wartime statute.

Third question. Does the authorization for use of military force provide the statutory approval that FISA requires? Answer: No, it does not. A settled canon of statutory interpretation is that specific provisions supersede general provisions. When FISA forbids electronic surveillance without a court order, except for 15 days, while the AUMF permits necessary and appropriate force, it seems to me, quite simply, bizarre to argue that electronic surveillance is thereby authorized without a warrant.

Congress, in passing the AUMF, did not intend to make compliance with FISA optional. In fact, Congress was simultaneously relaxing selected surveillance provisions via the PATRIOT Act. To my knowledge, not a single Member of Congress, among the 518 members who voted for the AUMF, now claims that his vote changed domestic wiretapping rules.

Fourth question and the most difficult: do the President's inherent wartime powers allow him to ignore FISA? My answer is no. That is not to say the President is powerless to order warrantless wartime surveillance. For example, intercepting enemy communications on the battlefield is clearly an incident of his war power, but warrantless wiretapping of Americans inside the United States, who may have nothing to do with al Qaeda, does not qualify as incidental wartime authority. The President's war powers are broad, but they are not boundless, and indeed, they are not exclusive. The power to grant pardons, for example, is exclusive. Congress could not make an exception for persons convicted of, let us say, child abuse.

But war powers are not exclusive. They are shared between the President and Congress. It is Congress, not the President, that is constitutionally authorized to declare war, suspend habeas, define and punish offenses against the law of nations, make rules concerning captures on land and water. The real question is not whether the President has some inherent authority to conduct warrantless surveillance. He does. The tougher question is to determine the scope of his authority in the face of Congress's concurrent powers. And the key Supreme Court case, as you know, is Justice Jackson's concurrence in *Youngstown Sheet and Tube v. Sawyer*. Clearly, the NSA surveillance program belongs in *Youngstown's* third category, in which the President has acted in the face of an express statutory prohibition. In my view he has overreached. The

executive branch may be justified in taking measures that in pre-9/11 times could be seen as infringements of civil liberties, but the President cannot, in the face of an express prohibition by Congress, unilaterally set the rules, execute the rules and eliminate oversight by the other branches. In short, the NSA surveillance program, under current law, is illegal.

Now in the 20 seconds remaining, I would like to comment on Director Woolsey's statement that the battlefield is here at home. Calls from the actual battlefield, Afghanistan, or anywhere else outside the United States, can be monitored under current FISA rules, as long as the target is not a U.S. person in the U.S. So to suggest that calls cannot be monitored is a mistake. A call from France or the U.K. cannot be construed as battlefield-related, unless the term "battlefield" has no geographic limits, and indeed, if France is part of the battlefield, why not Nebraska? The same logic that argues for warrantless surveillance of foreign communications would permit warrantless surveillance of domestic communications as well.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Levy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Levy.

Our next witness is Professor Doug Kmiec, Professor of Constitutional Law at Pepperdine; one time Dean and Professor at Catholic University, and on the faculties of Notre Dame Law School and Valparaiso; undergraduate degree from Northwestern with honors, and a law degree from the University of Southern California; Assistant Attorney General in the U.S. Department of Justice for 4 years from 1985 to 1989. Thank you for being with us today, Professor, and we look forward to your testimony.

STATEMENT OF DOUGLAS W. KMIEC, PROFESSOR OF CONSTITUTIONAL LAW, PEPPERDINE UNIVERSITY SCHOOL OF LAW, MALIBU, CALIFORNIA

Mr. KMIEC. Thank you, Mr. Chairman, and members of the Committee. I ask that my full statement be made part of the record.

Chairman SPECTER. Without objection, it will be made part of the record, as will all the statements.

Mr. KMIEC. I believe there is a common objective between the President and the Congress, and of course, that common objective is to prevent further attack.

One of the things that was immediately recognized after 9/11, recognized by both the President and by the Congress, was that there were missed opportunities to unravel that plot through enhanced surveillance. The joint independent inquiry of the Select Intelligence Committees recognized that. It also recognized that there was a perception that FISA was not working because of its lengthy process. So there was a legal issue. Did the President have the authority to address that question—the shortcomings with surveillance?

The President's lawyers in the White House concluded that he did. The Chair of the Senate Intelligence Committee concluded that he did. The Attorney General, in a eloquent statement to you on February 6, illustrated why he concluded that he did. And I affirm

these conclusions as both constitutionally reasonable, practically justified and necessary.

In my written testimony I give detailed support for that conclusion, but in a nutshell it is this: that Congress, through FISA, was seeking to address a political abuse of the use of surveillance. It was important for them to address that abuse. They did, and it has been stopped. That Congress, through FISA, was taking up Justice Powell's suggestion in the *Keith* case, that domestic security, while needing to comply with the Fourth Amendment did not need to comply precisely in the same way as criminal investigations. It could be done through a specialized court and specialized determinations of particularity and probable cause.

But Congress also chose to launch into an area that is very difficult because there is authority in both Congress and the President with regard to issues of foreign intelligence. Griffin Bell cautioned the Congress on this score, and it responded to that caution with a number of provisions in FISA that basically anticipated the need for specialized legislation in the event of wartime. I believe that specialized legislation has been passed in the form of the Authorization for the Use of Military Force, and that fully authorizes, as the Supreme Court has held in *Hamdi*, that the President can use all incidents of war to wage war successfully.

I recognize that reasonable minds can differ on this question. Reasonable minds have been differing on this question since Madison and Hamilton had a debate about the neutrality policies of the United States. Justice Jackson himself disagreed with FDR on some questions with regard to foreign affairs authority. Of course, this body disagreed to some degree with President Reagan in matters of Iran-Contra.

But the fact that these questions have been debated perennially since the time of our founding, certainly does not mean that these disagreements are illegal or that they call for the appointment of a special counsel. Such rhetoric, it seems to me, to be partisan, unnecessary, unfortunate and unwise.

The American poet, T.S. Eliot, observed that war is not life, it is a situation. It is a situation which can neither be ignored nor accepted. The war on terror cannot be ignored, and the prospects of further attack cannot be accepted.

I think the real constructive purpose of this hearing, Mr. Chairman, is not to have recriminations about legality or illegality, because there is a genuine argument on both sides of that question, but rather to pursue the issue of what is the appropriate course as we go forward. I know that legislation has been drafted for our consideration, and my sense with regard to that legislation is to give it a qualified affirmation. It is qualified, as it must be, because, of course, any legislation in this area must always maintain focus on the primary objective to prevent attack, and to the extent that it fails to accomplish that objective, it must be rejected. But if it does in fact authorize a program warrant requirement that meets constitutional specifications—and I believe in many respect it does—then it is striking a more appropriate balance between the legislature and the executive. I hope to answer your specific questions about the legislation in the questions that are to come.

Thank you, sir.

[The prepared statement of Mr. Kmiec appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor.

Our next witness is Mr. Bruce Fein, Partner of Fein and Fein; undergraduate degree from the University of California, phi beta kappa, Harvard Law, cum laude; was a special assistant in the antitrust division of the Department of Justice, 1973 to 1980; General Counsel to the FCC under President Reagan, 1983 to 1985; constitutional lawyer, international consultant.

Thank you very much for agreeing to be a witness, Mr. Fein, and we look forward to your testimony.

**STATEMENT OF BRUCE FEIN, FEIN AND FEIN, WASHINGTON,
D.C.**

Mr. FEIN. Thank you, Mr. Chairman, and members of the committee. This is a defining moment in the constitutional history of the United States. And on this issue I think we are all Republicans and we are all Democrats, to borrow from Thomas Jefferson's Inaugural, because the issues that we confront with regard to checks and balances, are indispensable to the liberty of those living and those yet to be born.

The theory invoked by the President to justify eavesdropping by the NSA, in contradiction to FISA, would equally justify mail openings, burglaries, torture, or internment camps, all in the name of gathering foreign intelligence. Unless rebuked, it will lie around like a loaded weapon, ready to be used by any incumbent who claims an urgent need. On this score, as Justice Holmes said, a page history speaks volumes of logic.

FISA was the child of the Church Committee hearings. It disclosed, among other things, that in 1938, when a secret program of domestic surveillance not authorized by Congress was undertaken to identify fascists or communists, the Director of the FBI, the Attorney General and the President concurred as follows: "In considering the steps to be taken for the expansion which then occurred of the present structure of intelligent work, it is believed imperative that it be preceded with the utmost degree of secrecy in order to avoid criticism or objections, which might be raised by such an expansion by either ill-informed persons or individuals having some ulterior motive. Consequently, it would seem undesirable to seek special legislation which would draw attention to the fact of what is being done."

President Bush has advanced the identical justification for refusing to seek congressional authority for the NSA's warrantless eavesdropping targeting American citizens at home. What happened after the 1938 secret intelligence program commenced? The abuses, mail openings, burglaries, Internal Revenue Service harassments, a security index in violation of the Internal Security Act of 1950 and COINTELPRO. The bureaucratic mentality of the spy was captured in the following FBI Headquarters response to its New York office's conclusion that surveillance of a civil rights leader should cease because an investigation had unearthed no evidence of communist sympathies.

And this is what the Bureau headquarters wrote in response: The Bureau does not agree with the express belief of the New York

office that Mr. X is not sympathetic to the party cause. While there may not be any direct evidence that Mr. X is a communist, neither is there any direct substantial evidence that he is anti-communist.

In other words, it is the mental inclination of spies and the intelligence community to overreach, because their job is to gather intelligence, their job is not to weigh and balance privacy interests. Privacy interests that Justice Louis D. Brandeis characterized in *Olmstead v. United States*, as the right to be left alone, the most comprehensive of rights and the right most valued by civilized men.

This Committee was told by the Attorney General on February 6 that we can all be assured because NSA professionals are deciding who is and who is not sympathetic to al Qaeda, that only the culprits are targeted. But the whole purpose of the Fourth Amendment, the whole purpose of FISA was to have an outside check on the executive branch spying because of the inherent tension with the desire of the professional to get the maximum intelligence and the desire of the American people to be secure in their persons, houses, papers and effects.

That is the reason why FISA was enacted and why it has demanded such scrupulous conformity over the years. The argument is made that the authorization to use military force somehow overrode the FISA statute. On its face it is preposterous because the theory that the AUMF authorized the President to undertake anything pertinent to collecting foreign intelligence, also meant that this Committee and this Congress silently overrode the prohibitions on mail openings, on breaking and entering homes, on torture, cruel, inhumane degrading treatment of prisoners, and to do all of those things in silence on its face is laughable.

I would like to briefly address what I think the responsibility of this Committee is. You do not know, we do not know exactly what the nature of the spying program of the NSA is, as the Attorney General conceded on February 6th. So we do not know the nature of the problem that is created by FISA. The Attorney General said, to domestic al Qaeda calls, "FISA works reasonably well, and the President hasn't authorized those kinds of interceptions without warrants." Well, on its face, why would the practical difficulty of complying with FISA when an international call is at issue, should be different from the domestic calls? Maybe there is, but this Committee and the American people have not been told why. The burden of persuasion ought to be on the President to explain why FISA is unworkable, not on us to explain why a secret program we know nothing about is unnecessary.

The power of the purse is perhaps the greatest power the Founding Fathers entrusted to the legislative branch. It has been used in the past, and in my judgment, should be used now to stipulate that the President can undertake no electronic surveillance for foreign intelligence purposes outside of FISA unless—

Chairman SPECTER. Mr. Fein, could you summarize?

Mr. FEIN. Yes. Unless within 30 days the President comes forward with a plan that this Congress agrees will be treated on a fast track basis like trade negotiations, and let the burden be on the administration to explain to this Committee why changes are necessary.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fein appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Fein.

We now turn to Professor Robert Turner of the Woodrow Wilson Department at the University of Virginia; bachelor's degree from Indiana University, and an advanced law degree from University of Virginia Law School; has served in key positions such as the Associate Director of the Center for National Security Law, the President's Intelligence Oversight Board, and the President of the Institute for Peace, and worked back in the 1970s for Senator Robert Griffin.

Thank you very much for agreeing to join us today, Professor Turner, and we look forward to your testimony.

**STATEMENT OF ROBERT F. TURNER, ASSOCIATE DIRECTOR
AND CO-FOUNDER, CENTER FOR NATIONAL SECURITY LAW,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA**

Mr. TURNER. Thank you, Mr. Chairman. It is an honor to be here. I hope that our question period will provide an opportunity to talk both about the power of the purse and also about the statutory authorization issue. I think a case can be made that the AUMF did authorize these intercepts, but I have 5 minutes, so let me focus on the more important issues.

I share the view that no one, including the President, is above the law, but I would emphasize when we are talking about law, that the Constitution comes first, as the Chairman did in his opening remarks. Chief Justice John Marshall told us in *Marbury*, an Act of the legislature repugnant to the Constitution is void. I think there is a place for FISA, but the bill needs to include a recognition of the President's independent constitutional power to act in this area, as Attorney General Griffin Bell noted during the Carter administration when he testified before the Senate in 1978.

During these hearings it has been suggested that unchecked Presidential power is incompatible with democratic governance. Once again I would call your attention to *Marbury v. Madison*, where Chief Justice Marshall noted, "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country and his political character, and to his conscience. Whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist no power to control that discretion."

At the core of Executive discretion, I submit, is the control of foreign intelligence during wartime. As John Jay noted in Federalist No. 64, "The Convention have done well, "and so dividing the treaty powers, that the President "will be able to manage the business of intelligence as prudence might suggest." When the Founding Fathers vested the Executive power in the President in Article II, section 1, they gave the general control of foreign intercourse to the President subject only to narrowly construed negatives or checks vested in the Senate or Congress.

As I document in my written statement, George Washington, James Madison, Thomas Jefferson, John Jay, Alexander Hamilton and John Marshall, all specifically referred to the “Executive power” grant as the reason for the President’s control in this area. As Jefferson put it in 1790, “The transaction of business with foreign nations is Executive altogether.”

The need for secrecy was central to the decision to vest not only foreign intelligence, but also the negotiation of treaties exclusively in the President. As the Supreme Court noted in the landmark 1936 *Curtiss-Wright* decision, “into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.” Sadly, since Vietnam, Senators have too often breached this barrier.

In my prepared statement I explain why *Curtiss-Wright* remains the primary Supreme Court precedent concerning foreign affairs. I also explain that *Youngstown* is not really a foreign affairs case. Both Justice Black for the majority, and Justice Jackson, in his concurring opinion, time and again, emphasized that this was a question of internal powers, of a taking of private property without due process of law, a clear violation of the Fifth Amendment.

Similarly, the *Keith* case has been greatly misunderstood. Like Justice Black and Justice Jackson, Justice Powell, for the unanimous Court in *Keith*, repeatedly emphasized the case involved internal threats from domestic organizations, in this case, the Black Panthers. And he noted that the Court took no position on the President’s power with respect to foreign powers within or without this country.

I would add that the argument that FISA was enacted in response to an invitation from the Supreme Court is simply not accurate. What Justice Powell said, was, “given those potential distinctions between Title III”—that is, Title III of the ’68 Crime Control and Safe Streets Act—“criminal surveillance and those involving the domestic security,” that is, groups like the Black Panthers, “Congress may wish to consider protective standards for the latter,” that is, domestic security, “which differ from those . . . in Title II.” The Court made no suggestion that Congress should put any constraints on foreign intelligence gathering. And since *Keith* the courts have clearly sided with the President, as have all the Presidents.

In 2002, the Foreign Intelligence Surveillance Court of Review noted that every court that has considered the issue has held the President did have inherent authority under the Constitution to conduct warrantless searches to obtain foreign intelligence. And the Court went on to say, “we take it for granted the President does have that authority, and assuming that is so, FISA could not take away that Presidential power.”

Finally, Mr. Chairman, I would note that FISA has done serious harm to this Nation. Colleen Rowley was one of *Time’s* Persons of the Year because she complained that the FBI would not even request a FISA warrant. In fact, as I am sure, you know, the reason the FBI would not request a FISA warrant was because Congress had failed to consider the possibility of a “lone wolf” terrorist like Zacarias Moussaoui, and the statute made it clearly illegal to get

a warrant to look at his laptop. FISA was amended in 2004 to fix that omission.

General Michael Hayden, former head of NSA, has said that if this program had been legal back before 9/11, it might have prevented those attacks, but FISA prohibited this kind of program.

We have heard a lot of talk about a “risk-avoidance culture” in the intelligence community. I followed the Church hearings. I was here at the time. Look at the fact you have made felony penalties for—

Chairman SPECTER. Professor Turner, could you summarize at this point?

Mr. TURNER. Yes, sir. You have made felony penalties for intelligence agents who step over the line, even if they do so with Presidential authority, and that contributes to such a culture.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Turner.

Our concluding witness is Professor of Law from Duquesne University, Professor Ken Gormley; undergraduate degree from University of Pittsburgh, law degree from Harvard; clerked for Federal Judge Ziegler and State Supreme Court Justice Ralph Cappy. In 2002 he organized a symposium to celebrate the 50th anniversary of the *Youngstown* steel seizure case, and without object, we will make a part of the record, the videotape and the statement of the Coalition to Defend Checks and Balances, an initiative of the Constitution Project.

I reviewed your tape, Professor Gormley, and it brought back a lot of memories. The steel seizure case in black and white does not have the drama that the videos did with the newsreels of President Truman, the Korean War and the pressure the need for steel put on the President’s wartime powers. We were at war at that time, although we have not found any nominee for the Supreme Court who will say it was a war yet. I have been trying for more than a decade.

If you will permit just a 30-second personal aside, I was one of 2,000 ROTC cadets at Lowry Air Force Base, arriving there on June 25th, 1950, the day the Korean War started, and we were sure in TACU we were heading right for the trenches. And after we were there for six weeks, they sent us all back to college. I guess they wanted to win the war.

[Laughter.]

Chairman SPECTER. But when your video was shown, it was enormously impressive, and you were able to get Chief Justice Rehnquist to say that public opinion influences the Supreme Court. I thought that was quite a concession.

By the way, none of this is out of your time, Professor Gormley. You may proceed, please.

STATEMENT OF KEN GORMLEY, PROFESSOR OF CONSTITUTIONAL LAW, DUQUESNE UNIVERSITY SCHOOL OF LAW, PITTSBURGH, PENNSYLVANIA

Mr. GORMLEY. Thank you very much, Chairman Specter and members of the Committee. It is a great privilege to testify today,

and as Senator Specter said, I have had the good fortune of studying the issue of Presidential power and specifically the steel seizure case often described as the granddaddy of the cases dealing with Presidential power, especially on American soil. And my written testimony contains a lengthy summary of that.

Let me just summarize the problems I do see with the current Bush administration secret surveillance program, acknowledging that I believe it flows from good faith efforts to wage a crucial war on terror. Then I would like to talk about solutions.

Justice Jackson, as you know, declared in his famous concurrence in that case that Presidential power is at the high point, at the theater of war abroad; it is at its low ebb on American turf, especially when the President has acted without constitutional or congressional support. Applying that precedent, I see four problems with the current surveillance program.

Nothing, first, in the text of the Constitution specifically gives the President power to conduct such secret warrantless surveillance on the domestic front, even in times of emergency.

Second, the administration specifically bypasses an Act of Congress in creating the FISA Court that directly deals with precisely these sorts of surveillance efforts with respect to citizens of the United States and residents.

Third, the President's power—and this is important—the President's power is further diminished because the program directly collides with rights of American persons under the Bill of Rights, specifically, the Fourth Amendment. And this collision, I should point out, potentially puts President Bush's power even at a lower point than President Truman's in the steel seizure case.

And fourth, this is interesting, if you adapt the steel seizure test and apply it to Congress, you discover that unlike the President, Congress is at its zenith of power here. Congress has the power to establish inferior courts under Article I, which it has done in establishing the FISA Court. It has the power to enact laws to ensure that Fourth Amendment rights and Bill of Rights protections are safeguarded, as it has done since the 1960s with wiretap laws. So Congress is at its high point here. The President is at low ebb.

So how does this Committee give the President the tools he needs to fight the war on terror while still making sure that no constitutional shortcuts are taken? Here is a very quick summary.

First, the existing FISA statute, I believe, should be used as a starting point. It works. It has been in place for 28 years. It is the best framework for any new legislation.

Second, a mechanism has to be created for judicial review. Congressional oversight is important, yes, and I have proposed a form of that in my written comments, but any secret surveillance legislation that makes it impossible to test the constitutionality of the program in the courts will end up violating the separation of powers doctrine as well as the Fourth Amendment. Probable cause, by definition, includes the participation of neutral and detached judges. So it is key that the FISA Court be included in the process, albeit making sure it operates in a highly secure fashion.

Third, a mechanism must be created to allow standing for aggrieved parties so that a valid case or controversy can be created in the courts. As you know, this is very complicated stuff. I have

attempted to spell out some suggestions in my written testimony. I think there are ways to accomplish standing legitimately. My proposal would put the Intelligence Committees of Congress in the role of intermediary in order to permit valid cases and controversies to be presented to the courts without jeopardizing national security.

And fourth, the U.S. Supreme Court must possess the final power of review. All roads have to lead to the Supreme Court here. Even Congress cannot write the Supreme Court out of Article III.

And fifth, the intake valve in what is funneled into the FISA Court has to remain extremely narrow. Any new legislation has to be fine tuned carefully when it comes to surveillance of American citizens in secret. This should be a rare thing, to be limited to cases where there is an awfully good reason to believe there is someone linked to terrorism on the other end of the communication. I think that still needs some tweaking.

Let me just end by saying, Mr. Chairman, that there is no question in my mind that President Bush and his advisers and the Attorney General are doing everything humanly possible to do the right thing for our country here, just as Harry Truman did in 1952 in the steel seizure case. He thought it was essential to seize those steel mills in order to protect American troops in the field of battle. President Bush confronts a world quite different than any other previous President. This is serious business, there should be no finger-pointing here.

At the same time, this Congress has clearly defined powers under the Constitution. It has a duty to our system of Government to ensure that these are not disemboweled or diminished in any way by any other branch of Government, however well intentioned. Some of the draft legislation I believe is a positive step in that direction. This is not about right or wrong, Mr. Chairman. It is about attempting to find some common constitutional ground among equally well-intentioned public officials and branches of Government, and I pray that we as a Nation are still capable of doing that.

Thank you for the privilege of testifying.

[The prepared statement of Mr. Gormley appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Gormley.

As I said at the outset of the hearing before some of the Senators had arrived, we have the PATRIOT Act on the floor, and a number of us have to be there this morning. Scheduling of the PATRIOT Act and a motion to cutoff debate coincides with this hearing, so we are going to have to stay on the schedule and conclude in the next hour, hour and a quarter. And we have, as is our practice, 5-minute rounds for Senators, and on the early bird, in order of arrival.

Beginning with you, Professor Kmiec, I note your statement on page 18 of your 27-page statement—and we thank you for being so detailed—you have come to the conclusion that if legislation were enacted giving the Foreign Intelligence Surveillance Court the responsibility to determine constitutionality under the standards set forth in the proposed bill, that it would not be an advisory opinion. You articulated that the program warrant is a fair equivalent of

the FISA warrant, which has been upheld, as you put it, as a quintessential judicial determination at common law. Would you amplify your reasoning on that point, please?

Mr. KMIEC. Certainly, Mr. Chairman. The concerns I had when I first saw the draft of legislation was whether this was an advisory opinion, whether this was assigning to the Court something that was inconsistent with the Court's function in the sense that it was an administrative or non-judicial posture.

But one of the things that is very clear from our history and from the cases, is that the determination of probable cause and particularity is, and has been described since Matthew Hale, since Blackstone and commentators thereafter, as quintessentially a judicial function.

Chairman SPECTER. And a determination about the constitutionality of the overall program would follow those general principles?

Mr. KMIEC. It would as well, because, of course, the very determination of the appropriateness or inappropriateness of a warrant always has as a background principle the issue of constitutionality, and the way you describe it in your proposed legislation is that the judges would be ascertaining that constitutionality in the performance of this function. I think that is what they do generally.

Chairman SPECTER. We only have a limited amount of time so you will have to forgive our moving rather rapidly to another question.

Dean Koh, you said that unless the President agrees to comply with the operation of the Foreign Intelligence Surveillance Act it would be meaningless to pass more legislation, where we would give to the Foreign Intelligence Surveillance Court the responsibility to determine constitutionality of the overall program. Why do you say it would be meaningless? You are not suggesting that it would be meaningless if the FISA Court made a determination that the program was unconstitutional? It has to be noted we do not know the details of the NSA program, and I do not think we are about to find out anytime soon. There may be some very limited oversight, but even then the administration has shown a real reluctance to tell the Congress.

I served as Chairman of the Intelligence Committee in the 104th Congress—and Director Woolsey has real insights here—I could not find out very much even though I was Chairman of the Committee. I thought at times the Director did not know very much about what the Central Intelligence Agency was doing. It's a very compartmentalized and secret agency.

Let the record show Director Woolsey is smiling.

[Laughter.]

Chairman SPECTER. I will not say that is an affirmation of what I said, but it has some probative value. Perhaps not much.

But, Dean Koh, if the FISA Court said it was unconstitutional, that would not be meaningless, would it? It would be respected by the President?

Mr. KOH. Well, Senator, 28 years ago Congress and the President enacted a law which they said was exclusive, and now the President is saying in fact it is not exclusive. He can operate outside the scope of that law.

Chairman SPECTER. But the President is saying the Attorney General came in and said he has constitutional authority. If the President does have inherent authority under Article II, would that not trump the statute?

Mr. KOH. Well, what I am saying is that if you pass a new statute, and the Attorney General and the President have inherent authority to operate outside the scope of it, you can keep passing statutes as long as you want, and they can keep doing it under their inherent power or under the AUMF.

I should just point out that the act of passing the PATRIOT Act, again, is irrelevant if their theory is true, because the AUMF has already reauthorized the key provisions, and you do not need to pass anything. In other words, the role of Congress here is to either give a blank check, which is revised later on, or to just play this role in which you pass legislation that can be ignored at will.

Chairman SPECTER. In the 15 seconds I have left, I can propound the question, Professor Gormley, and you will have more time to answer it after my red light goes on. You have come to the conclusion that the creation of this legislation would not be an advisory opinion. Would you amplify that, please?

Mr. GORMLEY. Yes, Chairman Specter. I think that it, again, requires some fine tuning. Here we are talking about the proposed draft Specter bill, and I think it is a good start, it is a good framework, because it allows for program-based warrants, but it requires probable cause. It includes the FISA Court. It includes Congress in an oversight capacity, so we have all three branches of Government working. I think that is a good start.

I do think that it is essential to make sure that there is some way that there can be a case or controversy presented to the courts. That is a problem, because when you stop and think about it, when matters are done in secret, there is no plaintiff by definition. You have to allow some plaintiff to be created legitimately.

So what I have proposed is to give the power—require the Director of National Intelligence to give an inventory of American citizens who have been subject to surveillance who are not terrorists, as is done under Title III, and allow the congressional oversight committee, the Intel Committees, with consultation with the executive branch, to determine if it is OK to release some of those names, and then you would have live cases or controversies and they could go to the FISA Court.

But I do think that in general the system works. I do think it has to be tweaked, and let me just give you one example, Mr. Chairman. The way this thing is written right now—and I think it is why Dean Koh and John Podesta at the Center for American Studies, and others have some problem as written—it talks only about foreign agents, which makes sense currently under FISA. But, for instance, if one of your staff members contacted today a Government official in Canada, that is a foreign agent, and then that person, your staff member could be wiretapped for 45 days. I do not think that that is what is intended. I think there has to be a more direct link to terrorists and I think that can be done fairly easily.

Chairman SPECTER. Thank you, Professor Gormley.

Senator Leahy will be returning shortly, and in his absence, I will turn to Senator Biden.

Senator BIDEN. Thank you very much.

I would like to ask Messrs. Woolsey and Turner, is FISA constitutional?

Mr. WOOLSEY. I believe insofar as it intrudes on mapping the electronic battlefield in war time when the United States is under direct threat of attack, Number one believe that there are many provisions of FISA that are constitutional with respect to looking into individuals, and as Judge Posner's proposal, that I in general endorsed, suggests, in traditional cases of FISA, spies and the like, where you have the identity of an individual and the question of probable cause of whether or not that individual is an agent of a foreign power or terrorist organization arises, under those circumstances I think FISA can operate, and should operate today, and should operate in the future, but that is not what we have here.

What we have here—we often do not even know individual who is at issue with the electronic surveillance plan.

Senator BIDEN. In the interest of my time, you have answered my question. Thank you.

Mr. Turner?

Mr. TURNER. Thank you, Senator Biden. I was here when FISA was passed—

Senator BIDEN. So was I.

Mr. TURNER. And spent 3 years overseeing it as Counsel to the President's Intelligence Oversight Board. I am a fan of FISA, but ultimately, as Griffin Bell noted as Attorney General in the Carter administration in '78, and as the FISA Court of Review that you established has said, the President has independent power in this area that cannot be taken away by Congress. So I—

Senator BIDEN. To the extent that FISA attempts to limit the President, it is unconstitutional?

Mr. TURNER. In cases involving foreign intelligence, and certainly during time of war, I would say yes. This is the administration—

Senator BIDEN. I got it. My time is—with all due respect. I apologize.

Mr. TURNER. Yes, sir.

Senator BIDEN. Now, based on the legal—one of the advantages of commuting, you get to read all this. I read all your statements, and I must say for the record I agree most with Mr Fein, which should worry him.

[Laughter.]

Senator BIDEN. But the fact is that under the legal reasoning that some of you have put forward, in addition to the legal reasoning put forward by the administration in the memorandum prepared by Mr. Yoo in 2002, on August 1, 2002, I do not see any rational distinction in the argumentation being made by the administration or by you, Mr. Woolsey, or by you, Professor, or by you, Mr. Turner, that would suggest that the President does not have authority to exercise the same authority absent any prohibition and including any prohibition on the part of Congress for domestic-to-domestic wiretapping. What is the distinction?

Mr. KMIEC. I think the distinction is the Supreme Court's decision in *Keith* has made it plain that with regard to domestic security, the Fourth Amendment does have an application different than it has with regard to foreign intelligence. The motivation for FISA was largely to pursue that domestic security side of the question, and I think that is fundamentally different.

Senator BIDEN. I was here, and was a cosponsor of that, and I disagree with both your characterizations of what we intended to do at the time, but I do not have time.

Mr. Woolsey?

Mr. WOOLSEY. I might just quickly say I think internal communications, even between terrorists, are a different and a more troubling case. Mr. Levy says that the battlefield was Afghanistan, but not France. I do not think the United States is the only side that gets to decide where the battlefield is. If you were here on 9/11 and saw that crash into the Pentagon, it is hard to tell the families of the people who died that they were not on a battlefield. I think the battlefield is in part here, and connections between here and terrorists overseas, whether they are in France or anyplace else—

Senator BIDEN. And whether or not they are overseas or not, I do not get it.

Mr. Fein, what would you say? My time is running out.

Mr. FEIN. I agree exactly, Senator Biden, and Attorney General Gonzales himself, on February 6, said there is not any difference, it is just the President, for political purposes, decided that domestic-to-domestic would subject him to too great recriminations, and therefore, this is not because of absence of legal authority.

If I could just mention a couple points that former Director Woolsey made. Number one, General Hayden has said the United States is targeting specific individuals. This is not a dragnet. It is not data mining that we are discussing. Specific individuals precisely of the type that FISA is addressed to.

And second, with regard to battlefield intelligence, the Supreme Court has made clear for more than a decade, when we are intercepting calls on a battlefield abroad, or even al Qaeda into the United States, where we are intercepting the conversation before it gets into domestic transiting, there is not any Fourth Amendment protection at all for al Qaeda. So this is not application of FISA to curtail or handicap in any substantial way the President's ability to gather foreign intelligence. It is not an effort to micro-manage what the President can gather in fighting al Qaeda and otherwise.

And I think there has been gross misrepresentations of suggesting that under FISA, if al Qaeda makes a call into the United States, an American picks up the phone, then the United States has to stop listening. No. That has not been the case. It has never been the case and it should not be the case.

Mr. WOOLSEY. Mr. Fein has misrepresented what General Hayden said.

Senator BIDEN. Pardon me?

Mr. WOOLSEY. I think Mr. Fein has misrepresented what General Hayden said. He has not said that each of these cases is going after an individual, a known individual. I believe they are going after phone numbers, cell phone numbers, addresses, e-mail ad-

dresses and the like. If they were going after individuals, then individual tests of probable cause could be supplied. It is precisely the problem that in many cases one does not know who has the cell phone or when it has been thrown away and the rest. I think Mr. Fein fundamentally misstated what the General said.

Chairman SPECTER. Thank you, Senator Biden.

Senator Hatch?

Senator BIDEN. Could Mr. Fein respond to that?

Mr. FEIN. I would disagree with that characterization of Mr. Woolsey because—

Chairman SPECTER. Yes, you may respond, Mr. Fein.

Mr. FEIN. Because when you are targeting a specific location, even if you do not have the name of an individual, it is focused on an ability to establish some probable cause or a suspicion that that particular phone or location is being utilized to further terrorism or the al Qaeda war against the United States, and it is that focus that is addressed by FISA and distinguishes this from simply a data mining gathering of information that is not targeting any particular location.

Chairman SPECTER. Under the early bird rule, Senator Kyl was here earlier.

Senator KYL. Thank you, Mr. Chairman.

Let me pursue just a little bit the question that Senator Biden asked, because we pursued this with the Attorney General when he was here too. No one was suggesting at that time that we should engage in a domestic surveillance program such as is being done with respect to the surveillance where there is an international point of contact, but I think we were troubled by his answer which was actually that he had not done the analysis. The Attorney General said the analysis on domestic has not been done. I said, "Well, you ought to at least do it."

I am just wondering, apart from your other views with respect to this question of the distinction between international and domestic, I gather some of you think there is a distinction there that would authorize some kind of program like this, and others believe there is not.

If the Attorney General said to you, "I would like to do this analysis and understand whether there is a distinction between domestic and international," what would your advice be? If I could just a quick response from each of you on the panel, because I do have one other question to ask.

Director Woolsey, maybe we can begin with you.

Mr. WOOLSEY. I think the distinction comes when one zeroes in on an individual and then you can have a court understandably consider whether there is probable cause that that individual is an agent of a foreign power or a terrorist organization. When there is not an individual, when a call is from a switch in Yemen to a cell phone in the United States, then I think under those types of circumstances, the administration's assertion of its authority is well taken. It is a tougher case if one has a call from a cell phone in Lackawanna from someone you suspect to be a terrorist to a cell phone in Toledo, and we have apparently terrorist cells, one in Lackawanna and one potentially in Toledo. That is a tougher case.

Once individuals get involved, and one knows names and locations, it seems to me the FISA procedures begin to be appropriate. This is a tough crosswalk between those, but for what the administration is talking about—calls from that switch in Yemen to a cell phone of unknown possession in the United States, which in fact occurred with Al-Midhar and Al-Hasmi—NSA did not follow it up, because as NBC News says, it was worried about being charged with domestic intelligence collection. I think in cases like that, the administration program ought to be able to go forward.

Senator KYL. Thank you.

Mr. FEIN. Mr. Senator, I do not see any distinction in the sense that the critical point is whether the gathering of the information is for foreign intelligence purposes. That is the touchstone of FISA application. And if it is for foreign intelligence purposes, namely, to fight or identify terrorism or help in the conduct of foreign relations, I do not see why it makes any difference whether you are gathering that information when it happens to transit in the United States as opposed to transiting between the United States and elsewhere. It is the use that is critical.

Senator KYL. Thank you.

Maybe just quickly get, again, because of the time, just a real quick response from the others of you too.

Mr. KOH. I agree that it is about foreign intelligence gathering. If all the world is a battlefield, the question is whether the FISA is still relevant and still controls the way in which Congress, the President and the courts operate, or whether the President is suddenly entitled to step completely outside that and rely on inherent unwritten power.

Senator KYL. Thank you.

Mr. LEVY. The restrictions in FISA apply to U.S. persons who are in the United States and who are specifically and intentionally targeted. It does not matter whether the person on the other end of that line is somebody who is in Toledo, Ohio or somebody who is in Beirut. The distinction here between domestic and foreign is not a distinction that you can find anywhere in the FISA statute. Domestic surveillance consists of targeting somebody in the United States who is a U.S. person. And I see nothing in the NSA program, other than the President's assertion, that it only applies when one end of the conversation happens to be outside the United States. Nothing conceptually would distinguish those two cases.

Senator KYL. OK, thank you.

Professor Kmiec?

Mr. KMIEC. Well, I agree with much of your statement, and I think they indicate that this distinction between domestic and foreign is not the right distinction. The right distinction is whether or not there are individuals, whether they are domestic or foreign, who are associated with al Qaeda and are seeking to materially advance al Qaeda's interests.

I think the fundamental difficulty for the President is that the NSA, in their description of the operational details, which we do not have, has indicated that the program, as it operates, inevitably picks up some U.S. persons, and to the extent that it does, it then starts to rub against the provisions of the FISA statute.

So the President tried to solve that problem by drawing this distinction between domestic and international, but it does not solve it because the right distinctions, as others on this panel have said, is the connection to al Qaeda and their purpose to harm us.

Senator KYL. Professor Turner?

Mr. TURNER. Sir, I think the confrontation here is between the President's powers under the Executive Power Clause and Commander in Chief Clause and the Fourth Amendment. I do not think Congress can narrow the Fourth Amendment. I do not think Congress could take away the President's independent powers. I think that the Fourth Amendment does allow at least some domestic surveillance when you are talking about people the President believes are foreign terrorists. I do not doubt that will mean some injustice or some innocent people will be listened to, but the President makes all sorts of targeting decisions during war that kill innocent people around the world, because that is the nature of war. It is unfortunate, but I do not think FISA can really play in this game when you are talking about a confrontation between major constitutional powers.

Mr. GORMLEY. Senator Kyl, it is a great question, and I think the greatest danger that faces Congress in dealing with this issue is allowing the distinction between domestic and international surveillance to be collapsed into one in the wake of September 11th. In one case Congress has more power under the Constitution, in another, the President. And the solution, in my view, is to include the courts because the courts can make sure that boundary line is not crossed, even though it is a fuzzy one.

Senator KYL. Appreciate it. Thank you very much to all of you.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. Senator Leahy had to leave and asked if we could put a few items in the record for him: February 12th New York Times editorial; February 16th George Will column; and a statement from the Coalition to Defend Checks and Balances.

Chairman SPECTER. Without objection, they will be made a part of the record.

Senator FEINGOLD. Thank you, Mr. Chairman. I appreciate this hearing, appreciate all the witnesses, and regret that I have to go to the floor shortly on the PATRIOT Act issue the Chairman mentioned.

But I would like to ask one question. Let me first say I am just amazed at the constantly shifting justifications for this NSA program. After going through two Supreme Court nominations and hearing these two now-Justices talk about how central *Youngstown* is to the analysis of this sort of thing, we hear the argument now that *Youngstown* does not even apply. I mean, literally, it is a spectacular range of shifting justifications for what is, frankly, in my view unjustifiable from a legal point of view.

But I am very concerned that the administration's theory in support of the NSA program has no limits, and that it could be used to justify virtually any action, and override virtually any statute based just on a tangential relation to combatting terrorism. None of us actually know what else the administration might have al-

ready authorized. As the Chairman has indicated, we do not even know for sure what this program is, but based solely on its legal theory, I do not know what would prevent the administration from authorizing all kinds of activities that would otherwise violate a statutory prohibition.

It seems to me that its legal theory could be used to justify, as we were just discussing, of course, purely domestic communications of Americans, but also conducting warrantless searches of people's homes or even assassinating citizens inside the United States.

I would like each of you to tell me whether you see any limit to the administration's legal theory, and if so, where would you draw the line? Let me start first with those who generally support the administration position, and then elicit a response from those who oppose it.

Mr. Woolsey?

Mr. WOOLSEY. Senator Feingold, I think that even at its lowest ebb under the *Youngstown* language, Justice Jackson's, there is still an ocean, and the ocean is the President's Article II authority as Commander in Chief. Personally, I see mapping the electronic battlefield in a situation in which the United States has been attacked, as far more inherently related to the President's Commander in Chief powers than operating steel mills under one set of labor regulations or another. So I do not think *Youngstown* reaches this commander in chief power.

Senator FEINGOLD. My question is, what limits are there under the doctrine?

Mr. WOOLSEY. As one gets further away from what a Commander in Chief does in wartime, I think congressional counteraction, such as FISA or something else, begins to have more and more effect. I agree with Justice Jackson's underlying rationale in the concurring opinion in *Youngstown*. So if the President, for example, decided he needed to operate computer companies in order to have better computer chips, I think he loses under *Youngstown*, even if he tries to do it under his inherent commander in chief rationale.

Senator FEINGOLD. I will try to get an answer from everybody, so Professor Kmiec?

Mr. KMIEC. Senator, I think *Youngstown* has been portrayed aptly as a limitation on Presidential power, clearly it was in that case, as applied. But there is also instruction from Justice Jackson in that case that the real purpose is to see that Congress and the President work together. Because he indicates that he can find apt quotations, as he says, to support the President's power independently and Congress's power independently, from materials that he described as enigmatic as the dreams of a pharaoh.

The fact of the matter is, is that there are limits. Mr. Woolsey properly described them. The limits start to apply more soundly and more directly as you move away from military intelligence, battlefield intelligence, and what the Attorney General described to you when he was here, and that is, reasonable suspicion that a person is connected to al Qaeda or a related organization. That is—

Senator FEINGOLD. What about assassinating American citizens; is that prohibited?

Mr. KMIEC. I think it clearly is by existing—

Senator FEINGOLD. By what?

Mr. KMIEC. By existing Executive order as well—

Senator FEINGOLD. If that order was rescinded, what would prohibit it under your doctrine?

Mr. KMIEC. I think you are asking what are the tactical judgments of the President in the time of war.

Senator FEINGOLD. Could the President make the tactical judgment to assassinate American citizens under the power you described?

Mr. KMIEC. I do not believe he can.

Senator FEINGOLD. I do not think that is the logical extension of your argument.

Professor Turner?

Mr. TURNER. Yes, sir. The reason the Founding Fathers largely cut Congress out of the detailed business of war is because they felt it could not keep secrets. I discuss that in my testimony. D-Day was not prebriefed to Congress. That did not mean that FDR thought he was doing something evil or illegal. It was because he understood that operational security and the lives of our troops depended upon keeping that operation a secret.

Sure, the President could abuse these powers. Imagine if we focused instead on his power to order the use of lethal force. Could the President decide that a Senator he did not like was flying on an airplane out of France, and tell the military, "That is an al Qaeda plane; shoot it down?" Possibly that could happen. If it did happen, there are tremendous checks within the executive branch that would undoubtedly bring it to light. There are over 200 employees in the NSA I.G. office alone.

Senator FEINGOLD. Sir, I have to move to the other people. Now, I am really getting worried.

[Laughter.]

Senator FEINGOLD. Dean Koh?

Mr. KOH. *Youngstown* is critical, Senator, because it states a vision of shared power and national security between Congress, the President and the courts. The vision that they are painting is one in which the President only has a role, and Congress and the courts can be ousted.

Your example of assassination is apt in the sense that if would ordinarily be forbidden by a criminal statute, the President could override the criminal statute, as he has overridden FISA here.

The only other limitation that would come in is the Fourth Amendment, which, of course, would limit him to reasonable searches and seizures. But the battlefield argument being used makes everything "reasonable." And also, you have the problem that the program perspective on this—and program preauthorization means you could sweep up in a dragnet a huge number of unreasonable searches looking for one reasonable search.

So I think the answer to your question is, taken to its logical limit, there are no limits posed by the theories presented here.

Senator FEINGOLD. Thank you, Dean.

Mr. Levy.

Mr. LEVY. If the President's inherent wartime powers were not limited by Congress, surely they would extend to roving wiretaps,

to sneak-and-peek searches, to library record searches, to national security letters, all of which are now being vigorously debated in terms of reauthorizing the PATRIOT Act. What is the purpose of that debate if the President has inherent authority? And indeed, we have evidence that the President believes his inherent authority extends to such lengths. The President has used the same justification, namely the authorization to use military force, his Executive power, and commander in chief power, to authorize military tribunals without congressional authorization, secret CIA prisons, indefinite detention of *Hamdi* and Padilla, and enemy combatant declarations in Guantanamo without the hearings that are required by the Geneva Convention.

Senator FEINGOLD. Thank you, Mr. Levy, very much.

Mr. Fein.

Mr. FEIN. I think the President's actions are more illegal than in *Youngstown* for two reasons. One, *Youngstown* related to seizure of private property, as opposed to invading privacy of conversation, which Justice Brandeis characterized as the most cherished right among civilized people.

Second, in *Youngstown*, it was implied that Congress had turned down or had impliedly not authorized the seizure of the business. In this case, FISA has affirmatively said you cannot surveil outside of FISA, that it is the exclusive means for conducting electronic surveillance. So it is a much more affirmative assertion of congressional power than was at issue in *Youngstown*. In my judgment, therefore, if *Youngstown* is good law, this case is very easy.

With regard to limits, it is clear that the President, in my judgment, has propounded a theory that would surely justify torture, claiming that we maybe can get better intelligence if we torture individuals irrespective of the Federal statute. The early decisions of the United States Supreme Court, Chief Justice Marshall, *Little v. Barreme*, *U.S. v. Brown*, they concern Presidential assertions of power far less weighty than the President's here, and were turned down. Namely, in *U.S. v. Brown*, the President asserted a power to confiscate enemy alien property in the United States during the War of 1812. And Supreme Court said, no, Congress is the only authority to condemn that property. In *Little v. Barreme*, the Congress said that the President could not intercept ships going from France to the United States, as opposed to going from the United States to France. Both upheld.

And last, with regard to Mr. Turner's statement about secrecy, we built the Manhattan Project in secrecy, and Congress was consulted, in World War II. The Nazis, the Japanese did not get any fair warning.

Thank you.

Chairman SPECTER. Senator Feingold, you are almost 5 minutes over.

Senator FEINGOLD. Just one question.

Chairman SPECTER. We are going to have a—yeah, I know, but you keep re-asking it.

[Laughter.]

Chairman SPECTER. And it is true that the witnesses have done most of the talking. You have been very artful with your 5 minutes.

Mr. GORMLEY. Mr. Chairman, can I invoke the rule that the person from Pennsylvania gets at least 30 seconds?

Chairman SPECTER. You could if there were any such rule.

[Laughter.]

Chairman SPECTER. Go ahead, Senator Feingold. Finish up.

Senator FEINGOLD. I just wanted to ask—

Mr. GORMLEY. In the present posture, Senator, I don't think that there are any boundaries. Even Congress can't authorize the President to eviscerate the Fourth Amendment. And as I said in my testimony, homeland security includes protecting the Bill of Rights. So unless we are prepared to say a President can unilaterally suspend the Constitution indefinitely, I think the answer has to be that, after a period of time, you simply would have to amend the Constitution.

Senator FEINGOLD. Thank you, Mr. Chairman, for all the time.

Chairman SPECTER. Thank you, Senator Feingold.

Senator HATCH.

Senator HATCH. Well, the Fourth Amendment does talk about reasonable search and seizures, and there is some real question whether there is reasonable cause to do this. I believe that I would come down on the side of reasonable cause.

Mr. Woolsey, you started this off and you have been attacked ever since, to a degree. I would like to just spend a few minutes with you on this because I kind of think that the *Curtis Wright* case is a central case as well. In fact, maybe in this instance much more important than the *Youngstown Sheet & Tube* case.

But I think you didn't have a chance to use some of your remarks—and I would just like to get your ideas on this. You say that “the captured al Qaeda or Hezbollah computer contains, like Moussaoui's, a substantial number of e-mail addresses and phone numbers and we have only hours before the capture is known, during which time we must check out those numbers and addresses and others with whom they may have been in contact before the owners throw away their phones and change their e-mail addresses. How can an Attorney or a FISA court, even with amended procedures, make these decisions sufficiently quickly? The FISA court considered and deliberated about only 1759 requests for warrants in all of 2004 and asked that 94 be modified before they were granted.” And then you go on to list each of the FISA warrant application approaches in order to get a FISA warrant in individual cases.

Now, with all due respect, other than with the possible exception of Mr. Woolsey, I don't think anybody on this panel—and I may be wrong on this, but I don't think anybody on this panel has a full understanding of what really is being done here. But you say here that just to get a warrant for an individual before FISA, you make a warrant request form filled out by the FBI, the target and individuals identified, facts are set out establishing there is probable cause to believe that the individual is involved in terror or spying, details of the facilities and communications to be monitored are supplied, procedures are set forth to minimize the collection of information about people in the U.S., a field office supervisor then verifies and approves the request.

And you go further. I mean, to me—well, let's just give the last few: FBI special agents and attorneys at headquarters ensure that the form contains all required information and finish the form, the Director at the Agency certifies that the information being sought is necessary to protect the U.S. against actual potential attacks, spying, or international terrorism. It cannot be obtained by normal investigative techniques. At the Justice Department, lawyers at the Office of Intelligence Policy and Review draft a formal application based on the request. The Attorney General reviews and approves the application. Then you have to go to the FISA court and get the warrant. In each case.

Is that right?

Mr. WOOLSEY. That is—this summary is taken from the New York Times summary of the statute, Senator. I think this is the main problem. And it is not ill will on anyone's part. It is that the operation of Moore's law has given us the Internet and throw-away cellular phones and everything else, which terrorists have access to. That was not remotely envisioned in 1978.

Senator HATCH. And Moussaoui may have sent thousands of references.

Mr. WOOLSEY. I don't know how many were on, but apparently there was a large number.

Senator HATCH. Well, I am just saying, any number of these people may have had thousands of e-mail addresses, names, other references.

Mr. WOOLSEY. Exactly. We captured Khalid Sheik Mohammed and got his computer. We have captured other hard disk drives from people. And when it is known that they are out of communication and they are not going to be back up for awhile, people suspect that they may be captured and, I would surmise, do things like throw away their cell phones and change to different chat rooms and the rest. This is a fast-operating world, this business of electronic battlefield surveillance. And it is not the President's fault that we are on the battlefield here. We didn't want to be on the battlefield. The battlefield is not, as Mr. Levy seems to suggest, just where we choose, like Afghanistan.

Senator HATCH. Now, do you believe it is just Afghanistan and Iraq?

Mr. WOOLSEY. Say again?

Senator HATCH. Is the battlefield just Afghanistan and Iraq?

Mr. WOOLSEY. Of course not. I mean, not this war that we are in—the Administration is starting to call it “the long war,” which I think is better than “war against terrorism.” The first part of my testimony suggests we really have two totalitarian movements, broadly speaking, fragmented into different parts, that have chosen to be at war with us. And they include elements, I think, within the Iranian government, they include Hezbollah in some circumstances, include different Sunni Islamist groups, include for some purposes the Wahhabis in Saudi Arabia. This is a complicated matter. We are in the gunsights of more than one international terrorist Islamist organizations that have ties, some of them, to states. And these are shifting alliances. This is a hard kind of thing to keep up with.

And trying to do it spy-by-spy, case-by-case, pleading-by-pleading, as one does in the FISA court, is not only difficult, it is absolutely impossible. The FISA court doesn't fit with this need poorly; it doesn't fit at all, as far as I am concerned.

Senator HATCH. So the President has exercised his inherent power to do the best he can to protect the homeland?

Mr. WOOLSEY. I believe in this regard, that is correct. I don't believe the President could order assassinations of Americans. I am something of a student of American military history and I can't think of a single case in all the wars we have been in where the President has ordered the assassination of an American citizen. But the President has collected a lot of battlefield intelligence in wartime.

Senator HATCH. My time is up. Thank you.

Chairman SPECTER. Thank you, Senator Hatch.

Mr. Levy, you testified that the electronic surveillance of citizens other than al Qaeda is beyond the pale, in effect. Attorney General Gonzales testified that the program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization. We have never had any specification as to how they can make that kind of a determination. It is difficult to see how they would do it, and I would be interested in how they do it. And then you have the career professional who makes the reasonable grounds determination, which obviously is not an impartial magistrate. But if there were a way—and I use the subjunctive there—that you knew that at one end of a conversation there was an agent of al Qaeda or an affiliated terrorist organization, would you think that permissible?

Mr. LEVY. It depends on who is the target of the surveillance, Senator. If the target of the surveillance is the agent, then surely it is permissible. And in fact, procedures are available under FISA to authorize that. If the target of the surveillance is a mere contact, somebody who may not even be aware that his conversation has intelligence value, the notion that the U.S. Government can put a wiretap or some other form of surveillance on that person's communications, his telephone calls and e-mails, is outside the scope of FISA.

Chairman SPECTER. Do you think that necessity could be shown or a program could be justified where you have a career professional at NSA making that determination?

Mr. LEVY. I would be leery of having career professionals make these kinds of determinations. I mean, the very essence of our constitutional structures is sharing of power between branches. So if we're going to have a career professional providing input, that is all good and well, but I would like to see input provided to someone outside of the executive branch, preferably the FISA court, and that information can then be used and agreed upon by more than one branch of Government before this kind of surveillance is authorized.

Again, the key point for me is who the target of the surveillance is. There is no restriction right now on intercepting communications that go to a U.S. person in the United States if the U.S. person in the United States has not been made the intentional target

of the surveillance. So the suggestion that battlefield communications can't be intercepted, that is nonsense.

Chairman SPECTER. Let me move now to Director Woolsey. The National Security Act of 1947, under the title of General Congressional Oversight Provisions, specifies that the President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States. And the statute, as you know, refers to the committees repeatedly. What do you make of this practice to limit it to the so-called Gang of 8 in derogation of what the statute requires when it refers to a Committee which has 15 members in the Senate.

Mr. WOOLSEY. It does, Senator, but I think when you add the House Committee and the appropriations subcommittees and the staffs of all four of those, you get up in the ballpark of 200 individuals.

Chairman SPECTER. Well, you don't have the appropriations committees specified in the statutes. You have the intelligence committees. And you could read that to exclude the staff, but it is pretty hard to read it to exclude the Senators or the Members of the House.

Mr. WOOLSEY. You could try to do that and—

Chairman SPECTER. What is the justification? When you were Director of CIA under President Clinton's administration, did you limit the information to the so-called Gang of 8?

Mr. WOOLSEY. No, but I frequently would go to the Chairman and Ranking Member of each of the two oversight committees and each of the two appropriations committees and leave it to their discretion as to how widely to hold a hearing, for example. But I never went precisely to the so-called Gang of 8 because that really is related, as I recall, to a later amendment dealing—or Executive order dealing—with certain CIA covert actions, and we didn't have any that I thought needed to be limited to Gang-of-8 notification. So I always dealt with the Chairman and Ranking Member and left it, essentially, up to their judgment how widely to disseminate things. You and I, unfortunately, only overlapped for a very brief period of time. I wish you had been Chairman in 1993 and 1994 and not just come in in 1995, frankly.

Chairman SPECTER. So do I.

Before turning to Senator Schumer, who has just arrived, let me turn to Senator Kyl for a second round.

Senator KYL. Thank you, Mr. Chairman.

Other than Professor Kmiec, do any of you believe that the FISA court could judge the constitutionality of the NSA program, as suggested by Senator Specter's proposed legislation, without an actual plaintiff who presents an actual case or controversy? Do any of you agree with him on that?

Mr. FEIN. I do, Senator Kyl. I think the way in which this could be done is if the Attorney General approached the FISA court with an application for a warrant and said we are using, as part of this application, information obtained from the NSA's warrantless surveillance program. Then it would be up to the court to decide whether that program was tainted and therefore the information could be utilized or not, and—

Senator KYL. Excuse me, so if the Attorney General approached the court with a warrant for an actual—

Mr. FEIN. Seeking a FISA warrant and saying to the FISA court, In support of this warrant I am utilizing the following information that we received from the NSA's warrantless surveillance program.

Senator KYL. Well, let me back up. There is a big difference between collecting intelligence, on the one hand, which is what this program is intending to do, and collecting evidence for prosecution in a case. And I think we need to keep that distinction in mind here. It may be that evidence collected under this program could not later be used to make a criminal case—

Mr. FEIN. I am not addressing that issue, Mr. Senator. What I am addressing is application of a warrant to collect foreign intelligence under FISA, not for a criminal prosecution. I am saying you go in seeking that warrant—

Senator KYL. And you think that could—all right. But are you suggesting it would have to be for a particular situation?

Mr. FEIN. For a particular search-warrant-under-FISA case.

Senator KYL. OK, that would presumably, then, offer up an actual case or controversy.

Mr. FEIN. Yes.

Senator KYL. All right. Well, my question was no case or controversy. So, all right.

It seems to me—and if any of you—well, let me ask this. Several of you have noted the fact that there is a genuine legal argument to be made for power residing both in Congress and the Executive, and perhaps even a court review of that in a particular situation, and have noted that this is to some extent dependent upon the facts—is it domestic, is it not domestic? There were other distinctions made earlier.

It seems to me that this is almost a classic case, like the war powers debate, where it is not arguable that both Congress and the Executive have authority. It is to some extent competing, to some extent overlapping. And it is very difficult to sort out in the abstract. It is the classic case where the court on political questions has avoided sometimes getting involved in the debate and where both parties, both the Congress and the President, have marched right up to the brink and have backed away and resolved the issue. I mean, we don't—I mean, the President still says I don't have to follow the War Powers Act; Congress says yes, you do. And yet we both go on about our business warily working with each other in a way that doesn't set that conflict up, because we understand there are larger, more important things than necessarily having a fight that is going to try to force a court to resolve an issue where in fact the Founding Fathers and the Constitution does not provide a crystal-clear answer for every situation. And so I guess what I am arguing for here is a resolution of this that is sort of in the spirit that some of you have suggested.

Let me just pose one hypothetical case. And this may be so hypothetical that it is not helpful or real. But hypothetically, if the Intelligence Committee or parts of the Intelligence Committee were regularly briefed—say, 45 days—on this program, and that that briefing included a certified IG report on whether there were ever any situations of purely domestic surveillance, inadvertent, in the

program which would then enable Congress to suggest that the court ought to have a role in this, is it necessarily the case that the court would have to have a role in it prior to that situation?

We are going to get into the admonition of the Chairman, so at least a couple of you. Professor Kmiec and then the two of you down at this end that had your hands up.

Mr. KMIEC. I think both of your questions are is it more appropriate for a court or for an Inspector General, an Executive agent, to have this oversight responsibility.

I think the reason Justice Powell suggested the court in the *Keith* case was because some of this evidence potentially can end up in a criminal prosecution. Not all does. Much of it is for purposes of prevention. And that is why there is a constitutional justification for the court, because—

Senator KYL. If I could just interrupt you. I am really sorry to do it, but the Chairman would get all over me if I don't here. I was not talking about the ultimate oversight. My hypothetical was you have the existing program, it is briefed to members of the Intelligence Committee, and if there is ever a situation where there is an inadvertent surveillance that is purely domestic, that involves no international context, that that would have to be told to the committee. And my hypothetical, really, is, in that intelligence-gathering context, given the fact that Congress would then have the ability to inject the judiciary, and if it decided to do so, would that be an appropriate way to begin to provide oversight?

Mr. KMIEC. No question about it. It would be a more deferential form of oversight insofar as it would allow the Executive to more fully operate, and until a problem arose there would not be a referral to a court or to others for further proceeding. So it is tweaking the process of oversight—

Senator KYL. Admittedly.

Mr. KMIEC [continuing]. And it is just simply more deferential to the Executive side.

Senator KYL. Thank you.

Just the first two, would that be all right, Mr. Chairman, and then—

Chairman SPECTER. Go ahead, Jon.

Senator KYL. Mr. Woolsey and Dean Koh.

Mr. WOOLSEY. Senator Kyl, what you suggest is a rather close cousin to the amended version of Judge Posner's recommended oversight procedure that I include at the end of my testimony. I would far rather have the intelligence committees or some subset thereof, or perhaps the Group of 8—it would be up to Congress—be the oversight mechanism here than the FISA court. I don't believe courts are, as I said earlier, the right institution to provide oversight over intelligence collection as distinct from these individual cases we talked about.

I think that a mechanism somewhat of that sort would be a compromise, somewhat analogous to the compromise or standoff that had developed with respect to war powers, and I think it is a good insight. I agree with it.

Senator KYL. Dean?

Mr. KOH. Senator, I agreed with your main point, which is this is one of those areas in which Congress and the President make a

bargain as to how they are going to do things, and then both sides are supposed to agree to stick within the bargain. If the FISA is not working, as Senator Hatch is suggesting, then the job of the President is to come to Congress, give those examples, and ask for an amendment to remove the court and insert various bodies of Congress into it. They have done that in the PATRIOT Act. They have come for various kinds of FISA amendments.

Senator KYL. Or—excuse me—we could do it on our own initiative.

Mr. KOH. You could have hearings to do that based on knowing more—

Senator KYL. We could pass a law to do it.

Mr. KOH. Well, it might help first to know exactly what it is that they are doing and what warrants they can't get. That is what I don't know. In what ways has the FISA court actually stood in the way of them getting warrants that they need to get?

Now, they are suggesting that there are so many warrants they want to get that the FISA court, which has given 19,000 warrants and rejected only five, won't give them. And they have never given us an example of a warrant that they can't get.

So the real question is why is it that the FISA court is failing them? And why is it they need to involve the committees of Congress? But the point that the Chairman made is they have not even involved the intelligence committees, only the Gang of 8 and on limited briefings.

Senator KYL. Thanks very much. And of course the answer that the administration gives to the question you posed is that that gets into the operational details of the program, which would make it very, very difficult to discuss publicly.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. And again, I want to thank you for your work in arranging these hearings. I think you have tried very hard to be fair. This panel shows it. It probably has one more witness against what the administration wants than for it overall. So despite your best efforts, which I have no problem with, you have been fair, as you usually are, or always are—almost always, I guess.

I am worried about these hearings. The structure of the hearings I don't think is going to allow us to get to the heart of the matter. We had General Gonzales, who is a spokesperson for the administration. I don't begrudge him that; that is his job. Here today we have an extraordinarily distinguished panel of experts and thinkers, all smart on the law, smart on policy, but, unfortunately, ignorant of the details of the NSA surveillance program at issue here today. And while I and others on the Committee welcome your expert testimony, what we really must have before this process is over is the frank testimony of former administration officials who are familiar with the NSA program. What about the people who dissented? What about people who expressed reservations—Jim Comey, John Ashcroft, Jack Goldsmith? Hardly flaming liberals, all of whom had real problems with this. Will we ever hear from them?

We have the 42-page white paper that is an after-the-fact defense of the NSA program, but what about the other papers? What about the contemporaneous legal memos that supposedly justified the NSA program? Will we ever see those?

Now, after Attorney General Gonzales testified, the administration made clear they are going to assert every conceivable privilege, maybe with the exception of priest-penitent, to prevent former officials from shedding light on their view of the legality of the program. More than 3 weeks have passed and we haven't even gotten answers to any of our followup questions to the Attorney General.

So, Mr. Chairman, I fear that without hearing from the other witnesses and without receiving other materials, these hearings will be like a baseball game where only one team gets to bat. You guys are sort of referees and umpires there. But we haven't heard from the other team.

So let me ask each of you, do you agree that it would be helpful to hear from those who are actually familiar with the NSA program, who had concerns within the administration? And do you believe it would be good for the administration to be flexible about the issue of privilege so the American people can get to the bottom of what went on here?

I will take anybody who wants to say something.

Mr. FEIN. I agree, Mr. Senator, and I think that it is almost irresponsible for the Congress to enact legislation not knowing what the nature of the problem is. And the reason isn't your fault, it is that the administration has concealed everything, not just operational details. They haven't provided a glimpse as to the nature of this surveillance program. The way in which the Congress was clearly intended by the Founding Fathers to extract that kind of information is through the power of the purse. You simply enact a law that says the President has no authority to conduct electronic surveillance outside of FISA unless within 30 days, 60 days, he comes forward and explains the program to Congress and the need for any changes. That is the only way I think you are going to get this information. This bargaining is just going to last for years and have no end point.

Senator SCHUMER. Thanks.

Professor Koh, and then Mr. Levy.

Mr. KOH. I would differ with Mr. Fein only in saying it is not almost irresponsible, it is irresponsible to pass new legislation without knowing exactly what went on. And without getting a commitment from the administration that, if you revise FISA, they will obey the new FISA, when they didn't obey the old FISA.

Senator SCHUMER. Mr. Levy?

Mr. LEVY. One purpose of these hearings was to determine whether or not what the administration is engaged in is legal. And I don't believe that this Committee needs much more in the way of inputs to make that legal assessment. I do believe that the remedial question is quite separate; that is, what should we be doing about that? And that question, of course, depends heavily on operational details. It is impossible to craft a remedy if the administration believes that the existing procedures are too cumbersome or take too long unless we know whether the NSA program is essen-

tial, number one and number two whether it is effective. We don't know the answer to either of those questions.

Senator SCHUMER. Does anyone dissent from the general view here?

Mr. KMIEC. I dissent. I think the administration has been very forthcoming. I think the Attorney General has tried his best to outline the legal rationale, which I think is a plausible one. But I think, with all due respect, Senator, the purpose of this Committee is not recrimination. It is for the very purpose that Justice Jackson outlined in *Youngstown*, and that is to have this Congress and the President work together to solve the basic problem. And the basic problem is we are fighting a novel war where we have specific needs of surveillance and intelligence that both require us to preserve the civil liberties of individual citizens in ways that are differently challenged because of the nature of that war.

So what we need is a programmatic way to have a detached set of eyes check the responsibility of the Executive.

Senator SCHUMER. But don't you think, sir, that having people—

Chairman SPECTER. Senator Schumer, your time has expired. As I said when we began the hearings at 9:30 and before we started on the first round, the PATRIOT Act is on the floor. Some of us are going to have to be there before noon and we had targeted a conclusion at about 11:30. Finish your last question, but we are going to have to move on.

Senator SCHUMER. OK, I was just saying to Professor Kmiec, doesn't it make eminent sense to do exactly what you are saying, that it would help to find some people who not only have a great deal of legal knowledge but who were on the ground and the time and realized the subtleties and difficulties that I am very well aware of. I mean, I hardly have an absolutist position on this. And to not have someone like Jim Comey, the premier terrorist prosecutor, around, who knows both the Constitution and the difficulty in prosecuting people in these difficult times, as you say, deprives us of the kind of key input that we need. You don't agree with that view?

Mr. KMIEC. Well, I think it will unnecessarily provoke a dispute over executive privilege and deliberative process, and all of that ends up being kind of a principled dog fight between this body and the Executive. That is not helpful, in my judgment, to actually solving the immediate problem, and that is how to get a proper authorization, a specific authorization for the authority that the President believes he has as a constitutional matter.

Chairman SPECTER. We are going to have to go now to Senator Hatch and then Senator Kennedy.

Senator Hatch.

Senator HATCH. I just want to say this is a particularly profound panel of experts. I really have enjoyed every one of you. I have listened very carefully to every one of your testimonies here today.

I do think, Senator Schumer, you would have a little bit of—I thought Bob Levy's testimony was particularly important, as I did all of them, but I think you would find a little difficulty not considering New York as a battleground in this unusual war on terror and that only Afghanistan or Iraq constitute that. I am not sure that is what you said, but that is the way I—

Senator SCHUMER. No, it is not.

Senator HATCH. I didn't think so. I hope not. I wanted to make that clear.

But let me just clarify your position, some of you who care to respond, your position on a few points based on your understanding of the law. If the Government obtains information through the NSA program, do you believe, as a matter of law, that this information can be used in support of applications for a court order under the FISA statute?

Mr. FEIN. I would say no.

Mr. LEVY. I would agree. To the extent that the NSA program is illegal, as I believe it is, then any information—

Senator HATCH. Well, do you believe that any fruit of the poisonous tree arguments are valid in this matter?

Mr. KMIEC. I don't think there is an easy answer to that question, Senator. I think the answer turns—to the extent that there is derivative information that is used for purposes of bringing criminal charges against individuals—on the nature of those criminal charges. Are we talking about sabotage? Are we talking about materially advancing terrorism? Or are we talking about some independent drug crime or something else? I think the constitutional question is different in each case and I think the court would practically examine those issues—

Senator HATCH. Let me go a little bit further here. Professor Koh, I didn't mean to cut you—

Mr. KOH. Senator, the very question you ask shows the way in which the program has cast doubt on the credibility of evidence and the usability of evidence. That is exactly what FISA was supposed to do, to create a process where evidence obtained through FISA warrants could be used. And now this extra-legal program is not only putting into jeopardy that evidence, but also the warrants that is based on that evidence, and bringing the entire FISA scheme under a cloud.

Senator HATCH. Well, I don't agree with that. Let me ask this—did you have a comment?

Mr. WOOLSEY. Just a quick point, Senator Hatch. I think the proposal that I mentioned by Judge Posner has some real merit here, because one thing it does—by having a statutory declaration of a national emergency and a Presidential declaration that this particular type of surveillance is necessary—is narrowly define the purpose. It narrowly defines national security; for example, with respect to terrorism it does not involve ecoterrorism and the like. And so one has the surveillance focused on precisely what the administration says it is concerned about, which is violent terrorists abroad communicating with people in the United States.

I think under those circumstances one still should not be able to use the fruits of this surveillance in a criminal prosecution. But there would be less conflict under Judge Posner's approach than under some of the others.

Senator HATCH. I don't think that—I don't believe that any of you believe that information obtained under the NSA program may be legally used in support of an application for a Title 18 warrant, where you believe that one of the parties has been determined to be an al Qaeda affiliate but is—or has not been determined to be

an al Qaeda affiliate but is just a common criminal, such as a drug dealer.

Let me ask this question. Can information obtained from the NSA program, but found not to be connected to al Qaeda activities or associates, be used by agencies like the IRS or DHS for non-terrorist proceedings such as tax evasion proceedings or immigration proceedings? Just yes or no.

Mr. LEVY. Not under Judge Posner's proposal and not under mine.

Senator HATCH. I agree. The administration says in its 42-page legal opinion that earlier presidents have used surveillance programs like the NAS program in other war-time situations. Do any of you believe that the facts support this assertion, and do you believe that the presence of the current FISA statutes affects this argument?

Mr. FEIN. Well, I think that the earlier claims were without FISA, so you didn't have Congress speaking itself directly to the matter. The Supreme Court in *U.S. v. Calandra* said that wire-tapping taken in violation of Title III can't be used in grand jury investigations. I don't see how there would be any deterrent, how there would be any teeth to the Fourth Amendment if you said the electronic surveillance, even if it is illegal, can be utilized and that there is no remedy for individual whose conversations have been illegally seized. There must be some remedy or else the right becomes totally hollow. That is the reason why the Supreme Court decided it would no longer tolerate *Wolf v. Colorado* and provided a remedy in *Mapp v. Ohio* and then the *Bivens* case.

Senator HATCH. Senator Leahy is going to allow me to ask one more question, and I really appreciate it because it goes directly to his statute. And that is this: In preparation for this hearing, Senator Specter asked you all to review his draft bill. Now, the Specter bill contains a probable cause standard. Senator DeWine has suggested that a reasonable suspicion standard might be more appropriate for this type of program because, at this stage of an investigation, there may be relatively little known about the persons involved. And I would like to know what you think the appropriate standard should be.

And let me tell you my problem. My problem is that I believe that you must have a probable cause standard to appear before FISA. But this type of surveillance is reasonable, but I don't know that it rises to the dignity of a probable cause standard. And unlike Dean Koh, I really believe that this is a very, very big problem here if we are going to really protect the country. I would just like to know which standard do you think should be applicable, because I don't think you could do most of this work on a strictly probable cause basis. And I suggest that an awful lot of reasonable cause problems are never brought to FISA because that is all they can raise is a reasonable cause. And in spite of the almost 2000 FISA requests last year, we are talking about maybe many multiples of that.

So I would like to just have your view on this.

Mr. WOOLSEY. Senator Hatch, I think that is precisely the problem. If you try to fit this electronic battlefield mapping operation into the FISA warrant process and you lower the warrant require-

ment to one of only, say, “reasonable suspicion”, or maybe even lower—“might yield useful information”—then you rapidly approach the point where the warrant process ceases to be a filter and judges have no basis for refusing to grant applications.

Also, much of this is not about individuals who may be agents. Suppose al Qaeda calls someone in the United States and it is a false flag operation and they pretend to be Hezbollah, to get him to do something. Is that probable cause to believe he is an agent of al Qaeda? I don’t think so. I don’t know. And you might not even know who is at the other end on the cell phone. None of this concern and need really fits into warrants and individual case-by-case determination about single individuals. I think that is the essence of the problem.

Mr. KMIEC. I also think that, in fairness to Senator Specter’s draft, his definition of probable cause is different than probable cause of a specific individual or a particular crime or a crime that is being committed. The definition is probable cause to believe that the program will intercept communications of a foreign power or a foreign agent. And so he is really creating a programmatic form of approval before a neutral magistrate.

Now, the benefit of the program warrant is the neutral magistrate and the demonstration of those facts that lead to that belief. I think it is important for us not to confuse old FISA with this reform of the FISA program that is being proposed.

Mr. KOH. Senator, I think the question is probable cause of what. It is not saying in this bill probable cause that somebody on the conversation is from al Qaeda, it is saying probable cause to believe that the program will accept communications from persons who had communications with agents of foreign powers. I would say everybody in this room has had communications with a foreign government official when you get a visa. And if the program will accept the communications of everyone in this room, then it is not a program in which the probable cause standard is limiting the surveillance.

Chairman SPECTER. Let us come back to Senator Hatch’s question after Senator Kennedy is given a chance to answer. Playing referee on time is always hard here. Senator Feingold was almost 5 minutes over. Senator Hatch has an important question. Senator Kennedy has been waiting. Senator Hatch has been here all morning. You know, Senator Kennedy—

Senator KENNEDY. If he wants to—if Orrin wants to finish up—

Senator HATCH. No, I am happy.

Chairman SPECTER. The Chair recognizes Senator Kennedy.

Senator KENNEDY. Thank you.

Thank you very much, Mr. Chairman. Thank all of you for being here.

I remember a different time, 1976, President Ford, Attorney General Levi, understanding in the wake of all the Watergate and all the challenges that we had at that time we had to do something that was going to be in our national security interest. That is what we are talking about today, what is in our national security interest. And I remember myself and other members of our Judiciary Committee on four different occasions going down to the Justice Department with Attorney General Levi to work out that language,

which was the FISA language. And finally, at the final roll call that was called in 1978, there was one vote in the U.S. Senate against it.

And we took into consideration the dangers, the national security issues of secrecy at that time in the language which was included. And the members of this Committee understood it, the administration understood it. And with the intervention of President Ford, this was passed, bipartisan, in our national security interest.

Now we have a wild-haired scheme which is going to open up, I think, the NSA individuals to suit, open up the telephone companies to suit, and is going to taint evidence as we are even seeing at the Fourth Circuit at the present time, where evidence has been introduced and there has been a delay in terms of sentencing and remanding of cases because whether that evidence is going to be tainted. And we will have al Qaeda out there, individuals that ought to be treated harshly and possibly creating the loopholes where they will escape.

I think what is happening now is not in the national security interest. What we are looking for here in this Committee is something that would be in the national security interest and worked out in a bipartisan way. We asked the administration, if we have seen the example that has been done in a previous time, why not do that at this particular time. The administration doesn't care any more about national security than any individual members of this Committee or any of the members on this panel. And that, I think, is really the dilemma that we are facing at this time.

I would ask Professor Koh—and I realize we are all short on time—and there is an additional question I want to ask about the Fourth Circuit and if members are familiar with what is happening there, the two cases there. Maybe there are members of the panel that understand it.

But in your understanding of the history of the FISA—other members do as well—do you really question that this Committee and an administration couldn't get together and try and pass legislation that would be in the national security interest and meet the particular sort of constitutional issues and challenges, and also respect the Executive for their interests?

Mr. KOH. I agree that this is the moment to have that kind of discussion, with the factual background of knowing exactly what warrantless surveillance programs have been going on for the last 4 years. I think the public has a right to know and the Committee has a right to know.

I recall this discussion about trained NSA professionals. You will remember, Senator, that it was because of the work of trained NSA professionals who did all kinds of domestic wiretapping that we had a FISA in the first place. We weren't going to trust these professionals, we were going to trust an independent FISA court.

Senator KENNEDY. Professor Fein?

Mr. FEIN. I think that there is a misunderstanding that "checks and balances" means "weak government." And I want to call the Committee's attention to something that Justice Robert Jackson wrote. He was Attorney General under Roosevelt who was a strong proponent of Executive power. He was also the Nuremberg prosecutor. And he wrote, in *West Virginia State Board of Education v.*

Barnett, assurance that rights are secure tends to diminish fear and jealousy of strong government and by making us feel safe to live under it makes for its better support. So that limits on power does not mean anemic government, it means stronger government.

Mr. GORMLEY. Senator Kennedy, I do think that it is possible for Congress and the executive branch to get together to do this. This can't be a partisan issue. It really can't. And I think Senator Specter's bill is a good step toward that. I think it does have to be worked out. But you have to include the courts, as I said earlier. You cannot box them out. That is not our system of government. No one is saying that the President can't get the materials, the tools he needs to fight the war on terror. But certain procedures must be followed consistent with our Constitution. I think that is all that everyone is saying.

Senator KENNEDY. Just finally, and I will wind up with this, Mr. Chairman, on the Fourth Circuit, is Professor Koh or Professor Fein familiar with the two cases there that are at this time being reviewed?

Mr. FEIN. I am familiar with one case relating to sentencing of someone who pled guilty to an offense, and the court has now issued an order demanding that the administration respond to the demand to disclose whether the NSA surveillance was utilized in the investigation of the individual. And the administration has not yet responded.

Senator KENNEDY. Professor Koh, just on the—

Mr. KOH. Yes, the other is the *Padilla* case, which was up at the Supreme Court, went back down. But it was before the District of South Carolina and then back up in the Fourth Circuit.

I think the main point that you are making, Senator, which I could not agree with more is that every defendant's lawyer for a terrorist defendant has a new argument until this matter is clarified: exactly what evidence was legally obtained and what evidence was illegally obtained.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Hatch, do you want to complete the round robin on the question you had posed?

Senator HATCH. I think Senator Leahy is—

Senator LEAHY. If you want to go ahead—

Senator HATCH. No, no, that is fine. Unless somebody would care to—

Mr. GORMLEY. Yes, Senator Hatch, I just wanted to say that I do think that this can be done within the court system. But I do think you must have particularity and you must have some of the procedures that are already set out in FISA and this draft legislation.

But it is a question, as Dean Koh said, of "probable cause of what?" If you have probable cause that a person on one end of a communication is a terrorist, for instance, I don't think there is anything wrong with allowing what amounts to, based on reasonable suspicion, a stop-and-frisk of American citizens who may be in communication with them for a short period of time to see if you have anything there. And I think that courts can monitor that.

So I think there is a way to do this, to deal with new technology but still to include the courts.

Mr. FEIN. Mr. Senator, that particular proposal of yours was raised by Senator DeWine in 2002. The Department of Justice testified and said no, it wasn't needed, the probable cause standard was good enough, and indeed lowering to that level would create constitutional qualms in the Department of Justice. That is the same Department that addressed this Committee on February 6th.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Leahy.

Senator LEAHY. Thank you.

Let me just ask this question. You can answer it basically yes or no, so I will ask it of everybody. It has been reported that the President's domestic spying program was suspended in March 2004, then reauthorized with somewhat stricter standards after some in the administration raised doubts as to its legality. Attorney General Gonzales would not address that.

So let me ask you this: Do any of you know what the scope and internal rules of the President's program were between October 2001, when it was first authorized, and March 2004, when it was reportedly suspended and overhauled?

Mr. WOOLSEY. No.

Mr. KOH. No.

Mr. LEVY. No.

Mr. KMIEC. No.

Mr. FEIN. No.

Mr. TURNER. No.

Mr. GORMLEY. No.

Senator LEAHY. So you can't really give an answer as to what the legality of the program was during those two and a half years, not knowing the full details of the program.

Mr. KOH. Well, we know that the law in 1978 and now says that the way to do it is exclusively through FISA, and it wasn't done through FISA.

Mr. KMIEC. Of course, FISA also provides that it can be authorized by other statutes and it also had a specific reservation for time of war.

Senator LEAHY. But if we don't know what is going on, we don't know whether it was authorized by any other statute.

Mr. KMIEC. Without a doubt, the facts are important.

Senator LEAHY. And of course, the war on terrorists, we can assume throughout our lifetime we will be facing war on terrorists, and to what extent do we have extraordinary means throughout our lifetime. Now, we are not told how many Americans are affected by the program. In fact, we are not told whether it has produced any useful information at all. So it is hard to see how it satisfies the Fourth Amendment.

If the program has provided valuable information—and so far, nobody in the administration says it has—but if it has, then the analysis may be different. Mr. Fein, what do you think?

Mr. FEIN. What you have raised is the dilemma that this Committee confronts. Unless you know what is going on, who is being targeted, and what the results are, you can't possibly make a Fourth Amendment evaluation because the Supreme Court has stated that the effectiveness certainly is an element of Fourth Amendment.

Take, for example, 287,000 homes in Vermont, the latest census. If you decided to break and enter every single one of them on the understanding that, as a probability, you would uncover at least a handful of cases where you discover evidence of crime, then you would destroy the Fourth Amendment. Because you have to have something more than just a probable statistical likelihood of getting evidence to satisfy the Fourth Amendment. It has to rise above that minimal threshold.

And the whole difficulty of addressing, for example, Senator Hatch's idea of a reasonable suspicion test is we don't even know what problem we are addressing, because the administration has concealed it from this Committee, from the American people.

That is why I continue to suggest that the way responsibly to go forward is to insist that the administration come forward with the intelligence information that we have just asked about, or they will have their program shut down by the power of the purse within 30 days. The burden of persuasion should be on the President to explain why the Fourth Amendment needs to be compromised, not on this Committee.

Senator LEAHY. You know, it is funny, we got into, somewhat, these areas of where can we go in our laws, what could be set aside for facing terrorists. And it worries me, coming from a State, for example, where we strongly respect our privacy. And I remember my days as a prosecutor, when I had to make sure I got warrants.

And I asked Professor Koh, when he came here testifying about Attorney General Gonzales, and I asked—Dean Koh, you probably remember this—I asked you whether the President could override our laws on torture and immunize those who commit torture under his order. Your answer was pretty succinct. You said no.

So let me ask you a similar question. Can the President override our laws on domestic wiretapping and immunize those who engage in warrantless wiretapping under his order?

Mr. KOH. I believe he cannot. And in page 2 of my testimony, I cite *U.S. v. Smith*, a case decided 200 years ago, by Justice Paterson. It says the President of the United States cannot control the statute nor dispense with its execution, and still less can he authorize a person to do what the law forbids.

Senator LEAHY. We sometimes get interesting things when this happens. We find that the administration has not complied with the mandatory 45-day review provision of the Exon-Florio law with regard to the Dubai Ports Commission. Now we see what happens. I come from a State where they follow rules, and I think—well, it is up to the Chairman. I saw Professor Turner's hand go up.

Chairman SPECTER. You may proceed to answer the question, Professor Turner, then we are going to have to wrap up.

Mr. TURNER. I think it is very important. I started off with *Marbury v. Madison*, the idea that a statute that violates the Constitution is not law, and the President has discretion that is not intended to be checked. We don't have time to draw all those lines, but remember, Griffin Bell said that FISA could not take away the President's power in this area. The appeals court you set up under FISA has said the President has independent power to do this, and FISA could not take that away.

The issue here is a struggle between the Fourth Amendment and the President's constitutional powers, in which FISA is a relatively minor player. It is very hard in 5 minutes or 30 seconds to draw the line on those powers, but to me that is the issue you have to look at. Since the Jay Treaty debates, John Marshall was in the Congress and said the President is the final determinator of what documents in his branch he will share with Congress. The Supreme Court in *Curtis Wright* said the same thing. We have gotten away from that. And I think it is very important that we remember that the Constitution is the supreme law, and if Congress passes laws that violate the Constitution, it is Congress that is the law-breaker.

Chairman SPECTER. Senator, what he says—Professor Koh wants to make a comment, and Mr. Levy, and that is going to be it. Will you please be brief, Dean Koh?

Mr. KOH. If the President thinks that a law is unconstitutional, he can veto it, and Congress can override, and then they can test it in court, as was done with McCain-Feingold, Gramm-Rudman, and a host of others. As we have recently seen with the McCain Amendment to the authorization act, the President can do a signing statement saying I think parts of it have to be administered in a certain way. One thing he can't do is pretend like he is complying with it and for 4 years be operating an entirely different system that is not under statutory examination or involving judicial review.

Chairman SPECTER. Mr. Levy, briefly.

Mr. LEVY. Just to be clear about what FISA did: FISA expanded, it amplified the President's authority. So the holding in the case that was just cited, the *Sealed Case* holding, was not that FISA encroached upon his authority, but rather that FISA, permissibly, expanded the President's authority without violating the Fourth Amendment. The restrictions in FISA simply explain the President's new and expanded authority, as authorized under the FISA statute.

Chairman SPECTER. Thank you, all.

Director Woolsey, you have a brief comment?

Mr. WOOLSEY. Mr. Chairman, just one point. The intelligence provided about terrorists overseas in the course of this could be as important to us as the Enigma code-breaking was in World War II, and our breaking of the Japanese codes. Those were instrumental with respect to D-Day, Midway, and the rest. One cannot in public inform, as Mr. Fein says, who did what from the administration. What was the method? What the target was? Or, as Mr. Koh said, what kind of surveillance has been going on for the last 4 years? The public has the right to know. One cannot do that without informing al Qaeda. It is absolutely impossible.

So I have no objection, as my testimony said, to a targeted, specific, in-house congressional examination of how to set up a check and balance here. But we cannot just sit here and talk about how everything needs to be public. I am sorry, but my background rather influences me on this particular matter.

Thank you, Mr. Chairman.

Chairman SPECTER. Well, thank you all very much. This has been a very lively hearing, especially at the end.

We, as I said earlier, have floor business which a number of us have to attend to. And Senators are very busy and Senators come and go. You witnesses don't have to sit still, you are not under subpoena, you can leave if you choose. I think it has been a very informative hearing. And we will continue to work on the program and on the issues in the legislation.

It is certainly true that we cannot approve a program that we don't understand and don't know about. There is no doubt about that. I agree that it would be irresponsible for us to do that, and we are not about to approve a program we don't understand. But we do have to have respect for the President and for the emergency situation, for the war we are in. And when he makes an argument on constitutional grounds, we have to give him some slack. If he has inherent Article II powers, that tops a statute.

I do not believe we have to get agreement from him. Dean Koh suggests that he is not going to observe a new statute since, as Dean Koh argues, he hasn't observed FISA. I do not believe that the resolution for the authorization for the use of force changes FISA. I do not think that is so. And I think FISA requires a warrant. But it is a different issue as to constitutional powers which may trump FISA. And we will struggle to try to find out what the program is.

When Senator Schumer says he would like to have Former Attorney General Ashcroft and Former Deputy Attorney General Comey in, so would I. And I called both of them and I talked to them. We had an agreement from the Attorney General in his testimony on February 6th that, taking one step at a time, he would not object to Attorney General Ashcroft's testimony and that others muddied the waters in terms of what we accomplished there. I wrote to the Attorney General telling him what Mr. Ashcroft and Mr. Comey had said and asking for administration authorization for them to testify.

When it comes to the issue of legal interpretation, neither Comey nor Ashcroft can tell us a whole lot more than Attorney General Gonzales did; all are interpreting the law. It has been reported that there was some activity at a hospital. We would like to know—I would like to know—what happened at the hospital with Attorney General Ashcroft and Deputy Attorney General Comey. But does that intrude on executive privilege, on what the lawyers are talking about if they had disagreements?

Well, the issue is not closed. We are going to continue to work on it.

But meanwhile, the Majority Leader has called a meeting this afternoon—it is at 5:30, so I think I will be able to make it; I think this hearing will be over by then—where we are going to try to structure the legislation. We face very, very important issues. And I am sympathetic to the difficulty of telling Congress very much. I am not sympathetic to the administration leaks. We have a knotty problem here with very serious consequences on protecting America and very serious consequences on protecting civil rights, and you seven men have added substantially to our progress. You may not think so, but you have.

Senator LEAHY. Mr. Chairman, may I just say one word in there?
Chairman SPECTER. One word? Yes, Patrick, one word.

[Laughter.]

Senator LEAHY. You are absolutely right if we go into questions of executive privilege. But some assistant in the Attorney General's office is not the one who can claim executive privilege. The President is the only one that could. Mr. Fein raises a very good point—other than the fact that he completely snowed me; I could not name the number of households in Vermont.

Chairman SPECTER. Well, Senator Leahy—

Senator LEAHY. But Mr. Chairman, I think you are to be applauded. And that will be my final word. You are to be applauded to have these hearings, but—

Chairman SPECTER. If you are going to say that, you can go on.

[Laughter.]

Senator LEAHY. But we have a way to go. We have a way to go. And if they want to claim executive privilege, make them actually do it.

Chairman SPECTER. Well, Senator Leahy and I have disagreed on very little as we have worked through the Committee for the better part of 15 months, and we will continue to work on this issue. It is a big one and we are going to devote our full energies to it.

That does conclude the hearing.

[Whereupon, at 12 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Mr. Bruce Fein
Wartime Executive Power and the NSA's Surveillance Authority II
February 28, 2006

ANSWERS TO SENATOR LEAHY'S QUESTIONS

1. The NSA's warrantless surveillance program in violation of FISA encroaches on the fundamental Fourth Amendment right of citizens to be free of unreasonable searches. The War Powers Resolution regulates the deployment of United States troops abroad in conflict situations. Its treatment as advisory by presidents has not transgressed on the individual rights of American citizens.
2. Congress could prohibit the expenditure of any monies of the United States to conduct electronic surveillance for foreign intelligence except in conformity with FISA unless within 30 days of the enactment of the prohibition the President either (1) discloses all of the NSA's spying programs conducted outside FISA to each member of the Senate Intelligence Committee and House Intelligence Committee, or (2) seeks a warrant from the Foreign Intelligence Surveillance Court based upon information yielded from the warrantless surveillance program and asks for a ruling on the constitutionality of the latter.
3. Congress could stipulate that the sole remedy for the past illegal surveillances by the NSA would be damages against the United States and not the suppression of illegally obtained evidence.
4. Congress under the necessary and proper clause can guarantee privacy rights beyond the constitutional floor of the Fourth Amendment or other provisions of the Bill of Rights. Congress guaranteed free exercise clause rights as against the

federal government beyond the floor mandated by the First Amendment in the Religious Freedom Restoration Act.

ANSWERS TO SENATOR KENNEDY'S QUESTIONS

1. Yes. The customary remedy for illegally obtained evidence is suppression, not damages for the individual whose rights were violated. Congress, however, might enact a new law stipulating that damages rather than suppression should be the remedy for the illegality. The entire problem could have been averted if the President had asked Congress to amend FISA where needed to authorize whatever new surveillance techniques were thought urgent and imperative.
2. The President's violation of FISA and refusal to disclose to Congress the full dimensions of the NSA's warrantless spying cripples the ability of the legislature to check executive overreaching of the type that lead to 20 years of illegal mail openings, 20 years of illegal interceptions of telegrams, and seven years of NSA's illegal eavesdropping for non-foreign intelligence purposes. The President's evasion of judicial review of the warrantless surveillance program further undermines time-honored checks and balances.
3. Congressional oversight and judicial review of domestic surveillance programs to prevent a repetition of COINTELPRO and sister illegal invasions of the privacy and First Amendment freedoms of United States citizens. Spies are rewarded for spying, not for desisting to safeguard the Bill of Rights. Absolute power to spy corrupts absolutely.
4. The NSA should be required to demonstrate to the FISA Court before conducting surveillance against an American citizen on American soil "probable cause" to

believe involvement in terrorist plotting or acting as an agent of a foreign government or listed terrorist organization. The burden should be on the government to demonstrate that a lesser standard of suspicion is necessary to thwart terrorist attacks.

5. Congress would be acting irresponsibly to enact legislation before knowing the full dimensions of the NSA's warrantless surveillance programs. Congress should demand to know the number of Americans targeted; the success rate in gathering useful foreign intelligence from the Americans targeted; the NSA's standards, if any, for determining which Americans to target; whether the criteria are uniform or idiosyncratic; the disposition of intercepted material unrelated to foreign intelligence, i.e., minimization rules; the training of NSA professionals in the meaning of the Fourth Amendment; the NSA's sanctions, if any, for spying that is too indiscriminate; the percentage of foreign intelligence information that is gathered outside the constraints of FISA or the Fourth Amendment because the surveillance is targeted on Al Qaeda or other aliens abroad; why FISA is unworkable post 9/11 in light of the Bush administration's testimony on July 31, 2002 before the Senate Intelligence Committee that FISA was working flawlessly to nip terrorist conspiracies in the bud.

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Direct Telephone: (412) 396-6184
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April 28, 2006

Honorable Arlen Specter
Chair, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

ATTN: Barr Huefner

Via e-mail and regular mail

Dear Senator Specter,

In response to your letter dated March 17, 2006, the following is my response to the written questions propounded by Committee members, flowing from the hearing on "Wartime Executive Power and Power and the NSA's Surveillance Authority II," held on February 28, 2006, at which I had the privilege of testifying.

Questions from Senator Edward M. Kennedy

1. How are the actions taken by the President to authorize this program consistent with our system of checks and balances in government?

It is my belief that when President Bush initially implemented the secret, warrantless surveillance program, it was likely consistent with our system of checks and balances. Although we still do not know complete details concerning the nature of the program, and the precise time-frame during which it evolved, it is clear that the President's action was taken in the aftermath of the terrorist attacks of September 11, 2001, in response to an extraordinary threat unlike any other in the history of the United States. It is also clear, in my view, that President Bush's power as Commander-in-Chief became enhanced, on American soil, because of the exigencies of that situation. Our Constitution was built with flexibility, so that each of the three branches of

government can exercise power in a manner that expands or contracts given the subject matter in question and the circumstances presented. Following the events of September 11th, for some limited period of time (perhaps as much as a year or so), the President=s power on American soil was at a high-point under the well-known *Steel Seizure Case* precedent.

However, the continuation of the secret, warrantless surveillance program for a period of nearly five years, without the benefit of Congressional legislation authorizing such action and without review by the judicial branch, in my view seriously undermines the system of checks and balances that defines our government. First, it undercuts Congress=s express power set forth in Article I of the Constitution, which gives the legislative branch primary responsibility for making laws and formulating policy on the domestic front. Those powers of Congress were unambiguously exercised in 1978 when Congress enacted the FISA statute, making it the exclusive mechanism for dealing with this sort of surveillance involving American persons. Thus, the prolonged continuation of the Bush Administration policy has in effect disemboweled the FISA statute, upsetting the Constitutionally prescribed balance of power.

Second, the secret, warrantless surveillance program shuts the entire judicial branch out of the process (when it comes to determining probable cause, determining the reasonableness of searches and seizures, and determining generally whether governmental action violates the 4th Amendment). By definition under the Constitution, however, that is a process that requires a judicial determination. The 4th Amendment rights of American citizens do not exist, under the United States Constitution, without reference to determinations made by neutral and detached magistrates (i.e. judges) as to whether a warrant should be issued and whether a reasonable search and seizure has occurred. By boxing the judicial branch out of the process, the Bush Administration has undercut a co-equal branch of government, to which the Constitution has specifically allocated this authority.

For both reasons, it is my belief that the executive branch has jeopardized the system of checks and balances so carefully constructed by our Constitution. It is problematic enough if one branch of government gathers up more power than it is allocated under the Constitution, at the expense of another branch of government. Ordinarily, however, there is a remedy for that problem: The Congress or the Courts react by passing legislation or by reviewing the Constitutionality of the executive branch conduct, in order to restore the proper Constitutional equilibrium. In this case, however, such a remedy is impossible. The President has excluded both the legislative and judicial branches, by acting in secret, thus forcing those co-equal branches of government to operate in the blind.

2. Should there be both Congressional oversight and judicial review over domestic surveillance programs?

As discussed above and in my full Senate testimony, I believe that it is essential that both Congress and the judicial branch play a role in overseeing any surveillance program that involves American citizens and residents. The Constitution gives Congress a key role here, because it is primarily responsible for enacting legislation and formulating policy in domestic matters.

Specifically, with respect to wiretap and surveillance laws, Congress has actively entered this field since the 1960s when many modern wiretap laws were enacted to address widespread concerns relating to the privacy rights of American citizens. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 at 1357-1374 (1992). Even more directly, Congress entered the field in 1978 with the adoption of the FISA statute, specifically setting forth the procedures by which the executive branch was permitted to engage in surveillance of American citizens and residents, particularly in situations where national security concerns required a heightened level of precaution and even secrecy.

Given that solid Constitutional foundation for Congress's power in this area, and Congress's consistent exercise of that power, it is essential that any domestic surveillance program implemented by the executive branch include a) Congressional authorization and b) Congressional oversight. On pages 25 - 28 of my written testimony, I spell out a plan for Congressional oversight that I believe would be workable. Given the fact that the instant surveillance program is designed to facilitate the difficult war on terrorism and to deal with previously unforeseen forms of communications technology, it seems appropriate that a small joint intelligence committee representing both the House and Senate should be utilized. This would ensure the highest level of confidentiality and secrecy.

At the same time, such a committee must not be constructed in a fashion that allows for even the appearance of partisanship. Particularly in a situation where one political party controls the executive branch and both houses of Congress (as is the case presently), a small and secretive oversight committee could create the appearance that the President and a select group of political allies in Congress were running a secret domestic surveillance program in a dimly lit back-room. To avoid such an appearance, it is essential that the designated joint oversight committee be as balanced as possible, politically. It is also crucial that mechanisms are created to ensure that the full membership of Congress has access to information, from that committee, necessary to make informed legislative judgments.

As set forth in more detail in my written testimony, I believe that the executive branch should be required to report, periodically, to the designated Congressional committee and to provide details concerning any such domestic surveillance program. As part of that reporting requirement, the Director of National Intelligence should be required to file an inventory of U.S. persons whose communications have been intercepted by means of secret surveillance, and who have been determined to have no link to terrorism. (This is a procedure already common in Title III surveillance matters.) In this way, the Congressional Committee would be fully informed concerning the benefits and potential hazards of the program. It would also be in a position to notify aggrieved U. S. persons, after consultation with the Director of National Intelligence (to ensure that national security was not jeopardized), so that such U.S. persons would have standing to sue and to challenge questionable government surveillance activity in the courts.

In a similar vein, it is absolutely essential that the judicial branch play a role in the process. As discussed previously, the Constitution contemplates that the courts shall have the power of

judicial review over acts of Congress and the executive branch, generally. Specifically, when it comes to determinations as to whether probable cause exists for a search, and whether a search (or surveillance) is reasonable under the 4th Amendment, that provision of our Bill of Rights mandates that the judicial branch have the ultimate power to make the determination. Allowing the executive branch to make its own determination whether the 4th Amendment is violated is like telling the executive branch or Congress that it can determine, for itself, whether certain governmental action violates citizens' First Amendment rights. The very purpose of the Bill of Rights is to place that judgment in the courts, where a detached decision can be reached guided by the Constitution and over 200 years of judicial precedent.

Moreover, if we are to continue to be a government of laws in the United States, rather than a government of secret decision-makers with no mechanism for challenging unconstitutional acts, there *must* be a process by which aggrieved parties can challenge any such domestic surveillance program in the courts. It may be necessary to require that such challenges take place in the FISA court, in order to maximize the protection of national security. One way or another, however, all roads must ultimately lead to the United States Supreme Court. That is the American system of justice.

3. What standard should be met to demonstrate a link to terrorism before the National Security Agency should be able to initiate surveillance under this program?

Any program designed to engage in surveillance of United States citizens and residents, in furtherance of the war against terror, must be premised on a direct link to known foreign terrorists, with sufficient information presented to the FISA court to back up that premise. Currently, the FISA statute speaks in terms of Agents of a foreign power. These foreign agents, as currently defined, are not necessarily terrorists or in any way connected with terrorism. Once the government seeks to sweep American citizens and residents within the ambit of the statute, and to loosen the existing Constitutional standards in order to monitor those American persons' communications, its footing becomes more tenuous. In such a case, if American persons are to be brought under surveillance in a manner that departs from the usual 4th Amendment procedures, a direct link must be established to a known or suspected foreign terrorist. Otherwise, the foreign affairs justification for departing from the ordinary guarantees contained in our Bill of Rights evaporates.

By way of example, there does not exist a valid justification to monitor every call and email of an American citizen, for an indefinite period of time, simply because that American citizen has telephoned a person of foreign citizenship in Afghanistan or Iraq. It may turn out that the foreign individual in question is merely a cousin or a casual business contact. In order to justify engaging in surveillance of the American citizen B making that person a target, gathering that person's communications and emails to other American citizens in order to flush out terrorists -- there must be a showing of probable cause. Specifically, there must exist probable cause, established to the satisfaction of the FISA court, that there exists a compelling basis for believing that the foreign individual is a terrorist or has direct ties to a terrorist organization. Once that link is established, the FISA court could then authorize surveillance of the American citizen for a defined period of time B

much like a stop and frisk^B to determine if there is any reasonable basis for the government to continue its surveillance. Such surveillance would be limited in time and scope based upon the specific facts presented to the court. If probable cause then existed, at a later time, further surveillance could be authorized. It is key, however, that the intake value be limited such that matters coming to the FISA court for this extraordinary treatment would be based on concrete evidence that the American person is linked to foreign terrorists.

Without such a direct link to a foreign terrorist or terrorist organization, the usual Constitutional procedures that apply to surveillance of American citizens or residents must remain in force.

4. Would Congress be remiss if it failed to fully understand the details of the program before acting on any legislation? What would a complete investigation entail?

Now that the existence of the secret wiretap program has been revealed, I believe that it is incumbent upon the executive branch to explain the program in as much detail as possible to the designated intelligence committees of Congress. It is difficult, if not impossible, for Congress to legislate in the dark. Although some information may be so sensitive, because of its potential impact on national security, that the executive branch feels compelled to withhold it even from Congress, it is hard to understand what fact would justify the executive branch withholding such information from the highly-secure joint intelligence committee. There must be a level of trust displayed here, especially when the Constitution assigns two coordinate branches of government powers that overlap.

Thus, it is important for the Congress to prod and to insist that the executive branch provide to the legislature as much information as possible.

Yet I do not believe that Congress can or should wait until all information is disgorged before it takes action. The existence of the program has been revealed. That program seems to run afoul of the separation of powers doctrine. It also seems to directly collide with the guarantees of the 4th Amendment that apply to American citizens and residents, as set forth in the Bill of Rights. Given those attributes of the secret wiretap program, I do not believe that Congress has the luxury of waiting for all of the data. Information must be demanded by Congress, from the executive branch, so that Congress can do its job properly. However, if this or any other executive branch refuses to cooperate, the only recourse is to adopt legislation as expeditiously as possible, correcting the most obvious deficiencies and accomplishing the task in stages. As long as the legislation initially adopted incorporates a procedure for judicial review, the courts will serve as the ultimate arbiter of the constitutional question and determine the legitimacy or illegitimacy of the executive branch's actions.

It thus seems better to adopt legislation that cures the most obvious problems, than to remain paralyzed. Once the question is called, the issue will be put into play in the courts (ultimately, in the United States Supreme Court) and the precise parameters of the necessary Congressional action

will become sharpened. In the meantime, at least the most glaring Constitutional problems will be addressed.

Questions from Senator Charles E. Schumer

1. **Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved U.S. citizens to be able to challenge the NSA program in court. Specifically, he said:**

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a "terrorist" under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

As stated more fully in my written testimony, I believe that any surveillance program conducted by the executive branch that does not provide a mechanism for allowing judicial review -- ultimately by the United States Supreme Court -- violates the separation of powers doctrine and amounts to a usurpation of the judicial branch's powers under Article III of the Constitution. This is not the first time in American history that a President and the courts have confronted situations in which sensitive information implicating national security is involved. In the case of the White House tapes subpoenaed in the Watergate case, for instance, Judge John J. Sirica made provision for review of the tapes *in camera*, in order to avoid disclosing any material that might jeopardize national security. *See*, KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION at 305 (1997). Later in the 1970s, when the FISA Court itself was created, it was structured to maximize secrecy in order to handle precisely these sorts of sensitive national security matters relating to surveillance. The United States Supreme Court is perfectly equipped to handle matters in a confidential fashion and to rule upon Constitutional issues without disclosing facts that the President and the executive branch deem to be secret or classified or otherwise off limits to the rest of the public and to our country's enemies. Whether or not the executive branch welcomes review of this government surveillance program or of any other governmental action is not the question. The question is whether the Constitution requires such review. There is simply no provision in the Constitution that permits the executive branch to draw a box around certain programs that it deems

to be related to "national security," and to shield these from review by the federal courts. This is particularly true where, as here, the program directly implicates the rights of American citizens and residents under the 4th Amendment of the Constitution, which *by definition* contemplates the involvement of the judicial branch. As stated at the hearing, it is my belief that any surveillance program involving American citizens and residents that excludes the judicial branch is patently unconstitutional.

2. In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?

If anything, it would seem that the executive branch would welcome the involvement of the FISA court in reviewing and approving program-based warrants relating to domestic surveillance. If a new piece of legislation is indeed constructed to permit program-based warrants to deal with the war on terror -- a step that I support in order to give the Bush Administration the tools it needs to fight a difficult war against an elusive enemy -- this is no different than 19,000 other instances in which the FISA court has handled matters related to national security and has done so in a professional manner that has protected confidential information. Indeed, the irony of the current situation is that few individuals in America or abroad even knew about the FISA court or of the large number of sensitive cases that it handled beneath the radar screen, until the disclosure of the current secret surveillance program drew attention to that court's work. It seems that the executive branch could assist the FISA court in performing the job which Congress explicitly entrusted it, if it would cooperate in the construction of legislation that would address the Administration's needs relating to legitimate challenges in domestic surveillance, while allowing the other two branches of government to play the roles that the Constitution intended for them.

3. Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?

As stated in my written testimony at pages 25 - 28, I believe that the executive branch should be required to report to Congress (or to a designated joint intelligence committee) on a periodic basis, to keep it abreast of its activities and to permit Congress to determine what is working properly and what is not working properly when it comes to surveillance of American citizens and residents. Communicating the number of FISA orders requested and granted or denied is essential. However, it is also my position that any new legislation should require the executive branch to provide the designated intelligence committee of Congress with an inventory, or list, of American citizens and residents who have been the subjects of domestic surveillance and who have been determined to have no link to terrorism. In this fashion, as is the case in Title III matters, Congress will be in a position to notify such individuals if it makes a determination that disclosing such information will

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not jeopardize national security. In this fashion, there will be a mechanism in place to allow legitimate cases and controversies to percolate into the courts, as contemplated by Article III of the Constitution. A program that keeps secret all information indefinitely, so that aggrieved citizens and residents cannot seek recourse in the courts when their rights under the U.S. Constitution have been violated, is anathema to our system of government.

I thank you for the opportunity to respond to these thoughtful questions from the Committee.

Sincerely,

Ken Gormley
Professor of Law

KG/jd

**Questions for Professors from
Senator Charles E. Schumer**

Douglas Kmiec Answers

1. Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved US citizens to be able to challenge the NSA program in court. Specifically, he said:

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a terrorist under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

My own study of hot and cold war-time matters for the Supreme Court Historical Society, as well as the writing of the late Chief Justice William Rehnquist, is that the Court has historically striven to avoid these questions because they have few manageable judicial standards and the Constitution has assigned the primary oversight role in military affairs to the political branches. The Court is also fearful of issuing a ruling during a military conflict, since it feels that doing so presents a risk of sanctioning or denying a matter said to be a military necessity, when the Court is not privy to the entire foreign affairs context, as the President and the appropriate members of Congress would be. Justices Jackson and Frankfurter raised this concern in *Korematsu*. Pleadings have apparently been filed in some lower courts asking for disclosure of surveillance-related information. This question cannot be answered in the abstract, and I fully expect the district judges have asked for briefing on the permissibility of disclosure of that information and any related classified materials. I would fully expect the Department of Justice to ably defend the President in court, and consistent with the ruling in *In re Sealed Case* argue for an affirmation of the President's authority. That question, as well as FISA's own constitutionality has not been adjudicated before the Supreme Court. Were the lower court cases to advance, I

would expect a Court ruling to be either avoided for reasons of nonjusticiability or quite narrowly focused, and as in the past, unlikely (perhaps impossible) to be “definitive.” More fruitful and responsible in light of the terrorist threat, I believe, are the collaborative steps now being taken for the President and the Intelligence Committees, or an specialized subcommittee thereof, to be fully apprised of the program and press for individual warrants under FISA whenever possible, and where said to be not possible, have any exception fully vetted before that subcommittee.

2. In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?

As your question suggests, and as I believe Attorney General Gonzales affirmed, the FISA judges after 9/11 have been highly responsive. The answer to the question depends on operational details that presumably make individualized warrant applications impossible. My assumption -- only from personal study, not briefing -- is that the President's program at least initially is premised upon sophisticated data matching which does not lend itself to a probable cause showing with respect to any one individual. I assume the President has been advised that without a warrant, evidence gathered has a higher likelihood of suppression in a subsequent criminal trial. Again, as I understand it, the primary concern of the President is preventive.

3. Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?

Reporting to Congress is a necessary adjunct to the Constitutional plan that divides power to prevent abuse of it. Ideally, reporting would be to a single committee or subcommittee and would not require the disclosure -- in writing at least -- of sensitive informant or operational method, for example -- that would undermine the integrity of the program. Again, the regular 45 day oversight envisioned for the specialized intelligence subcommittee by Senator Roberts seems wholly appropriate in principle.

I hope these responses are helpful to the Committee.

With respect,

**Harold Hongju Koh
Dean, Yale Law School**

**Response to Questions from
Senator Charles E. Schumer**

April 30, 2006

1. **Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved US citizens to be able to challenge the NSA program in court. Specifically, he said:**

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a “terrorist” under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

I support passage of legislation that would give standing to individual Americans concerned that they have been subject to illegal surveillance by our government. Americans are entitled to access to the courts to vindicate their rights under the Constitution, and authorizing such access would allow the courts to address the program’s legality without the barriers to standing presented by the status quo. This legislation resembles the provision in the Gramm-Rudman Budget Balancing Act that allowed the legal challenge subsequently adjudicated by the Court in *Bowsher v. Synar*, [please fill in cite] as well as the provision in the McCain-Feingold Campaign Finance Bill which led to the speedy adjudication of the constitutionality of that law. [please fill in cite]

If the Administration is as confident as it claims that the NSA program is legal under the sweeping vision of executive power they have articulated, I cannot think of any legitimate reason why the Administration would not have already sought, nor would now oppose, court review of the program. I am confident that the many able lawyers working for the executive branch recognize what I explained before the Judiciary Committee on

February 28¹ and what the overwhelming majority of legal scholars believe:² that the NSA program is blatantly illegal.

A decision from a court to that effect would be an overdue corrective. As I noted in my testimony, the Administration is calling into question FISA and other statutes based upon an expansive view of presidential power that is not supported by the text of the Constitution, our constitutional tradition, or Supreme Court jurisprudence. However, as I stated in my testimony, Congress should not wait for the courts to act. The courts often avoid constitutional questions and rule on narrow issues or procedural grounds, and thus this provision alone would not guarantee that the courts will rule on the legality of NSA surveillance program. As I testified, Congress first needs to find out precisely what the program involves, carefully evaluate the legislative alternatives, and then pass legislation that regulates domestic electronic surveillance – as FISA did in 1978 – in a way that gives effect to the Fourth Amendment’s requirement that any surveillance be reasonable, supported by warrants issued by courts, and based on specific probable cause in each case. As I testified, I believe such legislation should contain opportunities of the kind this question describes, for Americans who believe they have been wrongly subjected to government surveillance to seek redress.

2. In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?

No. All the Administration had to fear from seeking a warrant for surveillance in the United States under the NSA program was that the FISA Court would have rejected that request. Even if that had happened, the Administration would have had to consider an appeal or a legislative change, which the Congress almost assuredly would have made after September 11.

If the Administration had sought a FISA warrant under the NSA program for a particular individual, phone number, computer, or email account, and could show probable cause that the individual was an agent of a foreign power or a suspected international terrorist, the FISA Court almost certainly would have approved the warrant application. If, however, the NSA program is indeed the kind of broad datamining operation at telecommunication switches reported in the media, involving searches of the messages of innocent Americans without probable cause, it is unlikely that the FISA Court would have granted the warrant. If the program is overbroad for a FISA warrant, then the law and common sense dictate that rather than proceeding with an illegal program, the Administration should either have sought a change in the law or changed its own program.

¹ See generally, *Wartime Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2nd Sess. (Feb. 28, 2006) (statement of Harold Hongju Koh), available at http://www.law.yale.edu/outside/html/Public_Affairs/713/HHKNSAtestfinal.pdf.
² See *Id.* at 1-2, n5.

Nor, from the standpoint of protecting classified information, sources, and methods, do I believe that the Administration had anything to fear from seeking court warrants for surveillance. Judge James Robertson, a former FISA Court judge who resigned after the Administration's evasion of the FISA statute and court became public in December, wrote in a recent letter to Congress, the FISA Court's "judges are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record."³ Even if its FISA Court warrant request had been rejected, the Administration could have appealed to the FISA Court of Review and then if necessary to the Supreme Court. If these appellate bodies had rejected both the warrant request and the Administration's claim of warrantless wiretap authority outside of FISA, the Administration could have sought an amendment to FISA from Congress to allow for the program. Instead, the Administration took none of these established routes to establish or confirm the program's legality. Had the Administration simply followed the law, there would have been no story, and no need to put forward such sweeping assertions of executive authority that endanger our Constitution's vision of shared power regarding national security.⁴

3. Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?

The annual reporting requirement in FISA in no way endangers national security. Not only are the FISA reports to Congress fairly minimal, but there is to my knowledge no instance of information from a FISA report leaking from Congress. As I have noted above, Judge Robertson has indicated that for its part the FISA Court that makes the warrant decisions that are the basis of the reports has a "perfect security record" regarding classified information.⁵

Although I am not aware of whether or how often FISA-related classified information has leaked from the executive, it is well known as a general matter that far more classified information leaks from the executive branch than from the Congress or the courts. On this basis, the insistence of the Administration that classified briefings about the illegal NSA program be restricted to Congress's senior "Gang of Eight" (minus the technical and legal experts of the intelligence committee staffs) were not only inconsistent with the National Security Act of 1947 as amended, but also misdirected. In this case, the existence of the NSA program was leaked not by the Congress or a court but by officials in the executive branch.

³ See Eric Lichtblau, *Judges on Secretive Panel Speak Out on Spy Program*, N.Y. TIMES, March 29, 2006.

⁴ For greater discussion of this point, see Harold Hongju Koh, *A Law Unto Itself?*, YALE L.J. (THE POCKET PART), March 2006, <http://www.thepocketpart.org/2006/03/koh.html>; and HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER IRAN-CONTRA (1990).

⁵ See *supra* note 3.

You also asked whether a similar congressional reporting requirement for the NSA program would impose different security concerns. If reports to Congress regarding the NSA program were as brief as those under FISA, providing mainly a tally of the number of those under surveillance, that is very unlikely. However, there might be new concerns if the NSA program is in fact a broad datamining operation, and if Congress passes legislation allowing the program to continue while calling for more detailed reporting to Congress on surveillance.⁶ If such reports to Congress were to include the content of the communications of individuals rather than simply a tally of the number of those surveilled, Congress would have a responsibility to ensure that the personal communications of the Americans surveilled are secure from improper disclosure, particularly in the case of any communications of innocent Americans unconnected to Al Qaeda.

Finally, let me note that the Congress should take great exception to questions raised by the Administration about Congress's ability to handle classified information related to the NSA program and other secret operations. The Congress's comprehensive authority under the Constitution is explicit and clear. Congress has legislative authority over all government programs and activities under Article I of the Constitution in Section 1 (the Legislative Vesting Clause), Section 8, Clause 14 (providing authority "for the Government and Regulation" of the Armed Forces), Section 8, Clause 18 (the Necessary and Proper Clause), and Section 9, Clause 7 (appropriations). This comprehensive authority "To make all laws which shall be necessary and proper for carrying into Execution...all...Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"⁷ and control expenditure of all federal funds necessarily entails a comprehensive oversight power, which requires Congress to handle classified information.

⁶ For discussion of a newly introduced Senate bill that would presumably allow the NSA program with additional reporting requirements, see Charles Babington, *Bill Would Allow Warrantless Spying: GOP Plan Would Bring Surveillance Under Review of Congress*, *FISA Court*, WASH. POST, March 17, 2006, at A05.

⁷ U.S. CONST. art I., § 8, cl. 18 (emphasis added).

**Wartime Executive Power and the NSA's Surveillance Authority II
Response to Supplementary Questions**

**Submitted to the Committee on the Judiciary
United States Senate**

by
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Washington, D.C.

March 24, 2006

1. Question from Sen. Schumer: Assuming that plaintiffs can establish legal standing to sue, would Supreme Court review of the NSA program be a good idea? Can you think of any legitimate reason why the administration would not welcome Supreme Court review, especially because the President is certain that the program is legal and Constitutional?

1. Response: Supreme Court review of the NSA program would be useful in settling the following questions: (a) Does the program violate the Fourth Amendment? (b) Does the program violate provisions of FISA? (c) Does the AUMF satisfy FISA's requirement for an authorizing statute? (d) What is the scope of the President's Article II powers? (e) To what extent are the President's powers elevated during wartime, even though Congress has not formally declared war? (f) Did Congress, in enacting FISA, unconstitutionally encroach on the President's inherent powers?

On the other hand, Supreme Court review of the NSA program might be counterproductive in these respects: (a) Policy issues related to necessity and effectiveness of the program are best addressed by the political branches. Judges have no special expertise to make those evaluations. (b) Litigation would likely postpone a congressional remedy, thereby extending the period during which the President is disregarding a duly enacted federal statute. (c) The Court might determine that a narrow remedy is appropriate – e.g., dismissing a criminal prosecution or rejecting illegally gathered evidence – thereby leaving an illegal program in place. (d) If instead, the Court were to enjoin all or part of the NSA program, national security might be compromised. In short, the better remedy is a congressional fix.

2. Question from Sen. Schumer: In the history of the FISA court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Did the administration have anything to fear from asking the FISA court for orders to conduct NSA surveillance?

2. Response: A comparison between the number of warrant applications approved under FISA and the number denied can be somewhat misleading. Undoubtedly, a large number of

applications were not presented to the FISA court because the Justice Department knew they would have been rejected. As noted on page 13 of my testimony, FISA allows warrants only against foreign powers, including terrorist groups, or their agents. Therefore, a warrant is not available if the intended domestic target is not an “agent,” even if he is an al-Qaeda contact (perhaps not aware that his communications have intelligence value). I do not know whether the NSA is monitoring the communications of non-agent U.S. persons. But if so, surveillance of non-agent U.S. persons would be an even more egregious violation of FISA than warrantless surveillance of agents. The latter could be cured by a warrant; the former could not. In other words, if the NSA targets a non-agent U.S. person, the violation of FISA consists not merely of unauthorized surveillance without a FISA warrant, but of surveillance under circumstances where a FISA warrant would never have been granted.

Additionally, the administration might not have sought approval of specific NSA activities because “emergency” surveillance had already been implemented and the Justice Department could not complete the post-implementation application within the allotted 72-hour window. Indeed, that was the argument proffered by Attorney General Gonzales (www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html) in his January 24, 2006, speech at Georgetown University. I address (and reject) that argument on pages 12 and 13 of my testimony.

3. Question from Sen. Schumer: Under FISA, the administration must report to Congress every year on the number of FISA orders requested, granted, and denied. Does that reporting requirement endanger national security? Would a similar requirement for the NSA domestic surveillance program pose different security concerns?

3. Response: While I have no special knowledge on the subject, I am not aware of claims by the administration that reporting requirements under FISA have compromised national security. Presumably, surveillance conducted under the NSA program is more sensitive and, therefore, might raise concerns not raised by FISA warrant applications. Nonetheless, the administration has reportedly agreed to a proposed bill – drafted by Senators DeWine, Graham, Hagel, and Snowe – that requires semiannual reporting to Congress on the extent and effectiveness of the NSA program. That bill also directs the administration to provide operational details about specific surveillance, on request, to newly-formed Terrorism Surveillance Sub-Committees.

4. Question from Sen. Kennedy: How are the actions taken by the President to authorize the NSA program consistent with our system of checks and balances?

4. Response: The animating sentiment at the time of the founding was fear of executive power. Against that backdrop, it is remarkable that the President now claims that our founding documents authorize him to wield unilateral wartime powers with virtually no safeguards. He asserts, in effect, that his actions are presumptively and irrebuttably legal, without judicial review, despite a contrary statute.

Nor were separation of powers concerns alleviated when the administration briefed the Gang of Eight – especially when the members were not given complete and timely information, they were not allowed to take notes or consult aides, they were prohibited from discussing it afterward with others, and the briefings were operational not legal. Indeed, the National Security Act of 1947 states that “The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States.” 50 USC §413(a)(1).

The enactment of FISA in 1978 was intended, in part, to curb the abuses of Projects Minaret and Shamrock. But FISA used velvet gloves. Essentially, it legalized some conduct that had previously been illegal – for example, NSA surveillance of U.S. persons in the United States without probable cause that a crime had been (or was about to be) committed. Now the administration contends that FISA, because it still requires a warrant (albeit under liberalized standards), did not go far enough. Perhaps so. But most presidents, when they think a law is outdated or ineffective or otherwise ill-advised, ask Congress to amend or repeal the law. President Bush, on the other hand, basically repealed FISA by himself, by ignoring its provisions. He argues that Article II of the Constitution gives him all the authority he needs. But section 3 of that article obligates him to “take Care that the Laws be faithfully executed.” FISA is one of those laws – duly enacted by Congress, signed by a previous president, and later by President Bush when he signed the PATRIOT Act, which amended several FISA provisions that he now finds unacceptable. The President cannot, on one hand, agree to FISA amendments, then, on the other hand, insist that FISA’s provisions, as amended, are an abuse of his constitutional authority.

To be sure, Article II states that “The executive Power shall be vested in a President” who “shall be Commander in Chief of the Army and Navy.” But that provision simply establishes that the President has certain inherent powers, especially during wartime; it does not define the *scope* of those powers, much less excuse him from compliance with the law. The President has some discretion in enforcing the law, but he does not have latitude to pick and choose which laws he will enforce or to take actions that the law expressly prohibits.

Some legal authorities have questioned whether a mere statute (FISA) can impinge on the President’s Article II powers. Yes, it can: First, because Congress exercises concurrent authority during wartime (see page 4 of my testimony), and is thus empowered to delineate the scope of the President’s wartime powers. Second, because Article I, section 8, of the Constitution expressly authorizes Congress to “make all Laws which shall be necessary and proper” for executing not only its own powers, but also “*all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*” [Emphasis added.] So the Constitution explicitly provides that the President’s inherent authority under Article II is subject to regulation by Congress. Perhaps some regulations of national security are too absurd or cumbersome for emergencies, and are therefore “unnecessary or improper,” but the burden of proof is on the President, and he has not produced any evidence at all. [See William Van Alstyne, “The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause,” *Law & Contemporary Problems*, vol. 40, no. 2, spring 1976, pp. 102-34 (The Necessary and Proper

Contemporary Problems, vol. 40, no. 2, spring 1976, pp. 102-34 (The Necessary and Proper Clause “assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are indispensable”).]

5. Question from Sen. Kennedy: Should there be both Congressional oversight and judicial review over domestic surveillance programs?

5. Response: Judicial review of warrant applications already exists under FISA, and judicial review of the admissibility of evidence obtained by domestic surveillance is available in criminal prosecutions. But judicial review of the legality of the NSA program might not be available under current law. A threshold obstacle to such programmatic review is the requirement that plaintiffs have legal standing to sue. As noted on page 13 of my testimony, the courts may decide they cannot play a role: First, the Justice Department will not prosecute; second, surveillance targets who have been secretly monitored are unlikely to know of their victimization; third, potential targets may not be able to prove sufficient injury; and fourth, aggrieved members of Congress have previously been denied legal standing (see *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), cert. denied 121 S. Ct 50 (2000)).

Furthermore, Article III courts are constitutionally obligated to address only “Cases” or “Controversies,” not to issue advisory opinions. The FISA court, while it may examine warrant applications related to a specific investigation, may not be instructed by Congress to review the NSA program in its entirety. Consequently, the process for judicial review outlined by Chairman Specter in the draft of his National Surveillance Act of 2006 would not, in my view, pass constitutional muster. (I have submitted, separately, comments to Senator Specter regarding his draft legislation.)

Congress could, by statute, create legal standing for FISA plaintiffs. Still, even if the standing problem were resolved, I have reservations about the desirability of judicial review of the NSA program, as outlined in the second paragraph of my response to Question #1 above.

Both the difficulty of providing for judicial review, and reservations regarding its desirability, suggest that the need for congressional oversight is elevated and urgent. In that regard, I commend, as a starting point, the proposal by Seventh Circuit Judge Richard A. Posner (“A New Surveillance Act,” *Wall Street Journal*, February 15, 2006).

Under Judge Posner’s proposal, warrantless surveillance would be permitted only if the President certifies its necessity and Congress declares a national emergency. Then, surveillance related only to foreign terror groups would be covered; i.e., no surveillance of domestic terror groups and no use of the surveillance for ordinary criminal investigations. The statute would be subject to a five-year sunset provision. On an annual basis, an administration official would have to certify, subject to perjury charges, that all surveillance complied with the new law. Semiannually, the NSA would report to the FISA court, identifying each warrantless surveillance and why it was undertaken. The court, in turn, would report any improper surveillance to

congressional intelligence committees and a newly-formed oversight committee, which comprised the head of the Department of Homeland Security, the Attorney General, the Director of National Intelligence, and a senior or retired federal judge appointed by the Chief Justice. That committee, not an Article III court, would have primary responsibility to oversee compliance with the statute.

6. Question from Sen. Kennedy: What standards should be met to demonstrate a link to terrorism before the NSA should be able to initiate domestic surveillance?

6. Response: I do not know the full extent of NSA surveillance. But Attorney General Gonzales stated (www.whitehouse.gov/news/releases/2005/12/20051219-1.html) that surveillance is triggered when an executive branch official has reasonable grounds to believe that a communication involves a person “affiliated with al-Qaeda or part of an organization or group that is supportive of al-Qaeda.” That means FISA warrants might *not* be available for some surveillance operations that the NSA is undertaking – e.g., monitoring the communications of al-Qaeda “contacts” who do not rise to the level of “agent.” Useful intelligence might therefore be lost even if the administration were forced to seek FISA warrants, which are not presently available unless the target is an agent.

Conceivably, FISA could be amended so that warrants could issue merely upon showing that an individual has had contact with al-Qaeda. That is a policy question, not a legal question, on which I claim no special insight. If the administration were to furnish convincing evidence that (a) existing FISA procedures are proscribing surveillance that is necessary to combat terrorism, (b) a change in the law would be effective in obtaining the intelligence that is now unobtainable, and (c) no less intrusive method of getting that same intelligence would be equally effective, then I would likely favor changing the law – notwithstanding attendant civil liberties concerns – thereby relaxing the links to terrorism that must be demonstrated in order to trigger surveillance. But unless there is a persuasive showing of necessity and effectiveness, coupled with a narrowly tailored legislative remedy, I would leave FISA’s warrant provisions in place, direct the President to comply with those provisions, and establish by statute legal standing to test the President’s compliance in court, if necessary.

7. Question from Sen. Kennedy: Would Congress be remiss if it failed to fully understand the details of the program before acting on any legislation? What would a complete investigation entail?

7. Response: At a minimum, before enacting legislation, Congress should determine answers to the following questions: (1) What is the scope of the NSA program? Are only al-Qaeda agents targeted, or mere contacts as well? (2) How often has the NSA monitored the communications of U.S. persons in the United States? Over what period? (3) What are the technological advances that may have rendered FISA obsolete? (4) To what extent is data-mining part of the program? (5) Is the physical intelligence collection done domestically or overseas? (6) What evidence suggests that the program has been effective? How many false

positives and false negatives have there been? (7) What minimization procedures are in place to ensure that intelligence is not retained longer, or distributed more widely, than is absolutely necessary?

Ultimately, the goals of any legislation should include: (1) Legitimizing essential surveillance; (2) requiring judicial review when the target is a U.S. person; (3) limiting the relaxed surveillance standards to foreign counter-terrorism, excluding domestic surveillance that might sweep in environmental activists, abortion and animal rights groups, etc.; (4) ensuring appropriate minimization procedures; and (5) providing for recurring congressional oversight. Finally, the legislation should be sunsetted – perhaps after four years, to coincide with the expiration of selected provisions of the reauthorized PATRIOT Act.

Senator Edward M. Kennedy
Questions for the Record
Hearing on
“Wartime Executive Power and the NSA’s Surveillance Authority II”

Questions for Robert Turner

QUESTION 1:

- **Please expand on your statement that “FISA has done serious harm to this nation”? Please provide specific examples to support your view.**

ANSWER:

In some respects, I am a fan of FISA. And I certainly admire the FISA Court judges and the lawyers in the FBI, NSA, and the Office of Intelligence Policy and Review who work so diligently to make the system work. But as I have tried to explain in my prepared testimony, the Constitution clearly entrusted what John Jay in *Federalist* No. 64 called “the business of intelligence” to the discretion of the President to be managed “as prudence might suggest.” Thus, as the FISA Court of Review noted in 2002, FISA could not “encroach on” the President’s constitutional power to authorize the collection of foreign intelligence information—*especially* during wartime.

It is my view—an opinion that dates back to my years as a Senate staff member more than three decades ago—that the broad congressional assault on the constitutional powers of the President that followed the Vietnam War has done serious harm. Former Marine Corps Commandant P.X. Kelley and I co-authored an op-ed in the *Washington Post* on October 23, 1994, (“Out of Harm’s Way: From Beirut to Haiti, Congress protects Itself Instead of Our Troops”) summarizing how a horribly partisan congressional debate over the War Powers Resolution contributed to the deaths of 241 Marines, sailors, and soldiers eleven years earlier in Beirut. I commend to you as well the colloquy among Senators

Nunn, Warner, Byrd, and Mitchell in the *Congressional Record* of May 19, 1988 (pages 6173-78), where they noted both the constitutional problems with the statute and its harmful effect in undermining our security. For example, Senator Nunn observed that the War Powers Resolution “raises questions about the U.S. staying power in [the] midst of a crisis, thus making it harder for the United States to secure the cooperation of our friends abroad.” Senator George Mitchell reasoned:

[D]ebate over the resolution conveys the appearance of a divided America that lacks resolve and staying power. The resolution severely undercuts the President by encouraging our enemies to simply wait for U.S. law to remove the threat of further American military action.

Into the very situation that requires national steadiness and resolve, the War Powers Resolution introduces doubt and uncertainty. This does not serve our nation.

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.

I discuss this colloquy on pages 161-63 of my 1991 book, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*.

In my prepared testimony I give two specific examples of the harm done by FISA (which is far from the *worst* of the post-Vietnam laws):

- Although *Time* Magazine named FBI whistleblower Colleen Rowley as one of its 2001 “Persons of the Year,” her complaint was without merit. She was understandably outraged that, after her colleagues in the Minneapolis FBI office had identified Zacarias Moussaoui as a potential terrorist, she was unable to get FBI Headquarters in Washington, DC, to even *request* a FISA warrant to examine the contents of his laptop computer. With that access, she believed, the plot might have been foiled and thousands of lives saved. The problem is that the *reason* she was denied a warrant was that, in enacting FISA, Congress (or perhaps your staff, if my recollection is correct that you introduced the FISA bill) failed to consider the possibility of a “lone wolf”

terrorist like Moussaoui. The law permitted surveillance only of “foreign powers” (defined to include foreign terrorist organizations) and their “agents.” Moussaoui was neither employed by al Qaeda nor did he take directions from them, so you made it *unlawful* for the FBI to obtain a FISA warrant in this case—punishable by felony criminal sanctions. And had Ms. Rowley understood the situation, her angry letter presumably would have been addressed to *you* instead of Director Freeh. It was not until late 2004 that FISA was amended to deal with this problem.

Now, I don’t know whether the FBI could have discovered the planned attack, or not, had such a warrant been available, or had the President exercised his constitutional power to authorize the FBI to target Moussaoui as a likely source of foreign intelligence in spite of FISA (but, even had he tried, the criminal sanctions attached to FISA might well have led to refusals to carry out his orders). The fact remains that the statute precluded the issuance of such a warrant, and the FBI lawyers Ms. Rowley was so angry at were merely “obeying the law.” Had Spike Bowman and his tremendously able staff of FBI national security law attorneys elected to risk felony convictions and ignore the requirements of FISA, I am very confident that the attorneys in the Office of Intelligence Policy and Review (OIPR) would have rejected any such application. And had OIPR conspired to break the law, the FISA Court would have turned down the application.

- The second example I give in my prepared testimony is that, prior to the September 2001 Authorization for the Use of Military Force (AUMF) joint resolution, the current intercept program was viewed by at least some lawyers as prohibited by FISA. And by including felony criminal penalties for any government official who violates FISA, Congress obviously intended to impose a “chilling effect” on the gathering of foreign intelligence in this area. You told our intelligence community professionals that, unless they relish going to prison, they should in the event of any doubt disapprove proposed

surveillance of international terrorists or their agents or supporters in this country. And, as I note on page 37-38 of my prepared statement:

Lt. Gen. Michael V. Hayden, currently Deputy Director of National Intelligence and former Director of the National Security Agency, has expressed the view that "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."

Now I have been out of the intelligence business for decades, and I can't second-guess General Hayden on this point. But he has a sterling reputation as a brilliant and very honorable man, and he obviously knows the details of this program and the broader business of intelligence far better than any of us do. So I believe his comments should be taken at face value.

I think there may well be other examples. We know the FBI had briefly focused on two of the 9/11 hijackers when they were living in San Diego in 2000. It would not surprise me to learn that their investigation was constrained out of fear that they might violate the civil liberties of the terrorists. And if we look at FISA in the context of the broader assault on presidential constitutional power and the Intelligence Community—an assault led by the Church and Pike committees—then we might also consider the dramatic decrease in Human Intelligence (HUMINT) resources that began in response to those hearings during the Carter Administration. And, of course, the current public debate over the NSA surveillance program has in my view wrongly convinced much of the American public and probably most of the outside world that our government is controlled by lawbreaking tyrants. I can't imagine that there are not Intelligence Community professionals out there today—perhaps risking their lives for this country—who feel a need to consult with an attorney before carrying out their instructions for fear of being sent to prison as felons if they err in their efforts to prevent the next

major terrorist attack. And some of them might well decide that it is wiser to do as little as possible than to aggressively pursue terrorists and risk offending Congress and going to prison.

QUESTION 2:

- **In response to a question from Senator Feingold, you stated that the President has the authority to order the assassination of United States citizens. Are there any checks outside the Executive Branch that can limit the President's authority in what you describe as the "business of war"?**

ANSWER:

With all due respect, I believe you misunderstood my response to Senator Feingold's question. If my memory is correct, Senator Feingold complained about the secrecy surrounding the NSA surveillance program and asked whether there were any limits on the President's commander in chief power. He indicated he wanted each member of the panel to respond, but then engaged in a series of exchanges with Professor Kmiec—including asking whether the President could authorize the "assassination" of American citizens. When Senator Feingold later said "Professor Turner?," which I interpreted as inquiring whether I wanted to add something to that discussion, I replied "yes sir"—meaning not that I thought the President could authorize "assassination" but rather that I would welcome an opportunity to address the issue—and then I began by noting that secrecy is essential in wartime (I think I noted that President Roosevelt did not inform Congress or the public about the planned D-Day invasion, but that was not because he believed he was doing anything evil or illegal). I noted that many presidential powers during wartime are theoretically subject to abuse and yet still are not subject to "check" by Congress. A rogue President might conceivably instruct the military to shoot down an aircraft on the theory that it was being operated by al Qaeda when in fact he or she simply wished to kill a domestic political opponent who was on the flight. But few intelligence

people would argue that all targeting decisions must be approved by statute to avoid such a risk. And there are enough “checks” within the Executive Branch (NSA now has something like 200 people in the Office of the Inspector General alone) that such flagrant misconduct would quickly become public. Senator Feingold was concerned about his limited time, and interrupted me, at which time I started to address the “assassination” issue but realized my time was up. Because I did not get an opportunity to address the “assassination” issue—and, all the more so if others perceived, as you did, that I had endorsed it—I am grateful to you for raising this issue.

I first focused on the “assassination” issue while working as a Senate staff member during the Church Committee hearings more than 30 years ago. I believe that you and Senator Leahy are the only current members of the Committee who were in the Senate at that time, and I’m confident that you will recall the proposed “Intelligence Community Charter” that was considered to impose a variety of statutory limits on the Intelligence Community—including a prohibition against “assassination.” I remember discussing with my own boss, Senator Griffin, my concern that a situation might conceivably arise in which it would be very much in the interest of the United States and world peace to intentionally kill a particularly horrible tyrant—such as if we could have killed Adolf Hitler in 1939 and perhaps spared the 30 million deaths in World War II. (As you may recall, the lengthy Church Committee report on assassination was unable to identify a *single* person who had ever been “assassinated” by the CIA, and acknowledged that both DCIs Richard Helms and William Colby had on their own initiatives issued internal directives prohibiting any direct or indirect CIA involvement in “assassination.”)

Fifteen years later, I helped start the modern “assassination” debate when I wrote the lead article in the October 7, 1990, *Washington Post* Outlook Section under the heading, “Killing Saddam: Would It Be a Crime?” I drew a distinction between the intentional killing of a foreign leader who was engaged in a massive act of international aggression as an act of individual or collective self-defense, and the unprivileged “murder” of such a person. Most definitions of “assassination” include the word “murder.” They tend to focus either on the target (“the murder of a politically important figure”) or the technique

(“murder by stealth, murder by treachery or by lying in wait”), but the common element is that the killings are unprivileged acts of *murder*. So I believe it is important to draw a sharp distinction between “assassination” (which is barred by Executive Order 12333 and ought not be engaged in) and the use of lethal force against tyrants and aggressors as an act of self-defense as recognized by Article 51 of the UN Charter.

The issue can be confusing when force is used against a prominent figure whose killing might in other circumstances be thought of as “assassination.” Thus, if a prominent political figure broke into someone’s home and began shooting family members, and the homeowner shot and killed him with her deer rifle, she would not be guilty of “assassinating” a political leader because her act was a justified act of self-defense. While once there was a rule in international law that it was unlawful to kill the enemy’s leader, even in the days when launching an aggressive war was considered a sovereign prerogative of kings the leading publicists of the law of nations ridiculed the rule. In 1588, Alberico Gentili wrote in *The Law of War* that “our worthy leaders consult for their own interests” in making this rule, “for if they should come into the hands of the enemy, they would no longer have to fear for their own lives” And in an era where aggressive war is now a crime for which even heads of state may be put to death under the Nuremburg principles, it makes absolutely no sense to accept a legal rule that says tyrants like Saddam Hussein and Osama bin Laden must receive the special protections normally reserved during wartime for Red Cross or hospital workers.

So the short answer to Senator Feingold’s question is “*No*, the President may *not* order the assassination [murder] of an American citizen pursuant to his commander in chief power or any other constitutional authority.” But I think it is important to clarify that answer. I believe the President *does* have the authority to order the intentional, non-judicial killing of enemy leaders and combatants during wartime, and that applies not just in situations like the present when Congress has expressly authorized the President to use force, but even in situations of *de facto* war. Thus, on October 26, 1998, I published an op-ed in *USA Today* entitled “In self-defense, U.S. has right to kill terrorist bin Laden.” I expanded my views on this issue at a 2002 conference at the University of Richmond

School of Law, and they were later published in volume 37 of the *University of Richmond Law Review* in March 2003 under the title “It’s Not Really ‘Assassination’: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites.”

Indeed, I would go further and suggest that in certain extreme settings the President has the right to order the intentional killing of Americans. Imagine, for a moment, the consequences of a contrary rule. If the President may not authorize the intentional killing of enemy combatants who happen to also be American citizens, then since we know that some members of al Qaeda and the Taliban have American citizenship, presumably we must instruct our soldiers to hold their fire until a federal judge can hear evidence, establish the nationality of each individual enemy, and authorize the targeting of the enemy. While one might argue that the situation on the “battlefield” is different and soldiers may certainly shoot back when fired upon, the situation is not that clean. First of all, in war enemy combatants may be lawfully engaged even when sleeping at night in their barracks. War involves more than merely “shooting back” when fired upon. More important, the concept of the “battlefield” has lost much of its traditional meaning—as our enemies have demonstrated that they hope to make American cities a major part of the battlefield and huge numbers of American citizens the target in this struggle. Indeed, as I noted in my prepared statement, it appears that, thus far, more Americans may have died on the American “battlefields” of September 11, 2001, than in Iraq and Afghanistan combined.

While we all have a strong preference for judicial sanction before human life is taken, the realities of warfare make that undesirable in many cases. Indeed, this principle goes beyond the scope of war. Every police officer in America is empowered to use lethal force against wrongdoers when, in the officer’s judgment, such force is necessary to preserve either the officer’s own life or the lives of innocent civilians. We train both military and police sharpshooters to “take out” wrongdoers without the slightest prior judicial review in settings where reliable nonviolent means of dispute resolution are deemed impractical, such as in many hostage situations.

By entrusting such decisions to individual police officers or their local commanders, we obviously increase the risks that an injustice will be done. Requiring that the police (or military) marshal their facts and evidence and seek the sanction of a federal judge would probably prevent a few miscarriages of justice. We are all aware of situations in which officers misperceived an existing situation and resorted to lethal force when it later became clear that they had the wrong suspect or the suspect was reaching in his pocket for a cigarette rather than a handgun. But imagine how many policemen and innocent citizens would die if we imposed a delay of days or even hours to involve a judge after the officers on the scene has concluded that the bank robber or terrorist is about to start shooting hostages? This need for “speed and dispatch” was discussed repeatedly during the Philadelphia Convention and the various state ratification conventions in explaining why the President *had* to be given these tremendously broad powers.

Obviously, when dealing with U.S. Persons inside this country, as a *policy* matter I believe there should be a strong presumption in favor of trying to apprehend them and try them rather than kill them. But the *Hamdi* Court relied upon *Quirin* in holding that U.S. citizens who join up with our enemies and plan or carry out hostilities against the United States or its forces may be treated as enemy combatants (e.g., they may be detained without trial until the end of hostilities), and I think that would apply as well to intentionally targeting them here or abroad.

Does that increase the risks that Americans will be killed without clear justification? I think it does. Giving the President the power to authorize a lieutenant or sergeant to employ lethal force during war increases the risk that innocent people—perhaps including U.S. citizens in an area of active hostilities—will be killed. And in every war, totally innocent people become “collateral damage” because they are in the wrong place and the wrong time, or because of bad intelligence, equipment failure, or human error. This is not desirable, but it is the lesser evil. Because if we require our soldiers to hold their fire until they are absolutely *certain* that no civilians are at risk, we will pay a large price in the form of dead American soldiers.

One might go further and note that the President has the constitutional authority to order the intentional killing of totally innocent American citizens in an extreme and exceptional case. For example, if we learned that bin Laden and his top 20 lieutenants were flying in a chartered aircraft (perhaps pretending to be traveling as businessmen to a sales convention), and they would be landing in a country that would not cooperate with the United States in the war on terror, a prudent and wise President might well order our military to shoot down the aircraft over international waters—even if we knew that the pilot, a member of the crew, or another passenger was a totally innocent American. Bringing the case closer to home, it is my understanding (from press accounts) that on September 11, 2001, orders were given to shoot down United Airlines Flight 93 (a Boeing 757 carrying 40 passengers and crew members and seven terrorists) because the terrorists were thought to be planning to crash it into the White House, Capitol Building, or similar high-value target in the Washington, DC, area. In war, difficult judgment calls have to be made expeditiously. Anyone who would contend that the President may *never* authorize the non-judicial taking of an American life will presumably be willing to explain why it is preferable to permit a foreign terrorist to crash a hijacked commercial airliner into the Capitol Building—perhaps killing hundreds of legislators, staff, and visitors—rather than shoot down the plane and kill 40 or 50 innocent Americans.

I hope I have been responsive to your questions. If not, please let me know and I will be pleased to elaborate further.

Prof. Turner's Answers to
Questions from
Senator Charles E. Schumer

1. Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved US citizens to be able to challenge the NSA program in court. Specifically, he said:

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a "terrorist" under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

ANSWER:

I believe Chief Justice John Marshall answered this question in *Marbury v. Madison* when he wrote: "Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." That is to say, many decisions involving the conduct of armed conflict are entrusted entirely to the discretion of the President and were not intended to be "checked" either by Congress or the judiciary. At the core of these political powers vested in the President would be the negotiation of treaties and the collection of foreign intelligence information—both of which depend greatly for their success on secrecy, speed, and dispatch.

Obviously, in exercising his political powers the President must comply with the other provisions of the Constitution. So were a President to abuse his foreign intelligence collection power in such a manner as to violate a person's Fourth Amendment rights, and then seek to prosecute that person relying on evidence obtained through an unreasonable search or seizure, the defendant could presumably raise a Fourth Amendment challenge in seeking to exclude the evidence.

The Congress does have certain broad “checks” that can impede the President’s ability even to collect foreign intelligence information. Thus, it could lawfully refuse to raise any military forces and could refuse to appropriate any money for the military or the Intelligence Community. But Congress may no more properly use “conditions” on appropriations legislation to provide that no funds may be spent unless the President surrenders his constitutional powers—be it by requiring that he nominate an individual dictated by the Speaker of the House to be Secretary of Defense, or that he agree not to employ more than 100 soldiers on a particular hill after 7:00 PM during an authorized military campaign—that it may condition appropriations for the Supreme Court by withholding all funds in an otherwise valid appropriations act if the Court struck down as unconstitutional one or more specified acts of Congress.

Indeed, since our hearing took place the Supreme Court has reaffirmed the importance of the doctrine of “unconstitutional conditions,” noting in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, that the Court has long recognized that there are limits on “Congress’ ability to place conditions on the receipt of funds.” Referring to an amendment denying funds to universities that refused to permit military recruiting on campus, the unanimous Court explained earlier this month: “Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.”

[*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 74 U.S.L.W. 4159 (U.S. Mar. 6, 2006).]

And by this same logic, Congress may not constitutionally condition appropriations for co-equal branches of our government upon the requirement that they surrender discretion vested in them by the Constitution.

I note on pages 27 and 28 of my prepared statement that the Founding Fathers feared that Congress might try to usurp the powers vested in the discretion of the other branches of government, and in my forthcoming trilogy on *National Security and the Constitution* I provide a number of historical examples to demonstrate that legislators have long acknowledged these limits. Consider this brief excerpt from volume two of that series:

EXCERPT from the unpublished draft of 2 Robert F. Turner, *National Security and the Constitution*, being revised for publication by Carolina Academic Press:

**Senator Borah and Congressional Controls on
the Commander-in-Chief (1922, 1928)**

Senator William Borah of Idaho served as a member of the Senate Committee on Foreign Relations for nearly thirty years and was its chairman for six. He was in addition

a respected constitutional lawyer. His views on the power of Congress to control the President's power as Commander-in-Chief are therefore worthy of careful attention.

On December 27, 1922, Senator Borah participated in an interesting colloquy on the Senate floor with Senator James Reed of Missouri:

MR. REED of Missouri. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?

Mr. BORAH. I do.

Mr. REED of Missouri. So do I Would it not be easier to bring the troops home than it would be to have the proposed [disarmament] conference?

Mr. BORAH. You can not bring them home, nor can I.

Mr. REED of Missouri. We could make the President do it.

Mr. BORAH. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.

Mr. REED of Missouri. I wish to change my statement. We can not make him bring them home . . . , but I think if there were a resolution passed asking the President to bring the troops home, where they belong, the President would recognize that request from Congress.

[64 CONG. REC. 993 (1922).]

An even more illuminating exchange occurred six years later, during consideration of a naval appropriations bill, when the Foreign Relations Committee chairman had this exchange with Senator John Blaine, a newly elected member from Wisconsin:

Mr. BORAH. Mr. President, the Constitution of the United States has delegated certain powers to the President; it has delegated certain powers to Congress and certain powers to the judiciary. Congress can not exercise judicial powers or take them away from the courts. Congress can not exercise executive power specifically granted or take it away from the President. The President's powers are defined by the Constitution. Whatever power belongs to the President by virtue of constitutional provisions, Congress can not take away from him. In other words, Congress can not take away from the President the power to command

the Army and the Navy of the United States. . . . Those are powers delegated to the President by the Constitution of the United States, and the Congress is bound by the terms of the Constitution.

Mr. BLAINE. Another question. All that the Senator has said in a general way is sound constitutional law, but before there can be any action on the part of any Government unit requiring the expenditure of funds that are in the Public Treasury, or that may be placed in the Public Treasury, Congress must first act and make an appropriation for every essential purpose. That money so appropriated can be used for no other purpose than that designated by Congress, and there is no power that can coerce Congress into making an appropriation. Therefore, Congress's power over matters respecting the making of war unlawfully, beyond the power of the President outside of the Constitution or within the Constitution, or conducting hostilities in the nature of the war during peace time, can be limited and regulated under the power of Congress to appropriate money.

Mr. BORAH. Of course, I do not disagree with the proposition that if Congress does not create an army, or does not provide for an army, or create a navy, the President can not exercise his control or command over an army or navy which does not exist. But once an army is created, once a navy is in existence, the right to command belongs to the President, and the Congress can not take the power away from him.

After some additional discussion involving other participants, Senator Blaine returned again to his contention that Congress could control the President's conduct as Commander-in-Chief by using its power over the purse:

Mr. BLAINE. Mr. President, just one other question of the distinguished Senator from Idaho [Senator Borah]. I know that ordinarily he does not hedge. I want to press him just once more to give us the value of his training as a constitutional lawyer. I repeat, assuming that Congress has created an army and has created a navy, after that is all done, then may Congress not limit the uses to which money may be put by the President as Commander in Chief in the operation and in the command of the Army and Navy?

The Senator has said that, of course, if we do not create an army and navy, then there is nothing over which the President has command. But we have an Army and a Navy. *Can not Congress limit, by legislation, under its appropriation acts, the purpose of which money may be used by the President as Commander in Chief of the Army and Navy?*

Mr. BORAH. I do not know what the Senator means by "purposes for which it may be used." Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it.

But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.

Shortly thereafter, in response to another question, Senator Borah said:

[I]f the Army is in existence, if the Navy is in existence, if it is subject to command, he may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury. What the result would be in the future as to appropriations would be another thing. I do not challenge the proposition that by refusing to appropriate, the President may be affected in the exercise of his power to command. The Congress might also refuse to appropriate for the Supreme Court for marshals, but why speculate about fanciful things?

Finally, this exchange occurred between Senator Borah and Senator Henrik Shipstead, a first-term Senator from Minnesota:

Mr. SHIPSTEAD. I agree with the Senator in that and I do not want to take away from the President the power to use the troops to protect American life and property.

Mr. BORAH. The Senator could not take it away from the President even if he wanted to do so. It is a power which belongs to him. We can not take it away from him.

[69 CONG. REC. 6759-60 (1928).]

[End Excerpt]

Senator Schumer, having focused much of my professional scholarship over the past three decades on the separation of national security constitutional powers—including writing a 1700-page Doctor of Juridical Science (SJD) dissertation on the issue—it is my very strong conclusion that the modern view (expressed during our hearing by Dean Koh and my old friend Bruce Fein) that Congress may control constitutional discretion vested in the President by the Constitution by the use of conditional appropriations threatens the heart of our Constitution. For, if Congress may usurp presidential control over troop deployments and foreign intelligence collection, there is no chance that the Supreme Court can maintain its independence from a usurping Congress. Why could not a simple majority of congressional conservatives, for example, simply include a “condition” on the next appropriations for the Supreme Court declaring that no funds in that or any other bill may be expended by the Court until the Court overturns *Roe v. Wade*? Why could not a rogue Congress (and I think that term appropriately can be applied to the congresses that

followed the Civil War and the war in Vietnam) simply eliminate judicial review altogether by including a condition denying all funds to the Court if it held *any* statute to be unconstitutional? You might call it the “Supreme Court Neutralization Act of 2006.” After all, unlike the commander in chief power, there is nothing in the Constitution that expressly vests in the judiciary the power to strike down enactments of the legislature—and, indeed, President Jefferson was outraged when Chief Justice Marshall asserted such a power in *Marbury*.

During World War II, Chairman Martin Dies of the House Committee on Un-American Activities persuaded his colleagues to insert a condition on an essential war appropriations measure declaring that no funds could be used to pay the salaries of thirty-nine named government employees he and his HUAC colleagues had concluded were Communists. The President could not afford to veto the bill without jeopardizing the success of military operations and the lives of American forces, so the proviso became law. And when it was challenged in the Supreme Court, the House sent its counsel into the Court to argue that the “power of the purse” was a plenary power that could not be reviewed, and thus the dispute was a “political question” that the Court could not properly address. The Court’s holding is instructive:

In view of the facts just set out we cannot agree . . . with counsel for Congress . . . that Section 304 is a mere appropriation measure, and that since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

We hold that the purpose of Section 304 was . . . permanently to bar them [the 39 named individuals] from government service, and that the issue of whether it is constitutional is justiciable. . . . What is involved here is a Congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, ‘. . . a limited constitution . . . (is) one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.’ Federalist Paper No. 78. . . .

We hold that Section 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed.’

[*United States v. Lovett*, 328 U.S. 303, 313-15 (1946).]

And so, with all due respect, Senator, I would submit that those in Congress who are concerned about civil liberties (which I assume includes an overwhelming majority if not all members) must protect the separation of powers established by the Constitution even when they don't approve of the way other branches are exercising the powers committed to their discretion. I certainly share the frustration of most of you over the "torture" issue, and had either of us been the Commander in Chief we might well have done things differently. But we are not. And unless and until we are entrusted with that awesome responsibility by the people, we are free to voice our dissent over the way in which our President exercises the discretionary powers entrusted by the people to his care; but an actual assault on the powers of the President is an assault upon the Constitution itself. And once Congress decides it is permissible for the legislature to "condition" appropriations to usurp presidential discretion, it creates precedents for future congressional majorities to impose their will on minorities without regard for such "inconveniences" as the Bill of Rights.

2. **In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?**

ANSWER:

Those who rely upon the approval rate data from the FISA court to draw the conclusion that it is merely a "rubber stamp" for the Intelligence Community do a grave disservice to both the court and to the late Mary Lawton, a truly extraordinary public servant who set up and ran the Office of Intelligence Policy and Review in the Department of Justice until her death in 1993. The *reason* few applications are rejected is that Mary—and the lawyers she trained who have run that office since her death—did an *outstanding* job of making certain that no application that did not clearly satisfy the statutory predicate for a warrant was ever submitted to the court.

Another distinguished public servant who has contributed to this process has been M.E. "Spike" Bowman, who set up the national security law division of the office of general counsel at the FBI and ran it until last year. An exceptionally able retired Navy JAG captain (who previously served as NSA Assistant General Counsel), Spike Bowman is dedicated to assisting the Bureau in the accomplishment of its national security missions in full compliance with the law. I would add that it is my sense that the judges who have been assigned to sit on the Foreign Intelligence Surveillance Court (and the FISA Court of Review) have as well been able and hard-working public servants.

I have been out of government for far too many years to pretend that I understand the current technologies and have a handle on all of the problems associated with using FISA

in the operation currently being criticized. From the facts as set forth by the Attorney General and Lt. Gen. Hayden, it seems clear to me that this program does not even arguably violate anyone's Fourth Amendment rights. (In a February 24 exchange with me in the pages of *The CQ Researcher*, Center for National Security Studies Director Kate Martin conceded that monitoring communications between al Qaeda and Americans "is manifestly reasonable.") And in the absence of a constitutional problem, as all of the courts have agreed, the President has independent constitutional authority to collect foreign intelligence. And as the FISA Court of Review (and President Carter's Attorney General Griffin Bell) observed, Congress could not take away that constitutional power by a mere statute like FISA.

I don't pretend to have a full explanation of why this program was conducted outside the FISA system (and, as a constitutional matter, that is irrelevant, as it is entirely the President's choice), but I strongly suspect that the need for "speed and dispatch"—an issue repeatedly discussed in the Philadelphia Convention and the state ratification conventions—was a major consideration. Keep in mind that obtaining a FISA warrant is a time-consuming process. Once an NSA professional makes a determination that a channel of communications needs to be monitored, he or she must get approval from NSA lawyers in the office of the general counsel. If they concur, then the request is submitted with accompanying paperwork to the Office of Intelligence Oversight and Review at the Justice Department. There it is staffed anew, and if approved it must then go to the desk of the Attorney General (who has other responsibilities that demand his attention). If he approves, then the National Security Adviser or another senior national security official must also sign off. By then the average file is perhaps an inch thick, and it gets in line to be considered by the FISA Court. I am told the FISA judges have been working long hours and weekends, but if the system is to be anything more than a rubber stamp they cannot simply push these applications through without reviewing them. And while all of this is taking place, our enemies are actively at work—perhaps planning the next attack on New York City.

Complaining about the delay associated with trying to conduct the Revolutionary War under the watchful eye of the Continental Congress, General George Washington wrote in May 1780:

[A] plan must be concerted to bring out the resources of the Country with vigor and decision; this I think you will agree with me cannot be effected if the measures to be taken should depend on the slow deliberations of a body so large as Congress admitting the best disposition in every member to promote the object in view.

This first-hand experience with the evils of trying to fight a war effectively while having to "phone home" regularly for permission from Congress—along with the influence of the theoretical writings of brilliant scholars like John Locke—helped the Framers of our Constitution decide, as Jay put it, to leave "the business of intelligence" to be managed by the President "as prudence might suggest." Indeed, the Continental Congress ultimately invested General Washington with almost dictatorial powers so that he could

win the war. Throughout our history since then, legislators have often been frustrated over perceived weaknesses in the President's conduct of war. (During World War I, Congress briefly flirted with the idea of creating a committee of successful businessmen to whom the efficient management of the conflict would be delegated.) But, fortunately, there have usually been wiser and more senior members around to make the point that (to again quote John Marshall in *Marbury*): "Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

I would add but another point. We know that al Qaeda operatives are trained to exploit our moral values and our legal system as a tactic of struggle in this conflict. In 2000, the British intercepted an al Qaeda training manual during a raid that expressly stated that if taken to court al Qaeda operatives are to allege that they have been "tortured." And even if Congress had the constitutional power to insert federal district court judges between our soldiers and the enemy it ought not do so. In such an event, presumably, there would be even greater concern to make certain that soldiers were not shooting at people who had not been established "beyond reasonable doubt" to be enemy combatants than to merely guard against listening to the conversations of suspected terrorists.

One reason al Qaeda has not managed to carry out a single major attack inside this country since September 11, 2001 is the hard work of the men and women who make up our military, our police, and our intelligence services. Much of their work is done in secrecy, to avoid tipping off our enemies to what we know and what we are planning. We owe them all a tremendous debt of gratitude and our support. But in the wake of Vietnam, Congress passed a number of criminal statutes designed to punish government employees who violate the "rights" of suspected enemies. FISA includes criminal and civil penalties, but it is far from the only example. And my expectation is that al Qaeda operatives are going to start bringing lawsuits against some of our best and brightest public servants—not Senators or Representatives (you are largely protected by the Speech or Debate Clause)—but soldiers and police and FBI officials at every level. Because our enemies know that they don't have to actually "win" such a suit in order to score a victory. If they can force our most effective defenders to have to focus their energies on protecting their homes and life savings from a large court judgment, and perhaps even drive them into bankruptcy from the legal costs of even a successful defense in such a lawsuit, they know the effort will reach beyond punishing the named defendant. For as other government employees watch as the most able and effective public servants are crushed by the financial burden of defending themselves in such a lawsuit, the chilling effect will be palpable. Indeed, one likely consequence will be our smarter soldiers, intelligence operatives, and public officials within the military and intelligence communities will conclude that their personal welfare would be better served by finding a new way to earn a living.

I understand that we need to deter war crimes and abuses of civil liberties. This can be done. You have already enacted a variety of legislation that can be used to hold such people accountable—perhaps including serious prison time or even capital punishment. The issue I am raising is whether it is in the public interest to empower suspected foreign

terrorists and enemy combatants—people who may be doing everything within their power to kill tens of thousands of our fellow citizens—to use our courts as a weapon to weaken or destroy the brave young men and women who go into harm’s way on our behalf. I predict that we are going to see these suits, and they are going to add yet another chilling effect to the harm done by the Church and Pike committees more than three decades ago.

Don’t misunderstand me. If there is clear evidence that an American government employee—be it a cabinet member, an Army private, or an intelligence professional at NSA or in the FBI or CIA—has knowingly and intentionally violated the rights of a suspected terrorist, I’m not against holding that person accountable through our criminal justice system. But the initiative for such proceedings ought to be in the hands of government officials and prosecutors, not foreign terrorists. And if Congress in its wisdom concludes that a suspected terrorist whose rights were violated ought to receive millions of dollars in compensation, then pass a private bill. Don’t impose the burden of paying such judgments upon individual soldiers or intelligence officers, or soon you may find that only fools will be willing to accept such positions.

- 3. Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?**

ANSWER:

I don’t have the factual or technical expertise to answer this question, but I do feel competent to address the more fundamental constitutional issue of whether Congress has the power to impose a “requirement” that the President communicate information to Congress about sensitive intelligence programs. And until about the time of the Vietnam War, all three branches of our government agreed that the answer was an emphatic “NO.”

If you will look at pages 15-28 of my prepared testimony, you will find a fair amount of historical material to reinforce this point. If you would like more examples, just let me know. These are tremendously important issues, and I would like to be as helpful to you as I can.

Your question reminds me very much of the debate I took part in a dozen years ago over a proposal to make public the aggregate budget of the Intelligence Community. I argued that this was properly a decision for the President, not Congress, to make; and noted that none of us is likely to have the expertise to answer the question with any confidence. You can find my prepared statement to the House Permanent Select Committee on Intelligence online at http://www.fas.org/irp/congress/1994_hr/turner.htm.

I was told by HPSCI staff at the time that my testimony had persuaded the Committee not to pursue the proposed legislation to compel such disclosure. (I don't know if it is true that my testimony was important, but the legislation was not pursued.) As a general principle, I would submit that we don't want our country's enemies to know any more than is absolutely necessary about our intelligence programs. And there is no way to keep the American people informed of these issues without sharing that information with our enemies, who have agents who regularly follow our media. Announcing, for example, that in a certain year there had been a major increase or decrease in the Intelligence Community budget (or in applications submitted to the FISA Court) would likely be of little interest to the average American. But it might be of tremendous interest to our enemies, because it may help confirm reports they may have received from other sources about new technologies or major cutbacks in our surveillance or counter-intelligence programs. Let's say that in a given year we decide as a cost-cutting measure to deactivate and not replace an expensive space-based surveillance system that is manpower intensive. Cuban DGI agents pass the word to Iran that Americans will no longer be spending two billion dollars each year monitoring activities at third-tier military installations in that country because we have concluded they are no longer pursuing development there of biological weapons, and then Congress issues a report revealing a two billion dollar cut in the NRO budget. That could be vitally important information that could lead to a dramatic increase in Iranian WMD programs at the sites no longer being monitored.

An example concerning FISA might also be envisioned. What if the People's Republic of China were to attempt to discreetly double the number of its intelligence agents operating within the United States through an expanded university exchange program? By tracking the activity of the FISA court and learning there had been a significant increase in applications at the time the new covert agents arrived at their new universities, Beijing might well realize that we had an agent inside the office that was running this program—leading perhaps to the agent's death or the feeding of disinformation through the agent that would undermine our intelligence capabilities.

I'm not objecting to the making of reports to Congress on the number of FISA requests that are made or approved. I'm not in a position to balance the public good that might be served by such disclosures against the potential harm of providing such information to our enemies. But as a national security lawyer who has spent decades specializing in issues of separation of constitutional powers, I can tell you that this is the *President's* decision to make. And even if Congress had the power to compel such disclosure, it would be irresponsible to exercise it over the objections of the President.

I would respectfully submit as well that—on the basis of what has been said thus far—you have mischaracterized the NSA operation in calling it a “domestic surveillance program.” To date I have seen no serious evidence that the program involves any warrantless surveillance of communications that both originate and terminate within the United States. On the contrary, both the December 16 *New York Times* article that broke the story and the presentation by General Hayden at the National Press Club on January 23, asserted that the monitored communications were all between known or suspected al

Qaeda members (or members of groups known to be associated with al Qaeda) outside this country and people within the United States. No one would seriously contend that an aircraft that either took off or landed in a foreign country was a "domestic" flight, and by the same logic it appears that all of the communications intercepted in this program were "international" in character.

Finally, Senator Schumer, I would urge you to consider carefully how actively involved you want our courts to be in overseeing the conduct of military operations -- be they attacks on enemy troop emplacements or the gathering of intelligence to locate targets for attack. Historically, the courts have recognized this to be an area where they lack the competency to second-guess the Commander in Chief and where judicial interference might well cause unforeseen and incalculable harm. Thus, on pages 27-28 of my prepared statement, I quote the Supreme Court in *United States v. Reynolds* as saying that the Court should not inquire into matters that involve "military secrets." And in *United States v. Nixon*, the 1974 Watergate executive privilege case, the Court carefully distinguished the president's qualified privilege in that case from the strong executive privilege regarding military and diplomatic secrets. In so doing, the Court quoted with approval the following language from the 1948 case of *C. & S Air Lines v. Waterman S.S. Corp.*: "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

Although there are now hundreds of people within the executive branch charged with overseeing the legality of intelligence operations, if Congress and the courts are not given access to all of the secrets there is at least some risk that civil liberties will be compromised. And that is unfortunate. But I believe that risk must be balanced against the far greater risk that the lives of our soldiers and intelligence operatives who have been sent into harm's way on our behalf will be endangered, and the success of military operations compromised, if Congress departs from the way America has fought wars for the past 230 years. If you empower our nation's enemies (and al Qaeda could easily establish a house organ and credential its operatives in this country as "journalists") to interfere with the collection of foreign intelligence information and perhaps other military operations during wartime, even if the net effect is primarily to divert the men and women we rely upon to defend our nation from their assigned duties so they can return to America and testify in court, the consequences could be disastrous. And imagine for a moment the implications for operational success and troop safety if every federal district judge is empowered to order a halt to a challenged intelligence activity or military operation until a hearing could be held -- a power to be exercised at whim without any knowledge of the broader picture.

Legitimate foreign intelligence surveillance programs are extremely unlikely to run afoul of the Fourth Amendment, as "reasonableness" is determined by balancing the privacy interest at stake against the governmental interest, and the Supreme Court observed in *Haig v. Agee* and several other cases that "It is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation." The real threat is that a president might decide to abuse his or her constitutional powers, such as

by directing the NSA to monitor all of your or Senator Kennedy's communications. In the first place, under the modern system the possibility that such an order could be carried out without a single person blowing the whistle -- either to Congress or the media -- is infinitesimal. And if we really had a rogue president, monitoring conversations might be the least of our concerns, as he might equally abuse his power over our armed forces to order the use of lethal force against his political enemies.

The nature of war is that success requires secrecy, unity of design, and speed and dispatch. None of these attributes are compatible with a process by which the Commander in Chief must share his operational plans and get approval from either Congress or the courts. Because we don't require proof beyond reasonable doubt before targets may be engaged in the battlefield, it is probably true that collateral damage increases. And in addition to the deaths of totally innocent noncombatants-either because they happened to be in the wrong place at the wrong time, or because bad intelligence or human error led to the bombs falling on the wrong target-there may well be "collateral damage" in the form of human rights violations, with NSA inadvertently monitoring a totally innocent communication between Americans by mistake. We have minimization procedures to deal with such situations, and, in the big picture, accidentally intercepting e-mail or phone conversations between totally innocent Americans does not approach some of the other inevitable tragic human consequences of fighting a war. And for Congress to conclude that the privacy interests of private citizens is the supreme value in wartime, and is to be protected irrespective of the costs involved-such as the Americans who might die in the next catastrophic terrorist attack in New York City, and the lives of our soldiers and intelligence operatives abroad--would in my view constitute both a violation of the oath of office each member takes to support the Constitution and a horribly shortsighted policy blunder.

Senator Edward M. Kennedy
Questions for the Record
Hearing on
“Wartime Executive Power and the NSA’s Surveillance Authority II”

Questions for James Woolsey

- How are the actions taken by the President to authorize this program consistent with our system of checks and balances in government?

A: I believe that the President has the authority under Article II of the Constitution to intercept enemy communications in wartime. I believe that a legally adequate check would occur with regular briefings of the eight members of the House and Senate designated for some covert action briefings, but that regular briefings of the subcommittee of each of the two Intelligence Committees would be a reasonable alternative.

- Should there be both Congressional oversight and judicial review over domestic surveillance programs?

A: I do not believe that judicial review, in the sense of FISA court involvement, is reasonable in this case because, as explained in my written testimony, these intercepts do not lend themselves to case-by-case determination in which evidence about each individual is weighed. Of course at some point it may come to be the case that the Supreme Court would be asked to rule on the constitutionality of the intercept program and in this sense judicial review would occur.

- What standard should be met to demonstrate a link to terrorism before the National Security Agency should be able to initiate surveillance under this program?

A: I would leave that decision to discussions between those members of the House and Senate who are briefed on the program and the executive branch.

- Would Congress would be remiss if it failed to fully understand the details of the program before acting on any legislation? What would a complete investigation entail?

A: If all of Congress “fully understand[s] the details of the program”, particularly after a “complete investigation”, the 535 members plus the number of staff who would be fully informed would constitute a number of individuals that is inconsistent with the program’s being highly classified. I believe that a high degree of classification is necessary for the program to be successful. Accordingly I believe that only the eight members of the House and Senate or the Intelligence Committee subcommittees described above should be briefed on the program.

**Questions for Professors from
Senator Charles E. Schumer**

1. Professor Gormley said at the hearing that he believes it to be crucially important for aggrieved US citizens to be able to challenge the NSA program in court. Specifically, he said:

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a "terrorist" under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

With such a statutory change in mind, do you believe that allowing the Supreme Court the opportunity to rule on this program would be a good idea as it would settle the controversy in a definitive way? Can you think of any legitimate reason why the Administration should not welcome such Supreme Court review, especially because the President is so certain that the program is legal and Constitutional?

A: I would not support a statute of the sort proposed by Professor Gormley. I do believe that on a matter of this importance some sort of Supreme Court review of the President's authority to conduct this surveillance is reasonable.

2. In the history of the FISA Court, more than 19,000 applications for warrants have been made, and only five have ever been denied. Do you think, therefore, the administration had anything to fear from asking the FISA court for orders to conduct the surveillance they were doing?

A: FISA Court applications are tailored, and sometimes amended, to ensure that they will pass review, so I don't believe these numbers accurately reflect the overall influence of the Court on surveillance requests within its jurisdiction. As explained in my written testimony, I do not believe the types of intercepts at issue in these hearings may be constitutionally required to be submitted to the FISA Court.

3. Under FISA, the administration must report to Congress every year on the number of FISA orders they have requested, and the number that have been granted or denied. Do you think that reporting requirement endangers national security? Would a similar requirement for the NSA domestic surveillance program impose different security concerns?

A: As explained in my written testimony, although I believe that FISA is an appropriate mechanism for reviewing individual case-by-case surveillance requests regarding individuals suspected of espionage I believe that a similar requirement for the NSA surveillance at issue in these hearings would be wholly impractical and that such a requirement may not constitutionally be placed by Congress on the executive in light of the executive's powers under Article II.

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March 1, 2006

The Honorable Arlen Specter, Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter:

This is to request that the Association's recently adopted policy and accompanying explanatory report on domestic electronic surveillance, which ABA President Michael S. Greco sent to you on February 13, be included in the record of the hearing titled "Wartime Executive Power and the NSA's Surveillance Authority," which was conducted by your committee on February 28. The resolution and report are attached for ready reference.

We hope that you and your committee members will have an opportunity to review our resolution and report in the course of your deliberations over the complex and critical legal issues raised by the recent revelations about the National Security Agency's domestic surveillance program.

The Association welcomes the opportunity to discuss these issues with you at any time.

Sincerely,

Denise A. Cardman

cc. Members of the Committee
Michael S. Greco

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 13, 2006

RESOLVED, that the American Bar Association calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees;

FURTHER RESOLVED, that the American Bar Association opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization;

FURTHER RESOLVED, that the American Bar Association urges the Congress to affirm that the Authorization for Use of Military Force of September 18, 2001, Pub.L. No. 107-40, 115 Stat. 224 § 2(a) (AUMF), did not provide a statutory exception to the FISA requirements, and that any such exception can be authorized only through affirmative and explicit congressional action;

FURTHER RESOLVED, that the American Bar Association urges the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies; and (e) whether this information was used in legal proceedings against any U.S. citizen.

FURTHER RESOLVED, that the American Bar Association urges the Congress to ensure that such proceedings are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information; and

FURTHER RESOLVED, that the American Bar Association urges the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the President to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

REPORT

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . ."

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

A. Introduction

On December 16, 2005, the New York Times reported that the President had "secretly authorized the National Security Agency (NSA) to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials."¹

The New York Times revelation has created a major national controversy. The NSA program has drawn severe critics and staunch defenders; dozens of newspaper editorials and op-ed pieces have published, it has been a "hot topic" on hundreds of blogs, and both Democrat and Republican members of Congress have called for hearings.²

A number of terrorism defendants have filed legal challenges to their previous pleas of guilty or convictions,³ and a lawsuit has been filed in Detroit against the NSA by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Lawyers (NACDL), the Council on American Islamic Relations (CAIR) and named individual plaintiffs -- including several lawyers -- seeking declaratory and injunctive relief demanding the NSA cease and desist warrantless interception of Americans' electronic and telephone conversations because such interceptions "seriously compromise the First

¹ See James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," New York Times, December 16, 2005.

² The first of what is expected to be several Senate Judiciary Committee hearings, with Attorney General Alberto Gonzales as the sole witness for a full day, was held on February 6, 2006, and the Senate Intelligence Committee will soon follow with its own hearings on the NSA program.

³ See Jerry Markon, "Spying Cited in Bid To Erase Terror Plea," Washington Post February 4, 2006.

Amendment's guarantees of the freedoms of speech, of the press, and of association, and the Fourth Amendment's prohibition on warrantless searches and seizures."⁴

In light of the importance of these issues, ABA President Michael S. Greco appointed a Task Force on Domestic Surveillance in the Fight Against Terrorism⁵ to "examine the legal issues surrounding federal government surveillance conducted inside the United States relating to the investigation of potential terrorist activities" and bring a preliminary report with recommendations to the ABA House of Delegates at the February 2006 Midyear Meeting. In his appointment letters, President Greco stated:

Recent revelations about the National Security Agency's domestic surveillance program remind us that we must continually and vigilantly protect our Constitution and defend the rule of law.

While the Task Force was operating under intense time pressures, it benefitted from the fact that substantial analyses of the legal issues had already been undertaken by a wide and diverse variety of sources. For example, the Department of Justice issued a 42 page "white paper," an Assistant Attorney General sent a strong letter responding to congressional inquiries, and the Attorney General delivered a major address on the issue at the Georgetown Law Center. Each, as expected, vigorously defended what the Administration is calling a "terrorist surveillance program" (as opposed to "domestic surveillance" or "warrantless eavesdropping"), as being entirely lawful and within the President's constitutional and statutory authority.⁶

⁴ See NACDL News release, January 19, 2006, "When the Government Becomes a Lawbreaker, Part 2," available at: <http://www.nacdl.org/public.nsf/newsreleases/2006mn001?OpenDocument>

⁵ The Task Force is chaired by Neal R. Sonnett, and includes Mark D. Agrast, Deborah Enix-Ross, Stephen A. Saltzburg, Hon. William S. Sessions, James R. Silkenat, and Suzanne Spaulding. Dean Harold Hongju Koh and Dean Elizabeth Rindskopf Parker serve as Special Advisers, and Alan J. Rothstein was named Liaison to the Task Force from the New York City Bar, whose members have contributed substantially to this Report. A short biography of each appears in an Appendix to this Report.

⁶ See, e.g., Letter to House and Senate Intelligence Committee Leaders from Assistant Attorney General William E. Moschella on Legal Authority for NSA Surveillance, December 22, 2005, available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf>; DOJ Legal Authorities Supporting the Activities of the National Security Agency Described by the President, January 19, 2006, available at www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf; Prepared Remarks for Attorney

On the other side of the issue, a variety of constitutional law scholars and former government officials have released letters and memoranda decrying the NSA program as a violation of FISA, and the Constitution,⁷ and several Web sites have collected documents related to the NSA domestic surveillance issues.⁸

The bipartisan Congressional Research Service issued three reports: a report on the legislative history of the AUMF issued on January 4, 2006; a lengthy report issued on January 5, 2006, analyzing the NSA program, and another report on January 18, 2006, regarding the statutory reporting procedures required in intelligence matters.⁹

The Task Force unanimously agreed that the President should abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees. There was also consensus that any electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes must comply with the provisions of FISA and that, if the President believes that FISA is inadequate to safeguard national security, he should seek appropriate amendments or new legislation rather than acting without explicit statutory authorization.

General Alberto R. Gonzales at the Georgetown University Law Center, January 24, 2006, available at: http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html

⁷ Letter to Congress from 14 Constitutional Law Professors and Former Government Officials, January 9, 2006, available at: <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf>.

⁸ See, e.g., Findlaw at: http://news.findlaw.com/legalnews/documents/archive_n.html#nsa; Bill of Rights Defense Committee, at: <http://borde.org/threats/spying.php>; Federation of American Scientists, at: <http://www.fas.org/irp/agency/doj/fisa/>; Electronic Privacy Information Center, at: <http://www.epic.org/privacy/terrorism/fisa/>.

⁹ See "Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History," Congressional Research Service January 4, 2006, at: <http://www.fas.org/spp/crs/natsec/RS22357.pdf>; "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," Congressional Research Service, January 5, 2006, at: <http://www.fas.org/spp/crs/intel/m010506.pdf>; "Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions," Congressional Research Service, January 18, 2006, at: <http://news.findlaw.com/hdocs/docs/nsa/crs11806rpt.pdf>.

The Recommendation also urges the Congress to conduct a thorough, comprehensive investigation of the issues surrounding the NSA domestic surveillance program, with proceedings that are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information.

The Task Force also calls for the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the president to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

B. Electronic Surveillance for Foreign Intelligence Purposes Conducted Within the United States Should Comply with FISA

The Administration concedes that its secret NSA electronic surveillance program entails “electronic surveillance” of “United States persons” as those terms are defined by the Foreign Intelligence Surveillance Act (“FISA”). The Administration maintains, however, that Congress, in enacting the Authorization for the Use of Military Force on September 18, 2001 (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224, authorized the President to conduct such foreign intelligence electronic surveillance without obtaining the court orders required by FISA.

As we explain, FISA is a detailed and comprehensive statute that was enacted to strike a balance between the recognized need to conduct foreign intelligence surveillance and the need to protect fundamental civil liberties. FISA makes specific provision for exceptions to its requirements in emergencies and in the event of war. Moreover, following 9/11, FISA was amended by the Patriot Act, at the behest of the President, to provide the greater flexibility the administration argued was needed to address the enhanced threat of international terrorism so tragically dramatized by the 9/11 attacks. The Patriot Act amendments, however, left intact FISA’s explicit provisions making FISA procedures the exclusive means for conducting electronic surveillance for foreign intelligence purposes in the United States.

There is nothing in either the language of the AUMF or its legislative history to justify the assertion that the general grant of authority to use “all necessary and appropriate force” against Al Qaeda and those affiliated with or supporting it, was intended to amend, repeal or nullify the very specific and comprehensive terms of FISA. Nor, under our system of checks and balances, is there any serious constitutional issue concerning Congress’ power to regulate electronic surveillance for foreign intelligence purposes where it intercepts the communications of persons within the United States, to

assure that the Nation has the necessary means to combat terrorism while also assuring that those means are not abused to unjustifiably infringe civil liberties, through invasions of privacy that not only violate the Fourth Amendment but chill the freedom of speech and association protected by the First Amendment.

1. The FISA Statutory Framework

In 1967, the Supreme Court held for the first time that as a general matter wiretapping was subject to the Fourth Amendment's protections against unreasonable searches and its requirement of a warrant in most circumstances. *Katz v. United States*, 389 U.S. 347 (1967). The Court left open, however, the question of whether the Fourth Amendment applied to wiretapping conducted to protect national security. *Id.* at 358.

Subsequently, in 1972, the Court held that wiretapping conducted for domestic security purposes was subject to the Fourth Amendment and required a warrant. *United States v. United States District Court*, 407 U.S. 297, 313-14, 317, 319-20 (1972). It left open the question, however, whether electronic surveillance for foreign intelligence purposes was subject to the Fourth Amendment's requirement of a warrant issued by a court authorizing the surveillance. *Id.* at 308.

There followed a period in which lower courts differed on this question. During this same period, following the Watergate scandal and revelations of abuses of wiretapping during the Nixon administration, and with the support of both Presidents Ford and Carter, a Senate Select Committee, headed by Senator Frank Church (the "Church Committee"), undertook a comprehensive investigation of government wiretapping and other surveillance procedures conducted by the Executive branch without a warrant.

The Church Committee exposed substantial abuses of this purported authority. *See* S. Rep. No. 94-755 (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) 94th Cong., 2nd Sess., Book II at 5-20 (1976). It therefore recommended congressional legislation to provide the government with needed authority to conduct surveillance to protect national security but to protect against the abuses of that authority and the serious infringements of civil liberties disclosed by the investigation. *Id.* at 296-341. FISA was enacted to carry out these recommendations. Pub. L. 95-511, 92 Stat. 1783 (1978).

The bill, as enacted, had the full support of President Carter and the Executive branch. *See* S. Rep. No. 95-604 (Judiciary Committee) 95th Cong., 1st Sess., Part 1 at 4 (1977). President Carter's Attorney General, Griffin Bell, testifying in support of the bill, emphasized:

In my view this bill . . . sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions . . . will have the affirmation of Congress that their activities are proper and necessary.

Id. at 4. *See also* S. Rep. No. 95-701 (Intelligence Committee), 95th Cong., 2nd Sess., 6-7 (1978).

When President Carter signed FISA into law, he said in his signing statement:

The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others involved in intelligence collection that their acts are authorized by statute and, if a U.S. person's communications are concerned, by a court order. And it will protect the privacy of the American people.

In short, the act helps to solidify the relationship of trust between the American people and their Government. It provides a basis for the trust of the American people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that intelligence relating to national security can be securely required, while permitting review by the courts and Congress to safeguard the rights of Americans and others.

See Statement on Signing S.1566 Into Law, October 25, 1978, available at: <http://www.cnss.org/Carter.pdf>.

FISA applies to "electronic surveillance" which, among other things, would include the electronic acquisition, within the United States, of the content of communications to or from the United States or of communications of a "United States person" located in the United States. 50 U.S.C. § 1801 (f). A "United States person" includes, among others, U.S. citizens or permanent resident aliens. The Administration has never questioned, and in

fact, has conceded, that the NSA surveillance program meets FISA's definition of "electronic surveillance."¹⁰

With certain exceptions, FISA requires that to conduct "electronic surveillance" the government must obtain a court order from a special, secret court created by FISA known as the FISA court. To obtain such an order, a federal officer must certify that "a significant purpose" of the surveillance is to obtain foreign intelligence information and provide a statement describing, among other things, the basis for the belief that the information sought is foreign intelligence information. 50 U.S.C. § 1804 (a)(4) and (7). The court will issue an order authorizing the surveillance upon making a series of findings, including that there is probable cause to believe that a target of the electronic surveillance is a foreign power or agent of a foreign power and that the surveillance is directed at facilities used, or about to be used, by a foreign power or agent of a foreign power. *Id.* at § 1805 (a) and (b). A "foreign power" includes international terrorist groups and an "agent of a foreign power" includes a person other than a United States person engaged in international terrorism. *Id.* at §1801(a)(4) and (b)(1)(C).

¹⁰ Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at: www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

FISA provides a number of exceptions, two of which are of particular significance. First, it permits electronic surveillance without first obtaining a court order, in situations certified by the Attorney General as an emergency, provided that an order is sought within 72 hours of the authorization of the surveillance by the Attorney General. *Id.* at §1805(f). Second, recognizing the exigencies created by war, the President through the Attorney General, may authorize electronic surveillance without a court order for a period of 15 days after a declaration of war by Congress. *Id.* at § 1811.

This provision was intended to provide time to enable Congress to amend FISA if it was determined necessary to do so to meet special war-time needs. H.R. Conf. Rep. No. 95-1720, 95th Cong., 2nd Sess., 34 (1978). Notably, Congress rejected a request to make this exception extend for one year after a declaration of war, indicating that 15 days should be sufficient to make any necessary amendments. *Id.*

Congress made explicit its intention that FISA is the exclusive means by which electronic surveillance for foreign intelligence purposes may be conducted. 18 U.S.C. §2511 provides in part: “[T]he Foreign Intelligence Surveillance Act of 1978 [50 U.S.C. § 1801 *et seq.*] shall be the exclusive means by which electronic surveillance, as defined in Section 101 of such Act [50 U.S.C. §1801] . . . may be conducted.” FISA also makes it a criminal offense “to engage in electronic surveillance under color of law except as authorized by statute.” 50 U.S.C. § 1809 (a).¹¹

Following the attacks of September 11, 2001, the Administration asked Congress to enact legislation to enhance its ability to protect the nation against such attacks by Al Qaeda and other international terrorists. Congress responded promptly to that request, enacting the USA PATRIOT Act in October and the Intelligence Authorization Act in December.

Those laws amended FISA in a number of respects, including expanding the period for emergency electronic surveillance from 24 hours to 72 hours and reducing the requirement that the government certify that the foreign intelligence gathering was a “primary purpose” of the electronic surveillance to a showing only that it was “a significant purpose.” *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, §

¹¹ Two separate statutes regulate electronic surveillance: FISA governs electronic surveillance for foreign intelligence purposes; Title III of the Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*, 2701 *et seq.*, and 3121 *et seq.*, governs domestic electronic surveillance. 18 U.S.C. § 2511 expressly makes these two statutes the exclusive means for conducting electronic surveillance for foreign intelligence or domestic purposes.

314(a)(2)(B), 115 Stat. 1394 (Dec. 28, 2001); USA PATRIOT Act, Pub. L. 107-56, § 218, 115 Stat. 272 (Oct. 26, 2001).¹²

In sum, FISA is a comprehensive and exclusive procedure for conducting foreign intelligence electronic surveillance in the United States. It anticipates emergencies and the exigencies of war, and it was specifically amended at the Administration's request to make it more responsive to the need to combat international terrorism following the attacks of September 11, 2001. Nevertheless, the Administration concedes that NSA conducted electronic surveillance for a period of four years without complying with FISA's procedures.

2. The AUMF Does Not Create an Exception to FISA

The argument that Congress implicitly authorized the NSA program when it enacted the Authorization for Use of Military Force (AUMF) against al Qaeda, Pub. L. No. 107-40, 115 Stat. 224 (September 18, 2001), is unpersuasive. There is nothing in the text or the history of the AUMF to suggest that Congress intended to permit the Executive to engage in any and all warrantless electronic surveillance in the United States without judicial approval or a showing of probable cause as required by FISA.

The argument put forward by the Executive assumes that Congress intended to remove all restraint on electronic surveillance currently mandated by FISA or Title III, at least with regard to the fight against terrorism. The history of FISA demonstrates a congressional commitment to regulate the use of electronic surveillance and to assure that there is a judicial check on Executive power. Nothing in the AUMF suggests that Congress intended to unleash the Executive to act without judicial supervision and contrary to standards set by Congress in conformity with the Constitution.

The Executive's argument rests on an implicit, unstated inference from the AUMF. Such an inference is directly contrary to the explicit text of FISA. The Supreme Court has stated that specific and carefully drawn statutes prevail over general statutes where there is

¹² Indeed, Congress has amended FISA a total of five times since 1999 in response to requests from the Department of Justice. In addition to those set forth above, FISA amendments related to: court orders for pen registers, trap and trace devices, and certain business records of suspected agents of a foreign power, P.L. 105-272, §§ 601, 602 (1999); definition of "agent of a foreign power" to include people working for a foreign government who intentionally enter the United States with a fake ID or who obtain a fake ID while inside the US, P.L. 106-120, § 601 (2000); which federal officials could authorize applications to the FISC for electronic surveillance and physical searches, P.L. 106-567, §§ 602, 603 (2001); eliminated requirement that non U.S. persons be acting on behalf of a foreign power in order to be targeted, P.L. 108-458, § 6001 (2004).

a conflict. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987)).

FISA contains a section entitled “Authorization during time of war,” which provides that “[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information *for a period not to exceed fifteen calendar days following a declaration of war by the Congress.*” 50 U.S.C. § 1811 (emphasis added). One need not parse the language to determine Congressional intent, because the plain meaning of the language is indisputable: i.e., When Congress declares war, the President may permit the Attorney General to authorize electronic surveillance without a court order under FISA for 15 days. Thus, Congress limited the Executive power to engage in electronic surveillance without judicial supervision to 15 days following a formal declaration of war. It is inconceivable that the AUMF, which is not a formal declaration of war, could be fairly read to give the President more power, basically unlimited, than he would have in a declared war.

The legislative history of § 1811 demonstrates that Congress intended that the Executive seek legislation if it concluded that there was a need for electronic surveillance not authorized by FISA for more than 15 days: “The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. . . . The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter.” H.R. Conf. Rep. No. 95-1720, at 34 (1978).¹³

The Executive’s argument distorts FISA and makes meaningless 18 U.S.C. § 2511(2)(f), the provision that identifies FISA and specific criminal code provisions as “the *exclusive* means by which electronic surveillance . . . may be conducted” because the argument assumes that the Executive may treat any congressional act as authorizing an exception from Title III and FISA. Were the argument accepted, the Executive could justify repeal or suspension of FISA and Title III restrictions in statutes appropriating money for federal agencies or virtually any other legislation that, in the sole judgment of the Executive, would be rendered more effective by greater electronic surveillance.

¹³ The House version of the bill would have authorized the President to engage in warrantless electronic surveillance for the first year of a war, but the Conference Committee rejected so long a period of judicially unchecked eavesdropping as unnecessary.

The argument that the AUMF implicitly creates an exception to FISA and is therefore consistent with § 2511(2)(f) strains credulity. It rests on the notion that Congress, although it never mentioned electronic surveillance or FISA in the AUMF, nevertheless implicitly intended to create an undefined, unrestrained exception to FISA and give the Executive unlimited power to engage in unlimited electronic surveillance with no judicial review.

In an area as heavily regulated and as important to basic notions of privacy as electronic surveillance, it is inconceivable that Congress would have ceded greater unfettered power and discretion to the Executive in dealing with al Qaeda than it would in a declared war.

Moreover, the Attorney General has essentially conceded that no reasonable person would conclude that Congress intended to cede such power to the Executive: “We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.” See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>. In light of this concession, the claim that Congress granted the Executive this authority under the AUMF is not credible.

The administration has argued that its position is supported by the Supreme Court’s opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but this is also unpersuasive. A plurality of the Court in *Hamdi* held that the AUMF authorized military detention of enemy combatants captured on the battlefield abroad as a “fundamental incident of waging war.” *Id.* at 519. When Congress authorizes the use of force, it clearly contemplates that the enemy will be killed or captured. There can be little doubt that those who are captured on the battle field may be held while the battle is fought. Typically, those captured are deemed prisoners of war. But, in *Hamdi*, the question was whether a captured individual could be held as an enemy combatant. The plurality expressly limited its affirmative answer to individuals who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516 (emphasis added).

It is not a fair reading of the *Hamdi* case to suggest that AUMF repeals all limitations on Executive power previously contained in any federal statute as long as the Executive in its sole discretion deems additional power useful in the general fight against terror.

The Hamdi plurality agreed “that indefinite detention for the purpose of interrogation,” even of conceded enemy combatants, “is not authorized” by the AUMF. *Id.* at 2641. If Congress did not provide the Executive with the right to detain enemy combatants for intelligence purposes, it is inconceivable that Congress intended to permit the indefinite eavesdropping and invasion of privacy of American citizens who are neither enemy combatants nor suspected of criminal activity.

3. The Government’s Interpretation of the AUMF Is Not Required to Avoid a Constitutional Question

The Administration mistakenly argues that its construction of the AUMF is required to avoid a serious constitutional question. First, the canon of avoidance only comes into play if there is an ambiguity in a statute. See *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001).

But neither FISA nor the AUMF are ambiguous on the question of electronic surveillance. FISA explicitly makes its procedures the exclusive means for conducting electronic surveillance. Meanwhile, the AUMF contains no reference to electronic surveillance, and as indicated above, nothing in the history or circumstances suggests that the AUMF was intended to authorize electronic surveillance.

In any event, the constitutional question must be serious and substantial. The Administration claims that unless its construction of the AUMF is accepted, a serious constitutional question would be raised as to whether FISA unconstitutionally encroaches on inherent powers of the President as Commander-in-Chief. That question is neither serious nor substantial. Even assuming that, after FISA, the President retains inherent authority to conduct electronic surveillance without a warrant to acquire foreign intelligence – a question that has never been decided – that does not mean that Congress lacks authority to regulate the exercise of that authority to prevent its abuse and unnecessary intrusions on civil liberties.

It should be noted that both President Ford and President Carter supported legislation to regulate the conduct of foreign intelligence surveillance, and as noted, FISA was enacted with the full support of President Carter. As the Senate report accompanying the bill that became FISA noted:

The basis for this legislation is the understanding – concurred in by the Attorney General – that even if the President has an “inherent” constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.

S. Rep. (Judiciary Committee) No. 95-604, 95th Cong., 1st Sess., Part 1 at 16 (1977). As Congress observed, this analysis was “supported by two successive Attorneys General.” H.R. Rep. No. 95-1283, 95th Cong., 2nd Sess., Part 1 at 24 (1978).

The analysis is plainly correct. Whatever inherent authority the President may have to conduct foreign intelligence surveillance, Congress also has the authority under Article I to regulate the exercise of that authority. *See* Article I, Section 8, Cl. 1, 14 (power to provide for the common defense), Article I, Section 8, Cl. 3 (power to regulate commerce).

Here, through FISA, Congress has exercised its Article I powers to regulate electronic surveillance for foreign intelligence purposes in great detail and made it the exclusive means for conducting such surveillance. The NSA domestic surveillance program is in direct conflict with this detailed statutory scheme. Under the criteria set forth in Justice Jackson’s famous concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, in these circumstances the President’s inherent power is at its “lowest ebb.” 343 U.S. 579, 637 (1952). To sustain the President’s power here a court would have to find that such power was “beyond control by Congress.” *Id.* at 640. In other words, the President’s authority must be not just inherent but exclusive.

Such a conclusion would be at odds with the principles of separation of powers and our cherished system of checks and balances and faces a particularly high hurdle where, as here, individual liberties are at stake. As Justice O’Connor observed in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004):

Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Id. (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”).

The government argues that prior presidents have exercised their inherent authority to conduct electronic surveillance without a warrant for foreign intelligence purposes and that courts have consistently upheld the exercise of that power.

But FISA was enacted precisely because, prior to FISA, prior presidents had repeatedly abused that power. *See* S. Rep. (Judiciary Committee) No. 95-604, 95th Cong., 1st Sess., Part 1 at 7-8 (1977) (“[The Church Committee] has concluded that every

President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority. While the number of illegal or improper national security taps and bugs conducted during the Nixon administration may have exceeded those in previous administrations, the surveillances were regrettably by no means atypical . . . [and were] ‘often conducted by illegal or improper means’ . . .”).

In enacting FISA, Congress was concerned not only with violations of the Fourth Amendment, but the chilling effect that abuses of electronic surveillance had on free speech and association. As the Senate Report accompanying FISA explained:

Also formidable – although incalculable – is the “chilling effect” which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. . . . The exercise of political freedom depends in large measure on citizens’ understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

Id. at 8.

Moreover, the cases upholding the President’s inherent authority all preceded the enactment of FISA. No court has ever held that Congress was without power to regulate electronic surveillance for foreign intelligence purposes to protect against the abuse of such surveillance. The government incorrectly relies on a statement in *In re Sealed Case*, 310 F.3d 717 (FISA Court of Review 2002), that: “We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence] and, assuming that is so, FISA could not encroach on the President’s constitutional power.” *Id.* at 742. But this statement is dictum, made without any analysis, in a case which raised no issue about the President’s inherent authority or the constitutional power of Congress to regulate the President’s exercise of that authority under FISA.

To the contrary, the issue in *Sealed Case* was whether FISA’s criteria for the issuance of court orders authorizing electronic surveillance satisfied the requirements of the Fourth Amendment. The Court of Review held that they did. Moreover, the cases cited by the Court of Review for the proposition that the President had inherent authority to conduct warrantless surveillance all addressed surveillance predating the enactment of FISA and hence, have no bearing on whether any inherent authority the President had survives FISA, i.e., whether the President has not just inherent but exclusive authority to order warrantless surveillance of Americans.

Finally, if there is any serious constitutional question, it is raised by the government's construction of the AUMF. It would give the President unfettered discretion, subject neither to regulation by Congress nor scrutiny by a court, to conduct warrantless electronic surveillance of Americans, based on the President's (or his designees') unilateral determination that there is reason to believe that one of the parties to the communication is a member of Al Qaeda or of groups affiliated with or supporting Al Qaeda.

While the Supreme Court has never addressed the question of whether such warrantless electronic surveillance would meet the requirements of the Fourth Amendment, and a conclusive assessment of that question would require a careful analysis of the facts, which the secrecy surrounding this program precludes. The government maintains that such surveillance fits within a "special needs" exception to the Fourth Amendment's requirement of a warrant or other court order authorizing a search and that given the post 9/11 circumstances its electronic surveillance without a court order was not an "unreasonable search" within the meaning of the Fourth Amendment. But the "special needs" exception is a narrow doctrine. The doctrine has usually been invoked to protect law enforcement officers from concealed weapons, prevent the destruction of physical evidence like illegal drugs, or permit testing for drugs or alcohol to regulate the safety of schools, workplaces or transportation. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709 (1987); *New York v. Burger*, 482 U.S. 691 (1987), *Griffin v. Wisconsin*, 483 U.S. 868 (1987), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). None of these cases involved government acquisition of the content of private communications, where the intrusion into privacy has a chilling effect on freedom of speech and association. It was for that very reason that the Supreme Court rejected government claims that it had a special need for warrantless electronic surveillance of communications for domestic security purposes. As the Court explained:

National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime 'Historically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.' [Citation omitted.] History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

United States v. United States District Court, 407 U.S. 297, 313-314 (1972). These considerations also apply to electronic surveillance of persons in the United States for foreign intelligence purposes.

Thus, even if there were a "special needs" exception for warrantless surveillance of Americans, it is likely that a court would construe it extremely narrowly, subject to the Fourth amendment, and available only in extraordinary circumstances unforeseen by Congress and in which there is no time to seek amendment to the law. It is highly unlikely that a court would uphold the exercise of such authority for four years, let alone indefinitely. The government has not shown that resort to FISA's procedures is impractical, nor has it provided any explanation as to why in the more than four years since 9/11 it has not asked Congress for any amendments to FISA – beyond those sought and obtained under the USA PATRIOT Act – to address any alleged inadequacy of FISA.

The government's argument that the President and the NSA have limited the program to circumstances where they have "reason to believe" that at least one party to the communication is a member of Al Qaeda or organizations affiliated with or supporting Al Qaeda does not provide reasonable protections against unjustified invasions of the privacy of innocent persons or a safeguard against abuse from a long-term program. The "very heart" of the Fourth Amendment requirement is that the judgment of whether the evidence justifies invasion of a citizen's privacy be made by a "neutral and detached magistrate." *United States v. United States District Court*, 407 U.S. at 316 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971)). As the Court there explained:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . The Fourth Amendment contemplates a prior judicial judgment . . . , not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

Id. at 317 (internal citations omitted).

Thus, warrantless electronic surveillance in the United States for foreign intelligence purposes would raise very serious and substantial Fourth Amendment questions.

C. The Need for Additional Congressional Investigation and Oversight

There are important questions about the nature, scope, and operation of the NSA domestic surveillance program that remain unanswered and which have not been examined by the Congress. For example, it has been reported that serious dissension existed within the administration over the expansive authority granted to the NSA, that then-Deputy Attorney General James Comey, acting in the absence of Attorney General John Ashcroft who was in the hospital with a serious pancreatic condition, once refused to reauthorize the NSA program, causing a high level delegation of White House Counsel Gonzales and chief of staff Andy Card to visit Ashcroft in the hospital to appeal Comey's decision.¹⁴

The questions about the scope of the NSA's electronic surveillance are highlighted by conflicting statements made by government officials. While the Administration now argues that only calls by suspected terrorists emanating from outside the United States have been monitored, the San Francisco Chronicle reported on December 22, 2005 that:

White House Press Secretary Scott McClellan said National Security Agency surveillance ordered by the president after the Sept. 11 attacks four years ago might have inadvertently picked up innocent conversations conducted entirely within the United States by Americans or foreigners.

That would violate what McClellan called Bush's requirement that one party to the communication had to be outside the United States and raised the possibility that NSA surveillance of terror suspects had morphed into surreptitious monitoring of some communications strictly within the United States without court approval.

In Congress, Rep. Peter Hoekstra, R-Mich., chairman of the House Intelligence Committee, told a news conference that White House officials had acknowledged during briefings for congressional leaders that U.S.-to-U.S. communications might be inadvertently intercepted during NSA's worldwide quest for al Qaeda-related conversations between terror suspects in the United States and overseas.

See Stewart M. Powell, "White House acknowledges some taps wholly domestic," Hearst Newspapers, December 22, 2005, at: <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/12/22/MNGOHGBM9N1.DTL>

¹⁴ See Daniel Klaidman, Stuart Taylor Jr. and Evan Thomas, "Palace Revolt," Newsweek, February 6, 2006, at: <http://www.msnbc.msn.com/id/11079547/site/newsweek>.

Moreover, public statements made well after the NSA program was underway raise issues that should be examined by Congress. When James A. Baker, the Justice Department's counsel for intelligence policy, testified before the Senate Select Committee on Intelligence on July 31, 2002, he stated that the Administration did not support a proposal by Senator Mike DeWine (R-OH) to lower the legal standard for electronic surveillance "because the proposed change raises both significant legal and practical issues," might not "pass constitutional muster," and "could potentially put at risk ongoing investigations and prosecutions." He added:

We have been aggressive in seeking FISA warrants and, thanks to Congress's passage of the USA PATRIOT Act, we have been able to use our expanded FISA tools more effectively to combat terrorist activities. It may not be the case that the probable cause standard has caused any difficulties in our ability to seek the FISA warrants we require, and we will need to engage in a significant review to determine the effect a change in the standard would have on our ongoing operations. If the current standard has not posed an obstacle, then there may be little to gain from the lower standard and, as I previously stated, perhaps much to lose.

See Dan Eggen, "White House Dismissed '02 Surveillance Proposal," Washington Post, January 26, 2006. Interestingly, these paragraphs no longer appear in the official version of Baker's testimony.¹⁵ Senator Russell Feingold recently accused Attorney General Gonzales of "misleading the Senate" during his confirmation hearings in his answer to a question about whether the president could authorize warrantless wiretapping of U.S. citizens. As the Washington Post reported:

Gonzales said that it was impossible to answer such a hypothetical question but that it was "not the policy or the agenda of this president" to authorize actions that conflict with existing law. He added that he would hope to alert Congress if the president ever chose to authorize warrantless surveillance, according to a transcript of the hearing.

See Carol D. Leonnig, "Gonzales Is Challenged on Wiretaps," Washington Post, January 31, 2006, at: <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001318.htm>

¹⁵ See Chris Anderson, "NSA, FISA, and the 'Missing 3 Paragraphs,'" IndyMedia, January 27, 2006, at: <http://nyc.indymedia.org/en/2006/01/63921.html>.

Even the President has come under attack for potentially misleading statements. In a speech in Buffalo, NY, on April 20, 2004 – more than two years after the NSA program had been authorized – President Bush stated:

Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so.

See “President Bush: Information Sharing, Patriot Act Vital to Homeland Security,” Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004, at: <http://www.whitehouse.gov/news/releases/2004/04/20040420-2.html>

Thus, the Task Force Recommendations also urge the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; and (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies.

We also believe that these hearings should be open and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information.

Finally, the Congressional Research Service report of January 18, 2006, “Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions,”¹⁶ makes it clear that Congress needs to thoroughly review and make recommendations concerning the intelligence oversight process, to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

D. Conclusion

¹⁶ See Fn. 9, *supra*.

The American Bar Association has stood shoulder to shoulder with the president in the fight against terrorism. Every member of the Task Force – indeed, every member of this great Association – wants the president to use all appropriate tools to defeat these enemies of democracy. However, as President Greco said in creating the Task Force, “We must continually and vigilantly protect our Constitution and defend the rule of law.” And, as Supreme Court Justice Murphy warned in a case arising during World War II:

[W]e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”

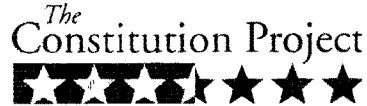
Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring).

We simply cannot allow our constitutional freedoms to become a victim of the fight against terrorism. The proposed Recommendations should be adopted by the ABA House of Delegates in order to strike a proper balance between individual liberty and Executive power.

Respectfully submitted,

NEAL R. SONNETT, Chair
ABA Task Force on Domestic Surveillance
in the Fight Against Terrorism

February 2006



STATEMENT OF
THE COALITION TO DEFEND CHECKS AND BALANCES
AN INITIATIVE OF THE CONSTITUTION PROJECT

We are former government officials and judges, scholars, and other Americans who are deeply concerned about the risk of permanent and unchecked presidential power, and the accompanying failure of Congress to exercise its responsibility as a separate and independent branch of government.

Reasonable people can disagree about the precise dividing line between executive and legislative power. Our country's framers intended that the debate over this line would be ongoing, and that it should take place in a setting where no single actor would assume unfettered control and where there was authentic public engagement about how the country should be governed.

In a democracy, these matters should be debated in public. The executive branch, which the Constitution requires "shall take Care that the Laws be faithfully executed," should not withhold information from Congress, which needs such information to carry out its constitutional responsibility to enact legislation and to conduct oversight, nor from the public, unless legitimate national security concerns require it.

This is not a partisan issue. We are conservatives and liberals, Republicans and Democrats. We are advocates of a strong president, a strong Congress, and a strong federal judiciary. We believe that the system of checks and balances created by our country's founders is required to preserve Americans' freedoms and liberties and our country's security. Without true cooperation among the three branches of government, this system no longer exists and we are less free and less safe.

Recently, the President has asserted that he may not be bound by statutes enacted by Congress, such as the "McCain amendment" prohibiting the cruel, inhuman, or degrading treatment of detainees, and the Foreign Intelligence Surveillance Act, which prohibits wiretapping of Americans without a warrant. Similarly, the administration has claimed that the President's commander-in-chief power authorizes him to ignore long-standing treaty commitments and statutes that prohibit the torture of prisoners. With regard to "enemy combatants," the administration has often acted without any participation by the legislative and judicial branches.

When the courts have refused to accept the argument that the federal courts have a limited role - or no role at all - in overseeing the administration's actions in certain areas, such as the detention and treatment of "enemy combatants," the administration has sought legislative action stripping the courts of their jurisdiction in these areas, thus further weakening the balance of powers.

At the same time, Congress has repeatedly surrendered its responsibility as a separate and independent branch of government by failing to exercise its clear constitutional obligation to make the laws, and when it has made such laws, to ensure through oversight that the executive branch is enforcing those laws and is otherwise carrying out its responsibilities in a manner consistent with the laws and the Constitution.

Our system of checks and balances depends on the candid and free flow of information among the branches. Therefore, the executive branch should publicly announce and explain its intention not to comply with any statute or treaty, and the reasons for its decision not to comply, including any belief that such statutes or treaties unconstitutionally infringe on executive branch power. Only then can Congress, the courts, and the public determine whether such a failure to comply is legitimate and warranted.

The Revolutionary generation that secured American independence and adopted the Constitution were the opponents of monarchical government, not its advocates. The presidency they established in 1787 was a constitutional office, subject to the checks and balances that shaped the Constitution as a whole. Essential powers related to national security were given to Congress as well as the president, making both institutions partners in the basic tasks of protecting Americans against both external dangers and internal threats to liberty.

We have come together to issue this statement because we agree that we face a constitutional crisis, not about whether the U.S. should do the things this or any other president proposes, but about who is empowered to make these decisions, and how those decisions are made.

In an ongoing war against terror that will endure for decades, the answer to this question is even more important. We are united in our belief that America's greatness is due in no small measure to our system of government in which power and authority are deliberately divided. The separation of powers is not a mere "technicality." It is the centerpiece of our Constitution and our freedoms depend upon it.

As Justice O'Connor wrote last year in the Supreme Court's decision in the *Hamdi* case:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . . [I]t was [citing another case] "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"

No matter what their political affiliation and philosophy, Americans must never forget these lessons or our freedoms will become a thing of the past, impossible to recover.

February 27, 2006

THE COALITION TO DEFEND CHECKS AND BALANCES

(List in Formation)

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of Patriots to Restore Checks and Balances; practicing attorney; Consultant on Privacy Matters for the ACLU

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; senior scholar, Woodrow Wilson International Center for Scholars; US Ambassador to the UN for UN Management and Reform, 1994-1996

Christopher Bryant, Professor of Law, University of Cincinnati; former Assistant to the Senate Legal Counsel, 1997-99

Eliot A. Cohen, Robert E. Osgood Professor of Strategic Studies, Johns Hopkins University, School of Advanced International Studies

David Cole, Professor, Georgetown University Law Center

John J. Curtin, Jr., Bingham McCutchen LLP, former President, American Bar Association

Mickey Edwards, Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution

Bruce Fein, Constitutional lawyer and international consultant at Bruce Fein & Associates and The Lichfield Group; associate deputy attorney general, Reagan administration

Morton H. Halperin, Director of U.S. Advocacy, Open Society Policy Center; Senior Vice President, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton administration

David Kay, Former Head of the Iraq Survey Group and Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

David Keene, Chairman, American Conservative Union

The Honorable Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton administration

Robert E. Hunter, U.S. Ambassador to NATO, 1993-1998

Robert A. Levy, Constitutional Scholar

Stephen M. Lilienthal, Director, Free Congress Foundation

Thomas Mann, Senior Fellow and W. Averell Harriman Chair, Governance Studies Program, The Brookings Institution

Norman Ornstein, Resident Scholar, the American Enterprise Institute

Thomas R. Pickering, Undersecretary of State for Political Affairs, Clinton administration; United States Ambassador and Representative to the United Nations, 1989-1992

Jack Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Professor; Glen Earl Weston Research Professor, George Washington Law School

L. Michael Seidman, Professor, Georgetown University Law Center

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

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David Skaggs, Former Member of Congress (D-CO), Executive Director, Center for Democracy & Citizenship at the Council for Excellence in Government

Abraham D. Sofaer, George P. Shultz Distinguished Scholar and Senior Fellow, The Hoover Institution, Stanford University; Legal Advisor, U.S. Department of State; Reagan administration; former United States District Judge, Southern District of New York

Neal Sonnett, Esq., Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Suzanne E. Spaulding, Managing Director, The Harbour Group; former Chief Counsel for Senate and House Intelligence Committees; former Executive Director of National Terrorism Commission; former Assistant General Counsel of CIA

Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, The University of Chicago

Jane Stromseth, Professor, Georgetown University Law Center

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Charles Tiefer, General Counsel (Acting) 1993-94, Solicitor and Deputy General Counsel, 1984-95, U.S. House of Representatives

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute, Washington, DC

John W. Whitehead, President, The Rutherford Institute

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of U. S. Community Relations Service, Johnson administration

Affiliations Listed for Identification Purposes Only

Statement of Bruce Fein
Before the Senate Judiciary Committee
Re: Presidential Authority to Order NSA
Warrantless Surveillance Targeting American
Citizens

February 28, 2006

Dear Mr. Chairman and Members of the Committee:

I. A Dangerous Precedent

I am grateful for the opportunity to speak at a defining moment in the nation's constitutional history. This fateful hour has been forced by President George W. Bush's claim of virtual omnipotence in the war against international terrorism. If Congress flinches from its duty to reject the legality of the President's directive to the National Security Agency to target American citizens on American soil for warrantless surveillance in flagrant violation of the Foreign Intelligence Surveillance Act, a precedent will have been set that will permanently cripple the Constitution's checks and balances. The theory invoked by the President to justify the eavesdropping would equally justify mail openings, burglaries, torture, or internment camps in the name of gathering foreign intelligence. Unless rebuked, it will lie around like a loaded weapon, ready to be used by any incumbent who claims an urgent need.

II. The History of Intelligence Abuses

FISA was the child of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities in 1975-76 (the "Church Committee"). Its exhaustive hearings disclosed, inter alia, that in 1938 when a secret program of domestic surveillance not authorized by Congress was undertaken to identify Fascists or Communists, the Director of the FBI, the Attorney General, and the President concurred as follows: "In considering the steps to be taken for the expansion which then occurred of the present structure of intelligence work, it is believed imperative that it be proceeded with the utmost degree of secrecy in order to avoid criticism or objections

which might be raised by such an expansion by either ill-informed persons or individuals having some ulterior motive...’Consequently, it would seem undesirable to seek special legislation which would draw attention to the fact of what is being done.’” President Bush has advanced the identical justification for refusing to seek congressional authority for the NSA’s warrantless eavesdropping targeting American citizens at home.

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

Spies, whether at the FBI, CIA, or NSA, are unschooled in the values of privacy and the Fourth Amendment. They are not sensitized to Justice Louis D. Brandeis’ teaching in Olmstead v. United States, 277 U.S. 438, 478 (1928) that the makers of our Constitution “conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.”

The Church Committee’s findings of systematic intelligence illegalities by the Executive Branch should inform the congressional response to President Bush’s claims of constitutional power and necessity to direct the NSA to spy on American citizens without

accountability to anyone but himself. FISA was enacted to check a well-documented tendency towards intelligence collection abuses fueled by the political ambitions of President or his subordinates. The response to President Bush should not expose Congress to the reproach of the French Bourbons: they forgot nothing, and learned nothing.

III. The Philosophy of the Founding Fathers

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

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

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

President Bush claims wartime omnipotence as commander-in-chief. The Founding Fathers empowered Congress to regulate war measures to reduce the likelihood of historically documented executive usurpations or overreaching. In Federalist 69,

Alexander Hamilton elaborated: “The president is to be commander in chief of the Army and Navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of military and naval forces; while that of the British king extends to declaring war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.” Accordingly, in the early case of Brown v. United States, 8 Cranch 110 (1814), Chief Justice John Marshall held that Congress, not the President, enjoyed the power to confiscate enemy property during the War of 1812. And in Little v. Barreme, 6 U.S. 170 (1804), the Chief Justice denied that the President was empowered to seize a ship coming from France when Congress had authorized only the seizure of ships headed for France, a statutory regulation of tactics on the high seas.

III. The Claim of Necessity

The Constitution, of course, is not a suicide pact. The Founding Fathers provided ample authority to thwart terrorism by collecting foreign intelligence without creating a monarchical form of government. Thus, the NSA may intercept every international communication into the United States of a suspected Al Qaeda member or other alien during its transit outside the United States before it reaches an American citizen. Neither a warrant issued by a judge nor probable cause is required. As the United States Supreme Court has explained in United States v. Verdugo-Urquidez (1990), the Fourth Amendment does not protect aliens abroad in any respect. And the American citizen lacks any protected privacy when the target of the surveillance is Al Qaeda.

Furthermore, checks and balances—some limits on power—does not mean anemic government. As Supreme Court Justice Robert Jackson lectured West Virginia State Board v. Barnette, 319 U.S. 624, 636 (1943): “Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support.”

President Bush has tacitly discredited his insistence that FISA hobbles the collection of foreign intelligence against international terrorism and thus requires a bypass by the NSA to protect the nation. Attorney General Gonzalez, speaking on behalf of the President, informed this Committee on February 6, 2006 that purely domestic Al Qaeda-to-Al Qaeda calls are intercepted through FISA warrants without seeming difficulty. Further, on July 31, 2002, the Department of Justice informed the Senate Intelligence Committee that PATRIOT ACT amendments to FISA enabled swift and nimble electronic surveillance of terrorists; and, that no further FISA amendments were needed. Speaking for the Bush administration, James A. Baker, counsel for intelligence policy, amplified: “The reforms...have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going ‘up’ on those suspected terrorists in the United States. [Lengthening emergency FISA warrants from 24-72 hours] has allowed us ...to ensure that the government acts swiftly to respond to terrorist threats.” The Department also voiced Fourth Amendment concerns over lowering the FISA standard for surveillance against non-U.S. persons from probable cause to reasonable suspicion.

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

IV. Well-Founded Fears of Spying Abuses

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

President Bush's claim that the NSA is only targeting Americans reasonably believed to be "a member of Al Qaeda, or an affiliated terrorist organization" is not comforting. Terrorists do not keep membership lists. An "affiliate" terrorist organization has an elastic definition. No judge or other independent third party reviews the judgments of NSA professionals to prevent dragnet searches or political vendettas. As the Church Committee hearings convincingly established, unchecked spying—whether

by the FBI, CIA, or NSA—generally degenerates into surveillance for partisan political advantage. Would it surprise any Member of this Committee if the NSA warrantless eavesdropping targeted detractors of the PATRIOT ACT, the Iraq war, or President Bush’s claims of monarch-like war powers? What has been the Bush administration’s reflexive response to the President’s scolds?. It is inconceivable that any NSA professional would be reproached for spying too broadly or indiscriminately on American citizens. The intelligence imperative is that more surveillance is always superior to less; and, that more spying will never be criticized if carried out under the banner of fighting terrorism. In addition, NSA professionals involved in the warrantless spying are expert in Al Qaeda and international terrorism, not in the Fourth Amendment and the values secured by privacy.

FISA safeguards against the intelligence agency propensity for excesses or illegalities by interposing a neutral and independent magistrate between an American citizen and the spy. As Justice Robert Jackson explained in the criminal justice context in Johnson v. United States, 333 U.S. 10 (1948): “The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime...Any other rule would undermine ‘the right of the people to be secure in their persons, houses, papers and effects,’ and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the

law, and the police-state where they are the law.” President Bush similarly resists coming under the FISA law and its judicial check in favor of being the law himself.

V. Flawed Legal Justifications

A. The AUMF.

The Attorney General concedes that the NSA’s electronic surveillances fall within the scope of FISA. That means it must be targeting American citizens on American soil and intercepting communications within the territorial jurisdiction of the United States in which the citizen holds a reasonable expectation of privacy. The Attorney General has further stated that to avoid political repercussions, the President has chosen to confine the NSA’s warrantless electronic surveillances to international calls with one point in the United States and one point abroad. The Attorney General has not disputed that his interpretation of the AUMF would permit NSA warrantless interceptions of purely domestic communications.

The Attorney General unconvincingly argues it constitutes a recognized exception to FISA under 50 U.S.C. 1809. First, that interpretation was fashioned only after the disclosure of the NSA’s spying program by The New York Times more than four years after enactment of the AUMF. It was not hinted at in a presidential signing statement. No Member of Congress who voted for the AUMF thought it would supercede FISA. No legislative history supports that interpretation. Indeed, it supports the opposite. As former Senator Tom Daschle has recounted, Congress rejected AUMF language which would have authorized necessary and appropriate force “in the United States.” The Supreme Court has instructed that contemporaneous are preferred to tardy and surprise interpretations of statutes by authorities entrusted with their enforcement. And the

contemporaneous interpretation of the AUMF was that it did not trump FISA in the collection of foreign intelligence by electronic surveillance in the aftermath of war.

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

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

Moreover, if the AUMF is interpreted as authorizing the President to gather foreign intelligence as an incident to war irrespective of contrary statutes, then it necessarily also overrides federal laws prohibiting burglaries, mail openings, torture, or even internment camps that might be employed in such a quest. To think that Congress would have demolished these fundamental statutory protections of civil liberties without expressly saying so is to enter the domain of Alice in Wonderland. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)("[W]e are confident that Congress

could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

In addition, Congress specified as unambiguously as language permits in 18 U.S.C. 2511(2)(f) that FISA and the criminal code are the “exclusive means” for conducting electronic surveillance. That emphatic statement by Congress was reinforced by its attaching criminal punishments for wiretapping except as “specifically provided in this chapter, or as authorized by FISA. 18 U.S.C. 2511(1), 2511(2)(e). It is implausible to believe that Congress would have overridden such an emphatic policy with the opaque language of the AUMF regarding necessary and appropriate force.

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

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

Constitutionally protected liberties have been regularly compromised by the Commander-in-Chief during wartime, whether during the Civil War, World War I, World War II or the Cold War. In 1975-1976, the Church Committee unearthed 20 years of illegal mail-openings by the CIA and the FBI; Operation Shamrock, in which three international telegraph companies for 20 years were enlisted by the NSA to turn over certain international telegraph traffic, including the messages of United States citizens; and, the misuse of the NSA’s foreign intelligence mission for law enforcement purposes.

The short-lived Huston plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating that, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." FISA was thus a rational response to prevent unjustified Executive Branch encroachments on the civil liberties of United States citizens.

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

Chief Justice John Marshall stated the constitutional test for a statute enacted under the "necessary and proper" clause in McCulloch v. Maryland, 17 U.S. 316 (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." FISA's end is to protect First and Fourth Amendment rights consistent with the need to gather foreign intelligence by electronic surveillance during wartime. It regulates the military tactics of

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

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

B. Inherent Constitutional Power.

President Bush unconvincingly insinuates that FISA unconstitutionally handcuffs his power to war against Al Qaeda and international terrorism generally. As amplified above, FISA leaves the President with muscular means to collect foreign intelligence through electronic surveillance. The burden of persuasion should be on the President to show FISA is defective in a post-9/11 world. By keeping the NSA's warrantless spying program and yield of foreign intelligence secret, its need is pure conjecture. And if FISA were flawed post-9/11, Congress could amend the law without compromising national security as was done in funding the Manhattan Project during World War II. In any event, Supreme Court precedents are decisively against the President.

According to Mr. Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, for example, a law forbidding concentration camps, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a withholding of federal funds sought to extend the Iraq war into Iran to destroy its nuclear facilities. Under that unprecedented and insidious

theory, the stream of federal statutes during the Vietnam War ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos were all unconstitutional.

President Bush's constitutional power is not established by the fact that many of Bush's predecessors have made comparable assertions. In Youngstown Sheet & Tube v. Sawyer (1952), the United States Supreme Court rejected President Harry Truman's claim of inherent power to seize a steel mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other Presidents. Writing for a 6-3 majority, Justice Hugo Black amplified: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in the Constitution in the Government of the United States...."

Longevity does not save usurpation. For fifty years, Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in Immigration and Naturalization Service v. Chadha (1983). Approximately 200 laws were set aside. Similarly, the High Court declared in Erie Railroad v. Tompkins (1938) that federal courts for a century since Swift v. Tyson (1842) had unconstitutionally exceeded their adjudicative powers in fashioning a federal common law to decide disputes between citizens of different States.

In a concurring opinion in Youngstown Sheet & Tube, Justice Jackson instructed that the war powers of the President are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. That case invalidated a seizure of private property (with just compensation) a vastly less troublesome invasion of civil

liberties than the NSA's interception of the conversations of American citizens on American soil on President Bush's say so alone. In addition, Youngstown involved a refusal by Congress to grant authority, whereas FISA involves a direct denial of presidential power. The latter creates a greater clash with the President than the former. It might be said that Youngstown did not implicate battlefield tactics, in contrast to the NSA's surveillances of international calls that target American citizens on American soil. Those surveillances, however, are not on a battlefield in any ordinary sense. Furthermore, Little v. Barreme did implicate tactics at sea in the United States conflict with France, and congressional authority was sustained against the President.

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

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

C. Fourth Amendment.

In addition to violating FISA and the Constitution's checks and balances, the NSA's warrantless electronic surveillances may transgress the Fourth Amendment's

prohibition of unreasonable searches. The constitutional analysis is elusive because President Bush is still concealing the scope of the NSA's eavesdropping. Attorney General Gonzalez made clear to this Committee on February 6, 2006, that he was discussing only the parts of the program that the President had confirmed; but that unconfirmed and undisclosed NSA surveillances would continue to be kept secret. That is troublesome. How can a President be held accountable to the law and to the public for surveillance activity that is unknown to anyone but himself? Further, the constitutional reasonableness of any surveillance program requires an assessment of its success in gathering foreign intelligence. But Congress, the FISA Court and the American people are clueless as to what percentage of the Americans targeted by the NSA yield useful foreign intelligence. If the percentage is tiny or microscopic, then the spying would be unconstitutional, akin to a general search warrant abhorred by the Founding Fathers. Indiscriminate searches based on the hope that something will turn up clearly violate the Fourth Amendment. Otherwise, every home in the United States could be burglarized in the expectation that at least a handful would produce evidence of material support or sympathy for Al Qaeda.

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

VI. The Power of the Purse

I would recommend that Congress employ the power of the purse to check President Bush's circumvention of FISA. A statute should be passed that prohibits the use of any funds of the United States for electronic surveillance to gather foreign

intelligence except in accord with FISA. In testifying before this Committee on February 6, 2006, the Attorney General acknowledged that, "Congress has a powerful check on the commander in chief, it is through the purse." In the past, Congress has employed the power of the purse to end covert action in Angola, to curtail support for the resistance in Nicaragua, and to prevent expansion of the Vietnam war into neighboring countries.

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

.....

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

February 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Ranking Member:

I am writing to respond to the February 3, 2006 letter submitted by the Honorable Pat Roberts, Chairman, Senate Select Committee on Intelligence, defending the legality of warrantless electronic surveillance by the National Security Agency that targets United States citizens on American soil. I wish to amplify reasons that would suggest the Chairman's defense is unconvincing.

The law has never required the Executive Branch to obtain a warrant to conduct electronic surveillance against Al Qaeda or other terrorist operatives or sympathizers abroad. The United States Supreme Court in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) held that the Fourth Amendment has no application to searches and seizures targeting aliens outside the United States. Accordingly, President Bush has always enjoyed unconstrained authority to search the homes or offices of suspected terrorists in foreign countries or to monitor their communications via interceptions effectuated outside the United States. Even if an American in the United States is at the other end of the conversation, the NSA is not required to stop listening.

The Foreign Intelligence Surveillance Act does not disturb that conclusion. Under 50 U.S.C. 1801(f)(2), the NSA is unrestricted in intercepting international wire communications to or from a person in the United States who is not the surveillance target if the acquisition occurs outside the United States. On the other hand, FISA does apply when the electronic surveillance targets a United States citizen or permanent resident alien in the country in circumstances in which they enjoy a reasonable expectation of privacy. President Bush's concession that the NSA's eavesdropping falls within FISA crystallizes the legal question addressed by Chairman Roberts: whether the President is crowned with inherent constitutional power to disregard FISA's wartime regulation of domestic spying that targets citizens in the United States (or any other legal restraint he finds irksome) in combating international terrorism, i.e., whether FISA is unconstitutional.

No court has ever held that FISA subverts the President's wartime prerogatives. The statute fits comfortably within congressional power to enact laws "necessary and proper" to the execution of any power entrusted to the United States or any department or agency thereof. Article I, section 8, clause 18.

Constitutionally protected liberties have been regularly compromised by the Commander-in-Chief during wartime, whether during the Civil War, World War I, World War II or the Cold War. In 1975-1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), disclosed 30 years of illegal mail-openings by the CIA and FBI; Operation Shamrock, in which three international telegraph companies for 30 years were enlisted by the NSA to turn over certain international telegraph traffic, including the messages of United States citizens; and, the misuse of the NSA's foreign intelligence mission for law enforcement purposes. The short-lived Huston plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating that, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." FISA was thus a rational response to prevent unjustified Executive Branch encroachments on the civil liberties of United States citizens.

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

Chairman Roberts declares (p. 13): "...I believe the Supreme Court would recognize (and arguably has recognized) the President's constitutional authority to conduct warrantless electronic surveillance and, even after FISA, determine that Congress cannot define the 'exclusive means' for the conduct of that authority." The Chairman further reasons: "Having assumed a constitutional responsibility to protect the United States from attack...the President exercised his inherent constitutional authority as Commander-in-Chief to prevent further attacks." (Id.).

If those assertions are accepted, then the President also enjoys inherent constitutional power to break and enter the homes of American citizens in search of foreign intelligence contrary to FISA. He enjoys the right to open the mail of United States citizens in search of foreign intelligence contrary to the postal statutes. He enjoys the right to torture or otherwise mistreat detainees in a quest for foreign intelligence, notwithstanding the McCain amendment. And he may send citizens to concentration camps if he suspects them of terrorist affiliations contrary to federal law. In sum, if the

Chairman's assertions are accepted, then checks and balances during war would be crippled and the measure of our civil liberties would be the President's "trust me" refrain.

The Chairman's insistence that FISA is unworkable in a post-9/11 world is counterfactual. His letter asserts (p. 14): "FISA does not provide an effective alternative to [the NSA's domestic spying] to authorize the 'hot pursuit' of terrorists operating in this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility impossible to achieve...Attorney General approval of 'emergency' surveillance under FISA must meet a probable cause standard, is limited to 'foreign powers' or 'agents of a foreign power' as defined in FISA, and is similarly encumbered by a bureaucratic approval process."

President Bush, speaking through the Department of Justice, disputed every word of the Chairman in testimony presented to the Senate Intelligence Committee on July 31, 2002, long after the NSA's domestic spying had commenced. James A. Baker, Counsel for Intelligence Policy, glowingly praised FISA amendments in the USA PATRIOT ACT: "The reforms...have affected every single application made by the Department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening the time period for emergency FISAs] has allowed us ...to ensure that the government acts swiftly to respond to terrorist threats."

Even if the Chairman's indictment of FISA was correct, his letter fails to address why the shortcomings should not have been cured with further amendments in lieu of lacerating the Constitution's checks and balances. Chairman Roberts does not suggest that a Republican-controlled Congress would have balked, or that legislative deliberations would have exposed state secrets.

The war against international terrorism is historically unique in an important constitutional sense. It has no end point. It will be permanent. All previous assertions of inherent presidential war powers had some natural stopping point—when the enemy nation surrendered. The presidential war powers defended by Chairman Roberts, in contrast, would permanently shift the political and constitutional landscape towards one-branch government contrary to the intent of the Founding Fathers.

Accordingly, I submit that the Chairman's challenge to the constitutionality of FISA is unpersuasive.

Sincerely,

Bruce Fein
Former associate deputy attorney general under President Ronald Reagan

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February 28, 2006

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Hon. Colleen Kollar-Kotelly
Presiding Judge
c/o Clerk of the Court
Foreign Intelligence Surveillance Court
Department of Justice
Room 6725
950 Pennsylvania Avenue, N.W
Washington, D.C. 20530

Re: National Security Agency Warrantless Electronic Surveillance

Dear Judge Kollar-Kotelly:

I represent amici curiae the Constitution Project and the Center for National Security Studies. As explained more fully in the accompanying brief, amici are public interest organizations that seek, among other things, to ensure that national security concerns are addressed in a manner that protects civil liberties. Amici are gravely concerned about recent disclosures that the Executive has decided not to comply with the Foreign Intelligence Surveillance Act ("FISA")—including the requirement of seeking a warrant from the Foreign Intelligence Surveillance Court—when conducting certain electronic surveillance as defined in that statute. According to media reports, the Court has requested and received a confidential briefing from the Administration on the warrantless surveillance activities, including the Administration's asserted legal justification for its program. See, e.g., Carol D. Leonnig, Surveillance Court Is Seeking Answers, Wash. Post, Jan. 5, 2006, at A2; Carol D. Leonnig & Dafna Linzer, Judges on Surveillance Court To Be Briefed on Spy Program, Wash. Post, Dec. 22, 2005, at A1. Based on reported descriptions of the program and attempted justifications of it recently advanced in public by the Administration, amici believe that the program violates both FISA and the Constitution. Amici have therefore submitted the attached brief in order to aid the Court in any deliberations it may be undertaking on the issue.

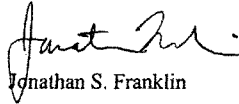
Amici have no classified or other non-public information regarding this program. Likewise, amici have no knowledge of any particular proceedings before the Court, or any

HOGAN & HARTSON L.L.P.
Hon. Colleen Kollar-Kotelly
February 28, 2006
Page 2

member of it, in which the legality of the warrantless electronic surveillance program may be an issue. Nevertheless, given reports that the Court has already requested and received the Administration's defense of its actions, amici have submitted the accompanying brief to ensure that the Court is apprised of both sides of this vitally important issue in connection with any deliberations the Court or any member may undertake. Participation of amici is particularly important in such circumstances. The Court's warrant issuance proceedings are ex parte, those who are the targets of warrantless electronic surveillance will be unaware of such activities, and the recent briefing by the Administration could not have reflected the views of amici or other members of the public who favor enforcement of FISA. See In re Sealed Case, 310 F.2d 717, 719 (For. Intel. Surv. Ct. Rev. 2002) (considering views of amici "since the government is the only party to FISA proceedings").¹

Accordingly, amici respectfully submit the accompanying brief to aid the Court and its members in any deliberations that may be undertaken on this important issue.

Sincerely,



Jonathan S. Franklin

Counsel for Amici Curiae

Enclosures

cc: The Hon. Dee Benson
The Hon. Robert C. Broomfield
The Hon. James G. Carr
The Hon. John E. Conway
The Hon. Michael J. Davis
The Hon. Nathaniel M. Gorton
The Hon. Claude M. Hilton
The Hon. Malcolm Howard
The Hon. George P. Kazen
The Hon. Alberto R. Gonzales
The Hon. Paul D. Clement
James A. Baker, Esq.

¹ Amicus the Center for National Security Studies was one of the amici in In re Sealed Case.

STATEMENT OF PROFESSOR KEN GORMLEY
BEFORE THE SENATE JUDICIARY COMMITTEE CONCERNING
BUSH ADMINISTRATION WIRETAPS AND SCOPE OF PRESIDENTIAL POWER

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Good morning. My name is Ken Gormley. I am a Professor of Constitutional Law at Duquesne University in Pittsburgh. I would like to begin by saying, Senator Specter, that it means a great deal to participate in these hearings. You have made enormous contributions to the Commonwealth of Pennsylvania and to the nation, as a Senator and as Chair of this Committee, and so it is a special honor to join you today. I would also like to acknowledge Senator Kennedy, who gave me great help and support in my work on the Archibald Cox biography. I'd finally like to thank Senator DeWine B who has accomplished so much in neighboring Ohio B and all of the members of the Committee for the invitation to testify here today.

I. Introduction

I have been interested, for quite some time, in the subject of Presidential power. In 2001, I testified before this Committee on the subject of the President's pardon power. Before that, in writing the biography of Archibald Cox and delving into his role as Watergate Special Prosecutor, I spent time studying *United States v. Nixon* and the Presidential power issues that confronted this nation during Watergate. Perhaps most directly related to these hearings, in 2002 I organized a program at Duquesne University, in cooperation with the Harry S. Truman Library & Institute, commemorating the 50th Anniversary of the *Steel Seizure Case* -- which, as you know, is the granddaddy of the Supreme Court cases dealing with Presidential

power. As part of that program, I was fortunate enough to film an interview with Chief Justice Rehnquist to discuss his memories of that historic case -- he was a young law clerk at the time, clerking for Justice Robert Jackson on the Supreme Court. We were also able, in organizing that program, to bring together a number of still-living advisors to President Harry S. Truman, who had worked in the White House as these events unfolded, to get their first-hand perspectives. After that symposium in 2002, I had the chance to speak and write on the subject of the application of the *Steel Seizure Case* and its pronouncements on Presidential powers, to post-9-11 America.

So I believe that this Committee's hearings are vital. They are important not only to iron out this extremely complex problem relating to the Bush Administration's wiretap program and its interplay with the FISA court; but they also are critical in order to address the longer-term issue of the appropriate boundaries among the executive and judicial and legislative branches of government, all of which have crucial roles to play in our Constitutional system.

I know that the Committee's chief task is to focus on the issue that confronts it in 2006, dealing with the wiretap program that has been initiated by the Bush Administration, and seeking to lessen any friction that may arise among the three branches of government as a result of that program. However, one of the great legacies of this body over the past 200-plus years has been its ability to look to the past, in order to gain an understanding of history, and forward B in order to understand future ramifications of Congressional action B to sculpt legislative solutions that are built to endure.

So I would like to begin by discussing history, and the situation confronted by President Harry S. Truman in the Steel Seizure Case. It has a haunting relevance to us today, in a post-9-11 America. That case must serve as the beginning and end-point in understanding the scope of, and limitations upon, Presidential power in the current situation involving the surveillance authorized by President Bush, as part of the nation=s war on terror. It gives us the Constitutional tools necessary to intelligently discuss the scope of President Bush=s power to deal with suspected terrorists B especially on U.S. soil -- and the related scope of Attorney General Gonzales=s power to conduct warrantless wiretaps and interceptions of e-mails in a manner that departs from the ordinary standards set forth by the 4th Amendment.

Since I have the luxury, in my written comments, of going into greater detail with respect to historical background than is possible in my oral testimony, I will take advantage of that luxury by discussing the events of 1952 that brought to a head that confrontation among the executive, legislative and judicial branches in the United States. I will then discuss the relevance of that history, as it applies to the current controversy involving the Bush Administration=s secret surveillance plan.

II. The Steel Seizure Case: Its History as a Foundation For Modern Presidential Powers Issues

At first blush, the *Steel Seizure Case* seems to have scant relevance to the modern-day war on terror. It did not involve al-Quida or plots against the homeland or efforts by the executive branch to carry out a battle against enemies who would fly airplanes into buildings in New York City. Rather, it involved disputes over wages, benefits, and the price of steel per ton. On closer inspection, however, there are unmistakable parallels. The question in each

case involves the issue of Presidential power, and the limits upon that power when its exercise collides with an act of Congress and the authority of the courts. The following is a summary of the relevant background of the Steel Seizure controversy, as the stage was set for a Constitutional show-down in April of 1952. [Much of this background is set forth in *Steel Seizure Symposium Issue*, 41 DUQUESNE LAW REVIEW 665-795 (2003).]

Steelworkers hadn't received a wage increase since 1950. Their contracts expired at the end of 1951; but the steel companies refused to budge. After rancorous negotiations between labor and management, the Wage Stabilization Board intervened in March of 1952 to break the deadlock. President Truman had created that Board to regulate wages and prices in key industries to keep the economy from spiraling out of control, during the Korean War. It therefore waded into the steel controversy and recommended a 26-cent-per-hour increase in wages, and a price increase of \$4.75 per ton. The steel companies were outraged & they said they needed at least a \$12 per ton price increase to justify hiking wages that high. So they defied the Wage Stabilization Board recommendations. The nation's steelworkers announced that they were going on strike, at midnight on April 9th. *Id.* at 668. That's when Harry Truman stepped in.

By this time, President Truman was sympathetic with the steelworkers. United Steelworkers President Philip Murray had already kept his men from striking for months, at the President's request. Murray had gone to the bargaining table and agreed to abide by the Wage Stabilization Board decision. Now here were the steel companies crying poor -- Harry Truman didn't feel moved by this plea for higher profits. *Id.*

So he convened an impromptu press conference on April 8th & two hours before the

nation=s steelworkers were set to walk out *en masse* B and didn=t mince words. In old film clips of Truman=s press conference, one can see President Truman dressed in his dark suit, his spectacles firmly affixed to his face, staring into the camera with steely eyes. He says of the steel companies demand for a \$12-per-ton price increase: ANow that=s the most outrageous thing I=ve ever heard of. They not only want to raise their prices to cover any wage increase, they want to double their money on the deal.@ Id. at 668 n. 7.

Most galling to him was the fact that the war in Korea going on at the 38th parallel. President Truman believed it was plain un-American that the Aprofiteering@ steel companies would provoke a strike at a time like this.

So Truman ended the press conference by taking a step that was virtually unprecedented (except for several seizures of private property by FDR=s during World War II). He ordered his secretary of Commerce, Charles Sawyer, to seize the nation=s steel mills and to keep them running. After that Presidential order, a storm of protest was unleashed that haunted Truman until he left the White House, as a *very* unpopular President.

The Chicago Daily News called Truman=s decision Aleaping socialism.@ The Washington Post wrote: APresident Truman=s seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President.@ National Steel Chairman E.T. Weir asked: AWhat the hell=s the difference between this and what they do in Russia?@ The New York Daily News said, AHitler and Mussolini would have loved this.@ Id. at 669.

In truth, it wasn=t nearly as Mussolini-like as it sounded. Truman did not send in

government agents to start operating the blast furnaces. He simply ordered that U.S. flags be flown in front of the steel companies; everything (otherwise) remained business as usual. But the *image* of Truman commandeering private businesses as a *payback* for the unions' support of him in the 1948 election, an image that was propagated in newspaper cartoons of the day, outraged many Americans across the country.

When asked by a newspaper reporter what authority he had to take over the steel mills, in the spring of 1952, President Harry Truman answered in characteristic blunt fashion: *Tell em to read the Constitution. The President has the power to keep the country from going to hell.* [Cite]

Yet *every* President has an intense and legitimate interest in keeping the country from *going to hell.* The question became for President Truman -- just as it will ultimately become for President George W. Bush -- When does the Constitution circumscribe the power of the executive branch? When does it hold a President in check to prevent his encroachment upon powers reserved to other branches of government, and to the people themselves, under the Constitution?

What prompted Truman to push his Presidential powers this far? Was it *bad legal advice* from his White House advisors and *rash judgment* by the President himself, as most historical accounts of the Steel Seizure Case report?

Those who were close to President Truman at the time disputed that over-simplistic explanation.

Milton Kayle, who was a young Special Assistant in the White House at the time, was one of the people writing memos to Truman, in 1952, spelling out his options. Kayle dug out a

memo showing me that he specifically warned Truman that if he seized the mills and the matter jumped into the courts, Truman might not have a sturdy Constitutional leg to stand on. There is no question that Truman was aware of this danger. But Kayle said that the President from Missouri consciously took action *in spite* of this danger: He was deeply worried about the threat to troops in Korea B this was not a fake or a smoke-screen. The President was meeting with his top military advisors, including Secretary of Defense Robert Lovett, on a regular basis. Kayle was meeting daily with representatives of the Defense Department. All of them were making a firm case -- backed up by hard statistics B that a serious threat to American troops would present itself if the steel mills went idle. For one, it would produce a shortage of conventional weapons -- guns and tanks. Second, it would interfere with production of nuclear weapons -- by now a part of the critical weapons stockpile B that also depended upon steel production. Id. at 671.

Virtually every old-timer I interviewed who worked in the White House at the time described how dead-seriously President Truman took these warnings.

Harry S. Truman had been a Captain in the army himself. He knew the polls didn't support him on this, but he would respond to his advisers: AWhat would Moses have done if he had taken a poll (before handing down the Ten Commandments?)@

On his tenth birthday, Truman's mother gave him a four-volume work entitled AGreat Men and Famous Women. He had been a student of history since he was a child. He did not balk at putting it to use. Id. at 672.

Ken Hechler, one of his advisors in the White House -- later congressman and secretary of state of West Virginia -- became one of the leading Truman scholars in the United States.

He told me that Truman really had developed a consistent theory of Presidential power from his study of history. It came into play when he ordered the dropping of bombs on Japan to end World War II; when he fired General MacArthur; when he ordered the desegregation of the armed forces; when he sent troops into Korea. That theory was: Don't wait for Congress to act during times of emergency. If you do, it will render the Presidency impotent and jeopardize the nation. *Id.* at 671-72.

And so the decision in the Steel Seizure case, Hechler said, was both inevitable and natural for Truman. Truman certainly knew he could invoke the Taft-Hartley Act recently adopted by Congress (over his veto), to impose an 80-day cooling off period. But he felt this was too cumbersome and time-consuming. Was Truman being stubborn and bull-headed, as many historians now sum it up? Hechler had a different view: *AI* would use the word *>principled=* rather than *stubborn and bull-headed,@* he said. *Id.* at 672.

One thing, though, that the White House didn't count on was that this would turn into a Constitutional show-down in the courts. Although advisors like Milt Kayle warned Truman of the danger, they also believed that the odds were low that the judicial branch would actually meddle here -- they figured the courts would leave this political hot-potato alone.

So Truman=s real plan was to seize the steel mills, force the steel companies and labor to sit down at the bargaining table again, and muscle them into a compromise.

That plan was upended by Judge David Pine, an obscure federal trial judge in D.C. He heard the case and, to the shock of everyone including the steel companies= own lawyers, declared President Truman=s actions unconstitutional. *Id.* at 669-70. This propelled the case out of the political arena and into the appellate courts. And we now know that the Supreme

Court B in taking up the case with lightning speed B inadvertently prevented a settlement from occurring.

President Truman had it Aworked out,@ politically speaking. He called both sides together at the White House, after Judge Pine=s ruling, and played a shrewd poker hand. He said: AThe secretary of commerce is going to issue a *new* ruling about wages and prices for the steel companies, and *neither* side is going to like it.@ He put them in a room in the White House and said: AWork out a deal.@ Id. at 672.

That deal, it turns out, was 99 percent consummated. David Feller, one of the top lawyers for the steelworkers, told me that it wasn=t until the Supreme Court granted certiorari and took the case, that the whole plan unraveled.

Once the Court took the case under the caption *Youngstown Sheet & Tube Company v. Sawyer*, President Truman never regained his balance. The steel companies had retained as their lawyer John W. Davis, the legendary white-haired Supreme Court advocate who had run for President in 1924, and was treated with reverence by the Justices. On the other side, the Truman Administration=s Justice Department B which was in between Attorneys General due to a petty scandal B was represented by Solicitor General Philip Perlman, who seemed to crumble when he got up to the wooden lectern to present the President=s case, clinging to the basic argument that was, in essence: AThis is wartime, the President can do anything he wants as part of his emergency powers.@ Id. at 673.

The government attempted to pull this argument off by Aaggregating@ powers in Article II of the Constitution B namely, the provision that states AThe executive power shall be

vested in the President; and he shall take care that the laws be faithfully executed; and (most importantly) the provision that states he shall be Commander in Chief of the army and navy. But that didn't seem to sway many of the Justices.

Two weeks later, the Court handed down its decision. Before the Justices had even finished reading their opinions, the steelworkers had gone on strike, shutting down the nation's steel mills for 54 days — exactly the outcome President Truman wished to prevent.

It was a 6-3 decision, that amounted to a stinging rebuke of President Truman. Justice Hugo Black, who wrote for the majority, declared that as broad as the President's war powers might be, and no matter how broadly the Court might interpret the notion of theatre of war, seizing private property at home was stretching it too far. If anything, this was a matter for Congress, which has the power of eminent domain and generally makes laws that govern domestic matters. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In other words, the Constitution simply didn't give Harry S. Truman the power to keep the country from going to hell by seizing American factories.

The most enduring opinion turned out to be the concurrence of Justice Robert Jackson, a powerful intellectual who didn't particularly care for Harry S. Truman. Jackson had headed the trials at Nuremberg; he had been mentioned as a candidate for President; he was a towering figure as Solicitor General and as Attorney General under FDR; he wasn't particularly thrilled that Truman had passed him up as Chief Justice for crony Fred Vinson.

But Jackson's opinion is a masterpiece not because of the personal saga, but because he went to the heart of the President's power under the Constitution. Professor John Barrett,

who is currently working on Justice Jackson's biography, has explained that Jackson had very clear views about this "Presidential Powers" issue: He had struggled with it as Attorney general, when he supported President Roosevelt's seizing of the North American Aviation plant during World War Two mainly because that company was an exclusive producer for the government, and almost amounted to a branch of the Pentagon. *Id.* at 674.

In eloquent fashion Jackson laid out a spectrum of three different shades of Presidential power that existed in our Constitutional system. And that was the legacy of the Steel Seizure decision. 343 U.S. at 634 (Jackson, J., concurring).

In the first category, when the President acts pursuant to express or implied authorization of Congress, his powers are strongest. He is acting based upon whatever powers he has (inherently) in the Constitution, *plus* whatever Congress is allowed to delegate him. In the second category, when the President acts where Congress has neither granted nor denied authority, he is in a middle ground. He must rely on his own powers in the Constitution; but there is a "zone of twilight" where he and Congress can comfortably overlap. In the third category, where the President acts in a manner incompatible with the express or implied will of Congress, his power is at lowest ebb. He can rely only on his own powers, the Constitution's powers granted to Congress. Here, the "equilibrium" of our system of separation of powers is at stake; so the courts must be leery when he ventures into this danger zone. *Id.* at 635-38.

In this case, Justice Jackson concluded, President Truman was in the third, weakest category. The Constitution didn't specifically or even implicitly authorize him to seize private property on U.S. soil. And Congress hadn't given him that power in fact, at the time it debated the Taft-Hartley Act in 1947, it specifically rejected an amendment that would have

allowed the President to seize businesses in times of emergency. The President's powers were at their nadir here. *Id.* at 640.

Only Chief Justice Vinson B Truman's close friend and poker-playing partner B and Justices Reed and Minton (two other Truman appointees) voted in favor of the President. *Id.* at 667 (Vinson, C.J., dissenting).

The Court's decision in *Youngstown* was a stunning blow for Truman, during the final months of his Presidency. It dramatically undercut his stature as President, and amounted to a rebuke from Congress and the courts from which he never fully recovered. Ken Hechler told me: "There was a blue smoke around the White House for days." *Id.* at 675.

III. The Constitutional Lessons of the Steel Seizure Case

Why did the Supreme Court conclude that Harry S. Truman had overstepped his Constitutional boundaries?

It boils down to a simple point that Chief Justice Rehnquist made in that interview we filmed for the introduction to the *Steel Seizure* program several years ago: By the time the case made it to the Supreme Court, there simply was not a sense among citizens in this country that we were seriously at risk.

Fighting in Korea had come to a lull during truce talks. People in the United States were more concerned with a race between the New York Yankees and the Brooklyn Dodgers that summer than the war overseas. There was a sense that the dire warnings by the military were overblown. In fact, that turned out to be accurate: Secretary of Defense Lovett had warned that *any* interruption in the production of steel would put soldiers at risk. Yet the steel strike went on for two months before it was settled, and it produced no apparent shortage.

Steel was being released for bicycles and domestic luxuries B there was no noticeable impact. The military warnings, in hindsight, were probably puffed. *Id.* at 676.

So yes, America was at war. But there was a public Aambivalence,@ as Chief Justice Rehnquist put it, about the steel crisis. Guns and bullets were essential to troops in Korea; yet the threatened strike did not justify throwing the Constitution out the window.

It is also important to note, however, that Harry Truman doesn=t come out looking so bad in the history books even after this serious goof-up. As Milt Kayle told me: AHe did what he believed was the right thing to do, and history has treated him kindly for that.@ *Id.* at 677.

So the Steel Seizure Case isn=t about good and bad; it isn=t about moral absolutes. It is about the very difficult process that a *nation* must go through during times of crisis, struggling with how much latitude to give a President as commander-in-chief; how much power to preserve for Congress; and the courts= role in this complicated juggling act.

The Steel Seizure case, and Justice Jackson=s three-part test dealing with Presidential power, has lurked in the shadows of every President after Harry Truman. It was cited prominently by the Supreme Court when it ordered President Nixon to hand over the Watergate tapes in *U.S. v. Nixon*, 418 U.S. 683, 703, 707 (1974). It was a key case in deciding that President Ronald Reagan had the power to freeze assets in the United States and set up a special tribunal to deal with claims against Iran in the aftermath of the Iran hostage crisis. *Dames & Moore v. Reagan*, 453 U.S. 654, 660 (1981). It was a major factor in 1983 when the Court concluded that Congress could not maintain a legislative veto over the Immigration and Naturalization Service and invalidate a decision of the executive branch which had authorized a deportable alien to remain in the United States. *INS v. Chadha*, 462 U.S. 919, 953 n. 16

(1983). It was cited in *Clinton v. Jones*, in deciding that a President could be sued civilly while in office. (If the courts could review the legality of Truman=s *official* conduct while in office, the Supreme Court concluded, they could determine the legality of *unofficial* conduct as well.) 520 U.S. 681. 697 (1997).

The Steel Seizure Case is always there, like a length of cord loosely wrapped around the President=s wrists, ready to tighten itself around his hands B and around the entire executive branch that answers to him. But this only happens if the courts (and ultimately the American people) determine that he has stepped across that fine Constitutional line.

IV. Application of the Steel Seizure Case to the Bush Administration=s Wiretap Program and Its Circumvention of the FISA Court

How do the Steel Seizure case and the lessons of Harry S. Truman in 1952 have any application to President George W. Bush in 2006, following the upheavals of September 11th and this nation=s resulting war on terror?

The White House has acknowledged that in the wake of the September 11th attacks, President Bush authorized the National Security Agency (NSA) to institute a program to monitor and intercept communications between persons on American soil and others abroad, presumably to pierce the al-Quida terror network. According to the Justice Department=s own Awhite paper@ published on January 19, 2006, these domestic wiretaps and interceptions were carried out by NSA without warrants ordinarily required under the 4th Amendment. U.S. Department of Justice, ALegal Authorities Supporting the Activities of the National Security Agency Described by the President,@ 2-19-06, at 4-5. The policy also circumvented

the elaborate mechanism of the 1978 Foreign Intelligence Surveillance Act, or FISA, by which Congress had set up a special court pursuant to its powers under Article I of the Constitution, to handle precisely these sorts of emergency requests from the executive branch. *Id.* at 2-3, 18-28.

In testimony earlier this month in front of this Committee, Attorney General Gonzales defended the Bush Administration's practice by insisting that it was vital to the national defense. The Justice Department white paper declares that that program falls within the President's inherent powers to conduct the war against international terrorists. *Id.* at 1. President Bush has similarly stated that as commander-in-chief, he must have the power to fight our enemies wherever -- and however -- he sees fit.

I do not question the good faith of our President or our Attorney General. These are unusual times in our nation's history. I agree that the President's power as commander-in-chief -- even on American soil -- is potentially heightened for a period of time given the attacks on the World Trade Center and the continued threat of attacks from a new brand of enemy.

At the same time, the defense offered by the Bush Administration for its wiretap program is eerily similar to the losing argument advanced by President Harry Truman in 1952, when he seized the steel mills. Even aggregating all of the powers available to him under the Constitution, the Supreme Court concluded that the goal of keeping the country from going to hell -- even during time of war -- was not sufficient to nullify the Constitution. Seizing private property on American soil is a power generally reserved to Congress pursuant to the 5th Amendment power involving eminent domain. To make matters worse, President Truman defied legislation there, amendments to the Taft-Hartley Act dealing with labor

unrest B that specifically *withheld* such power from the executive branch.

As Justice Jackson declared in his now-famous concurrence in the Steel Seizure Case, presidential power was at its high point in the theater of war, @ abroad. It was at its lowest ebb @ on American turf, especially when the president had acted without Constitutional or Congressional support. 343 U.S. at 635-38 (Jackson, J., concurring).

Applying these lessons to the Bush wiretap program, certain conclusions can be drawn. There are problems enough when the executive branch does an end-run around an act of Congress, by-passing a legislative scheme that has been put in place for this type of domestic surveillance. But the problems only multiply ten-fold where, as here, the chief executive=s actions collide with the fundamental rights of citizens and residents under the Bill of Rights, specifically the 4th Amendment. In such a case, the president=s power is at rock bottom. Indeed, it arguably falls into a category even lower than that occupied by President Truman in the Steel Seizure case.

There is no question that President Truman believed passionately that his actions were necessary to protect American soldiers= lives and to safeguard the nation. (It turned out, years later, that the threat posed by a steel strike was grossly overstated). Symposium at 676. There is likewise no doubt that President Bush believes, fervently, that the warrantless surveillance of certain communications by citizens or residents on American soil is necessary to carry out the administration=s formidable war on terror.

Moreover, it is important to recognize that after September 11th, a fair case can be made that our nation is faced with a shifting paradigm, in which our own soil is potentially part of the field of battle. This, combined with new challenges posed by previously-

unimagined forms of communications technology, may ratchet up presidential power (generally) on the homefront.

Yet this does not, as Senator Specter aptly stated in the first round of this Committee's hearings, provide a blank check. Congress and the courts have a duty to correct the situation, if the executive branch commits an error in assessing its own powers. Let me summarize the principal problems with the current Bush administration secret surveillance program, as I see them:

First, nothing in the text of the Constitution specifically gives the President the power to bypass the warrant requirement of the 4th Amendment, on the domestic front, even during times of emergency.

Second, the administration's program circumvents a specific act of Congress, which establishes the FISA court and sets forth detailed procedures for conducting surveillance of precisely this sort, involving citizens and residents of the United States. 50 U.S.C. Section 1801 *et seq.* (1978).

Third, that power is even further diminished because the Bush administration's program collides with rights of American citizens and residents under the Bill of Rights, to wit, those protected by the Fourth Amendment. This collision puts the President's power at an even lower point on the continuum of Constitutional power than that of President Truman in the Steel Seizure case.

Fourth, if one adopts the Steel Seizure test and applies it to Congress, one discovers that Congress is at its zenith in exercising powers in this domain. Congress has the power to establish inferior courts and to define their jurisdiction, pursuant to Article I, Section 8,

Clause 9 of the Constitution. Congress furthermore has the power to enact laws ensuring that the 4th Amendment and other provisions of the Constitution are observed; it has done so with detailed wiretap statutes since the 1960's. Thus, Congress is at a high point in terms of exercising its powers here. On the other hand, President Bush is arguably in the third and lowest category of Presidential power set forth by Justice Jackson in the Steel Seizure case, as discussed above.

A number of important lessons can be gleaned from the events of recent months, that may provide guidance to this Committee as it works diligently to find an appropriate resolution to this quandary.

First, it has become increasingly evident that homeland security includes observing and protecting our Bill of Rights. Without adhering to the commands that James Madison and other Founders included in our Constitution's first eight amendments, there is no democratic nation to protect.

Second, in the past months, with the confirmation of two new Supreme Court Justices B which this Committee handled in a professional fashion of which all Americans can be proud B we heard a great deal about judges not Aegislating@ from the bench. That is based on the correct notion that the Constitution spells out differing roles for each branch of government, and that no branch should encroach upon the province of another. Yet that rule holds true for the executive branch, with equal force. The executive branch has no basis for usurping the powers of Congress, on the domestic front, even based upon a good-faith belief that such action might advance its legitimate war on terror.

Third, it is insufficient for the President to declare: AI must do this as commander-in-

chief, regardless of what any other branch of government says, and regardless of any specific authorization in Article II of the Constitution. That boils down to a political claim, akin to Louis the XIV's statement that *AL=etat, c=est moi,* or *AI am the state.* In the American system of government, the rule of law is something greater than the President or Congress or the judiciary or any single office or its occupants. If Congress properly enacts a law, as it has done in creating the FISA court and its related procedures, and the executive branch succeeds in bypassing it without resort to the courts, the entire notion of *Arule of law* collapses.

Fourth, by insisting that the President adhere to the FISA procedures or some updated version of them, Congress is not in any way preventing the President from carrying out his duties under the Constitution. To the contrary, it is giving the President additional Constitutional authority that he does not otherwise possess, and enabling him to carry out his important war on terror with enhanced Congressional support. It simply requires him to adhere to certain procedures, that are already flexible and sensitive to national security concerns.

Fifth, one justification advanced by the executive branch can be summarized as follows: *AWe are engaged in an ongoing war on terror, that has moved to American soil. The President must therefore be empowered to take extraordinary action during such times of emergency.* See Justice Department white paper at 34. The response to that justification, however, is: *AWhen does this emergency cease?* It may be true that in the immediate aftermath of a horrible act of aggression like the attack of September 11th, the President assumes heightened powers, even on the domestic front. But unless we are prepared to say that the President may unilaterally suspend the Constitution for an indefinite period of time in

order to deal with emergencies that have no ending-point, the correct reply must be: **If the body politic believes our Constitution is outdated and no longer works, it should be amended.** It has been nearly five years since the events of 9-11. There is a Constitutional mechanism in place (i.e. the amendment process set forth in Article V of the Constitution) if the executive branch believes its powers on the homefront must be enhanced beyond those powers that Congress has granted it through the Patriot Act and other pieces of legislation governing domestic powers.

In the end, the conflict presented here raises the age-old Latin riddle: **Quis custodiet ispos custodes?**, or **Who guards the guardians?** The answer, in our democratic republic, is that we maintain an elaborate system of checks and balances that maintains an equilibrium so that no one branch of government may improperly usurp the power of another. No one branch is given the authority to **opt-out** of complying with the Constitution. This is particularly true when it comes to observing the rights of American citizens, from whom the government's power is derived.

It is here that the observation of Chief Justice Rehnquist becomes relevant. The point he made, in reflecting on the Steel Seizure case, was: **If the nation as a whole feels a sense of *imminent threat* here on the homefront, then the courts may give the President and Attorney General more latitude than usual in exercising their Constitutional authority. Yet once that sense of imminence and urgency passes, the courts will return to the Constitutional base-line.** Symposium at 683. An emergency justifying the suspension of Constitutional rights and any re-drawing of the lines that separate the powers among the three branches of government is **perforce temporary in nature. The longer the executive branch, in this case, bends the rules in**

the name of an emergency, the weaker the justification becomes. At some point, a President who seeks such enhanced powers must get them in one of two ways: He must obtain direct authorization from Congress (assuming this comports with the Constitution); or he must convince the people themselves to amend the Constitution.

V. Key Features of Legislation Necessary to Reform Bush Administration Wiretap Program

Efforts to draft corrective legislation to address problems in the current wiretap program are still in their early stages. Nonetheless, time is of the essence. Several basic reforms are advisable if legislation is to correct defects in the Bush Administration program in a fashion that will pass constitutional muster in the courts. At a minimum, such legislation should seek to accomplish the following:

A. Use as a Starting Point the Current FISA Statute

The FISA statute has been fine-tuned by the legislature and subjected to judicial scrutiny since 1978. It already provides flexibility and relaxed standards to the executive branch. The statute should not be abandoned. However, it must keep up with fast-moving technological change (the evolution from analog to digital technology since the enactment of FISA is one change with enormous ramifications). Therefore, one sensible approach is to enact an addendum to FISA until that statute can be fully updated and overhauled at a later date. For the moment, several basic statutory reforms will correct the problem and allow the Administration to move forward. It is very important to note that the FISA statute already exists very close to the line of watering down the Constitutional guarantees contained in the 4th Amendment. Some observers have referred to it as providing for *probable cause lite*.⁹ Any

new legislation should adhere as closely as possible to the existing statute, in order to avoid undermining the Constitutional guarantees set forth in the 4th Amendment by disemboweling the probable cause requirement.

B. Create a Mechanism for Judicial Review

The nature of the post-9-11 war on terror, combined with the dramatic changes in technology (particularly with respect to electronic communications) since FISA was first enacted 28 years ago, admittedly create a daunting challenge for this and future Administrations. As Congress seeks to re-vamp and update the existing law, an immediate hurdle faces it: How can an addendum be crafted such that the Administration=s evolving wiretap and surveillance programs can be subjected to judicial scrutiny, i.e. tested in the courts? Ever since *Marbury v. Madison*, in 1803, our Constitutional system has recognized the principle of judicial review, by which federal courts are empowered to determine if governmental action is Constitutional. In the new world of high-tech communications, however, problems arise. By definition, the government=s surveillance activity brought to the FISA court are conducted in secret. In the overwhelming number of cases, the identity of the individuals whose communications have been monitored or intercepted will not be known. Thus, there is rarely a classic aggrieved Aplaintiff,@ as would be the case if the government sought a warrant to tap a phone or to intercept John Q. Citizen=s mail.

For this reason, the most sensible way to ensure review by the courts is to require all federal agencies or actors who engages in secret, warrantless surveillance to apply to the FISA court for some sort of Aprogram-based warrant,@ *in camera*, seeking permission from a neutral and detached judge (or panel of judges) to engage in a specific type of surveillance or a

specific category of monitoring. The program-based warrant would explain the nature of the surveillance in detail, and set forth reasons why it was impossible or impracticable for the government to obtain a traditional search warrant.

C. Create a Mechanism for Congressional Oversight

The statute should further require oversight by Congress. It might require periodic reporting, in a confidential manner, to a designated committee of both the House and Senate (i.e. the Permanent Select Committee on Intelligence of the House and the Select Committee on Intelligence of the Senate). As part of that reporting function, the agency or government actor would be required to explain the nature of any secret, warrantless surveillance and the reasons why obtaining traditional warrants was impossible. To that extent, the reporting requirement vis-a-vis Congress would be similar to that already existing under FISA. See 50 U.S.C. Sec. 1826. The statute would additionally empower the designated legislative committees to file a complaint with the FISA court in the event they had reason to believe that the agency or individual's activity violated the statutory requirements set forth in the statute. The FISA court would then be empowered to issue a Rule to Show Cause to the agency or actor, requiring it to explain its non-compliance with the statute or to be held in contempt of the FISA court. In this fashion, a valid case or controversy would be created, sufficient to satisfy Article III, Section 2 of the Constitution. (Aggrieved individuals, to the extent they determined that they had been subjected to surveillance by the government, would still have standing to bring suit as well.)

This is not unlike other situations in which a case or controversy is established, for purposes of Article III, where a matter is not ripe for judicial review in a traditional sense but

there exists a high probability of repetition that evades review. In certain cases e.g. dealing with abortion and/or matriculation of university students the matter inevitably becomes moot before it can be fully reviewed by the courts. Nonetheless, a case or controversy is deemed to exist, as a matter of necessity. The issue is likely to repeat itself and will otherwise evade review. Likewise, when it comes to the implementation of secret surveillance programs carried out by the executive branch, important and concrete Constitutional questions might be avoided indefinitely if some party were not given standing to present the matter to the FISA court. Thus, allowing Congress as part of its oversight function to file a complaint is one sensible fashion by which to place the issue within the purview of the judicial branch. Since Congress has the power to create the FISA court in the first place, and to authorize certain highly-sensitive types of surveillance by the executive branch, creating a mechanism for judicial review becomes essential. Not only does it maintain the equilibrium of our system of separation of powers, but it also provides a mechanism to ensure that the guarantees of the 4th Amendment are not circumvented.

D. Congressional Oversight Alone is Insufficient

Ultimately, issues dealing with the constitutionality of wiretap programs carried out by the executive branch must be reviewed by the courts. Creating a mechanism for the FISA court to review such programs is an important first step. The statute must there create a mechanism of appeal to the FISA Court of Review, as well as a mechanism of appeal to the United State Supreme Court. Such a requirement is essential. Article 1, Section 8, Clause 9 of the Constitution allows Congress to create inferior tribunals, i.e. tribunals inferior to the Supreme Court. This means -- as is restated in Article III, Section 1 -- that the Congress lacks

power to transform the FISA courts into courts of last resort. They *must* be answerable, ultimately, to the Supreme Court. Otherwise, a surrogate Supreme Court would be created that stripped Article III courts of their constitutionally-defined jurisdiction.

5. The Intake Mechanism for Matters Funneled Into the Secret FISA Court Must Be Strictly Limited

It is crucial, in drafting any electronic surveillance legislation that is to withstand Constitutional scrutiny, that the intake mechanism by which cases are funneled into the secret FISA court remain as narrow and carefully-defined as possible. No branch of government, even Congress, has the power to indefinitely suspend the protections of the 4th Amendment. Currently, the FISA statute is scrupulously limited to surveillance relating to international security matters. This is so because the courts have consistently held that the executive branch's power is at its zenith when it comes to foreign affairs. Thus, the current FISA statute permits an alternative procedure to our usual requirement of open courts, traditional search warrants, etc., only where the government certifies there exists probable cause to believe that the target of the electronic surveillance is a *Aforeign power@* (including international terrorist groups) or *Aan agent of foreign power@* (See 50 U.S.C. Section 1805(a)). Moreover, the government must certify that a *Asignificant purpose@* of the surveillance is to obtain foreign intelligence information, and provided a detailed statement of the basis for that belief. (See 50 U.S.C. Section 1804).

In order to prevent any amendment or addendum to FISA from eviscerating the guarantees of the 4th Amendment that ordinarily apply to American citizens and residents, the intake mechanism must be carefully limited to surveillance dealing with international security

matters and foreign affairs. Otherwise, the distinction between those matters (where the President is given ample latitude and authority under the Constitution) and matters dealing with domestic affairs (where he is significantly circumscribed by the Constitution including the Bill of Rights) will be gutted. Thus, the resulting statutory scheme will become Constitutionally indefensible.

* * *

We know from experience that times of crisis are often when the worst decisions are made, in historical hindsight. The fear of communists and socialists during the First and Second World Wars led to prosecutions under the Espionage Act that, in hindsight, unnecessarily curtailed first amendment freedoms. Attorney General Palmer=s round-up and arrest of thousands of suspects in 1919-1920, during WWI, whom he alleged were part of a communist plot to overthrow the government (which never panned out) was viewed as a disgrace. The panic after the Japanese invasion at Pearl Harbor led to the internment of 100,000 American citizens of Japanese descent on the West Coast, and the infamous Korematsu case that has since been repudiated by the United States Government itself, has been vilified because it disregarded basic individual rights. [CITE]

On the other hand, there were real, pressing reasons for those decisions. Abraham Lincoln -- when he was criticized for suspending writs of habeas corpus during the Civil War, arguably in violation of the Constitution responded by saying, in effect BA maybe so, but the Constitution won=t do us much good if we have no country to protect anymore.@ [CITE]

During the course of my work relating to the Steel Seizure case, which spanned several years, I spent considerable time with men who worked alongside Harry Truman in the White

House, as he confronted these difficult decisions. They were now in their eighties and nineties, at the end of their careers; there was nothing politically-inspired about their impressions a half-century later. There was absolutely no question that President Truman believed with all moral certainty that he needed to take action to protect the country and to save lives of American troops. His advisors in the White House believed the same thing, honestly, based upon the best information available to them. There was nothing manufactured about this. Harry Truman was trying with every fiber in his body to discharge his duties as President as he believed the Constitution commanded him.

There is no question in my mind that President Bush and his advisors in the White House and Attorney General Gonzales are doing everything humanly possible to do the right thing for the country here. There should be no finger-pointing, or criticism with respect to motives or partisan jousting. This is serious business. President Bush confronts a world quite different than any other previous President. We should not be quick to condemn his efforts to preserve our nation. At the same time, Congress has clearly delineated powers under the Constitution, and it owes a duty to our system of government to ensure that those are not disemboweled or diminished, even by the President. This is not about right or wrong or moral absolutes. It is about attempting to find a common constitutional ground among equally well-intentioned public officials and branches of government. I pray that we, as a nation, are still capable of doing that.

As citizen-observers during this complex, dangerous, uncertain time, we are provided a direct glimpse into the minds of past leaders -- including Harry S. Truman -- who have taken controversial actions during times of crisis, that were ultimately viewed as over-reaching.

Dangers, however, only prove themselves to be over-exaggerated in hindsight. Our fear of terrorism today in the United States may prove to be overblown; or it may prove to have been under-estimated. We will not know for quite some time, until the web of history is woven.

Through these hearings, this Senate is beginning the important public dialogue that ultimately B in two years or five years or twenty years B will allow the courts and Congress and executive officials to determine how much power is appropriately wielded by each branch of government. It will also inform the decision as to when, and whether, each branch of government has crossed over the line in dealing with the aftermath of 9-11.

When our children, and their children, walk the halls of this Senate building in a half-century, there will undoubtedly be discussion during some future time of crisis about the exercise of Presidential and Congressional power in the aftermath of the terrorist attacks on New York City and Washington, D.C. in the year 2001. God-willing, we will have a secure United States by that time. Our nation will have survived this threat and moved on to address wholly new challenges in this country.

Several lessons can be learned from Harry S. Truman=s experience in 1952. One is that it is not the President or the courts or even this Congress that will ultimately decide how far each branch of our government is permitted to go.

In the end, the citizens of the United States of America will make that call.

Thank you for inviting me to testify at these crucial hearings today.

TESTIMONY OF
DOUGLAS W. KMIEC
CHAIR & PROFESSOR OF CONSTITUTIONAL LAW
PEPPERDINE UNIVERSITY
FMR. ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL,
U.S. DEPARTMENT OF JUSTICE
BEFORE THE
U.S. SENATE JUDICIARY COMMITTEE
FEBRUARY 28, 2006

Mr. Chairman and Members of the Committee

When Franklin Roosevelt gave his famous “four freedoms” speech to the seventy-seventh Congress on January 6, 1941, he observed that the will that would prevail in war and preserve human freedom was the one that pursued its task “without regard to partisanship,” but nevertheless was committed “to [an] all inclusive national defense. . .” I commend this committee for addressing the topic of reforming the Foreign Intelligence Surveillance Act of 1978 (FISA) in a responsibly bipartisan fashion that meets the novel and continuing threats of the war on terror in a manner that also safeguards civil liberty.

Frequent reference has been made to Justice Jackson’s framework in *Youngstown Sheet & Tube v. Sawyer*¹ for analyzing differences that occur between the executive and the legislative branches of our government. *Youngstown* is often remembered as a case which limited the President, but I submit it is better understood for its encouragement of cooperation. Yes, Justice Jackson opined that when the President acts against the legislative choices of Congress, his sole support for action must then be found in the Constitution, but he also was at least indirectly reminding Congress that in times of national peril, the Congress ought neither remain silent nor stand in unbending opposition. Both political branches must strive toward the common objective of defeating our nation’s adversary. It is fair to say that Justice Jackson sketched his outline of the respective powers of the branches of our government not to encourage greater division, but greater harmony – to, if you will, ensure that when the President acts against a radicalized, terrorist force such as al Qaeda that indeed he acts not at the lowest ebb of authority, but at its zenith.

In the midst of the Iran-Contra debates, when I was serving President Reagan as head of the Office of Legal Counsel, I had occasion to reflect on the importance of this cooperation, noting that:

An overly adversarial attitude, which insists upon a precise demarcation of

¹343 U.S. 579 (1952).

powers in matters of every significance, thrives on a level of confrontation which neither is in keeping with the intent of the framers nor is necessarily conducive to good government. As former Attorney General and Professor of Law Edward Levi remarked, '[t]he branches of government were not designed to be at war with one another. The relationship was not to be an adversary one' Similarly, the late Justice Robert Jackson observed that 'while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'

As history and even current events demonstrate, members of any branch of government forget this lesson at their peril. President Truman forgot it when he seized steel plants without legislative authorization or inherent constitutional authority. President Nixon did the same when he impounded or refused to spend funds authorized to be spent by Congress. Congress overstepped its constitutional boundary when it sought to empower a largely legislative commission to enforce election laws through litigation, and when it retained authority over the implementation of previously passed laws by means of the legislative veto. In each case, there was a direct corrective reaction by the branch encroached upon or an indirect correction through the courts. In a sense, these corrections give proof to the genius of the framers' creation for thwarting even petty tyrannies. However, each occasion for correction does its own damage, just as something repaired never quite equals the vitality it had when new. Furthermore, in these corrections lie the seeds of greater hostility and suspicion. . . .

Action, reaction, counteraction--the process is inexorable and self-destructive. . . . Thus, failure to understand that the framers envisaged the separated branches of government not as balkanized empires but as cooperative allies designed to 'achieve a harmony of purposes differently fulfilled' leads to a divorce, rather than a separation of powers, and, in that, its own undoing.²

The Common Objective: To prevent further attack by use of enhanced surveillance

President Bush and the Congress are of one mind on the need for enhanced surveillance capacity. A few days after 9/11, President Bush promised to use "every tool of intelligence . . . and every weapon of war to the destruction of and to the defeat of the global terrorist network."³ Likewise, the Joint Inquiry Report of the U.S. Senate Select Comm. on Intelligence & U.S. House Permanent Select Comm. on Intelligence, factual findings conclude: regarding

²Douglas W. Kmiec, *Of Balkanized Empires and Cooperative Allies*, 37 CATH. U. L. REV. 73, 77-78 (1987).

³Address to a Joint Session of Congress (September 20, 2001).

intelligence failures before 9/11: “the [Intelligence] Community missed opportunities . . . to at least try to *unravel the plot through surveillance* and other investigative work *within the United States*; and, finally, to generate a heightened state of alert and thus harden the homeland against attack.”⁴ The same Joint Inquiry Report of Congress made a systemic finding that FISA applications were declining because of difficulties with the process and the “perception . . . that the FISA process was lengthy and fraught with peril.”⁵

Attorney General Gonzales has commended the FISA judges for their heroic work to make probable cause and other findings under very demanding, often middle-of-the-night conditions. As the Attorney General observed, “[t]he FISA process makes perfect sense in almost all cases . . .,” but “the terrorist surveillance program operated by the NSA [National Security Agency] requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail.”⁶ The Attorney General noted that “[t]he critical advantage offered by the terrorist surveillance program compared to FISA is *who* [a professional intelligence officer] makes the probable cause determination and how many layers of review must occur *before* surveillance begins.”

The reasonable necessity of the terrorist surveillance program has likewise been made plain by the Chairman of Select Committee on Intelligence, who has been briefed on the program from its inception and concludes that the “NSA Program is legal, necessary, and reasonable.”⁷

The Legal Issue

This Committee has already heard ample testimony on the legal issues surrounding the Terrorist Surveillance Program, and it is not my purpose to rehearse them. While some arguments, in my judgment, are more persuasive than others, I have concluded that the President has existing legal authority to undertake the program as it has been publicly discussed.

The primary argument against the President’s existing legal authority is the claim, asserted by several academics and legal professionals in a letter to Congress dated February 9,

⁴S. Rep. No. 107-351, H.R. Rep. No. 107-792 (2002) (emphasis supplied).

⁵Systemic finding 12.

⁶Prepared Statement of Attorney General Alberto Gonzales before the Senate Judiciary Committee (February 6, 2006).

⁷ Letter from Senator Pat Roberts to Senators Specter and Leahy (February 3, 2006).

2006,⁸ to the effect that Congress had “expressly establishe[d] FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigations) as the ‘exclusive means by which electronic surveillance . . . may be conducted,’ 18 U.S.C. 2511(2)(f) (emphasis added).”⁹ While having tremendous respect for the insight of these men and women, I believe their almost singular reliance upon this statutory section is no more definitive than the opposing view that relies heavily upon the “except as authorized by statute” caveat in 50 U.S.C. 1809(a)(1).

It was clear that in enacting FISA, Congress was primarily seeking to prevent a recurrence of abuse of domestic surveillance against domestic political adversaries. As a democratic matter, this was, and is, an unassailable objective. But it was also evident to those drafting and considering FISA that the Supreme Court had separately considered the President’s authority over intelligence as it related to foreign affairs. In *United States v. United States District Court*, 407 U.S. 297 (1972) (the “Keith” case), the Supreme Court made clear that it was not addressing the President’s authority to conduct *foreign* intelligence surveillance without a warrant and that it was expressly reserving that question: “[T]he instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.” *Id.* at 308; *see also id.* at 321-22 & n.20 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”). Following *Keith*, three courts of appeals squarely concluded – after expressly taking the Supreme Court’s decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g., Truong Dinh Hung*, 629 F.2d at 913-14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425-26.

That the President has inherent authority to conduct foreign intelligence surveillance, of course, does not answer the question whether that authority is subject to Congressional regulation or whether such Congressional regulation, if it is constitutionally permissible,¹⁰ must

⁸Letter from Beth Nolan, David Cole, Harold Koh, Laurence H. Tribe and ten others to the members of Congress, *reprinted in the New York Review of Books*.

⁹ *Id.*

¹⁰This testimony largely relies upon the few lower federal court decisions that have found FISA, as applied, to be constitutional. *See, e.g., U.S. v. Belfield*, 692 F.2d 141 (D.C. 1982); *U.S. v. Cavanaugh*, 807 F.2d 787 (9th Cir. 1987), and *U.S. v. Duggan*, 743 F.2d 59 (2d Cir. 1984). The constitutional arguments raised in these cases principally relate to whether the FISA warrant is an adequate substitute for a Fourth Amendment warrant to justify surveillance for foreign intelligence purposes. In light of *Keith*, the relaxed probable cause showing required by FISA has been found to be constitutionally reasonable. While a variety of other separation of powers issues are presented in these cases, mostly related to the designation by the Chief Justice of

necessarily be different in times of war and peace.

Congress' Foreign Affairs Power

With regard to congressional regulation, the answer must surely be informed by the broad grants of authority to Congress in matters of foreign affairs, including: "Congress shall have Power to provide for the common Defence. ..." to regulate foreign commerce, and to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the law of Nations." Of course, Congress is also empowered to declare war, to make rules of war, grant letters of marque and reprisal, and to raise, support and regulate an army and a navy. Treaties are ratified only on a two-thirds vote of the Senate. Beyond this, Congress also has the power to "provide for calling forth the Militia to execute the Laws of the Union.... and substantial authority over foreign commerce. There is also implied congressional power under the "necessary and proper" clause.¹¹

Article III judges to serve on the FISA court, no case, in my judgment, thoroughly and conclusively addresses whether FISA, itself, is on its face or as applied, an unconstitutional encroachment upon executive authority or an improper assignment of executive decision making to a judicial officer in ways that would transgress the incongruity principles stated in *Morrison v. Olson*, 487 U.S. 654 (1988). Except insofar as a proposed reform of FISA considered herein may aggravate these constitutional questions, they are not addressed in this testimony. As indicated immediately below, because of Congress' ample authority over foreign affairs, there is no easy answer to the general question of FISA's constitutionality vis a vis executive or judicial power, and it is one that inter-branch comity may suggest should not be pressed by either Congress or the President to its farthest extensions.

¹¹The Supreme Court has acknowledged the existence of a constitutionally implied power authorizing Congress to regulate foreign affairs. In *Perez v. Brownell* 356 U.S. 44 (1958), the Court held that Congress was acting within its foreign affairs power by stating in the Nationality Act of 1940 that any United States citizen voting in a foreign political election would lose his citizenship. Justice Frankfurter, writing for the Court, asked:

[W]hat is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the nation.... [A] Federal Government to conduct the affairs of that nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations ... [i]t must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.

The President's Foreign Affairs Power

Of course, the President, as the Attorney General has ably demonstrated, can list significant constitutional support for his own authority, including a post-FISA, 2001 acknowledgment by Congress that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”¹² The court created by the FISA regime, itself, has recorded that “all the other courts to have decided the issue [have] held that the President [has] inherent authority to conduct warrantless searches to obtain foreign intelligence information *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*” (emphasis added), see *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). As long as we have been a nation, the President and Congress have been contesting the exact scope of their respective authorities over foreign affairs without definitive resolution.¹³ It is well known that the eminent Justice Jackson opined that he could find apt quotations justifying both positions out of materials which he described as enigmatic as the dreams of the Pharaoh.¹⁴

Enigmatic or not, the competing executive-legislative claims of authority were reflected in the deliberations over FISA and the matter was left unresolved. Whether or not one credits the Attorney General's construction of FISA under the “other statutes” provision or not, it is evident

Though the precise holding of this case was later overruled, the Court cast no doubt on the reasoning and principle that Congress was constitutionally empowered to legislate on such matters.

¹²Authorization for the Use of Military Force (AUMF), pmb. Pub. L. No. 107-40, section 2(a), 115 Stat. 224 (Sept. 18, 2001), codified at note 50 U.S.C. 1541.

¹³The continual controversy existing between Congress and the executive as to the extent of each branch's foreign affairs power centers on whether Congress and the President act as constitutional equals in this sphere or whether the executive initiates foreign policy while the Congress reacts merely to implement the president's policy. The importance of congressional participation in international affairs was recognized during the early stages of United States' foreign policy, especially by James Madison in his neutrality debates with Hamilton.

¹⁴*Youngstown Sheet*, 343 U.S. at 634 (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh”).

that the FISA drafters attempted to avoid encroaching on the substantial power of the President. Senator Roberts indicated in his letter to this committee of February 3, 2006 that some committee report language pertaining to FISA claimed to deny the president any constitutional authority to conduct surveillance in the United States “outside the procedures contained in [Title III and FISA],”¹⁵ while President Carter’s Attorney General, Griffin Bell, sought to defend that independent power and indicated that the FISA legislation could not take it away.¹⁶ Thus, it is not surprising that when President Carter signed the legislation in October 1978, he indicated that the new legislation “clarifies the Executive’s authority to gather foreign intelligence by electronic surveillance in the United States.”¹⁷ A “clarification” was needed because the decision in *Keith* and lower court decisions had applied different Fourth Amendment considerations to domestic and foreign surveillance, even as both implicated national security. In any event, as Senator Roberts has aptly observed, whether Congress may have intended to regulate the statutory or constitutional authority of the president, or both, “Congress, by statute, cannot extinguish a core constitutional authority of the President.”¹⁸

The Authority of the Congress and President – in light of FISA – in Time of War

It is a fair interpretation of FISA that it largely leaves wartime surveillance to be governed prospectively by later legislation as needed. In essence, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA’s express procedures and during which Congress would be expected to re-visit the issue of what specific statutory authority the President needed in war-time. See 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063. This is a highly significant, and indeed, particularly wise reservation of a question to be decided later. The Conference Report noted that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to “allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency.”

¹⁵S. Rep. 604, 95th Cong., 1st Sess., 64-65 (November 15, 1977).

¹⁶Testimony of Attorney General Griffin Bell, Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5974, Before the Subcommittee on Legislation of the House Committee on Intelligence, 95th Cong., 2d Sess. 15 (1978).

¹⁷Foreign Intelligence Surveillance Act of 1978, Signing Statement for S. 1566, (October 25, 1978).

¹⁸ Letter from Senator Roberts to Senators Specter and Leahy (February 3, 2006) at 12.

Additional legislative history suggests that Congress' specific definition of "electronic surveillance" in FISA was intended to carefully exclude certain then-known intelligence activities – signals intelligence – conducted by the National Security Agency. According to the report of the Senate Judiciary Committee on FISA, "this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States." S. Rep. No. 95-604, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of "electronic surveillance" was crafted for the same reason. *See id.* at 33-34, 1978 U.S.C.C.A.N. at 3934-36. FISA thereby "adopts the view expressed by the [then] Attorney General [Griffin Bell] during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation." *Id.* at 64, 1978 U.S.C.C.A.N. at 3965. The Department of Justice reports that such legislation placing limitations on traditional NSA activities was never passed. *See* National Intelligence Reorganization and Reform Act of 1978: Hearings Before the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 999-1007 (1978) (text of unenacted legislation).

While signals intelligence has been a common feature of past war efforts, this exclusion is apparently insufficient to cover the present Terrorist Surveillance Program of the NSA. Assuming this to be true, it is nevertheless significant that Congress understood that the NSA surveillance that it had categorically excluded from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The Senate Report, for example, specifically referred to the Church Committee Report for its description of the NSA's activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965-66 n.63, which stated that "the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans . . ." S. Rep. 94-755, at Book II, 308 (1976). Congress' understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures again suggests the prudent manner in which Congress sought to avoid executive-legislative clash.

Which brings us to the question of what, if anything, does FISA require during wartime? It is fair to observe that in all the recorded military engagements of our past, the military has engaged in searches and surveillance without a warrant. Neither Congress nor the President has required the armed forces to seek a battlefield warrant to conduct visual or electronic surveillance of enemy forces. Was it FISA's intent for military operations *within* the United States to operate under a different rule? There is no legislative history requiring that FISA be construed contrary to historical practice. The Civil War is, of course, the main historical battle fought on our soil and there is no history suggesting that any search or observation of

confederate forces during the Civil War was subject to a warrant requirement. The expressed congressional intent was to “reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights.” S.Rep. No. 95-701, 95th Cong., 2d Sess. 16 (1978). The courts have interpreted this language carefully so as not to defeat valid intelligence needs. Thus, Judge Wilkey in *U.S. v. Belfield*, 692 F.2d 141 (D.C. Cir 1982) rejected the claim that FISA, insofar as it does not require disclosure and an adversary hearing, violates the Fifth and Sixth amendments or was contrary to the Omnibus Crime Control and Safe Streets Act of 1968 (OCCA) 18 U.S.C. § 2518(9) (1976) (providing the contents of an intercepted communication may not be used in any proceeding unless the aggrieved person is first furnished with a copy of the application and court order authorizing the interception). Applying the general disclosure obligation, Judge Wilkey reasoned, would have ignored that Congress recognized the need for the Executive to engage in and employ the fruits of clandestine surveillance without being constantly hamstrung by disclosure requirements.

It is thus no disrespect to Congress’ ample authority in matters of foreign affairs to believe that FISA should not be readily interpreted to “hamstring” the Executive in its conduct of *wartime* intelligence. Were enemy al Qaeda forces to invade and operate on the territory of the United States, the Constitution could not reasonably be construed to require a search warrant for the military to conduct surveillance of the enemy, and the greatest hesitation should be exhibited before attributing to Congress the intent to encumber the military with a FISA warrant.

There is nevertheless some confusion on this. A November 15, 2001 Department of the Army Memorandum from the Deputy Chief of Staff for Intelligence suggests that the collection of foreign intelligence information about U.S. Persons acting as foreign agents is on-going by military intelligence. No specific reference is made to the need for a FISA warrant, though there is a perfunctory reference to a pre-war-on-terror regulation, and that regulation (dating to 1984) incorporates a FISA requirement. Nonetheless, the post 9/11 DoD memorandum recites:

Subject: Collecting Information on U.S. Persons

.....

2. Many of the perpetrators of [the 9/11] attacks lived for some time in the United States. There is evidence that some of their accomplices and supporters may have been U.S. persons, as that term is defined in Executive Order 12333. This has cause concern in the field regarding MI’s collection authority. With that in mind, [the memorandum] offers the following guidance:

- a. Contrary to popular belief, there is no absolute ban on intelligence components collecting U.S. person information. That collection, rather, is regulated by EO

12333¹⁹ and implementing policy in DoD 5240 1-R and AR 381-10.

b. Intelligence components may collect U.S. person information The two most important categories for present purposes are “foreign intelligence” and “counterintelligence.” Both categories allow collection about U.S. persons reasonably believed to be engaged, or about it engage, in international terrorist activities. Within the United States, those activities must have a significant connection with a foreign power, organization, or person (e.g., a foreign terrorist group).

3 . . . [S]taff has received reports from the field of well-intentioned MI personnel declining to receive reports from local law enforcement authorities, solely because the reports contain U.S. person information. MI may receive information from anyone, anytime. . . . Remember, merely receiving information does not constitute “collection” under AR381-10²⁰; collection entails receiving “for us.”

¹⁹ Executive Order 12333 pre-dating the present war on terror provides that “All means, consistent with applicable United States law and this Order, and with full consideration of the rights of United States persons, shall be used to develop intelligence information for the President and the National Security Council.” Para. 1.1 (b). The Army Regulation referenced in the DoD Memorandum also pre-dates the war and was issued on July 1, 1984. This regulation provides that “A DoD intelligence component may conduct electronic surveillance within the United States for foreign intelligence and counterintelligence purposes only pursuant to an order issued by a judge of the court appointed pursuant to the Foreign Intelligence Surveillance Act of 1978.” Part 5. Electronic Surveillance. Whether any military intelligence has been conducted in the present war outside of FISA parameters, other than pursuant to the Terrorist Surveillance Program, is unknown to this witness.

²⁰ AR 381-10 provides:

Collection. Information shall be considered as “collected” only when it has been received for use by an employee of a DoD AR 381-10 • 1 July 1984 intelligence component in the course of his official duties. For information to be “received for use” and therefore “collected” by an Army intelligence component, an employee must take some affirmative action that demonstrates an intent to use or retain the information received (such as production of a report, filing of an investigative summary, or electronic storage of received data.) Establishment of “unofficial files” and the like may not be used to avoid the application of this procedure. Thus, information volunteered to a DoD intelligence component by a cooperating source would be “collected” under this procedures when an employee of such

But apart from the military intelligence piece of the puzzle, it must be conceded that the present war on terror is not solely undertaken by uniformed military pursuing intelligence activities in a battle theater, even if part of that theater is our homeland. As disclosed by the *New York Times*, civilian intelligence officers are apparently conducting the Terrorist Surveillance Program in a manner which captures, and therefore arguably searches, the conversations of U.S. persons as it is looking for the hidden terrorist enemy seeking to harm us from within or without.²¹ At most FISA could be said to apply to such wartime civilian officer surveillance only if Congress ignored its wartime exception and refused to legislate more specifically. This conclusion is informed by the FISA provisions discussed earlier – especially section 1811 providing an express, short-term exemption from FISA in the event of a war declaration and its related legislative history anticipating the enactment of specialized wartime legislation thereafter. The present hostilities are the very circumstances wisely anticipated by the drafters of FISA when they contemplated the need for additional legislation in a time of war.

FISA is in short *not* a wartime measure. In the war on terror, it is an important background principle – the beginning, not the end of an executive-legislative conversation. It is best understood as confirmation of the earlier executive branch and judicial view that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA importantly confirms – or as President Carter said, “clarifies” – the idea that, in the non-war-time foreign affairs context, the Fourth Amendment applies differently than in the criminal context. Following Justice Powell’s outline in *Keith*, FISA tries to parallel the warrant process in a criminal proceeding, but adjusted to its different non-war-time, foreign intelligence setting.

component officially accepts, in some manner, such information for use within that component. Data acquired by electronic means is “collected” only when it has been processed into intelligible form. Information held, or forwarded to a supervisory authority, solely for the purpose of making a determination about the collectability of that information under this procedure (and not otherwise disseminated within the component) is not “collected.”

²¹It is always possible in electronic surveillance, with or without a warrant, that purely innocuous communications could be unintentionally monitored. A drug kingpin, for example, under surveillance could be calling a high school pal to talk over old times and other personal issues. To protect against this, agencies that conduct such surveillance employ “minimization” procedures that are designed to filter out innocent communications. The Attorney General has indicated that the Terrorist Surveillance Program employs those measures to make sure that innocuous communications are not recorded and are filtered out.

FISA thus creates procedures for periods other than war, that, when used, creates a presumption that surveillance is reasonable by constitutional standards akin to, but not identical with, the Fourth Amendment. Any contemplated reform of FISA for war-time should arguably have a similar objective: to ensure that specialized war-time search measures meet a standard of reasonableness appropriate for a time of threat.

Does the AUMF sufficiently supplement FISA? – Balancing Inherent Presidential Power with Responsible Oversight

This committee is right to review whether there is a need for further legislation. As the American poet, T.S. Eliot observed: “War is not a life: it is a situation. One which may neither be ignored nor accepted.” In light of the situation of war which cannot be ignored and the threat of attack which cannot be accepted, it was entirely plausible for legal advisors to the President to construe the AUMF as confirming the President’s war-time authority for foreign intelligence surveillance without the necessity for meeting the existing FISA warrant requirement. Those opposing this view assert that to interpret the AUMF as permitting the president’s Terrorist Surveillance Program would raise “serious constitutional questions.” With all due respect, it is the reverse. All of the serious questions the opponents raise, however, assume what *Keith* did not; namely, that the Fourth Amendment applies to surveillance aimed at acquiring foreign intelligence information in the same fashion as domestic national security surveillance.

Keith, of course, suggested that Congress might fashion a specialized determination of probable cause for matters of *domestic security cases*. It expressly did not decide, because it was not before the Court, that the President’s foreign intelligence authority, let alone his war-time authority to conduct surveillance of an enemy, was subject to the Fourth Amendment. To the contrary, the Court cited authority for the “view that warrantless surveillance though impermissible in domestic security cases, may be constitutional where foreign powers are involved.”²² FISA, of course, went beyond Justice Powell’s recommendation and regulated domestic and foreign intelligence surveillance, while reserving the question of the pursuit of foreign intelligence in war time, except for a blanket 15 day period of exemption to allow legislative deliberation. Whether it was constitutional for Congress in FISA to regulate in the area of foreign intelligence surveillance has not been resolved by the Supreme Court. It is indeed a serious and open question. The seriousness, and doubtfulness, of an affirmative answer is compounded when the question is put in war-time.

The opponents of the Terrorist Surveillance Program posit that “construing the AUMF to authorize [wiretapping of those in communication with al Qaeda]

²²407 U.S. at 322 & n.20, citing *United States v. Smith*, 321 F. Supp. 424, 425-26 (C.D. CA 1971).

would raise serious questions under the Fourth Amendment.”²³ The argument is overbroad, and if credited, would cast doubt on FISA, itself. FISA warrants are not warrants under the Fourth Amendment. Fourth Amendment warrants require a showing of probable cause that “the evidence sought will aid in a particular apprehension or conviction for a particular offense” and “must particularly describe the things to be seized as well as the place to be searched.” FISA warrants require only that the government show that probable cause exists to believe that the target of the surveillance is the agent of a foreign power. When the target is a U.S. person, FISA standards require that the conduct of the U.S. person falls within federal criminal statutes. Nonetheless, even in such cases, FISA requires a lesser showing of probable cause than would apply in domestic criminal cases. FISA warrants, therefore, are not “warrants” as that term is used in the Fourth Amendment. The showing of probable cause for a FISA warrant is not that required by the Amendment. The availability and pursuit of the FISA warrant enhances the constitutional determination of reasonableness only. That is the necessary import of the FISA Court of Review’s decision, where it writes:

Although the Court in *City of Indianapolis* [distinguishing earlier checkpoint cases that secured the border or the safety of highways from intoxicated drivers from a checkpoint that had only general law enforcement purposes] cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. Our case may well involve the most serious threat our country faces. *Even without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.* We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillance it authorizes are reasonable.²⁴

Even if FISA had not already settled the Fourth Amendment issue outside of war-time,

²³ January 9, 2006 letter, supra.

²⁴ *In re Sealed Case*, 310 F.3d 717, 746 (For. Intel. Surv. Rev., 2002). That the FISA Court of Review believes its own authority is constitutional is worthy of great respect, even as it remains well short of a Supreme Court determination. In any event, the decision confirms what the President’s opponents deny – inherent foreign intelligence surveillance authority without a warrant.

the Department of Justice ably demonstrated in its memorandum of January 19, 2006 why the compelling interest of protecting the nation from terrorist attack outweighs the narrow intrusion on individual privacy interests implicated by the Terrorist Surveillance Program. These arguments are sound and will not be repeated here. They are referenced briefly below in summary, however, only to underscore that the Fourth Amendment cannot be meaningfully asserted, as the opponents of the Terrorist Surveillance Program have, to suggest that it was “implausible” to construe the AUMF as a sufficient, FISA-contemplated war-time authorization for the Terrorist Surveillance Program.

* The Fourth Amendment has never been understood to require warrants in all circumstances.²⁵

* There is a special need to operate without a warrant in the war on terror because the purpose of the search far exceeds general crime control.²⁶

* General reasonableness applies to the “special need” of preventing another terrorist attack.²⁷

The Fourth Amendment cannot be credibly raised as an objection to the AUMF as authority for the Terrorist Surveillance Program. As Attorney General Gonzales noted, the AUMF both recognizes the President’s “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” and it supplemented that authority empowering the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the

²⁵See, e.g., *Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (warrantless border search upheld); see also *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (stating that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”).

²⁶*Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

²⁷Determining the reasonableness of a search for Fourth Amendment purposes requires balancing privacy interests with the Government’s interests and ensuring that we maintain appropriate safeguards or minimization procedures to avoid any unnecessary examination of private conversations unrelated to al Qaeda. *United States v. Knights*, 534 U.S. 112, 118-19 (2001). Although the terrorist surveillance program may implicate substantial privacy interests, the Government’s interest in protecting our Nation is compelling. Because the need for the program is reevaluated every 45 days and because of the safeguards and oversight, the al Qaeda intercepts are reasonable.

terrorist attacks” in order to prevent further attacks on the United States.

The most persuasive aspect of seeing the AUMF as authority for the Terrorist Surveillance Program is the breadth of its language making it comparable to a formal declaration of war. Like the historically rare war declarations, the AUMF does not restrict the *resources* available to the President. He can employ all the military forces of the government. Second, the AUMF does not limit the *methods* of force that the President can use. As Professors Goldsmith and Bradley have pointed out, a good number of force authorizations outside of declared wars, “have been limited to particular methods of force, such as subduing or seizing certain entities or compelling certain actions.”²⁸ There is no relevant limitation on *targets* at least as it relates to a Terrorist Surveillance Program aimed at al Qaeda. Lastly, like the authorization in declared wars, the purpose of the AUMF is quite *expansive in objective*: to both defeat the al Qaeda forces and to prevent further attacks.

The present AUMF is faithfully contrasted with others of more limited scope. For example, the 1991 authorization to use force against Iraq allowed the President only to implement UN resolutions related to Iraq’s invasion of Kuwait. So too, the authorizations to use force in Lebanon in 1983 and Somalia in 1993 were even narrower. Goldsmith and Bradley write: “[i]n the Lebanon authorization, Congress limited the President’s use of the armed forces to the performance of certain functions (as specified in an agreement with Lebanon), established an eighteen-month limitation on the authorization, and imposed detailed reporting requirements. Similarly, the Somalia authorization had a very limited purpose (most notably, the protection of U.S. personnel and bases), a time limitation of approximately five months, and (in a later statute) a reporting requirement.”²⁹

The broadly worded AUMF also manifests an understanding that the war against al Qaeda implicates the homeland³⁰ and necessarily includes the usual incidents of war.³¹ In 2004,

²⁸Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2074-75 (2005).

²⁹*Id.* at 2076-77.

³⁰ The AUMF calls on the President to protect Americans both “*at home* and abroad,” to take action to prevent further terrorist attacks “against the United States,” and directs him to determine who was responsible for the attacks.

³¹ Justice O’Connor reasoned: “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and

the Supreme Court considered the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and confirmed this understanding. There, the question was whether the President had the authority to detain even though it was not expressly mentioned. As Justice O'Connor recognized, "it is of no moment that the AUMF does not use specific language of detention" or even refer to the detention of U.S. citizens as enemy combatants at all. *Id.* Nor did it matter that individual Members of Congress may not have specifically intended to authorize such detention, a distinct possibility in light of the Non-Detention Act. The reasoning necessarily must apply in a similar fashion to electronic surveillance. This is especially the case given the common acceptance of military intelligence gathering in wartime, the history of which has again been detailed for the Committee by the Attorney General.³²

The opponents of the Terrorist Surveillance Program have no effective response to the broad scope of the AUMF, the Court's sympathetic and flexible construction of it in *Hamdi*, and the historical practice of military intelligence in war time. It is hardly sufficient or meaningful to posit that these military engagements occurred pre-FISA, since as already noted, FISA deliberately left surveillance in war-time to be resolved later and contemporaneously with the relevant hostilities.

Having determined that FISA left the question of war-time surveillance unresolved, and that the AUMF, could reasonably and constitutionally be construed to authorize the Terrorist Surveillance Program, the question remains, should Congress explicitly and specifically authorize the Terrorist Surveillance Program, and is the oversight mechanism proposed by the National Security Surveillance Act of 2006 (NSSA)³³ both prudent and constitutional?

appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." 542 U.S. at 519 (plurality opinion).

³² The Attorney General pointed to "a long tradition of wartime enemy surveillance – a tradition that can be traced to George Washington, who made frequent and effective use of secret intelligence. One source of Washington's intelligence was intercepted British mail. *See* Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In the Civil War, telegraph wiretapping was common and provided important intelligence for both sides. In World War I, President Wilson authorized the military to intercept all telegraph, telephone, and cable communications into and out of the United States; he inferred the authority to do so from the Constitution and from a general congressional authorization to use military force that did not mention anything about such surveillance. *See* Exec. Order No. 2604 (Apr. 28, 1917). So too in World War II; the day after the attack on Pearl Harbor, President Roosevelt authorized the interception of *all* communications traffic into and out of the United States."

³³An earlier draft of this proposal was style the Wartime Intelligence Surveillance Act of 2006 or WISA. This appellation was more apt since it both candidly conceded the wartime

The National Security Surveillance Act of 2006

As discussed above, Congress has already given general authorization of the Terrorist Surveillance Program by means of the AUMF. Congress should only undertake explicit and specific authorization of the Terrorist Surveillance Program if it can do so without disclosing the particular operational features of the Terrorist Surveillance Program and without seriously reducing or eliminating its utility in the war with al Qaeda. The Attorney General in testimony before this Committee indicated that Members of Congress advised him that the pursuit of specific authorization would, in fact, run the risk of jeopardizing the program's integrity. NSSA, however, proposes to give approval without detailed public exposure of operational detail in legislative text, and assigning to the FISA Court the determination of constitutionality.

Program Warrants – A Non Judicial Function?

The essential purpose of NSSA is to authorize a program-wide warrant for the Terrorist Surveillance Program or equivalent programs. The authority of an Article III court to involve itself in this may appear somewhat novel. It might be argued to be a non-judicial function improperly assigned to the judicial branch. Professor Martin Redish has identified two separation of powers dangers inherent in congressionally mandated extrajudicial duties.³⁴ First, as the “enforcer of counter-majoritarian constitutional norms and as a check against the representative branches, the judiciary must remain sufficiently independent of the political branches. Second, the unelected judiciary must not encroach on the authority of the democratically elected branches. Judges performing administrative tasks raise these issues. Indeed, as discussed below, the latter concern is of special relevance to NSSA.

If a program warrant is more administrative than judicial function, it would raise serious constitutional objection. As a general matter, Article III judges acting as judges (as opposed to their individual capacities) may not take on extrajudicial activity. For example, the Court examined this issue in *Hayburn's Case*,³⁵ when it considered a request for a writ of mandamus ordering a circuit court to execute a statute empowering courts to set pensions for disabled Revolutionary War veterans. Congress said it wanted to utilize the judges “to make further use

reservation in the existing FISA statute, and appropriately suggested that programmatic warrant authority would be limited to time of war and would not become a permanent fixture in the world of national security surveillance.

³⁴MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 12 (2d ed. 1990).

³⁵ 2 U.S. (2 Dall.) 409 (1792).

of the judges' honesty as well as their ability as intelligent and capable fact-finders." This motivation is certainly not dissimilar from the desire implicit in NSSA to have the detached judgment of the FISA judges check any abuse in the Terrorist Surveillance Program. Judges on three circuit courts (including later Supreme Court Chief Justice John Jay and later Justices Cushing from New York and Iredell from North Carolina) concluded that the task could not be performed by an Article III court. Although Congress changed the law before the Supreme Court could decide the issue, the opinion noted in an extensive footnote that three circuit courts had held that the statute infringed on separation of powers by assigning a non-judicial function to the judiciary.

NSSA can be distinguished, however. Hayburn's Case was made especially problematic since the judicial decisions were subject to administrative review. NSSA by contrast directs its oversight not over the judicial, but the executive, branch. Sec. 705. In addition, while a program warrant is not the exact equivalent of a Fourth Amendment warrant, the determination of the appropriate standard of probable cause has long been acknowledged to be judicial in nature. For example, Sir Matthew Hale observed that it was for the judicial officer to "adjudge" the reasonableness of an accuser's suspicion. This sentiment was echoed by Lord Mansfield and Blackstone that it was the justice of the peace who judged the "grounds of suspicion." As a recent comment summarized, "[t]he determination of probable cause belongs to the judiciary. That is the common law principle that was constitutionalized through the Fourth Amendment."³⁶ Given the lineage of the association between the courts and warrants, the constitutional objection that a program warrant is an improper assignment of a nonjudicial function to an Article III court should be rejected.

An Advisory Opinion?

This venerable doctrine preserving the separation of powers prohibits federal courts from providing opinions about the constitutionality of pending legislation or on constitutional questions referred to them by other branches of government. It can be argued that the program warrant, insofar as it requires an assessment of the Attorney General's conclusion that the Terrorist Surveillance Program "is consistent with the requirements of the United States Constitution" is such an improperly referred request for opinion. To reach this conclusion, however, one would have to come close to declaring the adjudication of warrants generally to be likewise infirm. However, as noted above, the assessment of probable cause is quintessentially a judicial determination, at common law and under the Constitution. Moreover, the proposed findings required of the FISA judge – that any warrant issued be consistent with the Constitution – is simply the restatement of judicial oath. Most importantly, the program warrant is the fair equivalent of the FISA warrant, issued on similar criteria, though with necessary revision to

³⁶Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J. L. & PUB. POLY. 711, 725-26 (2000).

reflect its broader, program application. The FISA warrant has been repeatedly held by lower courts to comport with the judicial office. For example, in *U.S. v. Nicholson*,³⁷ it was argued that FISA violates Article III and the Separation of Powers doctrine. The court found that “[e]very court that has addressed the issue has held that an Article III judge is properly ‘acting in his judicial capacity’ when sitting on the FISA Court.”³⁸

An impermissible general warrant?

Nor can it be fairly said that a program warrant is the equivalent of the historically disfavored general warrant. As the Supreme Court held in *Stanford v. Texas*,³⁹ “The hated [general warrants] or writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as ‘the worst instrument of arbitrary power. . . .’”⁴⁰ In *Stanford*, the Court invalidated a warrant to search generally for books, records, pamphlets, cards, etc., and other written instruments concerning the state Communist Party and its operations. By contrast, the Terrorist Surveillance Program is a far more narrowly directed program which does not target any single U.S. person with the kind of sweeping order present in *Stanford*. In addition, there is no credible suggestion that the Terrorist Surveillance Program is being employed as an instrument of political oppression.

Additional support may also be found by analogy to complex white collar or mob investigations. In the context of such investigations, it is lawful and often necessary to seize documentary evidence in order to prove certain types of criminal conduct, and papers and records are often unusually difficult to describe with specificity as it is seldom possible to be exactly certain what documents exist or will be present. Nevertheless, the Eleventh Circuit Court of Appeals has noted, “effective investigation of complex white-collar crimes may require the assembly of a ‘paper puzzle’ from a large number of seemingly innocuous pieces of individual evidence [hence,] reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the ‘paper puzzle.’” The rule of thumb which can be synthesized from the exceedingly wide diversity of case law on the issue of the requisite constitutional particularity of document searches is that *documentary evidence must be described in the search warrant as specifically as is reasonably possible given the nature of the investigation and the*

³⁷955 F.Supp. 588 (E.D.VA 1997).

³⁸*Id.* (citing cases).

³⁹379 U.S. 476 (1965).

⁴⁰*Id.* at 481.

circumstances of the search. As the Eleventh Circuit Court of Appeals has elaborated:

There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in the commission of a crime. In these situations, we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.⁴¹

In the *Russell* case cited in the note, the context dealt with a large number of stolen video-tapes and games, and the warrant authorized the seizure of “Written records of sales[,] ... Computer documents [,] Bank records[,] Email records relating to E-bay auctions,” and “Financial records relating to E-bay auctions.” Despite the difficulties inherent in specifying the types of documents to be seized, *see Vitek*, 144 F.3d at 481, the court found that each category named in the warrant had a direct relationship to the suspected crime. The warrant therefore satisfied the Fourth Amendment’s requirement of particularity. This level of flexible particularity is comparable to what the program warrant under NSSA envisions. As the definition of “electronic surveillance program” indicates in section 701(5)(A) not every conversation, but only those conveying foreign intelligence information is sought for surveillance. These, by original FISA definition when a U.S. person is implicated, “[are] necessary to the ability of the United States to protect against actual or potential attack, sabotage, or clandestine intelligence activities by, among others, an agent of a foreign power.” 50 U.S.C. 1801(b)(2)(e)(1)(A),(B), or (C) (slightly paraphrased). If anything, the Terrorist Surveillance Program described by the Attorney General

⁴¹*Russell v. Harms*, 397 F.3d 458, 464 (7th Cir. 2005). In *Russell*, the police had reason to believe that Russell and Davis had stolen hundreds of videos and games. Under the circumstances, it would have been impractical to list each title individually. The warrant accommodated this reality by specifying that “Video tapes” and “Nintendo games” be seized. And because the universe of movies and games is so large, it was impractical to list the titles *not* suspected of being stolen. The warrant gave the officers as much guidance as was feasible. *See United States v. Vitek Supply Corp.*, 144 F.3d 476, 481 (7th Cir.1998) (warrant directing seizure of “tainted animal feed” and “any and all misbranded drugs to include clenbuterol and any of its derivatives” held sufficiently particular “[b]ecause the warrant could not have better informed the agents how to distinguish between legal and illegal substances”). Thus, the Seventh Circuit concluded that the warrant was not so broad as to amount to a general warrant to seize any document found on the premises.

is even more particular insofar as it is related specifically to the foreign intelligence activities of al Qaeda or their confederates. Moreover, as the preamble to NSSA observes, the Supreme Court in *Keith* indicated that “[national] security surveillance may involve different policy and practical considerations from the surveillance of organized crime.” NSSA Section 2(15).

It could be objected that the envisioned program warrant lacks particularity because it is reasonable to anticipate that it will harvest innocent (legal) as well as terrorist (illegal) conversations. The objection, however, is overstated, since courts regularly acknowledge that material evidence of criminal activity is not necessarily limited just to evidence describing the criminal activity. In complex tax fraud cases, for example, it is often necessary to reconstruct defendants’ true financial and tax picture and evidence regarding legal as well as illegal transactions may be necessary to show a violation of federal tax laws and the extent of any possible violations. See *United States v. Frederickson*, 846 F.2d 517, 519-20 (8th Cir.1988) (to secure conviction of income tax evasion, government had to have evidence sufficient to reconstruct defendant’s true income liability); *United States v. Hershenow*, 680 F.2d 847, 853(1st Cir. 1982) (warrant authorizing search and seizure of doctor’s records depicting both legal and illegal practices held permissible “in order to get a complete picture of a patient’s case”).

It must be admitted that the flexibility for broader warrants noted above in case law involves document searches, not eavesdropping, and the searches were criminal prosecutions aimed at specific defendants. Such differences, however, have been averted to and dismissed in the consideration of FISA warrants. This is the essence of *In re Sealed Case*, 310 F. 3d 717, 746 (2002), which, itself, speaks in somewhat program-related terms. The FISA Court of Review writes in conclusion:

FISA’s general *programmatic* purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from “ordinary crime control.” After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date. We acknowledge, however, that the constitutional question presented by this case—whether Congress’ disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer. The Supreme Court’s special needs cases involve random stops (seizures) not electronic searches. In one sense, they can be thought of as a greater encroachment into personal privacy because they are not based on any particular suspicion. On the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning. Although the Court in *City of Indianapolis* cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. Our case may well involve the most serious threat our country faces. Even without taking into account the President’s inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the

procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillance it authorizes are reasonable.

An Unreasonable Invasion of Privacy?

Programmatic approval is, of course, different than a warrant issued even with the looser particularity requirements of FISA. Hazarding a prediction over whether the Supreme Court would find a program-wide approval to be constitutionally reasonable might well depend on operational facts not available. For purpose of speculative analysis, however, I will assume (without any basis to know) that the Terrorist Surveillance Program involves sensitive data matching in which algorithms and other statistical formulas are employed to identify suspect, al-Qaeda-related conversations between an international point and someone in the United States. While computer technology greatly enhances matching capability, such activity is the equivalent of an investigator gathering bits of information in order to identify a suspect. Prior to computerized technology, this effort was often slow and filled with trial and error. With computer-assistance, the search range and the search effort is more vast and fast, but the number of false-positives likely to be higher as well. In the context of the Terrorist Surveillance Program, a false positive is an invasion of privacy unwarranted by al Qaeda-related connection.

Presumably, most of the reasonableness concerns can be met by rigorous minimization procedures, and NSSA prudently calls for this to be addressed in application by section 703(a)(8) and (13) directly and indirectly under 703(a)(13). These application provisions are then made the basis of necessary findings by the FISA court under section 704 (a)(4) and 704(b)(1)(A).

It has been suggested by one author that data mining based programs be analogized to investigative stops and frisks.⁴² This is indeed a promising analogy and one directly supportive of the Terrorist Surveillance Program and NSSA review thereof. Investigative stops may be conducted on the basis of reasonable suspicion that a crime is being or is about to be committed, and thus often involve a predictive judgment by the investigating officer. *Terry v. Ohio*,⁴³ the first case upholding investigative stops against a Fourth Amendment challenge, is a good example of this kind of predictive assessment. Terry was seen walking repeatedly in front of a jewelry store in conversation with several associates, suggesting a possible robbery. The Court found the police observation of this to form “articulable facts” justifying a stop for further investigation. Later, the Supreme Court extended this doctrine of preventive seizures to so-

⁴²Daniel J. Steinbock, *Data Matching, Data Mining and Due Process*, 40 GA. L. REV. 1 (2005).

⁴³392 U.S. 1, 26-30 (1968) (holding that officer may stop and frisk suspect on basis of articulable facts providing reasonable grounds to believe crime is afoot).

called “reactive” stops premised upon reasonable suspicion in light of past felony.⁴⁴ As with the assumed data base matching underlying the Terrorist Surveillance Program, certain incoming or outgoing communications trigger reasonable suspicion when made to or from a number associated with al Qaeda operatives or associates. It is possible, of course, that the person stopped is wholly innocent, as it is possible that someone’s communication could be caught innocently by the Terrorist Surveillance Program. This should not vitiate the reasonableness of the effort. As with a *Terry* stop, the entire point of the exercise is to either validate or dispel rational suspicion. For purposes of constitutional analysis, it should not matter whether the purpose is to dispel crime or the next terrorist attack. While it is an inconvenience to be wrongly stopped, and an infringement on liberty to be innocently surveilled, it is not a constitutional injury that is redressible in light of the countervailing need. The theory underlying investigative stops assumes and accepts for the sake of civil society that predictions of criminality will produce a certain number of false positives, and that the cost of error is an unfortunate, but necessary, part of maintaining safety and order. Virtually every American who has visited an airport since 9/11 has willingly borne a related cost.

In some reported cases,⁴⁵ the Supreme Court has considered and generally accepted a *Terry* stop premised on a predictive formula, such as a drug profile. The profile was assessed as one of several factors to consider, not unlike the list of factors in NSSA section 704. Obviously, a factor of importance is the reliability of any computer algorithm for projecting that level of suspicion, but this too is provided for in NSSA section 704(b) – considering the past performance of the Terrorist Surveillance Program. The FISA court would presumably build up an expertise setting the appropriate threshold for computer-triggered investigations. There is a small amount of analogous case law. In this regard, one case evaluating the Fourth Amendment reasonableness of an air hijacker profile accepted a rate as seemingly low as six percent of weapons discovery among the selected targets.⁴⁶

Again, whether the Terrorist Surveillance Program is based on data matching or not is unknown to this witness. If it is, however, then the operational assessment done by the FISA court pursuant to NSSA section 704 (b)(1)(C) should find it to meet the standard of

⁴⁴*United States v. Hensley*, 469 U.S. 221, 229 (1985) (allowing stop based on reasonable suspicion of past felony).

⁴⁵*Ornelas v. United States*, 517 U.S. 690, 692 (1996); *United States v. Sokolow*, 490 U.S. 1, 10 n.5, 13 (1989); *INS v. Delgado*, 466 U.S. 210, 215-17 (1984); *Florida v. Royer*, 460 U.S. 491, 497-501 (1983); *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *United States v. Mendenhall*, 446 U.S. 544, 551-57 (1980).

⁴⁶*United States v. Lopez*, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971) (referring to hijacker profiling).

constitutional reasonableness. As one commentator put it: “If stopping and questioning an individual who is running in the street wearing a mask is reasonable . . . , then why is questioning or investigating someone whose electronic trail indicates a reasonable suspicion of terrorist activity presumptively not?”⁴⁷

An avoidable constitutional encroachment on Executive authority

To this point, NISSA has withstood constitutional review. Parts of section 704(b), however, are highly problematic insofar as they assign to the FISA court an evaluation that encumbers the core of the President’s foreign affairs authority. Specifically, sections 704(b)(1) (B) and 704(b)(3) invite the court to assess the “benefits” of the foreign intelligence information obtained. This is beyond judicial competence, unnecessary to prevent abuse of the Terrorist Surveillance Program, and an impediment to the performance of the presidential function. In *U.S. v. Duggan*,⁴⁸ the court avoided a serious separation of powers challenge to 50 U.S.C. 1801(e)(2)(B), defining foreign intelligence information as “that which is necessary to . . . the conduct of the foreign affairs of the United States.” Had that been the sole definition and had the court not construed the statute as something the court was *not* to determine, the constitutional problem would have been unavoidable. Instead, the court ruled that the judge was merely to determine that the executive’s certification was not “clearly erroneous.” In my judgment, NISSA sections 704(b)(1) (B) and 704(b)(3) ought to be eliminated. If there is to be additional evaluative oversight, it ought to be left to Congress, as is anticipated by section 705.

I began this testimony with heartfelt gratitude that this Committee had undertaken this inquiry out of a bipartisan desire to strengthen our nation’s security while safeguarding civil liberty. In so doing, Congress’ ample foreign affairs authority was acknowledged. But the conduct of foreign affairs, while shared in general outline is also necessarily divided or allocated in some particular respects. If it is to be pursued, legislative authority over foreign affairs in this instance is best directed at setting a salutary framework for the surveillance of foreign intelligence information, and ill directed toward an assessment of its value or benefit. As John Jay in *Federalist 64* observed, “perfect secrecy and immediate despatch are sometimes requisite.” That is why, Jay explained, that the convention did well to give the Senate a ratifying role in treaties, but left the management of “the business of intelligence” to the prudent judgment of the President alone. As I have reflected in an earlier note, it is not certain that FISA, itself – at least in war-time – observes this line, but surely, this founding sentiment must now be observed in any reform of FISA. This is especially true when we are in the midst of a War, no

⁴⁷K.A. Taipale, *Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data*, 5 COLUM. SCI. & TECH. L. REV. 2, 34 (2003).

⁴⁸743 F.2d 59 (2d Cir. 1984).

matter how unconventional and Janus-faced that war may seem.⁴⁹

The Attorney General has come before you and thoughtfully demonstrated that among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans abroad, *see, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g., The Prize Cases*, 67 U.S. at 668. *See generally Ex parte Quirin*, 317 U.S. 1, 28 (1942) (recognizing that the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. *The Prize Cases*, 67 U.S. at 670; *see also Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). Indeed, "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted).

In exercising his constitutional powers and the sentiment explicated by our first Chief Justice (John Jay) in *Federalist 64*, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation's enemies in a time of armed conflict. The Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g., Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."). Chief

⁴⁹See generally, Douglas W. Kmiec, Observing the Separation of Powers: The President's War Power Necessarily Remains 'The Power to Wage War Successfully,' 53 Drake L. Rev. 851 (2005).

Justice John Marshall even described the gathering of intelligence as a military duty. *See Tatum v. Laird*, 444 F.2d 947, 952-53 (D.C. Cir. 1971) (“As Chief Justice John Marshall said of Washington, ‘A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information’”) (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), *rev’d on other grounds*, 408 U.S. 1 (1972).

NSSA in its entirety must be carefully designed to safeguard civil liberty without undermining the President’s core responsibility in time of war and his special competence in matters of foreign intelligence. Sections 704(b)(1) (B) and 704(b)(3) do not maintain this balance. Failing to strike this proper balance would transgress the separation of powers doctrine outlined in *Morrison v. Olson*.⁵⁰ Under *Morrison*, these problematic features of NSSA represent a fundamental reallocation of the President’s core responsibilities to judicial officers or Congress. This would be “an attempt by Congress to increase its own powers at the expense of the Executive Branch.” *Cf. Commodity Futures Trading Comm’n v. Schor*, 478 U.S., at 856, 106 S. Ct., at 3259-3260. So too, in *Morrison*, the Court was careful to note that the duties given the special division were not in themselves “executive” functions in the constitutional sense. The NSSA provisions referenced are quite to the contrary. Indeed, it is fair to conclude that these provisions give the FISA court an unconstitutional supervisory power. Most of all, the NSSA provisions singled out here “impermissibly undermine” the powers of the Executive Branch, *Schor, supra*, 478 U.S., at 856, 106 S. Ct., at 3260, and “disrupt the proper balance between the coordinate branches [by] prevent [ing] the Executive Branch from accomplishing its constitutionally assigned functions,” *Nixon v. Administrator of General Services, supra*, 433 U.S., at 443, 97 S. Ct., at 2790.

It is my judgment that, except for the provisions noted, NSSA is constitutional, and as a policy matter, advances the goals of responsible oversight.⁵¹ I should note, however, as a former

⁵⁰487 U.S. 654, 693-96 (1988).

⁵¹The oversight provided by NSSA is aimed at minimizing the invasion of privacy. It does not directly address the possible misuse of the Terrorist Surveillance Program as a means of circumventing Title III or even the more generous traditional FISA warrant standard. In other words, some thought might be given to when Terrorist Surveillance Program-derived materials can be introduced against a criminal defendant. No one wants to see the reconstruction of the “wall” that prevented the sharing of intelligence information with law enforcement and vice versa, and that this Congress appropriately de-constructed under the Patriot Act. Yet, to the extent broader programmatic warrants become fruitful sources for not only deterring attack, but also identifying evidence of on-going criminal activity, law enforcement officials ought not be in a position to slight the Fourth Amendment by disregarding the protections of Title III.

presidential lawyer, that the greatly increased burden of both judicial and legislative oversight envisioned by the NSSA, especially compressed as it is over relatively short periods, may in itself be seen as an unconstitutional and unwise layering of paper submissions. These extensive filings, even if accompanied by the best of intentions and precautions, compound the occasion for improper or inadvertent disclosure and the ultimate defeat of surveillance efforts that both Congress and the President wish success.

Respectfully submitted,
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One possible way to guard against misuse of programmatic warrants would be to place the evaluation of this issue squarely in district courts. Thus the FISA court would limit its review to the satisfaction of the FISA criteria (e.g., significant foreign intelligence purpose, probable cause to believe the target is an agent of a foreign power). By contrast, the Fourth Amendment concerns would be vindicated in federal district court in the context of suppression hearings. Applying an abuse of discretion standard when Terrorist Surveillance Program-derived evidence is sought to be introduced in a criminal proceeding, the district judge might then be statutorily directed to inquire as to a number of factors: the subdivisions of the Justice Department involved in the investigation, the nature of the pending charges, and in light of both, whether a Title III warrant would have been more appropriate. Applying this framework, when a prosecution is for a foreign intelligence crime, like those listed in FISA itself, a Terrorist Surveillance Program-inspired FISA warrant should be seen as appropriate, be it individually or programmatically authorized. By contrast, when the crime is facially unrelated to foreign intelligence, such as securities fraud or other economic crime, a Title III warrant would presumably be more compatible with Fourth Amendment values.

Statement of Harold Hongju Koh
Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law
Yale Law School
before the Senate Judiciary Committee
regarding
Wartime Executive Power and the National Security Agency's
Surveillance Authority
February 28, 2006

Thank you, Mr. Chairman and Members of the Committee, for inviting me today.

I am Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at the Yale Law School, where I have taught since 1985 in the areas of international law, human rights, and the law of U.S. foreign relations.¹ I appear first, to testify regarding the claimed legal authority for the Administration's National Security Agency (NSA) domestic surveillance program; second, to respond to the Administration's legal defense of the program, as set forth in several recent Justice Department documents and in the Attorney General's testimony before this Committee on February 6, 2006;² and third, to comment on a draft bill entitled the "National Security Surveillance Act," which I received from this Committee's staff on February 24, 2006.

To state my conclusions briefly: I have served the United States government in both Republican and Democratic Administrations.³ I have also filed lawsuits against both Republican and Democratic administrations when I became convinced that their conduct violated the law.⁴ In my professional opinion, the ongoing NSA domestic surveillance program is blatantly illegal, whether or not—as its defenders claim—it is limited to international calls with one end in the United States.⁵

¹ A summary of my views on the constitutional law governing national security can be found, *inter alia*, in HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990). A brief *curriculum vitae* is attached as an appendix to this testimony. Although I sit on a law school faculty as well as on the boards of numerous organizations, the views expressed here are mine alone.

² See, e.g., Prepared Statement of Hon. Alberto R. Gonzales, Att'y Gen. of the United States, Feb. 6, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060206.html; U.S. Dept. of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) [hereinafter DOJ White Paper] (setting forth, after the fact, the Department's analysis of the legal basis for the terrorist surveillance program); Letter from William E. Moschella, Asst. Att'y Gen., Office of Legislative Affairs to Hon. Pat Roberts, Chairman, S. Select Comm. on Intelligence (Dec. 22, 2005).

³ I served as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice from 1983-85, and as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001.

⁴ I appeared as private counsel challenging U.S. government actions, *inter alia*, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (interdiction of Haitian refugees); *Cuban-American Bar Ass'n v. Christopher*, 43 F.3d 1413 (11th Cir. 1995) (detention of Cuban refugees on Guantanamo).

⁵ I believe that my opinion is widely shared in the legal community. To give just three examples, I direct the Committee's attention first: to two detailed letters, which I co-signed, recently sent to Members of Congress by fourteen constitutional law scholars and former government officials regarding the illegality of

None of the program's defenders – including those who appear today-- has identified any convincing legal justification for conducting such a sweeping program without the legally required checks of congressional authorization and oversight and judicial review. My government service makes me fully sensitive to the ongoing threat from Al Qaeda and the need for law enforcement officials to be able to gather vital information before another terrorist attack occurs. Of course, in time of war, our Constitution recognizes the President as Commander-in-Chief. But the same Constitution requires that the Commander-in-Chief obey the Fourth Amendment, which guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁶ By so saying, the Fourth Amendment requires that any government surveillance be *reasonable*, supported except in emergency situations by *warrants* issued by courts, and *based upon specific probable cause*. The current NSA surveillance program, as I understand it, violates all three constitutional standards.

For nearly thirty years, the Foreign Intelligence Surveillance Act of 1978 (FISA)⁷ has guaranteed compliance with these constitutional requirements by providing a comprehensive, exclusive statutory framework for electronic surveillance. Even as Commander-in-Chief, the President carries the solemn constitutional duty to “take Care that the Laws be faithfully executed.”⁸ Yet apparently, the NSA has violated these statutory requirements repeatedly by carrying on a sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents. As Justice Paterson wrote two centuries ago in *United States v. Smith*: “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what law forbids.”⁹

the NSA domestic surveillance program. See Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M. Sullivan, Laurence H. Tribe, Martin Lederman, Philip B. Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S. Sessions, William Van Alstyne, On Nsa Spying: A Letter To Congress, available at <http://www.nybooks.com/articles/18650>; <http://balkin.blogspot.com/FISA.Doj.Reply.pdf>; second, to the Resolution of the ABA House of Delegates and Task Force Report of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism (to which I served as Special Advisor) dated Feb. 13, 2006, available at <http://www.abanet.org/op/domsurv/> (resolving inter alia “that the American Bar Association opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization.”); and third, to the similar conclusion reached by the Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

⁶ U.S. Const., amend. IV.

⁷ Act. of Oct. 25, 1978, Pub. L. No. 95-511, 92 Stat. 1783.

⁸ U.S. Const., art. II, sec. 3.

⁹ *U.S. v. Smith*, 27, F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., Circuit Justice).

The NSA program's defenders cannot plausibly claim that the ongoing program follows the letter of the FISA. Instead, to justify this flouting of the FISA, they argue both that Congress authorized this program in the resolution authorizing force and offer a sweeping interpretation of unchecked Executive authority that cannot be squared with the vision of *shared* national security powers evident in our Constitution's text, structure and purpose. That vision of unchecked executive discretion would upset what Justice Robert Jackson in his famous concurrence in the *Steel Seizure Case* termed the "equilibrium established by our constitutional system."¹⁰ Taken seriously, the President's reading of the Constitution would render Congress a pointless rubberstamp, limited in an unending war on terror to enacting laws that the President can ignore at will and issuing blank checks that the President can redefine at will.

Of course, we can and should aggressively fight terrorism, but doing so outside the law is deeply counterproductive.¹¹ The NSA program undermines, rather than enhances, our ability to combat terrorism through the criminal justice system. Under the ongoing NSA program, NSA analysts are increasingly caught between following superior orders and carrying out illegal electronic surveillance. The nation can scarcely afford to lose analysts that are on the front lines protecting our national security. Furthermore, because evidence collected under the NSA electronic surveillance program will almost surely be challenged as illegally obtained, such evidence may prove inadmissible in cases against alleged terrorists, giving them greater leverage in plea bargains and making it far more difficult to prosecute them criminally.

Unfortunately, for reasons detailed below, the proposed National Security Surveillance Act (NSSA) would not improve the situation. Instead of subjecting the legality of the ongoing program to meaningful congressional oversight and contemporaneous judicial review, the proposed law would simply amend the 1978 Foreign Intelligence Surveillance Act to increase the authority of the President to conduct surveillance, based on a showing of "probable cause" that the *entire surveillance program* -- not any particular act of surveillance -- will intercept communications of a foreign power or agent thereof, or anyone who has ever communicated with a foreign agent. While perhaps legalizing a small number of reasonable searches and seizures, the proposed statute would make matters far worse, by giving the Congress' blanket pre-authorization to a large number of unreasonable searches and seizures. To enact the draft legislation, which ratifies an illegal ongoing program without demanding first a full congressional review of what is now being done and more executive accountability going forward, would provide neither the congressional oversight nor the judicial review that this program needs to restore our confidence in our constitutional checks and balances. Most fundamentally, unless the President agrees to operate within the terms of any FISA amendments, the new congressional action would be meaningless.

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

¹¹ The Administration claims that the very discussion of these matters before this Committee and elsewhere has compromised the NSA's ability to get its important job done. But if the Administration had only stayed within the four corners of the FISA and sought additional statutory authority as necessary, we would not be here discussing these important issues.

I. The Illegality of the Ongoing NSA Domestic Surveillance Program

We must not forget the historical events that led to enactment of the 1978 FISA statute. When American ships were attacked in the Gulf of Tonkin in 1964, President Johnson asked Congress for a broad resolution that gave him broad freedom to conduct a controversial undeclared war in Indochina; that war traumatized our country and triggered a powerful antiwar movement.¹² It soon came to light that to support the war effort, three government agencies--the FBI, the CIA, and the NSA – had wiretapped thousands of innocent Americans suspected of committing subversive activities against the U.S. government.¹³

To end these abuses, Congress passed, and President Carter signed, the Foreign Intelligence Surveillance Act of 1978 (FISA), which makes it a crime for anyone to wiretap Americans in the United States without a warrant or a court order.¹⁴ The law makes it clear that the FISA (and specified provisions of the federal criminal code that govern criminal wiretaps) “shall be the *exclusive* means by which electronic surveillance . . . and the interception of domestic wire communications may be conducted.”¹⁵ In an emergency, where the Attorney General believes that surveillance must begin before he can get a court order, FISA permits the wiretap to begin immediately, but only so long as the government seeks a warrant from the special FISA court within 72 hours.¹⁶ Drafted with wartime in mind, the FISA permits the Attorney General to authorize warrantless electronic surveillance in the United States for only 15 days after a declaration of war, to give Congress time to pass new laws to give the President any new wiretap authority he may need to deal with the wartime emergency.¹⁷ In short, FISA was based on simple, sensible reasoning: before the President invades our privacy, his lawyers must get

¹² Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). Repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053 (1971).

¹³ To give just a few examples, the “Rockefeller Commission” investigation into CIA activities within the United States found that in 1972, the CIA examined some 2.3 million pieces of mail, and opened some 8,700 of them. Much of the mail examined and opened was selected based on “watch lists” the agency had developed. The Comm’n on CIA Activities within the United States: Report to the President 111-12 (1975). Available at: <http://www.history-matters.com/archive/church/rockcomm/contents.htm> (last visited Feb. 26, 2006). Under “Operation CHAOS,” the CIA gathered files on more than 7,000 US citizens, containing the names of more than 300,000 persons and organizations. *Id.* at 23. The “Church Committee” found that Presidents Johnson and Nixon had requested and received information on antiwar activists, political critics, and even members of Congress. The Committee also discovered that the FBI had engaged in virtually unsupervised electronic wiretapping, including bugs that were famously placed in the hotel rooms of the late civil rights leader Dr. Martin Luther King, Jr. Select Comm. to Study Gov’t Operations with respect to Intelligence: Final Report, S. Rep. No. 755, 94th Cong., 2d Sess. (1976).

¹⁴ 50 U.S.C. § 1809 (2000).

¹⁵ 18 U.S.C. § 2511(2)(f) (West 2002) (emphasis added).

¹⁶ 50 U.S.C. § 1801. (West. 2004). Although the emergency wiretap period was originally only 24 hours, after September 11, 2001, the Bush Administration specifically requested and received the increase to 72 hours. See Pub.L. No. 107-108, 115 Stat. 1394 (2001).

¹⁷ 50 U.S.C. § 1811. The House version of the bill would have authorized the President to conduct warrantless electronic surveillance for one year after a declaration of war, but the Conference Committee expressly rejected that suggestion, reasoning that the 15-day “period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency.” H.R. Conf. Rep. No. 95-1720, at 34 (1978). “The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter.” *Id.*

approval from someone who does not work for him: either members of Congress must pass an amendment to FISA, or members of the independent Foreign Intelligence Surveillance Court must approve a particular warrant.

For almost thirty years, the FISA scheme worked to protect our rights as American citizens to privacy, while still allowing our government to engage in necessary foreign surveillance. From 1979 to 2004, the FISC approved nearly 19,000 warrants and rejected only five.¹⁸ Even since September 11, officials of the Bush Administration officials have obtained thousands of warrants approved by the special FISA court.¹⁹ During the last few years, the President was asked several times whether judicial permission is required for any government spying on American citizens; on each occasion, he answered in the affirmative.²⁰ And last January, when Alberto Gonzales was being confirmed as Attorney General, Senator Russ Feingold asked whether he believed the President could violate existing criminal laws and spy on U.S. citizens without a warrant. Mr. Gonzales answered that it was impossible to answer such a "hypothetical question" but that it was "not the policy or the agenda of this president" to authorize actions that conflict with existing law.²¹

Given this background, as of three months ago, the law seemed crystal clear. If executive officials wanted to wiretap or conduct electronic surveillance of Americans, they could do so without a warrant, but only for three days, or for fifteen days after a declaration of war. After that, they must either go to the special FISA court for an order to approve the surveillance, come to Congress seeking wartime amendments to FISA, or be in violation of the criminal law.

¹⁸ Annual reports of the FISA Court available at <http://www.fas.org/irp/agency/doj/fisa/#rept> (last visited Feb. 26, 2006).

¹⁹ *Id.*

²⁰ "[A]ny time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so." President George W. Bush, Information Sharing, Patriot Act Vital to Homeland Security (April 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/04/20040420-2.html>; "[T]he government can't move on wiretaps or roving wiretaps without getting a court order." President George W. Bush, President's Remarks at Ask President Bush Event (July 14, 2004), available at <http://www.whitehouse.gov/news/releases/2004/07/20040714-11.html>; "Law enforcement officers need a federal judge's permission to wiretap a foreign terrorist's phone, a federal judge's permission to track his calls, or a federal judge's permission to search his property. Officers must meet strict standards to use any of these tools. And these standards are fully consistent with the Constitution of the U.S." President George W. Bush, President Discusses Patriot Act (June 9, 2005), available at <http://www.whitehouse.gov/news/releases/2005/06/20050609-2.html>.

²¹ *A Hearing of the Senate Judiciary Committee: Nomination of Alberto Gonzales to be Attorney General*, 109th Cong. (Jan. 6, 2005) (statement of Alberto Gonzales). He added that he would hope to alert Congress if the president ever chose to authorize warrantless surveillance. *Id.*

And so we were all stunned to learn in December 2005 that despite this settled law, the Executive Branch has in fact been secretly spying on large numbers of Americans for four years and eavesdropping on "large volumes of telephone calls, e-mail messages, and other Internet traffic inside the United States."²² Despite the clear requirements of the FISA law, the President had apparently launched this eavesdropping program without ever seeking a search warrant. Nor did the Administration ever seek new laws that would authorize such domestic intelligence gathering.²³ Moreover, we learned that President Bush has personally authorized this eavesdropping program more than three dozen times since October 2001, at times over the objections of high senior officials in his own Justice Department.²⁴

Although the program's details continue to remain hidden from public view, we now know that intelligence officials apparently persuaded officials of major telecommunications companies to let the NSA monitor communication activity through "electronic backdoors."²⁵ Recent Justice Department documents and statements appear to acknowledge: (1) that the NSA engages in such surveillance without judicial approval, and apparently without the substantive showings that FISA requires—e.g., that the target subject is an "agent of a foreign power;"²⁶ (2) that the NSA determines on its own which phone calls and emails to monitor, without seeking prior approval from the White House, the Justice Department, or any court before it starts monitoring any specific email or phone line; (3) that no lawyer or prosecutor reviews any records before the NSA starts to listen in on a line;²⁷ and (4) that despite the Administration's assurances, we have no way of knowing that searches will be strictly limited to people who have made contact with Al Qaeda.

Some commentators have claimed that the NSA searching involves only computerized datamining that intercepts little or no communicative content, and hence does not constitute surveillance subject to the FISA or a "search" or "seizure" subject to

²² James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

²³ Just six weeks after September 11, Congress passed the USA PATRIOT Act to expand the government's powers to conduct surveillance of suspected terrorists. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272. Yet the Administration never asked for, nor did the Patriot Act include, any change to FISA's requirement that courts give warrants before Americans in the United States can be wiretapped.

²⁴ Daniel Klaidman, et al., *Palace Revolt*, NEWSWEEK, February 6, 2006, available at <http://www.msnbc.msn.com/id/11079547/site/newsweek/>.

²⁵ James Risen, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 48-53 (2006).

²⁶ See, generally, *id.*; 50 U.S.C. § 1805(a) (provision of FISA requiring that a subject be "the agent of a foreign power").

²⁷ As Attorney General Gonzales said in his testimony before this Committee, "the program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization." *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (Feb. 6, 2006) (statement of Alberto Gonzales) (hereinafter NSA Hearing).

the Fourth Amendment. But in fact the Attorney General himself has expressly rejected those claims by repeatedly stating that the NSA program involves "electronic surveillance," defined in FISA to mean the interception of the *contents* of telephone, wire, or e-mail communications that occur, at least in part, in the United States.²⁹ In a press briefing held on December 19, 2005, Attorney General Gonzales also conceded that the NSA program intercepts the "contents of communications"³⁰ and that the "surveillance that . . . the President announced on [December 17]" is the "kind" that "requires a court order before engaging in" it "unless otherwise authorized by statute or by Congress."³¹

On its face, the NSA Program blatantly violates the statutory FISA standards outlined above. By their own admission, the Administration's officials did not seek a warrant within three days of commencing the NSA Program, nor did they do so within fifteen days after the congressional resolution authorizing the use of force, nor have they done so in the nearly four years since. To this day, the Administration has yet to offer any convincing explanation why it could not have sought or obtained warrants from the special FISA court created for this purpose, which has approved tens of thousands of warrants over the years. Nor despite the many *post hoc* legal justifications that have been released since December, has the Administration yet to make public any *contemporaneous* legal opinion provided to the President upon which its decision to launch the NSA program was actually based.³²

When the President acts in a field in which Congress has legislated so comprehensively, the acknowledged touchstone for constitutional analysis is *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, in which the Supreme Court invalidated an attempted presidential takeover of the steel mills in the name of national security during the Korean War.³³ In his landmark concurring opinion in that case, Justice Robert Jackson wrote: "Presidential powers are not fixed, but fluctuate, depending on their . . . disjunction with those of Congress. When the President takes measures incompatible with the express or implied will of Congress, his *power is at its lowest ebb*,

²⁹ See NSA Hearing, *supra* note 26 (statement of Alberto Gonzales); 50 U.S.C. §§ 1801(f)(1)-(2), 1801(n). See also Letter from William E. Moschella to Senator Pat Roberts et. al. (Dec. 22, 2005), *supra* note 1 at 4.

³⁰ See Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

³¹ *Id.*

³² See *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (Joint Statement of John M. Harmon, Asst. Att'y Gen., Office of Legal Counsel, Dept. of Justice 1977-1981 and Larry L. Simms, Dep. Asst. Att'y. Gen., Office of Legal Counsel, Dept. of Justice 1979-1985) ("Indeed, it is quite unclear from the Administration's various factual assertions whether any written legal advice was received by the President or his then Counsel, now the Attorney General, before the program was implemented. . . . Congress has a right to understand what advice the President acted upon in 2001 when the program was implemented").

³³ 343 U.S. 579 (1952).

for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.”³⁴

The FISA was enacted by Congress precisely to regulate the kind of surveillance that has occurred here. In response, the Justice Department asserts that the President may choose clandestinely to ignore the FISA. *Youngstown* thus requires us to ask whether the Constitution subjects the presidential power at issue in this case to the control of statutes passed by Congress with the assent of the President, or whether the Constitution confides that power exclusively in the President.

The Justice Department claims that the President has an implied exclusive executive authority over “the means and methods of engaging the enemy,” including the conduct of “signals intelligence” during wartime.³⁵ Yet nothing in the text of Article II of the Constitution recognizes an exclusive presidential power to conduct warrantless, unreviewed wiretapping, akin to the textual powers to appoint or pardon, to veto legislation, or to recognize foreign governments. Nor is it clear that the Fourth Amendment would allow a sustained program of unchecked warrantless wiretapping within the United States, even if expressly authorized by Congress and President acting together.³⁶

As Justice Jackson wrote in *Youngstown*, “the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants.”³⁷ Congress undeniably has power “To make Rules for the Government and Regulation of the land and naval Forces” and to “make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁸ Under these authorities, Congress has enacted myriad statutes regulating the “means and methods of engaging the enemy,” including most obviously, the Uniform Code of Military Justice and the recent, much-discussed statutes prohibiting the use of torture and cruel, inhuman, and degrading treatment.³⁹ And whether or not the President as Commander in Chief may generally collect “signals intelligence” on the enemy abroad, no one denies that Congress may regulate electronic surveillance *within* the United States, as it has expressly done in FISA. Every Supreme Court decision to confront the question has rejected the claim that the President may invoke his Commander in Chief power to disregard an Act of Congress

³⁴ 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring)(emphasis added). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the entire Supreme Court embraced Justice Jackson’s view as “bringing together as much combination of analysis and common sense as there is in this area.” Id. at 661 (Rehnquist, C.J.).

³⁵ DOJ White Paper at 6-10, 28-36.

³⁶ See *United States v. U.S. Dist. Court* (Keith), 407 U.S. 297, 321-25 (1972).

³⁷ 343 U.S. 579, 643-44 (Jackson, J., concurring).

³⁸ U.S. Const., art. I, § 8, cl. 14; U.S. Const., art. I, §18.

³⁹ 18 U.S.C. §§ 2340-2340A (torture); Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2739-2740 (2005) (cruel, inhuman, and degrading treatment).

designed specifically to restrain executive conduct in a particular field.⁴⁰ If anything, such claim of presidential power deserves even less deference when Fourth Amendment values and a criminal statutory prohibition are at stake.⁴¹

In sum, under *Youngstown's* reasoning, given that “the President [has] take[n] measures incompatible with the express or implied will of Congress” as expressed in FISA, “his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.”⁴² Whether or not there are historical examples of the President engaging in warrantless wartime surveillance before the FISA was passed, it seems clear that he may not now constitutionally undertake such actions where Congress and the President have not just contemplated such behavior, but actually criminalized it.

II. The Arguments Defending the NSA Program Cannot Withstand Scrutiny

Since the domestic spying program came to light, the Administration has launched a broad public campaign to defend its legality. Let me explain why none of these legal and policy arguments withstand scrutiny.

A. The 2001 Authorization for Use of Military Force (AUMF) Resolution Does Not Authorize Domestic Surveillance

⁴⁰ Indeed, the relevant precedents are all to the contrary. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) (rejecting the President’s claim that courts may not inquire into the factual basis for detention of a U.S. citizen “enemy combatant,” reasoning that “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting the President’s claim that it would be an unconstitutional interference with the President’s Commander-in-Chief power to interpret the habeas corpus statute to encompass actions filed on behalf of Guantanamo detainees); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (invalidating the President’s seizure of the steel mills where Congress had previously “rejected an amendment which would have authorized such governmental seizures in cases of emergency.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that the Executive had violated the Habeas Corpus Act by failing to discharge from military custody a petitioner charged, *inter alia*, with violation of the laws of war); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (invalidating a presidential seizure of a ship during a conflict with France as implicitly disapproved by Congress); *United States v. Smith*, 27 F. Cas. 1192, 1218 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., Circuit Justice) (“[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what law forbids.”).

⁴¹ While the Foreign Intelligence Surveillance Court of Review suggested in dictum in *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam) that Congress cannot “encroach on the President’s constitutional power” to conduct foreign intelligence surveillance, the court in that case *upheld* FISA’s constitutionality, affirming that Congress may constitutionally regulate significant amounts of foreign intelligence without entrenching on exclusive presidential prerogatives.

⁴² 343 U.S. 579, 637 (1952) (Jackson, J., concurring)(emphasis added): *id.* at 644 (Jackson, J., concurring) (“That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. ... [T]he Constitution’s policy [is] that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.”).

⁴⁴ Pub. L. No. 107-40, § 2 (a), 115 Stat. 224, 224 (Sept. 18, 2001).

The Administration claims that the Congress implicitly authorized the NSA surveillance plan when it voted for the Authorization to Use Military Force (AUMF) Resolution in September 2001.⁴⁴ That law authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the terrorist attacks of September 11, 2001, in order to protect the nation from the recurrence of such attacks. But to read this law as the President’s lawyers do would recreate the Gulf of Tonkin Resolution: a law construed after the fact to give him a blank check to engage in broad domestic activities, in this case wiretapping of Americans on U.S. soil without a warrant. To accept that reading, Congress would now have to conclude that in September 2001, it silently approved what 23 years earlier it had expressly criminalized!

Absent “overwhelming evidence” of an “irreconcilable conflict”—neither of which exist here—⁴⁵ we cannot assume that Congress intended in the AUMF silently to repeal 18 U.S.C. § 2511(2)(f), which makes the FISA (and other specific criminal code provisions) “the exclusive means by which electronic surveillance...may be conducted.” When first asked why the Administration had not sought to amend FISA to authorize the NSA spying program, Attorney General Gonzales acknowledged, “[w]e have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.”⁴⁶ Yet remarkably, after candidly admitting that Congress would not have authorized the spying program, had it known about it, the Attorney General now argues that in fact, Congress *silently authorized it* four years earlier when it passed the AUMF, although that law nowhere mentions surveillance of any kind.

⁴⁵ *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) (“[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”) (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). The AUMF and § 2511(2)(f) are not irreconcilable, and there is *no* evidence, let alone overwhelming evidence, that the AUMF intended to repeal this section of FISA.

⁴⁶ Press Release, The White House, Office of the Press Secretary, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

This argument does not pass the “straight face” test.⁴⁷ In FISA, Congress not only specified the “exclusive means” for conducting domestic surveillance, but also specifically required that any domestic warrantless wiretapping be limited to fifteen days after a declaration of war.⁴⁸ “[W]hen Congress did specifically address itself to a problem, as Congress did [here,] to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld... is ...to disrespect the whole legislative process and the constitutional division of authority between President and Congress.⁴⁹

Remarkably, in his testimony before this Committee, the Attorney General repeatedly invoked *Hamdi v. Rumsfeld*⁵⁰-- in which the Supreme Court largely rejected the President’s arguments--to support his reading of the AUMF. But in *Hamdi*, a plurality of the Court held only that the AUMF authorized as a “fundamental incident of waging war” the military detention of enemy combatants captured on the battlefield abroad who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there” “for the duration of the particular conflict in which they were captured,” in order to prevent them “from returning to the field of battle and taking up arms once again.”⁵¹ But if, as the *Hamdi* plurality agreed, the AUMF does not authorize “indefinite detention [even of enemy combatants] for the purpose of interrogation,”⁵² why read the AUMF to authorize indefinite domestic wiretapping of American citizens who are not alleged to be enemy combatants, for the purpose of information-gathering? Indeed, while the AUMF was being debated, the Administration sought to have language inserted in it that would have authorized the use of military force domestically – which Congress rejected.⁵³ If

⁴⁷ Indeed, when the Attorney General made this claim to this Committee, Senator Lindsey Graham correctly called this argument “very dangerous in terms of its application for the future...I’ll be the first to say that when I voted for [the AUMF], I never envisioned that I was giving to this president or any other president the ability to go around FISA carte blanche.” <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601001.html> In *Gonzales v. Oregon*, 126 S. Ct. 904 (Jan. 17, 2006), Justice Kennedy, writing for the Court, recently rejected the parallel “idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in” a federal statutory registration provision. *Id.* at 921. “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.” *Id.* (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). Neither, one might add here, does Congress hide repeals of major national security framework statutes in the cryptic words “necessary and appropriate force.”

⁴⁸ See 50 U.S.C. § 1811 (2000) (15 day window); 18 U.S.C. § 2511(2)(f) (2000) (exclusivity). Such specific and “carefully drawn” statutory language prevails over general statutes, such as the AUMF, where there is a conflict. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

⁴⁹ *Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring).

⁵⁰ 542 U.S. 507 (2004).

⁵¹ *Hamdi*, 542 U.S. at 516-19 (emphasis added).

⁵² *Id.* at 520.

⁵³ As Tom Daschle, who as Senate Majority Leader negotiated with the Administration regarding the text of the AUMF, has written:

I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I

the AUMF authorization were actually as broad as the Administration now claims, why should the Administration request and the Congress now bother to reenact the USA PATRIOT Act? No less than the FISA, the various investigative and preventive authorities of the USA PATRIOT Act could already be undertaken by the President unilaterally under the AUMF.

B. We Have No Proof that The NSA Domestic Surveillance Program is Narrowly Aimed Only at Al Qaeda and its Associates.

At the Attorney General's December 19 press briefing, he noted that the four-year-old surveillance program applies narrowly only to "communications, back and forth, from within the United States to overseas with members of Al Qaeda."⁵⁴ In fact, there is mounting evidence that NSA has a second program that is a much broader operation that is violating the rights of uncounted innocent Americans.⁵⁵ The *New York Times* reported that the NSA swept up thousands of e-mail messages and telephone calls to generate thousands of leads.⁵⁶ The *Washington Post* recently reported that about 5000 "Americans in the past four years have had their conversations recorded or their e-mails read by

am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance....Literally minutes before the Senate cast its vote, the administration sought to add the words "in the United States and" after "appropriate force" in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas...but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused....The Bush administration now argues those powers were inherently contained in the resolution adopted by Congress -- but at the time, the administration clearly felt they weren't or it wouldn't have tried to insert the additional language.

Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, A21. See also 147 CONG. REC. H5675 (daily ed. Sept. 14, 2001) (statement of Rep. Jackson) ("I am not voting 'Yes' on September 14, 2001, for an open-ended Tonkin Gulf-type Resolution. . . . I'm not willing to give President Bush carte blanche authority to fight terrorism.")

⁵⁴ Transcript available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (last viewed Feb. 26, 2006).

⁵⁵ Some administration officials have denied a "driftnet" or "data-mining" operation. See, e.g., Michael Hayden, Address to the National Press Club: What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation, Jan. 23, 2006, available at http://www.dni.gov/release_letter_012306.html.

However, the number and consistency of media reports in the media over the past three months based on interviews with informed government officials provide cause for concern that a broader operation is indeed underway, and places a burden upon the Administration to explain how the surveillance operation is in fact kept limited.

⁵⁶ James Risen and Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, *N.Y. Times*, Dec. 16, 2005, A1; Spy Agency Mined Vast Data Trove, Officials Report, *N.Y. Times*, December 24, 2005, A1. See also, James Risen, *State of War: the Secret History of the CIA and the Bush Administration* 44 (2006): "The NSA is now tapping into the heart of the nation's telephone network through direct access to key telecommunications switches that carry many of America's daily phone calls and email messages. One indication of [the program's] large scale is the fact that administration officials say that one reason they decided not to seek court-approved search warrants for the NSA operation was that the volume of telephone calls and e-mails being monitored was so big that it would be impossible to get speedy court approval for all of them." *Id.*, at 48.

intelligence analysts without court authority.” Of those, “[f]ewer than 10 U.S. citizens or residents a year, according to an authoritative account, have aroused enough suspicion during warrantless eavesdropping to justify interception of their domestic calls.”⁵⁷

At the same press briefing, the Attorney General revised his remarks to say that the NSA will eavesdrop whenever “we . . . have a reasonable basis to conclude that one party to the communication is a member of Al Qaeda, affiliated with Al Qaeda, or a member of an organization affiliated with Al Qaeda or working in support of Al Qaeda.”⁵⁸ Under this reasoning, the NSA could conduct a secret, indefinite warrantless wiretap of phone calls and emails between two U.S. citizens living in the U.S., so long as one had once worshipped at a mosque that the Administration had concluded is in some way “supportive” of al-Qaeda. Yet in such a case, the total absence of congressional oversight and judicial review would leave those citizens’ Fourth Amendment rights to privacy unprotected.⁵⁹

C. We Have No Reason to Believe The NSA Program Would Have Prevented September 11

Another claim that cannot stand is that the attacks of September 11 could have been prevented if only the NSA Program had been in place. In fact, nothing in our law prevented American intelligence from listening to a call to or from the United States involving Al Qaeda before September 11, so long as they got the warrant duly required by the FISA. Indeed, as the 9/11 Commission Report amply showed, our government already had plenty of evidence before September 11 that attacks would occur. The Commission found that the failure of the government to register the significance of that evidence resulted not from any restriction (in FISA or any other law) on information gathering, but rather from restrictions on information-sharing within the government.⁶⁰ In short, Administration officials did not miss the 9/11 plot because they took the few hours necessary to get a FISA warrant to eavesdrop on phone calls and e-mail messages. If anything, they missed the plot because existing procedures made them overlook information that was already in the system.

D. Giving Restricted Information to the “Gang of Eight” Did Not Substitute for Genuine Congressional Oversight or Judicial Review

⁵⁷ Barton Gellman, Dafna Linzer and Carol D. Leonnig, *Surveillance Net Yields Few Suspects*, WASH. POST, Feb. 5, 2006, at A1.

⁵⁸ Dec. 19 Press Briefing, Transcript available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (last viewed Feb. 26, 2006).

⁵⁹ Given that the FISA scheme was designed precisely to protect those rights, these constitutional concerns further weigh against an overbroad interpretation of the AUMF that would silently repeal FISA.

⁶⁰ See 9/11 COMMISSION REPORT at 79 (“Agents in the field began to believe—incorrectly—that no FISA information could be shared with agents working on criminal investigations. This perception evolved into the still more exaggerated belief that the FBI could not share *any* intelligence information with criminal investigators, even if no FISA procedures had been used. Thus, relevant information from the National Security Agency and the CIA often failed to make its way to criminal investigators. Separate reviews in 1999, 2000, and 2001 concluded independently that information sharing was not occurring.”).

Some have also argued that Congress was “effectively informed” of the NSA Program by classified briefings that were given to the “Gang of Eight,” the chair and ranking members of both intelligence committees, the majority and minority leaders of the Senate, and the Speaker and minority leader of the House. But we know from Senator Rockefeller’s handwritten – and unanswered – letter to Vice President Cheney of July 17, 2003, and from several others among the Eight, that several of the Members did not find the briefings sufficiently informative to perform their oversight duty; that some protested and had their protests ignored; and that all believed that they were strictly barred from discussing the briefings they were given with the full intelligence committees and committee staff.⁶¹

The law regarding intelligence oversight only allows briefings to be restricted to the Gang of Eight in the case of a covert operation in which a formal presidential finding has been issued; no one has said such a finding was issued here⁶² (and even had the NSA program been designated a covert operation by the President, that would not have cured its illegality under FISA). Failure to brief the full intelligence committees as required by the National Security Act of 1947 denied the Gang of Eight the assistance of committee staff who had the technical and legal expertise to evaluate the program and to prepare a classified portion of an intelligence bill approving, denying funding for, or regulating the program pursuant to the Congress’s explicit constitutional power to appropriate funds and to Govern and Regulate the Armed Forces.⁶³ By so limiting the briefing, the Executive effectively demanded that its co-equal branch of government accept a likely illegal program as a *fait accompli*.

Under the Intelligence Oversight Act, the Gang of Eight is to be used only for covert operations “in extraordinary circumstances affecting vital interests of the United States,” not as a general substitute for the case-by-case independent judicial review for individual surveillance warrants based on probable cause required from the Foreign Intelligence Surveillance Court.⁶⁴ The fact that a few Members have been given limited information about the NSA program does not constitute congressional oversight, much

⁶¹ Letter from Senator Jay Rockefeller to Vice President Cheney, July 17, 2003, *available at* <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.pdf> (last viewed: Feb. 27, 2006).

⁶² For intelligence activities generally, including any significant anticipated intelligence activity other than covert action, the National Security Act of 1947 requires that “the congressional intelligence committees” are to be kept “fully and currently informed” of such activities. 50 U.S.C. § 413 (a)(1) (2000). *See also* ALFRED CUMMING, CONGRESSIONAL RESEARCH SERVICE, *STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTIONS* 3-6 (2006). By law, covert actions require a formal presidential “finding,” one that must be then shared with the Gang of Eight. There has been no assertion that the President issued such a finding in the case of the NSA domestic surveillance program; if he indeed has not, then the Administration had no basis in law for limiting its briefings to the Gang of Eight.

⁶³ U.S. CONST. art. I § 8 cls. 12, 14; § 9 cl. 7.

⁶⁴ 50 U.S.C. 413(a)-(b) (2000). Finally, even when such limited notice is given, the President is still required to report “in a timely fashion.” *Id.*

less congressional approval of the program, and in any event does not substitute for the genuine judicial review required by FISA.⁶⁵

E. All Other Administrations Since 1978 Have Obeyed the FISA

Finally, the Attorney General argued in his testimony to this Committee that many Presidents --dating back to George Washington, Woodrow Wilson and Franklin D. Roosevelt ---have all conducted various forms of wartime surveillance. Tellingly, he failed to mention the most important President, Richard Nixon, whose Vietnam-era surveillance of antiwar groups and political opponents led to FISA's enactment in the first place. Under questioning by Senator Feingold, the Attorney General essentially conceded that no other President has openly evaded the FISA after 1978.⁶⁶ The fact that Presidents historically collected signals intelligence on the enemy during wartime when Congress did not regulate foreign intelligence gathering in no way exempts this President from now following FISA—which expressly requires that the statutory warrant process be followed more than 15 days after a declaration of war.

III. The proposed National Security Surveillance Act Should Not Be Adopted.

I have only had a short time to examine the staff proposal for a “National Security Surveillance Act,” (NSSA) but my strong reaction is that its enactment would be entirely premature. It is the main job of this Committee, I believe, to investigate and determine whether the ongoing NSA program has violated the law for the last four years, and if so, to consider possible legislative remedies for those violations. At the same time, all members of the Congressional Intelligence Committees—not just the Gang of Eight—should now be “fully and currently” briefed on all operational details of the President’s NSA program, as required by the National Security Act of 1947. If and when those committees have been fully briefed, they should immediately hold legislative hearings, with expert witnesses, to determine whether the ongoing NSA surveillance program can be brought into compliance with the existing FISA law. Only when these two parallel Committee processes --on the Judiciary side and the Intelligence side--have been completed, will the time be ripe for the two Committees to consider legislative proposals to amend the FISA, which was itself the product of several years of commission and

⁶⁵ This is especially true when one of the few briefed, the Ranking Member on the House Permanent Select Committee on Intelligence, has publicly stated that: “I am one of the few in Congress who has been briefed on the program, and I am not clear why FISA as presently drafted cannot cover the entire program.” See Letter from Rep. Jane Harman to President George W. Bush, Feb. 1, 2006, available at http://www.house.gov/harman/press/releases/2006/0201PR_fisawarrants.html

⁶⁶ SENATOR FEINGOLD: Do you know of any other president who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?
AG GONZALES: None come to mind, Senator, but I'd be happy to look to see whether or not that's the case. *Transcript, NSA Hearing*, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601359.html>

committee studies, and extensive legislative hearings under two Presidential Administrations.

To proceed hastily to “quick-fix legislation”—without full investigation, subpoenas answered, legal opinions disclosed, facts fully aired, Members fully briefed and the public fully informed—would inevitably invite bad legislative process. How can Congress meaningfully legislate to repair the illegalities of the ongoing NSA surveillance program when only a tiny percentage of Congress has been briefed on how that program has actually operated? And how can Congress responsibly amend the mandate of the Foreign Intelligence Surveillance Court, when the Administration has made no showing that that court could not have handled the matters that the Executive Branch illegally avoided bringing to it?

The proposed bill would not improve the situation. Instead of subjecting the legality of the ongoing program to meaningful congressional oversight and contemporaneous judicial review, the proposed law would simply amend the 1978 FISA to increase the authority of the President to conduct surveillance based on a showing of “probable cause” that the *entire surveillance program* -- not any particular act of surveillance -- will intercept communications of a foreign power or agent thereof, or anyone who has ever communicated with a foreign agent.

Under FISA, the federal government may not engage in electronic surveillance targeted at a U.S. citizen or resident absent probable cause that the “target ... is a foreign power or agent of a foreign power.”⁶⁷ But under the proposed bill, the NSA need not show that *either* party to an intercepted phone call or e-mail has any connection to Al Qaeda or any other terrorist organization. Nor would the government need to show probable cause that *either* party to a call or e-mail is a foreign power, an agent of a foreign power, or even associated with a foreign power. Instead, the bill would permit domestic electronic surveillance targeted at U.S. persons based solely upon a showing of “probable cause” that the surveillance program *as a whole* -- not even the particular surveillance -- “will intercept communications of the foreign power or agent of a foreign power specified in the application, or a person who *has had communication* with the foreign power or agent of a foreign power specified in the application.”⁶⁸

On its face, this language is stunningly broad. Almost every American who has ever stood in a visa line or traveled abroad and spoken to a foreign policeman “has had communication with the agent of a foreign power.”⁶⁹ If this bill became law, the NSA could wiretap virtually any U.S. person or resident almost indefinitely,⁷⁰ without *any*

⁶⁷ 50 U.S.C. § 1805(a)(3) (2000)

⁶⁸ Proposed NNSA, § 704(3) (emphasis added).

⁶⁹ I am a board member of the National Democratic Institute (NDI), an American democracy nongovernmental organization that frequently makes contact with Middle Eastern foreign governments as part of pro-democracy work abroad. Read literally, this bill could authorize a surveillance program whereby NDI workers in contact with foreign government workers in connection with election monitoring could have all their e-mails and telephone conversations with anyone tapped, for a minimum of 90 days.

⁷⁰ Although under the bill “continuous” surveillance could only last 90 days, there is no apparent bar to the NSA simply waiting a few days then starting the surveillance anew.

showing that *any* of the target's communications have anything to do with Al Qaeda. The FISA court would then certify that the program as a whole (not any particular surveillance) is "consistent with" the Fourth Amendment in a secret, *ex parte* proceeding. Such wholesale ratification would be hard to square with the Fourth Amendment's requirement that any government surveillance be *reasonable*, supported by *warrants* issued by courts, and *based upon specific probable cause* in each case.

For example, this draft proposal would authorize the FISA Court to issue a general warrant whereby the NSA could conduct a program seizing all voice and e-mail communications traveling through a switch in New York City and sort through those communications as part of an "electronic surveillance program," the purpose of which is to collect foreign intelligence information concerning the activities of a religious order connected with a foreign power. The NSA would be authorized to sort through all the messages to obtain all those received by anyone who had ever had communications with any individuals who had ever been in contact with that religious order, or with any agent of any other foreign power. The NSA would then be free to listen to all such communications; to disseminate all such communications to any other intelligence agency; to keep all communications seized in its computers forever (whether listened to or not); to use the warrantless intercepts as evidence against the person; or to use the intercepts as a basis for getting a standard FISA warrant against that person.⁷¹

In short, the proposed bill would unwisely shift the focus of FISA from people to "programs," and allow entire programs to be authorized based upon a general showing of "consistency" with the Constitution.⁷² While perhaps legalizing a small number of reasonable searches and seizures, the proposed statute would make matters far worse, by giving Congress' blanket pre-authorization to a large number of unreasonable searches and seizures. The bill would do nothing to correct the blatant illegality of the ongoing program, and would potentially invite more of the same.

IV. Conclusion

⁷¹ Also curious is the bill's Section 704, which directs the FISA court to consider the benefits of a particular program "as reflected by the foreign intelligence information obtained." This is a judgment, calling in effect for an advisory opinion, which is far more appropriate for a legislative committee than for an Article III court tasked with deciding cases or controversies.

⁷² It is true that a line of Fourth Amendment cases permits warrantless search programs to further certain "special needs," such as drunk driving checkpoints and urine testing in schools. But when such practices have been sustained, courts have concluded that alternative search processes are reasonable, because the searches are generally brief, minimally intrusive, standardized, and there is a demonstrated government need to dispense with individualized warrants and probable cause. See, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding drunk driving checkpoints); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (upholding school drug testing). The NSA spying program, by contrast-- and the kind of "surveillance programs" this draft bill might approve -- authorizes potentially indefinite, intrusive warrantless wiretapping of private communications, based on secret discretionary targeting, without any meaningful judicial review or probable cause in individual case. Those whose privacy is invaded will often have no awareness, much less freedom to opt out, of the searches. There is no need for such a radical legislative change when nearly thirty years of experience under the FISA make clear that such surveillance can be effectively carried out through warrants based on individualized suspicion.

The NSA surveillance program is blatantly illegal because it permits wiretapping within the United States without any of the safeguards for electronic surveillance presumptively required by the Fourth Amendment or FISA —statutory authorization, individualized probable cause, or a warrant or other order issued by a judge or magistrate. The Supreme Court has never upheld such a sweeping, unchecked power of government to invade the privacy of Americans without individualized suspicion or congressional or judicial oversight. None of the defenses offered by the Administration explain why it refused to follow the time-tested warrant requirements of the FISA Court. If the Administration felt that FISA was insufficient for its present-day needs, it should have sought a legislative amendment—as Congress expressly contemplated when it enacted the wartime wiretap provision in FISA. Instead, the Administration conducted a covert end-run around FISA, and when that end-run came to light, it claimed incorrectly that its actions were legal.

As Justice Jackson noted, “power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”⁷³ Congress should now investigate, fully inform itself of the facts, and legislate a remedy to this illegal episode. For reasons I have explained, it would be premature and unwise to enact the draft National Security Surveillance Act bill. Convening prompt, full-scale hearings, perhaps in joint session with the Intelligence Committees, would give this body time to consider a number of thoughtful legislative proposals, including those put forward by the ABA’s Task Force on Domestic Surveillance.⁷⁴

In recent months, some have asked why they should care if the NSA illegally monitors domestic emails and phone calls. Why shouldn’t the government have a right to rummage through our communications, if it helps them to find information that warns them of terrorist attacks? In response, I ask whether they have heard of the British “general warrant” of the 1700s. Under the general warrant, British authorities could break into any shop or place suspected of containing evidence of potential enemies of the state.⁷⁵ I remind them that it was precisely because English law did not sufficiently protect the right of personal privacy that our ancestors in the new American colonies forbade general warrants and demanded specific warrants. Even while recognizing the President as our Commander in Chief, they adopted a Fourth Amendment to the Constitution that ensured that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized.”

⁷³ *Youngstown*, 343 U.S. at 564 (Jackson, J., concurring).

⁷⁴ See ABA Task Force Report, *supra* note 5.

⁷⁵ During the reign of Charles the First, general warrants were used to license the King’s men to ransack homes, to seize personal papers, and to intimidate critics of the King, particularly authors and printers of critical newspapers. The abuses became so obvious that in 1765, the British courts declared general warrants illegal and Parliament followed suit one year later. See generally William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 2 (2001) (“The British general warrant was a search tool employed without limitation on location, and without any necessity to precisely describe the object or person sought.”).

As a former government official and law dean, I oppose the domestic spying program because it violates our right, as the people, to be secure against unreasonable searches and seizures. The fact some of the many searches now ongoing might be reasonable responses to terrorism cannot justify the uncounted unreasonable searches being undertaken. Nor can a government sworn to protect the Constitution and laws of the United States ever justify flouting the constitutional amendments and laws that were set up precisely to protect our hard-won human rights.

Thank you. I stand ready to answer any questions the Committee may have.

**Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Hearing on
“Wartime Executive Power and the NSA’s Surveillance Authority II”
Tuesday, February 28, 2006**

Today’s hearing is our second to explore the legality of President Bush’s warrantless domestic spying program. On December 17, 2005 – one day after the existence of the program was reported by *The New York Times* – the President admitted that the Bush-Cheney Administration has engaged in secret wiretapping of ordinary Americans without warrants for more than four years. Seven weeks later, Attorney General Gonzales was called before this Committee and provided unsworn testimony about the program.

That testimony was far from complete and left many important questions unanswered. At that hearing, we had before us the chief legal officer of the United States. He is not the President’s legal advisor; he is the American people’s lawyer. His sworn duty is to uphold and enforce the Constitution and the laws enacted by Congress — including the Foreign Intelligence Surveillance Act, which we have amended five times since the September 11 attacks. It seemed reasonable to start by asking him about how his Department of Justice has and will interpret those laws. Also, by starting with legal questions, we avoided raising any operational issues that could conceivably implicate national security concerns. So I asked the Attorney General a simple question: When did the Administration come up with its current theory that the congressional resolution authorizing the use of military force against al Qaeda – a resolution that says nothing at all about wiretapping -- also authorized secret, warrantless wiretapping of Americans inside the United States? At every opportunity, the Attorney General failed and refused to answer this basic factual question.

The Attorney General was asked several times to clarify the scope of the Bush-Cheney Administration’s legal theory of Executive power. If, as they claim, they can ignore FISA’s express prohibition of warrantless wiretapping, can they also eavesdrop on purely domestic phone calls? Can they search or electronically bug an American’s home or office? Can they comb through Americans’ medical records and open first-class mail? Can they suspend the Posse Comitatus Act? These are questions to which Congress and the American people deserve answers. Based on his testimony and persistent refusals to answer responsively, it appears the Attorney General, whose job it is to enforce the laws, has a radically different understanding of the laws than do many of us -- the people’s representatives in Congress who wrote the laws. The Attorney General refused to answer questions – even legal and hypothetical questions – but limited his appearance to confirming “those facts the President has publicly confirmed, nothing more.” In a last-minute change to his prepared testimony he also followed the path of his predecessor by playing politics on important security matters, hoping to intimidate Senators who asked questions and sought to get to the facts.

Senators from both parties took great care to ask straightforward questions about the program that could be answered without danger to national security. When did the program begin? How many Americans have had their calls and emails intercepted? Has the program led to any arrests? What involvement, if any, has the FISA Court had with the program? Why was the program shut down in 2004, and was its scope changed in 2004? Once again, we got no answers. Attorney General Gonzales refused to answer a simple “yes or no” question regarding the role of telephone companies and ISPs in implementing the program. He asserted that the program was “very narrowly tailored,” but he pointedly refused to say whether earlier versions of the program were likewise “narrowly tailored,” or whether the President has authorized other, broader secret surveillance programs inside the United States – for example, programs that may involve warrantless physical searches or large-scale data-mining.

In short, we learned almost nothing from our prior hearing. So far as the Attorney General was concerned, any question that was *not* limited to confirming the current version of the specific program the President described in December was irrelevant or hypothetical, even if it went to the core of the Administration’s legal justifications. And any question that *was* about that program amounted to a request for “operational details” that the American people have no business knowing, even if those questions were confined to the purely historical question of when the program began. Whatever we asked, it was either too relevant or not relevant enough, and either way, we were getting no answers from the Attorney General.

There was, briefly, one crack in the stone wall he erected. It has been reported that senior Department of Justice officials concluded in 2004 that the President’s program was illegal and, backed by former Attorney General Ashcroft, insisted that its scope be narrowed. So Chairman Specter asked the Attorney General whether he had any objection to his predecessor testifying before the Committee on this issue. Attorney General Gonzales replied: “I would not.” One week later, in a carefully worded about-face, he had an assistant write to Chairman Specter that the Bush-Cheney Administration would not permit any former officials to provide any new information to the Committee. The stone wall was back up.

Attorney General Gonzales’ conduct has made the Bush-Cheney Administration’s position crystal clear: It claims there is no place for congressional or judicial oversight of any of its activities in any way related to national security in the post-9/11 world. Through stonewalling, steamrolling and intimidation, this Administration is running roughshod over the Constitution and hiding behind inflammatory rhetoric demanding Americans blindly trust every one of its decisions. Just last week we were reminded, again, that they hold to that position even when bipartisan members of Congress raise national security concerns about the approval of a government-owned Dubai company taking over port operations in the United States. There are some striking parallels between the warrantless wiretapping program and approval of the takeover of most of our key ports on the East Coast by a firm controlled by a foreign government that has previous ties to Osama bin Laden, to terrorist financing and to the proliferation of nuclear weapons technology by Ali Khan. In both cases, this obsessively secretive

Administration proceeded with action that it must have known would face strong bipartisan opposition and did so without informing Congress or the American people. In both cases, the Administration made no attempt whatsoever to follow even the confidential review processes mandated by specific and express federal statutes: the FISA Court warrant requirement in the wiretapping case, and the 45-day review requirement of the Exon-Florio law in the case of the ports deal. And in both cases, the Bush-Cheney Administration has responded to bipartisan efforts at congressional oversight with bellicose political threats.

Will the Republican Congress fulfill its constitutional duty of providing the checks and balances envisioned by the Framers by engaging in real and effective oversight, or will it continue to abdicate its oversight role in deference to the other end of Pennsylvania Avenue?

Chairman Specter has a history of engaging in meaningful, bipartisan oversight and I very much appreciate his efforts thus far to lead a bipartisan quest for straight answers on this illegal domestic surveillance program. I am glad that we are having today's hearing. But we should be clear about what today's hearing is, and is not. It is not an oversight hearing. Through Attorney General Gonzales, the Bush-Cheney Administration has refused to answer oversight questions and refused to allow former officials to answer them. At this point, meaningful oversight of the Government's actions can only be achieved by subpoenas backed by threat of real congressional sanctions if the Bush-Cheney Administration continues to stonewall.

Our hearing today will be an academic panel discussion featuring commentators who have not witnessed or played any role in the program that they are discussing, and who know no more than the very minimal facts about the program that the President has chosen to divulge. This is an important discussion to have to help this Committee, Congress and the American people understand our legal landscape, and what consequences this illegal program has on our system. These are scholars and former government officials with a great deal of expertise in the law or in the intelligence field. I greatly appreciate their analysis, just as I appreciate the analysis of former President Jimmy Carter, former FBI Director William Sessions, conservative columnist George Will, and the many other scholars and former government officials who have concluded that this program violates the Foreign Intelligence Surveillance Act and threatens the constitutional separation of powers. But today's hearing is no substitute for the vigorous and forceful oversight this Congress owes the American people.

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Wartime Executive Power and the NSA's Surveillance Authority II

Statement of

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before the

Committee on the Judiciary
United States Senate

February 28, 2006

Mr. Chairman, distinguished members of the Committee:

My name is Robert A. Levy. I am a senior fellow in constitutional studies at the Cato Institute. Thank you for inviting me to comment on selected aspects of the National Security Agency's warrantless surveillance program.

I. Introduction

President Bush has authorized the NSA to eavesdrop, without obtaining a warrant, on telephone calls, emails, and other communications between U.S. persons in the United States and persons outside of the United States. For understandable reasons, the operational details of the NSA program are secret, as are the details of the executive order that authorized the program. But Attorney General Gonzales has stated that surveillance can be triggered if an executive branch official has reasonable grounds to believe that a communication involves a person "affiliated with al-Qaeda or part of an organization or group that is supportive of al-Qaeda."¹

The attorney general has declared that the president's authority rests on the post-9/11 Authorization for Use of Military Force [AUMF] and the president's inherent wartime powers under Article II of the U.S. Constitution, which includes authority to gather "signals intelligence" on the enemy.²

¹ Press Briefing with Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

² U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, Jan. 19, 2006.

The NSA program, and its defense by the administration, raise these questions, which I propose to address below: (1) Does NSA warrantless surveillance violate the Fourth Amendment's protection against unreasonable searches? (2) Does the program violate the Foreign Intelligence Surveillance Act [FISA]? (3) Does the AUMF authorize warrantless surveillance by the NSA? (4) Do the president's inherent powers allow him to ignore FISA? (5) What should be done if the executive branch has acted unlawfully?

My conclusions, as elaborated in the following sections, are: First, the president has some latitude under the "executive Power" and "Commander-in-Chief" Clauses of Article II, even lacking explicit congressional approval, to authorize NSA warrantless surveillance without violating the "reasonableness" requirement of the Fourth Amendment. But second, if Congress has expressly prohibited such surveillance (as it has under FISA), then the statute binds the president unless there are grounds to conclude that the statute does not apply. Third, in the case at hand, there are no grounds for such a conclusion -- that is, neither the AUMF nor the president's inherent powers trump the express prohibition in the FISA statute.

My testimony today addresses *only* the legality of the NSA program, not the policy question whether the program is necessary and desirable from a national security perspective. If the program is both essential and illegal, then the obvious choices are to change the program so that it complies with the law, or change the law so that it authorizes the program.

Nor do I address, other than to mention in this paragraph, three other constitutional arguments that might be advanced in opposition to warrantless surveillance by the NSA. First, in contravention of the First Amendment, the program may deprive innocent persons of the right to engage freely in phone and email speech. Second, the president may have violated his constitutional obligation to "take Care that the Laws be faithfully executed."³ Among the laws to be faithfully executed is FISA. No doubt, the president has some discretion in enforcing the law, but not leeway to take actions that the law expressly prohibits. Third, in contravention of the Fifth Amendment, the NSA surveillance program may represent a deprivation of liberty without due process. Liberty, as we know from the Supreme Court's recent decision in *Lawrence v. Texas*,⁴ encompasses selected aspects of privacy that are separate from the question whether particular intrusions are reasonable in terms of the Fourth Amendment.

Those concerns are legitimate, but they have not been central to the debate over NSA surveillance, and they are not the focus of the Committee's deliberations or, therefore, of my testimony.

II. Does NSA Warrantless Surveillance Violate the Fourth Amendment?

³ U.S. Const. art. II, § 3. Indeed, even if the president believes in good faith that FISA is trumped by his war powers, his use of secret executive orders is not the manner in which he should discharge his obligation to defend the Constitution and execute the law. Instead, he should have made his case to Congress, expanding on the list of FISA grievances that he would like to have amended.

⁴ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

The president has contended that NSA warrantless surveillance does not offend Fourth Amendment protections against “unreasonable” searches. That contention is correct as far as it goes; but it does not go far enough.

To begin, the Fourth Amendment requires probable cause in order to obtain a warrant, but it does not require a warrant for all searches. There are numerous instances of permissible warrantless searches -- e.g., hot pursuit,⁵ evanescent evidence,⁶ search incident to arrest,⁷ stop and frisk,⁸ automobile searches,⁹ plain view searches,¹⁰ consent searches,¹¹ and administrative searches.¹² In fact, federal courts have recognized a border search exception¹³ and, within the border search exception, an exception for monitoring certain international postal mail.¹⁴ As for a national security exception for foreign intelligence surveillance, that remains an open issue. The so-called *Keith* case in 1972 said there would be no exception if a domestic organization were involved; but there might be an exception if a foreign power were involved.¹⁵

Thus, the administration can credibly argue that it may conduct some types of warrantless surveillance without violating the Fourth Amendment. And because the president’s Article II powers are elevated during time of war -- assuming the AUMF to be the functional, if not legal, equivalent of a declaration of war -- his post-9/11 authorization of NSA warrantless surveillance might be justifiable if the Congress had not expressly disapproved.

But the Congress *did* expressly disapprove, in the FISA statute. Therefore, the president’s assertion of a national security exception that encompasses the NSA program misses the point. The proper question is not whether the president has inherent authority to relax the “reasonableness” standard of the Fourth Amendment in order to direct warrantless surveillance, even if not approved by Congress. The answer to that question is “yes, in some cases.” But the narrower issue in the NSA case is whether the president, *in the face of an express statutory*

⁵ *Warden v. Hayden*, 387 U.S. 294 (1967).

⁶ *Cupp v. Murphy*, 412 U.S. 291 (2000).

⁷ *Chimel v. California*, 395 U.S. 752 (1969).

⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁹ *United States v. Ross*, 456 U.S. 798 (1982).

¹⁰ *Arizona v. Hicks*, 480 U.S. 321 (1987).

¹¹ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹² *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

¹³ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁴ *United States v. Ramsey*, 431 U.S. 606, 619-21 (1977).

¹⁵ *United States v. United States District Court (Keith)*, 407 U.S. 297, 322 n.20 (1972).

prohibition, can direct that same surveillance. The answer is “no,” and I am not aware of any case law to support an argument to the contrary.

Put somewhat differently, Article II establishes that the president has inherent powers, especially during wartime. And those powers might be sufficient to support his authorization of warrantless surveillance, notwithstanding the warrant provisions of the Fourth Amendment. But Article II does not delineate the *scope* of the president’s wartime powers. And because Congress has concurrent authority in this area,¹⁶ an express prohibition by Congress is persuasive when deciding whether the president has overreached.

The distinction between concurrent and exclusive powers is important. For example, the president’s “Power to grant Reprieves and Pardons”¹⁷ is exclusive; there is no stated power for Congress to modify it by legislation -- e.g., by declaring certain offenses unpardonable. By contrast, the president’s wartime powers are shared with Congress (see note 16). That suggests the president must comply with duly enacted statutes unless he can show that Congress has exceeded its authority. In this instance, President Bush has made no such showing.

III. Does NSA Warrantless Surveillance Comply with FISA?

Accordingly, even if the administration establishes that NSA warrantless surveillance during wartime is reasonable in the context of the Fourth Amendment, the question remains whether the NSA program violates the express terms of FISA. It does.

The text of FISA is unambiguous: “A person is guilty of an offense if he intentionally engages in electronic surveillance ... except as authorized by statute.”¹⁸ That provision covers communications from or to U.S. citizens or permanent resident aliens in the United States. Moreover, the Wiretap Act provides that its procedures and FISA “shall be the exclusive means by which electronic surveillance ... may be conducted.”¹⁹

From the early 1960s until 1973, the NSA, without approval of Congress, used a “watch list” of U.S. citizens and organizations in sorting through intercepted foreign communications. That was known as Project Minaret.²⁰ From 1945 to 1975, telegraph companies gave the NSA copies of

¹⁶ Congress’s authority includes the power to “define and punish ... Offenses against the Law of Nations” (U.S. Const. art. I, § 8); “declare War” (id.); “make Rules concerning Captures on Land and Water” (id.); “raise and support Armies” (id.); “provide and maintain a Navy” (id.); “make Rules for the Government and Regulation of the land and naval forces” (id.); call forth, organize, arm, discipline and govern the Militia “to execute the Laws ... suppress Insurrections and repel Invasions” (id.); and suspend habeas corpus (id. § 9).

¹⁷ U.S. Const. art II, § 2.

¹⁸ 50 U.S.C. § 1809(a)(1).

¹⁹ 18 U.S.C. § 2511(f).

²⁰ “National Security Agency Surveillance Affecting Americans,” *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans - Book III*, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, April 23, 1976, available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIj.htm>.

most telegrams sent from the United States to overseas. That was known as Project Shamrock, "probably the largest governmental interception program affecting Americans ever undertaken."²¹ Of course, there were also domestic spying abuses by the Federal Bureau of Investigation under J. Edgar Hoover against suspected communists, Black Panthers, civil rights leaders and others. That's why FISA was enacted in 1978. It had a dual purpose: to curb abuses while facilitating domestic surveillance for foreign intelligence purposes.

To be sure, the FISA statute was drafted to deal with peacetime intelligence. But that does not mean the statute can be ignored when applied to the post-9/11 war on terror. First, the FISA text makes no distinction between wartime and peacetime. To conduct surveillance without statutory authorization, in wartime or peacetime, is a crime, punishable by up to five years in prison.²² Second, in passing FISA, Congress expressly contemplated warrantless surveillance during wartime, but limited it to the first 15 days after war is declared. The statute reads: "Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."²³ Third, FISA warrant requirements and electronic surveillance provisions were amended by the USA PATRIOT Act,²⁴ which was passed in response to 9/11 and signed by President Bush. If 9/11 triggered "wartime," as the administration has repeatedly and convincingly argued, then the amended FISA is clearly a wartime statute.

Some administration supporters have argued that FISA and the PATRIOT Act provide tools that the president had anyway, except he could not use the acquired evidence in a criminal prosecution.²⁵ Yet there is no support for the notion that members of Congress, in passing the two statutes, thought they were simply debating the rules of evidence. Moreover, warrant requirements are triggered even if the government declines to prosecute. Imagine police secretly entering a private home without a warrant, installing bugs on phones and tracer software on computers, searching every room and closet, then leaving, never to be heard from again -- no arrest, no indictment, no notice to the target. Clearly, the Fourth Amendment's warrant provisions have been violated, even if the target is unaware and no fruits of the search are used as evidence in a criminal prosecution. A key purpose of the Amendment is to ensure privacy in those situations in which an expectation of privacy is reasonable.

That said, there may be some international satellite or radio communications that do not come under FISA's prohibition because the communicating parties could not reasonably expect

²¹ *Id.*

²² 50 U.S.C. § 1809(c).

²³ 50 U.S.C. § 1811.

²⁴ Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

²⁵ See, e.g., David B. Rivkin, online debate with Robert A. Levy on "NSA Surveillance," available at <http://www.fed-soc.org/pdf/domesticsurveillance.pdf>.

privacy. But I know of no court case that has denied there is a reasonable expectation of privacy by U.S. citizens and permanent resident aliens in their phone calls and emails.

Moreover, the Justice Department, in a December 2005 letter to Congress, acknowledged that the president's October 2001 NSA eavesdropping order did not comply with the "procedures" of the FISA statute.²⁶ The Department offers two justifications -- the first of which I examine next.

IV. Does the AUMF Authorize Warrantless Surveillance by the NSA?

The Justice Department asserts that Congress's post-9/11 AUMF provides the statutory authorization that FISA requires. Under the AUMF, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons" who may have been connected to 9/11.²⁷ But that cannot reasonably mean the AUMF authorizes warrantless surveillance by the NSA in the face of an express provision in FISA that limits such surveillance to the first 15 days after a declaration of war.

A settled canon of statutory interpretation directs that specific provisions in a statute supersede general provisions -- *lex specialis derogat legi generali*. When FISA forbids "electronic surveillance without a court order" while the AUMF permits "necessary and appropriate force," it is bizarre to conclude that electronic surveillance without a court order is authorized. In voting for the AUMF, members of Congress surely did not intend to make compliance with FISA optional. In fact, Congress was simultaneously relaxing selected provisions of FISA via the PATRIOT Act. Here's how the *Washington Post* put it: "Clearheaded members of Congress voting for the [AUMF] certainly understood themselves to be authorizing the capture of al-Qaeda and Taliban fighters. We doubt any members even dreamed they were changing domestic wiretapping rules -- particularly because they were focused on that very issue in passing the USA PATRIOT Act."²⁸

Also in the *Washington Post*, former Senate minority leader Tom Daschle (D-SD) wrote that Congress rejected proposed language from the White House that the broader purpose of the AUMF was to "deter and pre-empt any future acts of terrorism or aggression." And Congress also refused a last-minute administration proposal to change "appropriate force against those nations" to read "appropriate force *in the United States* and against those nations."²⁹ Notably, not one of the 518 members of Congress who voted for the AUMF has now come forth to dispute Sen. Daschle's account, or claim that his or her vote was intended to approve NSA warrantless surveillance.

²⁶ Memorandum from William Moschella, Asst. Attorney General for Leg. Affairs, to Chairs and Ranking Members of Senate and House Intelligence Committees (Dec. 22, 2005), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa122205ltr.pdf>.

²⁷ S.J. Res. 23, 107th Cong. (2001).

²⁸ "The Power to Spy," editorial, *Washington Post*, p. B6, Dec. 25, 2005.

²⁹ Tom Daschle, "Power We Didn't Grant," *Washington Post*, p. A21, Dec. 23, 2005.

Still, proponents of the NSA surveillance program argue that (a) the intent of members of Congress in signing the AUMF is trumped by the text of the AUMF itself, (b) “necessary and appropriate force,” as permitted under the AUMF, surely includes the gathering of battlefield intelligence, and (c) the war on terror, and the events of 9/11 in particular, have expanded the notion of “battlefield” to encompass places in the United States.³⁰ Those assertions, insofar as they are posited as justification for NSA warrantless surveillance, are mistaken for three principal reasons:

First, communications from the actual battlefield -- e.g., Afghanistan -- or from anywhere else outside the United States, can be monitored without violating FISA as long as the target of the surveillance is not a U.S. person in the United States.

Second, a call from, say, France or the United Kingdom cannot reasonably be construed as battlefield-related unless the term battlefield has no geographic limits. The courts have rejected that idea in comparing the arrests of two U.S. citizens, Yaser Hamdi and Jose Padilla. In *Hamdi v. Rumsfeld*, federal appellate judge J. Harvie Wilkinson pointedly noted that Yaser Hamdi’s battlefield capture was like “apples and oranges” compared to Jose Padilla’s arrest in Chicago.³¹ And in *Padilla v. Rumsfeld*, the U.S. Court of Appeals for the Second Circuit rejected the argument that all the world is a battlefield in the war on terror.³²

Third, if Naples, Italy is part of the battlefield, why not Naples, Florida? The same logic that argues for warrantless surveillance of foreign-to-domestic and domestic-to-foreign communications would permit warrantless surveillance of all-domestic communications as well. Of course, the administration denies the existence of an all-domestic surveillance program, but so too would the administration have denied the NSA’s current program but for the leak in the *New York Times*.

As law professor Richard Epstein has noted:³³ A current battlefield, where there is armed combat, is vastly different from a potential battlefield that could erupt if the enemy were to launch a terrorist act. To argue that we are living in a “war zone” would be news to most Americans jogging in Central Park or watching television in Los Angeles. There is, after all, a distinction to be made between suburban Chicago and suburban Baghdad. Nor did the events of 9/11 transform the United States into a battlefield in the Afghan war -- any more than did the attack on Pearl Harbor or the invasion by eight Nazis in the *Ex parte Quirin* case³⁴ transform the United States into a World War II battlefield.

³⁰ See, e.g., David B. Rivkin, online debate with Richard Epstein on “Domestic Eavesdropping,” available at <http://www.opinionduel.com/debate/?q=NDc=>.

³¹ *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc).

³² *Padilla v. Rumsfeld*, 352 F.3d 695, 721 (2003), *rev’d on other grounds*, 124 S. Ct. 2711 (2004).

³³ Richard Epstein, online debate with David B. Rivkin on “Domestic Eavesdropping,” available at <http://www.opinionduel.com/debate/?q=NDc=>.

³⁴ *Ex parte Quirin*, 317 U.S. 1 (1942).

What, then, does the preamble of the AUMF mean when it refers to terrorist acts that “render it both necessary and appropriate that the United States exercise the right to self-defense and to protect U.S. citizens both *at home* and abroad” (emphasis added)? Here, too, Professor Epstein has correctly interpreted the text.³⁵ The AUMF preamble sets out the purpose of the resolution but does not address the legitimacy of means undertaken to carry out that purpose. No one doubts that the president has the right to use force in self-defense to protect citizens at home and abroad. But a preamble containing a broad statement of goals is not an affirmative grant of power to violate the law.

Finally, did the Supreme Court in *Hamdi v. Rumsfeld*³⁶ interpret the AUMF so broadly as to buttress the administration’s claim that the AUMF justifies the NSA surveillance program? At issue in *Hamdi* was whether the AUMF satisfied the Non-Detention Act,³⁷ which required a statute authorizing Hamdi’s extended detention. The government insisted that a U.S. citizen could be detained indefinitely, without access to counsel, without a hearing, and without knowing the basis for his detention. The Court plurality agreed that a U.S. citizen could be initially detained under the AUMF. But only “Taliban combatants”³⁸; only with access to counsel³⁹; only after “notice of the factual basis for his classification”⁴⁰; only after a hearing⁴¹; and only if not “indefinite detention for ... interrogation.”⁴² In other words, the *Hamdi* Court interpreted the scope of the AUMF narrowly, not broadly. Not even Hamdi’s lawyers had argued that the government had to release enemy soldiers captured on the battlefield. Yet each of the government’s other contentions were rebuffed by the Court. Indeed, if *Hamdi* were a victory for the government, why did the Defense Department release him after declaring in court papers that merely allowing Hamdi to meet with counsel would “jeopardize[] compelling national security interests” and “interfere with if not irreparably harm the military’s ongoing efforts to gather intelligence.”⁴³

In summary, the AUMF does not address, much less authorize, warrantless domestic surveillance.

³⁵ Epstein, *supra* n. 33.

³⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁷ 18 U.S.C. § 4001(a).

³⁸ *Hamdi*, 542 U.S. at 521.

³⁹ *Id.* at 539.

⁴⁰ *Id.* at 533.

⁴¹ *Id.*

⁴² *Id.* at 521.

⁴³ Quoted in “Freeing Mr. Hamdi,” editorial, *Washington Post*, p. A24, Sep. 24, 2004.

V. Do the President's Inherent War Powers Allow Him to Ignore FISA?

Attorney General Gonzales has a second, more plausible, defense of warrantless surveillance -- namely, Article II of the Constitution states that "The executive Power shall be vested in a President" who "shall be Commander in Chief" of the armed forces. That power, says the attorney general, trumps any contrary statute during time of war.

I respectfully disagree -- which is *not* to say I believe the president is powerless to order warrantless wartime surveillance. For example, intercepting enemy communications on the battlefield is clearly an incident of his war power. But warrantless surveillance of Americans inside the United States, who may have nothing to do with al-Qaeda, does not qualify as incidental wartime authority. The president's war powers are broad, but not boundless. Indeed, the war powers of Congress, not the president, are those that are constitutionalized with greater specificity.⁴⁴

The question is not whether the president has unilateral executive authority, but rather the extent of that authority. And the key Supreme Court opinion that provides a framework for resolving that question is Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer*⁴⁵ -- the 1952 case denying President Truman's authority to seize the steel mills. Truman had argued that a labor strike would irreparably damage national security because steel production was essential to the production of war munitions. But during the debate over the 1947 Taft-Hartley Act,⁴⁶ Congress had expressly rejected seizure.

Justice Jackson offered the following analysis, which was recently adopted by the Second Circuit in holding that the administration could no longer imprison Jose Padilla:⁴⁷ First, when the president acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum."⁴⁸ Second, when the president acts in the absence of either a congressional grant or denial of authority, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁴⁹ But third, where the president takes measures incompatible with the express or implied will of Congress -- such as the NSA program, which violates an express provision of the FISA statute -- "his power is at its lowest."⁵⁰

Even under *Youngstown*'s second category (congressional silence), the president might have inherent wartime authority to interpret the "reasonableness" standard of the Fourth Amendment

⁴⁴ See *supra* n. 16.

⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

⁴⁶ 29 U.S.C. §§ 141-87.

⁴⁷ Padilla, 352 F.3d at 711.

⁴⁸ *Youngstown*, 343 U.S. at 635.

⁴⁹ *Id.* at 637.

⁵⁰ *Id.*

in a manner that would sanction certain warrantless surveillance. But the NSA program does not fit in *Youngstown's* second category. It belongs in the third category, in which the president has acted in the face of an express statutory prohibition.

Naturally, if the statutory prohibition is itself unconstitutional, the administration is not only permitted but obligated to ignore it. That's the argument administration supporters have proffered to excuse the NSA's defiance of FISA.⁵¹ To bolster their case, they cite the only opinion that the FISA Court of Review has ever issued, *In re: Sealed Case*.⁵² There, the appellate panel mentioned several earlier cases⁵³ that concluded the president has "inherent authority to conduct warrantless searches to obtain foreign intelligence information."⁵⁴ The Court of Review then added: "We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power."⁵⁵

Three responses: First, I do not contend that the president lacks "inherent authority to conduct warrantless searches to obtain foreign intelligence information." He has such authority, but Congress, exercising its own concurrent wartime powers, has limited the scope of that authority by excluding warrantless surveillance intentionally targeted at a U.S. person in the United States. Second, the surveillance in the earlier cases cited by *Sealed Case* took place pre-FISA, so Congress had not yet laid out the rules. Third, the quote from *Sealed Case* conveniently stops one sentence short. Here is the very next sentence: "The question before us is the reverse, does FISA amplify the President's power by providing a mechanism that at least approaches a classic warrant and which therefore supports the government's contention that FISA searches are constitutionally reasonable."⁵⁶ In resolving that question, the Court of Review did not conclude that FISA "encroach[ed] on the President's constitutional power." Quite the contrary, according to the court, FISA permissibly *amplified* the president's power. The restrictive provisions in FISA were simply a clarification of his new and *expanded* authority.

Thus, *Sealed Case* provides no support for the assertion that FISA unconstitutionally constrains the president's inherent wartime authority. Moreover, such claims leave important questions unanswered. For example: If warrantless domestic surveillance is incidental to the president's inherent powers, so too are sneak-and-peek searches, roving wiretaps, library records searches, and national security letters -- all of which were vigorously debated in deciding whether to reauthorize the PATRIOT Act. Could the president have proceeded with those activities even if they were not authorized by Congress? If so, what was the purpose of the debate? And if not, what makes the NSA program different?

⁵¹ See, e.g., Rivkin, *supra* n. 25.

⁵² *In re: Sealed Case*, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002).

⁵³ See, e.g., *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980).

⁵⁴ *In re: Sealed Case*, 310 F.3d at 742.

⁵⁵ *Id.*

⁵⁶ *Id.*

Further, the attorney general asserts that the AUMF and the commander-in-chief power are sufficient to justify the NSA program. He, or his predecessor, made similar claims for military tribunals without congressional authorization,⁵⁷ secret CIA prisons,⁵⁸ indefinite detention of U.S. citizens,⁵⁹ enemy combatant declarations without hearings as required by the Geneva Conventions,⁶⁰ and interrogation techniques that may have violated our treaty commitments banning torture.⁶¹ Is any of those activities outside the president's commander-in-chief and AUMF powers? If not, what are the bounds, if any, that constrain the president's unilateral wartime authority?

VI. What Should Be Done to Remedy Unlawful Acts by the Executive Branch?

Having concluded that NSA's warrantless surveillance program is illegal, let me comment briefly on some remedial steps to cure the president's violation of the FISA statute.

At the outset, I reject the proposition that the president, but for his ability to order warrantless surveillance of U.S. persons, would be impotent in the war on terror. First, he has expansive power to conduct surveillance outside the United States. Second, the PATRIOT Act and other statutes have given him broad leeway within the United States. Third, he has considerable, although not plenary, inherent authority under the commander-in-chief power when Congress has approved, or even perhaps when Congress has been silent. But when Congress exercises its own powers and expressly prohibits what the president would like to undertake, the president's power is limited.

Yet, even then, if it's necessary and desirable to monitor the communication of a U.S. person in the United States, then the president could, and should, have sought a FISA warrant. The requirement to obtain a warrant from the FISA court is probable cause that someone may be "an agent of a foreign power,"⁶² which includes international terrorist groups. That standard is far below the usual criminal-law requirement for probable cause that a crime has been, or is about to be, committed. Almost all FISA requests are granted, and emergency approval for wiretaps can

⁵⁷ See, e.g., *United States v. Hicks*, Prosecution Response to Defense Motion to Dismiss, p. 3, Oct. 18, 2004, available at <http://www.pentagon.mil/news/Oct2004/d20041022lack.pdf>.

⁵⁸ See, e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, "Re: Permissibility of Relocating Certain 'Protected Persons' from Occupied Iraq," March 19, 2004, available at http://www.humanrightsfirst.com/us_law/etn/gonzales/memos_dir/memo_20040319_Golds_Gonz.pdf.

⁵⁹ See, e.g., *Hamdi*, 542 U.S. at 516-17.

⁶⁰ See, e.g., Memorandum from President Bush, "The Humane Treatment of al-Qaeda and Taliban Detainees," Feb. 7, 2002, available at http://www.humanrightsfirst.com/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf.

⁶¹ See, e.g., President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

⁶² 50 U.S.C. § 1804(a)(4)(A).

be handled within hours. In fact, the FISA statute allows the government in emergency situations to put a wiretap in place immediately, then seek court approval later, within 72 hours.⁶³

Attorney General Gonzales has declared that 72 hours is not enough; it takes longer than that to prepare a warrant application.⁶⁴ That is tantamount to arguing that the Justice Department lacks sufficient personnel to handle its workload, so it's compelled to act illegally to circumvent prescribed procedures. Moreover, the administration has not, to my knowledge, complained about the same 72-hour window that governs domestic-to-domestic communications under FISA. Why is the window too short only when the party on the other end happens to be outside the United States? Indeed, the window was increased from 24 to 72 hours in the Intelligence Authorization Act for Fiscal Year 2002.⁶⁵ If the longer period is still inadequate, why hasn't the administration requested another extension from Congress?

In his recent Senate testimony on the NSA program,⁶⁶ Attorney General Gonzales outlined the following steps that must be taken before an emergency warrant application is filed. (1) NSA officials identify a legitimate target. (2) NSA lawyers ensure that the application complies with FISA. (3) Justice Department lawyers must agree. (4) The attorney general must agree. (5) The application must be approved by a Cabinet-level officer. (6) It must be approved by a senior official with mass security responsibility, such as the director of the FBI.

FISA itself imposes only three requirements:⁶⁷ (1) The attorney general must approve. (2) An official confirmed by the Senate with foreign affairs responsibility must certify that the surveillance has foreign intelligence value. (3) "Minimization procedures" must ensure that surveillance is not overbroad (for example, by preventing retention of information unrelated to national security). Accordingly, the redundancies cited by the attorney general are not necessary to comply with FISA. My colleague at the Cato Institute, Mark Moller, points out that the president "could cull out duplicative layers of lawyer oversight at both NSA and the Department of Justice. He could eliminate multiple sign-offs by senior officials. NSA case officers could initiate the warrant request. An intelligence oversight counsel assigned to specific ongoing investigations could process the warrant within the 72-hour time frame."⁶⁸

⁶³ 50 U.S.C. § 1824(e)(1)(A).

⁶⁴ Speech, Department of Justice, Prepared Remarks for Attorney General Alberto Gonzales at the Georgetown University Law Center, (Jan. 24, 2006), available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html.

⁶⁵ Pub. L. No. 107-08, 115 Stat. 1394 (Dec. 28, 2001).

⁶⁶ *Wartime Executive Power and the NSA's Surveillance Authority: Hearings Before the Senate Judiciary Committee*, 109th Cong. (Feb. 6, 2006). Transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html>.

⁶⁷ 50 U.S.C. § 1804(a).

⁶⁸ Mark Moller, "Oval Office Space," publication pending.

Moller concludes that “the president can simply change the procedures and cut the red tape. The president’s authority to manage the executive branch is a far more modest assertion of power than an ‘inherent’ authority to ignore the law.”⁶⁹

Admittedly, FISA warrants might not be available for some surveillance operations that the NSA would like to undertake. FISA allows warrants only against foreign powers, including terrorist groups, or their agents. Therefore, a warrant is not available if the intended domestic target is not an “agent,” even if he is an al-Qaeda contact (perhaps not aware that his communications have intelligence value). Conceivably, FISA could be amended so that warrants could issue merely upon showing that an individual has had contact with al-Qaeda. That is a policy question, not a legal question, on which I claim no special insight.

But it is important to note that under current law, surveillance of non-agent U.S. persons is even more egregious than warrantless surveillance of agents. The latter could be cured by a warrant; the former could not. In other words, if NSA targets a non-agent U.S. person, the violation of FISA consists not merely of unauthorized surveillance without obtaining a FISA warrant, but of surveillance under circumstances where a FISA warrant would never have been granted.

If the president thought the law should be amended to authorize warrantless surveillance of either agents or non-agents, he had a convenient vehicle for that purpose shortly after 9/11. That’s when the PATRIOT Act was passed, substantially enhancing the president’s authority under FISA and expanding his ability to conduct foreign intelligence surveillance. The president could have, but did not, seek new authority for the NSA -- authority that he has now decreed, unilaterally, without input from either Congress or the courts.

Maybe Congress would not have approved if asked. Or maybe the courts would have overridden any further loosening of the warrant provisions. But the legal stumbling block for the administration is not just that it failed to get affirmative support for expanded surveillance from Congress and the courts. The bigger predicament is that Congress, without objection from the president, expressly rejected warrantless domestic surveillance and codified that prohibition in the FISA statute, which the president implicitly accepted when he signed the PATRIOT Act.

Because the central problem with the NSA surveillance program is too much unchecked authority in the executive branch, the obvious solution is for the federal legislature or the federal judiciary to intervene. But the courts may decide they cannot play a role: First, the Justice Department will not prosecute; second, surveillance targets who have been secretly monitored are unlikely to know of their victimization; third, potential targets may not be able to prove sufficient injury; and fourth, aggrieved members of Congress have previously been denied legal standing to sue.⁷⁰

⁶⁹ Id

⁷⁰ See *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), cert. denied 121 S. Ct 50 (2000) (31 members of Congress denied standing to sue President Clinton for violating the 1973 War Powers Act when he ordered the military to join NATO in bombing Yugoslavia).

That elevates the need for congressional intervention. But the president has resisted asking Congress to approve NSA domestic surveillance because, among other things, publicity might tip off al-Qaeda.⁷¹ Perhaps his concern is legitimate, but “tipping off terrorists” is an excuse not to debate *any* counterterrorism statute, including the PATRIOT Act, which was nonetheless debated vigorously. Moreover, the president’s rationale assumes that al-Qaeda would be blissfully ignorant of the surveillance but for congressional deliberations.

The administration may be justified in taking measures that in pre-9/11 times could be seen as infringements of civil liberties. After all, the fuzzy text of the Fourth Amendment (unreasonable searches) and the Fifth Amendment (due process) leaves room for exceptions at the margin. But the executive branch cannot, in the face of an express prohibition by Congress, unilaterally set the rules, execute the rules, and eliminate oversight by the other branches.

⁷¹ See, e.g., John Diamond, “Lawmakers Doubtful on Surveillance; Gonzales Says He’ll Consider Proposals,” *USA Today*, p. 7A, Feb. 7, 2006.

New York Times
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Editorial

The Trust Gap

We can't think of a president who has gone to the American people more often than George W. Bush has to ask them to forget about things like democracy, judicial process and the balance of powers — and just trust him. We also can't think of a president who has deserved that trust less.

This has been a central flaw of Mr. Bush's presidency for a long time. But last week produced a flood of evidence that vividly drove home the point.

DOMESTIC SPYING After 9/11, Mr. Bush authorized the National Security Agency to eavesdrop on the conversations and e-mail of Americans and others in the United States without obtaining a warrant or allowing Congress or the courts to review the operation. Lawmakers from both parties have raised considerable doubt about the legality of this program, but Attorney General Alberto Gonzales made it clear last Monday at a Senate hearing that Mr. Bush hasn't the slightest intention of changing it.

According to Mr. Gonzales, the administration can be relied upon to police itself and hold the line between national security and civil liberties on its own. Set aside the rather huge problem that our democracy doesn't work that way. It's not clear that this administration knows where the line is, much less that it is capable of defending it. Mr. Gonzales's own dedication to the truth is in considerable doubt. In sworn testimony at his confirmation hearing last year, he dismissed as "hypothetical" a question about whether he believed the president had the authority to conduct warrantless surveillance. In fact, Mr. Gonzales knew Mr. Bush was doing just that, and had signed off on it as White House counsel.

THE PRISON CAMPS It has been nearly two years since the Abu Ghraib scandal illuminated the violence, illegal detentions and other abuses at United States military prison camps. There have been Congressional hearings, court rulings imposing normal judicial procedures on the camps, and a law requiring prisoners to be treated humanely. Yet nothing has changed. Mr. Bush also made it clear that he intends to follow the new law on the treatment of prisoners when his internal moral compass tells him it is the right thing to do.

On Thursday, Tim Golden of The Times reported that United States military authorities had taken to tying up and force-feeding the prisoners who had gone on hunger strikes by the dozens at Guantánamo Bay to protest being held without any semblance of justice. The article said administration officials were concerned that if a prisoner died, it could renew international criticism of Gitmo. They should be concerned. This is not some minor embarrassment. It is a lingering outrage that has undermined American credibility around the world.

According to numerous news reports, the majority of the Gitmo detainees are neither members of Al Qaeda nor fighters captured on the battlefield in Afghanistan. The National Journal reported last week that many were handed over to the American forces for bounties by Pakistani and Afghan warlords. Others were just swept up. The military has charged only 10 prisoners with terrorism. Hearings for the rest were not held for three years and then were mostly sham proceedings.

And yet the administration continues to claim that it can be trusted to run these prisons fairly, to decide in secret and on the president's whim who is to be jailed without charges, and to insist that Gitmo is filled with dangerous terrorists.

THE WAR IN IRAQ One of Mr. Bush's biggest "trust me" moments was when he told Americans that the United States had to invade Iraq because it possessed dangerous weapons and posed an immediate threat to America. The White House has blocked a Congressional investigation into whether it exaggerated the intelligence on Iraq, and continues to insist that the decision to invade was based on the consensus of American intelligence agencies.

But the next edition of the journal Foreign Affairs includes an article by the man in charge of intelligence on Iraq until last year, Paul Pillar, who said the administration cherry-picked intelligence to support a decision to invade that had already been made. He said Mr. Bush and Vice President Dick Cheney made it clear what results they wanted and heeded only the analysts who produced them. Incredibly, Mr. Pillar said, the president never asked for an assessment on the consequences of invading Iraq until a year after the invasion. He said the intelligence community did that analysis on its own and forecast a deeply divided society ripe for civil war.

When the administration did finally ask for an intelligence assessment, Mr. Pillar led the effort, which concluded in August 2004 that Iraq was on the brink of disaster. Officials then leaked his authorship to the columnist Robert Novak and to The Washington Times. The idea was that Mr. Pillar was not to be trusted because he dissented from the party line. Somehow, this sounds like a story we have heard before.

Like many other administrations before it, this one sometimes dissembles clumsily to avoid embarrassment. (We now know, for example, that the White House did not tell the truth about when it learned the levees in New Orleans had failed.) Spin-as-usual is one thing. Striking at the civil liberties, due process and balance of powers that are the heart of American democracy is another.

**CONGRESS, TOO,
MUST “OBEY THE LAW”:**

*Why FISA Must Yield to
The President’s Independent
Constitutional Power to Authorize
the Collection of Foreign Intelligence*

Prepared Statement of

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Before the

U.S. Senate Committee on the Judiciary

Hearing on

“Wartime Executive Power and the NSA’s Surveillance Authority II”

Room 226 Dirksen Senate Office Building

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[Revised & Corrected]



“There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although **the president** must in forming them act by the advice and consent of the senate, yet he **will be able to manage the business of intelligence in such manner as prudence may suggest.**”

— **John Jay**
Federalist No. 64

About the Witness

PROFESSOR ROBERT F. TURNER holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He selected Virginia for his formal legal education because, at the time, it was the only law school in the nation offering courses about what was then called “law and national security.” His 1700-page SJD dissertation (containing more than 3000 footnotes) was entitled: “National Security and the Constitution.” It has been accepted for publication as a trilogy by Carolina Academic Press, and is awaiting final revisions and updating by the author.

A veteran of two Army tours in Vietnam, Turner left the Army as a Captain in 1971 and became a Research Associate and then Public Affairs Fellow at Stanford’s Hoover Institution on War, Revolution, and Peace, where he served as Asia and Pacific editor of the *Yearbook on International Communist Affairs* and authored the first major English-language history of *Vietnamese Communism*. The Hoover fellowship provided for a second year in Washington, DC, which led to a five year position as national security adviser to Senator Robert P. Griffin, of Michigan, a member of the Foreign Relations Committee. Turner was in this capacity when the FISA was first enacted in 1978. He later served in the executive branch, first as Special Assistant to the Under Secretary of Defense for Policy, then in the White House as Counsel to the President’s Intelligence Oversight Board (where he was the senior full-time attorney responsible for the day-to-day oversight of FISA and other laws and executive orders pertaining to intelligence, and authored a 250-page analysis of the constitutional powers of Congress and the president over intelligence), and finally in the Department of State, where he served as Principal Deputy Assistant Secretary for Legislative and Intergovernmental Affairs (and for several months during 1984-85 as acting Assistant Secretary). For 20 months during 1986 and 1987 he served as the first President of the U.S. Institute of Peace. He has been a member of the University of Virginia general faculty since November 1987, and spent the year 1994-95 in Newport, RI, as the Charles H. Stockton Professor of International Law at the Naval War College. At Virginia, between 1988 and 1994 he taught large lecture classes on international law and on U.S. foreign policy, as well as the seminars “The Vietnam War” and “Foreign Policy and the Law” in what is now the Woodrow Wilson Department of Politics. At the Law School, he continues to co-teach law school seminars in the series Advanced Topics in National Security Law. He is a frequent guest lecturer in issues of national security separation of powers both at Virginia and at Georgetown University Law Center.

Dr. Turner chaired the American Bar Association’s Standing Committee on Law and National Security for three terms during the late 1980s and early 1990s and edited the ABA *National Security Law Report* for many years. He is an author or editor of more than fifteen books, including the 1400-page law school casebook *National Security Law*, in which he authored the chapters on separation of powers, war powers, and access to information. He is a member of the Council on Foreign Relations, the Committee on the Present Danger, and several other professional organizations. He has been a frequent contributor to the *Wall Street Journal*, *Washington Post*, and other major papers in this country, and has testified before more than a dozen committees of Congress.

EXECUTIVE SUMMARY

Mr. Chairman, I am honored to appear once again before this distinguished committee to address critically important issues of constitutional law related to the separation of national security and war powers. I have prepared a detailed statement of my views on these issues that I would propose to submit for the record. With your permission, I will at this time only briefly summarize some of my reasoning, authority, and conclusions.

I share the view, voiced time and again by members of this Committee during the first round of these hearings on February 6, that America is a “government of laws” and that no one—not even the president—is “above the law.” Indeed, my sense is that there is virtually *no* discord on the issue of whether, during a period of congressionally authorized war, our government should be seeking to intercept communications from members of *al Qaeda* and related terrorist organizations abroad—perhaps all the more so when someone inside this country is involved in the communication. The sole concern seems to be a belief that the President has violated the “exclusive” language of FISA—and that, even in wartime, the president must “obey the law.”

I certainly agree that the highest officials in our land must obey the law. And I would go further, and make the point that not even *Congress* is “above the law.” I would emphasize that not all “laws” are created equal. The supreme law of the land is, first of all, our *Constitution*. While the Constitution derives its legitimacy from the consent of the governed, and is subject to modification by the people through their elected representatives as

provided in Article V, until it is changed through that process—or its meaning is clarified by a decision by the Supreme Court—it binds Congress every bit as much as the president.

With all due respect, Mr. Chairman, it is my view that, in the wake of the Vietnam tragedy, Congress exceeded its proper authority in several instances related to war powers and intelligence. I don't question the sincerity of legislators (or *scholars*) who believe the Constitution intends for there to be legislative or judicial “checks” on all presidential powers, but having studied this area of constitutional law for three decades I can assure you that was *not* the understanding of our Founding Fathers. And when Congress seeks to impose “checks”—either in the form of a requirement for legislative approval or by creating a new “court” to oversee the exercise of executive discretion—it *violates* the law of the Constitution. And the consequences of such lawbreaking to our security can be substantial.

As Chief Justice John Marshall observed in perhaps the most famous of all Supreme Court cases, *Marbury v. Madison*, “an act of the legislature, repugnant to the constitution, is void.” And that fundamental principle is but one of *two* critical messages from *Marbury* of direct relevance to today's hearing. The other involves the belief that “unchecked” presidential power is incompatible with democratic governance. The Chief Justice wrote: “By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.” Marshall went on to explain,

[w]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and

being entrusted to the executive, *the decision of the executive is conclusive*. [Emphasis added.]

And at the core of this executive discretion, I submit, is the gathering of foreign intelligence during wartime. As John Jay explained in *Federalist* No. 64, under the new Constitution the President would be left “able to manage the business of intelligence as prudence might suggest.”

The men who gathered in Philadelphia in the summer of 1787 to write out Constitution were remarkably well-read individuals, and they had honed their theoretical understanding of the essence of good government through practical experience during the Revolutionary War and the colonial period. They understood and shared John Locke’s belief that success in war and foreign affairs required unity of plan, speed and dispatch, and secrecy—all attributes of the Executive rather than the Legislative branch—and, like Locke, they knew from experience that Congress could not be depended upon to keep secrets. Indeed, in 1776, Benjamin Franklin and the other four members of the Committee of Secret Correspondence explained their unanimous decision not to tell their colleagues in the Continental Congress about a sensitive French-American covert operation by writing: “We find by fatal experience that Congress consists of too many members to keep secrets.”

When they vested the nation’s “executive power” in the president in Article II, Section 1, of the Constitution, the authors of our Constitution interpreted that term—as it was described by writers like Locke, Blackstone, Montesquieu, and others of their era—as including the management of war, peace, and all relations with the external world.

This is not mere speculation. As I document in my written testimony, George Washington, James Madison, Thomas Jefferson, John Jay,

Alexander Hamilton, and John Marshall *each* made specific reference to the grant of “executive power” in Article II, Section 1, in concluding that the president had the general control over the making and implementation of foreign policy. As Jefferson put it in 1790, “The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. . . .”

To be sure, Congress and the Senate were given *very important* roles in both foreign relations and war. The president has no military to command unless it is first raised and supported by Congress, and he may not spend Treasury funds for any purpose without appropriations. He may not initiate an all-out aggressive war (which, like the power of Congress to grant “letters of marque and reprisal,” is now *illegal* under international law and thus an anachronism) without the approval of both chambers of the Legislature, he may not appoint ambassadors or military officers without Senate consent, and one-third-plus-one of the Senate is empowered to block his ratification of a treaty. Congress also has authority to regulate commerce with foreign nations; to make rules for the government and regulation of the military; to define and punish offenses against the law of nations (including, presumably, prohibiting *torture*); and other powers as well. But these were viewed as *exceptions* taken from the general vesting of “executive power” in the president, and thus were uniformly held to be subject to a narrow construction. And none of them even *arguably* gives Congress power to usurp the president’s “executive” power to collect foreign intelligence even in peacetime.

The need for secrecy was central to the decision to vest not just foreign intelligence but the negotiation of treaties exclusively in the president. As

the Supreme Court observed in the landmark 1936 *Curtiss-Wright* decision, “Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.” (Sadly, since Vietnam, Senators have too often breached this barrier.)

In his prize-winning book, *The National Security Constitution*, my friend Harold Koh, now Dean of Yale Law School, argues that *Curtiss-Wright* was essentially modified or overturned as the prevailing American foreign policy paradigm by Justice Jackson’s concurring opinion in *Youngstown*. With all due respect, that interpretation is manifestly in error. Justice Jackson did not in any way challenge *Curtiss-Wright*—which, just two years earlier, in *Eisentrager*, he had cited as authority for the proposition that the president is “*exclusively* responsible” (my emphasis) for the “conduct of diplomatic and foreign affairs.” On the contrary, like Justice Black for the Court majority, in *Youngstown* Jackson carefully *distinguished* the seizure of private property within the United States (without the “due process of law” required by the Fifth Amendment) from a case involving external affairs. He noted that the president’s “conduct of foreign affairs” was “largely uncontrolled, and often even is unknown,” by the other branches, and added: “I should indulge the widest latitude of interpretation to sustain his [the president’s] *exclusive* function to command the instruments of national force, at least when turned against the *outside* world for the security of our society.” (My emphasis.)

In a similar manner, there has been a great deal of confusion about the Court’s 1972 decision in the *Keith* case. Like Justices Black and Jackson in *Youngstown*, Justice Powell *repeatedly* emphasized that the case before the Court involved solely “internal” threats and “domestic organizations.” He noted that in 1968 Congress had recognized that the president had

constitutional power to protect the nation “against actual or potential attack or other hostile acts of a foreign power”—adding that “[f]ew would doubt this.” And he repeatedly emphasized—which would not have been necessary had he not recognized a constitutional distinction—that “the instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.”

Time and again it has been asserted in this debate that the Supreme Court in *Keith* “invited” Congress to legislate a system of oversight of the President’s collection of foreign intelligence. But that is simply not true. What the unanimous Court said in *Keith* was, and I quote: “Given those potential distinctions between Title III [of the 1968 Crime Control and Safe Streets Act] criminal surveillances and those involving the *domestic* security, Congress may wish to consider protective standards *for the latter* [*domestic* surveillance] which differ from those already prescribed for specified crimes in Title III.” (My emphasis.) That case was *repeatedly* distinguished from one involving the president’s constitutional power to collect foreign intelligence, and the Court did not so much as *hint* that Congress had the slightest power to usurp that presidential authority.

As the Court noted in *Curtiss-Wright*, the “exclusive power” of the President as “the sole organ of the federal government in the field of international relations” must be “exercised in subordination to the [other] applicable provisions of the Constitution.” That includes the provisions of the Fourth Amendment. But it is for the judiciary to draw the line between those powers, and Congress can no more by mere statute curtail the president’s independent constitutional power to collect foreign intelligence than it could by legislation narrow the scope of the Fourth Amendment.

As I discuss in my written statement, in 2002 the Foreign Intelligence Surveillance Court of Review—created by Congress in 1978 to oversee the FISA statute—observed that *every court* to have decided the issue has “held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information,” and concluded: “We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President’s constitutional power.*” (My emphasis.)

Assuming the facts as set forth in the *New York Times*, and as confirmed by the President, the Attorney General, and former NSA Director Lt. Gen. Michael Hayden are accurate on this program, the President’s critics have done a *grave disservice* to our nation in drawing comparisons with President Nixon’s “enemies list” and suggesting there is something evil about the program. The privacy interests of U.S. Persons in this program are no more violated than are the rights of American citizens who engage in communications with a domestic criminal suspect for whom the government has obtained a judicial warrant. If I communicate in total innocence with a drug dealer or organized crime figure who is the subject of a warrant, the police have every right to record every word I say or write and introduce it in court in a criminal prosecution against me or anyone else implicated in lawbreaking by the communication. My privacy interests essentially become “collateral damage” in the legitimate struggle against organized crime or international terrorism. The Intelligence Community follows elaborate “minimization procedures” when communications involving innocent U.S. Persons are inadvertently intercepted. I don’t pretend to speak for others, but I find it unimaginable that many rational Americans who are not intentionally assisting foreign terrorists would favor a policy by which

NSA would ignore communications between known or suspected *al Qaeda* operatives abroad and unknown people within this country. They would be asserting that their privacy interests are of greater importance than the right to “life”—also guaranteed by the Bill of Rights—of perhaps tens- or hundreds-of-thousands of their fellow citizens.

In 2001, *Time Magazine* included as one of its “Persons of the Year” a disgruntled FBI “whistleblower” named Colleen Rowley, who had written a scathing memorandum to Director Louis Freeh denouncing bureaucratic incompetence by FBI lawyers who had refused to even *request* a FISA warrant she sought to permit access to Zacharias Moussaoui’s laptop computer. In her view, she might have been able to prevent the September 11 attacks with such access.

I’m confident that most of you understand what *really* frustrated Ms. Rowley’s efforts. In its effort to constrain the president from the vigorous exercise of his exclusive constitutional power to authorize the collection of foreign intelligence information, Congress had simply not considered the possibility of a “lone wolf” terrorist like Moussaoui. The FBI lawyers she attacked had explained to her that she had failed to come close to meeting the factual predicate established by Congress to obtain a FISA warrant, but she apparently remains clueless to this day to the reality that FBI lawyers were merely “obeying the law” passed by Congress. In 2004, Congress corrected its error by amending FISA—but that was not soon enough to have permitted Ms. Rowley to have possibly prevented the 9/11 attacks. FISA also prohibited the interception of communications of the covert *al Qaeda* terrorists who carried out 9/11. Indeed, former NSA Director Hayden has expressed the view that, “had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 *al*

Qaeda operatives in the United States, and we would have identified them as such.”

Please don’t misunderstand me. I don’t question the sincerity of most legislators who voted to usurp the president’s constitutional power in this area—they didn’t have the opportunity to study “national security law,” and probably didn’t understand these issues. And very few members of the current Congress were even here three decades ago, so *you* are certainly not individually responsible for these tragic decisions. But you are here now, and you are in a position to correct the errors of the past and restore the constitutional “rule of law” in this area. And the congressional usurpation of presidential power of the 1970s would in my view be a fruitful area for future congressional inquiry should you wish to identify contributing factors to the successful 2001 attacks.

Mr. Chairman, let me just conclude by strongly endorsing the Committee’s belief that *all* Americans must obey the law—and by observing that FISA is one of several statutes that in my view “broke the law” by usurping powers vested by the American people through the Constitution in the exclusive discretion of the president. This interpretation is consistent with the statements and behavior of the Founding Fathers, uniform historic practice by both political branches prior to Vietnam, and a long history of judicial opinions dating back to *Marbury v. Madison*. I thank you for inviting me to share my views with the Committee, and I remain available to assist you should you or your staff decide to pursue any of the issues I have raised.

At the appropriate time I will be pleased to respond to any questions.

Thank you, Mr. Chairman.

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**Prepared Statement of
Professor Robert F. Turner
Center for National Security Law
University of Virginia School of Law**

MR. CHAIRMAN, and members of the Committee. I am honored to again appear before this august body to address an important issue involving the separation of national security powers under our Constitution. For the record, I will emphasize that the views I am expressing here today are of course *personal*, and they should not be attributed to any entity with which I am or have in the past been affiliated.

I am obviously in the minority among academic commentators on this issue, and I believe an extra burden therefore falls on me to explain *why* I am so confident that my very able and distinguished colleagues on the other side of the issue are mistaken. Unlike most of them, I have focused the bulk of my scholarship on these issues dating back to the 1970s. Indeed, in 1983, while serving as Counsel to the President's Intelligence Oversight Board (PIOB) at the White House, I authored a 250-page analysis of the separation of constitutional powers related to the control of intelligence activities. (I have provided a copy of that document to your staff, and it is also available on the Web site of the Center for National Security Law.¹) A decade later, my 1700-page doctoral dissertation, backed up by more than 3000 footnotes, was written on "National Security and the Constitution"² and focused heavily upon intelligence issues.

Even earlier, I worked on these and related issues as a senior Senate staff member three decades ago, and later as a member of the Senior Executive Service in the Pentagon, the Department of State, and the White House. Indeed, Mr. Chairman, you may recall that we first met when you visited the Department of State in 1984—on behalf of yourself and Senator John Tower—to discuss the possibility of trying to coordinate a "case or controversy" with Secretary of State Shultz so that the Supreme Court might clarify the constitutional issues raised by the War Powers Resolution at a time when the nation was not facing a military crisis abroad. Although nothing came of that effort, I was then and remain today impressed with your thoughtful and non-partisan approach to these important national security issues.

Over the years, I have written or edited several books and numerous articles in this area, and for three terms each I served as chairman of the American Bar Association's Standing Committee on Law and National Security and the Committee on Legislative-Executive Relations of the ABA Section on International Law and Practice. Throughout most of the 1990s, I served as editor of the ABA *National Security Law Report*; and I

¹ Robert F. Turner, "Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities" (1983), available online at: <http://www.virginia.edu/cnsl/>.

² Robert F. Turner, *National Security and the Constitution* (1996) (unpublished SJD dissertation, University of Virginia School of Law) (on file with author).

authored the separation of powers chapters in both the 1990 and 2005 editions of the law school casebook *National Security Law*—of which I am also one of the two editors.

I would add one other observation: I take pride that my work in this area has not been partisan. That is to say, I have published articles criticizing Republicans for making false and partisan charges against President Truman during the Korean War, and other articles criticizing Republicans and Democrats alike for betraying President John F. Kennedy's pledge that America would "oppose any foe" for the cause of freedom. I continue to believe that a misguided and horribly misinformed Congress snatched defeat from the jaws of victory in Indochina, leading directly to the slaughter of millions of innocent lives and the consignment to Communist tyranny of tens of millions more. While I think partisanship was a factor in that situation (as I believe it is in the current dispute over warrantless NSA surveillance), there were (and, in the current setting, are) enough Republicans among the critics to refute any speculation that partisanship was the only motive.

I proudly display on the wall of my office a framed memorandum³ I wrote on November 3, 1976, urging my boss, Senator Robert P. Griffin—who at the time was widely viewed as the leading candidate for Senate Minority Leader upon the retirement of Senator Hugh Scott—to reach out to President Carter and try to restore the tradition of bipartisanship once championed by another Michigan senator, Arthur Vandenberg. Like Senator Vandenberg, I believe that partisan politics should "stop at the water's edge." And in 1996, when presidential candidate Bob Dole pushed through a bill to compel President Clinton to move our embassy from Tel Aviv to Jerusalem in the hope of securing more Jewish votes, I wrote a long article in the *Legal Times*⁴ attacking the flagrantly unconstitutional action. When I left the State Department in 1985 as acting assistant secretary for legislative affairs, I turned down a very lucrative offer from Gray & Company to become a Washington lobbyist, preferring instead to take a \$20,000 pay cut

³ The memorandum read in part:

The voters have selected Jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

You have often praised Senator Arthur Vandenberg for his spirit of bipartisan cooperation in foreign policy. As Vandenberg once noted, "in the final analysis the Congressional 'opposition' decides whether there shall be cooperation."

Since you are the probable choice for Minority Leader (and a member of the Foreign Relations Committee), you are obviously going to have a lot to say about the Republican Party's policy vis a vis Carter's foreign relations.

So long as Carter's policies are reasonable — even though they might not conform to our own views on how best to get the job done — I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn't is no excuse for our not trying). . .

Memorandum from Bob Turner to Senator, Subject: "Possible 'Vandenberg' Speech for Next Year," dated 3 Nov. 76. This was written the day following the 1976 presidential election.

⁴ Robert F. Turner, *Only President Can Move Embassy*, *LEGAL TIMES*, Jan. 22, 1996 at 46.

and become a schoolteacher. I've never regretted that decision, because my current position permits me to pursue the truth as I see it—without pressure from clients or special interests.

None of this, obviously, assures that I am *correct* in any of my judgments. I have therefore sought to explain the basis of my views in some detail in the pages which follow, with appropriate citations to key historical documents and judicial opinions.

Summarized briefly, I believe the President's critics have been focusing on the *wrong law*. They are certainly correct when they emphasize the importance of the "rule of law" and note that the president is not "above the law" in our system of government. And in my view there *has* been some alarming "lawbreaking" that has contributed to the current controversy and has weakened our nation in the struggle against international terrorism. But to me, the primary focus ought not start with a discussion of whether the Authorization for the Use of Military Force (AUMF)—passed by Congress with but a single dissent on September 14, 2001—constituted statutory authorization for warrantless foreign intelligence "wiretaps" (and, obviously, the technology involved here has little to do with attaching alligator clips to telephone terminals), but on the more fundamental question of where the Constitution placed discretion in this area in the first place. For if the people have vested exclusive responsibility for foreign intelligence national security surveillance in the discretion of the Executive, and Congress has attempted to *usurp* that power not by amending the Constitution but merely by statute, I submit that it is *Congress* that has "broken the law." The remedy, then, is not to further encumber the President's efforts to discover and counter the military plans of our nation's declared enemies, but rather to correct the error and return to the original constitutional scheme. Obviously, if members believe that concerns of civil liberties or fair play warrant placing greater restrictions on the power of our Executive to protect this country from foreign terrorists or other enemies, the option will remain to argue that case on the merits and seek appropriate amendments to the Constitution as provided for in Article V.

The Statutory Argument—Did AUMF Authorize Surveillance?

For the record, I believe the Administration's statutory argument more than passes the straight-face test. I think the critics are likely correct when they note that no member of Congress subjectively *thought* Congress was modifying FISA or specifically authorizing warrantless surveillance when they voted for that joint resolution. But I think it is equally likely that no member believed they were empowering the President to detain American citizens indefinitely merely by declaring them "enemy combatants" contrary to the clear language of 18 U.S.C. § 4002(a)'s prohibition of detention of American citizens without statutory authorization. Yet a majority of the Supreme Court in the *Hamdi*⁵ case held

⁵ Writing for the plurality, Justice O'Connor explained:

[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4002(a)'s requirement that a

that, since detaining enemy combatants is one of the “fundamental incidents of war,” the clear statutory prohibition against detaining American citizens (like Yaser Esam Hamdi) without statutory authority was *satisfied* by the AUMF.

Now it is true that FISA makes specific provision for war,⁶ authorizing warrantless surveillance for a period of fifteen days – and I’m confident the authors of the statute *believed* that the role of FISA during wartime could be addressed during that period. But even if FISA made no mention of war, it was subject to being modified expressly or implicitly by subsequent legislation; and if detaining American citizens outside our judicial system is a “fundamental incident to war” implicitly authorized by the AUMF, the case that intercepting communications between actual or suspected foreign enemies and people within this country during wartime was similarly authorized seems far more persuasive. After all, the terrorists who attacked us on September 11, 2001, were inside this country and had been in regular communications with representatives of *al Qaeda* in other countries. Thus far, since the first of September 2001, more Americans have died as a consequence of enemy actions inside our country than abroad⁷; so the United States itself is very much a part of the “battlefield” in this struggle. And anyone who fails to understand that intelligence gathering is every bit as important to winning wars as tanks and warships knows nothing of World War II and clearly has never read Sun Tzu’s *The Art of War*.

The issue here is broader than simply ascertaining whether the AUMF implicitly authorized the president to detain American citizens as “enemy combatants” and intercepting the enemy’s communications. By enacting the AUMF, the Congress added its authority to that of the President as Commander in Chief. This places the President’s authority at its zenith—in Justice Jackson’s first category.⁸ Obviously, by enacting what

detention be “pursuant to an Act of Congress” (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. . . . We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.

Hamdi v. Rumsfeld, 542 U.S. 507, 517-18 (2004). Justice Thomas associated himself with this language (*id.* at 587), creating a five-member majority on the point.

⁶ The statute clearly makes reference to periods of declared war, but my sense both then and now was that this was basically a “punt” in order to avoid addressing the serious constitutional issues raised by trying to limit the Commander in Chief’s power to engage in foreign intelligence collection during wartime. Rather than establishing a regime for wartime, the Congress merely put off the issue on the assumption that it could be addressed and resolved during the 15-day period.

⁷ I am not certain of the precise figures, but it is my understanding that slightly more than 250 American military personnel were killed in Afghanistan through last year, and fewer than 2,200 had died in Iraq. I am told that 2,967 people are known to have died as a result of the terrorist attacks of September 11, 2001 (not counting the 19 hijackers).

⁸ “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In

is in a constitutional sense a “declaration of war,” the Congress has reinforced the President’s constitutional authority as Commander in Chief—and in that setting the President’s authority to detain enemy combatants has not merely a statutory but a *constitutional* basis. I’m not certain that even in that setting the Congress could not provide for at least some judicial review of a decision to detain American citizens. But the President’s constitutional power to authorize the monitoring of communications involving real or suspected *al Qaeda* operatives as part of our foreign intelligence collection effort would seem to be far stronger—to the point of being as beyond the reach of a mere statute as is his power to decide upon which hills to deploy our forces or where to deploy a naval battle group on the eve of major combat.

We are unlikely to encounter more than a handful of “Yaser Hamdis” in most wars, and their fate—in terms of whether they are detained in a military POW camp or transferred to the jurisdiction of a federal district court (which might well in some settings make America a *lawbreaker* in terms of our obligations under the Third Geneva Convention, which prohibits detaining POWs in civil prisons and requires that any trials for war crimes or criminal misconduct in detention be by military tribunals)—is unlikely to affect the outcome of a war. In contrast, congressional interference in the actual *conduct* of hostilities—be it by usurping the Commander in Chief’s constitutional discretion to decide what weapons to use in attacking which military targets, or by preventing the president from obtaining critical foreign intelligence that might be essential to *identify* those targets—might well place in unnecessary danger the lives of American forces and could ultimately cause the loss of a war. Particularly in the current conflict, where most of the American casualties to date have been civilians killed *within the United States* because we failed to discover the enemy’s plans, the unconstitutional legislative usurpation of executive power is obviously a *very* serious matter.

The Constitutional Questions

The courts, of course, are not supposed to resolve constitutional controversies if a case can be disposed of on statutory grounds. But it seems to me that your inquiry ought to focus first on the supreme source of our laws – our *Constitution* – and that the inquiry should begin at the beginning, looking at the statements and actions of our Founding Fathers. For, if I am correct in my belief that the Constitution gives the president exclusive⁹ control over “the business of [foreign] intelligence,” one need not spend time debating competing principles of legislative interpretation regarding FISA. It is my hope that, by starting at the beginning, I can demonstrate to you where my distinguished colleagues on the other side of the issue have gone astray.

these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (Jackson, J., concurring).

⁹ Obviously, Congress has some influence in this area, as without appropriations or even an army to command the president will be limited in what he can actually accomplish. As I have noted, the president’s discretion is also constrained by other constitutional provisions, including relevant provisions of the Bill of Rights.

**The Original Understanding About Secrecy
and “The Business of Intelligence”**

Put simply, the framers of our Constitution understood that Congress could not be trusted to keep secrets. Indeed, as early as 1776, when France agreed to provide covert assistance to the new American Revolution, Benjamin Franklin and the other four members of the Committee of Secret Correspondence agreed *unanimously* that they could not inform their colleagues in the Continental Congress, explaining: “We find by fatal experience that Congress consists of too many members to keep secrets.”¹⁰ I won’t dwell on this point here, as I testified at some length on this issue a dozen years ago before the House Permanent Select Committee on Intelligence, and that testimony is readily available on the Internet.¹¹

Having served as Secretary of State for Foreign Affairs and later as President of the Continental Congress, and been a key negotiator of the 1782 peace treaty with Great Britain, John Jay was America’s most experienced diplomat and had first-hand experience with the problem of congressional “leaks,”¹² remarking at on point: “Congress never could keep any matter strictly confidential; someone always babbled.”¹³ Jay was offered the position of Secretary of Foreign Affairs (later re-designated “Secretary of State”) by President Washington, but preferred instead to serve as America’s first Chief Justice – a role he had earlier filled in New York.

There are some today who assume that issues of “secrecy” and the need to protect “sources and methods” of foreign intelligence are relatively modern concerns – perhaps traceable back to the presidencies of Richard Nixon or Ronald Reagan. But, in reality, the Framers were well aware of the difficulty the new nation would have in acquiring foreign intelligence information unless our government could be trusted to keep secrets. As Jay explained in *Federalist* No. 64:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be*

¹⁰ *Verbal Statement of Thomas Story to the Committee, in 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, Fifth Series, 819 (1837-53).*

¹¹ Robert F. Turner, “Secret Funding and the ‘Statement and Account’ Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities,” prepared statement before the House Select Committee on Intelligence, February 24, 1994, available on line at http://www.fas.org/irp/congress/1994_hr/turner.htm.

¹² See, e.g., *id.*

¹³ HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 23 (1929).

*able to manage the business of intelligence in such manner as prudence may suggest.*¹⁴

Early Congressional Deference to Executive Power

That the First Congress—most of whose members had taken part in either the Philadelphia Convention that wrote the Constitution or their own state’s ratification convention—shared this understanding is apparent from a reading of the *Annals of Congress* and volume one of *U.S. Statutes at Large*. The president’s special responsibilities for matters of war and foreign affairs were apparent from the legislation enacted by Congress creating the various Executive departments of government. While the Secretary of the Treasury was directed to report on demand to Congress, and his annual report was to be made not to the president or the public but to Congress, when it came to the departments responsible for the business of war and foreign affairs a far more deferential tone was taken. Thus, the 1789 statute introduced by Representative James Madison to create the Department of Foreign Affairs was very brief and made no reference to Congress or the Senate. In its essence, it provided:

Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.¹⁵

As Johns Hopkins scholar Charles Thach observed about this statute in his 1922 classic study on *The Creation of the Presidency*:

The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the “presidential” departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.¹⁶

Despite the clear requirements of Article I, Section 9, of the Constitution, requiring that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,” when the First Session of the First Congress appropriated money for foreign affairs it provided:

¹⁴ FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).

¹⁵ 1 Stat. 28 (1789).

¹⁶ CHARLES C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789* at 160 (1922).

[T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually . . .¹⁷

This boilerplate language was repeated for many years in subsequent statutes.

Indeed, the consistent early practice under our Constitution was captured well by President Jefferson in a February 19, 1804, letter to Treasury Secretary Albert Gallatin:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the *duties* are by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.¹⁸

During an 1818 floor debate in the House of Representatives concerning press reports of a diplomatic mission to South America (for which the Senate had confirmed no presidential nominees), the great Henry Clay observed:

There was a contingent fund of \$50,000 allowed to the President by law, which he was authorized to expend without rendering to Congress any account of it—it was confided to his discretion, and, if the compensation of the Commissioners had been made from that fund, . . . *it would not have been a proper subject for inquiry*¹⁹

Rep. John Forsyth added during the debate: “It was true the President might have taken it out of the secret service fund, and no inquiry would have been made about it”²⁰ Today, such statements may seem shocking to Members who have been taught to believe that Congress makes the “laws” and can through them control every aspect of presidential conduct, but that was *not* the understanding throughout most of our nation’s history.

¹⁷ 1 Stat. 129 (1790) (emphasis added).

¹⁸ 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

¹⁹ 32 ANNALS OF CONG. 1466 (1818). If \$50,000 seems like a trivial sum by today’s standards, it should be kept in mind that at one point this fund constituted 14% of the federal budget.

²⁰ *Id.*

Breaking the Code – The Framers’ Understanding of “Executive Power”

Much of our difficulty results from a failure to study history, and to understand that when the Founding Fathers wrote in Article II, section 1, of the Constitution that the “executive Power” of the new nation “shall be vested in a President of the United States of America,” they understood that they were giving their new leader the general management of the nation’s foreign relations.

Some modern commentators would have us believe that Article II, section 1, was not a grant of power at all, but merely a clarification that there would be a unitary rather than a plural executive. But that was not the understanding of the authors of the *Federalist Papers*, who explained the new Constitution to the people. Alexander Hamilton, for example, was a principal author of Article II, and early in the Convention he slipped a note to Madison outlining his view of what the new constitution ought to provide. He included this language: “The Executive power, with the qualifications hereinafter specified, shall be vested in a President of the United States.” Hamilton’s early plan also gave the Senate “advice and consent” over treaties and nominations, and gave the President “the direction of war *when commenced*,” but gave the *Senate* power “to declare war.”²¹ (War could be “commenced” by an enemy attack as well as by a declaration of war.)

As already noted, as a member of the First Congress, Madison introduced the bill that established the Department of Foreign Affairs. An issue arose about where the Constitution had placed the power to remove from office the secretary of an executive department. Madison prevailed in that debate by reasoning: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department.”²² Thus, since the Senate was only joined in the appointment process, removal belonged to the president. In explaining this argument in a letter to a friend, Madison added: “In truth, the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself. And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department.”²³

In a memorandum to President Washington dated April 24, 1790, Secretary of State Thomas Jefferson reasoned:

The Constitution . . . has declared that “the Executive powers shall be vested in the President,” submitting only special articles of it to a negative by the Senate . . .

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it

²¹ 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 619 (emphasis added).

²² *Madison to Edmund Pendleton*, 21 June 1789, 5 WRITINGS OF JAMES MADISON 405-06 n. (1904).

²³ *Id.*

as are specially submitted to the Senate. *Exceptions* are to be construed strictly. . . .

The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them²⁴

It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the “secrets” of the Executive branch.²⁵

Washington shared Jefferson’s memorandum with Representative Madison and Chief Justice John Jay, and recorded their reactions in his diary:

Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that *they have no Constitutional right to interfere* with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, *all the rest being Executive and vested in the President by the Constitution.*²⁶

Three years later, Hamilton wrote in his first *Pacificus* essay that “[t]he general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.” From this, Hamilton concluded that “as the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general ‘Executive Power’ vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.”²⁷

For those who might wonder where such interpretations of “executive power” came from, the answer is apparent from a reading of the scholars whose writings most influenced the Framers. In his *Second Treatise on Civil Government*—described by Jefferson as being “perfect as far as it goes”²⁸—John Locke coined the term “federative” power to describe the “the management of the *security and interest of the publick without*, with all those that

²⁴ 16 PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd, ed. 1961) (emphasis in original).

²⁵ *Id.* 382 n.8.

²⁶ 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ ed. 1925) (emphasis added).

²⁷ 15 PAPERS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed., 1969). Consider also Thomas Jefferson’s September 1789 letter to Madison, in which the U.S. Minister to Paris observed that the Constitution had “transferred” the power of declaring war “from the Executive to the Legislative body.” 15 PAPERS OF THOMAS JEFFERSON 379. Since under the Articles of Confederation there had been no federal “Executive” and the power to “make war” had been expressly vested in Congress, Jefferson was obviously referring to the conventional wisdom of his era that the business of war was by its nature an “Executive” function.

²⁸ 16 PAPERS OF THOMAS JEFFERSON 449.

it may receive benefit or damage from”; but he argued that, of necessity, this power needed to be entrusted to the Executive. He reasoned:

And though this *federative power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.²⁹

In *Federalist* No. 64, Jay paraphrased Locke’s argument when he explained why the new American president would be given important powers that would not be controlled by Congress or the courts:

They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measures. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.³⁰

Even before mentioning the business of executing laws enacted by the legislature, Montesquieu—whom Madison in *Federalist* No. 47 described as the “oracle who is always consulted and cited” on issues of separation of powers—mentioned the “executive” power “dependent on the law of nations” by which the executive magistrate “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion.”³¹ The management of foreign intercourse was also seen as “executive” by others who were widely read by the Framers, including Adam Smith³² and William Blackstone—who in the first volume of his *Commentaries on the Laws of*

²⁹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 147 (P. Laslett, rev. ed. 1963) (emphasis in original).

³⁰ FEDERALIST No. 64 at 435-36 (Jacob E. Cooke, ed. 1961) (emphasis added).

³¹ 1 MONTESQUIEU, SPIRIT OF THE LAWS 151 (Thomas Nugent, trans. Rev. ed. 1900).

³² ADAM SMITH, LECTURES ON JURISPRUDENCE 204-09 (1978).

England wrote that, “[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation”³³

In his 1972 book, *Foreign Affairs and the Constitution*, Columbia University Law School Professor Lou Henkin remarked: “The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.”³⁴ This understanding was consistent as well with the views of Professor Quincy Wright—who served as President of both the American Political Science Association and the American Society of International Law—who wrote in his landmark 1922 treatise, *The Control of American Foreign Relations*: “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto.”³⁵

While it is common today to teach that the Framers sought to reject strong presidential power, this is not supported by a careful study of history. In 1922, Charles Thach observed in his highly acclaimed Johns Hopkins Ph.D. dissertation:

State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth. The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.

Madison expressed the general conservative view when he declared on the Convention floor:

Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.³⁶

Some today seem to believe that Congress is the ultimate sovereign authority in the United States, and the president merely an agent entrusted with the task of seeing the will

³³ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

³⁴ LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

³⁵ QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).

³⁶ CHARLES THACH, THE CREATION OF THE PRESIDENCY 1775-1789 at 52 (1922).

of Congress faithfully executed. But that was certainly *not* the view of our Founding Fathers. Consider, for example, this note made by Secretary of State Thomas Jefferson following a meeting with French minister Citizen Genet, who had complained that America was not abiding by its obligations under its treaty with France:

He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him *the Constitution had made the President the last appeal.*³⁷

As a Federalist representative in Congress in 1800, John Marshall observed that under our Constitution the President was "the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole *Executive power.*" And paraphrasing the words of Blackstone, the future chief justice added: "In this respect, *the President expresses constitutionally the will of the nation*"³⁸

As the nation's chief justice three years later, Marshall wrote in what is widely regarded as the most famous Supreme Court decision of all, *Marbury v. Madison*, that:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*³⁹

For further evidence that certain presidential powers were not to be "checked" by Congress, we need look only at the most frequently cited of all foreign affairs cases, *Unites States v. Curtiss-Wright Export Corp.*, where the Supreme Court said:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but *participation in the exercise of the power is significantly limited.* In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a

³⁷ Quoted in 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 680-81 (1906) (emphasis added).

³⁸ 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).

³⁹ *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).

representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*⁴⁰

Speaking for the Court, Justice Sutherland went on to address the issue of executive privilege as it respected documents in the foreign affairs realm:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus *the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations* — a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. In his reply to the request, President Washington said:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a

⁴⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added).

small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State [*sic*⁴¹], the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.⁴²

Now, in candor, I believe the Court in *Curtiss-Wright* got the right answer for the wrong reasons. Justice Sutherland focused not upon the expressed grant of "executive power" to the president, but instead on the idea that the foreign relations power was a natural attribute of sovereignty that attached to the presidency at the time of America's independence from Great Britain. It was not an unreasonable explanation (and *Curtiss-Wright* remains by far the most often cited Supreme Court foreign affairs case), but it is clear that the Framers believed they had *expressly* vested this power in the president through Article II, Section 1's grant of "executive power."

This longstanding deference to presidential discretion in foreign affairs was recognized by both the courts and Congress well into the second half of the twentieth century. In the 1953 case of *United States v. Reynolds*, the Supreme Court discussed the executive privilege to protect national security secrets, noting that: "Judicial Experience with the privilege which protects military and state secrets has been limited in this country" But the Court recognized an *absolute* privilege for military secrets, explaining:

In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of*

⁴¹ This practice initially developed over a congressional demand for documents held by the War Department. Washington's cabinet concluded that it had a right to refuse to share the documents, and Jefferson spoke with members of Congress who shared the view that the president had constitutional discretion in regard to military and diplomatic documents and began the practice described in 1936 by the Court. For a discussion of this and other relevant precedents, see, e.g., Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959).

⁴² 299 U.S. 319-21 (emphasis added).

*privilege if the court is ultimately satisfied that military secrets are at stake.*⁴³

Obviously, intelligence programs designed to intercept communications from our nation's enemies during a period of authorized war are among the most sensitive of "military secrets."

Four years later, one of the nation's leading constitutional scholars of his era, Professor Edward S. Corwin, wrote in his classic volume, *The President: Office and Powers*:

So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that *he is final judge of what information he shall entrust to the Senate as to our relations with other governments.*⁴⁴

In the 1959 *Barenblatt* case, the Supreme Court recognized that there are proper limits not only on the power of Congress to control Executive discretion, but even to "inquire" into matters vested by the people in the President: "Congress . . . cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the executive."⁴⁵

The most important executive privilege case of the twentieth century was certainly *United States v. Nixon*, where a unanimous Court set the stage for the resignation of President Richard Nixon by denying the President's privilege claim. But, for our purposes, it is important to keep in mind that the Court carefully *distinguished* that case from one involving a claim of national security executive privilege: "He [Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."⁴⁶ The Court then cited with approval the case of *C. & S Air Lines v. Waterman S.S. Corp.*, which it correctly characterized as "dealing with Presidential authority involving foreign policy considerations," where the Court said in 1948:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps

⁴³ *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

⁴⁴ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 211-12 (4th rev. ed. 1957) (emphasis added).

⁴⁵ *Barenblatt v. United States*, 360 U.S. 109 (1959).

⁴⁶ *United States v. Nixon*, 418 U.S. 683, 710 (1974).

nullify actions of the Executive taken on information properly held secret.⁴⁷

Obviously, if the Constitution protects the president's right to protect national security secrets from Congress and the courts, it would seem clear that Congress could not by mere statute compel the president to surrender those documents to private citizens or even foreign intelligence services. And in the 1973 case of *E.P.A. v. Mink*⁴⁸ the Supreme Court cited the *Reynolds* case in refusing to permit courts to second-guess executive judgments about whether information should be classified, noting in the process that the power of Congress to order such review would be contingent upon the scope of "executive privilege" in this area. But the following year, in yet another of many post-Vietnam assaults on presidential power, Congress amended FOIA to require federal courts to engage in an in camera, *de novo* review of classified documents to determine whether they were properly classified and thus exempt from disclosure.⁴⁹ (I have always found it amusing that Congress has never found that the people's "right to know" what their government is doing extends to giving them access to the documents of the *legislative* branch, where they might learn about the conduct of the men and women whose futures they could directly affect via the ballot box.)

Former Representative and DC Circuit Court of Appeals Judge Patricia Wald gave an insightful "Law Day" address at Emory University School of Law more than twenty years ago on FOIA, in which she noted that FOIA permits foreign entities to demand documents as a matter of legal right from our government, adding that "the defense and intelligence agencies have been worried that their obligations under FOIA—or even the perception of their obligations to disclose information—might compromise investigative and intelligence methods or, at best, dry up important confidential sources."⁵⁰ She added:

According to the CIA, two hundred high-level intelligence officers had to be assigned to FOIA to ensure that no isolated bit of information, innocent in itself but fatal when pooled with other pieces, would be unwittingly released. Sources must not be disclosed; ongoing operations must not be compromised; relations with counterpart intelligence groups in foreign governments must not be jeopardized. The CIA repeatedly invoked the spectre of egregiously far-reaching requests, citing often the \$325,000 cost of processing one request from Philip Agee for all CIA records mentioning him.⁵¹

Many members of this Committee may remember Mr. Agee, a cashiered CIA operative who in cooperation with the Cuban DGI and Soviet KGB made something of a career in disclosing the names of American and British intelligence operatives. Several of them were murdered, and as a direct result of the assassination of Richard Welch, the CIA Station Chief in Athens, Congress enacted the Intelligence Agent Identities Protection Act. It was not until the Cold War ended that former KGB officials confirmed Agee's

⁴⁷ *Id.*

⁴⁸ *E.P.A. v. Mink*, 410 U.S. 73 (1973).

⁴⁹ This amendment is discussed in *Ray v. Turner*, 587 F.2nd 1187 (D.C. Cir. 1978).

⁵⁰ Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L. J. 649, 665 (1984).

⁵¹ *Id.* at 672-73. See also, Robert F. Turner, *Access to National Security Information*, in NATIONAL SECURITY LAW 981-1023 (John Norton Moore & Robert F. Turner eds. 2d ed. 2005).

formal connection with Soviet intelligence,⁵² but he made no secret of his intentions to undermine American intelligence capabilities. In reality, the KGB did not need to use covert agents to demand CIA documents, as the way FISA was initially written the CIA had a legal obligation to comply with requests even if they came with a Moscow postmark and on KGB letterhead. And to exclude portions of documents, the Intelligence Community had to invest valuable professional resources in going through page after page and striking through language they could certify would do “identifiable harm” to U.S. national security if disclosed. Obviously, given the mosaic character of intelligence collection, unless one knows in advance which pieces an adversary has obtained from the *Washington Post*, *Aviation Week*, and the *Congressional Record*, it is often difficult to say that disclosure of any one piece would clearly do “identifiable harm.”

Fear of Congressional Usurpation of Power

The dramatic usurpation of presidential power in the aftermath of the Vietnam controversy was neither unprecedented⁵³ nor unanticipated by those who struggled through the Philadelphia heat in the summer of 1787 to provide us with a Constitution that could constrain the well-known tendency of legislative bodies to usurp all government powers to themselves. In *Buckley v. Valeo*, the Supreme Court observed in 1976: “[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”⁵⁴ And five years before the Philadelphia convention, Thomas Jefferson wrote in his *Notes on the State of Virginia* of the tendency of state legislatures to usurp the powers of the other branches:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation

⁵² Christopher Andrew & Vasill Mitrokhin, *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* 230-34 (2000).

⁵³ In the aftermath of the Civil War, Congress attempted to usurp the president’s pardon power (see, *United States v. Lovett*, 80 U.S. 128 [1871]); and even went so far as to pass a law making it a crime for anyone in the army to carry out an order from the president that had not been approved by the commanding general (an ally of key senators), and prohibiting the president from ordering the general out of the Washington, DC, area without the general’s consent. And when President Johnson ignored the Tenure in Office Act (declared unconstitutional by the Supreme Court in *Myers v. United States*, 272 US 52 (1926), he was impeached by the House.

⁵⁴ *Buckley v. Valeo*, 424 U.S. 1, 129 (1976).

on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy: and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. . . .

Searching for the foundations of this proposition, I can find none which may pretend a colour of right or reason, but the defect before developed, that *there being no barrier between the legislative, executive, and judiciary departments, the legislature may seize the whole* Our situation is indeed perilous, and I hope my countrymen will be sensible of it, and will apply, at a proper season, the proper remedy; which is *a convention to fix the constitution, to amend its defects, to bind up the several branches of government by certain laws, which when they transgress their acts shall become nullities; to render unnecessary an appeal to the people, or in other words a rebellion*⁵⁵

Congressional Recognition of Exclusive Presidential Power

Mr. Chairman, in my doctoral dissertation I show that, with very few exceptions throughout our history, Congress and the Senate have acknowledged the president's special constitutional responsibilities for foreign affairs. Indeed, even in the areas of war and treaty making—where Congress and the Senate have constitutional “negatives” over executive business—the Congress has never turned down a presidential request for a declaration of war, and the Senate has rarely refused to consent to the ratification of a treaty. In the areas where the president was given unchecked discretion, prior to the 1970s Congress frequently acknowledged the president's exclusive authority.

Consider, for example, this excerpt from a Senate report published in 1897:

⁵⁵ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Query XIII, available online at: <http://www.yale.edu/lawweb/avalon/jevifram.htm> (emphasis added).

It is to be remembered that effective intervention in foreign affairs sometimes requires the cooperation of other nations, while on the other hand, the expectancy of future intervention sometimes stirs up foreign governments to take preventive measures. Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these facts that *the superintendence of foreign affairs was intrusted to the executive and not to the legislative branch of the Government*. . . . [O]ur Constitution gave the President power to send and receive ministers...[etc.]. These grants confirm the *executive character* of the proceedings, and indicate *an intent to give all the power to the President, which the Federal Government itself was to possess—the general control of foreign relations*. . . . That this is a great power is true; but it is a power which all great governments should have; and, being executive in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.⁵⁶

Nine years later, in 1906, a debate occurred on the Senate floor when first-term Senator Augustus Bacon proposed that the Senate demand certain negotiating documents from the executive branch. During this debate, Senator John Coit Spooner—an experienced lawyer with a Ph.D. as well, who sat on the Foreign Relations Committee and was widely regarded as among the finest constitutional lawyers of his time—rose and delivered a lengthy exposition on the Senate’s powers under the Constitution, in which he said:

The Senate has nothing to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. . . .

From the foundation of the Government it has been conceded in practice and in theory that *the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President*. And, Mr. President, *he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined*.

I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. . . . *[S]o far as the conduct of our foreign relations is concerned, excluding only the Senate’s participation in the*

⁵⁶ U.S. Senate, Memorandum Upon the Power to Recognize the Independence of a New Foreign State 6-7, Sen. Doc. 54-56, 54th Cong., 2d. Ses. (1897) (emphasis added).

*making of treaties, the President has the absolute and uncontrolled and uncontrollable authority.”*⁵⁷

Senator Henry Cabot Lodge is remembered for his important role in persuading the Senate not to consent to the ratification of the Versailles Treaty following World War I, thus keeping us out of the League of Nations. He was an able Harvard Law School graduate and a champion of the powers of the Senate. But after Senator Spooner’s lengthy 1906 presentation on the treaty power, Senator Lodge rose and remarked on the Senate floor: “Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . [than] we have heard from the Senator from Wisconsin [Sen. Spooner].”⁵⁸ Senator Bacon then added that the Senate’s claim to the information was based not upon “legal right” but upon “courtesy” between the President and the Senate.⁵⁹

If you take a look at the original version of the National Security Act of 1947, you will get a sense of the view of Congress at the time. Congress didn’t “forget” to make provision for formal congressional oversight of intelligence activities. This was the business of the *executive*, it required unity of design, secrecy, and speed and dispatch, and Congress understood and appreciated that. And that statute was but a continuation of legislative deference dating back to the very First Congress.

As late as 1959, in his capacity as the new chairman of the Senate Foreign Relations Committee, Senator J. William Fulbright told an audience at Cornell Law School:

The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.⁶⁰

That was not a controversial position at the time. But in the following decade the nation entered a great controversy over Vietnam that nearly tore our nation apart. And in the heat of that crisis, it is as if we suffered a collective hard drive crash, and everyone forgot about the content of the “executive power” clause. Members of Congress became angry, and when they read through the Constitution they found no reference to “foreign affairs,” “national security,” or “intelligence.” From there it was not difficult to assume that presidential primacy in the formation and execution of foreign policy—subject to

⁵⁷ 40 CONG. REC. 1418 (1906).

⁵⁸ CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* at 182 (4th rev ed. 1957).

⁵⁹ *Id.*

⁶⁰ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L. Q. 1, 3 (1961).

important but narrow “negatives” vested in Congress or the Senate—had all been a fluke and a result of presidential usurpation. An angry Congress began demanding more control, and a Watergate-weakened President was in no position to resist. When Nixon resigned and Gerald Ford became our president—without even having been elected to the post of Vice President—he courageously voiced opposition to legislative encroachments, but lacked the political power to resist the growing assault. Then came the Carter Administration, elected to office by a public outraged over reports of presidential “lawbreaking,” and the assault on the constitutional powers of the executive continued.

The Rights of Americans Are Not Being Violated

Mr. Chairman, there have been various efforts to portray this NSA program as involving “domestic spying,” even though the available information (based upon the original *New York Times* story, the Attorney General’s testimony, and the remarks of former NSA Director Michael Hayden) suggests that every single communication at issue was *international* in character and focused on a foreign national, located outside this country, who was known or believed to be associated with *al Qaeda* or another foreign terrorist organization associated with *al Qaeda*. In this country, law enforcement personnel legally intercept communications involving U.S. Persons for whom they do not have warrants. So long as they have a warrant authorizing the surveillance of *one party* to a communication, the police may record all parties to the communication and introduce the products of that surveillance into courts of law. That is to say, a warrant to “wiretap” Joe’s telephone permits the police to record the voices of Bill and Bob when they telephone Joe in the absence of the slightest probable cause that Bill or Bob are wrongdoers.

These communications are being intercepted by NSA because of the involvement of *al Qaeda* operatives, and foreign nationals who are part of the *al Qaeda* network outside of this country have no Fourth Amendment rights against unreasonable search or seizure. (And even if they did, I would note that even Kate Martin, of the Center for National Security Studies, originally set up by Mort Halperin for the ACLU, has acknowledged that “surveillance of communications with *al Qaeda* . . . is *manifestly reasonable*.”⁶¹) And why U.S. Persons who are involved in communications with *al Qaeda* operatives ought to be entitled to *greater* protections than totally innocent Americans who engage in communications with American drug dealers or crime figures (for whom the police have a warrant) is not apparent to me.

Not all communications from *al Qaeda* operatives pertain to terrorism. Perhaps bin Laden himself might purchase a lamp on eBay, and send an e-mail to the totally innocent

⁶¹ Kate Martin, *At Issue: Is the administration’s electronic-surveillance program legal?*, C.Q. RESEARCHER, Feb. 24, 2006 at 185 (emphasis added). (This is a pro-con article including short essays by Ms. Martin and myself. She writes: “Following the law and obtaining a warrant would not make it impossible to conduct surveillance necessary to prevent future attacks. Courts would issue warrants for surveillance of communications with *al Qaeda*, which is manifestly reasonable.” Of course, given the stakes involved in the war on terror, one might hope that the standard would be a bit higher than that it not be “impossible” for the president to do his job.)

American seller instructing that it be shipped c/o General Delivery, Islamabad, Pakistan, for pickup at bin Laden's convenience. (That communication, of course, would have significant intelligence value. But an *al Qaeda* operative might contact someone in this country totally unsympathetic to his cause just to convey information that a mutual friend or relative had passed away in Afghanistan.)

All things being equal, we would presumably rather not have NSA monitoring communications unrelated to national security threats. But often that determination cannot be made without an experienced analyst examining the communication, and all things are certainly *not* equal. If we establish a presumption that NSA must "unplug" its equipment any time *al Qaeda* includes on the "cc" line of an e-mail a U.S. Person—who might well be a Saudi citizen lawfully in this country who is totally committed to bin Laden's cause—we will likely pay a tremendous price for that decision in the form of dead Americans in future terrorist attacks. If anything, listening to *al Qaeda* operatives when they are communicating with people in this country is *more important* than when they talk among themselves in the Middle East. And I'm confident most American voters will understand that.

***Youngstown and Keith* Were "Domestic" Cases
and Thus Are Not On Point Here**

In his prize-winning book *The National Security Constitution*, my friend Harold Koh, now Dean of Yale Law School, argues that "Jackson's *Youngstown* concurrent squarely rejected the *Curtiss-Wright* vision"⁶² as the proper paradigm for foreign affairs or national security cases. In a passage cited specifically to one of my own publications (followed by a string-cite to writings of several other scholars in this area), he explains:

Critics of the right . . . argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to content that the Framers did not originally draft the Constitution to promote *congressional* dominance in foreign affairs.⁶³

With all due respect, that interpretation is manifestly mistaken. Justice Jackson did not in the slightest way challenge or narrow *Curtiss-Wright*—which, just two years earlier, in *Eisentrager*, he had cited as authority for the proposition that the president is "exclusively responsible" (my emphasis) for the "conduct of diplomatic and foreign affairs."⁶⁴ On the contrary, like Justice Black for the Court's majority,⁶⁵ in *Youngstown* Jackson carefully

⁶² HAROLD HONGJU KOH, NATIONAL SECURITY AND THE CONSTITUTION 198 (1990).

⁶³ *Id.* at 225 (emphasis in original).

⁶⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

⁶⁵ Justice Black for the majority wrote:

distinguished the seizure of private property within the United States (and without the “due process of law,” required by the Fifth Amendment) from a case involving external affairs. He wrote “I should indulge the widest latitude of interpretation to sustain his [the president’s] *exclusive* function to command the instruments of national force, at least when turned against the *outside* world for the security of our society.”⁶⁶ But he emphasized the “military powers of the Commander in Chief were not to supersede representative government of *internal* affairs.”⁶⁷

Justice Jackson added “no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of *foreign affairs* is so largely *uncontrolled*, and often even is unknown, can vastly enlarge his mastery over the *internal affairs* of the country by his own commitment of the Nation’s armed forces to some foreign venture.”⁶⁸ Note here, as well, the distinction between a conflict unauthorized by Congress and our current situation, where Congress with but a single dissenting vote enacted two statutes pursuant to the War Powers Resolution specifically authorizing war.

As an aside, one of the many myths about the Korean War, even today, is that President Truman “ignored” Congress and took the nation to war as an “imperial president.” In reality, as I have documented at length elsewhere,⁶⁹ Truman repeatedly met personally with congressional leaders and sought a formal resolution and to address a joint session of Congress. He deferred to the will of Congress after being repeatedly urged by congressional leaders to “stay away” from Congress and assured he had authority to respond to the North Korean aggression under the Constitution and the UN Charter—and that was fully consistent with the positions taken by both Houses of Congress in 1945 when the UN Charter and UN Participation Acts were being approved.⁷⁰

In *Foreign Affairs and the Constitution*, Professor Henkin noted:

The order cannot properly be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though “theater of war” be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to *take possession of private property* in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 387 (1952). See also the concurring opinion of Justice Douglass, who focused primarily on the case as a taking without due process of law or just compensation. *Id.* at 630-31.

⁶⁶ *Id.* at 642.

⁶⁷ *Id.* at 644.

⁶⁸ *Id.* at 642 (emphasis added.)

⁶⁹ See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J. L. & PUB. POL. 533 (1996).

⁷⁰ This is discussed in Turner, *Truman, Korea and the Constitution*.

Youngstown has not been considered a “foreign affairs case.” The President claimed to be acting within “the aggregate of his constitutional powers,” but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.⁷¹

Similarly, in *Goldwater v. Carter* (an unsuccessful challenge by several Senators to President Carter’s unilateral termination of the mutual security treaty with Taiwan), Justice Rehnquist—in a concurring opinion joined by Chief Justice Burger, Justice Stewart, and Justice Stevens—rejected the Petitioners’ reliance on *Youngstown*, reasoning:

The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President’s authority under his war powers to seize the Nation’s steel industry, an action of profound and demonstrable *domestic* impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is “entirely *external* to the United States, and [falls] within the category of foreign affairs.”⁷²

For additional authority for his proposition that Congress is the “senior partner” in foreign affairs, Prof. Koh cites⁷³ cases like *Brown v. United States*⁷⁴ and *Little v. Barreme*,⁷⁵ ignoring the fact that both of these cases involve clear *exceptions* vested in Congress to the president’s general control of foreign affairs. Much like *Youngstown*, *Brown* involved a seizure of property within the United States prior to the congressional declaration of war in 1812. In *Barreme*, the Congress had—pursuant to its Article I, Section 8, power to “make rules concerning captures on land and water”—authorized the seizure of American vessels bound *to* French ports, and the American owner of the *Flying Fish* had brought suit for damages because his vessel had been seized coming *out* of a French port. And even there, where the implied congressional limitation on the power of the Commander in Chief was pursuant to an expressed grant of power to Congress, there is evidence that Congress itself was not pleased with the Court’s ruling, as it voted to *indemnify* Captain Little for his losses in the case.

In a similar manner, there has been a great deal of confusion about the Court’s 1972 decision in the *Keith* case. Like Justices Black and Jackson in *Youngstown*, Justice Powell repeatedly emphasized that the case before the Court involved solely “internal” threats from “*domestic* organizations.” He noted that in 1968 Congress had recognized that the president had constitutional power to protect the nation “against actual or

⁷¹ FOREIGN AFFAIRS AND THE CONSTITUTION 341 n.11.

⁷² *Goldwater v. Carter* 444 U.S. 996 (1979) (emphasis added).

⁷³ KOH, THE NATIONAL SECURITY CONSTITUTION 82.

⁷⁴ *Brown v. United States* 12 U.S. (8 Cranch) 110 (1814).

⁷⁵ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

potential attack or other hostile acts of a *foreign power*”—adding that “[f]ew would doubt this.”⁷⁶ And he stressed time and again—which would not have been necessary had he not perceived a constitutional distinction—that “the instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of *foreign powers, within or without this country.*”⁷⁷

It has been asserted in this debate that the Supreme Court in *Keith* “invited” Congress to legislate a system of oversight of the President’s collection of foreign intelligence. But that is simply not true. What the unanimous Court said in *Keith* was, and I quote: “Given those potential distinctions between Title III [the wiretap provisions of the 1968 Crime Control and Safe Streets Act] criminal surveillances and those involving the *domestic security*, Congress may wish to consider protective standards *for the latter [domestic security]* which differ from those already prescribed for specified crimes in Title III.”⁷⁸ That case was *repeatedly* distinguished from one involving the president’s constitutional power to collect *foreign* intelligence, and the Court did not so much as *hint* that Congress had the slightest power to usurp that presidential authority.

Importance of Safeguarding Constitutional Power Against Post-Vietnam War Usurpations

Some question why the President would risk a confrontation with Congress in the midst of a war. If you examine our history of wartime presidents, I don’t think you can identify one who tried to work more closely with Congress than the incumbent. Unlike Lincoln, Wilson, and Franklin Roosevelt, when it became apparent that war was being thrust upon us, President Bush went immediately to Congress both to get a (clearly unnecessary, in a constitutional sense⁷⁹) statutory authorization for war, and to seek a variety of new legal authorities through the USA PATRIOT Act.

Vietnam and the War Powers Resolution

On May 19, 1988, Senators Nunn, Byrd, Warner, Mitchell, and others took part in an important colloquy on the Senate floor in which they criticized some of the harm done by the War Powers Resolution. I commend that exchange to each of you.⁸⁰

⁷⁶ *United States v. United States District Court*, 407 U.S. 279, 313, 316 (1972) (emphasis added).

⁷⁷ *Id.* at 308, 321-22 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”)

⁷⁸ *Id.* at 322.

⁷⁹ Virtually all serious commentators acknowledge that the president has independent authority under the Constitution to “respond to sudden attacks” on the nation. This is also recognized in Section 2(c) of the War Powers Resolution. Obviously, however, the President needed congressional authorization in the form of appropriations for the major military operations that became necessary after 9/11; and as a matter of prudent policy I believe it is always useful for the president to consult carefully with Congress and seek its formal support in such settings.

⁸⁰ Portions of the colloquy are *reprinted* in ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN RELATIONS* 161-63 (1991).

History has not been kind to those who led the fight to usurp the president's constitutional powers over foreign affairs, war, and intelligence in response to the Indochina War. To begin with, we now know—and many of us knew at the time⁸¹—that on virtually *every issue* the critics were factually mistaken. The State Department was not “lying” when it said the war in Vietnam was a result of “Aggression from the North,”⁸² and since the end of the war Hanoi had published several accounts *admitting* that its Politburo made a decision in May 1959 to open the Ho Chi Minh Trail and start sending tens of thousands of armed forces south to “liberate” the Republic of Vietnam. This covert aggression was every bit as much a violation of the UN Charter and customary international law as the invasion of South Korea nine years earlier. It is also absolutely clear that the critics were wrong when they claimed the “National Liberation Front” was independent of Hanoi. I documented these and many other points more than thirty years ago in my first major book, *Vietnamese Communism: Its Origins and Development*.

There is also a growing consensus among serious scholars of the war, acknowledged in a recent issue of *Foreign Affairs* by Yale's very distinguished diplomatic historian John Lewis Gaddis, that America was winning the war by the early 1970s.⁸³ I think it is accurate to say that, in response to angry but horribly misinformed protesters, the Congress betrayed John F. Kennedy's inaugural pledge that we would “oppose any foe” for the cause of freedom, and by passing an unconstitutional statute prohibiting the expenditure of appropriated funds for “combat operations” anywhere in Indochina, Congress “snatched defeat from the jaws of victory.” And in the three years after those countries we had pledged to protect in the SEATO Treaty were “liberated” by the Communists, more people were killed than had died in the previous fourteen years of war. The *Black Book of Communism*, published in English by Harvard University Press, estimates that *three million* people were slaughtered by Communism in Indochina; and the Cambodia Genocide Project at Yale University estimated that the victims included more than *twenty percent* of the people of Cambodia.

I remember sitting on a couch in the back of the Senate chamber more than three decades ago and listening to confident Senators declare that, by cutting off funds, Congress could “stop the killing” and promote “human rights” in Indochina. I also recall hearing Foreign Relations Committee Chairman Senator Mike Mansfield assure his colleagues that he had spoken by telephone with someone in Asia—I believe it was Norodom Sihanouk—who had “assured” him that only a small number of leaders of the Lon Nol regime would be killed when the Khmer Rouge seized power in Phnom Penh. (He was only about 1.7 to 2 million off.) I was in South Vietnam at the end, in April 1975, trying desperately to get permission to go into Cambodia to try to rescue some of the many thousands of orphans. I was too late, and those innocent children were slaughtered by Pol Pot and his comrades.

⁸¹ See, e.g., ROBERT F. TURNER, *MYTHS OF THE VIETNAM WAR: THE PENTAGON PAPERS RECONSIDERED* (1972).

⁸² This was the title of a major 1965 State Department white paper that was a central focus of criticism by anti-war scholars and politicians.

⁸³ John Lewis Gaddis, *Grand Strategy in the Second Term*, FOREIGN AFFAIRS, Jan.-Feb. 2005. See also, WILLIAM E. COLBY, *LOST VICTORY* (1989); and LEWIS SORLEY, *A BETTER WAR* (1999).

Three years ago, *National Geographic Today* featured a story about the “killing fields” of Cambodia that reported “bullets were too precious to use for executions. Axes, knives and bamboo sticks were far more common. As for children, their murderers simply battered them against trees.”⁸⁴ Thanks to congressional lawbreakers who thought they knew better than our presidents what was likely to happen in a far off land, millions of innocent people were slaughtered and tens of millions were consigned to a Stalinist tyranny that even today is ranked among the “worst of the worst” human rights violators in the world by Freedom House.⁸⁵

As you assess the pros and cons of the legislation enacted by Congress in response to the Indochina tragedy, I hope you will consider these aspects of the problem. We continue to hear warnings about learning the “lessons” of Vietnam, but as someone who spent a great deal of time inside Indochina between 1968 and the final evacuation in 1975, has for years taught seminars on the war for undergraduate and graduate students at the University of Virginia, and has authored or edited several books on the conflict, I have a sad sense that too many are learning the *wrong* lessons.⁸⁶

FISA Has Done Harm to Our National Security

In 2001, *Time* Magazine included as one of its “Persons of the Year” a disgruntled FBI “whistleblower” named Colleen Rowley, who had written a scathing memorandum to Director Louis Freeh denouncing bureaucratic incompetence by FBI lawyers who had refused to even *request* a FISA warrant she sought to permit access to Zacharias Moussaoui’s laptop computer. In her view, she might have been able to prevent the September 11 attacks with such access.

I’m confident that most of you understand what *really* frustrated Ms. Rowley’s efforts. In its effort to constrain the president from the vigorous exercise of his exclusive constitutional power to authorize the collection of foreign intelligence information, Congress had simply not considered the possibility of a “lone wolf” terrorist like Moussaoui. The FBI lawyers Rowley attacked had explained to her that she had failed to come close to meeting the factual predicate established by Congress to obtain a FISA warrant, but she apparently remains clueless to this day to the reality that FBI lawyers were merely “obeying the law” passed by Congress. In 2004, Congress corrected its error by amending FISA to address the “lone wolf” problem—but that was not soon enough to have permitted Ms. Rowley to have possibly prevented the 9/11 attacks. FISA also prohibited the interception of communications involving the covert *al Qaeda* terrorists who carried out 9/11. Lt. Gen. Michael V. Hayden, currently Deputy Director of National Intelligence and former Director of the National Security Agency, has

⁸⁴ Zoltan Istvan, “Killing Fields” *Lure Tourists in Cambodia*, NATIONAL GEOGRAPHIC TODAY, January 10, 2003 available online at http://news.nationalgeographic.com/news/2003/01/0110_030110_tvCambodia.html.

⁸⁵ See, e.g., Freedom House, “World’s Worst Regimes Revealed,” Mar. 31, 2005, summarizing a report on “The Worst of the Worst: The World’s most Repressive Societies 2005,” available online at: <http://www.freedomhouse.org/template.cfm?page=70&release=255>.

⁸⁶ See *THE REAL LESSONS OF THE VIETNAM WAR* (John Norton Moore & Robert F. Turner, eds., 2002).

expressed the view that "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."⁸⁷

In a broader sense, the congressional contributions to the success of the 9/11 attacks date back to the sensationalized Church-Pike hearings of 1975, which prompted the dramatic decrease in emphasis on HUMINT intelligence collection during the Carter Administration. Former FBI counter-terrorism chief Buck Ravell has noted that, following the 1975 congressional hearings, he could not get a single FBI agent to volunteer for counter-terrorism duty. And surely Congress, when it imposed felony criminal sanctions on Intelligence Community professionals who carry out presidential orders that are later found to be in violation of FISA, foresaw and intended the "chilling effect" this would have and the likelihood it would promote the "risk-avoidance culture" that so many of the post-9/11 investigations have identified as a contributing factor to the success of those attacks. The message of the 1975 Church Committee hearings, and the felony convictions of FBI Deputy Director Mark Felt and intelligence chief Edward Miller for violating the civil rights of members of the "Weather Underground"—a purely domestic group that was exercising its First Amendment rights to murder policemen, rob banks, and set off pipe bombs across the country, and was conspiring to bomb a dance at a Non-Commissioned Officers' club in New Jersey—was not lost upon the Intelligence Community. I don't disagree that it is important to safeguard civil liberties as we seek to identify and bring to justice those who wish to harm our country, and I know drawing that line is not always easy. But the American people need to understand that, when Congress passed FISA, it legislated unconstitutional constraints on the president's ability to safeguard our nation from foreign terrorists and provided statutory disincentives for our law enforcement and intelligence professionals to monitor the activities of the two 9/11 terrorists who lived in San Diego in 2000 and of Zacharias Moussaoui in Minnesota. Sixteen months before 9/11, NSA Director Michael Hayden told an open session of the House Permanent Select Committee on Intelligence that if Osama bin Laden himself were to cross the bridge from Niagara Falls, Ontario, to Niagara Falls, New York, FISA "would kick in [and] offer him protections and affect how NSA could now cover him."⁸⁸

The Future of FISA and the Chairman's Draft Proposal

In my view (which is at least in part based upon experiences that are now two-dozen years in the past), both the FISA Court and the Office of Intelligence Policy and Review at the Department of Justice deserve very high praise for their *extraordinary* service to our nation. And because it does provide a useful check against the possibility of abuse, in most settings I believe the FISA court can make an important contribution. I'm not suggesting that it should be abolished, any more than I would demand that the Senate

⁸⁷ Remarks by Lt. Gen. Michael V. Hayden, National Press Club, January 23, 2006, available online at http://www.dni.gov/release_letter_012306.html.

⁸⁸ *Id.*

Select Committee on Intelligence and the House Permanent Select Committee on Intelligence be abolished.

What I think does need to be done is to recognize that in the sensitive area of foreign intelligence collection, the president has unusual and largely *unchecked* discretion to operate in the manner he believes will best protect the interests of the nation (consistent, of course, with other obligations found in the Constitution). Congress may not by simple statute modify this constitutional scheme, and even if it could it *ought* not do so.

I think that it would be useful for Congress to modify FISA in such a manner that the president's independent constitutional authority in this area is clearly acknowledged, so that everyone involved will understand that in exceptional cases the president has the power at his discretion to bypass this process. My sense, based upon the testimony of the Attorney General earlier in the month and his responses to written questions, is that the Administration would be more than willing to work with you to try to come up with a FISA-like bill that would provide for judicial involvement in the overwhelming majority of cases, but would not pretend to deprive the president of important powers vested in his discretion that clearly can not properly be usurped by Congress. And during peacetime, it would not surprise me if virtually every foreign intelligence surveillance within this country were carried out pursuant to warrants issued by the FISA court.

As for the draft bill I have received from the Chairman's staff, there are many parts of it that I find attractive. Time will not permit on such short notice a detailed commentary, but I would make a few general suggestions. For example, in Section 2(9), I would recommend the following changes (marked in **bold**):

(9) While Attorney General Alberto Gonzales explained that the executive branch reviews the electronic surveillance program of the National Security Agency every 45 days to ensure that the program is not overly broad, it is the belief of Congress that, **where in the President's judgment it is consistent with the security of the nation**, approval and supervision of electronic surveillance programs should be conducted outside of the executive branch, by the Article III court established under section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803). It is also the belief of Congress that it is appropriate for an Article III court to pass upon the constitutionality of electronic surveillance programs that may implicate the rights of Americans. **However, in a foreign intelligence collection setting in which time is of the essence and the Justice Department and Intelligence Community lawyers certify to the president that an operation is fully consistent with the protections of the Fourth Amendment, the Congress recognizes that exceptional circumstances may require the president to act outside the FISA framework. In those settings, the President is urged to report such activities (in sufficient detail to permit an understanding of the program without unnecessarily compromising sensitive sources or methods) to the FISA Court and the appropriate committees of Congress.**

In Section 702(e) I would make the following additions (or words to this effect):

“(e) Programs Subject to this Act.—

“(1) IN GENERAL.— **With the exceptions set forth below in § 702(e)(1)(a), All electronic surveillance programs to obtain foreign intelligence information or to protect against international terrorism or clandestine intelligence activities must be submitted for judicial authorization to the Foreign Intelligence Surveillance Court.**

(a) Nothing in this statute is intended to grant the president any authority to engage in warrantless surveillances of U.S. Persons in violation of the Fourth Amendment; but Congress recognizes that the president has independent constitutional power to authorize surveillance of foreign powers or their agents, and nothing in this statute is intended to deny that power to the president.

Again, Mr. Chairman, these are only very rough suggestions. My purpose would be to have Congress recognize that it lacks the power to usurp presidential authority in this area, and to leave the president with some discretion to act for the public good in extraordinary settings. I’m candidly not certain of the best way to accomplish that end.

Conclusions

In conclusion, Mr. Chairman, I would briefly summarize a few basic points:

- First, under our Constitution the president was given some very important discretionary powers that were not intended to be “checked” by Congress or the courts. These included the general management of our foreign affairs, subject to the expressed authorities given to the Senate or Congress in this area and other prohibitions embodied in the Constitution. These “exceptions” to the president’s general grant of “executive power” were intended to be strictly construed, and none of them was intended to give Congress a right to demand sensitive national security secrets or to permit Congress to usurp the president’s exclusive control over military operations, diplomacy, or the gathering of foreign intelligence. But like every constitutional power, the president must exercise his discretionary authority in a manner consistent with the other provisions of the Constitution. Thus, he must not violate the Bill of Rights during peace or war.
- The Supreme Court has held that when Congress authorized the President to fight the war on terror in September 2001, it granted him power to engage in such “fundamental incidents to war” as detaining enemy combatants. And that statute thus constituted the necessary statutory authorization to detain American citizens who fit into that category. By this logic, it would seem to follow that Congress has authorized the President to engage in the collection of foreign intelligence information—even when those communications being intercepted involve an

American at one end. To the extent this is inconsistent with the FISA framework, we can either conclude that the statute later in time prevails or,—preferably, I think—we can note that FISA could not deprive the President of his exclusive constitutional power to authorize the collection of foreign intelligence to begin with. That is the view of every court that has considered the issue, and it was reaffirmed as recently as 2002 by the Foreign Intelligence Surveillance Court of Review that Congress set up to oversee the FISA process.

- There is a lot of misunderstanding and confusion in the public debate on this issue. FISA was not the consequence of an “invitation” from the Supreme Court in the 1972 *Keith* case, nor is *Youngstown* the controlling paradigm in cases involving the president’s constitutional power to authorize warrantless surveillance of terrorists abroad during periods of authorized war. Both *Keith* and *Youngstown* addressed *domestic* activities unconnected with any “foreign power,” and the justices *repeatedly* emphasized that distinction.
- I believe the president’s critics are correct about the importance of the “rule of law” and the fact that some government officials have broken the law, but the “law” in question is the Constitution and the culprits are not in the White House but here in Congress. (Actually, most of them retired from Congress years ago.)

Mr. Chairman, I would strongly urge the Congress to conduct a serious and non-partisan inquiry into the congressional “lawbreaking” that occurred during the 1970s, when both Houses of Congress engaged in often highly partisan and in my view clearly *unconstitutional* usurpations of presidential power. As Locke and Jay anticipated, these usurpations of power have done serious and identifiable harm to our nation. I shall not dwell today on the War Powers Resolution, as I have written two books⁸⁹ about that and testified extensively in the past before this and several other committees in both Houses of Congress. I would only note that even former Senate Majority Leader George Mitchell has acknowledged the statute’s unconstitutionality, and Senators Sam Nunn and John Warner both have condemned the harm it has done over the years to our security. In 1994, former Marine Corps Commandant General P.X. Kelley and I co-authored a *Washington Post* op-ed documenting the responsibility of a highly partisan Senate war powers debate for the October 23, 1983, terrorist attack that killed 241 sleeping Marines and sailors in Beirut. By dividing our country over yet another false allegation of presidential “lawbreaking,” and assuring our enemies that additional American casualties could prompt congressional “reconsideration” of statutory authorization the President didn’t need under the Constitution in the first place, your predecessors virtually placed a *bounty* on the lives of our forces. On the eve of the bombing, we intercepted a message between two Islamic terrorist groups that said: “If we kill 15 Marines, the rest will leave.”

⁸⁹ ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* (1983); ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* (1991).

America is now engaged in a very dangerous war, and my guess is we haven't come close to seeing the worst of it. I had been warning for several years that we were going to be attacked,⁹⁰ and I suspect I was one of relatively few people who was not greatly surprised by the events of 9/11. I have been quite surprised by the effectiveness of our military and others involved in our defense in preventing—thus far—a single new attack on our territory. I don't think our good fortune will continue, but if we don't stop politics at the water's edge our chances of success will decline rapidly.

I recognize the tremendous importance of national unity during periods of crisis, I have long felt that, in refusing to challenge more vigorously statutes that attempt to usurp discretion vested directly in the president by our Constitution, our presidents were betraying a trust. As Harvard Law Professor Charles Warren once observed:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights—defense of power which the people granted him. . . . In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.⁹¹

Our greatest weakness, in the eyes of our adversaries, is our lack of *will*. Since Vietnam, the opposition party in Congress—whether Republicans or Democrats have occupied the White House—has sought partisan gain when we faced a crisis involving the possible use of military force. I have already mentioned the tragic loss of 241 Marines in Beirut in 1983, and if you like I'll be happy to talk about many other examples as well. And there is evidence that bin Laden himself was encouraged by the perception that Americans will divide among themselves and cut and run if threatened with serious military casualties.

Mr. Chairman, I don't pretend to know why we haven't been hit again by *al Qaeda* during the past four years. We are certainly vulnerable, and the nature of our society and character is such that we are never going to be able to bulletproof this country against terrorist attacks. Even were we to tear down every government structure and rebuild with 6000 psi reinforced hardened concrete, the terrorists would find a middle school or school bus to attack. It has long been my view that the most important single thing we could do to deter future attacks is to stand united and persuade our adversaries that, yes, they can attack us, but when the dust settles their cause and the things they most cherish will have suffered far greater losses than they have inflicted upon us. Incentive structures are important, and how we respond to attacks will likely be a big factor in their decisions about future engagements. Indeed, it is possible that following 9/11 they were smart enough to realize they had blundered horribly, awakening the "sleeping giant" and uniting America and much of the world against them. Perhaps that is one reason we have

⁹⁰ See, e.g., Robert F. Turner, *Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power*, 22 HOUS. J. INT'L L. 77 (1999).

⁹¹ Quoted in ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 132-33 (1983).

not been attacked again. But the current political atmosphere is likely to undo all the good that was done following 9/11. And while not all of the criticism stems from partisan motives, some of it clearly does. When the next attack comes, the American people will have every right to hold accountable those who have sought to divide this nation during a period of war.

In 1973, after being offered a position on the staff of Senator Bob Griffin, I took the occasion to examine some of the writings of one of his predecessors whom the Senator had said he admired, the late Senator Arthur Vandenberg. As I'm sure you know, Senator Vandenberg was largely responsible for the success of bipartisanship in this body in the years following World War II—when he served first as Ranking Republican and then Chairman of the Committee on Foreign Relations. And, Mr. Chairman, I would close by calling your attention to a speech Arthur Vandenberg delivered on the occasion of "Lincoln Day" in Detroit on February 10, 1949, in which the Foreign Relations Committee chairman said:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.⁹²

Thank you, Mr. Chairman. That concludes my prepared remarks. I will be pleased to take any questions at the appropriate time.

⁹² Quoted in TURNER, THE WAR POWERS RESOLUTION 118.

Washington Post No Checks, Many Imbalances

By George F. Will
Thursday, February 16, 2006; A27

The next time a president asks Congress to pass something akin to what Congress passed on Sept. 14, 2001 -- the Authorization for Use of Military Force (AUMF) -- the resulting legislation might be longer than Proust's "Remembrance of Things Past." Congress, remembering what is happening today, might stipulate all the statutes and constitutional understandings that it does *not* intend the act to repeal or supersede.

But, then, perhaps no future president will ask for such congressional involvement in the gravest decision government makes -- going to war. Why would future presidents ask, if the present administration successfully asserts its current doctrine? It is that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be. This monarchical doctrine emerges from the administration's stance that warrantless surveillance by the National Security Agency targeting American citizens on American soil is a legal exercise of the president's inherent powers as commander in chief, even though it violates the clear language of the 1978 Foreign Intelligence Surveillance Act, which was written to regulate wartime surveillance.

Administration supporters incoherently argue that the AUMF also authorized the NSA surveillance -- and that if the administration had asked, Congress would have refused to authorize it. The first assertion is implausible: None of the 518 legislators who voted for the AUMF has said that he or she then thought it contained the permissiveness the administration discerns in it. Did the administration, until the program became known two months ago? Or was the AUMF then seized upon as a justification? Equally implausible is the idea that in the months after Sept. 11, Congress would have refused to revise the 1978 law in ways that would authorize, with some supervision, NSA surveillance that, even in today's more contentious climate, most serious people consider conducive to national security.

Anyway, the argument that the AUMF contained a completely unexpressed congressional intent to empower the president to disregard the FISA regime is risible coming from this administration. It famously opposes those who discover unstated meanings in the Constitution's text and do not strictly construe the language of statutes.

The administration's argument about the legality of the NSA program also has been discordant with its argument about the urgency of extending the USA Patriot Act. Many provisions of that act are superfluous if a president's wartime powers are as far-reaching as today's president says they are.

And if, as some administration supporters say, amending the 1978 act to meet today's exigencies would have given America's enemies dangerous information about our

capabilities and intentions, surely FISA and the Patriot Act were both informative. Intelligence professionals reportedly say that the behavior of suspected terrorists has changed since Dec. 15, when the New York Times revealed the NSA surveillance. But surely America's enemies have assumed that our technologically sophisticated nation has been trying, in ways known and unknown, to eavesdrop on them.

Besides, terrorism is not the only new danger of this era. Another is the administration's argument that because the president is commander in chief, he is the "sole organ for the nation in foreign affairs." That non sequitur is refuted by the Constitution's plain language, which empowers Congress to ratify treaties, declare war, fund and regulate military forces, and *make laws "necessary and proper" for the execution of all presidential powers*. Those powers do not include deciding that a law -- FISA, for example -- is somehow exempted from the presidential duty to "take care that the laws be faithfully executed."

The administration, in which mere obduracy sometimes serves as political philosophy, pushes the limits of assertion while disdaining collaboration. This faux toughness is folly, given that the Supreme Court, when rejecting President Harry S Truman's claim that his inherent powers as commander in chief allowed him to seize steel mills during the Korean War, held that presidential authority is weakest when it clashes with Congress.

Immediately after Sept. 11, the president rightly did what he thought the emergency required, and rightly thought that the 1978 law was inadequate to new threats posed by a new kind of enemy using new technologies of communication. Arguably he should have begun surveillance of domestic-to-domestic calls -- the kind the Sept. 11 terrorists made.

But 53 months later, Congress should make all necessary actions lawful by authorizing the president to take those actions, with suitable supervision. It should do so with language that does not stigmatize what he has been doing, but that implicitly refutes the doctrine that the authorization is superfluous.

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The Washington Times

...unlimited?

By Bruce Fein

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According to President George W. Bush, being president in wartime means never having to concede co-equal branches of government have a role when it comes to hidden encroachments on civil liberties.

Last Saturday, he thus aggressively defended the constitutionality of his secret order to the National Security Agency to eavesdrop on the international communications of Americans whom the executive branch speculates might be tied to terrorists. Authorized after the September 11, 2001 abominations, the eavesdropping clashes with the Foreign Intelligence Surveillance Act (FISA), excludes judicial or legislative oversight, and circumvented public accountability for four years until disclosed by the New York Times last Friday. Mr. Bush's defense generally echoed previous outlandish assertions that the commander in chief enjoys inherent constitutional power to ignore customary congressional, judicial or public checks on executive tyranny under the banner of defeating international terrorism, for example, defying treaty or statutory prohibitions on torture or indefinitely detaining United States citizens as illegal combatants on the president's say-so.

President Bush presents a clear and present danger to the rule of law. He cannot be trusted to conduct the war against global terrorism with a decent respect for civil liberties and checks against executive abuses. Congress should swiftly enact a code that

would require Mr. Bush to obtain legislative consent for every counterterrorism measure that would materially impair individual freedoms.

The war against global terrorism is serious business. The enemy has placed every American at risk, a tactic that justifies altering the customary balance between liberty and security. But like all other constitutional authorities, the war powers of the president are a matter of degree. In *Youngstown Sheet & Tube v. Sawyer* (1952), the U.S. Supreme Court denied President Harry Truman's claim of inherent constitutional power to seize a steel mill threatened with a strike to avert a steel shortage that might have impaired the war effort in Korea. A strike occurred, but Truman's fear proved unfounded.

Neither President Richard Nixon nor Gerald Ford was empowered to suspend Congress for failing to appropriate funds they requested to fight in Cambodia or South Vietnam. And the Supreme Court rejected Nixon's claim of inherent power to enjoin publication of the Pentagon Papers during the Vietnam War in *New York Times v. United States* (1971).

Mr. Bush insisted in his radio address that the NSA targets only citizens "with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist organizations."

But there are no checks on NSA errors or abuses, the hallmark of a rule of law as opposed to a rule of men. Truth and accuracy are the first casualties of war. President Bush assured the world Iraq possessed weapons of mass destruction before the 2003 invasion. He was wrong. President Franklin D. Roosevelt declared Americans of Japanese ancestry were security threats to justify interning them in concentration camps

during World War II. He was wrong. President Lyndon Johnson maintained communists masterminded and funded the massive Vietnam War protests in the United States. He was wrong. To paraphrase President Ronald Reagan's remark to Soviet leader Mikhail Gorbachev, President Bush can be trusted in wartime, but only with independent verification.

The NSA eavesdropping is further troublesome because it easily evades judicial review. Targeted citizens are never informed their international communications have been intercepted. Unless a criminal prosecution is forthcoming (which seems unlikely), the citizen has no forum to test the government's claim the interceptions were triggered by known links to a terrorist organization.

Mr. Bush acclaimed the secret surveillance as "crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies." But if that were justified, why was Congress not asked for legislative authorization in light of the legal cloud created by FISA and the legislative branch's sympathies shown in the Patriot Act and joint resolution for war? FISA requires court approval for national security wiretaps, and makes it a crime for a person to intentionally engage "in electronic surveillance under color of law, except as authorized by statute."

Mr. Bush cited the disruptions of "terrorist" cells in New York, Oregon, Virginia, California, Texas and Ohio as evidence of a pronounced domestic threat that compelled unilateral and secret action. But he failed to demonstrate those cells could not have been equally penetrated with customary legislative and judicial checks on executive overreaching.

The president maintained that, "As a result [of the NSA disclosure], our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk." But if secrecy were pivotal to the NSA's surveillance, why is the president continuing the eavesdropping? And why is he so carefree about risking the liberties of both the living and those yet to be born by flouting the Constitution's separation of powers and conflating constructive criticism with treason?

The Washington Times

...or outside the law?

By Bruce Fein

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President Bush secretly ordered the National Security Agency (NSA) to eavesdrop on the international communications of U.S. citizens in violation of the warrant requirement of the Foreign Intelligence Surveillance Act (FISA) in the aftermath of the September 11, 2001, abominations.

The eavesdropping continued for four years, long after fears of imminent September 11 repetitions had lapsed, before the disclosure by the New York Times this month.

Mr. Bush has continued the NSA spying without congressional authorization or ratification of the earlier interceptions. (In sharp contrast, Abraham Lincoln obtained congressional ratification for the emergency measures taken in the wake of Fort Sumter, including suspending the writ of habeas corpus).

Mr. Bush has adamantly refused to acknowledge any constitutional limitations on his power to wage war indefinitely against international terrorism, other than an unelaborated assertion he is not a dictator. Claims to inherent authority to break and enter homes, to intercept purely domestic communications, or to herd citizens into concentration camps reminiscent of World War II, for example, have not been ruled out if the commander in chief believes the measures would help defeat al Qaeda or sister terrorist threats.

Volumes of war powers nonsense have been assembled to defend Mr. Bush's defiance of the legislative branch and claim of wartime omnipotence so long as terrorism persists, i.e., in perpetuity. Congress should undertake a national inquest into his conduct and claims to determine whether impeachable usurpations are at hand. As Alexander Hamilton explained in Federalist 65, impeachment lies for "abuse or violation of some public trust," misbehaviors that "relate chiefly to injuries done immediately to the society itself."

The Founding Fathers confined presidential war powers to avoid the oppressions of kings. Despite championing a muscular and energetic chief executive, Hamilton in Federalist 69 accepted that the president must generally bow to congressional directions even in times of war: "The president is to be commander in chief of the Army and Navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces; while that of the British king extends to declaring war and to the raising and regulating of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature."

President Bush's claim of inherent authority to flout congressional limitations in warring against international terrorism thus stumbles on the original meaning of the commander in chief provision in Article II, section 2.

The claim is not established by the fact that many of Mr. Bush's predecessors have made comparable assertions. In *Youngstown Sheet & Tube v. Sawyer* (1952), the U.S. Supreme Court rejected President Truman's claim of inherent power to seize a steel

mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other presidents. Writing for a 6-3 majority, Justice Hugo Black amplified: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in the Constitution in the Government of the United States."

Indeed, no unconstitutional usurpation is saved by longevity. For 50 years, Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in *Immigration and Naturalization Service v. Chadha* (1983). Approximately 200 laws were set aside. Similarly, the high court declared in *Erie Railroad v. Tompkins* (1938) that federal courts for a century since *Swift v. Tyson* (1842) had unconstitutionally exceeded their adjudicative powers in fashioning a federal common law to decide disputes between citizens of different states.

President Bush preposterously argues the Sept. 14, 2001, congressional resolution authorizing "all necessary and appropriate force against those nations, organizations or persons [the president] determines" were implicated in the September 11 attacks provided legal sanction for the indefinite NSA eavesdropping outside the aegis of FISA. But the FISA statute expressly limits emergency surveillances of citizens during wartime to 15 days, unless the president obtains congressional approval for an extension: "[T]he president, through the attorney general, may authorize electronic surveillance without a court order... to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress."

A cardinal canon of statutory interpretation teaches that a specific statute like FISA trumps a general statute like the congressional war resolution. Neither the

resolution's language nor legislative history even hints that Congress intended a repeal of FISA. Moreover, the White House has maintained Congress was not asked for a law authorizing the NSA eavesdropping because the legislature would have balked, not because the statute would have duplicated the war resolution.

As *Youngstown Sheet & Tube* instructs, the war powers of the president are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. Further, that case invalidated a seizure of private property (with just compensation) a vastly less troublesome invasion of civil liberties than the NSA's indefinite interception of international conversations on Mr. Bush's say so alone.

Congress should insist the president cease the spying unless or until a proper statute is enacted or face possible impeachment. The Constitution's separation of powers is too important to be discarded in the name of expediency.

The Washington Times

If Men Were Angels

by Bruce Fein

This article appeared in the January 4, 2006 edition of The Washington Times

The Founding Fathers would be alarmed by President George W. Bush's "trust me" defense for collecting foreign intelligence in violation of the Foreign Intelligence Surveillance Act (FISA) and the Constitution's separation of powers.

The president insists that the National Security Agency (NSA) has been confined to spying on American citizens who are "known" al Qaeda sympathizers or collaborators. Mr. Bush avows that he knows the eavesdropping targets are implicated in terrorism because his subordinates have said so; and, they are honorable men and women with no interest in persecuting or harassing the innocent. Presidential infallibility and angelic motives should be taken on faith alone, like a belief in salvation.

But the Founding Fathers fashioned sterner stuff to protect individual liberties and to forestall government oppression, i.e., a separation of powers between the legislative, executive and judicial branches. James Madison elaborated in Federalist 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices are necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

The separation of powers does not guarantee against government overreaching in wartime or otherwise. Congress, the president and the Supreme Court may all succumb to exaggerated fears or prejudices. Thus, Japanese Americans were held in concentration camps during World War II with the approval of all three branches. But requiring a consensus militates in favor of measured and balanced war policies. The commander in chief is inclined to inflate claims of military necessity, as the Japanese American injustice exemplifies.

Approximately 112,000 were evacuated to concentration camps to thwart sabotage or espionage on the West Coast. President Franklin D. Roosevelt, acting through commanding Gen. John L. DeWitt, maintained that Japanese ancestry, simpliciter, made them suspect. DeWitt relied on racist thinking outside the domain of military expertise.

In his Final Report on the evacuation from the Pacific Coast area, the commanding general refers to individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies." But he summoned no plausible evidence to support the indictment. During the nearly four months that elapsed between Pearl Harbor and the concentration camps, not a single person of Japanese ancestry was either accused or convicted of espionage or sabotage. Enlisting the "Who stole the tarts" precedent in Alice in Wonderland, DeWitt obtusely maintained that unwavering loyalty proved imminent treason: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It was said that case-by-case vetting of Japanese Americans for disloyalty was infeasible. But it was done for persons of German and Italian ancestry. The British government established tribunals to determine the loyalties of 74,000 German and Austrian aliens. Approximately 64,000 were freed from internment and from any special restrictions.

The maltreatment of Japanese Americans probably impaired the war effort. Despite the concentration camps, 33,000 served in the United States military. The famed 100th Battalion earned 900 Purple Hearts fighting its way through Italy. A greater number would have joined the armed forces if they not been wrongly suspected and degraded.

Like Roosevelt and DeWitt, President Bush claims military necessity for the NSA's eavesdropping on the international communications of Americans without adherence to FISA. The hope is to establish an early warning system to detect and prevent new editions of September 11, 2001. In a Dec. 22, 2005 letter to Congress, the Department of Justice asserted: "FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change . . . that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities."

But FISA crowns the president with electronic surveillance powers without a court warrant for 15 days after a congressional declaration of war. That duration could have been indefinitely extended by Congress without alerting terrorists to anything new. Further, Congress might have been asked to lower the threshold of suspicion required to

initiate surveillance without compromising intelligence sources or methods. Indeed, President Bush's continuation of the NSA's spying despite the disclosure by the New York Times discredits the argument that secrecy was indispensable to its effectiveness. On the other hand, congressional involvement in the early warning system would provide an outside check on whether the commander in chief is targeting only persons linked to al Qaeda or an affiliated terrorist organization.

To borrow from Justice Robert Jackson's dissent in *Korematsu v. United States* (1944), the chilling danger created by President Bush's claim of wartime omnipotence to justify the NSA's eavesdropping is that the precedent will lie around like a loaded weapon ready for the hand of the incumbent or any successor who would reduce Congress to an ink blot.

The Washington Times

I

Data Mining Doubts

by Bruce Fein

This article appeared in the January 24, 2006 edition of The Washington Times

President Richard M. Nixon maintained that anything the White House ordered was constitutional, for example, breaking and entering offices or homes. Nixon's scorn for the law led to crimes and ultimately to resignation when it appeared the Senate would unanimously vote to convict him of impeachable offenses.

President George W. Bush should learn from the Nixon example. He should concede that his secret order to the National Security Agency to eavesdrop on American citizens present on American soil without judicial warrants in contravention of the Foreign Intelligence Surveillance Act (FISA) violated the Constitution's separation of powers. He should acknowledge that a president cannot flout federal statutes because he would have struck a different balance between civil liberties and national security. He should renounce the idea that in wartime only the executive branch rules, which means forever, since the war against international terrorism has no endpoint. And the commander in chief should request Congress to amend FISA if it is thought a different balance between liberty and security should be struck in the aftermath of September 11, 2001.

What is demanded is not a pound of flesh or self-flagellation. What is urged is an unreluctant embrace by President Bush of keystone constitutional principles to which so many have given that last full measure of devotion to secure freedom for the living and those yet to be born. On that score, the slabs of legal argument featured in Attorney

General Alberto R. Gonzales' 42-page submission to Senate Majority Leader Bill Frist, Tennessee Republican, last Thursday to justify the NSA's warrantless spying on Americans are disappointing. The justifications oscillate between the risible and the chilling.

Section 111 of FISA addresses the president's electronic surveillance powers during wartime to gather foreign intelligence. It was supported both by the incumbent President Jimmy Carter and Congress as a judicious trade-off between national security and reasonable expectations of privacy in communications. Accordingly, the section authorizes eavesdropping on Americans without a customary court warrant "for a period not to exceed 15 calendar days following a declaration of war by Congress." A one-year window was initially contemplated. But Congress and the White House concluded that a shorter period would still afford the president time to ask for a legislative extension if national security concerns remained acute.

President Bush's eavesdropping order issued secretly in the aftermath of September 11 was not confined to 15 days, but has been continued for more than four years. Mr. Bush did not seek a statutory extension, although the request could have been considered in secrecy by Congress under Article I, section 5, clause 3. (The Manhattan Project during World War II was funded by Congress without compromising secrecy).

On September 18, 2001, Congress enacted the Authorization for Use of Military Force (AUMF). It succinctly provides, "[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any

future acts of international terrorism against the United States by such nations, organizations or persons."

Attorney General Gonzales' White Paper fatuously insists that the AUMF trumps the limitations of section 111 because it does not declare war. The attorney general maintains that war declarations are characteristically no more than a single sentence and cryptic on presidential war powers, whereas authorizations for the use of military force are ordinarily expansive "and are made for the specific purpose of reciting the manner in which Congress has authorized the president to act." But that contention is counterfactual.

The AUMF says absolutely nothing about the "manner" in which President Bush is to employ "necessary and appropriate" force. It is indistinguishable on that score from the declaration of war against Spain in 1898, which provided: "First. That war be, and the same is hereby declared to exist ... between the United States of America and the Kingdom of Spain. Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several states, to such an extent as may be necessary to carry this Act into effect." Neither the declaration nor the AUMF address war tactics, for example, eavesdropping, concentration camps, breaking and entering homes, or enjoining news disclosures like the Pentagon Papers thought injurious to the war effort.

The AUMF reticence over tactics is no aberration. With regard to the current war in Iraq, for instance, Congress similarly declared without elaboration: "The President is authorized to use the Armed Forces of the United States as he determines to be necessary

and appropriate in order to -- (1) defend the national security of the United States against the continuing threat posed by Iraq, and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

While the suggestion that the AUMF vanquishes FISA's limits on electronic surveillance during war is laughable, the attorney general's assertion of unchecked commander in chief powers to conduct war is chilling. According to Mr. Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, for example, a law forbidding concentration camps reminiscent of World War II, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a withholding of federal funds sought to extend the war in Iraq into Iran to destroy its nuclear facilities. Under that unprecedented and insidious theory, the stream of federal statutes during the Vietnam War ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos were all unconstitutional.

A president above separation of powers might help to defeat the terrorist enemy. But the nation's constitutional dispensation and bulwarks against tyranny would be destroyed. As Secretary of State Condoleezza Rice might put it, to bow to President Bush's usurpations would be a reprise of Napoleon's 18th of Brumaire in the French Revolution.

The Washington Times

I

Twist of Directive Signals?

by Bruce Fein

This article appeared in the January 31, 2006 edition of The Washington Times

President George W. Bush's signing of the Patriot Act on the heels of the terrorist attacks on September 11, 2001, belies the chief legal defense of his directive to the National Security Agency. The directive authorizes interception of international electronic communications of American citizens on American soil under circumstances in which they enjoy a reasonable expectation of privacy protected by the Fourth Amendment without a court warrant in violation of the Foreign Intelligence Surveillance Act (FISA).

According to the president, when Congress enacted the Authorization for Use of Military Force (AUMF) on Sept. 18, 2001, it intended to crown him with power to ignore any statute he insisted would impede collecting and analyzing foreign intelligence to combat international terrorism, including FISA. It governs, among other things, wartime or emergency surveillances and the breaking and entering of homes and generally requires a judicial warrant based on probable cause. No Member of Congress, however, hinted at such an intent, which would have permanently voided scores of meticulously crafted FISA provisions because the war against terrorism will be perpetual, for example, a requirement to minimize the interception or retention of innocent conversations.

Nor did the president claim unlimited spying powers through a presidential signing statement or otherwise in approving the AUMF. Nor did he solicit or receive oral or written legal advice from any administration lawyer or nonlawyer that the AUMF

trumped FISA until more than four years after its enactment when the New York Times disclosed the secret NSA eavesdropping. The president's startling new interpretation of the AUMF, reminiscent of a surprise O. Henry ending, enjoys little legal standing. The Supreme Court has repeatedly instructed that contemporaneous interpretations defeat the belated variety, where, as here, they smack of expediency.

The AUMF text authorizing use of "necessary and appropriate" force against the enemy does not buttress the president's case. In a nation that embraces the rule of law as a civic religion, the ordinary meaning of "appropriate" requires consistency with statutes like FISA, not their negation.

President Bush's support for the Patriot Act as a needed tool to fight international terrorism contradicts his belated and extravagant interpretation of the AUMF. The Act was signed into law Oct. 26, 2001, but five weeks after the AUMF.

More than a score of highly touted provisions would have been superfluous if the AUMF means what Mr. Bush now says it does, for example, FISA authority to target lone-wolf terrorists. And Mr. Bush's flagellation of Congress for temporizing over extending and strengthening the Patriot Act would be farcical.

The president's interpretation would reduce FISA to a shadow. He is asserting power to spy on every person thought a member of an organization thought to be affiliated in any way with al Qaeda on his say-so alone, which covers a staggering percentage of surveillance targets under FISA. Indeed, the spying seems indiscriminate if the spare results and endless dead ends reported by the FBI are to be believed.

On July 31, 2002, Mr. Bush, speaking through the Justice Department then headed by Attorney General John Ashcroft, informed the Senate Select Committee on

Intelligence the Patriot Act added important new tools in the war on terrorism.

The president tacitly asserted the legislation was not a needless echo of the AUMF. The department amplified: "Congress, in enacting the USA PATRIOT Act ... provided the administration with important new tools that it has used regularly, and effectively, in its war on terrorism. The reforms in those measures have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. One simple but important change that Congress made was to lengthen the time period for us to bring to court applications in support of attorney general-authorized emergency FISAs. This modification has allowed us to make full and effective use of FISA's pre-existing emergency provisions to ensure that the government acts swiftly to respond to terrorist threats." Indeed, Mr. Bush was then so pleased with FISA he opposed a measure by Sen. Mike DeWine, Ohio Republican, to relax the warrant standard for non-U.S. persons from probable cause to reasonable suspicion.

FISA was enacted in 1978 as a joint enterprise between the Executive Branch and Congress. It fits comfortably within the constitutional powers of Congress enshrined in Article I, section 8, clause 18 to make all laws "which shall be necessary and proper for carrying into execution ... all ... powers vested by this Constitution in the government of the United States, or in any department or agency thereof."

FISA properly regulates the president's authority to wage war to safeguard First and Fourth Amendment freedoms that historically have been compromised by the commander in chief, whether during the Civil War, World War I, World War II or the

Cold War. In 1975-76, the Church Committee discovered surveillance and mail opening abuses by the NSA, FBI, and Central Intelligence Agency. The CIA's legendary James Angleton testified the Constitution held a secret exemption for the agency, and President Nixon pontificated that anything the president ordered was legal.

FISA was thus a measured response to genuine, not contrived, executive branch sneers at the rule of law. Mr. Bush's challenge to the constitutionality of FISA is thus as unconvincing as his suggestion Congress is powerless to outlaw torture or cruelty in the treatment of detainees.

A new FISA balance between civil liberties and national security might be necessary in the post September 11 world. A Republican Congress would not defeat a reasonable proposal by Mr. Bush. And, as with the Manhattan Project to build an atomic bomb, Congress could amend FISA in a way that would not alert the enemy to surveillance techniques or strategies.

Mr. Bush's cold-shoulder to Congress thus seems inexplicable unless he harbors an ambition through the NSA spying precedent to cripple the legislative branch as a check against executive omnipotence.

The Washington Times

...or onerous surveillance?

by Bruce Fein

This article appeared in the February 6, 2006 edition of The Washington Times

President Bush's defense of his National Security Agency directive to undertake electronic surveillance targeting U.S. citizens in the United States without judicial warrants contrary to the Foreign Intelligence Surveillance Act (FISA) follows the advice customarily received by first-year law students: "If the law is against you, argue the facts. If the facts are against you, argue the law. If both the law and the facts are against you, confuse the issue."

Mr. Bush repeatedly insinuates that circumventing FISA is necessary to monitor calls from al Qaeda operatives into the United States which might thwart a new edition of attack like that of September 11, 2001. He and his subalterns rhetorically ask: "Should we stop eavesdropping on Osama bin Laden because a person in the United States picks up the phone? The obvious answer is "No." But neither the Constitution nor FISA has ever required a warrant in such circumstances. Mr. Bush's above hypothesis has never raised a legal problem.

In *United States v. Verdugo-Urquidez* (1990), the U.S. Supreme Court declared the Fourth Amendment protection against unreasonable searches or seizures does not apply to aliens outside the United States. In sustaining the warrantless search of an alien's Mexican residence by U.S. Drug Enforcement Agency agents, Chief Justice William H. Rehnquist explained: "[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the federal

government against aliens outside the United States."

"There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."

The chief justice added that aliens are endowed with constitutional protections only "when they have come within the territory of the United States and developed substantial connections with this country."

In sum, Mr. Bush has always enjoyed unconstrained authority to conduct NSA electronic surveillance against al Qaeda operatives or other aliens abroad no matter whom their communicants. The law has never suggested the NSA must cease monitoring al Qaeda communications if a person in the United States is on the other end. Like the Fourth Amendment as interpreted in *Verdugo*, FISA has never applied to interceptions of alien terrorist communications outside the United States. Under section 1801(f)(2) of Title 50, United States Code, electronic surveillance subject to FISA's restrictions is defined to exclude interceptions of international wire communications to or from a person in the United States who is not the surveillance target if the acquisition occurs outside the United States.

On the other hand, the definition includes surveillances that target U.S. citizens or permanent resident aliens in the country under circumstances in which they enjoy a reasonable expectation of privacy. Mr. Bush has not disputed that the NSA's eavesdropping falls within FISA, i.e., that it targets U.S. persons on American soil. His hypothetical featuring al Qaeda distracts from the legal issue at hand: whether he can ignore FISA's wartime regulation of domestic spying targeting American citizens or any

other legal restraint he finds irksome.

Mr. Bush's champions erroneously suggest the NSA spying is data-mining that eschews monitoring particular individuals. Gen. Michael Hayden, principal deputy director of national intelligence and former NSA director, has described the surveillance program as "hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. ... It is not a driftnet ... grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices."

Sen. Pat Roberts, Kansas Republican and chairman of the Senate Select Committee on Intelligence, lettered the Senate Judiciary Committee on Feb. 3, insisting "FISA does not provide an effective alternative to [the NSA's domestic spying] to authorize the 'hot pursuit' of terrorists operating in this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility impossible to achieve. ... Attorney General-approval of 'emergency' surveillance under FISA must meet a probable cause standard, is limited to 'foreign powers' or 'agents of a foreign power' as defined in FISA, and is similarly encumbered by a bureaucratic approval process."

But President Bush, speaking through the Justice Department, disputed the chairman's every word in testimony to the Senate Intelligence Committee on July 31, 2002, long after the NSA domestic spying had begun. James A. Baker, counsel for intelligence policy, acclaimed the FISA amendments in the USA PATRIOT ACT: "The reforms... have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government

to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening the time period for emergency FISAs] has allowed us... to ensure that the government acts swiftly to respond to terrorist threats."

Even if Mr. Roberts' indictment of FISA were correct, the senator failed to explain why the deficiencies should not have been cured with further amendments in lieu of trashing the Constitution's separation of powers. The chairman conspicuously omitted any suggestion a Republican-controlled Congress would have balked or that legislative deliberations would have exposed state secrets.

The question Mr. Bush and his surrogates evade can be simply stated: What constitutional authority empowers the president to nullify a federal statute that balances the privacy of U.S. citizens within the United States against national security in times of war because he prefers unconstrained spying?

The Washington Times

An Anemic Defense

by Bruce Fein

This article appeared in the February 14, 2006 edition of The Washington Times

On Feb. 6, before the Senate Judiciary Committee, Attorney General Alberto Gonzales anemically defended President Bush's National Security Agency (NSA) program that targets U.S. persons in the United States for electronic surveillance on his say-so alone in contradiction to the Foreign Intelligence Surveillance Act (FISA).

Indeed, the attorney general himself is unconvinced. He has bowed to the Foreign Intelligence Surveillance Court's insistence that no information extracted from NSA's warrantless surveillances be used in seeking FISA domestic wiretapping authority because its program is legally tainted.

In any event, the political tide has turned against Mr. Bush's usurpation of legislative authority and contempt for the Constitution's checks and balances. Time and further public education will force Mr. Bush to collaborate with Congress to enact new legislation authorizing more comprehensive surveillance of suspected al Qaeda operatives and repudiating the monarchical claims of the White House.

Public opinion is slow but decisive. Sixteen months elapsed between John Dean's devastating disclosures to the Senate Watergate Committee and President Nixon's resignation.

The attorney general's presentation careened between the preposterous, the outlandish and the outrageous. He asserted the "plain language" of the Authorization to

Use Military Force (AUMF) against international terrorist organizations implicated in the September 11, 2001, attacks intended to override FISA. The AUMF was enacted Sept. 18, 2001. If its language were "plain," it would be expected Mr. Bush would have been advised with alacrity that FISA no longer constrained his authority to target American citizens for surveillance. It might be expected that at least one member of Congress would have thought a vote to enact the AUMF was a vote to repeal FISA. But neither was the case. More than four years elapsed before the president's lawyers concocted the AUMF legal defense. And no Member has declared voting for the AUMF was understood and intended to supersede FISA's regulation of eavesdropping on Americans during wartime.

Mr. Gonzales startlingly revealed that the NSA's warrantless surveillance program excludes purely domestic al Qaeda-to-al Qaeda communications of the type that might have thwarted September 11. The program covers only calls traveling between the United States and a foreign point where an American citizen in the United States is the target of suspicion.

Mr. Gonzales explained Mr. Bush was worried that domestic-to-domestic interceptions would be politically costly and not worth the price of protecting the American people from terrorism, as confirmed by the following exchange between Sen. Herb Kohl, Wisconsin Democrat, and Mr. Gonzales:

Mr. Kohl: "If you would go al Qaeda-to-al Qaeda outside the country -- domestic-outside the country but you would not intrude into al Qaeda-to-al Qaeda within the country -- you are very smart. So are we. And to those of us who are interacting here today, there's something unfathomable about that remark."

Mr. Gonzales: "Senator, think about the reaction, the public reaction that has arisen in some quarters about this program. If the president had authorized domestic surveillance, as well, even though we're talking about al Qaeda-to-al Qaeda, I think the reaction would have been twice as great. And so there was a judgment made that this was the appropriate line to draw."

In other words, the fear of adverse public reaction caused the commander in chief to shy from warrantless domestic-to-domestic surveillances. The fear is mystifying because President Bush hoped to keep the NSA's spying perpetually secret from the people. Moreover, what is to be made of the sincerity of a president who talks so forcefully about the urgency of crushing terrorism yet flinches from measures that might awaken political opposition?

Additionally troublesome was the attorney general's testimony that there had been no research on the legality of domestic-to-domestic interceptions if Mr. Bush decides on broader NSA spying because of new foreign intelligence. This though that option has been on the table more than four years.

Finally, Mr. Gonzales' assertion that FISA is workable for al Qaeda's domestic communications but unworkable for international calls is incredible on its face.

President Bush has repeatedly maintained that only known al Qaeda operatives are targeted by the NSA; and, that the spying is incontestably legal. The attorney general's testimony was unpersuasive on both counts. According to Mr. Gonzales, career professionals at the NSA decide which Americans in the United States to target for surveillance.

They are instructed to select citizens reasonably suspected of membership in a

terrorist organization. NSA lawyers and the NSA inspector general review the spying program. Every 45 days the Justice Department reiterates the legality of the warrantless spying on citizens.

The attorney general ridiculously insinuated that concerns over indiscriminate spying were unjustified because the NSA professionals are infallible. They never err in their targeting. There is no need for an outside check to supervise their enormous discretion to invade the communications privacy of American citizens on American soil. The experts, not independent federal judges, should be trusted to protect civil liberties consistent with defeating terrorism.

As regards legality, Mr. Gonzales made the stunning admission he has no knowledge of whether the reasonable basis standard for selecting surveillance targets has proven accurate in a fair percentage of cases. Published reports indicate the accuracy rate approximates 1 percent or less. But the constitutionality of searches under the Fourth Amendment pivots on the probability something useful will turn up. Thus, without knowing the results of the NSA's warrantless foreign intelligence spying, the attorney general could not possibly voice an intelligent opinion on its constitutionality.

What should be done?

President Bush should confess error. Neither Congress nor the public should gloat. Partisan advantage should be resisted. And new legislation should be fashioned to ensure the president is armed with muscular tools to gather foreign intelligence against international terrorists while reasonably protecting the civil liberties of American citizens.

Senate Committee on the JudiciaryWartime Executive Power and the NSA's Surveillance Authority II

February 28, 2006

Testimony of

R. James Woolsey

Mr. Chairman and members of the Committee, it is an honor to be asked to testify before you today on this important subject. By way of identification I served as Director of Central Intelligence, 1993-95, and have held Presidential appointments in two Democratic and two Republican administrations in a career that has generally been devoted to private law practice and, now, consulting. I have received no classified information about the NSA surveillance in question. I am testifying solely on my own behalf.

It seems to me impossible to evaluate the President's NSA electronic surveillance program that is the subject of these hearings without making some assessment of the enemy we face, so let me begin there.

The Theocratic Totalitarian Movements in the Middle East That Are at War With Us.

As a result of many factors -- including the turbulent history of the Middle East in the years since WW I, the impact of oil wealth on Saudi Arabia, Iran, and other states in the region, and the extensive influence of the ideology shared by al Qaeda and the Saudi Wahhabi sect within Sunni Islam and of the movement represented by President Ahmadinejad of Iran within Shi'ite Islam -- we face at least two fanatical theocratic totalitarian movements in the Middle East today. Both, with the sponsorship or assistance in some cases by regimes in the region, have attacked us in recent years. One explicitly states that it wishes to destroy us, the other that it wishes to drive us from the Middle East and ultimately to incorporate us in a world-wide caliphate, a theocracy operating under the movement's version of ancient Islamic Law.

Such totalitarian visions seem crazy to most of us; we thus tend to underestimate their potency. Yet these current theocratic totalitarian dreams have some features in common with both the secular totalitarian dreams of the twentieth century, e.g., the Nazis' Thousand Year Reich and the Communists' World Communism and with the one powerful twentieth century totalitarian movement that had a religious component, Japanese Imperialism. These twentieth century totalitarian movements produced tens of millions of deaths in part because, at least in their early stages, they engendered "fire in the minds of men" in Germany, Japan, Russia, and China and were able to establish national bases. This century's Shi'ite theocratic totalitarians in the Middle East have had such a national base for over 25 years in Iran and the Sunni totalitarians had one for the better part of a decade in Afghanistan. In addition Wahhabism, one variety of Sunni theocratic totalitarianism, has been the state religion of Saudi Arabia for some eight decades. None of these groups has attained the Nazis', Japanese Imperialists' and

Communists' death totals yet, but this is principally due to lack of power, not to less murderous or less totalitarian objectives.

Shi'ite Theocratic Totalitarianism: Ahmadinejad's Movement and Hezbollah.

The Shi'ite theocratic totalitarian movement now represented by President Ahmadinejad of Iran and the government's cohorts in Hezbollah has been at war with us for over a quarter of a century, since its adherents seized our embassy personnel as hostages in Tehran in 1979. During the 1980's the representatives of this movement blew up our Embassy and Marine barracks in Beirut and kidnapped, tortured, and killed Americans. It seems clear that they were chiefly responsible for the attack on Khobar Towers in Saudi Arabia and the death of the US military personnel there in 1998. Although this movement certainly represents a small minority of Shi'ites, it controls a government that has oil wealth and a nuclear weapons program, and has close ties to the world's most professional terrorist group, Hezbollah.

One of its stated objectives is, quite explicitly, to destroy us. At a large "World Without Zionism" conference recently in Tehran President Ahmadinejad stated that "a world without Zionism and America . . . surely can be achieved." President Ahmadinejad's expressed view is that it is his mission to help bring about, by mass killings, conditions for the return of the Mahdi and thereafter the end of the world. The chief of strategy for Ahmadinejad, Hassan Abbassi, has said: "We have a strategy drawn up for the destruction of Anglo-Saxon civilization . . . we must make use of everything we have at hand to strike at this front by means of our suicide operations or means of our missiles. There are 29 sensitive sites in the U.S. and the West. We have already spied on these sites and we know how we are going to attack them. . . . Once we have defeated the Anglo-Saxons the rest will run for cover."

Sunni Theocratic Totalitarianism: Salafist Jihadis (al Qaeda) and Salafist Loyalists (Wahhabis)

Within the tent of Sunni Islam, along with several more moderate schools, there are also several strains of theocratic totalitarianism. The two most relevant in the current context are both Salafists, believing that only a literal version of the model of rule implemented in the seventh century in Islam has ultimate legitimacy. Both have the objective of rule by a unified mosque and state; for some this theocracy is personified by the caliph. Different individuals in these movements emphasize different aspects, but generally the common objective is to unify first the Arab world under theocratic rule, then the Muslim world, then those regions that were once Muslim (e.g. Spain), then the rest of the world.

Sunni Salafists of both jihadist and loyalist stripe, e.g. both al Qaeda and the Wahhabis, share basic views on all points but one. Both exhibit fanatical hatred of Shi'ite Muslims, Sufi Muslims, Jews, Christians, and democracy, and both brutally suppress women. They differ only on whether it is appropriate to carry out jihadist attacks against any enemy near or far *now*, i.e. to murder Iraqi Shi'ite children getting candy from GI's, people working in the World Trade Center, etc. — or whether to subordinate such efforts for the time being to the political needs of a particular state, i.e. Saudi Arabia. The two are bitter enemies, but not about underlying ideological beliefs. The relationship between the Salafist Jihadists such as al Qaeda and Salafist Loyalists such as the Wahhabis is thus loosely analogous in one way to that between the Trotskyites and the Stalinists of the 1930's, although the Saudi State is of course a very different creature than Stalin's USSR. The point is that doctrinal agreement and bitter enmity are not

incompatible, in the 1930's or now. Nor are doctrinal differences incompatible with alliances of convenience. Shi'ite totalitarians such as the Iranian regime have no difficulty supporting Sunni Salafist Jihadis such as al Qaeda and Zarqawi. Stalin reversed course and embraced the Russian Orthodox Church during WW II just as during the Gulf War Saddam embraced radical Islam with the same degree of cynicism. The totalitarian opportunism that gave rise to the Hitler-Stalin Pact in the 1930's is alive and well in the Middle East today. Understanding our enemies requires us to understand that ideology is only a sometime-guide to alliances and betrayals -- both can shift as fast as the desert sands.

Al Qaeda launches attacks in Saudi Arabia and the Saudis work with us to capture and kill al Qaeda members who threaten them. In this sense both Saudi government officials and probably even Wahhabi clerics are willing to "cooperate with the U.S. on counter-terrorism." But this cooperation with us does not counter at all the Wahhabi spread of what is, essentially, their and al Qaeda's common underlying Salafist totalitarian theocratic ideology. This spread has been financed by at least \$3-4 billion/year from the Saudi government and wealthy individuals in the Middle East over the last quarter century — and Salafism has invaded the madrassas of Pakistan, the textbooks of Turkish children in Germany, the mosques of Europe, and some mosques and prisons (via Wahhabi clerics selected as chaplains) in the U.S. Alex Alexiev, senior fellow at the Center for Security Policy, testified before Congress on June 26, 2003, that this sum is approximately three-to-four times what the Soviets were spending on external propaganda and similar "active measures" at the peak of Moscow's power in the 1970s.

The underlying Salafist ideology being spread by the Wahhabis is fanatical and murderous, indeed it is explicitly genocidal with respect to Shi'ites, Jews, and homosexuals. The president's "Islamofascist" term is thus perhaps understated — the Italian fascists were horrible, but not doctrinally genocidal. "Islam-Nazi" would be more accurate.

For example, the BBC reported on July 18 of last year that a publication given to foreign workers in Saudi Arabia by the Islamic cultural center, which falls under the authority of the ministry of Islamic affairs, advocates the killing of "refusers" (Shia). The imam of Al-Haram in Mecca, (Islam's most holy mosque), Sheikh Abd Al-Rahman al-Sudayyis, was barred from Canada last year after the translation of his sermons calling Jews "the scum of the earth" and "monkeys and pigs" who should be "annihilated." Materials distributed by the Saudi government to the Al-Farouq Masjid mosque in Brooklyn call for the killing of homosexuals and converts from Islam to another religion.

Saudi education is turning toward, not away from, Wahhabi influence and Salafism. In February of 2005 a secularist reformer, Muhammad Ahmad al-Rashid, headed the Saudi Education Ministry. As he was beginning to respond to internal criticism of curricula that incited hatred of non-Muslims and non-Wahhabi Muslims, he was replaced by Abdullah bin Saleh al-Obaid, a hard-core Wahhabi. Controlling 27 percent of the national budget, al-Obaid will have a substantial effect on the views of the next generation of Saudis. His views are illuminated by aspects of his background. From 1995 to 2002, al-Obaid headed the Muslim World League (MWL). According to the U.S. Treasury the MWL's Peshawar office was led by Wael Jalaidan, "one of the founders of al Qaeda." Moreover, the main arm of the MWL is the International Islamic Relief Organization (IIRO). The Egyptian magazine, *Rose al-Youssef*, describes the IIRO as "firmly entrenched with Osama bin Laden's al Qaeda organization." In March 2002 the U.S. headquarters representing both organizations was raided and closed by federal authorities. One

of the officers of the closed branch in Herndon, Virginia, was al-Obaid. The *Wall Street Journal* describes him as "an official enmeshed in a terror financing controversy."

Salafist ideology is also totalitarian to a unique degree in its repression of women. In 2002 the world press carried stories of an extreme example: Religious police in Saudi Arabia forced some young girls fleeing a burning school back inside to their deaths because they were not properly veiled. This is a fanaticism that knows no bounds.

Words and beliefs have consequences, and totalitarians are often remarkably clear about what they will do once they have enough power. Many brushed aside *Mein Kampf* when it was first written but it turned out to be an excellent guide to the Nazis' behavior once they had the power to implement it. We should not ignore the Wahhabis' teaching of Salafist fanaticism.

The Consequent Demands on the Intelligence We Must Collect.

The nature of the enemy that we face today and will face for many years, represented by these movements, suggests some factors we should keep in mind when assessing the President's NSA intercept program.

I would freely admit that there are important considerations on both sides of the debate over this intercept program – it enhances security at, to some extent, the expense of privacy. On the other hand banning the program and relying solely on FISA (even, in my view, an amended FISA) in order to more protect privacy would lead to a reduction in security. This is, in short, a debate in which both sides are giving primacy to an important value and each side has a point. I will do my best to offer my own rationale for the reason I strike the balance as I do and for my recommendation to the Committee.

Our View of the Nature of War in the Latter Half of the 20th Century.

During the Cold War and for a few years into the post-Cold War era, we developed and became accustomed as a nation to a set of assumptions about war – some have been better understood in the Cold War's aftermath. These Cold War assumptions include at least the following elements:

-- Our overarching struggle with our principal enemy – the Cold War vs. the USSR – was an effort to outlast a very rigid and bureaucratic empire that restively ruled much of Eurasia. Our principal strategy was deterrence and containment of this empire until it collapsed, and this strategy proved effective.

-- Our enemy proved to be economically inept and its relative poverty helped our strategy succeed.

-- We could afford to pay comparatively little attention to the our enemy's ideology since it had few believing adherents, within their empire anyway, after Stalin's crimes became common knowledge following WW II and ideology had rather little influence on their behavior. It was mainly a confusing theory derived from Hegel that had only one important role – to provide them with a rationalization for their dictatorship. By the Cold War era ideology was no longer a matter of religious-like fervor for the enemy as it had been in part during the 1917 Revolution and the inter-war years.

-- Other than the unlikely event of a major nuclear exchange -- to which we may have come close during the Cuban Missile Crisis -- there was no real likelihood of our enemy attacking the American homeland, via terrorism or otherwise, and the enemy generally saw to it that their client states were similarly constrained. We were able to reduce the likelihood of a nuclear exchange by conducting arms control negotiations and signing treaties with the enemy, treaties which could be verified and which they would generally, although not universally, observe.

-- Since any hot wars that occurred during this long Cold War occurred overseas, our intelligence activities could also be located there and the only principal need for intelligence collection in this country was to track traditional spies, ordinarily a deliberate and slowly-developing process involving thorough and careful investigation of a small number of individuals.

-- Terrorism was like other crimes and could effectively be dealt with by traditional law enforcement means. Terrorists were to be prosecuted and imprisoned and these steps would deter further terrorism.

-- There was little need (once the early 50's were over, with "duck and cover" drills in schools, fall-out shelters, and Senator Joe McCarthy) for the Cold War to affect Americans' daily lives in any substantial way by requirements to limit privacy or liberty, or in any other regard.

-- Developments in electronics were led in the main by the needs of the US Department of Defense and NASA but these did not revolutionize our lives during the early part of the Cold War. The electronic systems commonly used by the average citizen at, say, the end of the seventies -- telephones, radios, television sets -- were on the whole only somewhat updated versions of those of a quarter of a century earlier. The Internet, for example, was nothing much more than a gleam in the eyes of some scientists at DARPA.

Re-thinking the Cold War Assumptions.

None of the above assumptions accurately characterizes this century's Long War, one that I believe will last for decades, with the Middle East's theocratic totalitarians.

-- Far from constituting a single rigid empire, our enemies have a variety of shifting types of relationships to governments. Totalitarian Shi'ite theocracy as reflected in the Ahmedinejad regime, its nuclear weapons program, and the regime's close ties to Hezbollah constitute one type of problem. But far from being under a state's control, Al Qaeda has twice had a kind of "terrorist-sponsored-state" relationship with poor nations (Sudan and Afghanistan) and is now fighting hard for a home base in Iraq's Sunni triangle. The Wahhabis constitute the religious infrastructure of a state, Saudi Arabia, that has some reformers in its government who from time to time contend against the Wahhabis' allies. A containment strategy has very little to do with movements driven by religious fervor. And concerning deterrence, what would one hold at risk (as we held at risk the Soviets' military forces and cities) in order to deter an al Qaeda attack with a suitcase nuclear weapon, or a similar one planned secretly by Ahmedinejad, possibly together with Hezbollah, in order to hasten the return of the Mahdi and the end of the world?

-- Our enemies are fabulously wealthy, almost entirely from the sale of oil. Indeed in a sense this is the first war the United States has fought in which we pay for both sides. This will

be the case as long as we continue to borrow a billion dollars every working day, about \$250 billion per year, to import oil and the Middle East holds two-thirds of the world's proven reserves.

-- Our enemies' ideology is religiously rooted and is thus central to their behavior. Many adherents of these movements have no fear of death – indeed they welcome it – and it sustains them in both hatred and patience. I would judge that their next attack on the US will be larger than that of 9/11 (each al Qaeda attack on us has been, in an important sense, larger and more audacious than the one before), and that they care very little whether it is this year or next – the key thing is that they be as sure as they can be that it will damage us badly and, among other things, lead us to withdraw from the Middle East.

-- Far from being safe behind our shores we have already been invaded, albeit not occupied, and we live on the battlefield. Our enemy has already attacked New York and Washington, and in the case of the Ahmedinejad regime, quite possibly augmented by Hezbollah, its Chief of Strategy has said that the “29 sensitive sites” in the US and the West have already been “spied out” and that he knows how he will attack them. As for negotiations, sometimes even during periods of major tension between our governments during arms control negotiations in Vienna or Geneva, I would take my Soviet counterpart out to dinner, treat him to a nice bottle of wine, and end up trading jokes with him. President Ahmedinejad, Osama bin Laden, and Saudi Arabia's most senior Wahhabis would, to put it mildly, be unlikely to agree to such tension-reducing conviviality with any representatives of their movements.

-- Hot wars may occur overseas during this Long War, but it is at least as likely that important combat in the form of major terrorist attacks will occur here at home and consequently our battlefield intelligence requirements will include such steps as discovering terrorist cells exerting great effort to blend in to our population. Intelligence collection focused entirely overseas will not be likely to help us learn the contents of a future Moussaoui's computer or anything about the telephone calls of a future al-Mihdhar or al-Hazmi from the US to a terrorist communications relay in Yemen.

-- Although domestic terrorism – e.g. of the sort alleged in the January arrests of arsonists with a radical environmental beliefs -- should be dealt with by, and under the procedural protections of, the criminal law, we need to ask whether the same should be true for suicidal fanatic operatives of a foreign totalitarian movement. The penalties imposed by criminal law are not an effective way to deter a fanatic determined to die while killing thousands of us.

-- In a war of the sort embodied in the 9/11 attacks it is unfortunately the case that sometimes being able to thwart such attacks – security – comes into conflict with liberties to which we became accustomed in the pre-9/11 era – entering public buildings and airplanes, e.g., without being searched.

-- Moore's Law, the doubling every eighteen months of the capability of basic electronic components such as computer chips, has changed our world in fundamental ways. Throw-away cell phones and Internet web sites and chat rooms are now available for use by a huge share of humanity, including terrorists.

NSA Surveillance of Contacts Between these Theocratic Totalitarian Movements in the Middle East and US Persons or Visitors

In view of the above change in assumptions about the war with which we must now live – a war driven by our enemies’ decisions about how to make war on us, not by ourselves – I would focus the discussion about the authority for the NSA intercepts at issue on the President’s inherent powers under Article II of the Constitution, derived from his rights and duties as Commander in Chief.

I do not propose to deal with the rationale for the NSA surveillance program that has been advanced by the Justice Department deriving from the Joint Resolution that passed Congress shortly after 9/11, the Authorization for Use of Military Force (“AUMF”). In my view the President’s powers under Article II make it unnecessary to rely on the AUMF for this surveillance as long as it is, essentially, mapping the electronic battlefield. The legal arguments for and against relying on the AUMF Resolution relate to the President’s being authorized thereby to conduct the NSA surveillance program pursuant to using “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001” If the Resolution is read narrowly it could be argued that even if Hezbollah was working to “spy out”, as President Ahmedinejad’s strategy chief, Hassan Abbassi, put it, the 29 sites in the US and the West that he believes could, if destroyed, also destroy “Anglo-Saxon civilization”, but it did not assist in the attacks of 9/11, then a Resolution-based rationale might not authorize the President to approve NSA’s intercepting, say, communications between Hezbollah members and individuals in the US. As I noted above, the relationships between several terrorist organizations and governments can be fluid and can be the object of deception as well. Since I believe monitoring dangerous terrorist organizations beyond al Qaeda, such as Hezbollah, is one of several important needs for intelligence collection in the Long War in which we are engaged and that it is authorized under the President’s inherent (but not plenary) Article II powers, I will deal only with that rationale.

I believe it is clear that the President has some authority, even in the face of contrary legislation, to conduct warrantless foreign intelligence surveillance: the question is the extent of that authority. All federal appellate courts which have addressed the issue, including at least four circuits, have so held. See, e.g., In re Sealed Case, 310 F.3d 717, 742 (FISA Ct. of Review 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority”) Every President since 1978 when FISA was passed has asserted that he retained such authority. In short, conducting warrantless foreign intelligence surveillance is not like taxation. Even to defend us the President may not tax us, at all, on his own authority – prior Congressional action is essential under the Constitution since the President has no authority to tax under Article II. But the President does have, to some extent, independent authority as Commander-in-Chief under Article II that Congress may not take away. In order for his actions in conducting warrantless foreign intelligence surveillance to be fairly labeled “illegal” or in “violation of law”, it is not sufficient for them to violate FISA – they must, in the circumstances, also not be justifiable under his independent powers as Commander-in-Chief. Statutes must fit within the Constitution, not the other way around.

I realize that under some famous language in a concurring opinion by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), where the Supreme Court declared unconstitutional President Truman's seizure of the steel mills during the Korean War (to prevent their being shut down in a strike), the President's authority is "at its maximum" when their powers may conflict and Congress has authorized his action, and at a minimum when in such a case it has acted to restrict them. I will forgo the complex debates over the history of FISA, its interaction with the AUMF, and the subsequent history of Youngstown. If the President's Commander-in-Chief authority under Article II permits this type of warrantless foreign intelligence surveillance program even when his authority is at its minimum reach (because, arguably, of contrary Congressional action in passing FISA), then the surveillance is constitutional and hence legal without regard to FISA or the AUMF.

Reasons for Recognizing the President's Inherent Article II Authority for Mapping the Electronic Battlefield

I believe that the President has the inherent authority under Article II for the type of surveillance that is now, as described, being conducted for the following reasons:

First, the country was invaded, albeit of course not occupied, on 9/11. Being able to defend against invasions is the heart of the reason the President was given independent authority by the drafters of the Constitution under Article II.

Second, we stand in serious risk of being attacked here in the U.S. again. This is due to the ideologically-driven nature of the enemy, discussed above, and is evidenced by specific threats recently by bin Laden and by Ahmedinejad and his chief of strategy, Abbassi. Bin Laden has also recently made explicit threats and has obtained a fatwa from a Saudi cleric approving the use of a nuclear weapon against the U.S.

Third, since the battlefield is in part, sadly, here at home collecting intelligence on the enemy's contacts in this country is an essential part of serving as Commander in Chief. Shifting patterns of cooperation among terrorist groups and governments make attacks harder to detect, more likely, and more effective. They also make up-to-date intelligence essential. It is far from impossible for a government to supply a terrorist group with, say, anthrax – we still do not know the source of the anthrax that was used in the attacks of late 2001, including here at the Capitol. Iran has a nuclear weapons program and Ahmedinejad just visited personally various terrorist groups, Shi'ite and Sunni, in Syria. The fluid nature of these alliances, cases of assistance, training, safe harbor, and other types of collaboration between totalitarian movements and some states in the Middle East makes it imperative for us continually to track and map their planning and their contacts in order to keep track of the threat of against us. This difficult task is the sort of undertaking which those who collect and analyze signals intelligence understand and can accomplish – similar missions by collectors and analysts of electronic communications have been at the heart of warfighting for many decades.

Fourth, Moore's Law has undermined the framework of FISA in providing an oversight mechanism for surveillance of foreign and terrorist entities, who have easy access to modern electronics. This, not ill will, is the reason why the pre-9/11 history of FISA as a framework for intelligence collection against terrorism is so poor. There has been much written recently about the importance of "connecting the dots". There has been a complete reorganization of the Intelligence Community to that end. Yet to connect the dots one must first see them, and today

this means seeing what the enemy is doing with disposable cellular phones and in chat rooms. As Debra Burlingame has put it (a former attorney whose brother was the pilot of, and was killed during, the hijacking of, Flight 77 on 9/11): "it was the impenetrable FISA guidelines and fear of provoking the FISA court's wrath if they were transgressed that discouraged risk-averse FBI supervisors from applying for a FISA search warrant in the Zacarias Moussaoui case. The search, finally conducted on the afternoon of 9/11, produced names and phone numbers of people in the thick of the 9/11 plot . . ." And NBC News reported in 2004 that al-Hazmi and al-Mihdhar, who participated in hijacking flight 77, received more than a dozen calls from an al Qaeda switchboard in Yemen which was also receiving calls from bin Laden; NBC stressed that "NSA had the actual phone number in the US that the switchboard was calling," . . . but feared "it would be accused of domestic spying." Yet the government officials who made these decisions not to look at the dots provided by Moussaoui's al-Hazmi's and al-Midhar's behavior were not trying to make things easy for terrorists -- they were trying to apply an obsolete statute to an electronic world that could never have been envisioned when the FISA framework was established a quarter of a century earlier.

Awaiting a case-by-case decision about a warrant -- whether one by the Attorney General for a duration of 72 hours or a longer-term one by the FISA Court -- is not consistent with the need for what General Michael Hayden, Deputy DNI and former NSA Director, calls "hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda". However reasonable a framework FISA may be for overseeing and approving the sort of one-spy-at-a-time surveillance needs of the Cold War, it is not at all suited to managing the tasks being undertaken by the current NSA intercept program as publicly described. Much of modern intelligence development has related to finding ways to shorten the time and to speed up the link from "sensor to shooter". Yet courts are designed to deal with individual cases, to deliberate, and to pass judgment case by case -- not to manage fast-moving battlefield electronic mapping. If a captured al Qaeda or Hezbollah computer contains (like Moussaoui's) a substantial number of email addresses and phone numbers and we have only hours before the capture is known -- during which time we must check out those numbers and addresses, and others with whom they may have been in contact, before their owners throw away their phones and change their email addresses -- how can either an Attorney General or a FISA Court, even with amended procedures, make those decisions sufficiently quickly? The FISA Court considered and deliberated about only 1,758 requests for warrants in all of 2004 (and asked that 94 be modified before they were granted). And for each FISA warrant application:

- a warrant request form is filled out by the FBI;
- the target (an individual) is identified;
- facts are set out establishing that there is probable cause to believe that the individual is involved in terror or spying;
- details of the facilities and communications to be monitored are supplied;
- procedures are set forth to minimize the collection of information about people in the U.S.
- a Field Office Supervisor then verifies and approves the request;

-- FBI Special Agents and Attorneys at Headquarters ensure that the form contains all required information and finish the form;

-- The Director of the Agency certifies that the information being sought is necessary to protect the U.S. against actual potential attacks, spying, or international terrorism and cannot be obtained by normal investigative techniques;

-- At the Justice Department, lawyers in the Office of Intelligence Policy and Review draft a formal application based on the request;

-- The Attorney General reviews and approves the application.

After the above steps are completed, the Attorney General may authorize an emergency order for a 72-hour period if he determines that there is a "factual basis" to believe that the order would be consistent with FISA, but if a FISA Court order cannot be obtained within that time the information obtained from the surveillance may not be used. Once the application is before the Court it must determine that there is probable cause to believe that the targeted individual is involved in terrorism or spying, that the information sought is necessary to protect the country against terrorism, and that the minimization procedures are appropriate.

Applying the understandably case-by-case deliberative tool of the FISA Court to the need very rapidly to map the electronic battlefield of the current war is even more of a misfit than applying the rules of sailboat racing to a race between aircraft traveling several times the speed of sound. In my view it is not that an amended FISA procedure is necessary, it is that the case-by-case deliberation for which courts are designed and well-suited is not the right tool for providing a check on the type of electronic surveillance that is the subject of these hearings. Neither the Attorney General nor the FISA Court can usefully deliberate and decide almost instantaneously whether there is probable cause to believe that an individual is an agent of a foreign power or terrorist organization if the government does not even know the name associated with a cell phone or email address. More basically, this issue of probable cause is a law enforcement question, not an intelligence question. We may learn at least as much of importance if the individual being called from an al Qaeda site overseas is a dupe or the subject of a false flag operation by terrorists and is not their agent at all. And if one tries to fit this battlefield electronic mapping operation into the FISA warrant process, then as Judge Posner has pointed out (WSJ Feb. 15, 2006) – e.g. if one lowers the warrant requirement to one of only "reasonable suspicion" or even whether an intercept "might yield useful information" -- then one rapidly approaches the point where the warrant process ceases to be a filter and judges have no basis for refusing to grant applications. It is not just that rapid mapping of the electronic battlefield doesn't fit the FISA warrant process well, it does not fit it at all.

One Possible Formulation for Checking and Balancing the President's Authority.

Having said that I believe that present program as described publicly by General Hayden is within the scope of the President's Article II powers and that the FISA Court is not an appropriate tool with which to regulate it, there is still an important issue for the long run regarding oversight of this program. It is summed up, Mr. Chairman, by your statement on this subject that "[t]he whole history of America is a history of balance" and by Senator Graham's observation that we stand at the edge of a fundamental test for our Constitution. We are indeed in a Long War, one to be fought in part in this country, and we will have to take some steps --

such as this surveillance program -- to protect our security. But we cannot forget that we may have to live with the system that is now being devised for decades. We should try to ensure that there is oversight of the program by Congress and that it occurs in an agreed and reasonable manner to guard against abuses. But we should also ensure that the method of oversight does not widely disseminate, even within the Congress, extremely sensitive material that if leaked could severely endanger not only our ability to fight this war but our very existence.

In this context I find a great deal of merit in the interesting proposal recently set forth in the opinion piece by Judge Posner noted above. It includes:

- a statutory declaration of national emergency (I would suggest that this cover terrorism from more potential sources than does the AUMF of September 2001) and authorization of "national security electronic surveillance" outside FISA, in which "national security" is narrowly defined;

- a Presidential declaration that such surveillance is necessary;

- a bar against using information obtained under such national security electronic surveillance as evidence or leads in cases involving crimes other than terrorism;

- a continued requirement for FISA warrants under a probable cause standard for physical searches and for the type of electronic surveillance for which FISA was designed;

- an annual certification from the executive branch that there have been no violations of the statute during the previous year;

- a bar against lawsuits challenging the legality of the national security electronic surveillance; and

- a five-year sunset provision.

The only point on which I would depart from Judge Posner's proposal is his concept that reports about the national security electronic surveillance be submitted twice a year by NSA to the FISA Court. I would instead suggest that those reports be submitted to the Steering Committee for National Security Surveillance that he also proposes creating: the Attorney General, the DNI, the Secretary of Homeland Security, and a senior or retired federal judge or justice appointed by the Chief Justice. One might reasonably require periodic meetings between this Steering Committee and the eight senior members of the House and Senate (including four Intelligence Committee members) who serve a similar oversight function regarding some CIA covert actions; the eight might also meet periodically on the program with the Director of NSA. I would suggest that the FISA Court not be asked to oversee or make any judgments about a warrantless intelligence collection program. Foreign intelligence collection is not where courts' expertise lies.

For the duration of what may be a very long war I believe it is important both that the President be free to conduct warrantless national security electronic surveillance and that the Executive branch see some institutionalized Congressional check on his exercise of that power. I think this would be useful in deterring any abuse should such ever prove tempting to an Executive branch official. Adopting Judge Posner's approach (with or without the change I

suggest) might well still leave the Executive and the Congress at odds over the question of how far the President's inherent Article II powers reach; certainly a veto of a bill embodying such an approach is imaginable. But it is also possible that each of the two branches might be satisfied with less than a full loaf in practice even while each holds a different view in principle regarding the reach of the President's Article II authority. That is, after all, where the founders left the issue: that with regard to Executive and Congressional roles regarding war powers our Constitution is "an invitation to struggle". The objective should be for both branches to handle this current issue in such a way that, to the extent possible, both our security and our privacy are protected and we ensure that the struggle continues.

NSA III: WARTIME EXECUTIVE POWERS AND THE FISA COURT

TUESDAY, MARCH 28, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, DeWine, Graham, Leahy, Kennedy, Biden, Feinstein, Feingold and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Ladies and gentlemen, it is 9:30 and the Judiciary Committee will now proceed with this hearing, captioned, Wartime Executive Powers of the President of the United States and the Foreign Intelligence Surveillance Court.

We will be hearing today from two distinguished panels, the first consisting of judges who have had extensive experience with the Foreign Intelligence Surveillance Act, or who have been on the Foreign Intelligence Surveillance Court, and the fifth a key participant in the initial interpretation of the Foreign Intelligence Surveillance Act.

This is the third hearing by the Judiciary Committee on this subject. Earlier this month we heard from the Attorney General, and a second hearing, a panel of experts, and the central thrust of this hearing is to determine what judicial review, if any, should be accorded the electronic surveillance program, which the President of the United States has disclosed.

There is a contention by the administration that the Foreign Intelligence Surveillance Act was amended by the resolution authorizing the use of force on September 14th, 2001. After extensive hearings, it is widely viewed that the Foreign Intelligence Surveillance Act has been violated. That is my view, because the Act provides that the exclusive remedy for electronic surveillance in the United States must be preceded by a warrant of authorization by the FISA Court or with an exception, 72 hours afterward, on an emergency situation.

There is a second issue as to whether the President has inherent authority as Commander in Chief, to conduct the electronic surveillance. That, as I see it, would require knowing what the program is. It may well be that the program is within the President's inherent authority, but it seems to me that that determination has to

be made in accordance with the tradition in America, by a court, by a judicial review.

Our hearing today will take up the legislation which I have introduced, which essentially provides that the administration will have to submit the program to the Foreign Intelligence Surveillance Court, and the Court will make a determination as to constitutionality. The President says he is unwilling to share the information with the Intelligence Committees, as mandated by the National Security Act of 1947 because Congress leaks. That certainly is true, but so does the White House. But the FISA Court has an unblemished record of integrity and ability to maintain a secret, and they have the expertise to do the job.

There has been recently created a Subcommittee on the Intelligence Committee of the U.S. Senate, none yet in the House. There is a controversy with some saying that they will not have a Subcommittee because the statute says that the review should be by the full committee, so we will wait to see what happens.

There has been legislation introduced by Senator DeWine, which provides that the administration may conduct electronic surveillance without restraint for 45 days, and then at the end of 45 days, if there is sufficient evidence to go the FISA Court, they go there, but if there is not, then they go to the subcommittee of the Intelligence Committee. In my view, the subcommittee of the Intelligence Committee is no substitute for judicial review.

These are, obviously, very, very weighty considerations. There is no doubt about the tremendous threat posed by al Qaeda to the security of the United States. That is a given, and recognized everywhere in the wake of the calamity on September 11, 2001, and we do need to be secure, and we want the President to have the authority he needs. But this is a shared responsibility, as the Supreme Court has made clear. The President has extensive executive authority under Article II, but the Congress has extensive authority in the premises under Article I. And the arbiter under our system of laws are the courts, ultimately the Supreme Court of the United States.

We have a very unusual panel here today, judges who have experience on the FISA Court, who recognize the importance of security and the importance of law enforcement, but also recognize the importance of civil liberties, and the work which they have done on that court.

Let me yield at this point to the distinguished ranking member, Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. I thank you for holding the hearing. We desperately need some answers to the basic questions about the President's decision to wiretap Americans on American soil without court approval, without attempting to comply with the Foreign Intelligence Surveillance Act.

More than 3 months and two Committee hearings after the President was forced to acknowledge the program's existence, this Committee remains in the dark with regards to nearly every aspect

of the program. As Senator Specter succinctly put it recently, we are still flying blind on a great deal of this.

We had our first hearing on February 6th with Attorney General Gonzales, and his testimony was more obstructionist than enlightening. He flatly refused to discuss anything beyond those facts the President has publicly confirmed, nothing more. In other words, he would not tell us anything more than what we just read in the papers, and the stonewalling has gotten worse since then.

Three weeks later, the Attorney General wrote an extraordinary letter to Chairman Specter, seeking to alter his live, televised testimony; meaning to make it even less responsive. That letter raised serious additional concerns about the scope of the administration's domestic spying activities, his shifting legal rationalizations, and of course, the Attorney General's own credibility. His letter admits that the Department's legal analysis has evolved over time. In other words, they had one reason when they started, changed the reason when it became public, and again, refused to answer the basic factual question of when the administration came out with its theory that the congressional resolution authorizing military force against al Qaeda and the attempt to reach Osama bin Laden, a failed attempt to reach him in Afghanistan, authorized warrantless domestic wiretapping of Americans.

I can only infer that their theory was concocted long after they decided to ignore the law, and in my 32 years in the Senate, I have never seen anything like this ever.

To fulfill our legislative function, we need to know what other invasions into American rights and privacy the administration believes were authorized and why, but they continue to stonewall.

We received a response late last Friday to the priority questions we sent the Attorney General following his appearance on February 6. We got a response. We did not get any answers, but to virtually every question we got a response that was some version of, "We cannot answer," "We are not able to answer," "We are not in a position to answer," "It would be inappropriate for us to answer." In other words, take a long walk off a short pier.

We had a second hearing on this program on February 28th. That was an academic panel with scholars. All of this is good discussion, but it is not oversight because they have no knowledge what is in the program.

And our hearing today is somewhat the same. Our witnesses are experts in the Foreign Intelligence Surveillance Act, probably the best experts in the country, but they have no special knowledge of the President's program to wiretap Americans outside the Act. They cannot tell us any more than the very little we already know about what this administration has been doing under its theory of limitless Executive power.

So we have an impasse. We have an administration that says we have the power to do whatever we want to do, and actually the Congress and the courts are irrelevant. That, of course, is nothing new from an obsessively secretive administration. It has classified historical documents, documents that have been out in the public for years, are suddenly being yanked out of the Archives and marked "classified." They have conducted energy policy and attempted to outsource port security behind closed doors. It routinely

blocked investigations and audits. They repeatedly harass whistleblowers. They have dismissively refused to cooperate with congressional oversight for more than 5 years. They have a paranoid aversion to openness and accountability. They tell us, we will not tell you enough to do meaningful oversight of what we are doing, just trust us.

How do we trust an administration when every day there is more evidence of its incompetence, including yesterday's revelation that our borders, even though they spent billions of dollars extra, our borders are not even secure from the simplest scheme to smuggle in a dirty bomb? How do we move forward to protect the security and rights and freedoms of the American people?

I think first, if the rule of law means anything, we have to insist on real oversight and real accountability. The Chairman said it was a struggle to try to find out what the program is. We do not need to struggle. We have the constitutional right to compel information from this administration by subpoena.

During the last 2 years of the Clinton administration, this Committee approved the issuance of more than a dozen subpoenas to the Department of Justice and former DOJ officials, both for documents, including legal memoranda, and for live testimony. So the question is whether we can do the same thing when it is a Republican administration.

Second, if there is a real need for legislation to ease existing restrictions under FISA, we should, of course, pass it, as we have done before, on a bipartisan basis, and we have done this with numerous powers requested by the administration over the past 5 years, but we should not rush into that until we know it is happening.

And finally, in discussing legislation, we should collectively draw a line. No new powers should be given to this administration until we secure a firm assurance they will faithfully execute and abide by the laws as written. We have seen them say they will not do that in the PATRIOT Act, even though we passed it. They will not do it under FISA even though we passed it. And as George Will pointed out, all those debates have been a meaningless charade if the administration's monarchical assertions of essentially unfettered Presidential power are taken seriously.

So we are not here to play charades. We are here to legislate the law of the land, and I think at the very least, before we legislate, we ought to know what is going on. Nobody in this room really does.

Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

Before proceeding to the first witness, I want to read the first paragraph of a letter from Judge James Robertson of the United States District Court for the District of Columbia, who had been a member of the FISA Court, and shortly after the surveillance program was announced, Judge Robertson resigned from the FISA Court, so to say that he resigned because of the surveillance program. That has not been confirmed by Judge Robertson, but he had

been a member of the Court and he did resign, and that time sequence is a matter of record.

Without objection, I will put his entire letter to me, dated March 23rd, 2006 in the record, but I want to read the first paragraph where he endorses the legislation which I have proposed to give the FISA Court authority to review the electronic surveillance program. Judge Robertson writes as follows: "Thank you for soliciting my views on your proposal, which I support, to give approval authority over the administration's electronic surveillance program to the Foreign Intelligence Surveillance Court. Seeking judicial approval for Government activities that implicate constitutional guarantees is, of course, the American way, but prudence in the handling of sensitive classified material suggests that only a limited number of judges should have the job. The Foreign Intelligence Surveillance Court is best situated to review the surveillance program. The judges are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record."

We turn now to our first witness, who is Magistrate Judge Allan Kornblum. The five judges met with me briefly this morning, and nominated and elected unanimously, Judge Kornblum to be the lead witness, and that has been done because of his very, very extensive experience with the FISA Court. The other judges will appear in alphabetical order.

Judge Kornblum has an extraordinary academic record, a bachelor's degree from Michigan State University, a master's in public affairs from the Princeton University Woodrow Wilson School, a Ph.D. from Princeton in 1973. Then he served in the Department of Justice, and from 1979 to 1998, served as Deputy Counsel for Intelligence Operations at the Office of Intelligence Policy and Review, and for the 2 years from 1998 to 2000, as Senior Counsel. And during that time he supervised the preparation of more than 10,000 FISA warrant applications, and is, I think, easily the most experienced person ever on the issues of the FISA Court.

It is our custom, Judge Kornblum, to set the clock at 5 o'clock—5 minutes—we had a long session yesterday. Before you give your testimony, it is our practice to swear witnesses. I would ask you all to rise.

Do all of you solemnly swear that the testimony you will give to the Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you, God?

Judge KORNBLUM. I do.

Judge BAKER. I do.

Judge BROTMAN. I do.

Judge KEENAN. I do.

Judge STAFFORD. I do.

Chairman SPECTER. May the record show that each of the judges has answered in the affirmative.

Judge Kornblum, you have an extensive background on the FISA Court, and you are going to be giving an extensive overview, and as I say, it is our custom to set the clock at 5 minutes, but we would expect you to take more time as you need it, to give a full statement of the background and operation of the FISA Court and the analysis of the pending legislation by Senator DeWine and myself.

The floor is yours.

**STATEMENT OF HON. ALLAN KORNBLUM, MAGISTRATE
JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DIS-
TRICT OF FLORIDA, GAINESVILLE, FLORIDA**

Judge KORNBLUM. Thank you, Senator. I want to first express to you the humility that we feel, the five of us, at having the privilege to comment on this extraordinary proposed legislation, and I will be forthcoming and direct, but first I need to make two disclaimers. You should appreciate that we are not here to testify on behalf of the Federal Judiciary or the Judicial Conference, and we are not here to testify in any way representing the Foreign Intelligence Surveillance Court.

I will take up three points in my introductory remarks, the importance of the FISA statute, the value of the proposal that you have made in the National Security Surveillance Act of 2006, and I will also take up the question of Presidential authority to authorize warrantless surveillance of Americans. I would point out that I have carefully chosen the word "Presidential authority" because I exercise that authority through a number of Attorneys General for almost 20 years, and further disclaim that we will not be testifying today with regard to the present program implemented by President Bush. The main reason we are not going to discuss that program is because we have never been briefed on it, we do not know what it involves, and we are not in a position to comment intelligently about it.

I would also like to begin with our bottom line. Many judicial decisions begin with the court's holding, and so I would like to tell you right up front where we come out on these issues.

We believe that the Fourth Amendment permits the Congress to empower the President to seek judicial warrants targeting networks of communications of terrorists abroad used by persons who are engaged in international terrorism or activities in preparation therefore, which is the FISA standard, without having specific probable cause for all of those in the terrorist network, including incidental collection of U.S. person communications, balanced by stringent minimization procedures enforced by the FISA Court. That is the sort of holding that we have come to, and the position which I will argue in the next 10 or 12 minutes.

I would like to point out that I was very privileged in 1978 to be appointed by Attorney General Griffin Bell to handle all of the FBI and NSA warrantless surveillance applications, and subsequently, the Foreign Intelligence Surveillance Act. The purpose of our testimony today will be to assist the Committee in legislating I this field.

Because of my extensive experience in implementing the FISA statute from its inception in 1978, and my close lurking relationships with the FBI and NSA for more than 20 years, I am at a unique position to fully inform the Committee. "Fully inform" is the statutory provision in FISA, which I carried out for a number of years as the Deputy Counsel for Intelligence Operations. My presentation today is not going to be an academic discussion, but actually a discussion of my personal experiences, that is, I am going to

be testifying from the things that I know happened of my own personal knowledge.

I would like to begin by emphasizing one critical point. The FISA statute has been the most successful foreign intelligence program the United States has had since the code-breaking operations of World War II, the deciphering of the Japanese codes and the German codes. It has allowed the intelligence agencies to conduct intelligence activities beyond what they ever expected, and to succeed in many ways which have never been revealed, because in the intelligence business, your success is measured by the fact that these things are never disclosed.

I have also been involved in litigating more than 80 cases involving the FISA statute, and that also came to the Office of Intelligence Policy and Review, OIPR for short, and our office worked with the criminal division in preparing the briefs, both for the district courts and the appellate courts, on issues relating to FISA. I was very proud of the fact that there were more than 80 district and circuit court decisions upholding the constitutionality of the FISA statute and its use by the FBI and NSA. In my experience, the success of the FISA statute has been due to the professional efforts of hundreds of FBI agents and NSA officials, of numerous Department of Justice lawyers, of six Councils for Intelligence Policy, who I served under, and eight Attorneys General, who I served under, and not to mention the 30 or 35 Federal District Judges, such as those before you today, who have served on the FISA Court.

I also want to emphasize that the real success of the FISA statute is that it has proven indisputably that intelligence and counterintelligence activities are fully enhanced by the rule of law, and in fact, are fully compatible with the rule of law.

The final introductory point I would make is that the legal protections afforded to FBI agents and NSA personnel, and all of the others involved in clandestine collection and counterintelligence activities is under-appreciated by many people, but it is not under-appreciated by the men and women working for the FBI and NSA and the other intelligence agencies in the field.

Having said that, I would now like to turn to Senator Specter's bill and discuss specifically some of the provisions and the constitutional framework why we believe that the statement I made a few moments ago about surveillance of communications networks, terrorist communications networks, is constitutional.

As you know, the Fourth Amendment bars unreasonable searches and seizures, and the term "unreasonable" is the overarching concept. The substantive requirements of the Fourth Amendment are for probable cause and particularity. That standard of reasonableness applies to both substantive provisions, that is, what is probable cause and what is sufficient particularity are subject to the standard of reasonableness which the Supreme Court has indicated is subject to different standards, that is, the standards under the Fourth Amendment for criminal warrants, for arrest warrants, may be different from those necessary for foreign intelligence collection and counterintelligence investigations.

Just to clarify that, NSA, the National Security Agency, is in the foreign intelligence business. They are concerned with the plans, capabilities, intentions of foreign governments. The FBI is con-

cerned with counterintelligence work, with countering the efforts of hostile intelligence services and terrorists in the United States and abroad.

The definitions in FISA include a definition of international terrorism, as well as definitions of clandestine intelligence activities and terrorist organizations. The critical thing about terrorist organizations is that they bear a remarkable similarity to foreign governments. They have large numbers of people. They operate clandestinely. They have training facilities. They have weapons and munitions. And today, they use the worldwide network of sophisticated communications to further their terrorist plans.

The intelligence activities at issue in the proposed bill from Senator Specter, that is, Surveillance of Terrorist Communications Networks, are directed at foreign powers and their agents. They include primarily collection abroad. But since the networks are undetermined when these surveillances begin, it is not unreasonable to expect that some of those communications may come to persons in the United States. Based on my personal experience, I would think that they are relatively small in number. However, they are extremely important because communications to the United States from terrorist networks abroad would signal a presence in the United States of terrorist cells, as well as a forthcoming attack on the United States.

In the 1972 landmark decision of *U.S. v. U.S. District Court*, after striking down the executive branch's warrantless surveillance program—by the way, in that case, it was a bombing case in Ann Arbor, Michigan of a CIA recruiting station. Nevertheless, the Supreme Court struck it down, but in doing so, the Supreme Court sent a signal to the Congress. The Supreme Court said that the Fourth Amendment was highly flexible, and that the standard for criminal, what they call ordinary crimes, what I would call traditional law enforcement, need not be the same as that for foreign intelligence collection, and that different standards for different Government purposes are compatible with the Fourth Amendment. That decision served as the basis for the FISA statute.

There was actually a FISA statute from 1976, supported by Attorney General Levi and President Ford, that never passed. It was the Act of 1978, championed by Attorney General Griffin Bell and President Carter that actually passed, when I became to be involved in these intelligence activities. The reason I got involved is I was originally hired in 1975 to write the FBI's guidelines for domestic security and counterintelligence work. When that was done, some staff unit was necessary to apply the guidelines and then to handle the warrantless surveillances, and then the FISA surveillances. So I turned out to be the natural repository for that authority.

Because of the differences between traditional enforcement and the intelligence gathering requirements of the Fourth Amendment, the standard for intelligence gathering may be substantially different from those of traditional law enforcement. Notice I have used the word "different," not "lower." In other words, under Rule 41 of the Federal Rules of Criminal Procedure, if you want an arrest warrant, you must convince a judge there is probable cause to believe that somebody has committed a crime, and then you must

particularly describe that person. If you want a search warrant, you need probable cause to believe that the place to be searched contains the contraband of illegal substances, and you must describe that place with particularity.

Under the FISA statute, you need probable cause to believe that someone is a foreign power or an agent of a foreign power. You must also describe with some particularity what you want to seize, and in the case of FISA, what you want to seize is foreign intelligence information.

One of the critical factors of this is that the information, which is often foreign intelligence, can often be considered criminal evidence. That has always been a complicating factor in the operation of the FISA statute. I think that for the purpose of Senator Specter's bill, the critical factor here is that, in targeting terrorist communications networks abroad and applying the standard of reasonableness, you have to look at the fact that the terrorists are located outside the United States. They are overseas in foreign lands, using foreign languages and modern modes of communications to carry out their terrorism. Thus, it would be unreasonable to expect U.S. intelligence agencies to know in advance the identity or identities of all of the people in these intelligence networks, where they are located, what their telephone numbers are, what their e-mail addresses are. Indeed, this is the very purpose of the surveillances, to identify these people and neutralize their terrorist activities.

As I mentioned, U.S. persons may be in the network or chain of communications of known terrorists, but there will undoubtedly be many other people in the communications network who are known to the intelligence agencies. Some of them may include U.S. persons; thus, it is perfectly logical and reasonable to expect that, although the program is targeted against terrorist networks abroad, communications may come to the United States and are of great intelligence interest.

The situation is not unlike things I have seen as a magistrate judge in drug trafficking, where the DEA and State officers are able to secure a cell phone used by a drug dealer. They look at the records of the cell phone. They see he has talked to other cell phones. And the people on those cell phones have talked to other people on cell phones. And so the DEA begins to track all of the people to identify the people in the network of drug trafficking. But until you get the records from the communications companies that keep these phone records, until you determine what the pattern of operation is, until you determine the identities of these people, it can take more than a year. And that was a case I recently saw in Gainesville.

However, we do not have that time in dealing with international terrorism. Thus, as phone communications or e-mail communications are moving rapidly in international commerce, the intelligence agencies need to follow those communications without coming back to the FISA Court to specifically identify each individual in the network the way the law enforcement officers do in the drug-trafficking networks. And that is where I ended up a few minutes ago; that is, the Fourth Amendment permits Congress to empower the President to seek judicial warrants targeting networks of communications of terrorists abroad without having specific probable

cause for all of those in the network, including the incidental collection of U.S. person communications. And the critical factor here is the reasonableness standard in the Fourth Amendment.

The Fourth Amendment is not a suicide pact. It is intended to be a check on Government authority, and what is required is a reasonable application of that authority. And so when you are dealing with these communications networks worldwide—Saudi Arabia, Pakistan, Dubai, and all the countries in Southeast Asia—we cannot—that is, U.S. intelligence cannot know who all these people are and come to court, and each time someone is identified in the network, to rush back in the next morning and come to court. So the Government and the intelligence community needs a reasonable amount of time to gather this information and analyze and determine who are the real terrorists and who are the people who are being contacted but not necessarily involved in terrorism.

These collection programs would be primarily focused on networks outside the U.S., supported by probable cause. I believe your bill calls for identifying at least one person in the network, but not requiring the identification of all of the persons in the network. And we support that basic concept because it would be unreasonable to expect the Government to have that information and present it to the judges. But balanced against that broad collection is restrictive minimization procedures, and I don't think many people understand what minimization procedures are, and so I am going to explain them. It is not a difficult concept.

Most foreign intelligence information is collected in foreign languages. Much of it is encoded or encrypted or uses vague concepts. For example, terrorists might say, "Is everything ready for the wedding? Have all the presents for the wedding been gathered?" when referring to terrorist activities. So the first step in minimization is that the information collected, whether in an electronic surveillance or a search, needs to be translated or decoded and put into an intelligible form. Once it is in an intelligible form, then the intelligence agencies can make an analysis. Is it foreign intelligence information? And if so, how does it fit into the big picture? And if it is not, then we should not be keeping it.

Thus, in discussing this with your staff, I suggested some changes to the bill, simple ones. For example, in Section 701, where it talks about program, it is often misleading, and some people, I think, have misunderstood the purpose of the bill to think that the bill would allow targeting of just generic programs as opposed to specific terrorist networks. So when the definition of your program in Section 701(5), where it says, "The term 'electronic surveillance program' means a program to engage in electronic surveillance," I would add "targeting terrorist communications networks." That is what the program is about—"targeting terrorist communications networks."

Chairman SPECTER. Judge Kornblum, how much more time do you think you will require?

Judge KORNBLUM. Five minutes?

Chairman SPECTER. Thank you.

Judge KORNBLUM. I can stop now if you—

Chairman SPECTER. No. Proceed. Five minutes would be fine.

Judge KORNBLUM. I wrote the original sets of minimization procedures, which have been in use by the FBI and NSA since 1978. They have been amended from time to time to deal with new problems. But what I would see is, under your statute, broad collection, including incidental collection of Americans, if that should come about, but with stringent minimization at the end of the surveillance period. That is, if the information is determined not to be foreign intelligence, it should be discarded. If it is foreign intelligence, it should be used to produce additional applications in a FISA Court. But there is going to be a large body of information about which the intelligence community would not have had an opportunity to do a complete analysis and determine if it is foreign intelligence. In those cases, I would allow the Government to come to the FISA Court and seek a motion to allow the Government to continue to retain the information for continued analysis until such time with continuing Court approval.

And I will now just spend a few minutes talking about Presidential authority. Again, I am not talking about the President's program.

Presidential authority to conduct wireless surveillance in the United States I believe exists, but it is not the President's job to determine what that authority is. It is the job of the judiciary. Just as the judiciary determines the extent of Congress's authority to legislate, so it determines the Executive's authority to carry out his executive responsibilities. The President's intelligence authorities come from three brief elements in Article II: the Executive power is vested exclusively in the President; so is much of the responsibility as commander in chief; as well as his responsibility to conduct foreign affairs. All three are the underpinnings for the President's intelligence authorities. Most of the authority I see referred to in the press calls it "inherent authority." I am very wary of inherent authority. It sounds like King George. It sounds like the kind of authority that comes to the head of a nation through international law.

As you know, in Article I, section 8, Congress has enumerated powers as well as the power to legislate all enactments necessary and proper to their specific authorities, and I believe that is what the President has, similar authority to take executive action necessary and proper to carry out his enumerated responsibilities of which today we are only talking about surveillance of Americans.

Again, I emphasize that it is the judicial decisions that define the President's authority. These decisions pre-date the FISA statute, and I was reviewing the FBI and NSA applications for wireless surveillance. Those surveillances by law were transferred to the FISA Court in 1978, and actually when it began in May 1979. However, the FISA statute has very specific definitions, and there are intelligence activities that fall outside the FISA statute. Those activities went forward and have continued to this day and are still being done under the President's authorities set forth in the Executive orders describing U.S. intelligence activities.

There were three orders: President Ford's Order, 11905; President Carter's Order, 12036; and the current Order, 12333, which was issued by President Reagan in December of 1981. That Order has been used by all of the Presidents following President Reagan

without change, and I was responsible for processing those applications. They go to the Attorney General based on the delegation of authority. I have asked the staff to give you a copy of the current Executive order, and that is the authority that is being used today to some extent.

The Presidential authority that is being used today is being used unilaterally. I think all of the judges agree with me that when the President operates unilaterally, his power is at its lowest ebb, as has been mentioned in judicial decisions. But when Congress passes a law, such as one authorizing the surveillance program targeting communications networks, when the Congress does that and the judiciary has a role in overseeing it, then the executive branch's authority is at its maximum. What that means is they can do things, I believe, under an amended FISA statute that they cannot do now.

For example, the President's program says that the President reviews it every 45 days, but I would think, if Congress authorized the program and the Court oversaw it, that the surveillance programs could run for 90 days.

Chairman SPECTER. Judge Kornblum, would you summarize at this point?

Judge KORNBLUM. I will go back to what I started with, that I think and the judges all think that Congress can empower the President to conduct broad foreign intelligence surveillance programs targeting the communications networks of terrorists abroad, that the program can be monitored effectively by the FISA Court, that security can be maintained, and the bottom line would be an enhanced foreign intelligence collection program.

Chairman SPECTER. Thank you very much, Judge Kornblum.

Senator FEINGOLD. Mr. Chairman, could I just have 30 seconds? I just need to explain why I have to leave at this point, if I could. I would appreciate it, Mr. Chairman. I just want 30 seconds.

Chairman SPECTER. Go ahead.

Senator FEINGOLD. I was on the bipartisan delegation that went to Iraq this week, and the President has asked that we come to the White House now to brief him on that. Obviously, I regard this hearing as extremely important, and I am keeping an open mind on the Chairman's legislative idea. I just want to comment, after having listened to Judge Kornblum, and I will have to read the transcript with regard to the others.

I don't think anyone could reasonably take what the judge has said to suggest that there is legal authority for what—

Chairman SPECTER. Senator Feingold—

Senator FEINGOLD [continuing]. The President is doing now.

Chairman SPECTER. Senator Feingold, if you—

Senator FEINGOLD. That is all I—

Chairman SPECTER [continuing]. Want to explain your departure, we understand that.

Senator FEINGOLD. I just wanted to put that on the record.

Chairman SPECTER. But we do want to proceed in an orderly way here, and everybody is waiting to have a turn to comment.

Let us turn now to Judge Baker, who received his bachelor's degree from the University of Illinois, his law degree from the University of Illinois College of Law, appointed to the United States

District Court for the Eastern District of Illinois in 1978, served as Chief Judge from 1984 to 1991, was given senior status in 1994, and was appointed a judge on the U.S. Foreign Intelligence Surveillance Court in 1998 by Chief Justice Rehnquist.

Judge Baker, thank you very much for the very thoughtful analysis which you have provided to the Committee, and we look forward to your testimony.

STATEMENT OF HON. HAROLD A. BAKER, JUDGE, U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, URBANA, ILLINOIS

Judge BAKER. Thank you, Mr. Chairman, and I want to express my—this is not on? I will start again. Thank you, Mr. Chairman, and I want to express my appreciation for the privilege of being asked to come here and speak to the Committee.

Like the other judges, I am only speaking individually. I am not expressing opinions on behalf of the FISA Court or its members, as they are presently constituted. And what I hope to comment on is in a constructive manner to strengthen Senator Specter's bill and the functions of the FISA Court, to strengthen the FISA Court. What Judge Kornblum said about the FISA Court being an invaluable tool to the intelligence community bears emphasis.

The FISA statute—I suppose I only tell you what you know—is the compromise that was worked out between the congressional right of oversight and the powers of the Executive in gathering foreign intelligence. And it ends up being a balance between the constitutional construction and pragmatic necessities. It ended up that the intelligence community needed court orders in order to gain access to the carriers, the communications carriers.

One of the problems that seems to arise—and I mentioned this to Senator Specter—is the lack of understanding, it is amazing to me, on the part of the Justice Department and the intelligence community as to what probable cause has to be. They have some idea that probable cause is a high bar that they have to cross, and in foreign intelligence matters, it is not. And if they go read *Illinois v. Gates* and *Maryland v. Pringle*, where first Justice Rehnquist and, finally, in the *Pringle* case Chief Justice Rehnquist elaborates further, it comes down to a very practical, common-sense decision which in the case of foreign intelligence boils down to just a reasonable suspicion.

The other aspect in the statute that bears discussing is minimization, and also, like determination of probable cause, minimization should be a judicial decision, an oversight by the judiciary of what the Executive is doing.

I should call the attention of the Committee to the *In Re Sealed* decision that was decided by the FISA Court of Review, which put two limitations on the FISA Court that exist now: first, in determining probable cause, saying that except for clear error, the Court should not look past the determination by the Executive of the existence of probable cause to think the communications would contain foreign intelligence; and the other was that minimization is not or should not be solely a function for the Executive, and that it is subject to review, that the minimization standards established

by the Attorney General are reasonable and intended to protect Fourth Amendment rights of United States persons.

The point I wanted to stress—and I did with Senator Specter in my letter to him—was that the Congress should tell what its intention is, specifically what its intention is with regard to who has the right to decide probable cause, who has the right of oversight of minimization. And I see the clock ticking away. I think I am in an appellate court again. I would be delighted to answer questions that may be put to me by members of the Committee.

Thank you, Senator.

Chairman SPECTER. Thank you very much, Judge Baker.

Our next witness is Judge Stanley Brotman from the United States District Court of New Jersey, appointed there in 1975, bachelor's from Yale, law degree from Harvard, served in the Counter-intelligence Corps in Office of Strategic Services in World War II and in the Korean War in Armed Forces Security, a member of the FISA Court from 1997 until 2004.

Thank you for coming to Washington today, Judge Brotman, and we look forward to your testimony.

STATEMENT OF HON. STANLEY S. BROTMAN, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CAMDEN, NEW JERSEY

Judge BROTMAN. Thank you, Senator. Good morning, everyone.

Like the other judges, I also am honored to have been asked to appear before your Committee this morning to discuss the draft legislation entitled "The National Security Surveillance Act of 2006."

As you mentioned, I served as a member of the United States Foreign Intelligence Surveillance Court from May 1997 to May 2004. And I might add that, coincidentally, when I was recalled to active duty for the Korea campaign, I was assigned to an organization known as the Armed Forces Security Agency, which is the predecessor of the National Security Agency, only in those days it was operating solely from a military standpoint.

I feel that since the other judges will be talking a little more of the legal intricacies, I would try and give you a picture of the FISA Court as it really works, who makes it work, its composition, the type of judge who serves on the Court, who appoints that person, and such other aspects of the operative procedure that I feel can be disclosed. And it is really to give you added confidence to those who do not know or have heard very little about this Court, what this Court really is and how it approaches the issues that come before it.

Again, I also will say I am talking only for myself and not speaking for the FISA Court or any member of the FISA Court. My remarks are intended, as I said, to give you a feel for this Court.

Starting with its inception in 1978, the process of appointment to the Court was handled through the appointment of each judge by the Chief Justice of the Supreme Court of the United States. The term is a 7-year term. A judge cannot be reappointed. When his term is over, it is over.

Prior to 9/11, the Court was comprised of 7 members. Subsequent to 9/11, it was increased to its present membership of 11 members.

There is a geographic mix, an ethnic mix. Each of these judges are United States District Court Article III judges who have had extensive trial experience and have had a very, very interesting dossier.

How are the matters presented to the Court? What is the process? The process is by an application submitted by the requesting party's authority, passed through various stages of review within that particular authority, by the Attorney General and others, and then it is filed with the Court. In other words, there are extensive reviews even before it reaches the Court in terms of making sure it complied with the provisions of the statute and the facts of the situation.

It is then thoroughly reviewed by the assigned judge, and the agent or representative of the applicant appear before the judge at a hearing that is held, and if there are no problems, an order is issued allowing the collection. If there are problems, the judge will raise them and send the application back for further review and presentation. The culture or the theory of the Court is we are not there to stop the collection of information. It is vital to the security of the United States. What we are there for is to help those who make the application by making sure they comply with the law, with the statute, and as I say, if they are not complying or something is lacking, we will send it back, and you resubmit it. And that discipline has grown up over the last 28 years. As I say to them, the application must meet the request of the statute and of the Congress in the legislation creating the Court. And there must be, as we review these applications, there must be a balance between the needs of the surveillance and the protection of the provisions of Article IV. This balance has already been discussed by both Allan and Harold, and I will not repeat it. But it is crucial, and that balance is not always the same. It depends on the application of what is being sought.

The judges assigned to this Court—and I think I can say this about all of them—they really have dedicated themselves to doing the job that they are there for. They recognize the security of our country is at stake. They recognize the protections due our citizens. They are hard-working. At times I was visited in my home in South Jersey 2 or 3 o'clock in the morning to sign orders. I was even found out in California where I was attending a meeting at one time.

FISA has worked, and worked well. It is a necessary Court, and its orders reflect the balance to which I have made reference. It has no axe to grind, this Court. Judicial review provides confidence to the citizens of our country to know that a court has looked on what is being sought. Times change, methodology changes, equipment changes, processes change. All these things can be and should be accommodated with the FISA Court. And, again, I say I support, as do the other judges, the proposed amendment by Senator Specter in his draft.

I thank you very much.

Chairman SPECTER. Thank you very much, Judge Brotman.

Judge BROTMAN. Sorry I went over a minute and 46 seconds.

Chairman SPECTER. You are welcome to the extra time, and beyond it, Judge Brotman. We appreciate your coming in. We are not

running stopwatches on the Court. On some other witnesses, maybe yes, but not on the Court.

We will turn now to Judge John F. Keenan from the United States District Court for the Southern District of New York, appointed in 1983. Judge Keenan is a graduate of Manhattan College, Fordham Law School, was in the Army from 1954 to 1956, an assistant district attorney in New York County to the famed prosecutor, D.A. Hogan, whom I worked with in the so-called good old days; Deputy State Attorney General and special prosecutor for corruption in the city of New York from 1976 to 1979; appointed to the Foreign Intelligence Surveillance Court in 1994 and served there until the year 2001, and he is on senior status now.

Thank you very much for joining us, Judge Keenan, and we look forward to your testimony.

STATEMENT OF HON. JOHN F. KEENAN, JUDGE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NEW YORK, NEW YORK

Judge KEENAN. As the other judges have said, it is an honor for me to have been asked by Senator Specter to appear before your Committee and testify concerning Senator Specter's proposed draft bill entitled "The National Security Surveillance Act of 2006." As you heard, I served as a member of the United States Foreign Intelligence Surveillance Court from May 1994 until May of 2001. While I was in the Army, I served in the Far East in military intelligence in the Army Security Agency, which, as Judge Brotman said, was the precursor to the National Security Agency.

During my tenure on the FISA Court, the Court consisted of seven district judges, no two of whom could be from the same circuit. We each served for 7-year terms that were staggered terms in the sense that one new judge would come on each year and one judge would go off. And those 7-year terms could not be extended.

I know that Title 50, Sections 1801 and those sections that follow, the Foreign Intelligence Surveillance Act, or FISA, was amended after September 11th and that the Court now consists of 11 district judges.

FISA was originally enacted in 1978, and it is what I will call a Fourth Amendment statute. This is because in order to secure a FISA warrant, the Attorney General must establish probable cause. However, FISA probable cause is different than probable cause in the criminal context. In a FISA application, all the Government must show is that there is probable cause to believe that the target is a foreign power or the agent of a foreign power. In the case of a FISA warrant, the seizure is of foreign intelligence information.

At present, as we have all heard here this morning, this whole area is one where there is considerable controversy and disagreement. It is not my purpose, nor do I think it appropriate, for me to allude to the politics of the subject. I respectfully suggest to you that FISA has been a valuable tool for the Nation in the collection of foreign intelligence.

FISA can be improved and it should be improved to accommodate more modern technology, which was not contemplated in 1978 when the original law was enacted. I believe your legislation, Sen-

ator Specter, with certain modifications, would improve FISA very much.

Contrary, I should say, to an editorial that appeared in the February 9, 2006, Wall Street Journal, FISA and the Foreign Intelligence Surveillance Court should not be abolished. Under Article II, section 2 of the Constitution, the Executive has great power and authority in this area, as you have already heard and as you know. So, too, does the legislature under Article I, section 8, as is recognized in your bill and as is set forth in your bill.

Whatever legislation is enacted should accord these two principles sufficient and significant recognition. It is my understanding that the legislation before you proposes to supplement the present law, not to overrule, repeal, or supplant it. I am aware that Section 1805(f) of FISA was amended to authorize the Attorney General to employ electronic surveillance to obtain foreign intelligence without a court order for 72 hours in emergency situations. It is my understanding, based on an article in the March 9th New York Times, that there is a bill in the Senate Foreign Intelligence Committee seeking to allow warrants without court orders for up to 45 days.

The National Security Surveillance Act of 2006 which is before you makes no reference to the 72-hour period and, thus, presumably leaves it in place. I would respectfully suggest that the period be increased to 7 days, or 168 hours, in emergency cases. This should be more than ample time to address any unforeseen emergencies if FISA was amended and extended to 168 hours.

The legislation before you presumably leaves in place Section 1803(b), which establishes a three-judge court of review over the FISA Court. In 2002, the review court sat for the first time and ruled at 310 Federal Reporter Third page 717 that, "FISA does not contemplate" an en banc proceeding wherein all the judges sit contemporaneously. The legislation here makes no reference to en banc proceedings, and if there is a desire on the part of your Committee—and it seems to me in certain cases it might well be valuable to be able to have en banc proceedings, and since they are now outlawed, that might be a helpful addition to the legislation.

The legislation before you in proposed Section 701 defines several terms. Among them is the term "electronic surveillance." I respectfully point out that this term is already defined in present Section 1801(f) and that there are differences in the definitions which probably should be harmonized in the new legislation.

Because of modern technology, the United States presence may well be in the network or the chain of communication of known terrorists. Concerning those terrorists, there may well be ample probable cause, but little or nothing may be known other than that he is receiving communications from the terrorists. I believe in the context of intelligence gathering that the Fourth Amendment allows Congress to empower the President to seek warrants targeting networks of communication used by people, including United States persons, where the network is engaged in terrorism, or activities related thereto, without having specific probable cause for all people in the network. I believe that your legislation, sir, accomplishes this important purpose and takes into account the sophisticated modern technology employed in present-day electronic communications while recognizing the need for minimization procedures.

Thank you very much.

[The prepared statement of Judge Keenan appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Keenan.

Our final witness on this panel is Judge William Stafford from the United States District Court for the Northern District of Florida. Judge Stafford is a transplanted Pennsylvanian, Mercer County, and his wife is from Franklin County, I was pleased to learn this morning; graduated from Temple University in 1953, bachelor's degree, and a law degree from Temple in 1956; served as a Navy lieutenant for 4 years, was State Attorney for the First Judicial Circuit of Florida, the equivalent of a district attorney, and served as United States Attorney from 1969 to 1975 for the Northern District of Florida, when he was appointed to the district court. In 1996, he took senior status, was appointed to the Foreign Intelligence Surveillance Court, where he served until the year 2003.

We welcome you here, Judge Stafford, and the floor is yours.

STATEMENT OF HON. WILLIAM STAFFORD, JR., JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA, FLORIDA

Judge STAFFORD. Mr. Chairman and members of the Committee, you have done me the honor of soliciting my comments on the draft legislation entitled "The National Security Surveillance Act of 2006." It is my judgment that these proposed amendments to the FISA statute strike a reasonable balance between the President's power to conduct foreign affairs, including electronic surveillance, and the Congress's power of oversight over the same.

By positing the power to review and/or authorize this surveillance in the FISA Court of the third branch, this legislation accommodates the power of the President to fulfill his duty to protect the Nation against terrorism from without, while the civil liberties of Americans are being watched over by judges whose lifetime appointments put them above the current political clamor.

For those of us who came of age during the cold war, the world political scene and the communications universe have changed dramatically. It is well, then, that the FISA statute, created nearly 30 years ago, be looked at and revised in the light of the world as it really is in the year 2006. When FISA was first enacted in 1978, the Congress codified the President's power to conduct foreign intelligence surveillance and the method by which that could be done. In 1984, Congress amended the FISA statute to permit physical searches under the same foreign intelligence surveillance umbrella.

The Berlin Wall has since come down, and other artificial borders have disappeared, while wireless computers, cellular telephones, and other electronic creations have reduced the communications distances to nanoseconds.

The events of September 11, 2001, and their aftermath demonstrate that while it is indeed a different world in which we now live, constitutional principles still apply, and your proposed legislation accommodates both of these verities.

Your amendments create an electronic surveillance program in which the Congress recognizes that it is "not feasible to name every

person or address every location” and requires, again quoting, “an extended period of electronic surveillance.”

This is another recognition not only of the change in the world scene and in communications abilities, but also of the difference between traditional criminal prosecution and foreign intelligence gathering. By requiring a justification for continuing the surveillance and by establishing enhanced minimization procedures, these amendments offer a reasonable approach to meeting both the need for national security and for protecting Americans’ civil liberties.

Foreign intelligence surveillance, as has been mentioned, is a different form of executive function than is law enforcement, and your proposed legislation recognizes that. In my considered opinion, it is well that a different threshold is set for the initiation and/or the continuation of foreign intelligence surveillance as contrasted to the traditional Fourth Amendment probable cause that is required in criminal search and seizure warrant applications. This is because the purposes of the intrusion and collection of information in each case is different.

In the typical Fourth Amendment search and seizure context, the individual and/or the place and/or the type of evidence are generally spelled out in the warrant application, and criminal prosecution is the end game. Under FISA, the governmental function is the gathering of foreign intelligence information. And while the intelligence gatherers are not required to turn a blind eye to violations of the criminal laws, prosecution is not the purpose for the initiation or continuation of the foreign intelligence surveillance.

Spelling out in your legislation a different level for the initiation and/or continuation of foreign intelligence surveillance has the additional benefit, Mr. Chairman, of providing guidance for those courts that may be called upon to review the product of any such foreign intelligence surveillance. Should evidence, incidentally gathered as a result of a FISA warrant, be offered in a criminal case and there be challenged as a product of an unreasonable search and seizure, it would be comforting for the trial judge and for the court of appeals judges who may have the same issue on appeal to know that Congress made the deliberate choice to set a different threshold for foreign intelligence purposes.

Illinois v. Gates has been mentioned. It is my recollection that arose in a criminal case context. And while the language of that opinion may well allow for different levels of consideration, depending upon the purpose for the warrant application, having the legislative intent clearly stated here removes any doubt as to what the Congress would authorize or sanction in the FISA context.

Choice of language to accomplish this is for you as drafters, but I respectfully suggest that if it is the will of Congress to set a different standard for foreign intelligence surveillance gathering that you do so for the benefit of the other two branches of Government and for the American people.

As I approach my 75th birthday, it remains my belief that our Nation is really held together by a couple pieces of paper—the Declaration of Independence and the Constitution—and the belief of the American people that our system of Government works. FISA was created by Congress to clarify that the President had the authority to conduct foreign intelligence surveillance, but that the

President would do so through a court composed of judges who had been nominated for lifetime appointments by a President and confirmed by the Senate, as provided in Article III of the Constitution. This arrangement seems to have worked well for everyone, and these amendments will, in my judgment, continue that arrangement into the real world of the 21st century.

Thank you, sir.

[The prepared statement of Judge Stafford appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Stafford. Very profound. The two pieces of paper, so long as we follow them, have a great tradition for balance of power and for separation of power, which we are going to the heart of today.

We will now begin the 5-minute rounds of questioning by members of the Senate, and I will begin, Judge Baker, by asking you about your testimony on minimization and establishing probable cause. And you are testifying that you think that the Foreign Intelligence Surveillance Court would be in a position to analyze the administration's program, whatever it turns out to be, to see to it that those two constitutional requirements are followed if my bill was enacted, correct?

Judge BAKER. Yes. I would urge you not to abandon the language of the Fourth Amendment of probable cause. Probable cause is the test, but there is a different probable cause that applies in a foreign intelligence case. And going back to how I feel the effectiveness of the FISA Court was limited by the *In re Sealed Case* decision saying that we should not look behind the minimization procedures, we had no right of review, I think that that is an oversight function that the Congress intended, and also that we should not look behind the determination of probable cause. Probable cause has always been a judicial determination when it comes to a warrant.

Chairman SPECTER. And that can be accomplished with the legislation which I have proposed?

Judge BAKER. Absolutely. Yes, sir.

Chairman SPECTER. Judge Stafford, you testified about the necessity for balance and cited the advances in electronic and wireless communication. And you are looking for a balance for national security and protecting civil liberties. And do you think that the legislation which I have proposed will take into account the modern technological advances and will the FISA Court review provide that kind of balance?

Judge STAFFORD. Yes, sir, I do. I think you recognize that, as I indicated, it is not possible to name everyone—and, therefore—and as previously noted, the electronics just flies around this world so quickly, and the prospect of running to the Court every time, it seems to me, is not possible.

So I think your legislation is broad enough to permit the gathering of the foreign intelligence information and the minimization procedures to strike from that anyone, particularly U.S. persons, who may not have any foreign intelligence purpose whatsoever, so their names could be eliminated.

So I think the legislation will accomplish that, Senator.

Chairman SPECTER. Judge Keenan, you have sounded a similar note, talking about technology, and the Foreign Intelligence Surveillance Act, as you testified, should accommodate those changes which we find today contrasted with 1978 when FISA was enacted. Do you think that the legislation which I have proposed will appropriately take into account those changes in technology and provide the kind of judicial review which would establish constitutionality and at the same time give appropriate balance to law enforcement?

Judge BROTMAN. Yes, I do. Was that you? I am sorry.

Chairman SPECTER. That is fine. We will get a double answer.

Judge KEENAN. I agree with Judge Brotman. I certainly—

Chairman SPECTER. Before you answer, I want to be sure we have Judge Brotman on the record. I thought I heard you say, "Yes, I do"?

Judge BROTMAN. Yes.

Chairman SPECTER. OK.

Judge BROTMAN. I was going to say something else, but I will let him answer first.

Chairman SPECTER. OK.

Judge KEENAN. I certainly do agree that the legislation serves the purpose that you suggest, and if I may, most respectfully, I would like to repeat my suggestion that the 72-hour provision be extended to 168 hours, in other words, 72 days—from 72 hours to 7 days, I am sorry, the point being that emergencies sometimes arise.

You heard from Judge Kornblum, I think, the number of steps and hurdles in a sense that the FISA application has to go through before it ever gets to the Court, and you heard it from Judge Brotman, to a judge of the Court. Emergencies do arise in life, and particularly with the type of communications we are talking about, which were never envisioned in 1978.

When you were district attorney of Philadelphia and there was a wiretap, or when Senator Kennedy was an assistant up in Massachusetts and there was a wiretap, there were two people on the wire. That is not the way it is now, and that is what has to be covered, and you are covering it.

Chairman SPECTER. Thank you, Judge Keenan.

Judge Brotman, the red light went on, and I like to observe the red light so that everybody else does. The Chairman has to be the leader on that, and we will come back to you on my next round. I yield now—

Senator LEAHY. Go ahead if you want.

Chairman SPECTER. No, no.

Senator LEAHY. Or take it from my time.

Chairman SPECTER. I want to observe the time. Senator Leahy?

Senator LEAHY. Judge Keenan, you bring back some memories for a number of us on this panel who were prosecutors. I will not go on to telling war stories. I do have a question.

It has been reported that the current presiding judge of the FISA Court, Judge Kollar-Kotelly, and her predecessor, Judge Lambreth, expressed doubts about the legality of the President's warrantless wiretapping program. Both insisted that information obtained through NSA surveillance not be used to gain warrants in the FISA Court. Do you agree with the decision of the presiding judges

to bar the Justice Department from using information obtained from this program in their FISA applications, Judge Baker?

Judge BAKER. I am not familiar with her decision on that, and I would like you to excuse me from interfering in the proceedings of the existing Court. I don't know what has been presented to them. I am really in the dark with that, and for me to give an answer on it would be wild—would be speculation.

Senator LEAHY. Judge Brotman, do you have any different answer?

Judge BROTMAN. No, I would give the same answer.

Senator LEAHY. Judge Keenan?

Judge KEENAN. I am afraid, Senator, I would give the same answer. I don't know what the program is, and I have never been briefed.

Judge STAFFORD. I agree with my colleagues, Senator Leahy.

Senator LEAHY. OK. Well, let me ask you this then: Suppose the Justice Department wanted to test the legality of the NSA program, and let's assume for the moment that the facts are as I have described them by the chief judges. If they wanted to test the legality, couldn't they do that anytime by applying for a FISA warrant based expressly on evidence obtained through the program, that is, evidence obtained through a warrantless wiretap of an American inside the United States? If you have a case where evidence is obtained through a warrantless wiretap of an American inside the United States, the Justice Department now comes forward and asks for a FISA warrant based on that, on those facts would that not put the judge in a position to consider whether the evidence was obtained lawfully?

Judge BAKER. The judge would—

Senator LEAHY. Take it as a hypothetical.

Judge BAKER. Well, the judge would have to consider whether there was probable cause to believe that a foreign power was involved and that the communication was between a foreign power and there is probable cause to believe that the recipient is an agent. That would fall within the statute, if, if, if that was present.

Senator LEAHY. And that would be—

Judge BAKER. But I don't know that that would be present.

Senator LEAHY. And that would be—and doing that would really make the determination whether it was lawfully obtained, as well as asking the questions you have just referred to?

Judge BAKER. No, because it goes beyond the question of a foreign power and the agent of the foreign power, and it is raising the question of whether the President has the authority to do such a thing. And, again, I end up saying I cannot answer it because it would amount to speculation.

Senator LEAHY. You cannot answer a question whether if the Justice Department came in applying for a FISA warrant based expressly on evidence obtained through a warrantless wiretap of an American inside the United States, you couldn't make—you couldn't ask a question whether the evidence was obtained lawfully under FISA? That doesn't seem to make a lot of sense.

I mean, I will put it another way. Suppose they came in for a warrant to search a safe deposit box, and it said we are developing our probable cause based on an earlier warrantless search of the

suspect's home. Before you issued that search warrant for the safe deposit box, wouldn't you have to at least reach a question of the legality of the search of the home?

Judge BAKER. I might come to the conclusion that there was insufficient information because the information was not reliable to find probable cause. But I don't know that I have to go back and decide what the Executive is doing is legal or illegal. And—

Senator LEAHY. Well, then, let me wind up with this. Mr. Halperin is going to testify in the next panel. He said, "Should Congress seek to legislate based on the record currently before it, such legislation should respond to the specific needs that have been asserted by the Government rather than to conjecture as to what additional needs may exist." Do you disagree with that? You are saying you want to have the facts. Isn't Mr. Halperin saying the same thing?

Judge BAKER. I guess, you know, I came to talk about the proposed legislation and how it would assist and reinforce the FISA Court and whether—what the existing situation is now, whether something is legal or illegal goes beyond that, and that is why I am shying away from answering that.

Senator LEAHY. All right. With the heads shaking, I have a feeling I would get the same answer from Judge Brotman, Judge Keenan, and Judge Stafford.

Judge BROTMAN. I would say this, Senator: that any application made to the FISA Court would have to be considered by the judge who receives that application. In the course of reviewing that application, if it doesn't meet with the statute, then the application is not granted. We have to use the information in the application and the information we have learned, and all of us become briefed on new programs, become briefed on new equipment. We see how things operate. We have to in order to do our job. But if an application comes in and does not meet what it should meet, it goes back.

Judge BAKER. Judge Kornblum reminds me, Senator Leahy, that in the Ames case, warrantless searches were disclosed to the Court, and the Court did proceed on the basis of those warrantless searches and further FISA surveillance.

Senator LEAHY. And didn't we amend FISA after that, at the request of the administration, to take care of cases like Ames?

Judge BAKER. Yes, it was amended.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch?

Senator HATCH. Well, I want to personally thank all of you for your service to our country, and we appreciate what you folks in the Federal judiciary are doing for all of us. We thank you for being here today, and we appreciate all the testimony we have had.

I am going to direct my questions to you, Judge Kornblum, if I can, and anybody else who would care to respond, it would be fine with me.

When the accusations against the President's authorization of the NSA terrorist surveillance program were put together, the picture looked something like this: The President is given a mandate from the Constitution as Commander in Chief. The Congress, in response to domestic spying by certain administrations in the 1960s, devised a legal avenue by which the administration can conduct

surveillance on Americans, and thus the FISA Court was born. Therefore, goes the argument, if the administration is to engage in any kind of surveillance, it must go through the FISA court.

One Senator described FISA like a trap, with two escape hatches. Another Senator says the FISA Court is not a tool, but the prescribed avenue which Congress has given for conducting surveillance.

Now, if this line of reasoning is true, then the authority of the President has truly been diminished through the creation of FISA—the very thing FISA was not supposed to do.

On top of that, the leak of this classified program has been hailed as “a good thing” by some Senators. Other Senators have said publicly that they would be willing to give the President the explicit authority to conduct this program if the President had just asked.

Now, I submit that when we sought to give law enforcement officers authority to use time-tested tools from years of investigating health care fraud or mail fraud, just to mention a couple of matters, under the PATRIOT Act and, under the PATRIOT Act, use those same tools in terrorism investigations, the same Senators supported a filibuster of the PATRIOT Act.

Now, this is not an administration spying on political enemies. This is a well-regulated, carefully targeted effort to stop terrorists. The administration discussed this program with several congressional Members, and apparently none of them raised issues that so many are now trying to make political hay of today. And to my knowledge, no member has publicly requested the administration to stop the program or they have not even suggested that funding for NSA should be curtailed.

Now, Senator Specter has this bill, which is a good effort, in my view, that addresses the issue of the FISA Court and the power of the President to conduct surveillance on suspected terrorists.

One of the criticisms circulating regarding this bill is the constitutionality of the proposed bill, and we are all concerned about that.

So my question to you, Judge, and any of the other judges who care to comment, is this: If the administration files a request with the FISA Court for permission to conduct something like the current terrorist surveillance program, and the request is denied, and subsequent revised requests are denied, does the administration still have the options to pursue in the effort to foil the terrorists, or should the FISA Court's decision between a constitutionality infirm advisory opinion?

Judge KORNBLUM. Well, you have overlooked the easy answer. There is a court of review, and just as back in 2001, when the administration objected to the Court's decision in *In re: All Intelligence Matters*, they appealed to the court of review, and that is the specific purpose for the court of review, so they would have a legitimate legal outlet to pursue.

Senator HATCH. Except this may be a crucial time-constraining situation where lives of Americans, maybe millions of lives of Americans may be at stake. So, again, would it be an advisory opinion, in your opinion, or would it not be?

Judge KORNBLUM. No.

Senator HATCH. Assuming that that situation is the situation, and I can tell you personally, that very well may be the situation.

Judge KORNBLUM. If the facts were presented in the form prescribed in the FISA statute, and contained specific information regarding the foreign power, the agent of a foreign power, and explained how the surveillance was going to be conducted, and met all the requirements of the FISA statute, I would not think it is an advisory opinion. It would be a case of controversy for them to decide.

Senator HATCH. Even if it involved very, very serious potential harm to millions of Americans?

Judge KORNBLUM. I am not sure I understand your question, because it seemed to me almost all the FISAs.

Senator HATCH. Let us say that we have some evidence that there is a widespread conspiracy to bring a nuclear device into America, and that the FISA Court decided that they have not met the requisites a couple of times. Is the President bound not to do anything, or is his only limitation to appeal the FISA Court's to a court of review, that might take a tremendous amount of time and might result in the loss of millions of lives?

Judge KORNBLUM. Well, of course, the President would be relying on the Attorney General and now the new National Director of Foreign Intelligence for their recommendations, and I certainly do not consider myself an expert on Presidential authority, but I could see the President deciding that using what I called his necessary and proper authority, he would assume the risk, and order the executive action necessary, such as electronic surveillance despite the Court's approval—or disapproval. And I gather that's the premise you wanted me to address.

The Court would disapprove the application, and there would be insufficient time to call in the court of review. What should the President do? Well, just as the President is now acting unilaterally, he might choose to do that. If he—

Senator HATCH. And he might be right.

Judge KORNBLUM. He might be right, yes.

Chairman SPECTER. Thank you, Senator Hatch. We will pursue that question of whether he might be right when my turn comes. [Laughter.]

Chairman SPECTER. Senator Feinstein was here under the early bird rule.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I think four of us on this Committee are also members of Intelligence, and two of us are part of the Subcommittee that has been briefed on the program, and has been out to the NSA and seen it. It was very interesting.

What you said this morning was of great help to me. Two of you have said that the probable cause standard is not a bar, but it is really lower than a Title III probable cause. It is really reasonable suspicion. Do all of you agree with that? Does anybody not agree with that, that for the collection of intelligence, the probable cause standard is really reasonable suspicion?

Judge KEENAN. I am just not comfortable with those words. The reason that I say that is the cases all talk about "probable cause." As I think we all tried to articulate, in my view, FISA probable

cause is different than criminal probable cause. All you need with FISA is to prove—not prove—to establish probable cause—

Senator FEINSTEIN. I am sorry. I cannot hear you.

Judge KEENAN. I am sorry, excuse me. All you have to do with FISA, Senator, is establish that the target is an agent of a foreign power or a foreign power, and the purpose of it is to gain foreign intelligence. Once you have done that, you have cleared the probable cause hurdle for the FISA Act. If you want to—

Senator FEINSTEIN. There are a couple of other things here that were very useful. I think the extension of the 72 hours to 7 days is very helpful. I think reviewing a program en banc is very helpful. There are a lot of contrasts that we have to deal with, and not the least of which is if you take something off a satellite, it is legal, if you take it off a wire, it is not without a warrant. And as you have adequately pointed out, the technology has changed so much that a law passed in 1978 really needs to be changed for a program as opposed to an individual warrant.

I think there is justification for a program. The question now comes on: should the probable cause or reasonable suspicion standard be exercised? It certainly seems to me that a FISA Court, sitting en banc, is one appropriate standard.

The other one comes down to probable cause or reasonable suspicion of what? Now, you have said agent of a foreign power or a foreign power, but it is also threat. It is also affiliation. I do not know that you would have sufficient probable cause in a program if it is just limited to an agent of a foreign power or a foreign power, because you are trying to develop connections, and you are trying to evaluate threat as well. Could you comment on that?

Judge BAKER. I think that all you have to do is look at *Pringle*, the most recent Supreme Court case, where they hark all the way back to Chief Justice Marshall, and say, “a seizure under circumstances which warrant suspicion,” and being the agent of the foreign power would be involved in these activities that you describe. So it seems perfectly clear to me that probable cause in such a situation is a very low bar, a very low hurdle to get over, to make a warranted surveillance.

Senator FEINSTEIN. In other words, the foreign power is outside the country. The target is in the country. You would also want to know, it seems to me, who that target called.

Judge BAKER. Precisely. No, you would go after that target too.

Senator FEINSTEIN. Right. And so there you are still agent of a foreign power, or foreign power, rather than a threat or a conspiracy?

Judge BAKER. The agent of the foreign power engaged in clandestine activities which are a threat to the United States. I mean, it is what that agent is doing that you will be looking at, or we suspect that he is doing, or she.

Senator FEINSTEIN. Thank you very much. Now, I want to clear something up. Judge Kornblum spoke about Congress’s power to pass laws to allow the President to carry out domestic electronic surveillance, and we know that FISA is the exclusive means of so doing. Is such a law, that provides both the authority and the rules for carrying out that authority, are those rules then binding on the President?

Judge KORNBLUM. No President has ever agreed to that. When the FISA statute was passed in 1978, it was not perfect harmony. The intelligence agencies were very reluctant to get involved in going to court. That reluctance changed over a short period of time, two or 3 years, when they realized they could do so much more than they had ever done before without court—

Senator FEINSTEIN. What do you think as a judge?

Judge KORNBLUM. I think—as a Magistrate Judge, not a District Judge—that a President would be remiss in exercising his constitutional authority to say that “I surrender all of my power to a statute,” and, frankly, I doubt that Congress, in a statute, can take away the President’s authority, not his inherent authority, but his necessary and proper authority.

Senator FEINSTEIN. I would like to go down the line if I could, Judge, please. Judge Baker?

Judge BAKER. I am going to pass to my colleagues since I answered before. I do not believe a President would surrender his power either.

Senator FEINSTEIN. So you do not believe a President would be bound by the rules and regulations of a statute; is that what you are saying?

Judge BAKER. No, I do not believe that, a President would say that.

Senator FEINSTEIN. That is my question.

Judge BAKER. No. I thought you were talking about the decision that the—

Senator FEINSTEIN. No. I am talking about FISA, and is a President bound by the rules and regulations of FISA?

Judge BAKER. If it is held constitutional and it is passed, I suppose, just everyone else, he is under the law too.

Senator FEINSTEIN. Judge?

Judge BROTMAN. I would feel the same thing. I would feel the same way.

Senator FEINSTEIN. Judge Keenan?

Judge KEENAN. Certainly, the President is subject to the law, but by the same token, in emergency situations, as happened in the spring of 1861, if you remember—and we all do—President Lincoln suspended the writ of habeas corpus and got into a big argument with Chief Justice Taney, but the writ was suspended. Some of you probably have read the book late-Chief Justice Rehnquist wrote, “All the Laws But One,” because in his inaugural speech—not his inaugural speech, but his speech on July 4th, 1861, President Lincoln said, essentially, “Should we follow all the laws and have them all broken because of one?”

Senator FEINSTEIN. Judge?

Judge STAFFORD. Everyone is bound by the law, but I do not believe, with all due respect, that even an Act of Congress can limit the President’s power under the Necessary and Proper Clause under the Constitution. And it is hard for me to go further on the question that you pose, but I would think that the President’s power is defined in the Constitution, and while he is bound to obey the law, I do not believe that the law can change that.

Senator FEINSTEIN. So then you all believe that FISA is essentially advisory when it comes to the President.

Judge STAFFORD. No.

Senator FEINSTEIN. But that is what—my time is up, but this is an important point.

Chairman SPECTER. Excuse me. It was four and a half minutes ago, but pursue the line to finish this question, Senator Feinstein.

Senator FEINSTEIN. I do not understand how a President cannot be bound by a law—

Judge BAKER. I could amend my answer saying that—

Senator FEINSTEIN [continuing]. But if he isn't, then the law is advisory it seems to me.

Judge BAKER. No. If there is enactment, statutory enactment, and it is constitutional enactment, the President ignores it at the President's peril.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SPECTER. Let me interpose for just a moment here. I think the thrust of what you are saying is the President is bound by statute like everyone else unless it impinges on his constitutional authority, and a statute cannot take away the President's constitutional authority. Anybody disagree with that?

[No response.]

Chairman SPECTER. Everybody agrees with that. And the question, whether he has constitutional authority, depends upon what he is doing, and that is why you have judicial review, and have to know what the program is to make an evaluation, as the courts have done consistently with the President's authority once you know what a program is. And that is the thrust of what you have testified to in chief when you have given your 5-minute opening, and in response to my questions, that the FISA Court would have the authority to evaluate the specifics of the program and determine whether it is within the President's constitutional authority.

Anybody disagree with that?

Judge KORNBLUM. Senator, I would also reiterate that the President does not have a *carte blanche*, that the courts are the arm of Government that determines what the President's constitutional authority is, and over these past 25 years, in addition to the FISA statute, the President has continued to exercise his constitutional authority to authorize intelligence activities—

Chairman SPECTER. I will come back to this when my turn comes, but in light of Senator Feinstein's questions, I just thought that little bit of clarification might be in order.

Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Thank all of you. This has been enormously helpful, and I think all Americans ought to have a sense of confidence in those that are serving on the FISA Court. I certainly have been impressed by all of your presentations here, and reassured.

Just to back very briefly, at the time that we passed that Act, we worked with President Ford and Attorney General Levi. They brought the members of this Committee down to the Justice Department. We worked it out in a calm and bipartisan way. The Foreign Intelligence Surveillance Act was passed 95 to 1 in 1978. Many of us believe that it was enormously important, and I think history will show it.

Now many of us wonder why we are not having a similar kind of a situation, why we cannot, with the new kinds of challenges that we are facing here in the country with 9/11, why we cannot work in a calm and bipartisan way. We did at that time. We had the threats from the Soviet Union. There were provisions that were put in there as a result of secret information, all of which worked out, and worked out very well.

Now we have situations where we are having warrantless electronic surveillance on a number of individuals. Judge Baker, first of all, have the comments on the Chairman's proposal, have we all got the copies from your proposal? Has that been made available to all of us, Mr. Chairman, do you know, their comments on your proposal, do we all have those comments?

Chairman SPECTER. I will make a part of the record Judge Baker's comments, which are in writing, but those are the only comments. I will put in the record whatever comments have been made.

Senator KENNEDY. Thank you.

Second, this was originally going to be a hearing that was going to be a secret hearing. My question is, are we missing anything here that you would have told us. I mean, obviously, you can say, yes, a lot, and then everybody is going to want to know what. And then my next question, what is it, and we cannot hear it.

But I am just wondering—I do not want to use up a lot of time on this, but are we getting the central thrust, or are we missing out on something here that we ought to sort of know about? Just very quickly, because I have a short time. Please, Judge Keenan?

Judge KEENAN. I don't know anything more than what I had to say. I have been off the Court since May of 2001, so I don't know anything about the present situation other than what I have read.

Senator KENNEDY. I just note that heads are going up and down that we are really not missing out on a great deal.

Let me ask you if you have concerns about the potential impact on criminal prosecutions from evidence that is obtained from surveillance programs not approved by the FISA Court? Judge Baker?

Judge BAKER. Certainly. When you get to the District Court, I think that the prosecutor would have a real problem in trying to put forward evidence that had not been obtained with judicial imprimatur first. I would be very worried about that. Now, in the *In re: Sealed Case*, it really went up originally because the Attorney General took the position you could use FISA for law enforcement purposes, and I am the guy who has the singular notoriety of being the only FISA Judge in history who has ever been reversed, because I signed that order. And it went up, and you know, we never said that you couldn't down the line use it, or you couldn't initiate and control it by the criminal division.

I would be very concerned when I got to the District Court, if I was a prosecutor, with that kind of evidence.

Senator KENNEDY. The rest, Judge Keenan, Judge Stafford, have similar concerns?

Judge KEENAN. I agree with Judge Baker.

Senator KENNEDY. So here we have a situation under the current Justice Department—I think most of us have at least drawn the conclusion that some of these leaks on NSA are because people are

wondering about its constitutionality. We are going to find out in these courts whether the individuals, if they eventually get the al Qaeda and they are holding them, are generally thinking if you have a case that is just absolutely a closed case, that you might be able to get more information out of it. It enhances the Government's ability to get more information out of those individuals whether they think they might get off and beat the rap on this. And what I think I am hearing from you is that there is at least some concern about the question about the evidence that is obtained.

Let me ask you this. What about the information, is the Government required to get a court order or some other written certification before the Government can listen to telephone calls or read through e-mails? What is your understanding of the current law, the requirements that you think that must be met before the Federal Government can obtain information from telephone companies?

Judge BAKER. For instance, we issues orders for—

Senator KENNEDY. Do they have to get some written kind of authority to turn these matters over under your understanding under the FISA?

Judge BAKER. That is the way it has been happening, absolutely.

Senator KENNEDY. Would you think that they would have to do it if they are doing some other kind of process or some other procedure, which has not been described in detail to us, but would you assume that they have to have the same kind of an—

Judge BAKER. I can only look back in history when the carriers refused to cooperate until they had a court order.

Senator KENNEDY. Others would believe that to be so as well.

Just a final point. A point has been made about FISA being a rubber stamp. I think to the contrary. If you could outline just quickly, because my time is up, about the kinds of negotiations that are taking place. I understand there have been reviews of some of the request, I think 93 or 94 different instances where you have perfected these kinds of requests.

Just a last point. In response to the earlier kinds of questions with Senator Feinstein, we provide, if the President had a real issue on an emergency, we have in the FISA have the 72 hours in any event, so if they did not get the Court, the President could move ahead in the 72 hours I imagine. And as we remember when President Carter signed that, he effectively said he was going to be bound by the law. President Jimmy Carter said we are going to be bound. That was in his statement at the time. But would you just—I am exceeding my time—come back, any of the panel, talk just about these modifications. Can you describe about that process, or how you have altered or changed? Is it something that is done sometimes, infrequently, frequently? What can you tell us about it?

Judge KORNBLUM. Senator, in supervising the submission of the applications to the Court, from time to time, members of the Court would express concern regarding certain aspects of an application, such as conflicting information on the probable cause or greater specificity on the means for the surveillance. We simply asked the Court for an opportunity to conduct further investigation or gather

additional information, and file an amended application. And virtually every time that request was granted by the Court, and amended applications were filed and approved.

Senator KENNEDY. So it is more than a rubber stamp. This is the point I am trying to get to.

Judge BAKER. Oh, yes.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman.

Thanks to all the panel, and especially my friend, Judge Harold Baker. I am glad you are with us today.

Judge BAKER. Thank you.

Senator DURBIN. I am trying to follow the statement made by my colleague, Senator Hatch, in describing the FISA law, and he said at one point that it was not the intention to diminish the power of the President, FISA was not supposed to do that. But I cannot read that law without concluding that is exactly what Congress set out to do. By a vote of 95–1, they said that this was the exclusive means by which electronic surveillance and the interception of domestic wire, oral and electronic communications may be conducted.

Now, there has been a larger question raised by the Chairman and by the members of the panel, as to whether the President has constitutional authority which supersedes any statute. It seems to me at this moment in time that the President, with his new wiretap program, had three options. He could follow the FISA law. He could ignore or violate the FISA law, or he could seek to change the law. We know for certain he did not take option No. 1, or No. 3. He did not follow the FISA law, nor did he seek to change it.

Members of the Senate Judiciary Committee have been given proposals by the administration for the PATRIOT Act and its revisions after 9/11 to give new authority to the administration. Those provisions passed on a strong bipartisan vote.

So my question is very straightforward. Is there anyone on the panel here who believes that the President did not violate the FISA law with the new wiretap program as he has described it?

Judge KEENAN. I don't know what the new program is, Senator, and that is the reason—

Senator DURBIN. If you could lean over a little closer to the mike.

Judge KEENAN. Sure, I'm sorry. I don't know what the new program is, Senator, and that's why I, in my prepared remarks and in my answers to other questions, I'm not in a position to offer any opinion about that. My understanding—and this is from what I have read in the lay press now—I understand, having read this, I believe, in the Wall Street Journal, that some judges of the Foreign Intelligence Court, present judges—not any of us because we are not on it anymore, and certainly not me because I have been off it since 2001—some of the judges have been briefed on the program. I also understand, from what I have read in the lay press and what I heard from Senator Feinstein a few moments ago, that some Senators have been briefed. But I do now know what the program is, so I am not in a position to offer any comment at all about what the President's doing.

Senator DURBIN. Well, as we have heard it described—and I have not been briefed either, there are only a few Senators who have—it is the interception of domestic communications between people in the United States and those in foreign lands, and that strikes me as falling within the four corners of the FISA law as written.

Judge KEENAN. But you use the word in your introductory question and in that question, “domestic,” and as I understand from the lay press, again, this is international, it is not domestic. So that’s why I’m not in a position to answer, sir.

Judge BAKER. Senator, did the statute limit the President? You created a balance between them, and I don’t think it took away the inherent authority that Judge Kornblum talked about. He didn’t call it “inherent,” he doesn’t like that. But the whole thing is that if in the course of collecting the foreign stuff, you are also picking up domestic stuff, which apparently is happening, I don’t know that that’s—it becomes a real question, you know, is he under his inherent power? Is he running around the statute?

I had a great thought later when you asked the hypothetical about some FISA judge turning down the application on one of these warrantless programs, that that could happen, but not if the Court is allowed to sit en banc. My experience and knowledge of those judges, that’s just not going to happen, if they sit in en banc, where there is real problem or peril.

Senator DURBIN. May I ask one last question? In the proposal by Senator Specter under Section 702(a), it states, “The FISA Court shall have jurisdiction to issue an order under this title, lasting not longer than 45 days, that authorizes an electronic surveillance program.”

By passing this, would we be ceding authority to this Court to authorize programs, electronic surveillance programs, currently not authorized under law?

Judge BAKER. It would be a different approach, certainly, wouldn’t it, Allan?

Judge KORNBLUM. The programs that are being used, of which I don’t have any specific knowledge, are key to today’s technology and to the terrorist organizations, wherever they may be. It’s obvious, just as the years unfolded after 1978, that the intelligence threat changed. When we first started using FISA in 1978, the overwhelming number of targets were foreign governments, hypothetically, say the “evil empire” and Eastern European Bloc. However, as the world changed and the threat changed, so did the use of FISA. And by the time I left the FISA program, the balance between international terrorism and clandestine intelligence gathering, as the basis for the surveillances, had shifted dramatically to international terrorism.

For example, the FBI has made international terrorism its No. 1 priority, its No. 1 objective. So if you authorize programs, as opposed to surveillances of specific individuals or specific countries, it’s undoubtedly true that over time the programs will have to change to meet whatever the intelligence needs of the country are.

Senator DURBIN. I would just add that I think it goes without saying that every Member of the Senate on both sides of the table would agree that we want to give this administration the authority it needs to keep America safe and intercept all communications

necessary for that to happen. But we thought that we had established a legal process by which any President could use that authority with at least some court approval, carrying on a grand tradition in our country that no Executive could act unilaterally.

But I am concerned even in passing the Specter law as to whether this President or future Presidents would just ignore it and go back to a point made earlier, that a President, as you said earlier, would be remiss in surrendering his constitutional authority to a statute. If that is the case, then I wonder if, all of our efforts notwithstanding, the President can claim necessary and proper authority or whatever it might be and simply ignore what we have done.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Durbin.

Pardon the interruptions from time to time. We are negotiating the immigration bill while this is in process and we are concerned about a substitute being offered and vitiating the order for a vote on cloture. We have a lot of transactions we have to handle, so sometimes we are distracted a little bit, but I want to come back. Senator Hatch has another commitment, so I am going to yield to him at this point.

Senator HATCH. Thank you, Mr. Chairman. I appreciate that courtesy, and I want to personally thank you all for being here. I think you have done a very good job of trying to explain to us these principles that you all deal with or have dealt with in the past.

I am familiar with the program and I have to say that I certainly agree with your proposition that the Congress cannot take away the President's power under Section 2 of the Constitution. I would even make the argument that the President's program meets the Fourth Amendment requirements of reasonable cause.

But to make a long story short, I think you have been very helpful to the Committee here today and it has meant a lot to me. As you know, I have a tremendous regard for the Federal courts and for each of you. I appreciate all the work you are doing, and I do think it is a good thing if we can comply with the FISA statute. But this current statute is not adequate to take care of the problems that currently exist. I appreciate the distinguished Chairman and his efforts to try and come up with a statute that Presidents will comply with, or can comply with without taking away inherent powers, to use that term, that the President has under Article II or otherwise.

Let me just ask one more question, and I appreciate the distinguished Chairman giving me this opportunity. Again, I will direct it to you, Judge Kornblum. I would appreciate anything any of the rest of you tremendous judges would care to add. I would just like some clarification on a few points.

Based on your understanding of the law, if the government obtains information through the NSA program, do you believe, as a matter of law, that this information can be used in support of applications for a court under the FISA statute? And do you believe that any fruit of the poisonous tree arguments are valid? In other words, if they actually obtain information that would support applications for a court order under the FISA statute, would the fruit of the poisonous tree arguments be valid against that information?

Judge KORNBLUM. I think the answer to both questions is yes. As we did in the Ames case, we explained to the FISA court that Attorney General Reno had approved six warrantless searches of Ames's home and office at the CIA. We did that in conjunction with the applications for continued electronic surveillance of Ames because the FISA statute at that time didn't permit surreptitious searches. The court considered it and approved the electronic surveillances.

Ames never went to trial. He decided to plead guilty rather than have his wife face imprisonment. If he had gone to trial, his attorney, Plato Cacheris, would undoubtedly have challenged all of the evidence obtained in the warrantless searches. My personal belief is that when I persuaded Attorney General Reno to authorize the warrantless searches, she was doing so lawfully under the *Truong-Humphrey* line of cases in the Fourth Circuit, and, of course, Ames lived in Northern Virginia, which was in the Fourth Circuit.

So you had a situation where, in the Ames case, you had warrantless electronic surveillance—I am sorry, warrantless physical searches approved by the Attorney General in full conformity with the law in the Eastern District of Virginia, and at the same time, you had FISA surveillances authorized by the FISA court. I think both would have been sustained, but there is an important difference between them.

During the course of the trial, the FISA information, FISA applications would have been protected from discovery because FISA has that protective mechanism in it. Defense lawyers never get to see FISA applications. On the other hand, the warrantless searches authorized by Attorney General Reno would have been subject to full discovery, and whatever paperwork Attorney General Reno saw, what I had submitted to her would have been subject to disclosure and used by the District Court of the Eastern District of Virginia to determine whether the surveillances were lawfully authorized and conducted pursuant to the pre-FISA standard, even though it was conducted after FISA came into law, because the warrantless search was not available to the Government in the FISA statute.

In the context of the present situation, the warrantless collections now being done by the President will be subject to the same discovery, that is, whatever legal mechanism was being authorized or was being followed to authorize the collection, if the President wanted to go forward with prosecution and use that evidence at trial, it would be subject to the Federal Rules of Criminal Procedure through the normal discovery. If the President—

Senator HATCH. So there would definitely be protections for individuals?

Judge KORNBLUM. Well, you have the Classified Information Procedures Act to deal with that, and if the situation became unbearable, the President could always withdraw prosecution or exert the State Secrets privilege to protect military—

Senator HATCH. In either event, that would be a protection of the person accused?

Judge KORNBLUM. Yes. Well, the State Secrets Act would, in effect, end the prosecution.

Senator HATCH. Sure.

Judge KORNBLUM. But the Federal Rules of Criminal Procedure would protect any defendant charged with evidence collected in the program.

Senator HATCH. Do you mind, Mr. Chairman, if I ask just two more questions? I would be happy—

Chairman SPECTER. Do I mind if you ask two more questions?

Senator HATCH. If you do, I won't.

Chairman SPECTER. I have already opened the door. Ask all the questions you want, Senator Hatch.

Senator HATCH. Oh, I am just beginning, then. No, I am just kidding. I have two more, and please, any of the other judges who care to comment, I am not meaning to just make this a dialog between the two of us—

Chairman SPECTER. You want two more questions and how many more answers?

[Laughter.]

Senator HATCH. Well, anybody who feels like they should, I would be happy to listen to them. I am sure you would, too.

Judge, do you believe that information obtained under the NSA program may be legally used in support of an application for a Title 18 warrant where you believe one of the parties has been determined to be an al Qaeda affiliate but is a suspected common—or has not been determined to be an al Qaeda affiliate but is a suspected common criminal, say such as a drug dealer?

Judge KORNBLUM. Any determination like that that is faced by a district judge in trial is going to be decided under the Federal Rules of Criminal Procedure and the protective mechanisms of the Classified Information Procedures Act. There is no way to predict what the facts are and the district judge would be faced with making that decision.

Chairman SPECTER. Well, under Senator Hatch's hypothetical, if one of the parties to the conversation is not al Qaeda, that is outside of the President's purview. The Attorney General hasn't told us much, but he has told us that one party to the conversation is in the United States and one is overseas, but at least one is al Qaeda. So when Senator Hatch poses the hypothetical that neither is al Qaeda, how could that be justified under the President's program?

Senator HATCH. Or even if one is al Qaeda, the foreigner calling into the country but talks to a common criminal, couldn't that be used against the common criminal?

Chairman SPECTER. Well, you have changed the hypothetical now to making one al Qaeda.

Senator HATCH. OK. I kind of thought that was implied.

Judge KORNBLUM. Whatever the facts are, the standard followed by the district judge is going to be that enunciated in the pre-FISA decisions.

Senator HATCH. Right.

Judge KORNBLUM. That is—

Senator HATCH. In other words, the criminal will have some element of protection from a civil liberties standpoint.

Judge KORNBLUM. I would think the answer was, yes, that a district judge would protect his liberties and he is going to be bound by the judicial decisions which define the President's power.

Chairman SPECTER. How did the criminal have protection when the wall was down? The law was established that if you have a foreign intelligence warrant and incidental to that there is evidence of a crime, that it is usable. That is the current status of the law.

Senator HATCH. I am talking about using the current warrantless surveillance.

Chairman SPECTER. You are talking about what, Senator Hatch?

Senator HATCH. Warrantless surveillance, the warrantless surveillance.

Judge KORNBLUM. Well, to be admissible—

Chairman SPECTER. Let us see if we can bring this to a close, Judge Kornblum, if you will answer this question.

Judge KORNBLUM. To be admissible, the evidence would have had to have been lawfully seized or lawfully obtained and the standard that the district judge would use is that, depending upon where this is, is the law in his circuit. In most of the circuits, the law is clear that the President has the authority to do warrantless surveillance if it is to collect foreign intelligence and it is targeting foreign powers or agents. If the facts support that, then the district judge could make that finding and admit the evidence, just as they did in *Truong-Humphrey*.

Chairman SPECTER. Senator Hatch, I am delighted to have a few comments, but we are now over 10 minutes and we have another panel.

Senator HATCH. I am happy to discontinue any further questions.

Chairman SPECTER. Before you leave, Senator Hatch, I want to cover one point in your presence, and that is you have been privileged to have been briefed, because you are on the Subcommittee, and when you say that you believe that it is constitutional under the Fourth Amendment, I have a lot of respect for your legal judgment. I was once an advocate for you for the Supreme Court. But under the doctrine of separation of powers, you are not a judge—

Senator HATCH. That is true, and I may very well be wrong.

Chairman SPECTER. Well, you may be right or you may be wrong. Judges are sometimes right and sometimes they are wrong.

Senator HATCH. Right.

Chairman SPECTER. But our system is that the judges make determination of constitutionality. Senators don't. Even super-lawyer Senators like you, Senator Hatch, you don't make decisions on constitutionality.

Senator HATCH. Well, we make them every day. The problem is that they may not be worth the decisionmaking paper that we write them on.

Chairman SPECTER. I think they are very valuable, but it violates the principle of separation of powers. Senators are not judges, and to submit the program to the Intelligence Subcommittee and in a context of the statute proposed, to have 45 days of free reign for the administration, and then at the end of 45 days, if there is sufficient probable cause going to the FISA court, but if there is not, to go to the Subcommittee, I don't know exactly what the Subcommittee does at that point.

Senator HATCH. Let me just say this much. The administration, rightly or wrongly, and that might have to be determined by the courts in the final analysis, decided, the President decided that this

program had to be reauthorized every 45 days, that the Chief Judge of the FISA court was informed. Eight Members of Congress were informed on the program. The question is, is that enough information to be able to resolve the conflict in favor of the President's argument?

It may take the courts to decide that, but I see plenty of concern here on the panel that you may not know yourselves how that should be decided at this particular point. The fact of the matter is that we have had people who have been hotly criticizing the President for doing what the President feels he had to do to protect our Nation and to protect our people from terrorism that could amount to very serious consequences, even worse than 9/11. These are very important issues.

The distinguished Chairman, of course, is trying to come up with a statute that the Presidents will be happy to comply with that will solve the problems and the deficiencies of the current 1978 FISA statute. I commend the Chairman for that and I am certainly going to try and help him on that. And I commend all of you for being as cautious as you are on just how all of this is going to come down in the end.

So, Mr. Chairman, I just want to thank you for allowing me to have this little extra time. I know I have taken more than I should have, but I just want to, again, express my respect for all of you and what you have had to say here.

Chairman SPECTER. Let me make one more comment, Senator Hatch, before you go.

Senator HATCH. Sure.

Chairman SPECTER. That is that if there is an order by the FISA court that the President feels is wrong and needs to act against, he can get a supersedeas. I am going to ask that question, but we all know that he can get a supersedeas until there is an appeal. It is discretionary with the FISA court, but you would expect in an emergency situation there would be a supersedeas. Many have an appellate court for FISA. Then if you don't like what the appellate court does, you can get another supersedeas and go to the Supreme Court.

But when the court has ruled, if I understood Judge Kornblum correctly, the President can't disregard it. When the court makes a determination on constitutionality and you get to the Supreme Court, that is that, don't you agree, Judge Kornblum?

Judge KORNBLUM. Yes, I do.

Chairman SPECTER. That is *Marbury v. Madison*, 1803, which has been followed once or twice.

I am going to go on to some other lines of questioning, Senator Hatch.

Senator HATCH. Well, just one last point on that.

Chairman SPECTER. I doubt it, but go ahead.

[Laughter.]

Senator HATCH. Judge Kornblum also indicated that the President may be faced with a situation, because of the time constraints and so forth—it isn't just a yes here—where he may have to just act in the best interests of the country. That may be upheld by the courts and may not be, I don't know, and neither does anybody else here today. But I will tell you one thing. I want my President act-

ing, as long as it is clear that they have done everything they can to comply with the law and where they feel that they have this obligation under Article II of the Constitution. I would want my President to protect us.

Chairman SPECTER. Well, let us—

Senator HATCH. I think that is the position they have taken down there, rightly or wrongly, I personally believe rightly.

Chairman SPECTER. Well, when you say act, you customarily mean some response if the country is in jeopardy, and of course, the President should act.

Senator HATCH. That is right.

Chairman SPECTER. If you are talking about gathering additional intelligence, the President can do that, too, and he has 72 hours to go to the court. If he has acted in a way that the court later says is illegal, he has gotten the information. He has acted and he has that authority under an emergency situation.

Senator HATCH. All I can say is it is a little bit different in this situation from what I know about it.

Chairman SPECTER. Well, Senator Hatch, would you be willing to be a witness so we can really—

[Laughter.]

Chairman SPECTER [continuing]. Really find out what is going on here?

Senator HATCH. I think that is what I have been maybe doing, I don't know. I apologize to the Chairman.

Chairman SPECTER. Judge Brotman, we ended up on my first round with your being interrupted on responding to the question as to Judge Keenan, and to reconstruct the question, it is in a context of the modern technology and the changes since 1978 when the Foreign Intelligence Surveillance Act was passed. Do you think that the legislation which I have proposed will be a good balance to protect civil liberties and give the Executive sufficient authority to protect the country?

Judge BROTMAN. Well, I do because if you look back over the years, the court has reacted to these changes. We have met. We have discussed new methods. We have seen them. They talked to us about them. We have been able to have a colloquy going back and forth, and in instances, we have agreed on a methodology of presenting the application within the language that was currently in the FISA statute.

Chairman SPECTER. When—

Judge BROTMAN. I mean, everything—you can't keep coming back and forth all the time, but in the course of drafting something, and this is the Congress's function—

Chairman SPECTER. When—

Judge BROTMAN [continuing]. In the course of drafting something, the language has to be sufficient to cover.

Chairman SPECTER. When Senator Hatch was asking questions, hypothetical questions about obtaining information from the administration's program and then using it in the context of an application for a warrant from the FISA court, there was an issue as to whether the judge to whom the application goes knows what the program is. We know that President Judge Lambreth, or we hear that President Judge Lambreth was briefed on the program. We

hear that President Judge Kollar-Kotelly has been briefed on the program. But we don't know about the other judges. We know that Judge Robertson resigned and the inference is because he didn't know about the program and wasn't going to be a party to being on the court when there was a program in effect that he didn't know about. It is really very regrettable that we have to speculate about anything.

That is why it seems to me that when you have a court where you have expertise and you have the ability to keep a secret, that the program ought to be submitted to the court. If Senator Hatch is right that it is constitutional, then there oughtn't to be any hesitancy. When the court makes a ruling and the appellate court makes a ruling and then the Supreme Court makes a ruling, that is that under our society. That is how we decide that we are a nation of laws.

We do need to protect the country, and the President has very vast authority under Article II. There is no doubt about that. But as you have all testified to, that is ultimately a judicial determination. It is rockbed Americana. It is *Marbury v. Madison*.

We are going to take a very short break before the next panel, which will be heard more quickly since there won't be too many rounds of questioning, but I want to thank the judges for being here. We will take just a recess for a minute or two.

[Recess.]

Chairman SPECTER. The Committee will resume.

Our next witness is Mr. Morton Halperin, who is Senior Fellow for the Center for American Progress and Executive Director of the Open Society Policy Center. He has a Bachelor's from Columbia, a Ph.D. in international relations from Yale. He served in both the Johnson and Nixon administrations in key positions. He served as the Director of the Washington Office of the American Civil Liberties Union, a consultant to the Secretary of Defense in 1993. That would be the Clinton administration.

Thank you very much for joining us, Mr. Halperin, and thank you for your patience, if you have been patient. We welcome you here and look forward to your testimony.

STATEMENT OF MORTON H. HALPERIN, EXECUTIVE DIRECTOR, OPEN SOCIETY POLICY CENTER, WASHINGTON, D.C.

Mr. HALPERIN. Thank you very much, Senator. I appreciate the opportunity and I appreciate very much the efforts that you have made to try to bring this program under FISA and to reestablish the system that I think has worked very well, and as we heard from the judges, has permitted the intelligence agencies to gather the information that we need.

I agree with you that it is critical that we find a way to bring what needs to be done under congressional authorization and judicial review, but I also think, as you have suggested, that Congress can't legislate in the dark. We don't know what the program is, and therefore, it is not possible to tell whether your legislation, even if it were enacted, would actually authorize what the administration is now doing. I just think it is a fundamental mistake for Congress to legislate in this area before it has had a full investigation and knows what is being done and before the administration states

what it needs in order to carry on the surveillance that he thinks is necessary.

Chairman SPECTER. Since I am the only Senator present, Mr. Halperin, I am going to vary our procedure and ask you a question on the point you have just made. In terms of knowing the program, my legislation provides for knowledge of the program to the FISA court. Why isn't that sufficient?

Mr. HALPERIN. Because the problem, Senator, is that you don't just try to find the mechanism, which I think would be difficult to do, to say the administration's current program with the current congressional authorization should be reviewed by the court. Your bill actually authorizes a program with a standard requiring the Attorney General to make a certification to the court that certain factual predicates have been met—

Chairman SPECTER. Well, I disagree with you that we are authorizing the program. We are authorizing the FISA court to review the program.

Mr. HALPERIN. But with respect, Senator, as I read your bill, you are authorizing the FISA court to issue a warrant for the program if it meets the standard—if the Attorney General certifies to the court that it has met the standard laid out in your legislation.

Chairman SPECTER. Well, re-read my bill and so will I. That is not what is intended. What is intended here, and I think the statute provides what I have intended, and that is for the—we are not taking the Attorney General's certification. We are not going to do that. We are going to require that the administration inform the FISA court fully what the program is and then the FISA court is going to make a determination whether it is constitutional.

Mr. HALPERIN. Well, Senator—

Chairman SPECTER. How about that, if the language satisfies you?

Mr. HALPERIN. I think the problem with that is whether the FISA court could actually make a ruling, that is, whether there is a case in controversy since the administration is not asking for a warrant. But if you want to enact a bill that said, the President cannot conduct any surveillance except if he gets a warrant from the FISA court and it needs to go to the FISA court to see whether the court will give it a warrant for this program, I am not sure that that is constitutional because you don't have a specific case in controversy—

Chairman SPECTER. Well—

Mr. HALPERIN [continuing]. But that is not what the bill, as drafted, as I read it, does. It—

Chairman SPECTER. We have gone into the issue of advisory opinion and we did it here again today and we did it with a panel of experts. It is the same analogy. There is no case in controversy when the FBI goes to the FISA court and wants a warrant. It is an ex parte proceeding and there is no case in controversy. This is the analogy, which there is good legal authority is not advisory and is not in violation of the case in controversy rule.

Mr. HALPERIN. Well, that may be, and the court would obviously decide that, and I think that is the appropriate case to decide that, but I think it is essential, if that is what your intention is, that you not draft language which the court may well interpret as au-

thorizing the program. For example, we know the argument that is now going on about the military tribunals is that the Congress, by providing for judicial review of the military tribunals in the court of appeals, the Government is arguing is therefore authorizing military tribunals. The Government would certainly argue, based on your legislation, that you had authorized a program and authorized the court to grant a warrant for the program if it meets the standards set out in your legislation.

Chairman SPECTER. Well, the Government could argue most anything under any circumstance, but—

Mr. HALPERIN. No, but—

Chairman SPECTER [continuing]. But we will take a look at it and if you are correct, we will redraft.

Mr. HALPERIN. OK. Well, I appreciate that, Senator.

The critical section of your bill that deals specifically with that issue is Section 703(a)(7), which as I read it says that the Attorney General needs to certify that the program involves listening to agents of a foreign power or a foreign power or persons in communication with a foreign power where those persons have attempted to engage in terrorist activity, and that I read as an authorization of a program.

Let me suggest an alternative way that it seems to me that Congress might proceed here, which is to say the Attorney General in his testimony before this Committee was pressed very hard by Senator—

Chairman SPECTER. Mr. Halperin, let me set the clock back for you for 4 minutes so we will hear you. Senator Biden has arrived, so if other members are present, I will proceed informally. Instead of the 4-minutes, the floor is yours and then we will move on to Mr. Kris and then we will go to rounds of questioning.

Mr. HALPERIN. My view is that the Congress first, as I said, needs to have a full investigation so that it knows what is going on.

Second, I think it needs to insist that if it grants new authority to the President, that the President will agree to abide by that authority and again operate within FISA. There is no point in establishing a new procedure if the President takes the position that he is not bound by that new authority, as you gave him new authority in the PATRIOT Act, but is simply going to engage in whatever additional programs he wants, and I suggest in my bill some statutory changes in the language dealing with criminal penalties and civil penalties and the cooperation of the telephone companies which would make it absolutely clear, although I think it is unambiguous as Congress drafted it, that Congress intended that there be protection from civil and criminal penalties and a requirement by the phone companies to cooperate only if the surveillance is pursuant to FISA or Title III if it is a criminal case.

I also think that you should focus on what the Attorney General has identified as the problem, and in his testimony before this Committee, when pressed very hard by Senators on both sides as to why FISA was not sufficient, the Attorney General gave only one example. He said, in an emergency situation, NSA officials do not have the time to get to the Attorney General to get him to author-

ize an emergency surveillance, and that is, I think, a correct reading of the statute.

So what I would urge you to consider is to, in effect, grant him an additional 72 hours so that the Attorney General can establish a procedure under which the NSA officials can authorize a surveillance in an emergency. They have 3 days to get to the Attorney General. If he agrees, that as he puts it, there is reasonable belief that the target is an al Qaeda person, that he can then authorize an additional 3 days of emergency surveillance and then he can go to the FISA court and get a warrant.

That seems to me to satisfy the problem that the Attorney General has identified, and if the administration wants to come up and identify another problem, then I think the Congress needs to consider that other problem, as well, and assuming that it is constitutional, find a way to fix that problem. But I think to try to legislate a solution where the administration has not identified a problem that needs to be fixed simply will not solve the problem, which is that the administration is moving ahead without getting FISA warrants.

As you recall, Senator, one of the reasons that we got FISA, and I think it has been alluded to before, is that the telephone companies were saying that they wanted clear guidance, and I think administration officials and the FBI and NSA were saying they wanted clear guidance. I think that clear guidance is essential, because otherwise, you put FBI agents, NSA agents, and private individuals in jeopardy of civil or criminal penalties if the President is acting not pursuant to the statutory scheme, and you also get leaks.

I think it is not an accident that we got leaks before FISA was enacted because people thought the Presidents were ordering wire taps when they should not have done so in both Democratic and Republican administrations, and we got leaks of this program because people thought that the President was acting outside the law. As far as I am aware, there has not been a single leak of a program authorized under FISA, and I think that is because if people in the Government are confident that what is being done is constitutional and following the law as Congress has laid it out, then they don't leak it.

Therefore, I think it is essential to bring this program under those procedures. Thank you.

Chairman SPECTER. Thank you very much, Mr. Halperin.

[The prepared statement of Mr. Halperin appears as a submission for the record.]

Chairman SPECTER. We turn now to Mr. David Kris, who is Senior Vice President, Deputy General Counsel, and Chief Ethics and Compliance Officer at Time Warner. He is a graduate of Haverford College and has a law degree from Harvard. He served as a law clerk to Judge Trott of the Ninth Circuit and was a special assistant for the U.S. Attorney in the District of Columbia. He has had a variety of positions in the Department of Justice.

Thank you for joining us, Mr. Kris, and we look forward to your testimony.

**STATEMENT OF DAVID S. KRIS, SENIOR VICE PRESIDENT,
TIME WARNER, INC., NEW YORK, NEW YORK**

Mr. KRIS. Thank you, Senator Specter. Thank you for inviting me to testify. I am appearing here only in my individual capacity and not as a representative of any current or former employer.

On the legal issues raised here, I think I am exactly where you are. I believe that the NSA surveillance program violates the Foreign Intelligence Surveillance Act. I don't believe it is permitted under the Authorization to Use Military Force. And I don't know whether it is within the scope of the President's Commander in Chief powers because I don't possess the relevant facts. I was not read into this program at DOJ, and I have no classified information about its function or its operation.

Because of the way I analyze the legal issues, I see this as a constitutional moment. I see it as a clash between the expressed will of Congress and the actions of the President. And even if those actions are, indeed, constitutionally authorized—as they may be—it is not a very appealing state of affairs, at least for the long run. So for that reason, I think it is very wise to consider legislation that would authorize and regulate the NSA surveillance program or something like it.

Having said that, I don't know whether legislation actually should be enacted, and if it is to be enacted, I don't know exactly what it should say. I think factual ignorance is an impediment not only to legal analysis, but also to legislative drafting.

I have to admit that I spent the weekend on legislative drafting, and the result is in my written testimony that I submitted yesterday. I tried in my draft to follow your lead, to use your bill as a model and also to stick to three basic principles.

First, wherever possible, use existing language and structures from FISA. I think that will promote a more seamless integration of any new law into the old; and it will import into the new law the settled understandings of the terms that are used.

Second, like Mr. Halperin, I believe it is appropriate to accommodate the Government's needs to the extent that they should be, but I would not go beyond those articulated needs, at least without knowing what the facts are.

And third and finally, most important for somebody like me on the outside, try to provide something that will be a useful vehicle for discussion and debate. My draft is really designed to be modular, almost like Lego. You can snap individual policy pieces in and out according to your preferences without disturbing the underlying structure. So the goal was really not so much to stake out a strong policy position on any of these issues but just to tee them up cleanly for your resolution.

One of the key issues that we heard discussed this morning concerns the role of judges. Senator Specter, as I understand your bill, it would require the FISA court to review not only individual instances of electronic surveillance involving particular targets and facilities, as is the case now, but these electronic surveillance "programs" writ large.

I think that judicial review of that type has a number of advantages to recommend it, among them that I think it would increase the public's confidence in and acceptance of the surveillance. Now,

it raises a couple of constitutional questions, but as laid out in my written testimony, I don't know the answer to those questions and I don't say that they will be ultimately a problem. And it may or may not be acceptable in the end to a lawmaking majority. That is obviously something that is beyond my ken.

I do think, however, that your bill is an excellent, concrete, and specific vehicle for extended debate, which I assume will ensue. I have tried in my written submission and I will try today to contribute to that debate and I hope you find it helpful. Thank you.

Chairman SPECTER. Thank you very much, Mr. Kris.

[The prepared statement of Mr. Kris appears as a submission for the record.]

Chairman SPECTER. We appreciate your suggestions on drafting. We are open, so we appreciate what Mr. Halperin said earlier. We will read and re-read and look for the bill as I have described it.

Both of you have talked about an investigation so we know what the facts are before we legislate. That is a pretty good idea, generally. The President says that Congress leaks, and regrettably, that is true. The White House also leaks, and I wouldn't want to get involved in which institution leaks the most. But we do know that the court has maintained confidentiality and that is why not knowing what the program is, I come to the conclusion that you can structure a statute where the administration cannot claim refusal to turn over the program, disclose the facts, because of concern that there will be a leak or inappropriate disclosure.

Mr. Kris, you say that you have identified constitutional questions and you don't know what the answers are. You have a firm resume as a lawyer. Are you concerned about the advisory opinion issue or would you accept the analogy on the ex parte application for a warrant would be the same as, in effect, an ex parte application for approval of a program?

Mr. KRIS. It is interesting. In thinking about this, I actually found, with the assistance of a former colleague, an opinion of the Office of Legal Counsel from about 1978 that discussed whether the original version of FISA satisfied the case or controversy requirement. It made an argument that it did, and I assume that is why the legislation was enacted.

I think much of the reasoning in that opinion would apply to programmatic judicial review as well as individual judicial review. I am just not sure that all of it would or exactly what the differences would be. I don't mean to sort of be overly tentative, but I have only been thinking about this issue for about 72 hours and I am just not quite sure. I assume somebody, OLC or somebody else, can take a really hard look at it. Maybe you already have. Maybe this panel of experts that you had before have already thought through it, in which case that is fine. I really just thought I should flag the issue. I see that it was already flagged, and so I didn't need to.

Chairman SPECTER. We have taken a hard look at it and we have questioned experts. We have some testimony about it this morning again that it does not violate the advisory opinion doctrine so that we think we are on solid ground.

Mr. Halperin, let me come back to pursue the discussion which you and I had a few moments ago, and that is if you accept a statute which I described, and that is that Congress would authorize

the FISA court to review the administration's program and make a determination of constitutionality, not authorizing the program as you are concerned about—and I can understand that. I don't intend to offer it as a program. I don't know what the program is. I am not about to authorize a program. But I would like to have somebody find out what the program is and make a determination, and that is a judicial function, in my opinion. It is not the function of the Subcommittee on the Intelligence Committee.

Mr. HALPERIN. I certainly agree with that, Senator.

Chairman SPECTER. You agree? Well, I am glad we found something to agree on.

Mr. HALPERIN. No, I agree—I mean, I agree with all your comments on the other bill. I think they have those very serious—that they are relying on the Congress to do a judicial function and that is inappropriate.

I would say if you are going to go down that route, you need to find a way to require the President to submit the program to the FISA court, and I think the only way to do that is to amend FISA and the authorization to use military force to reinforce what I think is already in the bills, but the administration doesn't, that these are the sole and exclusive means that Congress intends to go forward and that nobody is safe from civil or criminal penalties, and the phone companies are not directed to cooperate unless the program is consistent with FISA.

Chairman SPECTER. Well, we can legislate. We can pass the bill. The President has the authority, obviously, to veto it. If we can pass it over his veto, if it comes to that, then we would have authorized the FISA court to examine the program. That is as far as we can go.

Mr. HALPERIN. But the President—the FISA court, I think, even under your theory, can't examine it unless the President brings it there, and there is nothing in what the administration has said—

Chairman SPECTER. If the legislation says the President must bring it there—

Mr. HALPERIN. Not if the President says that beyond whatever—as I understand the administration's position, it is beyond whatever Congress says, it has the authority that Congress cannot limit in any way to conduct warrantless surveillance whenever it believes it needs to do so. So the first step, I think, has to be either to get the administration to concede that if it gets the appropriate authority, it will follow the legislative rules, or to find a way to compel it to do so. I think, as I understand its position, even if you passed this bill over its veto, it would still say, that is fine, but we are not bringing any program to the FISA court, and—

Chairman SPECTER. My time is up and I believe in observing time—

Senator BIDEN. Keep going.

Chairman SPECTER. No, no—

Senator BIDEN. There are only two of us.

Chairman SPECTER. I am going to reserve time.

Senator BIDEN. I believe in getting ideas out. Keep going. Take some of my time.

Chairman SPECTER. You want to take less than 5 minutes, Senator Biden?

Senator BIDEN. I will take less than 5 minutes, and I will take five in my second round.

[Laughter.]

Chairman SPECTER. It may be easier to deal with the administration than Senator Biden.

[Laughter.]

Senator BIDEN. We would be a lot better off if you were dealing with me instead of the administration.

Chairman SPECTER. I am just going to make a concluding comment. I think there would be a political solution if Congress passed this bill over the President's veto. It would be like the torture issue, where when we had it 89 to nine, the President accommodated to it. Of course, there is always a loose end, whatever we do around here. As Secretary of State Shultz said, nothing is ever settled in Washington. We have the signing statement, which takes away perhaps, or arguably, takes away our authority—we are going to have a hearing on that, as to the role of the signing authority, not that what we decide on signing authority will bind the President, either, but I think there would be a political answer.

But if we pass a bill and we pass it over the President's veto, I think there would be a political solution, but as they said in the song "Kansas City," we have gone as far as we can go, and that is as far as this Judiciary Committee can go in pushing legislation for the Congress.

Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman.

I am not sure of this, but I think it was Professor Corwin who said the Constitution is little more than an invitation for the Congress and the President to do battle—I am paraphrasing—over the conduct of foreign affairs. We have retreated from the battlefield. This is a constitutional moment. This administration has virtually no credibility. And here we are—the Chairman's bill is a solid bill. But here we are as a Congress as a whole just refusing to engage in that contest.

I think if anybody gets censured, it should be the Intelligence Committee for failing to do its responsibility. I am serious about that. I think this idea of censuring the President, at this point, we don't know what he did. I mean, Mr. Kris, your phrase, if I can find it here, is that "it is difficult to analyze a surveillance program, and almost impossible to comment on legislation to regulate such a program, without knowing the facts."

You have Stuart Taylor, which I think is kind of interesting, a well respected commentator and a newsperson saying the following. He is saying that the administration argument about tipping our hand to terrorists by telling the Intelligence Committee, because no oversight is appropriate, and he quotes and he says, it is "utterly unpersuasive and rather alarming. Carried to its logical conclusion, it would argue for ending all congressional oversight and censoring of media coverage of all sensitive intelligence and defense activities." That is it in a nutshell, flat out. What are we doing here? What are we doing here?

We are talking about the courts. You know, there is a third branch of government called the Congress, and the idea that I am going to delegate to the courts, as well as the administration, some-

thing as fundamental to the security of my country to make a substantive judgment of whether what they are doing makes sense—not merely whether it is legal, does it make sense—does it make sense—what have we become? What has happened to the notion that this is something that the people have a right to have input on? It is bizarre. It is absolutely bizarre.

Now, I agree with the Senator. He is being practical. He is being practical about this. We have a Judiciary—look, I was there when we wrote FISA. I was on the Intelligence Committee and on the Foreign Relations Committee. Somebody tell me that the risk of leakage at the time we were talking about the location of SS-18 Soviet mobile missiles that the Soviets were in the process of pursuing and all the intelligence that we were engaged in around the world, that it was less dangerous then than it is today? Nothing got leaked. We held a year of oversight hearings, roughly, and then the Judiciary Committee, which I was also a member of, interfaced with the intelligence community when we came up with a thing called FISA.

So what I find absolutely amazing here is that we are essentially in this constitutional moment being required to say, it is really not practical. There is not practically much we can do. We don't have—here is my question. Does anybody think, are either of you convinced that the Attorney General knows the extent of the program? What do you think? I am not being facetious.

I asked him the question under oath. He was here and I asked him the question, Mr. Chairman, can you assure us the program you described is the only program that exists? And if my recollection is correct, he said no. I don't even believe the Attorney General of the United States of America knows the extent of this surveillance program and I find it breathtaking, breathtaking, the arrogance of this administration concluding that.

A group of people we do not even know—they do not name them, they will not tell us who they are—they are supposedly, quote, “experts on terror,” making judgments on the spot, as explained to us, as to upon whom to eavesdrop, and then no assurance or any program demonstrating how they mitigate information that they have gathered. This is like Alice in Wonderland. This is like Alice in Wonderland. And then this malarkey about, well, you know, if you raise questions about this, you want to support the terrorists.

So do you think the Attorney General of the United States, do either of you think he knows the full extent of this program?

Mr. HALPERIN. He certainly—I mean, he certainly doesn't because he was asked questions like, who is it in NSA that can authorize this, and that question he actually answered and said he didn't know. So I think it is clear that he doesn't know.

It is also, I think, clear if you look at the cases that authorized warrantless electronic surveillance prior to the enactment of FISA and the Ames case that the administration likes to talk about so much, they all turned and pawed on the fact that these were personal judgments by the Attorney General of the United States. There is no case that suggests that a nameless NSA official who is not confirmed by the Congress has the authority to make a determination of a warrantless surveillance of a United States per-

son. So at the very least, I think there is a statutory infirmity there.

But I think that the Congress has to act, in my view, on what the Attorney General said. He said, here is a specific problem. I think the Congress could react to that specific problem. But I think it would be a mistake to try to guess.

And Senator, if I may, Section 704(3) of your bill says that the FISA court shall issue an ex parte order if it finds that there is probable cause, and then it lays out a standard of probable cause of what. That is a new standard that doesn't appear in FISA, and as I read it, as I say, that is an authorization to the FISA court to conduct surveillance under that standard, and none of us have any idea whether that standard is what the administration is using on this program. That is the concern I have that the bill is an authorization.

Senator BIDEN. One more question. In full disclosure, I am one of those unnamed congressional offices you referred to in talking to you about this legislation. Is there a way that would make sense, not for the purpose of compromise but for the purpose of being more comprehensive, is there a way of marrying and/or dealing with both the approach of giving the Attorney General what he says is the only impediment that he named, was that he is just effectively inundated and you don't have time to make these judgments by extending the time available to the Attorney General's office and the approach that the Chairman is pursuing?

Mr. HALPERIN. Yes, I think there is. I mean, as I now understand the Chairman's approach, it is to try to find a constitutional way to bring before the FISA court the President's program as a program not authorized by Congress and to let the court make a judgment about whether that is constitutional or not.

I think the press reports suggest the court has already done that, that is that the court, according to the press, told the administration not to bring warrants for FISA surveillance based on this program, and that is another way, of course, that the FISA does make this judgment. If they have, in fact, told the administration—and I don't know whether that is true, it has certainly been reported in the press—but I think you also have to find a way to compel the President to do it, and I suggest in my testimony by rewriting those provisions so that you send a clear message to the telephone companies that whatever authorization or certification the Attorney General has given them isn't worth anything unless it is pursuant to a FISA warrant or the exceptions that are actually in FISA for emergencies.

I think if you did those two things coupled with a sunset provision and a requirement for a full investigation, that this would be a way to move it forward. So I would think it should be possible to merge these two approaches and I would hope that you would look at them.

Senator BIDEN. I would conclude by saying, Mr. Chairman, I truly appreciate your willingness not to let this issue just go away. No one else, nobody else in the Congress with any authority, is doing anything constructive, nobody but you. You are the sole source of any constructive attempt to deal with this problem. So please do not read my frustration as anything having to do with

my frustration with you. It is not. I understand that the truth of the assertion that the only thing that is going to change this administration's mind is a political judgment reached by the U.S. Congress and confronting the President where he politically concludes it is not in his interest to continue to pursue the avenue he is on without any consultation with anybody.

So you are right on the practical and probably right on the substance, as well. What frustrates me, I never thought I would sit here after 33 years, from Richard Nixon to this guy, to President Bush, and find ourselves in the posture where we are literally paralyzed from having any notion about having any idea, and I am supposed to accept and others accept the word of Dick Cheney, accept the word of the President, trust me? Trust me?

Thank you for the time, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Biden, and thank you, Mr. Halperin and Mr. Kris. Senator Biden and I intend to pursue this matter.

Senator BIDEN. Indeed, we do, and I would like to work with you in pursuing it.

Chairman SPECTER. I intend to bring this bill up on the Executive Calendar on Thursday, and Senator DeWine's bill at the same time. I want to vote these bills out of Committee and I am going to press the Majority Leader to list them for argument in the Senate and move ahead.

The testimony we had today was powerful. We had five judges testify, four former judges of the Foreign Intelligence Surveillance Court testified that this bill is an appropriate way to determine constitutionality of the program. They talk about probable cause and they talk about minimization and they are experienced. Judge James Robertson, the judge who resigned from the FISA court, submitted a letter, which I read the key part into the record. In addition, Magistrate Judge Kornblum, who has been involved in 10,000 applications under the FISA statute—very extensive experience going back to your work, Senator Biden, back in 1978, and their testimony is powerful, powerful, powerful, in my opinion.

We have given the administration a chance to be heard, and the Attorney General came. We invited them to come into this hearing today. We have had three hearings in 22 days, which is pretty good for this Committee. We heard the Attorney General on March 6 and we had a panel of experts in in the interim and then this hearing today and we are going to mark it up and we are going to bring it to the floor of the U.S. Senate.

There is no question about the fact that the tradition in this country is to have judicial review before there is an electronic surveillance. There is no question about that. And the Foreign Intelligence Surveillance Act gave exclusive authority to the FISA court, and I understand constitutional law, that if the President has power under Article II, it trumps the statute. Now, I want a determination made as to whether, looking at the program from the judiciary, it is constitutional. Congress can't do more than pass a law or exert political pressure and this is the avenue.

We are spawning a censure motion. There is no showing that the President acted in bad faith, and he may well have the constitutional authority. We can't determine that.

I wanted to add a panel here today, Senator Biden, because this issue bears on the censure motion and I asked Senator Feingold to be prepared to have a panel today and he demurred. He was in Iraq. We had a long hearing yesterday on immigration and he was in town to vote, but he wasn't in town for the Judiciary Committee meeting. I scheduled a hearing for Friday and he wants it postponed. I have got a letter, as soon as I get back to my office.—I have been engaged in this since 8:30 this morning—I am going to say no, and I am going to put that on the calendar for Thursday. Next week, we are going to be on the immigration bill. When we come back after the Easter recess, we have many hearings on the reauthorization of the Voting Rights Act, and the orderly processing of the Judiciary Committee is something the Chairman has to determine.

I know you would agree with that, Senator Biden, because you were the Chairman and you ran a good Committee. You were the Chairman from 1987 to 1995. The 1994 election changed that—

Senator BIDEN. I am so happy you are the Chairman now and not me.

[Laughter.]

Chairman SPECTER. Well, I am happy, too.

[Laughter.]

Chairman SPECTER. But I want to deal with the censure motion. Senator Feingold went to the Senate floor and got unanimous consent for 25 minutes to speak on it, and I knew he was going to be there so I got 25 minutes, and after he berated the President for 25 minutes, I wanted to have a discussion with him about it and he left the chamber after I asked him to stay. I sent Mike O'Neill, my General Counsel, after him. I thought that after 25 minutes of berating the President, there ought to be some discussion about it. I know that is not reasonable, but that is what I thought, so I took my 25 minutes ex parte. But there will be a day when we will be in the same room discussing the matter.

But I think today's hearing advances the ball. How much it advances the ball, nobody can tell, but the ball is being advanced. The ball is moving forward and I appreciate your testimony today, the endorsement by Mr. Kris and the qualified endorsement by Mr. Halperin, and thank you for coming, Senator Biden.

That concludes our hearing.

[Whereupon, at 2:33 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow].

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
201 S. VINE STREET
URBANA, ILLINOIS 61802

HAROLD A. BAKER
SENIOR JUDGE

PHONE: 217-373-5835
FAX: 217-373-5834

By Facsimile Transmission 202-224-9102

April 12, 2006

Barr Huefner
Hearing Clerk
United States Senate
Committee on the Judiciary

Re: Additional Questions submitted by Senator Russell D. Feingold in connection with the hearing on March 28, 2006

Here are my responses to the above questions:

Question: There has been some dispute in the media about your testimony regarding the legality or illegality of the President's program. Is it accurate to characterize your testimony as saying that the program the President authorized was legal?

Answer: I gave no opinion as to the legality or illegality of the President's program. I explained that I did not know what the President's program was and could not give an opinion.

Question: Do you think it is important for Congress to understand the facts about the President's program and to hear the Administration's case for why the current FISA law is inadequate before we attempt to draft a new law?

Answer: Naturally it is important for Congress to be fully informed on facts touching new legislation, but in this case I do not believe it is necessary before improvements could be made in the existing FISA. I attach a copy of my letter of March 7, 2006, to Senator Specter in response to his request for comments on the proposed legislation. There are things that could be accomplished now that would improve the oversight function of the FISA Court.

Question: Are you aware of any President since FISA was enacted, other than the current President, who has authorized a wiretap outside of FISA?

Answer: Yes. Foreign intelligence surveillances not covered by FISA have been authorized.

Question: Many believe that ultimately the judicial branch should assess the constitutionality of the NSA program that the President has authorized. However, the FISA court operates in secret, and does not have an adversarial process. As you well know, only the government makes

arguments before the court. The only way for a decision to be appealed to the Supreme Court is if the government loses in the FISA court of review. If the government wins, there is no appeal, and the Supreme Court would never have the opportunity to review the case.


a. Do you agree that any legislation designed to ensure judicial review of the President's program should also provide for an adversary process and Supreme Court review?

Answer: Yes. See my attached letter to Senator Specter. The legal advisors to the FISA court are experienced lawyers and have the necessary security clearances to handle such matters and to represent the position taken in the FISA court's ruling. I do believe that *In Re Sealed Case* the ACLU filed a petition for certiorari in the Supreme Court that was denied.

b. Do you have any reason to believe, based on your experience as both a FISA judge and a federal judge, that the federal courts, including the Supreme Court, could not appropriately handle any classified information that might be part of a constitutional challenge to this program?

Answer: I certainly know the FISA judges can and do handle highly classified materials appropriately. I have no doubt that the Supreme Court would also handle the materials appropriately. However, my observations and knowledge of history tell me that when you disseminate materials to a wide audience, the chances for compromise advance exponentially.

Very respectfully,



Harold A. Baker

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
STANLEY S. BROTMAN
SENIOR JUDGE

MITCHELL H. COHEN US COURTHOUSE
ONE JOHN F. GERRY PLAZA
FOURTH & COOPER STS., BOX 1029
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April 20, 2006

Barr Huefner
Senate Judiciary Committee
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Barr_Huefner@judiciary.senate.gov
Fax (202)-224-9102

RE: Additional Questions submitted by Senator Russell D.
Feingold in connection with the hearing on March 28, 2006.

My responses are as follows:

Question 1: There has been some dispute in the media about your testimony regarding the legality or illegality of the President's program. Is it accurate to characterize your testimony as saying that the program the President authorized was legal?

Answer: Since I had no knowledge of the President's program, I cannot give an opinion.

Question 2: Do you think it is important for Congress to understand the facts about the President's program and to hear the Administration's case for why the current FISA law is inadequate before we attempt to draft a new law?

Answer: I believe the draft amendment proposed by Senator Spector contains sufficient language that would tighten the oversight function of the FISA court. I recognize that Congress should be fully informed on facts touching legislation, and in this instance appropriate security measures must be in place.

Question 3: Are you aware of any President since FISA was enacted, other than the current President, who has authorized a wiretap outside of FISA?

Answer: Foreign Intelligence surveillances not covered by FISA have been authorized.

Question 4: Many believe that ultimately the judicial branch should assess the constitutionality of the NSA program that the President has authorized. However, the FISA court operates in secret, and does not have an adversarial process. As you well know, only

the government makes arguments before the court. The only way for a decision to be appealed to the Supreme Court is if the government loses in the FISA court of review. If the government wins, there is no appeal and the Supreme Court would never have the opportunity to review the case.

- (a) Do you agree that any legislation designed to ensure judicial review of the President's program should also provide for an adversary process and Supreme Court review?

Answer: Yes

- (b) Do you have any reason to believe, based on your experience as both a FISA judge and a federal judge, that the federal courts, including the Supreme Court, could not appropriately handle any classified information that might be part of a constitutional challenge to this program?

Answer: I believe that the Federal Courts including the Supreme Court can handle any classified information that may be part of a constitutional challenge to this program. Appropriate security measures can be determined and implemented.

Stanley S. Brotman
UNITED STATES DISTRICT JUDGE

Senator Leahy
Questions for Witnesses
Hearing On "NSA III: War Time Executive Power and the FISA Court"
March 28, 2006

Questions for Mort Halperin

1. Please explain the role that the concerns of the phone companies played in the enactment of FISA, and what role you think they are playing now with respect to the President's warrantless wiretapping program.

Prior to the enactment of FISA, AT&T, which was then the only phone company, provided access to phone lines to the FBI based on an oral request from a senior FBI official to the person in charge of security at AT&T. As information became public that some of the taps were only tangentially related to national security AT&T began to balk at cooperation on such an informal basis. Lawsuits directed at AT&T, including one filed on behalf of my family, increased the companies concern.

In enacting FISA, Congress wanted to give clear guidance to the phone companies. It did so by directing that they should cooperate only when given a warrant or a certification from the Attorney General that the statutory conditions for a warrantless surveillance had been followed.

Technical experts tell me that the surveillance described by the Attorney General would be difficult to carryout without the cooperation of the major telcons. If they have been cooperating they may now have come to understand that the surveillance was not being conducted pursuant to FISA and that they may be liable for civil and criminal penalties. We do not know what representations were made to the telcons to secure their cooperation.

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April 12, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Attention: Barr Huefner

Dear Senator Specter:

Enclosed are my answers to Senator Feingold's questions.

Warmest regards.

Sincerely,

John F. Keenan

JFK:maq
Enclosure

- (1) I have never been briefed on the "President's program" and do not know the details thereof. Therefore, I believe it inappropriate to attempt to pass any legal judgment on it.
- (2) That certainly would be helpful assuming this can be accomplished without the program being made public or leaked.
- (3) No.
- (4) a. Not necessarily. The structure of the present statute is adequate if a provision for en banc sittings of the court is included.

b. No, that's why the courts exist, to decide constitutional issues.

JOHN F. KEENAN
United States District Judge

804

David S. Kris
800 Connecticut Avenue, NW, Suite 800
Washington, D.C. 20006

April 21, 2006

Office of Senator Arlen Specter
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510
ATTN: Barr Huefner
copy via e-mail to Barr_Huefner@judiciary.senate.gov

Dear Senator Specter:

Thank you for your letter of April 11, 2006, enclosing questions from Senator Leahy. Answers to those questions are set forth below. These answers reflect my individual views, not those of any former or current employer. The Department of Justice has reviewed this letter under 28 C.F.R. § 17.18.

If you have any questions, please feel free to contact me. Thank you.

Sincerely,

David S. Kris

1. After the existence of this program was reported in December 2005, the Administration began criticizing FISA. All of sudden, we were told, the FISA statute – a statute that Congress had amended five times since 9/11 – was outdated, inflexible and overly cumbersome. The fact that the Administration did not express its dissatisfaction with FISA until after the program was revealed suggests that it was nothing more than an after-the-fact rationalization for violating FISA – sort of a variation on the “blame the victim” defense – with the victim in this case being the law. Is FISA a relic of the Cold War, useful only for long-term intelligence investigations of Soviet-style espionage operations?

I do not believe that FISA is a relic of the Cold War, useful only for long-term intelligence investigations of Soviet-style espionage operations. As enacted in 1978, FISA was designed to authorize and regulate electronic surveillance of international terrorists as well as spies. The statute provides explicitly that international terrorist groups and persons who engage in international terrorism may be targeted for electronic surveillance.¹ It also provides that the information sought by the surveillance may relate to “the ability of the United States to protect against . . . international terrorism.”² These definitions include international terrorism committed by groups without state sponsorship, and the 1978 legislative history refers explicitly to international terrorist groups that are, in some ways, the ancestors of more modern groups like al Qaeda and Palestinian Islamic Jihad.³ The legislative history discusses explicitly the possibility of these groups hijacking and bombing airplanes.⁴

FISA also contemplates surveillance in emergencies. As enacted in 1978, it had a provision that allowed surveillance for one day without judicial approval, placing “the Attorney General in the role of the court during the 24-hour emergency period.”⁵ In 2001, as part of the Intelligence Authorization Act, the emergency period was expanded from 24 to 72 hours.⁶

That does not mean, however, that FISA is adequate in its current form. National security is an evolving field, particularly after September 11, 2001. New technologies, changing strategies and tactics (by us and our adversaries), and political, cultural, and bureaucratic developments all require continual reexamination of our laws and policies. I have been out of government for nearly three years, I do not have any classified information about the NSA surveillance program, and I therefore do not know what should be done. In particular, as I testified before the Committee, I do not know whether legislation should be enacted, and if it is to be enacted, I do not know what it should say.

2. Attorney General Gonzales has said that FISA’s emergency authority is insufficiently “nimble” because it requires the Attorney General to satisfy himself that FISA’s standards are met before a wiretap can be initiated. Mr. Halperin has suggested that this issue could be addressed by building more flexibility into FISA’s emergency procedures, as for example by allowing the Attorney General to delegate authority for initiating wiretaps in emergency situations to designated intelligence officers. What do you think of this suggestion? Have you heard any specific

criticisms of FISA from the Administration, or are you aware of any based on your personal experience, that would not be addressed by Mr. Halperin's suggestion?

I think Mr. Halperin's suggestion should be considered; it is thoughtful and potentially promising. It has the advantage of effecting relatively minor changes to FISA, which as I testified reduces the risk of ambiguity or misunderstanding. To me, the proposal raises two conceptual questions and one empirical question, which I discuss below.

First, would the Attorney General (be required to) prescribe detailed procedures and protocols governing the intelligence officers to whom he (or the statute) delegates emergency authority? FISA itself may be sufficient guidance when the Attorney General is placed in the "role of the court" during the emergency period,⁷ but intelligence officers might benefit from more detailed guidance. Second, how long would the emergency authorization endure before review by the Attorney General or the FISC? If detailed protocols are prescribed, and if the emergency surveillance may continue for a substantial period of time without judicial review, the proposal begins to resemble – at a high level of generality – the programmatic approach offered by Senator Specter and others.

The third question reveals what I believe is the main difference between Mr. Halperin's proposal and the programmatic approach: How many discrete acts of surveillance – involving particular targets using particular facilities – should or must be accommodated? If the volume is very high, the Attorney General and the FISC may be overwhelmed by a requirement separately to evaluate and review each one in real time. The programmatic approach, with judicially approved specific procedures governing the surveillance in advance, and fully informed review of the surveillance after the fact, offers more flexibility.

The government's public statements suggest (to me at least) that a programmatic approach is necessary.⁸ Without the facts, however, I cannot evaluate the government's claims or say which approach is better or more appropriate.

3. Do you have any thoughts as to what principles should guide Congress's efforts to draft legislation here?

Some of those principles are set forth above. Chief among them, of course, is to know the facts. That does not mean that the Executive Branch should brief every Member of Congress on the NSA surveillance program. The Intelligence Committees were established to deal with the issue of legislation concerning classified matters.

As I testified, I believe that three other principles should govern any legislative drafting process. First, adhere as closely as possible to existing structures and language in FISA. That promotes seamless integration of the new provisions into the statute as a whole, and it promotes clarity by importing settled understandings. Second, accommodate the government's operational needs to the extent deemed appropriate, but

as a general matter do not exceed those needs, at least without knowing the facts. In some cases, the Executive Branch may be too restrained, and in such cases broad legislation may prompt more aggressive action. Although I do not know the facts, I must confess in this case that I do not fear excessive passivity. Third, especially at the early stages of the legislative process, provide a vehicle for useful debate. This is an area in which details matter, and miscommunication comes easily.

4. In your written statement, you offered some thoughts on possible legislation. Could you please explain how your proposal would work, and how it would differ from the two bills that have been introduced (S.2453 and S.2455)?

The draft legislation I submitted takes its policy and constitutional cues from S.2453 (Senator Specter's bill) and S.2455 (Senator DeWine's bill). Thus, for example, it does not simply narrow the definition of "electronic surveillance" in FISA to exclude international communications.⁹ At a high level of generality, it resembles S.2453, in that it calls for judicial review of surveillance programs rather than individual instances of surveillance, although it differs from S.2453 in its implementation. The draft is meant to be modular; elements can be added or removed without changing its basic structure. If S.2455 is the desired model, judicial review can be eliminated from my draft by making minor changes specified in my written testimony.

My draft would allow the President (or, as an alternative, the Attorney General) to authorize electronic surveillance – subject to judicial review if desired – for renewable periods of 45 days. The surveillance would be authorized if, and only if, it met each of the conditions specified in proposed 50 U.S.C. § 1881. There are three main groups of conditions. First, the surveillance would have to satisfy certain substantive requirements set out in proposed Section 1881(a), such as a requirement that it be conducted under specific procedures reasonably designed to ensure that the contents of a communication cannot be acquired without probable cause. The draft contemplates that the Attorney General would approve detailed procedures governing the surveillance, and that operational personnel would be directed to follow those procedures. The analogy in current FISA is to minimization, and (to a lesser extent) surveillance under 50 U.S.C. § 1802. Different standards would govern the surveillance of content rather than routing and addressing information.

Second, the government would have to provide certain information about the surveillance to the Congressional Intelligence Committees and to the FISC (or subsets of those entities). Initially, the government would provide "a report setting forth the standards and procedures governing the surveillance." This report likely would contain the instructions provided to the operational personnel at NSA or another agency, as well as a memorandum explaining why the instructions are in fact "reasonably designed to ensure compliance with" the statutory requirements and (as necessary beyond the statutory discussion) the Fourth Amendment.

After the fact, every 45 days, the government would provide a timely “accounting” of the surveillance previously conducted. The accounting would (or could) contain the following: information about any deviations from the standards and procedures governing the surveillance; the number of communications, communications facilities, and U.S. persons subjected to the surveillance; the types attributes (such as the number or other identifier) of all U.S. person communications subjected to the surveillance; and a summary of the foreign intelligence information acquired from the surveillance. The accounting would inform any required changes to the standards and procedures for subsequent periods of surveillance.

Third and finally (if desired as a policy matter), the surveillance would have to be conducted in accord with any orders of the FISC. Upon receipt of the government’s report, the FISC would have a short period of time to either approve the standards and procedures proposed by the government, or order modifications to them. If modifications were ordered, the government would be entitled to appeal. If surveillance were found to violate the statute (or the Fourth Amendment), the information obtained from it would be suppressed and generally would not be available for use (except where death or serious bodily harm may result).

Notes

¹ Every application to the Foreign Intelligence Surveillance Court (FISC) for an order authorizing electronic surveillance must include a statement of probable cause to believe that the target of the surveillance is a “foreign power” or an “agent of a foreign power,” and the FISC may not authorize surveillance without finding such probable cause. 50 U.S.C. §§ 1804(a)(4), 1805(a)(3). The definition of “foreign power” includes “a group engaged in international terrorism or activities in preparation therefor,” 50 U.S.C. § 1801(a)(4), and the definition of “agent of a foreign power” includes “any person other than a United States person who . . . acts in the United States . . . as a member” of such a group. 50 U.S.C. § 1801(b)(1)(A). The term “agent of a foreign power” is also defined to include “any person,” including a United States person, who “knowingly engages in . . . international terrorism, or activities that are in preparation therefore, for or on behalf of [any] foreign power,” including an international terrorist group or a foreign government. 50 U.S.C. § 1801(b)(2)(C). Conspirators and aiders and abettors of international terrorism are also agents of foreign powers. 50 U.S.C. § 1801(b)(2)(E). (In 2004, FISA’s definition of “agent of a foreign power” was amended to include non-U.S. persons who engage in international terrorism as lone wolves, without the backing of a foreign power. 50 U.S.C. § 1801(b)(1)(C).)

² Every application to the FISC for an order authorizing electronic surveillance must include a certification from a high-ranking Executive Branch official that, among other things, the official “deems the information sought to be foreign intelligence information.” 50 U.S.C. §§ 1804(a)(7)(A); see also 50 U.S.C. § 1804(a)(7)(B), (D) (E). The FISC may not authorize surveillance unless it finds that the certification contains the requisite elements, and, where the target is a United States person, that the certification is not clearly erroneous. 50 U.S.C. § 1805(a)(5). Under 50 U.S.C. § 1801(c), “foreign intelligence information” is defined to include the following:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against –

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power;
or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

³ The 1978 legislative history explains that FISA surveillance may be directed at “Black September, the Red Army Faction, the Red Brigades, and the Japanese Red Army.” H.R. Rep. No. 95-1283, Part I, at 30 (1978).

⁴ *Id.* at 46.

⁵ *Id.* at 85.

⁶ See 50 U.S.C. § 1805(f).

⁷ See text and note 5, *supra*.

⁸ The government has explained that the “President authorized the [program] because it offers . . . speed and agility Among the advantages offered by the [program] compared to FISA is *who* makes the probable cause determination and how many layers of review will occur *before* surveillance begins.”

Responses to Joint Questions from House Judiciary Committee Minority Members, Response to Question 32 (released March 24, 2006) (italics in original). The government's explanation continues:

Under the [program], professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communications systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. By contrast, because FISA requires the Attorney General to "reasonably determine[]" that "the factual basis for issuance of" a FISA order exists at the time he approves an emergency authorization, *see* 50 U.S.C. § 1805(f)(2), as a practical matter, it is necessary for NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General to review a matter before even emergency surveillance would begin.

Id. (second alteration in original). In sum, the government reports, the "relevant distinction between the two methods – and the critical advantage offered by the [NSA surveillance program] compared to FISA – is the greater speed and agility it offers." *Id.* at Response to Question 34.

⁹ That could be accomplished by creating new 50 U.S.C. § 1801(f)(5) as follows: "Notwithstanding subsections (1)-(4) of this section, 'electronic surveillance' does not include the acquisition of information from an international communication."

April 21, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
Washington DC

Dear Mr. Chairman:

This responds to your April 11 letter which enclosed four questions from Senator Feingold. To the extent that I am informed on the matter, and may otherwise ethically respond, I submit the following.

1. Because I am not informed as to what the President's program is, I am unable to answer this question.
2. As I noted in my March 28 testimony, the proposed changes to FISA in the " National Security Surveillance Act of 2006" strike a reasonable balance between the President's power to conduct foreign affairs and the Congress's power of oversight over the same subject. While it is certainly advisable for the Congress to be apprised on the subject matter of any proposed legislation, these amendments proposed by the Chairman, without more, will make changes that address the concerns I heard expressed at that hearing.
3. I am advised that other Presidents have authorized non-FISA wiretaps.
4. a. I agree.

b. I am confident that the judges who would be privy to these cases would handle all classified material appropriately. My security concerns would be focused on the non-judicial staff (often employed for only brief periods) who might be handling this material as it makes its way through the court system.

Respectfully yours,

William Stafford
Senior Judge

SUBMISSIONS FOR THE RECORD

**NSA III: Wartime Executive Power
and the FISA Court**

United States Senate Judiciary Committee

Statement of

Morton H. Halperin

Senior Fellow, Center for American Progress

Executive Director, Open Society Policy Center

March 28, 2006

Mr. Chairman,

It is an honor and a privilege for me to appear once again before this distinguished committee to discuss the appropriate standards and procedures for electronic surveillance of international terrorist activity. As the more senior members of the committee know, I had the privilege of testifying on a number of occasions when the committee was considering the enactment of The Foreign Intelligence Surveillance Act (FISA). More recently, I testified on proposed amendments to FISA after 9/11.

I bring to this subject a longstanding commitment to work to resolve perceived conflicts between national security and civil liberties as well as the perspective of someone who has served in three administrations in senior national security positions. I was also the victim of a 21 month warrantless wiretap of my home phone conducted by the Nixon Administration under the guise of national security.

The legal issues relating to the warrantless surveillance program currently being conducted have been extensively analyzed before this committee. I will not revisit ground covered in previous hearings, but wish to express my appreciation to the Chair of the Committee for conducting them, as well as this hearing. (My own legal analysis is attached to this statement and I ask that it be made part of the record along with my written statement). Rather, I want to focus on the policy issues that I believe should guide the committee in addressing possible legislative action.

Let me start with an area of complete agreement. If al Qaeda is calling someone in the United States, the government should be listening. I would have thought that FISA provided all the authority needed to listen to such calls. If the administration believed that the FISA rules were not sufficient it should have come to Congress and asked for an amendment to FISA. Now, if the administration makes the case in public that, following 9/11, greater flexibility is needed to listen in a timely way to such calls, Congress should be prepared to amend FISA as necessary and consistent with the Fourth Amendment—after it is fully briefed on any such need. I will describe below the possible elements of such legislation based on ideas that I understand have been discussed in various congressional offices.

I want to emphasize what I believe to be a fundamental point: Congress cannot legislate in the dark. Before Congress considers further legislation, it must conduct a full and complete investigation of the full range of current activities being carried on outside of the procedures prescribed by FISA. It should also insist that the administration provide a public explanation of what additional authority it believes it needs, with additional detail provided in closed hearings. And Congress should require that, as a condition for granting the additional authority, all surveillance be conducted pursuant to the standards of FISA.

The legislative history of FISA as well as the resolutions and legislation which created the Senate Intelligence Committee and the current oversight commission leave no doubt that this committee has a right to be fully briefed. I had understood that the Attorney

General was to return to continue his testimony. Moreover, the letter that he wrote to the committee after his testimony seemed to call into question the accuracy of the impression left by his responses to questions before this committee, making it all the more important that he testify again. That seems to be a vital next step before the committee considers any legislative approach. The administration has still not released its contemporaneous legal analysis of why it thought the Program was legal when it began or the full extent of the legal authority claimed. Nor has there been an explicit public denial of the existence of additional programs outside of FISA. This committee and the American public are entitled to know if such programs exist without making public details that need to be kept secret. We also do not know what role the telephone companies are playing and what certifications may have been provided to them by the Attorney General.

A review by a small sub-committee of the Intelligence Committee would not be sufficient. There can be no doubt that the Senators who are briefed have a constitutional right to share that information in confidence with all of their colleagues so that the Senate as a whole can determine what should be done.

When these investigations are completed, Congress may determine that some additional legislation is necessary. If so, it should follow the process that led to the enactment of FISA. This would mean extensive hearings on the precise legislation in both the intelligence and judiciary committees as well as adherence to key principles which I now want to briefly discuss.

When Congress considered the request of the Ford and Carter Administrations that it authorize a program under which surveillance could be conducted for national security purposes, it insisted on a number of key provisions, including that surveillance of U.S. persons required a warrant from the FISA court based on a particularized finding of probable cause and that FISA must be the exclusive means for such surveillance. I would like, if I may, to remind the committee of the policy considerations that led Congress to require these procedures. They were valid then and, despite the unsupported claims of some that FISA is obsolete, they remain valid in the post 9/11 environment.

As we learned from the abuses revealed by the Church and Pike Committees, allowing the President – any President – to determine on his own when surveillance is appropriate and to conduct it without judicial review inevitably leads to abuse. We cannot permit faith in any one administration's adherence to the Constitution to override that fundamental insight, well understood by the founders of this nation.

A process authorized by the Congress and providing for particularized judicial review provides the greatest assurance to those who must implement the program in the government and the private sector that it is lawful and that they can implement it without fear of criminal and civil penalties. We owe that to them. One of the main concerns of Congress in enacting FISA and making it the exclusive means was to provide clear guidance to the telephone companies about when they should and should not provide assistance. Moreover, when there are doubts about the constitutionality of a program, those involved in conducting the program will properly balk, thwarting the program, and

there will inevitably be leaks by those deeply troubled by what is being done. It is worth noting that there were leaks of surveillance programs before FISA was enacted and of the current program, but, as far as I am aware, there have been no leaks about programs conducted under FISA.

In addition, American citizens are entitled to know the rules under which they may be subject to surveillance by their government in the name of national security. This is so for several reasons. First, it is necessary to avoid paranoia and to secure the necessary support of the American people for the appropriate steps needed to reduce the risk of terrorist attacks. I cannot tell you how many times I have assured innocent Americans that they could not be the subject of electronic surveillance because the Justice Department would never seek a warrant, the FISA court would never conclude that there was the necessary probable cause, and warrantless surveillance were prohibited. In addition, the public is entitled to know what the rules are so that, if they believe the law requires reconsideration, they can seek change by lobbying the President and the Congress and by exercising their right to vote.

Because of these policy concerns, as well as the dictates of the Fourth Amendment, I urge the Congress to reaffirm, through oversight and, if necessary through legislation, the core principle of the FISA system that surveillance of Americans and all persons within the United States requires warrants based on particularized probable cause that the target of the surveillance meets criteria specified in the legislation.

It is against these criteria that I want to assess the two bills that are before this committee and to suggest the possible outlines of an alternative approach to legislation on this issue – should Congress determine after investigating the matter that legislation is needed. Before explaining why I believe that both of these bills fail to meet the criteria I have laid out, I want to express my deep appreciation to the Chairman for his determination to find a way to restore FISA as the exclusive means for electronic surveillance for national security purposes and to insure that all surveillance is consistent with the Fourth Amendment and is conducted under the supervision of the FISA court. Needless to say, I share all of those objectives.

I have four primary concerns with the current draft of the chairman's bill (S. 2453). First, it authorizes far more than the program, which the President and the Attorney General have described as the Terrorist Surveillance Program, already under way. Second, it does not require particularized probable cause related to the target of the surveillance. Third, the scope of what is covered is ambiguous. Finally, it does not deal with the exclusivity issue.

The Attorney General assured the committee that calls could be subject to surveillance only if there was reason to believe that at least one of the parties was overseas and that one of the participants was a terrorist related to 9/11 and covered by the Authorization to Use Military Force (AUMF). He also told the committee that the surveillance was narrowly focused and designed to prevent terrorist acts. S. 2453 goes far beyond these circumstances in a number of ways:

- it permits surveillance to gather any foreign intelligence information, not just information related to terrorist activity;
- it permits surveillance of all terrorist groups and not just al Qaeda;
- it permits surveillance of persons who engage in clandestine intelligence activities, which may not even be illegal, and not just terrorist activity;
- it permits the interception of electronic communications between two persons, both of whom are in the United States.

I do not understand why the Congress would grant new authority to the President to conduct electronic surveillance in situations that go far beyond the need described by the Attorney General to this committee. I understand that many people believe that there are one or more additional programs that are not conducted pursuant to FISA. That may well be true, but I do not see what is accomplished by trying to guess what those programs may cover, since the Congress could easily end up granting authority that imperils privacy even though it is not even needed, and not granting the authority which the government believes that it needs. This is especially so when the President has made clear that he will continue to assert the right to conduct programs beyond FISA even if granted this additional authority. In my view, any additional grant of authority should track the problem which led to the program as explained by the Attorney General to this Committee. I will return to this point.

The second major problem with S. 2453 is that it authorizes the FISA court to approve an entire program and does not permit the court to review individual surveillances to determine if they meet the standards of the law and the Fourth Amendment. Thus it does not provide for the particularized probable cause which I believe the Constitution requires and goes far beyond the standards that the Supreme Court has approved for surveillance of criminal enterprises.

The third issue I would raise is that S. 2453 is ambiguous about the circumstances under which the government could seek approval for a program. While I fully understand the difficulties of drafting with unambiguous language in this area, I must say that it is not clear what the bill does authorize.

The circumstances under which the Court may authorize a program are laid out in Section 703 (a) (7) of S. 2453. I have read the section carefully many times and conferred with others about it. The language of the paragraph permits two interpretations, but, with respect, neither appears to make sense or to be what was intended.

One reading of the language is that it permits the FISA court to authorize an entire program covering perhaps hundreds of targets based on a finding that at least one of the calls to be intercepted will include a person covered by S. 2453. The Attorney General,

under this reading, would not have to make any representation about any of the other individual surveillances under the program. That surely cannot be the Senate's intent.

The alternative interpretation is that the Attorney General must certify that each and every surveillance meets the criteria of the statute. The problem with that interpretation is that it produces a null set. Let me explain. S. 2453 says that the Attorney General can only use this procedure if he concludes that he cannot get a warrant from the FISA court under current law. The circumstances in which the government can seek a warrant under the new legislation are limited to situations in which a FISA warrant could be obtained. Specifically, the Attorney General needs to certify that the target is either a foreign power or an agent of a foreign power or a person who has been in communication with a foreign power or an agent of a foreign power and is seeking to commit an act of international terrorism. If he reaches that conclusion, then he can seek a FISA warrant and by the terms of this legislation cannot seek a warrant under the new program.

I am forced to conclude that the intent of the paragraph must have a third meaning and would urge you to redraft it to make that intent clear.

S. 2453 does attempt to put an additional limit on surveillance of persons within the United States, capping surveillance at 45 days. However, it appears that this limit can be overcome either by applying for an approval of a new program or by asserting that the AUMF authorizes the surveillance.

The fourth major problem with S. 2453 is that it fails to insist that the President conduct all electronic surveillance within the expanded authority granted by the Congress. I would urge the Congress to seek such a commitment from the President before enacting any legislation and I will suggest below some legislative changes that might well compel acceptance of this approach.

(My concerns about the Chairman's bill (S. 2453) are described in greater detail in a memorandum prepared by my long term comrade-in-arms on these matters, Jerry Berman and his colleagues at CDT. I attach a copy to this statement and ask that it be made part of the record.)

The second bill referred to this committee, introduced by Senator DeWine and others (S. 2455), shares many of the difficulties of S. 2453, including authorizing surveillance in situations that go far beyond the need described by the administration, not requiring particularized probable cause, and not requiring that it be the exclusive means. However, the difficulties with S. 2455 are even more serious. It authorizes indefinite warrantless surveillance (albeit in 45-day increments) of persons in the United States. In addition, while it seems to require probable cause that certain factual predicates have been met, it actually permits surveillance under the much lower standard of "reasonable likelihood" that the program is focused on a group that may be engaged in activities in preparation of a potential act of international terrorism. Moreover, these determinations are made by the executive branch on its own with no judicial review. (My concerns about S. 2455 are

described further in a different memorandum prepared CDT. I attach a copy to this statement and ask that it be made part of the record.)

Such sweeping proposals should be deferred unless and until a clear showing has been made to Congress as to why they are necessary. Should Congress seek to legislate based on the record currently before it, such legislation should respond to the specific needs that have been asserted by the government rather than to conjectures as to what additional needs may exist. Based on conversations I have had with various congressional offices I believe that legislation which includes the following elements might have broad support:

1. Authorize additional emergency procedures under FISA to deal with the problem explained by the Attorney General to this committee. As I understand the Attorney General's testimony, the sole reason he presented why FISA could not be used was that the emergency procedure was not flexible enough. This would be solved by including in the legislation provisions along the following lines:

- a. The Attorney General would be authorized to establish a program with appropriate procedures and criteria for initiating surveillance in emergency situations with appropriate minimization procedures. Under this program he could authorize designated officials of the NSA to initiate emergency surveillance of conversations when there are grounds to believe that one of the persons on the call is a member of al Qaeda and that one of the persons is outside the United States.
- b. Within 72 hours of initiating any emergency surveillance under this program, NSA would need to submit a request for authority to the AG specifying the basis for the belief. If the AG approves the surveillance, it can continue. If he disapproves it, the surveillance must be terminated and all the fruits destroyed.
- c. Within 72 of approving an emergency surveillance under this program the Attorney General must submit a request to the FISA court for a warrant under the existing FISA standards. If the court rejects the warrant, the surveillance must be discontinued and the fruits destroyed.

2. Amendments to FISA to reaffirm Congress' clear intent that FISA be the exclusive means to conduct electronic surveillance within the United States and of US persons for intelligence purposes. My legal analysis and that of many others, including most persuasively that by David Kris, which I assume this committee has, makes it unmistakably clear that Congress intended that FISA and Title III be the exclusive means of conducting electronic surveillance. Congress could reaffirm this position and make it clear that it rejects the executive branch's strained interpretation by amending the sections of FISA which deal with criminal penalties, civil penalties, and the obligations of private persons, including telecommunications companies, to refer specifically to activities conducted pursuant to FISA or Title III. This would mean, for example, that any

certification provided by the Attorney General to a telephone company would need to certify in specific terms that the statutory requirements of FISA had been satisfied as is the clear intent of the current statute.

3. Sunset the new authority in one year.

4. Direct the Intelligence and Judiciary Committees to conduct a full inquiry and to report back to the Senate within six months any additional legislation that may be required in light of the facts.

Mr. Chairman, I am grateful for this opportunity to testify and, of course, would be delighted to answer any questions.

**STATEMENT OF JUDGE JOHN F. KEENAN BEFORE SENATE
JUDICIARY COMMITTEE -- MARCH 28, 2006**

**IT IS AN HONOR FOR ME TO HAVE BEEN ASKED BY
SENATOR SPECTER TO APPEAR BEFORE YOUR COMMITTEE AND
TESTIFY CONCERNING SENATOR SPECTER'S PROPOSED DRAFT
BILL ENTITLED THE "NATIONAL SECURITY SURVEILLANCE ACT
OF 2006."**

**I SERVED AS A MEMBER OF THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT FROM MAY 18,
1994 UNTIL MAY 18, 2001. DURING MY TENURE, THE COURT
CONSISTED OF SEVEN DISTRICT JUDGES -- NO TWO OF WHOM
COULD BE FROM THE SAME CIRCUIT. WE EACH SERVED FOR
SEVEN YEARS AND COULD NOT HAVE THOSE TERMS EXTENDED.**

I KNOW THAT TITLE 50, SECTIONS 1801 ET SEQ., THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OR FISA, WAS AMENDED AFTER SEPTEMBER 11TH AND THAT THE COURT NOW CONSISTS OF ELEVEN DISTRICT JUDGES.

THE FISA WAS ORIGINALLY ENACTED IN 1978 AND IT IS WHAT I WILL CALL A FOURTH AMENDMENT STATUTE. THIS IS BECAUSE IN ORDER TO SECURE A FISA WARRANT, THE ATTORNEY GENERAL MUST ESTABLISH PROBABLE CAUSE. HOWEVER, FISA PROBABLE CAUSE IS DIFFERENT THAN IN THE CRIMINAL CONTEXT. IN A FISA APPLICATION, ALL THE GOVERNMENT MUST SHOW IS THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE TARGET IS A FOREIGN POWER OR THE

AGENT OF A FOREIGN POWER. IN THE CASE OF A FISA WARRANT, THE SEIZURE IS OF FOREIGN INTELLIGENCE INFORMATION.

AT PRESENT, THIS WHOLE AREA IS ONE WHERE THERE IS CONSIDERABLE CONTROVERSY AND DISAGREEMENT. IT IS NOT MY PURPOSE, NOR DO I THINK IT APPROPRIATE, FOR ME TO ALLUDE TO THE POLITICS OF THE SUBJECT. I RESPECTFULLY SUGGEST TO YOU THAT FISA HAS BEEN A VALUABLE TOOL FOR THE NATION IN THE COLLECTION OF FOREIGN INTELLIGENCE. FISA CAN BE IMPROVED AND IT SHOULD BE IMPROVED TO ACCOMMODATE MORE MODERN TECHNOLOGY WHICH WAS NOT CONTEMPLATED IN 1978 WHEN THE ORIGINAL LAW WAS ENACTED. I BELIEVE YOUR

**LEGISLATION, WITH CERTAIN MODIFICATIONS, WOULD IMPROVE
FISA.**

**CONTRARY TO THE EDITORIAL IN THE FEBRUARY 9,
2006 WALL STREET JOURNAL, FISA AND THE FOREIGN
INTELLIGENCE SURVEILLANCE COURT SHOULD NOT BE
ABOLISHED.**

**UNDER ARTICLE II, SECTION 2, OF THE CONSTITUTION,
THE EXECUTIVE HAS GREAT POWER AND AUTHORITY IN THIS
AREA -- SO, TOO, DOES THE LEGISLATURE, UNDER ARTICLE I,
SECTION 8, AS RECOGNIZED IN YOUR BILL. WHATEVER
LEGISLATION IS ENACTED SHOULD ACCORD THESE TWO
PRINCIPLES SUFFICIENT RECOGNITION.**

**IT IS MY UNDERSTANDING THAT THE LEGISLATION
BEFORE YOU PROPOSES TO SUPPLEMENT THE PRESENT LAW,
NOT TO OVERRULE, REPEAL OR SUPPLANT IT.**

**I AM AWARE THAT SECTION 1805(f) OF FISA WAS
AMENDED TO AUTHORIZE THE ATTORNEY GENERAL TO EMPLOY
ELECTRONIC SURVEILLANCE TO OBTAIN FOREIGN INTELLIGENCE,
WITHOUT A COURT ORDER FOR 72 HOURS, IN EMERGENCY
SITUATIONS. IT IS MY UNDERSTANDING, BASED ON AN ARTICLE
IN THE MARCH 9TH NEW YORK TIMES, THAT THERE IS A BILL IN
THE SENATE FOREIGN INTELLIGENCE COMMITTEE SEEKING TO
ALLOW WARRANTS, WITHOUT COURT ORDER, FOR UP TO 45
DAYS.**

THE "NATIONAL SECURITY SURVEILLANCE ACT OF 2006," WHICH IS BEFORE YOU, MAKES NO REFERENCE TO THE 72-HOUR PERIOD AND THUS, PRESUMABLY, LEAVES IT IN PLACE. I WOULD RESPECTFULLY SUGGEST THAT THE PERIOD BE INCREASED TO SEVEN DAYS, OR 168 HOURS, IN EMERGENCY CASES. THIS SHOULD BE MORE THAN AMPLE TIME TO ADDRESS UNFORESEEN EMERGENCIES.

THE LEGISLATION BEFORE YOU PRESUMABLY LEAVES IN PLACE SECTION 1803(b) WHICH ESTABLISHES A THREE-JUDGE COURT OF REVIEW OVER THE FISA COURT. IN 2002, THE REVIEW COURT SAT FOR THE FIRST TIME AND RULED AT 310 F.3d 717 THAT "FISA DOES NOT CONTEMPLATE" AN EN BANC PROCEEDING WHEREIN ALL THE JUDGES

**SIT CONTEMPORANEOUSLY. THE LEGISLATION HERE MAKES
NO REFERENCE TO EN BANC PROCEEDINGS AND, IF THERE IS
A DESIRE TO PERMIT THE ELEVEN JUDGES TO SIT EN BANC,
A SECTION SHOULD BE ADDED TO THE LEGISLATION TO ALLOW
THIS.**

**THE LEGISLATION BEFORE YOU IN PROPOSED
SECTION 701 DEFINES SEVERAL TERMS -- AMONG THEM IS
THE TERM "ELECTRONIC SURVEILLANCE." I SHOULD POINT
OUT THAT THIS TERM IS ALREADY DEFINED IN PRESENT
SECTION 1801(f) AND THAT THERE ARE DIFFERENCES IN
THE DEFINITIONS WHICH SHOULD BE HARMONIZED
IN THE NEW LEGISLATION.**

BECAUSE OF MODERN TECHNOLOGY UNITED STATES PERSONS MAY WELL BE IN THE NETWORK OR CHAIN OF COMMUNICATION OF KNOWN TERRORISTS. CONCERNING THOSE TERRORISTS, THERE MAY WELL BE AMPLE PROBABLE CAUSE, BUT LITTLE OR NOTHING MAY BE KNOWN ABOUT THE UNITED STATES PERSON IN THE CHAIN, OTHER THAN THAT HE IS RECEIVING COMMUNICATIONS FROM THE TERRORIST. I BELIEVE IN THE CONTEXT OF INTELLIGENCE GATHERING THAT THE FOURTH AMENDMENT ALLOWS CONGRESS TO EMPOWER THE PRESIDENT TO SEEK WARRANTS TARGETING NETWORKS OF COMMUNICATION USED BY PEOPLE, INCLUDING UNITED STATES PERSONS, WHERE THE NETWORK IS ENGAGED IN TERRORISM, OR ACTIVITIES RELATED THERETO, WITHOUT HAVING SPECIFIC

**PROBABLE CAUSE FOR ALL PEOPLE IN THE NETWORK. I BELIEVE
YOUR LEGISLATION ACCOMPLISHES THIS IMPORTANT PURPOSE
AND TAKES INTO ACCOUNT THE SOPHISTICATED MODERN
TECHNOLOGY EMPLOYED IN PRESENT DAY ELECTRONIC
COMMUNICATIONS WHILE RECOGNIZING THE NEED FOR
MINIMIZATION PROCEDURES.**

THANK YOU.

from the office of
Senator Edward M. Kennedy
of Massachusetts

FOR IMMEDIATE RELEASE
March 28, 2006

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

STATEMENT BY SENATOR KENNEDY ON EXECUTIVE POWER AND FISA
COURT
(AS PREPARED FOR DELIVERY BEFORE JUDICIARY COMMITTEE)

I commend these federal judges and experts on FISA for joining us today on this important issue. Many of us are concerned about the Administration's resort to unchecked presidential power, in defiance of our constitutional system of checks and balances.

Unfortunately, so far, our requests for witnesses and documents from the Administration have been rejected so far. The Congress obviously needs to know more about this controversial program, so that our oversight can be effective. Chairman Specter even said that he would be willing to consider cutting off funding for the surveillance program, unless the Administration is more forthcoming and we are still waiting to see whether Attorney General Gonzales will come back to testify a second time.

I remember a different time, in 1976, when Congress worked closely with President Ford and Attorney General Levi to develop a foreign surveillance and intelligence program to help protect our national security. On four different occasions, several of us on the Committee went to the Justice Department to meet with Attorney General Levi to work out the statute which became FISA. We took into consideration the threats to our country at that time as well as the need for secrecy on matters of national security, and we drafted the Act accordingly. In the Senate, there was only one vote against the bill.

That law may need to be upgraded in light of the war on terror and the revolution in technology that allows much wider types of surveillance. But the Bush Administration has chosen to act unilaterally, without any cooperation with Congress.

We all agree that the President should have the appropriate powers necessary to protect the American people from terrorists -- and we stand ready to work with the President to do so. We need to know more about this program, as well as any others. Based on what is known so far, the President has gone beyond the law with this surveillance program, and the American Bar Association, the Congressional Research Service, and legal experts across the political spectrum all agree. It's time for Congress to check the abuse of power by this White House.

Testimony of David S. Kris before the
Committee on the Judiciary, United States Senate
March 28, 2006

Mr. Chairman, Senator Leahy, and Members of the Committee: Thank you for the opportunity to testify about certain electronic surveillance conducted by the National Security Agency (NSA).¹ As you know, I worked on national security matters, including the Foreign Intelligence Surveillance Act (FISA), when I was at the Department of Justice (DOJ).² However, I was not read into the NSA surveillance program, and I have no classified information concerning it.³

My testimony is divided into two main parts. The first discusses statutory and constitutional issues raised by the NSA surveillance program. The second part offers some thoughts on possible legislation, including a draft bill and explanation of its main provisions.⁴ Both parts of the testimony suffer from my factual ignorance. It is difficult to analyze a surveillance program, and almost impossible to comment on legislation to regulate such a program, without the facts. *Caveat emptor*.

Statutory and Constitutional Analysis

My statutory and constitutional analysis of the NSA surveillance program can be summarized as follows: (1) NSA engaged in foreign intelligence “electronic surveillance” as defined by FISA⁵; (2) FISA’s “exclusivity provision”⁶ prohibits such surveillance except under the “procedures” in FISA; (3) the September 2001 Authorization to Use Military Force (AUMF),⁷ as interpreted by the Supreme Court in *Hamdi v. Rumsfeld*,⁸ does not implicitly repeal the exclusivity provision or otherwise authorize the surveillance; and therefore (4) the NSA’s surveillance program raises the question whether the exclusivity provision is an unconstitutional infringement of the President’s constitutional power under Article II. The answer to that question (and to the related Fourth Amendment question) depends in large part on facts not yet available. I believe, however, that the constitutional analysis will turn in large part on two operational issues – the importance of the information sought (as compared to the scope of the surveillance), and the need to eschew the use of FISA in obtaining the information. With the relevant facts unavailable, I express no opinion on the constitutional issue.

As of this writing, the government’s best legal defense of the NSA program appears in a letter from DOJ to certain Members of Congress dated December 22, 2005, and a whitepaper released by DOJ on January 19, 2006.⁹ The letter and whitepaper can be summarized as follows: (1) the President has constitutional authority under Article II to “order warrantless foreign intelligence surveillance within the United States” of the type conducted by NSA; (2) that constitutional authority “is supplemented by statutory authority under the AUMF” as interpreted in *Hamdi*; (3) the NSA surveillance program accords with the exclusivity provision because FISA “permits an exception” to its own procedures where surveillance is “authorized by another statute, even if the other authorizing statute does not specifically amend” the exclusivity provision; and (4) any doubt on the previous question must be resolved in the government’s favor to “avoid any potential conflict between FISA and the President’s Article II authority as

Commander in Chief.” Finally, the government asserts in its whitepaper, (5) if the exclusivity provision does forbid the NSA surveillance, then it was repealed by the AUMF or is unconstitutional.¹⁰ In the discussion that follows, I address each of these arguments. While I do not agree with the government, I appreciate the very high quality of its current legal analysis.

I. Did the NSA Conduct Foreign Intelligence “Electronic Surveillance”?

At the outset, it appears that NSA engaged in “electronic surveillance” as defined by FISA. In a briefing held on December 19, 2005, the Attorney General described NSA’s conduct as “electronic surveillance of a particular kind, and this would be intercepts of contents of communications where . . . one party to the communication is outside the United States.”¹¹ He also said that FISA “requires a court order before engaging in this kind of surveillance.”¹² It is generally “electronic surveillance” under FISA to acquire “the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States.”¹³ The definition is even broader as applied to the targeting of United States persons – *e.g.*, a citizen or green-card holder.¹⁴

In its whitepaper, DOJ acknowledges that NSA “intercept[ed] international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations.”¹⁵ It “assume[s] . . . that the activities described by the President constitute ‘electronic surveillance’ as defined by FISA,”¹⁶ although it also argues that the definition produces some anomalies in light of changing technology and other factors.¹⁷ In any event, there is no way for outsiders to look behind the government’s assumption, and therefore no option other than to proceed as if it were true.¹⁸ Following the government’s lead, I assume that NSA engaged in “electronic surveillance” as defined by FISA.

II. Did Congress Intend Such Surveillance to be Conducted Solely Under FISA?

A. Constitutional Preclusion.

Congress intended to foreclose the President’s constitutional power to conduct foreign intelligence “electronic surveillance” without statutory authorization. A provision of FISA, enacted in 1978 and now codified at 18 U.S.C. § 2511(2)(f), provides in relevant part that “procedures in . . . the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in [FISA] . . . may be conducted.”¹⁹ It also provides that the criminal wiretapping law known as “Title III,” and other statutes governing ordinary law-enforcement investigations, are “exclusive” as to the surveillance activity that they regulate.²⁰

The language of this “exclusivity provision” as a whole could be more elegant, but when read in light of FISA’s legislative history, its meaning is hard to avoid. The House Intelligence Committee’s 1978 report on FISA explains:

despite any inherent power of the President to authorize warrantless electronic surveillances in the absence of legislation, by [enacting FISA and Title III] Congress will have legislated with regard to electronic surveillance in the United

States, that legislation with its procedures and safeguards prohibit[s] the President, notwithstanding any inherent powers, from violating the terms of that legislation.²¹

Congress recognized that the Supreme Court might disagree, but the 1978 House-Senate Conference Committee report expressed an intent to

apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: "When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Congress over the matter." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)."²²

Indeed, FISA repealed a provision of Title III disclaiming any intent to limit the "constitutional power of the President" in this area.²³ This disclaimer provision, the Supreme Court held in 1972, "simply left presidential powers where it found them."²⁴ Citing the Court's holding, FISA's legislative history explains that it "does not simply leave Presidential powers where it finds them. To the contrary, [it] would substitute a clear legislative authorization pursuant to statutory, not constitutional, standards. Thus, it is appropriate to repeal this section [of Title III], which otherwise would suggest that perhaps the statutory standard was not the exclusive authorization for the surveillances included therein."²⁵ In short, FISA was designed "to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it."²⁶ As far as the President's constitutional power is concerned, there is no avoiding the preclusive intent of the exclusivity provision. As I read the government's whitepaper, it agrees with this point.²⁷

B. Statutory Preclusion.

The exclusivity provision also exerts a preclusive effect with respect to other statutes. It identifies the "exclusive means" for conducting electronic surveillance without regard to whether that surveillance is premised on legislation or the President's inherent constitutional power. Indeed, one "purpose" of the exclusivity provision was to "set[] forth the sections of the United States Code which regulate the procedures by which electronic surveillance may be conducted within the United States."²⁸ Put differently, FISA "constitute[s] the sole and exclusive statutory authority under which electronic surveillance of a foreign power or its agent may be conducted within the United States."²⁹ Congress has continued to respect that standard. When it enacted the Stored Communications Act in 1986, which authorizes conduct that is "electronic surveillance" under FISA, Congress made a corresponding amendment to the exclusivity provision.³⁰ The exclusivity provision consistently has been understood as a complete list of the statutes under which "electronic surveillance" may be conducted.

Of course, if Congress enacted a new statute expressly authorizing "electronic surveillance," but failed to amend the exclusivity provision, the new statute nonetheless would be given full force and effect. Facing an "irreconcilable conflict" between the new statute and the exclusivity provision,³¹ courts likely would overcome their normal aversion, and find an

implied repeal (or amendment) of the latter by the former.³² An ambiguous new statute, however, would be read not to authorize electronic surveillance in order to avoid a conflict with the exclusivity provision.³³ Thus, the statutory question presented here is whether Congress has enacted legislation clearly authorizing the NSA surveillance program and thereby implicitly repealing the exclusivity provision.

C. The Government's Argument.

The government appears to maintain that the exclusivity provision applies only to the President's constitutional power, not to other statutes. In support of that argument, it advances the "commonsense notion that the Congress that enacted FISA could not bind future Congresses."³⁴ It goes on to urge that "[i]t is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive Branch to engage in surveillance in ways not specifically enumerated in FISA or [Title III], or by requiring a subsequent Congress to amend FISA and [the exclusivity provision]."³⁵ Indeed, the government claims, the exclusivity provision can have no preclusive effect on other statutes because of the "well-established proposition that 'one legislature cannot abridge the powers or a succeeding legislature.'"³⁶

In my view, this argument mistakes a question of legislative intent for one of legislative power. Congress could authorize electronic surveillance under a new statute at any time, either by explicitly or implicitly amending or repealing the exclusivity provision; there is no need for what the Supreme Court has called "magical passwords" to overcome its preclusive effect on other statutes.³⁷ As Justice Scalia recently explained, "[a]mong the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate," but this doctrine "may add little or nothing to our already-powerful presumption against implied repeals."³⁸ All that is required is a sufficiently clear statement.

Moreover, as a matter of common sense, it is easy to see why Congress might have wanted the exclusivity provision to apply to other statutes as well as to the President's constitutional power. By enacting a comprehensive list of laws governing electronic surveillance, and declaring the list "exclusive," Congress foreclosed (or sought to foreclose) the President from relying on an ambiguous new provision to claim implicit legislative approval for surveillance conducted in violation of FISA. There is nothing "implausible" in that, given the then-recent history of abuse cited in the Church Report.³⁹ The government's current reliance on the AUMF – a law that does not mention surveillance – is, of course, a perfect illustration of what the exclusivity provision may have been designed to prevent.

As a fallback, the government maintains that FISA itself authorizes electronic surveillance under any other statute. In other words, it seems to accept that the "procedures" in FISA are indeed "the exclusive means by which electronic surveillance . . . may be conducted."⁴⁰ But it claims that "FISA permits an exception" to its own procedures for surveillance "authorized by another statute," and that this exception applies "even if the other authorizing statute does not specifically amend" the exclusivity provision.⁴¹ The government relies on a provision of FISA prescribing criminal penalties for persons who "engage[] in electronic surveillance under color of

law except as authorized by statute.”⁴² It explains that the “use of the term ‘statute’ here is significant because it strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA’s standard procedural requirements.”⁴³

This transitive argument, which moves from the exclusivity provision to FISA’s criminal penalty provision, and from there to any and all other surveillance statutes, deprives the exclusivity provision of any operative effect on other legislation. As such, it fails for the reasons stated above: The exclusivity provision applies to statutes as well as to the President’s constitutional power. If the transitive argument were correct, Congress would not have needed to list any other statutes, including Title III, in the exclusivity provision, because all would have been incorporated through FISA.⁴⁴ The government’s “exception” swallows the rule.

The government’s argument also fails on its own terms. Taking FISA as a whole, the penalty provision’s reference to surveillance “authorized by statute” is best read to incorporate another statute only if it is listed in the exclusivity provision (or, as discussed above, if it effects an implicit repeal or amendment of that provision). That reading retains the operative effect of the exclusivity provision on other statutes and harmonizes the exclusivity and penalty provisions. It also accords with the legislative history of the penalty provision, which describes it as establishing a criminal offense for surveillance “except as specifically authorized in” Title III and FISA, the two statutes listed in the 1978 version of the exclusivity provision.⁴⁵

A related version of the government’s argument would be that the penalty provision is “included” in FISA’s procedures rather than an “exception” to them. This argument, at least, finds some support in a footnote in FISA’s legislative history.⁴⁶ In pertinent part, the footnote declares that “the ‘procedures’ referred to in [the exclusivity provision] include” the procedure of obtaining judicial approval for pen-trap surveillance under Federal Rule of Criminal Procedure 41. Rule 41 is not listed in the exclusivity provision, but the footnote explains that it is included in FISA’s procedures “because of the [affirmative] defense” to prosecution in FISA’s penalty provision, which applies to surveillance “conducted pursuant to a search warrant or court order.”⁴⁷ The NSA surveillance, of course, was not conducted pursuant to court order. But if FISA’s “procedures” include Rule 41 because of the penalty provision’s affirmative defense, the government could argue that they must also include other statutes because of the elements of the penalty provision itself.

The chief difficulty with this argument is that it conflicts with the plain language of the exclusivity provision. That provision’s reference to “procedures . . . by which electronic surveillance . . . may be conducted” denotes provisions affirmatively authorizing surveillance, not those prescribing penalties for unauthorized surveillance. Thus, the relevant “procedures” are FISA’s rules governing applications to the Foreign Intelligence Surveillance Court (FISC) – a court that enjoys jurisdiction to grant orders “under the procedures set forth in this chapter”⁴⁸ – as well as the statute’s rules permitting electronic surveillance in certain circumstances without the FISC’s approval.⁴⁹ FISA’s penalty provision does not contain such “procedures” because it does not prescribe means by which surveillance may be conducted. A footnote in legislative history, even in history as authoritative as the House Intelligence Committee’s report, cannot

overcome the words of the statute. Perhaps for that reason, the courts have not relied on the footnote or adopted the government's argument, despite several opportunities to do so.⁵⁰

D. Constitutional Avoidance.

The government finally relies on the doctrine of constitutional avoidance, arguing that its interpretation must prevail to "avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief."⁵¹ Avoidance doctrine, however, applies only within a range of otherwise permissible constructions – in Justice Scalia's words, it "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."⁵² Although the government's interpretation is not frivolous, I do not think it is permissible. The exclusivity provision means what it says, and FISA's procedures simply do not incorporate or create an exception for any and all other surveillance statutes. Indeed, there is a certain irony in the government's reliance on avoidance doctrine where, as here, Congress so clearly intended to confront the constitutional question and limit the President's Article II authority. As a doctrine of legislative intent, rather than judicial humility, constitutional avoidance seems wholly inapplicable to the exclusivity provision.

E. Conclusion.

In sum, Congress declared that FISA's procedures are the exclusive procedures for conducting foreign intelligence electronic surveillance. As against the President's constitutional power to conduct such surveillance without adherence to FISA, Congress asserted its own power in opposition. As against other statutes, Congress meant at the very least to require a clear statement before they could be read to authorize such surveillance as an implied repeal or amendment of the exclusivity provision. That is the framework established by FISA in 1978 and upheld by Congress and the President, at least until now.

III. Does the AUMF Authorize the NSA Surveillance?

A. The AUMF.

The government contends that the NSA surveillance is permitted by the Authorization to use Military Force (AUMF),⁵³ a joint resolution passed by Congress and signed by the President shortly after the September 11, 2001, attacks.⁵⁴ In *Hamdi v. Rumsfeld*, the Supreme Court concluded that the AUMF authorized the use of military detention.⁵⁵ Although the AUMF did not refer specifically to such detention, it did authorize the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks, and the Supreme Court determined that in some situations, detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."⁵⁶

It would not be difficult for the government to advance the same argument with respect to intelligence gathering, which – although not as easily characterized as a "use of force" – has always been part of warfare. Electronic surveillance is obviously of more recent vintage, but

even FISA's legislative history acknowledges that it has been conducted by all Presidents since technology permitted;⁵⁷ electronic surveillance of telegraph signals was apparently conducted as early as the Civil War.⁵⁸ DOJ's whitepaper traces this history in detail,⁵⁹ and the NSA has published an informative study on the history of signals intelligence in war that makes similar assertions.⁶⁰ It is therefore possible to conclude that, in authorizing the President to commit our troops to battle, Congress also implicitly authorized the collection of signals intelligence to aid them. On the logic of *Hamdi*, electronic surveillance on the battlefield, or perhaps in Afghanistan generally, is fairly within the ambit of the AUMF, at least when the AUMF is read in a vacuum. Surveillance of international communications between the U.S. and Afghanistan (or of domestic communications within the United States made by persons with some connection to the war, which the government asserts it is not acquiring through the NSA program) would obviously be a more difficult assertion, but not necessarily out of the question.⁶¹

B. The AUMF and Other Laws.

To conclude that the AUMF authorizes (some form of) electronic surveillance when read in a vacuum, however, is not enough because of the atmosphere and circumstances in which it actually was enacted. In September 2001, when the AUMF was passed, Congress was also considering prototypes of what the following month became the USA Patriot Act.⁶² The Patriot Act, of course, substantially amended FISA to aid the government's efforts against terrorism.⁶³ I have not reviewed the legislative history of the Patriot Act for individual remarks supporting or undermining the government's current position, and in any event courts tend to mistrust such subjective indications of congressional "intent."⁶⁴ Nonetheless, given the nearly simultaneous Congressional overhaul of FISA, it is hard to read the AUMF as carving out a wide slice of "electronic surveillance" involving U.S. persons and others located in the United States.⁶⁵

It is even harder if, as I believe, the AUMF would effect such a carve-out only if it implicitly repeals the exclusivity provision. In *Hamdi*, Congress had enacted a statute in 1971 providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The *Hamdi* Court found that the AUMF was an "Act of Congress" and that detention pursuant to it therefore satisfied the 1971 statute. As explained above, however, the exclusivity provision does not simply forbid electronic surveillance except pursuant to an Act of Congress; it provides that, with respect to foreign intelligence surveillance, FISA is the only such Act.⁶⁶

Finally, the government's reading of the AUMF also stumbles on another of FISA's provisions. As enacted in 1978, FISA allows a limited exception from its normal rules requiring FISC approval of most surveillance for 15 days immediately following a declaration of war by Congress.⁶⁷ In light of that provision, FISA seems *a fortiori* not to contemplate a permanent or indefinite exception (to some or all of its rules) based on an authorization to use military force. The idea behind the 15-day period was to give Congress time "for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency."⁶⁸ The AUMF certainly was not an explicit amendment to FISA, and as noted above it falls short of effecting an implicit amendment or repeal, particularly because the USA Patriot Act is an explicit amendment to FISA enacted in response to the September 11 attacks.

C. Conclusion.

In sum, I do not believe the statutory law will bear the government's weight. It is very hard to read the AUMF as authorizing "electronic surveillance" in light of the nearly simultaneous enactment of the Patriot Act. It is essentially impossible to read it as repealing FISA's exclusivity provision.⁶⁹ And the AUMF suffers further in light of FISA's express wartime provisions. Even with the benefit of constitutional avoidance doctrine, I do not think that Congress can be said to have authorized the NSA surveillance.

IV. Is the NSA Surveillance Unconstitutional?

If FISA and the AUMF do not authorize the NSA surveillance, then a constitutional issue arises. Does the President's Article II power allow him to authorize the NSA surveillance despite the exclusivity provision?⁷⁰ That is a very hard question to answer. As Justice Jackson observed in 1952, and as the Court echoed in 1981, there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."⁷¹ In this concrete case, where we do not know what NSA was and is doing, legal poverty joins with factual ignorance. The combination hinders efforts to address either the separation-of-powers or the Fourth Amendment issues that are raised here. In the spirit of blind man's bluff, however, I can offer a few tentative observations.

A. Separation of Powers.

It may be useful to begin with the premise that the President has authority, under Article II of the Constitution, to conduct foreign intelligence electronic surveillance, including surveillance of U.S. citizens inside the United States, without a warrant, even during peacetime, at least where he has probable cause that the target of surveillance is an agent of a foreign power. Before FISA's enactment, in the face of Congressional silence,⁷² every court of appeals to decide that issue had upheld the President's authority.⁷³ Similarly, before FISA was amended to authorize foreign intelligence physical searches, it was relatively easy to conclude that the President had inherent authority to conduct such searches.⁷⁴ The DOJ whitepaper contains an extensive discussion of these points that I am more or less prepared to accept for present purposes.⁷⁵

The constitutional question presented here, however, is whether the President retains such authority in the face of Congressional efforts to restrict it. It is settled general law, after the *Steel Seizure* case and *Dames & Moore*, that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁷⁶ The government accepts this.⁷⁷ Thus, the question is not whether the President has inherent authority to conduct electronic surveillance, but whether FISA is unconstitutional in restricting that authority. Is there some hard core of Presidential power that is plenary – i.e., immune from Congressional regulation?⁷⁸ And is the NSA surveillance program within that core?

In certain circumstances, at least, there does appear to be a core of plenary Presidential power. Justice Jackson spent the bulk of his famous concurring opinion considering whether President Truman's steel seizure was constitutional despite congressional opposition (he and five

other Justices concluded that it was not).⁷⁹ The Supreme Court has used two tests to identify plenary powers, neither of which is very illuminating. As a formal matter, the question is whether “one branch of the Government [has intruded] upon the central prerogatives of another.”⁸⁰ As a functional matter, the question is whether one branch has unduly “impair[ed] another in the performance of its constitutional duties.”⁸¹ DOJ appears to agree that these are the relevant tests.⁸²

These principles apply to the President’s Commander-in-Chief power. For example, the Supreme Court has held that the President may convene courts martial even in the absence of any authorizing statute.⁸³ Yet Congress also clearly enjoys authority to prescribe standards and procedures for courts martial, based on its Constitutional grant of authority “To make Rules for the Government and Regulation of the land and naval Forces.”⁸⁴ The Court has said that under this clause Congress “exercises a power of precedence over . . . Executive authority.”⁸⁵ But could Congress forbid the President from ever convening a court martial? That seems unlikely given that the “President’s duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including courts-martial.”⁸⁶ Congress could, however, prescribe the factors controlling whether the death penalty may be imposed by a court martial, and the President probably would not be free to disregard those factors.⁸⁷

Other examples can be imagined. Could Congress declare war but order the military not to use airplanes or tanks to prosecute the war? As someone once asked, could Congress in 2003 have enacted legislation directing the Marines to execute a flanking maneuver in the battle for Tikrit? It is hard to see how Congress could do those things, because the use of particular weapons or maneuvers are essentially tactical decisions, at the core of what a Commander in Chief of armed forces must determine. On the other hand, it is probably common ground that Congress could stop appropriations for airplanes or for tanks altogether under its authority to “raise and support Armies” and to “provide and maintain a Navy.”⁸⁸ Congress sometimes enacts appropriations riders, setting conditions on the President’s use of monies, but it is not clear whether Congress can use such riders to accomplish indirectly what it cannot accomplish directly.⁸⁹ There are relatively few straight, bright lines in this area.

A real example arises in connection with the treatment of military detainees. After months of publicly-reported negotiations between Vice President Cheney and Senator McCain,⁹⁰ Congress in December 2005 passed, and the President signed, a law that would ban the torture of such detainees.⁹¹ However, the President’s signing statement explained that he intends to construe the law “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.”⁹² In other words, while the ban may be tolerable in some (or even most) instances, there may be other instances in which it unconstitutionally restricts the President’s power to use torture or other coercive interrogation techniques.⁹³ In such instances, the President apparently believes, his power to torture is plenary.⁹⁴

All of these real and hypothetical examples illustrate what Professor Corwin famously called the Constitution’s “invitation to struggle” for dominance in foreign affairs.⁹⁵ Depending on the vigor of the struggling parties, I believe that the constitutional (and perhaps political)

validity of the NSA program will depend in large part on two operational questions. The first question concerns the need to obtain the information sought (and the importance of the information as compared to the invasion of privacy involved in obtaining it). To take a variant on the standard example as an illustration of this point, if the government had probable cause that a terrorist possessed a nuclear bomb somewhere in Georgetown, and was awaiting telephone instructions on how to arm it for detonation, and if FISA were interpreted not to allow surveillance of every telephone in Georgetown in those circumstances, the President's assertion of Article II power to do so would be quite persuasive and attractive to most judges and probably most citizens.⁹⁶ The Constitution is not a suicide pact.⁹⁷

The second question concerns the reasons for eschewing the use of FISA in obtaining the information.⁹⁸ For example, if FISA did not contain an emergency exception,⁹⁹ and if a particular surveillance target satisfied the substantive requirements of the statute and absolutely had to be monitored beginning at once, the President's assertion of Article II power to do so for 72 hours while an application was being prepared for judicial approval also would be fairly persuasive. More generally, in this case, I would like to know whether NSA is satisfying all of FISA's substantive standards (e.g., probable cause that the target of surveillance is an agent of a foreign power), even if it is not satisfying all of the statute's procedural requirements (e.g., approval by the FISC or the Attorney General). As discussed in the second part of my testimony, this question bears directly on any proposed legislation.

If NSA is breaching FISA's substantive and procedural standards, and if the surveillance acquires a large amount of private information not directly relevant to its objective, it would likely be met with hostility. A reprise of something like Operation Shamrock,¹⁰⁰ for example, supported by arguments that FISA simply requires too much paperwork, would be very problematic. A lot turns on the facts.

B. Fourth Amendment.

The NSA surveillance program also presents a Fourth Amendment issue. It may be possible to construct an argument that, if the surveillance applies only to international communications intercepted at the border, no Fourth Amendment problem arises. In *United States v. Ramsey*,¹⁰¹ the Supreme Court upheld a search without probable cause or a warrant of international first-class mail as it entered the country. The Court observed that "[b]order searches . . . from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause."¹⁰² The Court rejected the argument that, despite this general principle, "mailed letters are somehow different."¹⁰³ It explained:

The border-search exception is grounded in the recognized right of the sovereign to control . . . who and what may enter the country. It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical. . . [C]ustoms officials could search, without probable cause and without a warrant, envelopes carried by an entering traveler, whether in his luggage or on his

person. Surely no different constitutional standard should apply simply because the envelopes were mailed not carried.¹⁰⁴

It is possible to imagine the government trying to extend this argument from paper mail to electronic mail or even to telephone calls. But it is by no means a sure thing. In any event, as far as I can tell, the government has not advanced the argument to support the NSA surveillance program.

Border exception aside, it is almost impossible to address the Fourth Amendment issue without more facts. In its whitepaper, DOJ explains that “in order to intercept a communication, there must be ‘a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.’”¹⁰⁵ In other locations, the whitepaper refers to a “reasonable belief” or its equivalent.¹⁰⁶ Translated into Fourth Amendment terms, this could be viewed as a reference to “reasonable suspicion,” which of course is something less than probable cause.¹⁰⁷ On the other hand, in his January 24 prepared remarks at Georgetown University, the Attorney General stated: “Moreover, the standard applied – ‘reasonable basis to believe’ – is essentially the same as the traditional Fourth Amendment probable cause standard. As the Supreme Court has stated, ‘The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.’”¹⁰⁸ The Supreme Court decision quoted by the Attorney General is *Brinegar v. United States*, a 1949 case with an extended discussion of “probable cause” as used in the criminal law.¹⁰⁹

Although it may look like nothing more than a semantic squabble, the legal difference between probable cause and reasonable suspicion could be very important. If the President prevails on the separation-of-powers question, then he would (to that extent) have the power to conduct warrantless foreign intelligence electronic surveillance despite FISA, just as the courts had held he did prior to FISA.¹¹⁰ All of those courts, however, required probable cause that the surveillance target was an agent of a foreign power; none suggested that surveillance is permissible based on reasonable suspicion.¹¹¹ As the government points out, those were peacetime decisions evaluating conventional surveillance techniques and technology, and it may be that something less than traditional probable cause is “reasonable” under the Fourth Amendment in wartime or with the advent of new surveillance approaches.

Ultimately, as the government recognizes, a reasonableness inquiry under the Fourth Amendment would depend on the totality of the circumstances, including “some measure of fit between the search and the desired objective,” and the importance of the objective and of the information obtained.¹¹² Applying that standard, the government has concluded that the NSA program is reasonable and therefore constitutional. I see no meaningful way to test that conclusion without the relevant facts, and the government apparently has concluded that it cannot provide those facts.¹¹³ Further discussion must await resolution of that informational impasse. If the NSA program ever were evaluated by a court, I believe the government’s separation-of-powers and Fourth-Amendment arguments would rise or fall together: It is very hard to imagine a court ruling that the President has plenary power to conduct surveillance that violates the Fourth Amendment.

Comments on Possible Legislation

I have been asked to discuss possible legislation that would regulate the NSA surveillance program. I appreciate the request, and I believe that a statute of some kind should be considered. As explained above, in my view the NSA surveillance violates FISA. Even if the President has inherent constitutional authority to do so – an issue on which I have not taken a position – an outright clash between two branches of government is not an appealing prospect for the long term. It therefore makes sense to review potential legislative solutions.

It is somewhat easier to critique legislation than to write it. A few days ago, Senator Specter's staff sent me his draft bill, which I think is an excellent vehicle for debate by informed persons. I am no expert, but I suspect the legislative process here may be long and arduous. The sooner there is something concrete to discuss, the better. Senator Specter's bill is very concrete, and to me that is a virtue, because this is an area in which details matter. All sides should benefit from having something so thoroughly set out. I also recently reviewed Senator DeWine's bill, which takes a slightly different approach. It too is an excellent vehicle for discussion.

At the conceptual level, both bills reflect the idea that FISA should not be scuttled altogether or confined to surveillance of purely domestic (rather than international) communications. Rather, they amend FISA to accommodate, and regulate, the use of new technologies and/or surveillance practices by the Executive Branch. In particular, Senator Specter's bill would authorize the FISC to approve not only individual instances of electronic surveillance – involving a particular target using or about to use particular facilities – but also “electronic surveillance programs.” As I understand it, these “programs” essentially consist of criteria governing surveillance that would be applied to many possible targets and facilities by operational personnel. In other words, the programs are the instructions given to the front-line intelligence officers who collect information, as appears to be the case now at the NSA. Senator DeWine's bill would substitute intensive legislative oversight for judicial review of such programs.

Both bills appear responsive to the government's operational justification for the NSA program. The government has explained that the “President authorized the [program] because it offers . . . speed and agility Among the advantages offered by the [program] compared to FISA is *who* makes the probable cause determination and how many layers of review will occur *before* surveillance begins.”¹¹⁴ The government's explanation continues:

Under the [program], professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communications systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. By contrast, because FISA requires the Attorney General to “reasonably determine[.]” that “the factual basis for issuance of” a FISA order exists at the time he approves an emergency authorization, *see* 50 U.S.C. § 1805(f)(2), as a practical matter, it is necessary for NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General to review a matter before even emergency surveillance would begin.¹¹⁵

In sum, the government reports, the “relevant distinction between the two methods – and the critical advantage offered by the [NSA surveillance program] compared to FISA – is the greater speed and agility it offers.”¹¹⁶

It is worth focusing for a moment on Senator Specter’s proposal to allow judicial review of surveillance programs. In effect, this approach would treat all standards governing electronic surveillance in the way that minimization procedures are treated under FISA’s current provisions. The government would propose, and the FISC would approve, the standards; and the government would apply those standards to particular facts, making judgments in real time.¹¹⁷ Then, just as the FISC currently may assess compliance with minimization procedures after the fact,¹¹⁸ and order modifications if necessary at the next renewal, so the FISC would assess all standards governing the surveillance.

Requiring judicial review both before and after the fact will probably add to public confidence and acceptance. In addition, operational personnel within the Executive Branch may well appreciate working with judicial approval. But it may not be acceptable to a legislating majority. In any event, given the range of opinions being expressed today, allowing the NSA surveillance but requiring judicial review may be a reasonable approach, at least as a matter of *realpolitik*. It is hard for me to know; there are, of course, many possible paradigms that could work.

Requiring judges to review surveillance programs raises some constitutional questions, and I have to say that I am not sure of the answers. First, such judicial review may raise a case-or-controversy question under Article III. There is an argument that it satisfies Article III because something concrete is at stake when the government tries to begin the surveillance, and there is the possibility of a motion to suppress in subsequent litigation. In 1978, the Office of Legal Counsel opined in a letter to Congress that while it was a “difficult question,” FISA satisfied Article III.¹¹⁹ Some, but perhaps not all, of the reasoning in the OLC letter seems applicable to the programmatic judicial review embodied in Senator Specter’s bill. In any event, it is an issue to be explored, the OLC letter is a good place to start, and after thinking about it over a long weekend, that is all I can say.

A second issue concerns the Warrant Clause of the Fourth Amendment.¹²⁰ Here too, I don’t have anything definite to offer. At first glance, Senator Specter’s bill may look like it calls for a general warrant, which (by definition) would be unconstitutional.¹²¹ On the other hand, as explained in the first part of my testimony, this is an area in which the Fourth Amendment allows warrantless surveillance under the proper conditions. There is an argument that under Senator Specter’s bill, the court’s order is not a (general) warrant, but only an authorization for warrantless surveillance that is more likely to be “reasonable” under the Fourth Amendment because it is subject to advance judicial review. I have not studied the question at any length, but I must say that I am instinctively sympathetic to this point of view.

Both of these constitutional questions, and perhaps others, would have to be resolved definitively before any legislation is enacted. For now, it is all I can do to flag them. If, in the end, Article III judicial review of surveillance programs is not permitted, and if there is no desire to create some non-Article III entity like the United States Surveillance Commission,¹²² it will be

relatively easy to make adjustments, as discussed in more detail below. For now, I will assume that Senator Specter's approach is constitutional.

At the technical level, I confess I don't fully understand all of the details of either Senator Specter's bill or Senator DeWine's bill. This may be a product of the drafters' knowledge and my ignorance of certain facts. If I were legislative counsel, instructed to write a bill allowing the use of FISA surveillance programs (with or without judicial review), I would start with something like what appears on the following page. I must emphasize that this is very tentative – really nothing more than a hurried sketch – and would surely benefit from more extended consideration, particularly by those who know what NSA is doing. I offer it, again, without knowledge of the relevant facts, and without trying to opine on any of the broad policy questions raised here, but merely as a scribe working hastily within the conceptual framework established by others. The draft presents three new provisions of FISA, 50 U.S.C. §§ 1881-1883, and includes optional or alternative language enclosed in double brackets. An explanation of the draft begins on the page immediately following.

1 **50 U.S.C. § 1881. TERRORIST SURVEILLANCE**
 2

3 Notwithstanding any other law, the President [[, through the Attorney General,]] may
 4 authorize electronic surveillance for periods of up to 45 days [[90 days]] if –
 5

6 (a) the electronic surveillance is conducted under specific standards and procedures,
 7 approved by the Attorney General, that are reasonably designed to ensure compliance with the
 8 following requirements –
 9

10 (1) the electronic surveillance is conducted only when it cannot with due diligence
 11 be conducted under the standards and procedures set forth in sections 1804-1805 and
 12 1842-1843 of this title;
 13

14 (2) the information acquired by the electronic surveillance is part of an
 15 international communication;
 16

17 (3) a significant purpose of the surveillance is to obtain [[the information sought
 18 by the surveillance is]] foreign intelligence information [[as defined in 50 U.S.C. §
 19 1801(e)(1)(A)-(B) and/or concerning a foreign power against which there is in effect a
 20 Congressional authorization to use military force]];
 21

22 (4) with respect to electronic surveillance of information other than dialing,
 23 routing, addressing, and signaling information utilized in the processing and transmitting
 24 of a communication –
 25

26 (A) there is probable cause to believe that the communication was sent to
 27 or from a foreign power or the agent of a foreign power [[or a person affiliated
 28 with a group engaged in international terrorism or activities in preparation
 29 therefor]]; and
 30

31 (B) the minimization procedures with respect such surveillance meet the
 32 definition of minimization procedures set forth in section 1801(h) of this title;
 33

34 (b) promptly [[within 15 days]] after the surveillance is authorized, the Attorney General
 35 provides to [[a subset of]] the committees listed in section 1808 of this title, and to the
 36 [[presiding judge of the]] court established by section 1803 of this title, the following –
 37

38 (1) a report setting forth the standards and procedures governing the surveillance,
 39 including an explanation of how and why they are reasonably designed to ensure
 40 compliance with the requirements of subsection (a) of this section; and
 41

42 (2) an accounting, reasonably to date, of any related surveillance previously
 43 conducted under this subchapter [[including any deviations from the standards and
 44 procedures governing the surveillance; the number of communications, communications
 45 facilities, and U.S. persons subjected to the surveillance; the types of attributes (such as
 46 the number or other identifier) of all U.S. person communications subjected to the

47 surveillance; and a summary of the foreign intelligence information acquired from the
48 surveillance]; and

49
50 (c) the surveillance is conducted in conformity with any orders of the court issued under
51 section 1882 of this title.

52
53 **50 U.S.C. § 1882. JUDICIAL REVIEW**

54
55 (a) Upon receipt of the information provided under subsection (b) of section 1881 of this
56 title, the court shall promptly [[within 7 days?]] assess it and issue an order approving the
57 standards and procedures governing the surveillance, or directing the Attorney General to make
58 such modifications to them or to take such other actions as are necessary to satisfy section 1881
59 [[and the Fourth Amendment to the U.S. Constitution]].

60
61 (b) An order issued by the court under this section requiring the Attorney General to
62 make modifications or take other actions shall be accompanied by a written statement of reasons
63 and subject to further review as would an order denying an application under section 1805 of this
64 title.

65
66 (c) With respect to any electronic surveillance determined to have been conducted in
67 violation of this subchapter [[or the Fourth Amendment to the U.S. Constitution]], no
68 information obtained or evidence derived from such surveillance shall be received in evidence or
69 otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury,
70 department, office, agency, regulatory body, legislative committee, or other authority of the
71 United States, a State, or political subdivision thereof, and no information concerning any United
72 States person acquired from such surveillance shall subsequently be used or disclosed in any
73 other manner by Federal officers or employees without the consent of such person, except with
74 the approval of the Attorney General if the information indicates a threat of death or serious
75 bodily harm to any person.

76
77 **50 U.S.C. § 1883. ASSISTANCE FROM THIRD PARTIES AND DEFINITIONS**

78
79 (a) With respect to electronic surveillance authorized by section 1881 of this title, the
80 Attorney General or his designee may direct a communication common carrier or other specified
81 party to –

82
83 (1) furnish all information, facilities, or technical assistance necessary to
84 accomplish the electronic surveillance in such a manner as will protect its secrecy and
85 produce a minimum of interference with the services that such carrier is providing its
86 customers; and

87
88 (2) maintain under security procedures approved by the Attorney General and the
89 Director of National Intelligence any records concerning the surveillance or the aid
90 furnished which such carrier wishes to retain.
91

92 The Government shall compensate, at the prevailing rate, such carrier or other specified party for
93 furnishing such aid.

94

95 (b) A party who, in good faith, complies with a direction under this section shall not be
96 liable to any other person for such compliance.

97

98 (c) Unless otherwise indicated, terms used in this subchapter shall have the same
99 meanings as in section 1801 of this title.

100

101 (d) For purposes of this subchapter, the term "international communication" means a
102 communication involving at least one party located inside the United States and at least one party
103 located outside the United States.

104

105 [[(e) As used in section 1881 of this title, the word "affiliated" means . . .]]

As noted, the foregoing draft legislation takes its policy and constitutional cues from Senator Specter's bill and, to a lesser extent, from Senator DeWine's bill. Thus, for example, it does not simply narrow the definition of "electronic surveillance" in FISA to exclude international communications.¹²³ It does include judicial review, but that review can be eliminated by making three minor changes specified below. The draft is meant to be modular; elements can be added or removed without changing its basic structure.

The draft would allow the President (or, as an alternative, the Attorney General) to authorize electronic surveillance – subject to judicial review if desired – for renewable periods of 45 days (lines 3-4). The surveillance would be authorized if, and only if, it met each of the conditions specified in proposed 50 U.S.C. § 1881. There are three main groups of conditions. First, the surveillance would have to satisfy certain substantive requirements set out in proposed Section 1881(a), such as a requirement that it be conducted under specific procedures reasonably designed to ensure that the contents of a communication cannot be acquired without probable cause. Second, the government would have to provide certain information about the surveillance to the Congressional Intelligence Committees and the Foreign Intelligence Surveillance Court (FISC). Third and finally (if desired as a policy matter), the surveillance would have to be conducted in accord with any orders of the FISC.

I. Substantive Requirements.

The draft contemplates that the Attorney General, or his subordinates, in consultation with the relevant operational agency (*e.g.*, NSA), would draft protocols governing the surveillance. These protocols would serve as a kind of instruction manual to the persons actually collecting the information; the government has indicated that such instruction manuals already exist.¹²⁴ The protocols would have to set out "specific standards and procedures" governing the surveillance that are "reasonably designed to ensure compliance" with the general requirements in the draft legislation (lines 6-8). The use of the phrase "specific standards and procedures" is meant to parallel the language elsewhere in FISA describing minimization procedures, which are defined as "specific procedures" that meet the general standards in current 50 U.S.C. § 1801(h). FISA's legislative history provides:

The definition begins by stating that the minimization procedures must be specific procedures. This is intended to demonstrate that the definition is not itself a statement of the minimization procedures but rather a general statement of principle which will be given content by the specific procedures which will govern the actual surveillances. It is also intended to suggest that the actual procedures be as specific as practicable in light of the technique of the surveillance and its purposes.¹²⁵

The same idea motivates the use of the phrase "specific standards and procedures" here. The procedures adopted under proposed Section 1881 need only be "reasonably designed" to satisfy the standards in the draft. Perfection is not attainable; some overruns or errors are inevitable. But the procedures would have to be written reasonably to minimize the risk of error.

There is also an analogy to current 50 U.S.C. § 1802, under which the Attorney General may authorize electronic surveillance without a court order if he certifies in writing and under oath that certain conditions are satisfied (generally, that the facility being surveilled is used exclusively by foreign powers, and that there is no substantial likelihood of acquiring the communications of a U.S. person).¹²⁶ The conditions in Section 1802 are narrower than those in the draft, but the basic idea is the same, and Section 1802 provides expressly that the surveillance “may be conducted only in accordance with the Attorney General’s certification and the minimization procedures adopted by him.”¹²⁷ In any given case, if the facts require detailed procedures to ensure compliance with Section 1802’s general requirements, then the minimization procedures must contain them. The same is true here.

The procedures approved by the Attorney General would have to be “reasonably designed” to “ensure compliance” with the specific requirements that are described in detail below. The first three of those requirements are that the surveillance be conducted only when (A) normal FISA procedures cannot be used; (B) the communication being monitored is international; and (C) the government has a significant purpose to obtain foreign intelligence information (or some subset of foreign intelligence information).

A. Inability to Use Normal FISA Procedures.

The first substantive condition, set out in proposed Section 1881(a)(1), is that the surveillance be conducted only when it “cannot with due diligence be conducted” under FISA’s ordinary procedures (lines 10-12). This language is borrowed from current 50 U.S.C. § 1805(f)(1), which allows the Attorney General to authorize electronic surveillance without a court order where “an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained” (emphasis added). The idea is that Section 1881 surveillance should not be conducted except where it must be, so that the exception does not swallow the rule. If that standard is deemed too strict, an alternative – e.g., “without substantially hindering the surveillance” – could be used. One specific standard that might be used to ensure adherence to the requirement would be a rule barring continuous surveillance of the same communications facility (e.g., a telephone line) for more than 72 hours (or perhaps longer), on the theory that if the surveillance endures that long, there is time at least to get an emergency FISA. (One drawback to this approach is that, if the substantive standards in the draft are reduced so that they are vastly lower than those in the rest of FISA, it may be that surveillance on relatively weak evidence may endure for a very long time. There are, of course, legislative and sub-legislative ways to deal with that problem.)

B. Limited to International Communications.

The second condition (lines 14-15) is that the information acquired by the surveillance be part of an international communication. This limitation is not essential, but reflects the scope of the NSA surveillance program as it has been described publicly. As noted in the first part of my testimony, limiting surveillance to international communications may affect the Fourth Amendment analysis.¹²⁸ The definition of “international” is set out in proposed Section 1883(d) of the draft (lines 101-103).¹²⁹ A full discussion of the application of such a definition is beyond

the scope of this testimony in this forum. The government has confirmed that, under the NSA program, “[t]here are procedures in place to avoid the interception of domestic calls.”¹³⁰

C. Foreign Intelligence Information.

The third condition (lines 17-20) concerns the purpose of the surveillance. Here I have borrowed from the current law. If surveillance is to be allowed under this new statute, I see no basis for rebuilding a wall between intelligence and law enforcement officials. We have been down that road before. If “foreign intelligence information” is limited in either of the two ways set out in the language in double brackets, as discussed in the next two paragraphs, the better phrasing might be that “the information sought by the surveillance is”

The first limit in double brackets would restrict the foreign intelligence information being sought to that concerning “attack or other grave hostile acts . . . [or] sabotage or international terrorism,” rather than “clandestine intelligence activities” and “affirmative” foreign intelligence.¹³¹ Does the government need to use the NSA surveillance program against espionage? Should it be permitted to? I don’t know, but the draft flags the issue. Obviously, any other limits that are desired could be inserted here.

The second limit in double brackets would restrict the foreign intelligence information being sought to that concerning foreign powers against which Congress has authorized the use of military force. I added this possibility principally because the Executive Branch has relied so heavily on the September 2001 AUMF in defending the NSA surveillance program. This condition puts substantially more power in the hands of Congress because, if no authorization is enacted, no surveillance may occur. I doubt the Executive Branch would accept this limit, and I acknowledge that it has several drawbacks. First, of course, it depends on Congress enacting an authorization; Congress acted quickly after September 11, but it might not be able to do so after a decapitation strike – a situation in which aggressive electronic surveillance might be most needed. Second, Congress may want to authorize the use of military force before it knows exactly who is responsible for an attack, leaving it to the President to find the enemy; ambiguity in the authorization would yield ambiguity under the draft.

D. Pen-Trap Surveillance and Surveillance of Contents.

1. Pen-Trap Surveillance. It would be possible to allow the use of a pen register and trap-and-trace device (pen-trap surveillance) under procedures that reasonably ensure compliance with the foregoing three conditions alone – (A) inability to use ordinary FISA procedures; (B) surveillance of international communications only; and (C) a purpose to obtain foreign intelligence information. Pen-trap surveillance involves the acquisition of dialing, routing, addressing, and signaling information utilized in the processing and transmitting of a communication.¹³² An example of such routing and addressing information is a telephone number. Pen-trap surveillance does not, however, involve the acquisition of what Title III, the law-enforcement electronic surveillance statute, refers to as “contents” – i.e., “any information concerning the substance, purport, or meaning of [a] communication.”¹³³ An example of contents is the words spoken in a telephone conversation. Under current law, the FISC must approve pen-trap surveillance for individual facilities (e.g., telephone numbers). By contrast,

under the draft, the facilities would be selected by operational personnel in accord with the standards and rules that govern the surveillance program.

2. Middle Ground. One other possibility bears mentioning. The line between contents and routing and addressing information is not always bright and clear, although it is deeply embedded in the law of electronic surveillance.¹³⁴ It would be a big task, but if necessary for this legislation, Congress could attempt to define more precisely which attributes of a communication are and are not “contents.” (For this project, knowing what NSA can do technically, and hopes to be able to do technically in the near future, would be helpful, but the law would have to be written in a way that does not reveal that. As noted earlier, I have no classified information on the NSA program.)

I can imagine Congress creating by statute, and the courts endorsing, a third category of information, between traditional routing and addressing information and full contents, that might be available to the government on a showing of something like reasonable suspicion. Congress might decide – and the courts might (or might not) concur – that such information is entitled to intermediate protection. I don’t mean to suggest that this would be constitutional, or even helpful; I say only that it might be worth considering.

3. Contents. To acquire the “contents” of a communication, or information that is not subject to pen-trap surveillance, the government would have to satisfy two additional substantive requirements set out in the draft (lines 26-32). First, it would need to have probable cause that the communication was sent to or from a foreign power or the agent of a foreign power. Persons conducting the surveillance would follow procedures that require them to make probable-cause determinations in particular cases. Operationally, it might be very similar to current NSA practice as it has been described by the government.¹³⁵

The language in double brackets that is associated with the probable-cause requirement would extend not only to agents of foreign powers, but also to persons “affiliated” with an international terrorist group. I do not know what the word “affiliated” would mean in this context, but the government has used the term in describing the scope of the NSA surveillance program. In particular, the government has said that the program requires “probable cause to believe that at least one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.”¹³⁶

Some, but perhaps not all, of “affiliation” already fits within the definitions of “foreign power” and “agent of a foreign power” in current 50 U.S.C. § 1801(a) and (b). Indeed, the government has at least once effectively stated that the NSA program, including the concept of “affiliation,” does not exceed FISA’s current definitions. In response to a question about my testimony before this Committee in 2002, Attorney General Gonzales wrote that the NSA surveillance program “involves the interception of communications only when there is probable cause (‘reasonable grounds to believe’) that at least one party to the communication is an agent of a foreign power (al Qaeda or an affiliated terrorist organization).”¹³⁷ If that is so, then FISA’s current definitions will suffice, and the word “affiliated” need not be added to the draft. If broader definitions are desired, then affiliation or some other concept could be used, as long as it is defined properly. The draft leaves a place to define “affiliated” in line 105. Of course it

would also be possible to limit the definitions – *e.g.*, to allow surveillance only where one party to the communication is an agent of a foreign power involved in terrorism or related activities, rather than espionage or other kinds of activities. It is a policy choice.

The second condition required for the surveillance of “contents” would be the use of minimization procedures. As discussed above, minimization procedures govern the acquisition, retention, and dissemination of information under FISA, and fundamentally must balance the government’s need to obtain foreign intelligence information against the privacy interests of U.S. persons.¹³⁸ They are a conventional part of electronic surveillance, and the government has stated that there are minimization procedures already in effect in the NSA surveillance program. If the scope of proposed Section 1881(c) is limited to a subset of foreign intelligence information (lines 18-20), then the minimization procedures as used here would have to contain a similar limit.

II. Procedural Conditions.

The draft requires the Attorney General to provide information about the surveillance to Congress and to the FISC. (Double bracketed language allows for use of subsets of those entities.) Promptly after the surveillance is authorized, the Attorney General would have to provide two things. First, under proposed Section 1881(b)(1) (line 38), “a report setting forth the standards and procedures governing the surveillance.” This report likely would contain the instructions provided to the operational personnel at NSA or another agency, as well as a memorandum explaining why the instructions are in fact “reasonably designed to ensure compliance with” the statutory requirements and (as necessary beyond the statutory discussion) the Fourth Amendment.

The Attorney General also would have to provide a reasonably timely “accounting” of “any related surveillance previously conducted,” as set out in proposed Section 1881(b)(2) (lines 38-43). When surveillance is commenced, of course, there would be no accounting. Upon renewal, however, the Attorney General would describe the surveillance previously conducted; as renewals mounted, the accounting could incorporate by reference the descriptions submitted previously. As a practical matter, therefore, after the initial surveillance authorization, the Attorney General at each renewal would be reporting on approximately the previous 45 days of surveillance.

The language in double brackets (lines 43-48) sets out with particularity the kind of information that could be included in the accounting. Examples include requiring the Attorney General to provide information about any deviations from the standards and procedures governing the surveillance; the number of communications, communications facilities, and U.S. persons subjected to the surveillance; the attributes (such as the number or other identifier) of all U.S. person communications subjected to the surveillance; and a summary of the foreign intelligence information acquired from the surveillance. Whether to include that level of specificity in the statute is a policy judgment. One alternative is simply to require the Attorney General to keep the Committees and the Court “fully informed,” which is the traditional oversight standard.¹³⁹ In this new context, however, more precision in the statute may be better.

The information provided would be used by the FISC to inform its ongoing review of the surveillance program, and in particular the question of whether the specific standards and procedures are indeed “reasonably designed” to satisfy legal requirements. The information would be used by Congress in keeping with the traditions of intelligence oversight. Both the FISC and the Congressional Committees would, of course, maintain the information under proper security procedures.

III. Conforming to Court Orders and Judicial Review.

Finally, under proposed Section 1881(c), the surveillance would have to be conducted in conformity with any orders of the FISC. As the draft is written, the surveillance would be authorized, and could be commenced, without judicial approval, as is the case with emergency FISA surveillance.¹⁴⁰ But the FISC would be required to review and approve (or disapprove) the surveillance within a fixed time period. If the government changed the standards and procedures governing the surveillance before 45 days expire, it would need promptly to provide the new procedures to the FISC (and to Congress).

Proposed Section 1882 (lines 48-70) explains how the FISC would conduct its review. The court would have a short period of time to consider the government’s report and either (1) approve the standards and procedures proposed by the government, or (2) order modifications to them. If modifications were ordered, the government would be entitled to appeal. If surveillance were found to violate the statute (or the Fourth Amendment), the information obtained from it would be suppressed and generally would not be available for use (except where death or serious bodily harm may result).

If Congress determines that judicial review is unconstitutional, or otherwise inappropriate, the draft could be changed to accommodate that. To eliminate the FISC’s role, three changes would need to be made:

- delete the deference to the FISC in proposed Section 1881(b), lines 35-36 (this could be retained if the FISC should be kept informed even if it does not review the program);
- delete proposed 50 U.S.C. § 1881(c) in its entirety, lines 50-51; and
- delete proposed Section 1882 in its entirety, lines 52-75.

IV. Miscellaneous Provisions.

Finally, proposed Section 1883 of the legislation has fairly standard language allowing the Attorney General to direct assistance from third parties, insulating those third parties from liability if they obey the Attorney General, and defining some of the terms used in the draft. There might need to be additional provisions, mirroring those in 50 U.S.C. § 1806, governing use and disclosure of information obtained from the surveillance. Those should not be too hard to draft.

Conclusion

Thank you again for the opportunity to testify. I repeat that my analysis, particularly with respect to possible legislation, is hindered by my ignorance, and that I have not tried to stake out strong positions on most of the policy issues. Particularly in the absence of facts, I feel more comfortable proceeding with extreme caution.

Notes

¹ See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, at A1 (Dec. 16, 2005); President's Weekly Radio Address (Dec. 17, 2006) (available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>).

² The views expressed in this testimony are solely my own, not those of any current or former employer.

³ This testimony has been cleared by DOJ under 28 C.F.R. § 17.18.

⁴ I have used the notes, rather than text, for the most arcane or uncertain elements of the analysis.

⁵ 50 U.S.C. §§ 1801 et seq. FISA's definition of "electronic surveillance" appears in 50 U.S.C. § 1801(f).

⁶ 18 U.S.C. § 2511(2)(f).

⁷ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

⁸ 542 U.S. 507 (2004).

⁹ Letter from Assistant Attorney General William E. Moschella, U.S. Department of Justice, to the Chairs and Ranking Members of the House and Senate Intelligence Committees, at 1 (Dec. 22, 2005) (available at <http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf>) (hereinafter DOJ 12-22-05 letter); Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (available at <http://rawstory.com/other/justicerawstory.pdf>) (hereinafter DOJ Whitepaper).

¹⁰ See DOJ Whitepaper at 35-36 & n.21.

¹¹ Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>) (hereinafter 12-19-05 briefing transcript). See also DOJ 12-22-05 Letter at 1 ("As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization").

¹² 12-19-05 briefing transcript. Strictly speaking, the most that could be said is that FISA generally requires a court order; the statute allows for electronic surveillance without a court order in certain situations. See note 49, *infra*.

¹³ 50 U.S.C. § 1801(f)(2). This provision of FISA defines "electronic surveillance" to include:

the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18, United States Code.

This provision applies to wire communications, such as corded telephone calls while they are traveling on a wire or cable, regardless of the citizenship or immigration status of the persons involved, as long as either the sender or recipient of the communication is in the United States, and neither sender nor recipient consents to the wiretap. It does not apply to radio communications and it excludes a narrow band of communications of computer trespassers, who are likewise unprotected by Title III, the 1968 wiretapping law applicable to ordinary criminal investigations, 18 U.S.C. §§ 2510-2522.

Under 50 U.S.C. § 1801(f)(1), "electronic surveillance" is also defined to include

the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

This is the principal provision applicable to wiretaps of United States persons – *e.g.*, U.S. citizens or permanent resident aliens – who are inside the United States. In essence, it applies whenever the government tries to overhear or record a telephone call or other similar communication to or from such a person, if (and only if) a warrant would be necessary for the same wiretap conducted for ordinary law enforcement purposes under Title III or a similar law. The subsection applies equally to domestic and international communications made by U.S. persons in the United States.

¹⁴ 50 U.S.C. § 1801(f)(1). The term “United States person” is defined in 50 U.S.C. § 1801(i).

¹⁵ DOJ Whitepaper at 5; see *id.* at 1, 13 n.4, 40.

¹⁶ *Id.* at 17 n.5. In a speech given on January 24, 2006, the Attorney General explained that, “because I cannot discuss operational details, I’m going to assume here that intercepts of al Qaeda communications under the terrorist surveillance program fall within the definition of ‘electronic surveillance’ in FISA.” Prepared Remarks for Attorney General Alberto Gonzales, at the Georgetown University Law Center (Jan. 24, 2006) (available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html) (hereinafter Georgetown Prepared Remarks). There is also some discussion in the Whitepaper of how FISA did not intend to regulate certain NSA surveillance activities. See DOJ Whitepaper at 18-19 & n.6 (discussing the first clause of 18 U.S.C. § 2511(2)(f) and citations of the Church Committee Report in FISA’s legislative history).

¹⁷ See DOJ Whitepaper at 18-19 & n.6, 35 & n.20.

¹⁸ If NSA was not engaged in “electronic surveillance,” then the analysis would be quite different because the surveillance program probably would not be governed by any statute, but only by Executive Order 12333 and the Fourth Amendment. Under the first clause of the exclusivity provision, the government may use any “means other than electronic surveillance as defined in FISA” to acquire “foreign intelligence information from international or foreign communications” without regard to the law-enforcement surveillance statutes or (obviously) FISA. 18 U.S.C. § 2511(2)(f).

¹⁹ 18 U.S.C. § 2511(2)(f) (emphasis added). Section 2511(2)(f) now provides as follows:

Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

Chapter 121 of Title 18 is the Stored Communications Act, 18 U.S.C. §§ 2701-2712, and Chapter 206 contains the criminal pen-trap surveillance statutes, 18 U.S.C. §§ 3121-3127. Section 705 of the Communications Act of 1934 is codified at 47 U.S.C. § 605. For a discussion of the legislation adding the reference to the Stored Communications Act, and other legislation amending the exclusivity provision, see note 30, *infra*.

²⁰ *Id.*

²¹ H.R. Rep. No. 95-1283, Part I, at 101. See also S. Rep. No. 95-604, at 6, 63, 64 (FISA “puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in [Title III and FISA]”); S. Rep. No. 95-701, at 71 (same).

²² H.R. Rep. No. 95-1720, at 35; see S. Rep. No. 95-604, at 16 & n.28.

²³ Section 201 of FISA repealed 18 U.S.C. § 2511(3), which provided: “Nothing contained in [Title III] or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.”

²⁴ *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 303 (1972) (*Keith*).

²⁵ H.R. Rep. No. 95-1283, Part I, at 101-102. See S. Rep. No. 95-604, at 17 (“Most importantly, the disclaimer in 18 U.S.C. § 2511(3) is replaced by provisions that assure that [FISA], together with [Title III], will be the *exclusive* means by which electronic surveillance covered by [FISA], and the interception of wire and oral communications, may be conducted” (italics in original)). As the Seventh Circuit has explained, “much concern was expressed in the debates about the constitutionality as well as the prudence of Congress’s displacing by legislation the President’s implicit authority under Article II to protect the nation’s security against intrigues by foreign powers. The debate was resolved in favor of the proposed legislation.” *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1985) (citations omitted); cf. *United States v. Biasucci*, 786 F.2d 504, 508 n.4 (2d Cir. 1986). The courts of appeals have not had much occasion to discuss the effect of the exclusivity provision on foreign intelligence investigations, although they have ruled on its application to ordinary criminal investigations. See, e.g., *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994) (joining several other circuits in holding that silent television surveillance, which is “electronic surveillance” under FISA but is not the “intercept[ion of] wire, oral, or electronic communications” under Title III, is not prohibited by the exclusivity provision in the context of ordinary criminal investigations because FISA does not limit investigative activity in ordinary criminal cases). These decisions are discussed further in note 50, *infra*.

²⁶ S. Rep. No. 95-604, at 8.

²⁷ See DOJ Whitepaper at 18-20. The whitepaper acknowledges that “Congress intended FISA to exert whatever power Congress constitutionally had over the subject matter to restrict foreign intelligence surveillance and to leave the President solely with whatever inherent constitutional authority he might be able to invoke against Congress’s express wishes.” *Id.* at 19. In other words, as the whitepaper summarizes, Congress “enacted a regime intended to supplant the President’s reliance on his own constitutional authority.” *Id.* at 20.

²⁸ S. Rep. No. 95-604, at 63; see S. Rep. No. 95-701, at 71 (same).

²⁹ S. Rep. No. 95-701, at 71. Cf. H.R. Rep. No. 95-1720, at 35 (discussion of statutory and constitutional authority indicating that the word “statutory” was removed from the exclusivity provision to ensure that it would be read to limit the President’s constitutional power, without suggesting that the provision applies only to the President’s constitutional power).

³⁰ The Stored Communications Act, now codified as chapter 121 of Title 18 (18 U.S.C. §§ 2701-2712), was part of the Electronic Communications Privacy Act (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (1986). Section 101(b)(3)

of ECPA amended the exclusivity provision to refer explicitly to the Stored Communications Act. See S. Rep. No. 99-541, at 18.

Here is a history of amendments to the exclusivity provision. As enacted by Section 201(b) of FISA, Pub. L. 95-511, 18 U.S.C. § 2511(2)(f) provided as follows:

Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

Since then, Section 2511(2)(f) has been amended three times. First, Section 6(b)(2)(B) of the Cable Communications Policy Act, Pub. L. 98-549, replaced “section 605” with “section 705” in referring to the Communications Act of 1934. Second, in addition to making the changes noted above, Section 101(b)(3) of ECPA also added the phrase “or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing” in place of the word “by” after the reference to “international or foreign communications.” Third, Section 204 of the USA Patriot Act, Pub. L. 107-56, added references to “chapter 206” and substituted “wire, oral, and electronic” for “wire and oral” at the end of the provision, in keeping with amendments made to other provisions of Title III by Section 101(c)(1)(A) of ECPA. The text of the exclusivity provision in its current form – citing FISA, Title III, and the Stored Communications Act – is set out at note 19, *supra*. The Patriot Act’s amendment to the exclusivity provision is discussed further in note 65, *infra*.

³¹ *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion).

³² See, e.g., *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

³³ See generally, e.g., *FDA v. Brown & Williamson*, 529 U.S. 120, 132-133 (2000); cf. *Pasquantino v. United States*, 125 S. Ct. 1766, 1777 (2005).

³⁴ DOJ Whitepaper at 20.

³⁵ *Id.* at 22 (italics in original).

³⁶ *Id.* at 26 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)).

³⁷ *Lockhart v. United States*, 126 S. Ct. 699, 701 (2005) (quoting *Marcello v. Bonds*, 349 U.S. 302, 310 (1955)).

³⁸ *Id.* at 703 (Scalia, J., concurring).

³⁹ S. Rep. No. 94-755.

⁴⁰ At least for purposes of this argument, the government does seem to acknowledge a preclusive effect with respect to other statutes, because its argument is that “FISA permits an exception” to the acknowledged rule set out in the exclusivity provision. DOJ 12-22-05 Letter at 3.

⁴¹ *Id.*

⁴² 50 U.S.C. § 1809 (emphasis added); see 50 U.S.C. § 1810 (civil liability). Section 1809 provides in pertinent part as follows:

(a) Prohibited activities.

A person is guilty of an offense if he intentionally –

(1) engages in electronic surveillance under color of law except as authorized by statute;

* * *

(b) Defense.

It is a defense to prosecution under subsection (a) of this section that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

⁴³ DOJ Whitepaper at 20 (*italics in original*).

⁴⁴ FISA's definition of "electronic surveillance," in 1978 and today, includes essentially all of what Title III defines as the "intercept[ion of] wire, oral, or electronic communications," as well as some additional activity. Compare 50 U.S.C. § 1801(f) (FISA's definition of "electronic surveillance"), with 18 U.S.C. § 2510 (definition of corresponding terms in Title III).

⁴⁵ H.R. Rep. No. 95-1283, Part I, at 96. The Senate Reports on FISA explained that the penalty provision made it "a criminal offense to engage in electronic surveillance except as otherwise specifically provided in [Title III] and [FISA]." S. Rep. No. 95-701, at 68; S. Rep. No. 95-604, at 61. However, the version of the penalty provision at issue in those reports did not contain an exemption for surveillance "authorized by statute." See S. Rep. No. 95-701, at 75; S. Rep. No. 95-604, at 67-68. In adopting the House version of the penalty provision, the Conference Committee Report does not suggest that Congress was incorporating into FISA's procedures an exception for surveillance conducted under statutes other than FISA and Title III. See H.R. Rep. No. 95-1720, at 33. When Congress enacted FISA's physical search provisions in 1994, it established essentially identical penalty provisions. 50 U.S.C. § 1827. The legislative history of the physical search provisions explains that "[o]ne of the important purposes of [the physical search provisions] is to afford security to intelligence personnel so that if they act in accordance with the statute, they will be insulated from liability." S. Rep. No. 103-296, at 73 (*emphasis added*). There is no exclusivity provision with respect to physical searches, and so the argument that the penalty and exclusivity provisions should be read together does not apply to the physical search penalty provision.

It is worth noting that even if FISA's penalty provision were read to incorporate all other surveillance statutes, and so to shield individuals from prosecution, it would not necessarily authorize an exception to the exclusivity provision. Governmental conduct may be forbidden without being criminalized. But cf. discussion in note 46, *infra*.

⁴⁶ H.R. Rep. No. 95-1283, Part I, at 100 n.54. In its entirety, the footnote reads as follows (citation omitted):

As noted earlier [page 96 of the report], the use of pen registers and similar devices for law enforcement purposes is not covered by [Title III] or this Act and [the exclusivity provision] is not intended to prohibit it. Rather, because of the criminal defense provision of [FISA's penalty provision, 50 U.S.C. § 1809(b)(1)], the 'procedures' referred to in [the exclusivity provision] include acquiring a court order for such activity. It is the Committee's intent that neither this [exclusivity provision] nor any other provision of the legislation have any effect on the holding in *United States v. New York Telephone* that rule 41 of the Federal Rules of Criminal Procedure empowers federal judges to authorize the installation of pen registers for law enforcement purposes.

As far as I know, this footnote has not been cited in the government's public materials on the NSA surveillance. Cf. DOJ Whitepaper at 23 & n.8. In my view, however, it is the best support for the government's position, and so I address it here at some length.

The footnote makes sense only when viewed in context. It is part of a technical discussion of the effect of the exclusivity provision on criminal pen-trap surveillance. When FISA was enacted in 1978, pen-trap surveillance was (and still is) “electronic surveillance” under FISA, but was not authorized by Title III (or by FISA when conducted for ordinary criminal law enforcement purposes). See H.R. Rep. No. 95-1283, Part I, at 51. Instead, criminal pen-trap surveillance was conducted under court order issued pursuant to Federal Rule of Criminal Procedure 41, like an ordinary criminal search warrant. See *id.* at 96 n.51 & 100 n.54 (citing *United States v. New York Tel. Co.*, 434 U.S. 159 (1977)). As such, it might have been deemed forbidden by the exclusivity provision.

Congress seems to have adopted the affirmative defense in FISA’s penalty provision at least in part to ensure that law enforcement officials could conduct court-authorized criminal pen-trap surveillance without fear of prosecution: “Since certain technical activities – such as the use of a pen register – fall within the definition of electronic surveillance under [FISA], but not within the definition of wire or oral communications under [Title III], [FISA] provides an affirmative defense to a law enforcement or investigative officer who engages in such an activity for law enforcement purposes in the course of his official duties, pursuant to a search warrant or court order.” H.R. Rep. No. 95-1283, Part I, at 96. Today, Chapter 206 of Title 18 separately authorizes criminal pen-trap surveillance (18 U.S.C. §§ 3121-3127), Title III contains an exception for pen-trap surveillance (18 U.S.C. § 2511(2)(h)(i)), and FISA separately authorizes foreign intelligence pen-trap surveillance (50 U.S.C. §§ 1841-1846). The judicial decisions cited in note 50, *infra*, have held that FISA does not preclude “electronic surveillance” conducted for ordinary law-enforcement purposes.

⁴⁷ 50 U.S.C. § 1809(b). The text of Section 1809 is set out at note 42, *supra*. See H.R. Rep. No. 95-1283, Part I, at 11 (substantially similar version of 50 U.S.C. § 1809 in the version of FISA discussed in the House Report).

⁴⁸ 50 U.S.C. § 1803(a) (emphasis added). See 50 U.S.C. §§ 1804 and 1805.

⁴⁹ There are four situations in which electronic surveillance may be conducted without advance approval from the FISC: (1) surveillance of communications systems used exclusively by foreign powers where there is no substantial likelihood of acquiring a U.S. person’s communications (50 U.S.C. § 1802); (2) emergencies (50 U.S.C. § 1805(f)); (3) training and testing (50 U.S.C. § 1805(g)); and (4) for 15 days following a declaration of war by Congress (50 U.S.C. § 1811). This wartime provision is discussed in more detail at text and note 67, *infra*.

⁵⁰ In a series of decisions beginning in 1984, the federal courts of appeals confronted the validity of silent television surveillance approved by court order in criminal investigations. See *Falls*, 34 F.3d at 679-680 (citing cases); note 25, *supra*. Like criminal pen-trap surveillance (see note 46, *supra*), such television surveillance was “electronic surveillance” as defined by FISA but was not authorized by Title III (or by FISA). The courts upheld the surveillance – not on the theory the government advances now, but instead because, as Judge Posner put it, the exclusivity provision means only “that the Foreign Intelligence Surveillance Act is intended to be exclusive in its domain and Title III in its.” *Torres*, 751 F.2d at 881; see S. Rep. No. 95-604, at 63-64. In other words, the courts held that FISA simply exerts no preclusive effect on ordinary law-enforcement surveillance, not that it incorporates or allows an “exception” for surveillance conducted under law-enforcement statutes or rules.

To be sure, it is easy to overstate the significance of the fact that these decisions did not adopt the government’s current argument. For example, although *Torres* was a government appeal (presumably approved by the Solicitor General), the government apparently did not advance the argument on which it now relies, so the court apparently had no occasion to review it. However, it is worth noting that the Solicitor General adopted and repeated the *Torres* court’s interpretation of the exclusivity provision in his brief in opposition to a certiorari petition filed in connection with the case. See *Rodriguez v. United States*, No. 86-5987, Brief for the United States in Opposition at ___, cert. denied, 480 U.S. 908 (1987) (brief in opposition available at <http://www.usdoj.gov/osg/briefs/1986/sg860179.txt>). (The significance of that adoption by the Solicitor General also can be overstated, of course, because a brief in opposition generally is not the best place to advance a novel legal argument not considered by the court below.)

In any event, these court decisions also make clear that the government’s statutory theory need not be adopted in order to preserve the legality of criminal pen-trap surveillance (or any other law-enforcement investigative activity that is “electronic surveillance” under FISA but is not affirmatively authorized under Title III).

See DOJ Whitepaper at 22; note 46, *supra*. There are two ways to read *Torres* and its progeny, either of which will suffice. First, they can be read to hold that FISA exerts no preclusive effect on law enforcement surveillance authorities (e.g., statutes or rules), and correspondingly that Title III exerts no such effect on foreign intelligence authorities. On this approach, the inquiry turns on the nature of the statute or other authority under which surveillance is conducted. For example, the government may use Federal Rule of Criminal Procedure 41 without regard to FISA because Rule 41 is a criminal rule. Correspondingly, it may use FISA without regard to Title III because FISA is a foreign intelligence statute. Alternatively, *Torres* can be read to make the inquiry turn on the nature or purpose of the particular surveillance, rather than the statute under which it is conducted. In practical terms, however, the result is largely the same because the requirements of the criminal surveillance statutes effectively guarantee a law enforcement purpose. See, e.g., 18 U.S.C. §§ 2516(1), 2518(1)(b), 2518(3)(a), 2518(5), 2703(a), 3122(b)(2), Fed. R. Crim. P. 41(c). (This inquiry is similar to the one required by the first clause of the exclusivity provision with respect to surveillance techniques that are not “electronic surveillance” under FISA.) Of course, where the government has a mixed purpose, it would be free to use either FISA or the criminal statutes if it could satisfy their requirements. The FISA Court of Review’s decision has cleared away most of the underbrush surrounding FISA’s own “purpose” requirements. See *In re Sealed Case*, 310 F.3d 717 (FISCR 2002).

Either way, *Torres* et al. render somewhat superfluous the first part of the exclusivity provision, which provides that the law enforcement surveillance statutes do not affect the government’s acquisition of “foreign intelligence information from international or foreign communications . . . utilizing a means other than electronic surveillance as defined in [FISA].” But some redundancy is understandable here, particularly because this language was adopted “to make clear that the legislation does not deal with certain international signals intelligence currently engaged in by the National Security Agency and electronic surveillance outside the United States.” H.R. Rep. No. 95-1283, at 100. These activities outside the United States – which now may be part of NSA’s conduct inside the United States – were (and are) conducted under the President’s Constitutional authority and Executive Order 12333. Prior to FISA, as discussed in the text, they were protected by the national security disclaimer, 18 U.S.C. § 2511(3). With FISA repealing that disclaimer and affirmatively regulating foreign intelligence “electronic surveillance,” however, it is understandable that NSA would have wanted an explicit safe harbor in the statute, even if redundant, to protect its foreign intelligence activities abroad that are not “electronic surveillance.” Indeed, the first part of the exclusivity provision is largely redundant in any event because Title III does not apply to interceptions that take place abroad. See *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987); *United States v. Cotroni*, 527 F.2d 708, 709 (2d Cir. 1975). And there are other redundant provisions of Title III on the books today. See, e.g., 18 U.S.C. § 2511(2)(h)(i) (providing explicitly that Title III does not prohibit pen-trap surveillance, despite the Supreme Court’s 1977 decision in *New York Tel. Co.* holding that pen-trap surveillance is not regulated by Title III). Like the government, see DOJ Whitepaper at 35 n.20, I am unable to say more on this topic. See note 16, *supra*.

⁵¹ DOJ 12-22-05 letter at 4.

⁵² *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005); See, e.g., *Spector v. Norwegian Cruise Lines*, 125 S. Ct. 2169, 2183 (2005).

⁵³ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF provides:

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force”.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

⁵⁴ 12-19-05 briefing transcript; DOJ 12-22-05 Letter at 2-3; DOJ Whitepaper at 2, 10-17.

⁵⁵ 542 U.S. 507 (2004). A four-Justice plurality concluded that the AUMF allows the detention, *id.* at 518, and Justice Thomas in dissent “agree[d] with the plurality” on that point, *id.* at 587.

⁵⁶ *Id.* at 518.

⁵⁷ Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (“The use of warrantless electronic surveillance to gather intelligence in cases involving threats to the Nation’s security can be traced back to 1940, when President Roosevelt instructed Attorney General Robert Jackson that he was authorized to approve wiretaps of persons suspected of subversive activities”). *Forsyth* also illustrates the way in which the NSA surveillance program might be reviewed by the courts. See *id.* at 513-514 (discussing 18 U.S.C. § 3504).

⁵⁸ See *Berger v. United States*, 388 U.S. 41, 45-46 (1967).

⁵⁹ DOJ Whitepaper at 6-10 and 14-17.

⁶⁰ National Security Agency, 50th Anniversary Brochure (discussing the history of cryptography and signals intelligence in warfare from the American Revolution forward) (available at <http://www.nsa.gov/publications/publi00012.cfm>).

⁶¹ Compare *Hamdi* (U.S. citizen first detained in Afghanistan), with *Padilla v. Rumsfeld*, 542 U.S. 426 (2004) (U.S. citizen first arrested in the United States). Subsequent proceedings involving Padilla are recounted in *Padilla v. Hanft*, No. 05-6396 (4th Cir. Dec. 21, 2005) (available at 2005 WL 3489526), application granted, No. 05A578 (U.S. Jan. 4, 2006) (available at 2006 WL 14310). As I understand DOJ’s argument, it seems to apply equally, or almost equally, to purely domestic communications.

⁶² Pub. L. 107-56, 115 Stat. 272 (2001). The AUMF passed both Houses of Congress on September 14, and was signed by the President on September 18, 2001. The Senate passed its first piece of post-attack terrorism legislation on September 13. See Beryl Howell, *Seven Weeks: The Making of the USA Patriot Act*, 72 Geo. Wash. L. Rev. 1145, 1151 (2004). By September 19, both the Administration and Members of Congress, including Senator Leahy, had drafted bills of more than a hundred pages each, including many amendments to FISA. *Id.* at 1152-1153 & n.41.

⁶³ Among the amendments to FISA made by the Patriot Act are the following: Sections 206 (allowing for roving FISA electronic surveillance), 207 (changing the duration of certain FISC authorization orders), 208 (increasing the number of FISC judges), 214 (amending FISA pen/trap provisions), 215 (amending FISA’s “business records” provisions), 218 (changing the allowable “purpose” of FISA electronic surveillance and physical searches), 225 (providing immunity for providers who comply with FISA), 504 (authorizing coordination between intelligence and law enforcement officials), and 1003 (amending the definition of “electronic surveillance”).

⁶⁴ The Supreme Court has interpreted statutes in light of their legislative “context,” see *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Merrill Lynch v. Curran*, 456 U.S. 353 (1982), but the argument here is closer to the traditional one that multiple statutes – especially those enacted almost simultaneously – should be read together. See *Brown & Williamson*, 529 U.S. at 132-133.

⁶⁵ That is particularly the case because the Patriot Act amended the exclusivity provision, albeit with respect to a different issue than the one presented here. Section 204 of the Patriot Act amended the first clause of the exclusivity provision by adding a reference to Chapter 206 of Title 18, which authorizes criminal pen-trap surveillance. 115 Stat. at 281. Section 204 of the Patriot Act was subject to the sunset provision in Section 224 of the Patriot Act, and the government has continued to press for its renewal. See, e.g., U.S. Department of Justice, *Fact Sheet: USA Patriot Act Provisions Set for Reauthorization* (Apr. 5, 2005) ("Section 204 also makes it clear that the statute's exclusivity provision applies to the interception of electronic communications as well as the interception of wire and oral communications") (available at http://www.usdoj.gov/opa/pr/2005/April/05_0pa_163.htm).

Justice Souter advanced a similar argument in his dissenting opinion in *Hamdi*, relying on Section 412 of the Patriot Act, 8 U.S.C. § 1226a(a)(5), which requires the Attorney General promptly to begin removal proceedings against, or indict, an alien detained in the United States on national security grounds. 542 U.S. at 551. The argument with respect to the FISA provisions of the Patriot Act, however, is substantially more compelling, because – among other things – Hamdi was neither an alien nor captured in the United States, and therefore not subject to Section 412. The Patriot Act addressed "electronic surveillance" far more extensively and directly than it addressed the detention of enemy combatants on a foreign battlefield. See Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization And The War On Terrorism*, 118 Harv. L. Rev. 2047, 2119 n.321 (2005). DOJ's whitepaper disputes this (page 24 n.10) by arguing that other statutes deal comprehensively with detention. Those statutes, however, were not part of the Patriot Act, and therefore do not illuminate Congressional intent in passing the AUMF.

⁶⁶ As noted above, the government relies on the fact that FISA's criminal penalty provision refers to surveillance authorized by "statute." I have not considered the rather technical question of whether the AUMF, a resolution passed by both Houses of Congress and signed by the President, is a "statute" as that term is used in FISA. I assume that it is based on the discussion on pages 23-24 of DOJ's whitepaper. Cf. *INS v. Chadha*, 462 U.S. 919 (1983).

⁶⁷ 50 U.S.C. § 1811 ("Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress"). It appears that this provision merely relieves the government of its obligation to seek FISC approval for surveillance; it does not seem to eliminate the substantive requirements in FISA (e.g., the requirement that the government establish probable cause that the target of the surveillance is a foreign power or an agent of a foreign power). See H.R. Rep. No. 95-1720, at 34 ("The conferees intend that this period [15 days] will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. The conferees also intend that all other provisions of this act not pertaining to the court order requirement shall remain in effect during this period.") It is not clear to me whether the government agrees with this point. See DOJ Whitepaper at 20.

⁶⁸ H.R. Rep. No. 95-1720, at 34.

⁶⁹ As noted in the text, I do not read the exclusivity provision to incorporate a wholesale exception for other surveillance statutes through FISA's penalty provision, and so I view the relationship between the exclusivity provision and the AUMF through the lens of implied repeal. If the government's interpretation were correct, and FISA really did create an exception for all other surveillance statutes, then its interpretation would have to hold even if the AUMF had been enacted before the exclusivity provision. To me, however, that hypothetical scenario illustrates the weakness in the government's position.

The government might argue that its interpretation need not hold if the two laws were enacted in reverse order. To be sure, in that scenario, Congress' failure to list the AUMF in the exclusivity provision would take on added significance. But that is true only if one accepts the premise that the exclusivity provision is meant to be a complete list of all statutory surveillance procedures. As explained in the text, the government rejects this premise, effectively treating the exclusivity provision as if it referred not only to the "procedures in FISA" but also to "the procedures in any other surveillance statute." Thus, on the government's theory, it should not matter which law came first.

⁷⁰ It may be that the government agrees, and welcomes resolution of the question. I say that because DOJ's letter and whitepaper noticeably begin with Article II – an approach that conflicts, both logically and rhetorically, with the

constitutional avoidance doctrine cited at the end of the letter. See DOJ 12-22-05 letter at 1-2; DOJ Whitepaper at 1-2.

⁷¹ *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

⁷² See *Keith*, 407 U.S. at 303 (citing 18 U.S.C. § 2511(3)); cf. *id.* at 308-309 & n.8, 321-322 & n.20.

⁷³ In *Keith*, the Supreme Court held that the President could not conduct warrantless electronic surveillance in domestic intelligence and security cases (e.g., investigations of domestic terrorism), but left open the possibility that he could do so in foreign intelligence cases. 407 U.S. at 308-309 & n.8, 321-322 & n.20. The decision in *Keith* was more focused on the Fourth Amendment than on separation of powers – i.e., on whether the President may conduct such surveillance rather than on whether he may do so with or without congressional support. Although the Court held that Congress remained silent on the question, *id.* at 303, the result probably would have been the same even if Congress had enacted a statute expressly authorizing warrantless domestic security surveillance. In evaluating warrantless foreign intelligence surveillance before the enactment of FISA, in the face of congressional silence, “virtually every court that had addressed the issue had concluded that the President had the inherent power to collect foreign intelligence information, and that such surveillances constituted an exception to the warrant requirement of the Fourth Amendment.” *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (citing cases). Four courts of appeals – the Third, Fourth, Fifth, and Ninth Circuits – upheld warrantless electronic surveillance conducted for a foreign intelligence purpose. See *id.* The D.C. Circuit suggested in dictum in a plurality opinion that a warrant would be required, but did not decide the issue, and no court ever held that a warrant was required. See *Zweibon v. Mitchell*, 516 F.2d 594, 633-651 (D.C. Cir. 1975). In *In re Sealed Case*, 310 F.3d 717 (FISCR 2002), the court did not decide that question. It explained: “We take for granted that the President does have that authority [to conduct warrantless electronic surveillance in foreign intelligence cases] and, assuming that is so, FISA could not encroach on the President’s constitutional power. The question before us is the reverse, does FISA amplify the President’s power by providing a mechanism that at least approaches a classic warrant and which therefore supports the government’s contention that FISA searches are constitutionally reasonable.” *Id.* at 742.

⁷⁴ See 50 U.S.C. §§ 1821-1829, added by Pub. L. 103-359, 108 Stat. 3443 (1994).

⁷⁵ See DOJ Whitepaper at 6-9. I do not necessarily agree with every aspect of DOJ’s argument here.

⁷⁶ *Youngstown*, 343 U.S. at 870 (Jackson, J., concurring). Citing Justice Jackson, the Supreme Court in *Dames & Moore* identified a three-part framework for Presidential powers as follows (453 U.S. at 668-669 (internal quotations and citations omitted)):

[1] When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. [2] When the President acts in the absence of congressional authorization he may enter a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. In such a case the analysis becomes more complicated, and the validity of the President’s action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including congressional inertia, indifference or quiescence. [3] Finally, when the President acts in contravention of the will of Congress, his power is at its lowest ebb, and the Court can sustain his actions only by disabling the Congress from acting upon his request.

The Court went on to observe that “it is doubtless the case that executive action in any particular action falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” *Id.* at 669.

⁷⁷ See DOJ Whitepaper at 2, 11, 33-35.

⁷⁸ See *id.* at 10. Scholars have long debated this question. In one professor's view, at least, "the weight of modern scholarship takes the view that the Constitution lodges most foreign affairs powers, including the power to formulate foreign policy, with Congress. . . . [and that] those foreign affairs powers that the Constitution vests exclusively in the President – to serve as Commander in Chief of the armed forces and to receive foreign ambassadors – should be narrowly interpreted." Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 Const. Comment. 87, 114-115 (2002) (footnotes omitted). (For examples of work by those who favor congressional power, see, e.g., Louis Henkin, *Foreign Affairs and the U.S. Constitution* (1996); John Hart Ely, *War and Responsibility* (1993); Harold H. Koh, *The National Security Constitution* (1990).) On the other side of the debate "are those who, in varying degrees, believe that the President has substantial authority in the conduct of foreign affairs and the protection of national security, including a power to formulate foreign policy." Bellia, *supra*, at 116. As Professor John Yoo, then a Deputy Assistant Attorney General in DOJ's Office of Legal Counsel (OLC), testified before Congress in 2002, "[u]nder Article II, Section 1 of the Constitution, the President is the locus of the entire 'executive Power' of the United States and thus, in the Supreme Court's words, 'the sole organ of the federal government in the field of international relations.'" John C. Yoo, *Applying the War Powers Resolution to the War on Terrorism*, 6 Green Bag 2d 175, 177 (2003) (footnotes omitted). Not all supporters of broad presidential power are members (or former members) of the Bush Administration. See, e.g., H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash. L. Rev. 527 (1999), and *The Founders and the President's Authority Over Foreign Affairs*, 40 Wm. & Mary L. Rev. 1471 (1999). Professor Powell worked in OLC in 1993-1994 and 1996.

⁷⁹ See 343 U.S. at 640-655.

⁸⁰ *Loving v. United States*, 517 U.S. 748, 757 (1996). As examples of such intrusions, the Court in *Loving* cited the following (*id.*):

See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-226 (1995) (Congress may not revise judicial determinations by retroactive legislation reopening judgments); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (Congress may not remove executive officers except by impeachment); *INS v. Chadha*, 462 U.S. 919, 954-955 (1983) (Congress may not enact laws without bicameral passage and presentment of the bill to the President); *United States v. Klein*, 13 Wall. 128, 147 (1872) (Congress may not deprive court of jurisdiction based on the outcome of a case or undo a Presidential pardon).

⁸¹ *Id.* The Supreme Court has sometimes considered, but very rarely found, such impairment. It has rejected claims of impairment as follows:

- Congress may enact a law requiring federal judges to serve on the United States Sentencing Commission. *Id.* (describing *Mistretta v. United States*, 488 U.S. 361 (1989)).
- Congress may enact legislation requiring a federal agency to control a former President's official papers. *Id.* (describing *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)).
- Courts may consider lawsuits against a sitting President for unofficial acts. *Jones v. Clinton*, 520 U.S. 681, 701-703 (1997).

⁸² See DOJ Whitepaper at 29.

⁸³ *Swain v. United States*, 165 U.S. 553, 557-558 (1897); cf. *Loving v. United States*, 517 U.S. 748, 773 (1996) ("we need not decide whether the President would have inherent authority as Commander in Chief to prescribe aggravating factors in capital cases" because Congress has delegated such authority to him).

⁸⁴ U.S. Const. Art. I, § 8, cl. 14. See *Loving*, 517 U.S. at 767-768.

⁸⁵ *Loving*, 517 U.S. at 767.

⁸⁶ *Id.* at 772.

⁸⁷ See *id.* at 756 (considering the question “whether it violated the principle of separation of powers for the President [rather than Congress] to prescribe the aggravating factors required [for a sentence of death] by the Eighth Amendment”).

⁸⁸ U.S. Const. Art. I, § 8, cl. 12-13.

⁸⁹ For a discussion of appropriations and national security, see Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 Va. L. Rev. 833 (1994). Cf. *AFSA v. Garfinkel*, 490 U.S. 153 (1989) (per curiam) (not deciding whether an appropriations rider forbidding spending on a particular non-disclosure form improperly infringes on the President’s Article II power).

⁹⁰ See, e.g., *President Relents, Backs Torture Ban*, Washington Post, at 1 (Dec. 16, 2005) (available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/15/AR2005121502241_pf.html).

⁹¹ Sections 1001-1006 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, H.R. 2863 (Dec. 30, 2005) (hereinafter December 2005 Supplemental Appropriations Bill). The text of the bill (now a law) is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h2863enr.txt.pdf.

⁹² The President’s signing statement is available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> (hereinafter Signing Statement on December 2005 Supplemental Appropriations Bill).

⁹³ Other provisions of the bill and the signing statement may more directly pertain to the NSA surveillance program. For example, Section 8007 of the bill provides that “[f]unds appropriated by this Act may not be used to initiate a [classified] special access program without prior notification 30 calendar days in session in advance to the congressional defense committees.” In response to this, the President’s signing statement explains:

The Supreme Court of the United States has stated that the President’s authority to classify and control access to information bearing on the national security flows from the Constitution and does not depend upon a legislative grant of authority. Although the advance notice contemplated . . . can be provided in most situations as a matter of comity, situations may arise, especially in wartime, in which the President must act promptly under his constitutional grants of executive power and authority as Commander in Chief of the Armed Forces while protecting certain extraordinarily sensitive national security information. The executive branch shall construe these sections in a manner consistent with the constitutional authority of the President.

⁹⁴ Section 1003(a) of the legislation provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Section 1003(d) defines the term “cruel, inhuman, or degrading treatment or punishment” as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” S. Treaty Doc No. 100-20 (1988). For a concise history of the treaty and the U.S. reservations to it, see S. Rep. No. 102-30, at 19-21.

⁹⁵ Edward S. Corwin, *The President: Office and Powers, 1787-1984*, at 200 (5th ed. 1984).

⁹⁶ Cf. S. Rep. No. 95-701, at 95-96 (additional views of Senator Malcolm Wallop) (“Consider the case of someone with knowledge of a band of nuclear terrorists, hiding in one of a thousand apartments in a huge complex. It would be both reasonable and easy to tap every telephone in the complex, discard all intercepts but the correct one, and gain the vital information. But that would involve 999 violations of this bill.”).

⁹⁷ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

⁹⁸ Many other issues would also be relevant, including the level of suspicion required before surveillance occurs; the purpose of the program; whether, when, and under what conditions the surveillance acquires the "content" of communications rather than the kind of "routing and addressing" information associated with pen-trap surveillance; and any number of logistical and technical issues raised by new surveillance capabilities. Cf. DOJ Whitepaper at 1, 5, 13 n.4, 40 (suggesting that the surveillance required reasonable suspicion of some connection to al Qaeda).

⁹⁹ 50 U.S.C. § 1805(f).

¹⁰⁰ As the Church Report explains:

SHAMROCK is the codename for a special program in which NSA received copies of most international telegrams leaving the United States between August 1945 and May 1975. Two of the participating international telegraph companies – RCA Global and ITT World Communications – provided virtually all their international message traffic to NSA. The third, Western Union International, only provided copies of certain foreign traffic from 1945 until 1972. SHAMROCK was probably the largest governmental interception program affecting Americans ever undertaken. Although the total number of telegrams read during its course is not available, NSA estimates that in the last two or three years of SHAMROCK's existence, about 150,660 telegrams per month were reviewed by NSA analysts. Initially, NSA received copies of international telegrams in the form of microfilm or paper tapes. These were sorted manually to obtain foreign messages. When RCA Global and ITT World Communications switched to magnetic tapes in the 1960s, NSA made copies of these tapes and subjected them to an electronic sorting process. This means that the international telegrams of American citizens on the "watch lists" could be selected out and disseminated.

S. Rep. No. 94-755, Book III, at 765; see also *id.*, Book, II, at 169 (SHAMROCK "involved the use of a Watch List from 1967-1973. The watch list included groups and individuals selected by the FBI for its domestic intelligence investigations and by the CIA for its Operation CHAOS program [which involved opening international mail]. In addition, the SHAMROCK Program resulted in NSA's obtaining not only telegrams to and from certain foreign targets, but countless telegrams between Americans in the United States and American or foreign parties abroad.").

Based on affidavits from the NSA, the D.C. Circuit has described watchlisting as follows:

NSA monitors radio channels. Because of the large number of available circuits, however, the agency attempts to select for monitoring only those which can be expected to yield the highest proportion of foreign intelligence communications. When the NSA selects a particular channel for monitoring, it picks up all communications carried over that link. As a result, the agency inevitably intercepts some personal communications. After intercepting a series of communications, NSA processes them to reject materials not of foreign intelligence interest. One way in which the agency isolates materials of interest is by the use of [l]ists of words and phrases, including the names of individuals and groups ... These lists are referred to as "watch lists" by NSA and the agencies requesting intelligence information from them.

Salisbury v. United States, 690 F.2d 966, 968-969 (D.C. Cir. 1982) (citations omitted, ellipsis in original). For a more complete discussion of NSA watchlisting and FISA, see H.R. Rep. No. 98-738, at 5-6.

¹⁰¹ 431 U.S. 606 (1977).

¹⁰² *Id.* at 619.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 620 (citations omitted).

¹⁰⁵ DOJ Whitepaper at 5; see *id.* at 40.

¹⁰⁶ *Id.* at 1, 13 n.4.

¹⁰⁷ See *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause”).

¹⁰⁸ Georgetown Prepared Remarks, *supra* note 16.

¹⁰⁹ 338 U.S. 160, 175 (1949); see also *Illinois v. Gates*, 462 U.S. 213, 240-241 (1983).

¹¹⁰ See cases discussed in note 73, *supra*.

¹¹¹ Cf. *Keith*, 407 U.S. at 323 (inviting Congress to authorize domestic security surveillance based on probable cause of “circumstances more appropriate to domestic security cases” but not suggesting the use of a reasonable suspicion standard).

¹¹² DOJ Whitepaper at 41.

¹¹³ *Id.* at 25 n.12.

¹¹⁴ Responses to Joint Questions from House Judiciary Committee Minority Members, Response to Question 32 (released March 24, 2006) (italics in original) [hereinafter HJC Minority QFRs (3-24-06)].

¹¹⁵ *Id.* (second alteration in original).

¹¹⁶ *Id.* at Response to Question 34.

¹¹⁷ See 50 U.S.C. § 1805(a)(4) (to issue an order authorizing electronic surveillance, the court must find that “the proposed minimization procedures [in the government’s application] meet the definition” of that term in the statute).

¹¹⁸ 50 U.S.C. § 1805(e)(3).

¹¹⁹ Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence of the House of Representatives, on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632, the Foreign Intelligence Surveillance Act of 1977, 95th Cong., 2d Sess. at 26-31 (1978) (available at <http://www.cnss.org/fisa01t078.pdf>). I am indebted to Marty Lederman for directing me to this source.

¹²⁰ The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

¹²¹ See, e.g., *Stanford v. Texas*, 379 U.S. 476 (1965).

¹²² Cf. *Mistretta v. United States*, 488 U.S. 361 (1989) (United States Sentencing Commission).

¹²³ That could be accomplished by creating new 50 U.S.C. § 1801(f)(5) as follows: “Notwithstanding subsections (1)-(4) of this section, ‘electronic surveillance’ does not include the acquisition of information from an international communication.”

¹²⁴ The government has stated that there are “procedures . . . in place under the Program to protect U.S. privacy rights, including applicable procedures required by Executive Order 12333 and approved by the Attorney General, that govern acquisition, retention, and dissemination of information relating to U.S. persons.” HJC Minority QFRs (3-24-06), Response to Question 10.

¹²⁵ H.R. Rep. No. 95-1283, at 55.

¹²⁶ 50 U.S.C. § 1802 provides in pertinent part as follows:

(a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that –

(A) the electronic surveillance is solely directed at –

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title;

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801(h) of this title; and if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 1808(a) of this title.

(3) The Attorney General shall immediately transmit under seal to the court established under section 1803(a) of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless –

(A) an application for a court order with respect to the surveillance is made under sections 1801(h)(4) and 1804 of this title; or

(B) the certification is necessary to determine the legality of the surveillance under section 1806(f) of this title.

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to –

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

¹²⁷ *Id.*

¹²⁸ See *United States v. Ramsey*, 431 U.S. 606 (1977).

¹²⁹ The definition is as follows: "For purposes of this subchapter, the term 'international communication' means a communication involving at least one party located inside the United States and at least one party located outside the United States."

¹³⁰ HJC Minority QFRs (3-24-06), Response to Question 40.

¹³¹ Compare 50 U.S.C. § 1801(e)(1)(A)-(B), with 50 U.S.C. § 1801(e)(1)(C) and (e)(2).

¹³² See 18 U.S.C. § 3127(3) and (4); 50 U.S.C. § 1841(2).

¹³³ 18 U.S.C. § 2510(8).

¹³⁴ See, e.g., Robert Ditzion, *Electronic Surveillance in the Internet Age: The Strange Case of Pen Registers*, 41 Am. Crim. L. Rev. 1321 (2004); U.S. Attorney's Manual § 9-7.500.

¹³⁵ The government has reported that under the NSA program, "[i]ntelligence officers are not making the determination of what is 'reasonable' under the Fourth Amendment; instead, they make a factual determination that the 'probable cause' standard is met in a particular instance." *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the Senate Committee on the Judiciary, Written Questions from All Democratic Senators, Response to Question 25* (released March 24, 2006) [hereinafter *SJC Minority QFRs* (3-24-06)].

In some ways, this would be stricter than FISA's ordinary standards, because it would require probable cause of a nexus between the agent of a foreign power and the particular communication being monitored, not merely between the agent and the telephone line carrying the communication. See 50 U.S.C. §§ 1804(a)(4)(A)-(B), 1805(a)(3)(A)-(B). But based on what I have seen in the government's public statements, using communications, rather than facilities, as the unit of analysis may make more sense here for operational reasons. Alternatively, the language in the draft could be changed to conform to that in traditional FISA – i.e., there must be probable cause that the communication is transmitted on a facility that is being used, or is about to be used, by a foreign power or an agent of a foreign power.

¹³⁶ HJC Minority QFRs (3-24-06), Response to Question 2.

¹³⁷ Letter of February 28, 2006, from Attorney General Alberto Gonzales to Senator Arlen Specter at 3 (emphasis added).

¹³⁸ 50 U.S.C. § 1801(h).

¹³⁹ See 50 U.S.C. § 1808(a)(1).

¹⁴⁰ See 50 U.S.C. § 1805(f).

**Statement Of Senator Patrick Leahy,
Ranking Member, Judiciary Committee,
Hearing On "NSA III: War Time Executive Power and the FISA Court"
March 28, 2006**

I thank the Chairman for holding this hearing today. We desperately need some answers to basic questions about the President's decision to wiretap Americans on American soil without court approval and without attempting to comply with the Foreign Intelligence Surveillance Act. More than three months and two Committee hearings after the President was forced to acknowledge the program's existence, this Committee remains in the dark with regard to nearly every aspect of the program. As Senator Specter succinctly put it recently, we are still "flying blind on a great deal of this."

We held our first hearing on February 2 with Attorney General Gonzales. His testimony was more obstructionist than enlightening. He flatly refused to discuss anything beyond "those facts the President has publicly confirmed, nothing more." In other words, he refused to tell us anything we did not already know.

The Administration's stonewalling has only gotten worse since then. Three weeks later, the Attorney General wrote an extraordinary letter to Chairman Specter, seeking to alter his live testimony – mainly by making it even less responsive than it was. That letter raised serious additional concerns about the scope of the Administration's domestic spying activities, its shifting legal rationalizations, and the Attorney General's own credibility.

For example, the Attorney General's letter suggests that the Administration is operating other secret programs that invade the rights and liberties of Americans. But it refuses to answer our questions regarding the scope and the purported legal basis of those programs. The Attorney General's letter admits that "the Department's legal analysis has evolved over time," while once again refusing to answer the basic factual question of when the Administration came up with its theory that the congressional resolution authorizing military force against al Qaeda also authorized warrantless domestic wiretapping of Americans. I can only infer that the Administration's AUMF theory was concocted long after it decided to ignore FISA.

The AUMF says nothing about FISA or about domestic wiretaps. And no members of Congress I have spoken to understood themselves to be partially repealing FISA's warrant requirement when they voted for the AUMF. So here, four years after the fact, we have an Administration that purports to pride itself on "strict construction" claiming that, unbeknownst to the Congress that passed it, the AUMF's silence on wiretaps overrides FISA's express prohibition, including in wartime, of warrantless domestic wiretaps. I agree with George Will who wrote in a column last month that that after the fact rationalization is both "risible" and "incoherent."

To fulfill our legislative function, we need to know what other invasions into Americans' rights and privacy the Administration believes we authorized, and why. However, the Bush-Cheney Administration continues to stonewall.

The Democratic members of the Committee finally received a response late last Friday to the priority questions we sent the Attorney General following his appearance on February 6. I say we received a “response” because saying we got “answers” would be an exaggeration. What we got, with respect to virtually every question, was some version of “we cannot [answer]” or “we are not able to [answer]” or “we are not in a position [to answer]” or simply, “it would be inappropriate for us [to answer].”

We held our second hearing on the program on February 28. That hearing was an academic panel discussion featuring scholars and former government officials with a great deal of expertise in the law, but no knowledge of the program that they were discussing. We had a good discussion. But it was not oversight.

Nor is our hearing today. Our witnesses are experts in the Foreign Intelligence Surveillance Act, but they have no special knowledge of the President’s program to wiretap Americans outside of that Act. They cannot tell us any more than the very little that we already know about what this Administration has been doing for the last four years under its theory of limitless Executive power.

We are stuck at an impasse, lacking information or cooperation from an Administration that refuses to submit to real congressional oversight. This is, of course, nothing new from an obsessively secretive Administration that has classified historical documents for no reason, conducted energy policy and attempted to outsource port security behind closed doors, routinely blocked investigations and audits, repeatedly harassed whistleblowers, and dismissively refused to cooperate with congressional oversight for more than five years. This Administration has a paranoid aversion to openness and accountability that will not be overcome by gentle persuasion.

The Administration tells us, we won’t tell you enough to do meaningful oversight over what we’re doing, so just trust us. But how can we trust this Administration, when every day brings more evidence of its incompetence, including yesterday’s revelation that our borders are not even secure from the simplest scheme to smuggle in a dirty bomb?

So how can we move forward to protect the security and the rights and freedoms of the American people? I believe that we in Congress need to do three things.

First, if the rule of law means anything, we must insist on real oversight and real accountability. The Chairman said at our last hearing, “we will struggle to try to find out what the program is.” With the greatest of respect, that need not be a “struggle.” We have the constitutional right to compel information from this Administration by subpoena. During the last two years of the Clinton Administration, this Committee approved the issuance of more than a dozen subpoenas to the Department of Justice and former DOJ officials, both for documents, including legal memoranda, and for live testimony. The question is not whether we *can* find out the extent of the Administration’s secret spying on the American people. The question is whether the Republican majority of this Congress has the political will to do so.

Second, if there is a real need for legislation that eases existing restrictions under FISA, we should of course pass it, as we have done on a bipartisan basis with numerous powers requested by this Administration over the past five years. However, we should not rush to give the Administration new powers it has not deigned to request, based on concerns it has not articulated.

Finally, in discussing legislation, we should collectively draw a line in the sand. No new powers should be given to this Administration until we secure a firm assurance that it will faithfully execute and abide by the law as written by Congress. We have spent many hours of the people's time in this Congress, and been subjected to extreme partisan political pressure, responding to the Administration's repeated demands for urgent amendments to FISA, the PATRIOT Act and other laws that limit Americans' civil liberties for the sake of security. Yet, as George Will pointed out, all those debates have been a meaningless charade if the Administration's "monarchical" assertions of essentially unfettered presidential power to conduct the war on terror are taken seriously. If, as the Administration contends, the President can pick and choose which laws he will or will not follow, what is the point of our amending FISA?

We are not here to play charades. We are here to legislate the law of the land. So any further legislation that we enact in this area should, at a minimum, include express provisions that require the President to stop equivocating with vague, expansive and dangerous theories of inherent powers, and to accept that he is fully bound by the legislation as written. We must put an end to police state powers operating outside the law.

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HEADLINE: More Than Meets the Ear

BYLINE: Shane Harris

HIGHLIGHT:

The NSA's warrantless monitoring of phone calls and e-mails in the United States is broader than the administration has described.

BODY:

The Bush administration has assiduously avoided any talk about the actual workings of its program to intercept the phone calls and e-mails of people in the United States who are suspected of having links to terrorists abroad. Officials' unwavering script goes like this: Present the legal justifications for the president to authorize domestic electronic surveillance without warrants, but say nothing about how the National Security Agency actually does it -- or about what else the agency might be doing.

But when Attorney General Alberto Gonzales appeared before the Senate Judiciary Committee on February 6 to answer questions about the program, what he didn't say pulled back the curtain on how the NSA decides which calls and e-mails to monitor. The agency bases those decisions on a broad and less focused surveillance than officials have publicly described, a surveillance that may, or may not, be legal.

In a hearing that lasted more than eight hours, Gonzales, who didn't testify under oath, dutifully batted away senators' inquiries about "operational details" and stayed silent, under determined questioning by some Democrats, about other warrantless programs that the president might have secretly authorized. When the hearing finally ended, so did Gonzales's comments on the program.

Until 22 days later. On February 28, Gonzales sent committee Chairman Arlen Specter, R-Pa., a six-page letter, partly to respond to questions he was unprepared to answer at the hearing, but also "to clarify certain of my responses" in the earlier testimony. In the letter, Gonzales took pains to correct any "misimpressions" that he might have created about whether the Justice Department had assessed the legality of intercepting purely domestic communications, for example, as opposed to those covered by the NSA program, in which one party is outside the United States. The attorney general didn't say that Justice had contemplated the legality of purely domestic eavesdropping without a warrant, but he also didn't say it hadn't.

Gonzales's letter was intriguing for what else it didn't say, especially on one point: With exacting language, he narrowed the scope of his comments to address only "questions relating to the specific NSA activities that have been publicly confirmed by

the president." Then, as if to avoid any confusion, Gonzales added, "Those activities involve the interception by the NSA of the contents of communications" involving suspected terrorists and people in the United States.

Slightly, and with a single word, Gonzales was tipping his hand. The content of electronic communications is usually considered to be the spoken words of a phone call or the written words in an electronic message. The term does not include the wealth of so-called transactional data that accompany every communication: a phone number, and what calls were placed to and from that number; the time a call was placed; whether the call was answered and how long it lasted, down to the second; the time and date that an e-mail message was sent, as well as its unique address and routing path, which reveals the location of the computer that sent it and, presumably, the author.

Considering that terrorists often talk and write in code, the transactional data of a communication, properly exploited, could yield more valuable intelligence than the content itself. "You will get a very full picture of a person's associations and their patterns of activity," said Jim Dempsey, the policy director of the Center for Democracy and Technology, an electronic-privacy advocacy group. "You'll know who they're talking to, when they're talking, how long, how frequently.... It's a lot [of information]. I mean, a lot."

According to sources who are familiar with the details of what the White House calls the "terrorist surveillance program," and who asked to remain anonymous because the program is still classified, analyzing transactional data is one of the first and most important steps the agency takes in deciding which phone calls to listen to and which electronic messages to read. Far from the limited or targeted surveillance that Gonzales, President Bush, and intelligence officials have described, this traffic analysis examines thousands, perhaps hundreds of thousands, of individuals, because nearly every phone number and nearly every e-mail address is connected to a person.

Patterns in the Sea

Analysis of telephone traffic patterns helps analysts and investigators spot relationships among people that aren't always obvious. For instance, imagine that a man in Portland, Ore., receives a call from someone at a pay phone in Brooklyn, N.Y., every Tuesday at 9 a.m. Also every Tuesday, but minutes earlier, the pay phone caller rings up a man in Miami. An investigator might look at that pattern and suspect that the men in Portland and Miami are communicating through the Brooklyn caller, who's acting as a kind of courier, to mask their relationship. Patterns like this have led criminal investigators into the inner workings of drug cartels and have proved vital in breaking these cartels up.

Terrorists employ similar masking techniques. They use go-betweens to circuitously route calls, and they change cellphones often to avoid detection. Transactional data, however, capture those behaviors. If NSA analysts -- or their computers -- can find these patterns or signatures, then they might find the terrorists, or at least know which ones they should monitor.

Just after 9/11, according to knowledgeable sources, the NSA began intercepting the communications of specific foreign persons and groups named on a list. The sources didn't specify whether persons inside the United States were monitored as part of that list. But a former government official who is knowledgeable about NSA activities and the warrantless surveillance program said that this original list of people and groups, or others like it, could have formed the base of the NSA's surveillance of transactional data, the parts of a communication that aren't considered content.

If the agency started with a list of phone numbers, it could find all the numbers dialed from those phones. The NSA could then learn what numbers were called from that second list of numbers, and what calls that list received, and so on, "pushing out" the lists until the agency had identified a vast network of callers and their transactional data, the former official said. The agency might eavesdrop on only a few conversations or e-mails. But starting with even an initial target list of, say, 10 phone numbers quickly yields a web of hundreds of thousands of communications, because the volume increases exponentially with every new layer of callers.

To find meaningful patterns in transactional data, analysts need a lot of it. They must set baselines about what constitutes "normal" behavior versus "suspicious" activity. Administration officials have said that the NSA doesn't intercept the contents of a communication unless officials have a "reasonable" basis to conclude that at least one party is linked to a terrorist organization. To make any reasonable determination like that, the agency needs hundreds of thousands, or even millions, of call records, preferably as soon as they are created, said a senior person in the defense industry who is familiar with the NSA program and is an expert in the analytical tools used to find patterns and connections. Asked if this means that the NSA program is much broader and less targeted than administration officials have described, the expert replied, "I think that's correct."

In theory, finding reasonable connections in data is a straightforward and largely automated process. Analysts use computer programs based on algorithms -- mathematical procedures for solving a particular problem -- much the same way that meteorologists use data models to forecast the weather. Counter-terrorism algorithms look for the transactional indicators that match what analysts recognize as signs of a plot.

Of course, those algorithms must be sophisticated enough to spot many not-so-obvious patterns in a mass of data that are mostly uninteresting, and they work best when the data come from many sources. Algorithms have proven useful for detecting frequent criminal activity, such as credit card fraud. "Historical data clearly indicate that if a credit card turns up in two cities on two continents on the same day, that's a useful pattern," says Jeff Jonas, a computer scientist who invented a technology to connect known scam artists who are on casinos' watch lists with new potential grifters, and is now the chief scientist of IBM Entity Analytics. "The challenge of predicting terrorism is that unlike fraud, we don't have the same volume of historical data to learn from," Jonas said. "Compounding this is the fact that terrorists are constantly changing their methods and do their best to avoid leaving any digital footprints in the first place."

The obvious solution would be to write an algorithm that is flexible and fast enough to weigh millions of pieces of evidence, including exculpatory ones, against each other. But according to technology experts, and even the NSA's own stated research accomplishments, that technology has not been perfected.

The Bleeding Edge

The NSA began soon after the 9/11 terrorist attacks to collect transactional data from telecommunications companies. Several telecom executives said in press accounts that their companies gave the NSA access to their switches, the terminals that handle most of the country's electronic traffic. One executive told National Journal that NSA officials urged him to hand over his company's call logs. When he resisted, the officials implied that most of his competitors had acceded to the agency's request.

Not long after the surveillance program started, in October 2001, the NSA began looking for new tools to mine the telecom data. The agency, the industry expert said, considered some that the Defense Department's Total Information Awareness program was developing. TIA was an ambitious and controversial experiment to find patterns of terrorist activity in a much broader range of transactions than just telephone data. But NSA officials rejected the TIA tools because they were "too brittle," the expert said, meaning that they failed to manage the torrent of data that the NSA wanted to analyze. He noted the irony of rejecting the TIA technologies -- which privacy advocates had characterized as huge, all-seeing, digital dragnets -- because they couldn't handle the size of the NSA's load.

In the fall of 2002, a federal research-and-development agency that builds technologies primarily for the NSA launched another search for pattern-detection solutions. The Advanced Research and Development Activity, ARDA, issued \$64 million in contracts for the Novel Intelligence for Massive Data, or NIMD, program. Its goal was "to help analysts deal with information overload, detect early indicators of strategic surprise, and avoid analytic errors," according to ARDA's public call for proposals released last year. In essence, NIMD is an early-warning system, which is how the administration has described the terrorist surveillance program. In 2003, ARDA also took over research of the tools being developed under TIA.

While the NSA was searching for the next generation of data-sifters, it continued to rely on less sophisticated tools. For an example, the former government official who spoke to NJ cited applications that organize data into broad categories, allowing analysts to see some relationships but obscuring some of the nuance in the underlying information. The results of this kind of category analysis can be displayed on a graph. But the graph might reveal only how many times a particular word appears in a conversation, not necessarily the significance of the word or how it relates to other words. Technologists sarcastically call these diagrams BAGs -- big-ass graphs.

Such was the state of affairs when the NSA started looking for terrorist patterns in a telephonic ocean. So, instead of looking for a tool that could cull through the data, the

agency decided to "reverse" the process, starting with the data set and working backward, looking for algorithms that could work with it.

The NSA has made some breakthroughs, the industry expert said, but its solution relies in part on a technological "trick," which he wouldn't disclose. Another data-mining expert, who also asked not to be identified because the NSA's work is classified, said that computer engineers probably started with the telecom companies' call data, looked for patterns, and then wrote algorithms to detect them as they went along, tweaking the algorithms as needed.

Such an ad hoc approach is brittle in its own right. For starters, if analysts are working with algorithms designed to detect only certain patterns, they could be missing others, the technology expert said. At the same time, the more dependent the algorithms are on identifying very specific patterns of behavior, the more vulnerable the NSA's monitoring is to being foiled if terrorists discover what the agency is watching for, or if they change their behavior. A more complex algorithm that considers thousands, or even millions, of patterns is harder to defeat.

The industry expert added that NSA officials have worried that "if you knew what the technical trick was they were doing [to make the surveillance program function], you wouldn't have to know what specific algorithms" the agency was using. This reliance on a "trick" makes the program very vulnerable to defeat and helps explain why the Bush administration is so keen on cloaking its inner workings.

"It's pretty bleeding-edge," the expert said, referring to a technology that's unperfected and therefore prone to instability. "We're talking about dumping hundreds of thousands or millions of records" into a system. In an unsophisticated system, connections among people can emerge that look suspicious but are actually meaningless. A book agent who represents a journalist who once interviewed Osama bin Laden, for example, doesn't herself necessarily know bin Laden. But she might turn up in an NSA search of transactional data. "False positives will happen," the expert said.

Gonzales and former NSA Director Michael V. Hayden have said that career agency employees decide to eavesdrop only if they have a "reasonable" basis to believe one party to a communication is a terrorist or connected to a terrorist organization. But what determines reasonableness? In a January speech at the National Press Club, Hayden drew a distinction between the Fourth Amendment's requirement that "no warrants shall issue, but upon probable cause," and its protection against "unreasonable searches and seizures."

When a journalist in the crowd questioned his logic, Hayden heatedly replied, "If there's any amendment to the Constitution that employees of the National Security Agency are familiar with, it's the Fourth. And it is a reasonableness standard in the Fourth Amendment.... I am convinced that we are lawful, because what it is we're doing [intercepting content] is reasonable." He said that the terrorist attacks fundamentally altered the NSA's thinking. "The standard of what [information] was relevant and

valuable, and therefore, what was reasonable, would understandably change, I think, as smoke billowed from two American cities and a Pennsylvania farm field. And we acted accordingly."

Aside from the question of whether NSA employees, rather than federal judges, are qualified to determine what constitutes a reasonable search, that determination provides much of the basis for deciding whose communications will be intercepted without a warrant. If the technology the NSA is using to determine what constitutes a reasonable search is unsophisticated, the industry expert said, "you're talking about tapping a phone based on a statistical correlation."

A New Legal Battle?

Gonzales's narrowly tailored letter to Sen. Specter raised more questions than it answered. Democrats were outraged by what they saw as the attorney general's attempt to alter his testimony and to obstruct senators' attempts to fully assess the program's legal basis. "Much of your letter is devoted to not providing answers to the questions of a number of us regarding legal justifications for activities beyond those narrowly conceded by you to have already been confirmed by the president," Sen. Patrick Leahy of Vermont, the Judiciary Committee's ranking Democrat, wrote to the attorney general in a follow-up letter.

Leahy also raised the question of what else Gonzales hadn't told lawmakers. The attorney general's letter contained "disturbing suggestions ... that there are other secret programs," Leahy wrote. In Gonzales's letter to Specter, the attorney general had referred to "other intelligence activities" and to his inability to discuss them; he left open the possibility that the president may not have authorized these activities. Gonzales wrote, "When I testified in response to questions from Sen. Leahy, 'Sir, I have tried to outline ... what the president has authorized, and that is all that he has authorized,' I was confining my remarks to the Terrorist Surveillance Program as described by the president."

Gonzales's testimony was meant to defend the program's legality. But as more about the NSA's operations become known, new legal questions arise, including one that goes to the heart of how officials reasonably identify suspected terrorists.

Under normal criminal law, content is defined as "any information concerning the substance, purport, or meaning of [a] communication," but the definition of content under the law that governs electronic eavesdropping on U.S. persons for intelligence purposes is different and is potentially in conflict with normal jurisprudence. That law, the Foreign Intelligence Surveillance Act, states that content "includes any information concerning the identity of the parties ... or the existence, substance, purport, or meaning of [their] communication."

A phone number can be used to identify a person, said Dempsey of the Center for Democracy and Technology, who for nine years was assistant counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights. Does that mean that a phone number is "content" under the law? FISA, enacted in 1978, didn't envision today's

technology, when anyone with an Internet connection can use a phone number to find someone's name, address, and even an aerial photograph of his house, Dempsey said.

"I just cannot read [FISA] and figure out what it means in the context of analysis of [transactional] data," he added. "Presumably somebody in the administration thinks they understand it.... Whether that's providing any clear guidance" to the people working on the NSA program, "that's not clear."

New York Times
March 25, 2006

Privileged Conversations Said Not Excluded From Spying

By THE NEW YORK TIMES

WASHINGTON, March 24 — The National Security Agency has the authority to listen without warrants to conversations between lawyers and their clients and doctors and their patients if a connection to Al Qaeda is suspected, the Justice Department told Congress in a report released Friday.

"Although the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception" if they met the other requirements of the eavesdropping program, including if there were a suspected link to Al Qaeda and if one party were outside the United States, the Justice Department said. It did not say whether that authority had been used.

Federal policy generally recognizes a high standard of confidentiality for privileged attorney-client and doctor-patient conversations. The monitoring of federal jailhouse conversations between a lawyer and a client, for instance, requires a special order of the attorney general.

The Justice Department's position on the question of privileged conversations came in its written responses to nearly 100 questions posed by Republicans and Democrats about the N.S.A.'s eavesdropping program, which has provoked fierce debate in Congress since it was disclosed last December.

Representative John Conyers Jr. of Michigan, one of the Democrats who questioned the department about the legal and operational details of the program, said the administration's suggestion that privileged communications could be monitored without a warrant was "one of the few revealing answers" in more than 50 pages of responses.

For the most part, Mr. Conyers said, the answers were "vague and unresponsive" and reflected an effort by the administration to "thumb its nose at the American people and their elected representatives."

The bulk of the written responses repeated the assertions the administration has made in defending the program in public statements, written reports and Congressional testimony in the last three months.

Once again, the Justice Department strongly defended the legality of the program, based on President Bush's constitutional authority to protect the country and a Congressional resolution passed after the Sept. 11 terrorist attacks. The department characterized as flawed and unfounded charges from critics that the program violated the Foreign Intelligence Surveillance Act of 1978, which required warrants from a special court for eavesdropping operations in intelligence cases.

The department also defended the effectiveness of the program, despite suggestions from some law enforcement officials that it had led to far more dead ends than productive leads. With the operation aimed at preventing another terrorist attack, the Justice Department said it "is confident that the program is helping to achieve that goal."

But as it has done repeatedly, the department refused to answer directly nearly all the questions raised by Democrats about the operational aspects of the program or what limits if any it saw to the president's legal authority to protect the country.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001JAMES ROBERTSON
United States District Judge

March 23, 2006

(202) 354-346
Fax (202) 354-346The Honorable Arlen Specter
United States Senate
711 Senate Hart Office Building
Washington, DC 20510-0001

Dear Senator Specter:

Thank you for soliciting my views on your proposal, which I support, to give approval authority over the Administration's electronic surveillance program to the Foreign Intelligence Surveillance Court. Seeking judicial approval for government activities that implicate Constitutional protections is, of course, the American way, but prudence in the handling of sensitive classified material suggests that only a limited number of judges should have the job. The Foreign Intelligence Surveillance Court is best situated to review the surveillance program. Its judges are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record.

I have reviewed the bill and Judge Baker's thoughtful remarks and submit these comments for your consideration.

The surveillance program in question (and other programs that may be developed over time) should be presented to the FISC, not for general review, but in the form of applications for approval for some period of time, say 45 or 90 days. Such applications would presumably not "fit" the FISA process as it now exists, but that process is easily adjustable.

An appropriate new standard would have to be crafted, as your proposal recognizes. My view is that probable cause to believe that the program will intercept communications of a foreign power or agent or a person who has had such communication (your section 6(a)(3)) is too low a threshold. I suggest something like "probable cause to believe that operation of the

The Honorable Arlen Specter
March 23, 2006
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program will identify or assist in the detection of terrorist activity."

I agree with Judge Baker that Congress needs to clarify the concept of minimization. Depending on what is actually collected by the Administration's surveillance program, this could be the most difficult part of the approval process.

I do not agree that the FISC should evaluate the effectiveness of the Administration's program or, in Judge Baker's words, that it should "determin[e] that the purpose of a surveillance fulfills the need for foreign intelligence." The Court of Review concluded, I believe correctly, that that is not a judicial function. FISC judges would nevertheless have the returns from previous approvals and other information about the results of the program as part of the record they consider when deciding whether there is probable cause for successive approvals.

FISC judges now sit individually, and not in panels or en banc. The statute should be amended to require that, for approvals of surveillance program applications, the Court sit in panels of three.

Sincerely yours,



cc: The Honorable Harold A. Baker

**Statement of William Stafford before Senate Judiciary
Committee, March 28, 2006**

Mr. Chairman and members of the Committee:

I am William Stafford, a district judge of the Northern District of Florida since May, 1975. Simultaneously with taking senior status in 1996, I began my seven year term on the Foreign Intelligence Surveillance Court.

You have asked for my comments on the draft legislation entitled the "National Security Surveillance Act of 2006." It is my judgment that these proposed amendments to the FISA statute strike a reasonable balance between the President's power to conduct foreign affairs, including electronic surveillance, and the Congress' power of oversight over the same. By positing the power to review and/or authorize this surveillance in the FISA Court of the

Third Branch of the government, this legislation accommodates the power of the President to fulfill his duty to protect the nation against terrorism from without, while the civil liberties of Americans are being watched over by judges whose lifetime appointments put them above the current political clamor.

For those of us who came of age during the Cold War, the world political scene and the communications universe have changed dramatically. It is well, then, that the FISA statute, created nearly 30 years ago, be looked at and revised in light of the world as it really is in 2006. When FISA was first enacted in 1978, the Congress ^{*Codified*} ~~settled~~ the ~~the President's~~ ^{*the President's*} ~~issue as to who had the~~ power to conduct foreign intelligence surveillance and the method by which that could be done. In 1984, Congress amended the FISA statute to permit physical searches under the same foreign

surveillance umbrella. The Berlin wall has since come down and other artificial borders have disappeared, while wireless computers, cellular telephones, and other electronic creations have reduced the communications distances to nanoseconds. The events of September 11th 2001 and their aftermath demonstrate that while it is, indeed, a different world in which we now live, constitutional principles still apply, and your proposed legislation accommodates both of these verities.

Your amendments create an electronic surveillance program in which the Congress recognizes that it is “not feasible to name every person or address every location” and requires an “extended period of electronic surveillance.” This is another recognition not only of the change in the world scene and in communications abilities, but also of the difference between traditional criminal

prosecution and foreign intelligence gathering. By requiring a justification for continuing the surveillance, and by establishing enhanced minimization procedures, these amendments offer a reasonable approach to meeting both the need for national security and for protecting Americans' civil liberties.

Foreign intelligence surveillance is a different form of executive function than is law enforcement, and your proposed legislation recognizes that. In my considered opinion, it is well that a ~~lower~~^{different} threshold is set for the initiation and/or the continuation of foreign intelligence surveillance, as contrasted to the traditional fourth amendment "probable cause" that is required in criminal search and seizure warrant applications. This is because the purposes of the intrusion and collection of information in each case is different. In the typical fourth amendment

search and seizure context, the individual and/or the place and/or the type of evidence are generally spelled out in the warrant application, and criminal prosecution is the end game. Under FISA, the governmental function is the gathering of foreign intelligence information, and while the intelligence gatherers are not required to turn a blind eye to violations of the criminal laws, prosecution is not the purpose for the initiation or continuation of the foreign intelligence surveillance.

Spelling out in your legislation a different level ~~for~~ for the initiation and/or continuation of foreign intelligence surveillance has the additional benefit of providing guidance for those courts that may be called upon to review the product of any such foreign intelligence surveillance.

Should evidence ^{incidentally} gathered as a result of a FISA warrant be offered in a criminal case, and there be challenged as the

product of an unreasonable search and seizure, it would be comforting for the trial judge, and for the court of appeals judges who may have the same issue on appeal, to know that Congress made the deliberate choice to set a ~~higher~~^{different} threshold for foreign intelligence purposes. Illinois v. Gates arose in an criminal case context; and while the language of the opinion may well allow for different levels of consideration depending upon the purpose for the warrant application, having the legislative intent clearly stated here removes any doubt as to what the Congress would authorize or sanction in the FISA context. Choice of the language to accomplish this is for you as drafters, but I respectfully suggest that if it is the will of the Congress to set a different standard for foreign intelligence surveillance gathering, that you do so for the benefit of the other two branches of government and for the American people.

As I approach my 75th birthday, it remains my belief that our nation is held together by a couple of pieces of paper, the Declaration of Independence and the Constitution, and the belief of the American people that our system of government works. FISA was created by Congress to clarify that the President had the authority to conduct foreign intelligence surveillance, but that the President would do so through a court composed of judges who had been nominated for lifetime appointments by a President and confirmed by the Senate as provided by Article III of the Constitution. This arrangement seems to have worked well for everyone, and these amendments will, in my judgment, continue that arrangement into the real world of the 21st Century.

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BYLINE: Chitra Ragavan

HIGHLIGHT:

The White House says spying on terror suspects without court approval is OK. What about physical searches?

BODY:

In the dark days after the Sept. 11, 2001, terrorist attacks, a small group of lawyers from the White House and the Justice Department began meeting to debate a number of novel legal strategies to help prevent another attack. Soon after, President Bush authorized the National Security Agency to begin conducting electronic eavesdropping on terrorism suspects in the United States, including American citizens, without court approval. Meeting in the FBI's state-of-the-art command center in the J. Edgar Hoover Building, the lawyers talked with senior FBI officials about using the same legal authority to conduct physical searches of homes and businesses of terrorism suspects--also without court approval, one current and one former government official tell U.S. News. "There was a fair amount of discussion at Justice on the warrantless physical search issue," says a former senior FBI official. "Discussions about--if [the searches] happened--where would the information go, and would it taint cases."

FBI Director Robert Mueller was alarmed by the proposal, the two officials said, and pushed back hard against it. "Mueller was personally very concerned," one official says, "not only because of the blowback issue but also because of the legal and constitutional questions raised by warrantless physical searches." FBI spokesman John Miller said none of the FBI's senior staff are aware of any such discussions and added that the bureau has not conducted "physical searches of any location without consent or a judicial order."

In December, the New York Times disclosed the NSA's warrantless electronic surveillance program, resulting in an angry reaction from President Bush. It has not previously been disclosed, however, that administration lawyers had cited the same legal authority to justify warrantless physical searches. But in a little-noticed white paper submitted by Attorney General Alberto Gonzales to Congress on January 19 justifying the legality of the NSA eavesdropping, Justice Department lawyers made a tacit case that President Bush also has the inherent authority to order such physical searches. In order to fulfill his duties as commander in chief, the 42-page white paper says, "a consistent understanding has developed that the president has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes." The memo cites congressional testimony of Jamie Gorelick, a former deputy attorney general in the Clinton administration, in 1994 stating that the

Justice Department "believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes."

"Black-bag jobs." Justice Department spokesman Brian Roehrkasse says the white paper cited the Gorelick testimony simply to bolster its legal defense of the NSA's electronic surveillance program. Roehrkasse points out that Justice Department lawyers have told Congress that the NSA program "described by the president does not involve physical searches." But John Martin, a former Justice Department attorney who prosecuted the two most important cases involving warrantless searches and surveillance, says the department is sending an unambiguous message to Congress. "They couldn't make it clearer," says Martin, "that they are also making the case for inherent presidential power to conduct warrantless physical searches."

It could not be learned whether the Bush administration has cited the legal authority to carry out such searches. A former marine, Mueller has waged a quiet, behind-the-scenes battle since 9/11 to protect his special agents from legal jeopardy as a result of aggressive new investigative tactics backed by the White House and the Justice Department, government officials say. During Senate testimony about the NSA surveillance program, however, Gonzales was at pains to avoid answering questions about any warrantless physical surveillance activity that may have been authorized by the Justice Department. On February 6, Patrick Leahy, the ranking Democrat on the Judiciary Committee, asked Gonzales whether the NSA spying program includes authority to tap E-mail or postal mail without warrants. "Can you do black-bag jobs?" Leahy asked. Gonzales replied that he was trying to outline for the committee "what the president has authorized, and that is all that he has authorized"--electronic surveillance. Three weeks later, Gonzales amended his answer to Leahy's question, stating that he was addressing only the legal underpinnings for the NSA surveillance program but adding: "I did not and could not address operational aspects of the program, or any other classified intelligence activities." In the past, when Congress has taken up explosive issues that affect the bureau, Mueller has made it a point, officials have said, to leave Washington--and sometimes the country--so as not to get pulled into the political crossfire. When Gonzales testified February 6, Mueller was on his way to Morocco.

Government officials told the magazine that Mueller and then Deputy Attorney General James Comey, who also questioned the NSA spying program, both believed that while it was a close call legally, the president did have authority to conduct electronic surveillance of terrorism suspects in the United States without court approval; both men, however, raised grave concerns about the possible use of any information obtained from any warrantless surveillance in a court of law.

At least one defense attorney representing a subject of a terrorism investigation believes he was the target of warrantless clandestine searches. On Sept. 23, 2005--nearly three months before the Times broke the NSA story--Thomas Nelson wrote to U.S. Attorney Karin Immergut in Oregon that in the previous nine months, "I and others have seen strong indications that my office and my home have been the target of clandestine searches." In an interview, Nelson said he believes that the searches resulted from the fact

that FBI agents accidentally gave his client classified documents and were trying to retrieve them. Nelson's client is Soliman al-Buthe, codirector of a now defunct charity named al-Haramain, who was indicted in 2004 for illegally taking charitable donations out of the country. The feds also froze the charity's assets, alleging ties to Osama bin Laden. The documents that were given to him, Nelson says, may prove that al-Buthe was the target of the NSA surveillance program.

The searches, if they occurred, were anything but deft. Late at night on two occasions, Nelson's colleague Jonathan Norling noticed a heavysset, middle-aged, non-Hispanic white man claiming to be a member of an otherwise all-Hispanic cleaning crew, wearing an apron and a badge and toting a vacuum. But, says Norling, "it was clear the vacuum was not moving." Three months later, the same man, waving a brillo pad, spent some time trying to open Nelson's locked office door, Norling says. Nelson's wife and son, meanwhile, repeatedly called their home security company asking why their alarm system seemed to keep malfunctioning. The company could find no fault with the system.

In October, Immergut wrote to Nelson reassuring him that the FBI would not target terrorism suspects' lawyers without warrants and, even then, only "under the most exceptional circumstances," because the government takes attorney-client relationships "extremely seriously." Nelson nevertheless filed requests, under the Freedom of Information Act, with the NSA. The agency's director of policy, Louis Giles, wrote back, saying, "The fact of the existence or nonexistence of responsive records is a currently and properly classified matter."

"Maximum speed." For the FBI, the very mention of the term "black-bag jobs" prompts a bad case of the heebie-jeebies. In 1975 and 1976, an investigative committee led by then Sen. Frank Church documented how the FBI engaged in broad surveillance of private citizens and members of antiwar and civil rights groups, as well as Martin Luther King Jr. The committee's hearings and the executive-branch abuses that were documented in the Watergate investigation led to numerous reforms, including passage of the Foreign Intelligence Surveillance Act in 1978. The law created a special secret court tasked with approving electronic wiretaps in espionage and other national security investigations. After the Aldrich Ames spy case, Congress amended FISA to include approval of physical searches. After 9/11, the law was further amended to allow investigators to place wiretaps or conduct physical searches without notifying the court for 72 hours and to obtain "roving" wiretaps to allow investigators to tap multiple cellphones.

In justifying the NSA's warrantless surveillance program, Gonzales has argued that the review process required for a FISA warrant is too cumbersome for a program that is of "a military nature" and that requires "maximum speed and agility to achieve early warning."

White House lawyers, in particular, Vice President Cheney's counsel David Addington (who is now Cheney's chief of staff), pressed Mueller to use information from the NSA program in court cases, without disclosing the origin of the information, and told Mueller to be prepared to drop prosecutions if judges demanded to know the sourcing, according to several government officials. Mueller, backed by Comey, resisted the administration's

efforts. "The White House was putting pressure on Mueller to broadly make cases with the intelligence," says one official. "But he did not want to use it as a basis for any affidavit in any court." Comey declined numerous requests for comment. Sources say Mueller and his general counsel, Valerie Caproni, continue to remain troubled by the domestic spying program. Martin, who has handled more intelligence-oriented criminal cases than anyone else at the Justice Department, puts the issue in stark terms: "The failure to allow it [information obtained from warrantless surveillance] to be used in court is a concession that it is an illegal surveillance."

Mueller has been criticized by some agents for being too close to the White House. His predecessor, Louis Freeh, made his break publicly from President Clinton, even returning his White House security access badge. Until recently, Mueller reported to the White House daily to brief Bush and Cheney. But Mueller has not shied away from making tough decisions. He refused to allow FBI agents to participate in CIA and Defense Department interviews of high-value prisoners because of the administration's use of aggressive interrogation techniques. In Iraq and at the Pentagon-run camp for terrorism suspects at Guantanamo Bay, Cuba, it has been FBI agents who have called attention to what they viewed as abuse of detainees.

It is unclear how much resistance from the FBI the White House and the Justice Department will be willing to brook. What is clear, however, is the extraordinary extent to which officials in both places inject themselves in the bureau's operations. In late 2004, President Bush asked then FBI Deputy Director Bruce Gebhardt, filling in for Mueller during the daily White House briefings, minute details about a suspected terrorism threat in Kansas. "Don't worry, Mr. President," responded Gebhardt, straight-faced. "We have Kansas surrounded."

WashingtonPost.com

Secret Court's Judges Were Warned About NSA Spy Data

Program May Have Led Improperly to Warrants

By Carol D. Leonnig

Washington Post Staff Writer

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Twice in the past four years, a top Justice Department lawyer warned the presiding judge of a secret surveillance court that information overheard in President Bush's eavesdropping program may have been improperly used to obtain wiretap warrants in the court, according to two sources with knowledge of those events.

The revelations infuriated U.S. District Judge Colleen Kollar-Kotelly -- who, like her predecessor, Royce C. Lamberth, had expressed serious doubts about whether the warrantless monitoring of phone calls and e-mails ordered by Bush was legal. Both judges had insisted that no information obtained this way be used to gain warrants from their court, according to government sources, and both had been assured by administration officials it would never happen.

The two heads of the Foreign Intelligence Surveillance Court were the only judges in the country briefed by the administration on Bush's program. The president's secret order, issued sometime after the Sept. 11, 2001, attacks, allows the National Security Agency to monitor telephone calls and e-mails between people in the United States and contacts overseas.

James A. Baker, the counsel for intelligence policy in the Justice Department's Office of Intelligence Policy and Review, discovered in 2004 that the government's failure to share information about its spying program had rendered useless a federal screening system that the judges had insisted upon to shield the court from tainted information. He alerted Kollar-Kotelly, who complained to Justice, prompting a temporary suspension of the NSA spying program, the sources said.

Yet another problem in a 2005 warrant application prompted Kollar-Kotelly to issue a stern order to government lawyers to create a better firewall or face more difficulty obtaining warrants.

The two judges' discomfort with the NSA spying program was previously known. But this new account reveals the depth of their doubts about its legality and their behind-the-scenes efforts to protect the court from what they considered potentially tainted evidence. The new accounts also show the degree to which Baker, a top intelligence expert at Justice, shared their reservations and aided the judges.

Both judges expressed concern to senior officials that the president's program, if ever made public and challenged in court, ran a significant risk of being declared unconstitutional, according to sources familiar with their actions. Yet the judges believed they did not have

the authority to rule on the president's power to order the eavesdropping, government sources said, and focused instead on protecting the integrity of the FISA process.

It was an odd position for the presiding judges of the FISA court, the secret panel created in 1978 in response to a public outcry over warrantless domestic spying by J. Edgar Hoover's FBI. The court's appointees, chosen by then-Chief Justice William H. Rehnquist, were generally veteran jurists with a pro-government bent, and their classified work is considered a powerful tool for catching spies and terrorists.

The FISA court secretly grants warrants for wiretaps, telephone record traces and physical searches to the Justice Department, whose lawyers must show they have probable cause to believe that a person in the United States is the agent of a foreign power or government. Between 1979 and 2004, it approved 18,748 warrants and rejected five.

Lamberth, the presiding judge at the time of the Sept. 11 attacks, and Kollar-Kotelly, who took over in May 2002, have repeatedly declined to comment on the program or their efforts to protect the FISA court. A Justice Department spokesman also declined to comment.

Both presiding judges agreed not to disclose the secret program to the 10 other FISA judges, who routinely handled some of the government's most highly classified secrets.

So early in 2002, the wary court and government lawyers developed a compromise. Any case in which the government listened to someone's calls without a warrant, and later developed information to seek a FISA warrant for that same suspect, was to be carefully "tagged" as having involved some NSA information. Generally, there were fewer than 10 cases each year, the sources said.

According to government officials familiar with the program, the presiding FISA judges insisted that information obtained through NSA surveillance not form the basis for obtaining a warrant and that, instead, independently gathered information provide the justification for FISA monitoring in such cases. They also insisted that these cases be presented only to the presiding judge.

Lamberth and Kollar-Kotelly derived significant comfort from the trust they had in Baker, the government's liaison to the FISA court. He was a stickler-for-rules career lawyer steeped in foreign intelligence law, and had served as deputy director of the office before becoming the chief in 2001.

Baker also had privately expressed hesitation to his bosses about whether the domestic spying program conflicted with the FISA law, a government official said. Justice higher-ups viewed him as suspect, but they also recognized that he had the judges' confidence and kept him in the pivotal position of obtaining warrants to spy on possible terrorists.

In 2004, Baker warned Kollar-Kotelly he had a problem with the tagging system. He had concluded that the NSA was not providing him with a complete and updated list of the

people it had monitored, so Justice could not definitively know -- and could not alert the court -- if it was seeking FISA warrants for people already spied on, government officials said.

Kollar-Kotelly complained to then-Attorney General John D. Ashcroft, and her concerns led to a temporary suspension of the program. The judge required that high-level Justice officials certify the information was complete -- or face possible perjury charges.

In 2005, Baker learned that at least one government application for a FISA warrant probably contained NSA information that was not made clear to the judges, the government officials said. Some administration officials explained to Kollar-Kotelly that a low-level Defense Department employee unfamiliar with court disclosure procedures had made a mistake.

Kollar-Kotelly asked Defense Secretary Donald H. Rumsfeld to ensure that wouldn't happen again, government officials said.

Baker declined to comment through an office assistant, who referred questions about his FISA work to a Justice Department spokesman. Pentagon spokeswoman Cynthia Smith also declined to comment and referred questions to Justice officials. Justice spokesman Brian Roehrkasse said the department could not discuss its work with the FISA court.

"The department always strives to meet the highest ethical and professional standards in its appearances before any court, including the FISA court," Roehrkasse said. "This is especially true when department attorneys appear before a court on an ex parte basis, as is the case in the FISA court."

Shortly after the warrantless eavesdropping program began, then-NSA Director Michael V. Hayden and Ashcroft made clear in private meetings that the president wanted to detect possible terrorist activity before another attack. They also made clear that, in such a broad hunt for suspicious patterns and activities, the government could never meet the FISA court's probable-cause requirement, government officials said.

So it confused the FISA court judges when, in their recent public defense of the program, Hayden and Attorney General Alberto R. Gonzales insisted that NSA analysts do not listen to calls unless they have a reasonable belief that someone with a known link to terrorism is on one end of the call. At a hearing Monday, Gonzales told the Senate Judiciary Committee that the "reasonable belief" standard is merely the "probable cause" standard by another name.

Several FISA judges said they also remain puzzled by Bush's assertion that the court was not "agile" or "nimble" enough to help catch terrorists. The court had routinely approved emergency wiretaps 72 hours after they had begun, as FISA allows, and the court's actions in the days after the Sept. 11 attacks suggested that its judges were hardly unsympathetic to the needs of their nation at war.

On Sept. 12, Bush asked new FBI Director Robert S. Mueller III in a Cabinet meeting whether it was safe for commercial air traffic to resume, according to senior government officials. Mueller had to acknowledge he could not give a reliable assessment.

Mueller and Justice officials went to Lamberth, who agreed that day to expedited procedures to issue FISA warrants for eavesdropping, a government official said.

The requirement for detailed paperwork was greatly eased, allowing the NSA to begin eavesdropping the next day on anyone suspected of a link to al Qaeda, every person who had ever been a member or supporter of militant Islamic groups, and everyone ever linked to a terrorist watch list in the United States or abroad, the official said.

In March 2002, the FBI and Pakistani police arrested Abu Zubaida, then the third-ranking al Qaeda operative, in Pakistan. When agents found Zubaida's laptop computer, a senior law enforcement source said, they discovered that the vast majority of people he had been communicating with were being monitored under FISA warrants or international spying efforts.

"Finally, we got some comfort" that surveillance efforts were working, said a government official familiar with Zubaida's arrest.

Washington Post
Authorizing Surveillance
Editorial

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IN THE PAST week both congressional intelligence committees have taken modest steps toward oversight of the National Security Agency's mysterious program of warrantless wiretapping. First, the House intelligence committee agreed to conduct a comprehensive review of the implementation of the Foreign Intelligence Surveillance Act (FISA) -- the law that governs national security wiretapping and searches within the United States -- and to push the Bush administration to give a substantial briefing on the NSA program to a subcommittee. Then, this week, the Senate intelligence committee -- having rejected Democratic requests for a full-blown oversight investigation -- set up a subcommittee of seven members to look into the matter. Previously, only individual members have received full briefings on the program, which circumvents FISA's requirement of a warrant from a special court.

In the Senate's case, the committee action coincided with a proposal by several moderate Republicans to authorize aspects of the NSA program and impose modest restrictions. The bill, which is being advanced by Sen. Mike DeWine (R-Ohio), would allow warrantless surveillance for 45 days -- and in some instances much longer -- when one party to a communication is outside the United States and one party is linked to terrorism. The bill has positive and negative elements. It contains important restrictions on the use and retention of information, and it would require the administration to get a warrant as soon as the standards for one can be met. But it would also allow surveillance to continue without a warrant if the administration certifies its necessity to a congressional subcommittee. Whatever its merits, the legislation seems premature. Any bill should flow out of the examination of the program the committees are only now undertaking, not from guesswork about what is going on and what rules should apply.

Two key inquiries ought to guide any new legislation: how FISA is working and what precisely the administration is doing outside of its strictures. The administration has said that the surveillance law is too cumbersome for certain essential national security surveillance. If this is true, the law needs to be updated. But Congress cannot reasonably authorize or limit the NSA's program without knowing what sort of surveillance it encompasses and how it works. How big is the program, and how many times has the NSA snooped on Americans using it? What are the technological advances that have rendered FISA obsolete and for what categories of surveillance? To what extent is data-mining part of the new program? Are the targets all abroad, and Americans' communications intercepted only incidentally, or are some of the targets domestic? Is the physical intelligence collection being done domestically or overseas? These questions may sound esoteric, but they are essential to assessing the legality of what the administration has done and how and whether the law should be updated. Much of this inquiry cannot be conducted in public. But it can and must happen -- and briefing members fully is the place to start.

The goal should be to modernize the compromise between national security and liberty that FISA represented in the 1970s: to legitimize essential surveillance by law, require judicial review when the targets are U.S. citizens or residents, limit the use of this material to counterintelligence purposes, and ensure that irrelevant material is not retained.

Crafting and maintaining compromise on this issue has always been bipartisan. It would be tragic and dangerous if it became a political football now -- either as a campaign issue for President Bush or a club with which Democrats can pound him. Consensus should be possible if the administration is willing to engage seriously with a Congress interested in rigorous oversight.