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109TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 109–382

DIRECTING THE ATTORNEY GENERAL TO SUBMIT TO THE HOUSE OF REPRESENTATIVES ALL DOCUMENTS IN THE POSSESSION OF THE ATTORNEY GENERAL RELATING TO WARRANTLESS ELECTRONIC SURVEILLANCE OF TELEPHONE CONVERSATIONS AND ELECTRONIC COMMUNICATIONS OF PERSONS IN THE UNITED STATES CONDUCTED BY THE NATIONAL SECURITY AGENCY

MARCH 2, 2006.—Referred to the House Calendar and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 643]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 643) directing the Attorney General to submit to the House of Representatives all documents in the possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

PURPOSE AND SUMMARY

House Resolution 643, introduced by Representative John Conyers (D–MI) on December 22, 2005, directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, all documents in the possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency (other than such warrantless electronic surveillance authorized to be conducted under section 102(a) of the Foreign Intelligence Surveillance Act of 1978), subject to necessary redactions or requirements for handling classified documents, including any and all opinions regarding warrantless electronic sur-

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veillance of telephone conversations and electronic communications of persons in the United States.

BACKGROUND

House Resolution 643 is a resolution of inquiry. Under the rules and precedents of the House of Representatives, a resolution of inquiry allows the House to request information from the President of the United States or to direct the head of one of the executive departments to provide such information. More specifically, according to Deschler's Precedents, it is a "simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch. The practice is nearly as old as the Republic, and is based on principles of comity between the executive and legislative branches rather than on any specific provision of the Constitution that a Federal court may be called upon to enforce." [1]

A resolution of inquiry is privileged and thus may be considered at any time after it is properly reported or discharged from the committee to which it is referred.[2] Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the committee to which the resolution is referred does not act on the resolution within 14 legislative days, a privileged motion to discharge that committee accorded privileged consideration on the House floor. In calculating the days available for committee consideration, the day of introduction and the day of discharge are not counted.[3]

A committee has a number of choices in disposing of a resolution of inquiry. It may vote on the resolution without amendment, or it may amend it. It may report the resolution favorably, adversely, or with no recommendation. A committee that adversely reports a resolution of inquiry does not necessarily oppose the resolution under consideration. In the past, resolutions of inquiry have frequently been reported adversely for various reasons. Two common ones are that an administration is in substantial compliance with the request made by the resolution or that there is an ongoing competing investigation. There is also past precedent for a resolution of inquiry to be adversely reported because the nature of the information requested was highly sensitive.[4] Upon its introduction on December 22, 2005, H. Res. 643 was referred to the Committee on the Judiciary. On February 15, 2006 H. Res. 643 was ordered reported adversely by the Committee, which was within the 14 legislative day period.

House Resolution 643 directs the Attorney General to transmit to the House of Representatives documents related to opinions of the legality of the surveillance and documents that are of a highly sensitive nature. Furthermore, Congress has received and continues to receive information responsive to the request for information contained in the resolution.

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[1] 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.
[2] 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.
[3] William Holmes Brown, House Practice: A Guide to the Rules, Precedents and Procedures of the House 819 (2003).
[4] H.R. Rep. No. 1079, 92nd Cong., 2nd Sess., (1972).

The war on terror

Osama Bin Laden, the head of the terrorist organization al-Qaeda, declared war on the United States in 1996. America ignored that declaration until the morning of September 11, 2001, when members of the terrorist organization attacked the United States by crashing four hijacked civilian airliners into the World Trade Center, the Pentagon, and a Pennsylvania field, killing over 3,000 people and injuring over 2,000. In response to this act of war by a terrorist organization—rather than a nation state—Congress passed the Authorization for Use of Military Force (AUMF) on September 14, 2001, which the President signed into law on September 18, 2001.[5]

The leak of the highly classified Terrorist Surveillance Program (TSP)

On December 16, 2005, the New York Times reported that President Bush ordered the National Security Agency (NSA) to conduct warrantless wiretaps on calls placed or received in the United States, to or from a foreign country. One of the New York Times reporters who broke the story, James Risen, also included an account of the NSA program in a book already submitted for publication. When explaining the decision to delay publication of the story for nearly a year, New York Times executive Bill Keller stated after its publication that: "[I]n the course of subsequent reporting we satisfied ourselves that we could write about this program—withholding a number of technical details—in a way that would not expose any intelligence-gathering methods or capabilities that are not already on the public record." The date of publication coincided with the date upon which the Senate voted on a motion to end debate on H.R. 3199, the "USA PATRIOT Improvement and Reauthorization Act of 2005." The New York Times article has subsequently spurned a debate as to whether the President went beyond his Executive powers when he authorized the NSA Terrorist Surveillance Program (TSP).

Pending criminal investigation into the unauthorized disclosure investigation of the Terrorist Surveillance Program

On December 30, 2005, the Justice Department opened a criminal investigation into the unauthorized disclosure of the existence of this highly classified program. MSNBC.com reported that, "White House spokesman Trent Duffy said Justice undertook the action on its own, and the president was informed of it on Friday. 'The leaking of classified information is a serious issue. The fact is that al-Qaeda's playbook is not printed on Page One and when America's is, it has serious ramifications,' Duffy told reporters in Crawford, Texas, where Bush was spending the holidays."[6] Several additional reports confirm the existence of an ongoing criminal investigation into this matter.[7]

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[5] Pub. L. No. 107–40.

[6] Justice Dept. to probe leak of spy program, the Associated Press, Dec. 30, 2005, available at http://msnbc.msn.com/id/10651154/from/RL.1/.

[7] David Johnston, Officials interviews in widening inquiry into eavesdropping article, N.Y. Times, February 13, 2006. Dan Eggen, Eavesdropping Inquiry Begins Officials Question if Secret Material Leaked Illegally, the Washington Post, Dec. 31, 2005.

Documents and information pertaining to TSP already presented to Congress and to the public

H. Res. 643 requests internal documents that are related to a highly sensitive national security program. The following summary highlights efforts by the Department of Justice and the Administration to provide information about TSP to Congress and the public. These efforts include providing documents, conducting classified briefings, and presenting hearing testimony relating to these issues.

(1) December 17, 2005 radio address by the President [8]

The day following the publication of the New York Times story, the President gave a radio address and acknowledged the existence of the program. He stated: "To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th. I'm also using constitutional authority vested in me as Commander-in-Chief." [9] The President stated that the TSP began "[i]n the weeks following the terrorist attacks on our nation," when "[he] authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al-Qaeda and related terrorist organizations." [10]

The President explained that these intercepts were related to the war on terrorism and that "[b]efore we intercept these communications, the government must have information that establishes a clear link to these terrorist networks." He also explained that the program was a "highly classified program" and "crucial to our national security." [11]

He reminded the public that as the "9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the Commission criticized our nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the United States to other members of al-Qaeda who were overseas. But we didn't know they were here, until it was too late." [12]

The President stated that "[t]he authorization [he] gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with [his] constitutional responsibilities and authorities." He stated that "the activities [he] authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the

[8] Radio Address of the President to the Nation, Dec. 17, 2005, http://www.whitehouse.gov/news/releases/2005/12/20051217.html (last visited February 2, 2006)
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

Attorney General and the Counsel to the President. [He has] reauthorized this program more than 30 times since the September the 11th attacks, and [he] intend[s] to do so for as long as our nation faces a continuing threat from al-Qaeda and related groups." [13]

The President explained that a review process of the NSA's activities exists that includes thorough review by the Justice Department and NSA's top legal officials, including NSA's general counsel and inspector general. He also pointed out that the leadership and the Intelligence Committee chairs and ranking members "have been briefed more than a dozen times on this authorization and the activities conducted under it." [14]

The President concluded that "[t]he American people expect [him] to do everything in [his] power under our laws and Constitution to protect them and their civil liberties." He promised that that "is exactly what [he] will continue to do, so long as [he's] the President of the United States." [15]

(2) December 18, 2005 broadcast television interview of the Vice President of the United States

On December 18, 2005, the Vice President discussed the TSP, and other issues in a network television interview. The Vice President explained the legal authority of the program and stated that it was "consistent with the President's constitutional authority as Commander-in-Chief. It's consistent with the resolution that passed by the Congress after 9/11. And it has been reviewed repeatedly by the Justice Department. . . ." [16]

(3) December 19, 2005 press briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

On December 19, 2005, the White House held a press briefing with Attorney General Alberto Gonzales and General Hayden, the Principal Deputy Director for National Intelligence, to brief the press and the public on the legal issues surrounding the authorization of the TSP. At the briefing, the Attorney General and General Hayden explained the legal bases of the program and provided details on unclassified aspects of the program. The Attorney General emphasized that the targeted phone calls were not domestic but rather "intercepts of contents of communications where one of the—one party to the communication is outside the United States." He went on to state:

> [W]e also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world war, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Interview by ABC News with Richard Cheney, Vice President, United States (December 18, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051218–4.html.

> Justice O'Connor talked about in the Hamdi decision. We believe that—and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.[17]

General Hayden added that the program "is less intrusive [than FISA]. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of intelligence, but to detect and warn and prevent [future] attacks."[18]

(4) December 22, 2005 Department of Justice letter to the chairmen and ranking members of the House and Senate Intelligence Committees

The Department of Justice sent a letter to the Chairmen and Ranking Members of the House and Senate Committees on Intelligence on December 22, 2005, to provide "an additional brief summary of the legal authority supporting the NSA activities described by the President."[19] In summary, the letter states that "[u]nder 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."[20] In the letter, the Attorney General further states that "this constitutional authority includes 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."[21] The Attorney General also emphasized that the TSP is consistent with the Foreign Intelligence Surveillance Act because Congress provided authority in the Authorization of the Use of Military Force (Pub. L. No. 107–40) that "the President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[22]

(5) January 11, 2006, Presidential discussion of the global war on terror at the Kentucky International Convention Center, Louisville, Kentucky

On January 11, 2006, the President participated in a discussion on the Global War on Terror at the Kentucky International Convention Center in Louisville, Kentucky at which he provided additional legal justification for the establishment of the TSP.[23]

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[17] Alberto Gonzales, U.S. Attorney General, NSA Terrorist Surveillance Program, Press Briefing before the White House Press Corp (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219–1.html.

[18] General Michael Hayden, U.S. Principal Deputy Director for National Intelligence, NSA Terrorist Surveillance Program, Press Briefing before the White House Press Corp (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219–1.html.

[19] Letter from William A. Moschella, U.S. Assistant Attorney General, Department of Justice, to Chairmen Pete Hoekstra and Pat Roberts, Ranking Member Jane Harman and Vice Chairman John D. Rockefeller IV, House and Senate Intelligence Committees, available at http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] A transcript of these remarks can be found at http://www.whitehouse.gov/news/releases/2006/01/20060111–7.html.

(6) January 19, 2006 Department of Justice white paper on legal authorities supporting the activities of the National Security Agency described by the President

On January 19, 2006, the Department of Justice sent a 42-page legal analysis explaining the "legal authorities supporting the activities of the National Security Agency described by the President." Addressed to Senate Majority Leader Frist and signed by Attorney General Alberto Gonzales, the cover letter stated:

> As I have previously explained, these NSA activities are lawful in all respects. They represent a vital effort by the President to ensure that we have in place an early warning system to detect and prevent another catastrophic terrorist attack on America. In the ongoing armed conflict with al-Qaeda and its allies, the President has the primary duty under the Constitution to protect the American people. The Constitution gives the President the full authority necessary to carry out that the solemn duty, and he has made clear that he will use all authority available to him, consistent with the law, to protect the Nation. The President's authority to approve these NSA activities is confirmed and supplemented by Congress in the Authorization for Use of Military Force (AUMF), enacted on September 18, 2001. As discussed in depth in the attached paper, the President's use of his constitutional authority, as supplemented by statute in the AUMF, is consistent with the Foreign Intelligence Surveillance Act and is also fully protective of the civil liberties guaranteed by the Fourth Amendment.[24]

(7) January 23, 2006 press conference by former NSA Director General Hayden

On January 23, 2006, General Hayden held a press conference in which he provided unclassified details concerning the TSP. He emphasized that the TSP only intercepted suspected enemy electronic signals when there was "reason to believe that one or both communicants are affiliated with al-Qaeda."[25]

In explaining what NSA is not doing, General Hayden discussed the volume of misinformation in the public record concerning the NSA and stressed that the NSA is acutely aware of the balance between security and civil liberties. He stated that:

> the great urban legend out there then was something called "Echelon," and the false accusation that NSA was using its capabilities to advance American corporate interests: signals intelligence for General Motors, or something like that.
>
> You know, with these kinds of charges, the turf back then feels a bit familiar now. How could we prove a negative, that we weren't doing certain things, without reveal-

[24] Letter from Alberto Gonzales, U.S. Attorney General, Department of Justice, to Senator Bill Frist, Majority Leader, U.S. Senate (January 19, 2006), available at http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf.

[25] General Michael Hayden, U.S. Principal Deputy Director for National Intelligence, What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation, Remarks before the National Press Club (January 23, 2006), available at http://www.dni.gov/release_letter_012306.html.

ing the appropriate things we were doing that kept America safe? You see, NSA had—NSA has—an existential problem. In order to protect American lives and liberties, it has to be two things: powerful in its capabilities and secretive in its methods. And we exist in a political culture that distrusts two things most of all: power and secrecy.

Modern communications didn't make this any easier. Gone were the days when signals of interest—that's what NSA calls the things that they want to copy—gone were the days when signals of interest went along some dedicated microwave link between Strategic Rocket Force's headquarters in Moscow and some ICBM in western Siberia.

By the late '90s, what NSA calls targeted communications—things like al-Qaeda communications—coexisted out there in a great global web with your phone calls and my e-mails. NSA needed the power to pick out the ones, and the discipline to leave the others alone. So, this question of security and liberty wasn't a new one for us in September of 2001. We've always had this question: How do we balance the legitimate need for foreign intelligence with our responsibility to protect individual privacy rights? It's a question drilled into every employee of NSA from day one, and it shapes every decision about how NSA operates.

September 11th didn't change that.[26]

(8) January 24, 2006 remarks by Attorney General Gonzales at the Georgetown University Law Center concerning the legal basis of the TSP

On January 24, 2006, the Attorney General publicly outlined the Administration's view of its legal authority to conduct wartime electronic surveillance:

Some contend that even if the President has constitutional authority to engage in the surveillance of our enemy in a time of war, that authority has been constrained by Congress with the passage in 1978 of the Foreign Intelligence Surveillance Act. Generally, FISA requires the government to obtain an order from a special FISA court before conducting electronic surveillance. It is clear from the legislative history of FISA that there were concerns among Members of Congress about the constitutionality of FISA itself.

For purposes of this discussion, 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.

The FISA Court of Review, the special court of appeals charged with hearing appeals of decisions by the FISA court, stated in 2002 that, quote, "[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." We do not have to decide

[26] *Id.*

whether, when we are at war and there is a vital need for the terrorist surveillance program, FISA unconstitutionally encroaches—or places an unconstitutional constraint upon—the President's Article II powers. We can avoid that tough question because Congress gave the President the Force Resolution, and that statute removes any possible tension between what Congress said in 1978 in FISA and the President's constitutional authority today.

Let me explain by focusing on certain aspects of FISA that have attracted a lot of attention and generated a lot of confusion in the last few weeks.

First, FISA, of course, allows Congress to respond to new threats through separate legislation. FISA bars persons from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized by statute." For the reasons I have already discussed, the Force Resolution provides the relevant statutory authorization for the terrorist surveillance program. *Hamdi* makes it clear that the broad language in the Resolution 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." Even though the detention of a U.S. citizen involves a deprivation of liberty, and even though the Force Resolution says nothing on its face about detention of U.S. citizens, a majority of the members of the Court nevertheless concluded that the Resolution satisfied the statutory requirement. The same is true, I submit, for the prohibition on warrantless electronic surveillance in FISA.

You may have heard about the provision of FISA that allows the President to conduct warrantless surveillance for 15 days following a declaration of war. That provision shows that Congress knew 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 it 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. That is exactly what happened three days after the attacks of 9/11, when Congress passed the Force Resolution, permitting the President to exercise "all necessary and appropriate" incidents of military force.

Thus, it is simply not the case that Congress in 1978 anticipated all the ways that the President might need to act in times of armed conflict to protect the United States. FISA, by its own terms, was not intended to be the last word on these critical issues.

Second, some people have argued that, by their terms, Title III and FISA are the "exclusive means" for conducting electronic surveillance. It is true that the law says

that Title III and FISA are "the exclusive means by which electronic surveillance . . . may be conducted." But, as I have said before, FISA itself says elsewhere that the government cannot engage in electronic surveillance "except as authorized by statute." It is noteworthy that, FISA did not say "the government cannot engage in electronic surveillance 'except as authorized by FISA and Title III.'" No, it said, except as authorized by statute—any statute. And, in this case, that other statute is the Force Resolution.

Even if some might think that's not the only way to read the statute, in accordance with long recognized canons of construction, FISA must be interpreted in harmony with the Force Resolution to allow the President, as Commander in Chief during time of 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.

Third, I keep hearing, "Why not FISA? Why didn't the President get orders from the FISA court approving these NSA intercepts of al-Qaeda communications?"

We have to remember that we're talking about a wartime foreign intelligence program. 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.

Consistent with the wartime intelligence nature of this program, the optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. They can make that call quickly. 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.

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's a serious misconception about these emergency authorizations. People should know that we do not approve emergency authorizations without knowing that we will receive court approval within 72 hours. FISA requires the Attorney General to determine IN ADVANCE that a FISA application for that particular intercept will be fully supported and will be approved by the court before an emergency authorization may be granted. That review process can take precious time.

> Thus, to initiate surveillance under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers alone. Those intelligence officers would have to get the sign-off of lawyers at the NSA that all provisions of FISA have been satisfied, then lawyers in the Department of Justice would have to be similarly satisfied, and finally as Attorney General, I would have to be satisfied that the search meets the requirements of FISA. And we would have to be prepared to follow up with a full FISA application within the 72 hours.
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> A typical FISA application involves a substantial process in its own right: the work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security Adviser, the Director of the FBI, or another designated Senate-confirmed officer; and, finally, of course, the approval of an Article III judge.
>
> We all agree that there should be appropriate checks and balances on our branches of 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.[27]

(9) January 25, 2006 Presidential visit and speech at the National Security Agency

In a speech delivered during a visit to the National Security Agency on January 25, 2006, the President stated " . . . I authorized a terrorist surveillance program to detect and intercept al-Qaeda communications involving someone here in the United States. This is a targeted program to intercept communications in which intelligence professionals have reason to believe that at least one person is a member or agent of al-Qaeda or a related terrorist organization. The program applies only to international communications. In other words, one end of the communication must be outside the United States."[28]

He went on to explain:

> We know that two of the hijackers who struck the Pentagon were inside the United States communicating with al-Qaeda operatives overseas. But we didn't realize they were here plotting the attack until it was too late.

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[27] Alberto Gonzales, U.S. Attorney General, Department of Justice, Remarks at the Georgetown University Law Center (January 24, 2006), available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html.

[28] George W. Bush, President of the United States, Remarks at the National Security Agency (January 25, 2006), available at http://www.whitehouse.gov/news/releases/2006/01/20060125–1.html.

> Here's what General Mike Hayden said—he was the former director here at NSA. He's now the Deputy Director of the National Intelligence—Deputy Director of National Intelligence—and here's what he said earlier this week: "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."
>
> The 9/11 Commission made clear, in this era of new dangers we must be able to connect the dots before the terrorists strike so we can stop new attacks. And this NSA program is doing just that. General Hayden has confirmed that America has gained information from this program that would not otherwise have been available. This information has helped prevent attacks and save American lives. This terrorist surveillance program includes multiple safeguards to protect civil liberties, and it is fully consistent with our nation's laws and Constitution. Federal courts have consistently ruled that a President has authority under the Constitution to conduct foreign intelligence surveillance against our enemies.[29]

(10) January 26, 2006 Department of Justice briefing to the Senate Judiciary Committee

The Department of Justice provided the Senate Judiciary Committee a briefing prior to the scheduled February 6, 2006 hearing.

(11) February 1, 2006 Department of Justice briefing to the Senate Select Committee on Intelligence

On February 1, 2006, the Administration provided a classified briefing to the Senate Select Committee on Intelligence.

(12) February 3, 2006 Department of Justice response to January 24, 2006 letter from Senate Judiciary Chairman Arlen Specter

On January 24, 2006, Senator Specter, Chairman of the Senate Committee on the Judiciary, sent a letter to the Department of Justice that contained 15 questions in advance of the panel's February 6, 2006, hearing requesting the Department to explain the legal authority for the program. The Attorney General responded in writing on February 3, 2006, answering each question.

(13) February 3, 2006 Department of Justice response to January 24, 2006 letter from Senate Judiciary Democrat members

On January 27, 2006, Democratic Members of the Senate Judiciary Committee sent a letter to the Department of Justice regarding the TSP. On February 3, 2006, the Department of Justice sent a letter notifying the Senators that the Department had received the letter and was in the process of responding.

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[29] *Id.*

(14) February 3, 2006 Department of Justice response to January 30, 2006 letter from Senator Feinstein

On January 30, 2006, Senator Feinstein sent the Department of Justice a letter regarding the TSP. On February 3, 2006, the Department of Justice sent a letter notifying the Senator that the Department was working on a response.

(15) February 3, 2006 Department of Justice response to January 30, 2006 letter from Senator Feingold

On January 30, 2006, Senator Feingold sent a letter to the Department of Justice about the TSP. On February 3, 2006, the Department of Justice responded to the Senator's letter notifying the Senator that the Department was working on a response.

(16) February 3, 2006 Department of Justice response to January 31, 2006 letter from Senator DeWine

On January 31, 2006, Senator DeWine sent a letter questioning the Department of Justice about the TSP. On February 3, 2006, the Department of Justice responded to Senator DeWine notifying the Senator that the Department was working on a response.

(17) February 6, 2006 Senate Judiciary hearing: "Wartime Executive Power and the NSA's Surveillance"

The Attorney General testified before the Senate Judiciary Committee on February 6, 2006 from 9:30 a.m. to shortly after 5:30 p.m. The Attorney General provided detailed information pertaining to the legal authority and scope of the program.

(18) February 8, 2006 hearing before the House Permanent Select Committee on Intelligence

On February 8, 2006, Attorney General Gonzales and General Hayden testified in a closed classified hearing before the House Permanent Select Committee on Intelligence answering questions about the TSP.

(19) February 8, 2006 Departments of Justice and Defense briefing to the House Armed Services Committee

On February 8, 2006, the Departments of Justice and Defense presented a classified briefing to the House Committee on Armed Services regarding the National Security Agency Terrorism Surveillance Program.

(20) February 9, 2006 hearing before the Senate Select Committee on Intelligence

On February 9, 2006, Attorney General Gonzales and former NSA Director General Hayden testified in a closed classified hearing before the Senate Select Committee on Intelligence answering questions about the National Security Agency Terrorism Surveillance Program.

(21) February 9, 2006 Department of Justice response to the February 8, 2006 letter from House Judiciary Committee Chairman F. James Sensenbrenner, Jr.

On February 8, 2006, Judiciary Committee Chairman Sensenbrenner, Jr., sent a 14-page letter to the Department of Justice

with 51 questions regarding the legal authority, the review process, and scope of the TSP. On February 9, 2006, the Department of Justice sent a letter notifying the Chairman that the Department had received the letter and was in the process of answering the questions.

(22) February 13, 2006 Department of Justice briefing to the House Committees on Judiciary and Appropriations

On February 13, 2006, the Department of Justice presented a briefing to the House Committees on Judiciary and Appropriations on the legal authority of the program.

D. Sensitive documents requested

The United States is engaged in a war against terrorism and this resolution calls for integral information, much of which is of a highly sensitive and classified nature.

As the Weapons of Mass Destruction Commission explained as it discussed the threats from other countries: ". . . for several reasons, penetrating these targets has also become more difficult than ever before. For example, authorized and unauthorized disclosures of U.S. sources and methods have significantly impaired the effectiveness of our collection systems. Put simply, our adversaries have learned much about what we can see and hear, and have predictably taken steps to thwart our efforts." [30]

Echoing this concern, on a February 12, 2006 television appearance, Representative Hoekstra, Chairman of the House Intelligence Committee stated: "Does anyone really believe that after 50 days of having the program on the front page of our newspapers, across talk shows across America, that al-Qaeda has not changed the way that it communicates?" [31]

CONCLUSION

The Committee is reporting this resolution adversely for several reasons. First, as the Committee on Armed Services concluded in H.R. Rep. No. 92–1003, because of the highly sensitive nature of the information requested, the public revelation of such information would not be compatible with national security interests. The United States is at war against a diffuse and shifting international terrorist threat and the information requested is directly related to a classified program aimed at preventing future terrorist attacks. The information requested concerns signals intelligence and communications surveillance upon al-Qaeda. The disclosure of this information could disrupt the efforts of our military and Intelligence Community to prevent another attack upon the United States. While this resolution contains language intended to protect classified information, past disclosures have led to leaks of valuable information. In addition, the Committee is concerned that even unclassified briefings have aided the country's enemies as the Administration has been required to explain in an accessible public forum strategies and operational details of operations aimed at preventing terrorist attacks. Furthermore, the Administration has already

[30] WMD Commission p. 354 citing National Intelligence Council (NIC), Title Classified (NIE 98–04) (1998–99).

[31] Meet the Press Interview with Pete Hoekstra, House of Representatives Committee on Intelligence Chairman (Feb. 12, 2006), available at http://www.msnbc.msn.com/id/1127264/.

demonstrated a willingness to provide information sought by the resolution. Therefore, the Committee is following the precedents established in H.R. Rep. Nos. 109–230, 108–658, and 92–1003, which concluded that the sensitive nature of the information requested was reason for adversely reporting a resolution of inquiry.

Second, H. Res. 643 has the potential to jeopardize the ongoing criminal investigation of the leak. Due to the classified nature of the NSA program, the Department of Justice has opened a criminal investigation of the leak of the program to the New York Times. A competing investigation is a common reason that committees have opposed resolutions of inquiry in the past. This Committee has previously reported resolutions of inquiry adversely for this very reason. On July 29, 2005, this Committee adversely reported House Resolution 420, in part, due to an ongoing grand jury investigation.[32] On September 7, 2004, the Committee adversely reported House Resolution 700, as this resolution of inquiry requested documents related to several ongoing investigations, among other things.[33] On February 27, 2004, this Committee adversely reported House Resolution 499,[34] a resolution of inquiry, due to an ongoing grand jury investigation and, on July 17, 2003, adversely reported House Resolution 287,[35] a resolution of inquiry, due to an ongoing competing investigation of the Inspector General of the Department of Justice. The Committee has also reported a resolution of inquiry adversely to avoid jeopardizing a competing investigation into the Abscam case.[36]

Finally, the Administration has substantially complied with information requested thereby diminishing the need to risk the disclosure of national security classified information. Congress has and continues to receive responsive information pertinent to the information requested in H. Res. 643. Prior to the New York Times article, the Administration had provided classified briefings to Members of Congress throughout the course of the program's implementation. After the leak of the program, the Department of Justice sent a white paper to Congress detailing the legal authority for the President to establish the program. Furthermore, the Administration has provided testimony in open and closed hearings to Congress explaining the legal authority for the program, as well as classified and unclassified briefings regarding the program, its scope, and the Administration's authority. In addition, the Administration has held public forums and press conferences to inform the public about the TSP. Finally, the Administration has answered and is still answering several letters sent by various Members of Congress. These documents, speeches, testimony, and press conferences have detailed the Administration's legal reasoning for the President to authorize the TSP.

Accordingly, because the resolution could jeopardize national security and an ongoing criminal investigation; and because the Administration has substantially complied with the intent of the resolution, the Committee reported H. Res. 643 adversely.

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[32] H.R. Rept. 109–230, 109th Cong., 1st Sess. (2005)
[33] H.R. Rept. 108–658, 108th Cong., 2nd Sess. (2004)
[34] H.R. Rept. 108–413, Part 3, 108th Cong., 2nd Sess.(2004)
[35] H.R. Rept. No. 108–215, 108th Cong., 1st Sess. (2004)
[36] H.R. Rept. No. 96–778, 96th Cong., 2nd Sess. (1980).

HEARINGS

No hearings were held in the Committee on the Judiciary on H. Res. 643.

COMMITTEE CONSIDERATION

On February 15, 2006, the Committee met in open session and adversely reported the resolution H. Res. 643 by a roll call vote of 21 to 16, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee sets forth the following roll call votes that occurred during the Committee's consideration of H. Res. 643:

Final Passage. The motion to report the resolution, H. Res. 643, adversely was agreed to by a rollcall vote of 21 to 16.

	Ayes	Nays
Mr. Hyde	X	
Mr. Coble	X	
Mr. Smith	X	
Mr. Gallegly	X	
Mr. Goodlatte	X	
Mr. Chabot	X	
Mr. Lungren	X	
Mr. Jenkins	X	
Mr. Cannon	X	
Mr. Bachus		
Mr. Inglis	X	
Mr. Hostettler		X
Mr. Green	X	
Mr. Keller	X	
Mr. Issa	X	
Mr. Flake	X	
Mr. Pence	X	
Mr. Forbes	X	
Mr. King	X	
Mr. Feeney	X	
Mr. Franks	X	
Mr. Gohmert	X	
Mr. Conyers		X
Mr. Berman		X
Mr. Boucher		
Mr. Nadler		X
Mr. Scott		X
Mr. Watt		X
Ms. Lofgren		X
Ms. Jackson Lee		X
Ms. Waters		X
Mr. Meehan		X
Mr. Delahunt		X
Mr. Wexler		X
Mr. Weiner		X
Mr. Schiff		X
Ms. Sanchez		X
Mr. Van Hollen		X
Mrs. Wasserman Schultz		
Mr. Sensenbrenner, Chairman	X	
Total	21	16

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates the costs of implementing the resolution would be minimal. The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

H. Res. 643 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the rule does not apply because H. Res. 643 is not a bill or joint resolution that may be enacted into law.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The Resolution directs that the Attorney General transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution all documents in the possession of the Attorney General, relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency (other than such warrantless electronic surveillance authorized to be conducted under section 102(a) of the Foreign Intelligence Surveillance Act of 1978), subject to necessary redactions or requirements for handling classified documents, including any and all opinions regarding warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States.

CHANGES IN EXISTING LAW MADE BY THE RESOLUTION, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes that H. Res. 643 makes no changes to existing law.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, FEBRUARY 16, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr., (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

Pursuant to notice, I now call up H. Res. 643, directing the Attorney General to submit to the House of Representatives all documents in possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency for purposes of markup and move that it be reported adversely to the House. Without objection, the resolution will be considered as read and open for amendment at any point, and the chair recognizes himself for 5 minutes to speak on the resolution.

H. Res. 643 is a resolution of inquiry relating to the President's legal authority to establish an NSA terrorist surveillance program. This program, the operational details of which remain classified, permits the NSA to monitor communications of suspected terrorists overseas with persons in the United States. Under Clause 7 of Rule 13 of the House Rules, the Committee must report this resolution within 14 legislative days after its introduction or a privileged motion to discharge the Committee from consideration would be in order on the House floor.

On December 22, Ranking Member Conyers introduced the resolution, as he states in his press release, to allow Congress to obtain the necessary information so that we can learn precisely what the legal basis was for this great expansion of executive power.

Since the *New York Times* publicly disclosed this highly classified program, the Administration has and continues to provide information about its legality. The Administration has conducted press conferences, public briefings, Congressional briefings, both classified and unclassified, sent officials to testify at Congressional hearings, and submitted responses to several letters by Members of Congress explaining the legal authority for establishing the program.

Whether or not Members agree with the Administration's responses to the inquiries, this does not change the fact that the Administration has substantially complied with the stated purpose of this resolution of inquiry. Furthermore, there is broad recognition that this program is highly classified in nature and disclosure of

its operational details could harm our nation's efforts in the war on terror.

This Committee has adversely reported previous resolutions of inquiry because the information they requested could harm national security. Compounding the problem, due to the classified nature of this program, the unauthorized leak of its existence is now under criminal investigation. There is also precedent that supports the adverse reporting of a resolution that could interfere with a competing investigation. This resolution requests all the documents related to the terrorist surveillance program and that these are the same documents that may be required in the criminal investigation.

Accordingly, I move that the Committee report the resolution adversely. As with previous resolutions, this one should be reported adversely because the Administration has already substantially complied with the request, the information requested is related to a highly classified program, and there is an ongoing criminal investigation on the leak of the existence of this program. I urge the Members to support the motion to report adversely and recognize the gentleman from Michigan, Mr. Conyers.

[The resolution, H. Res. 643, follows:]

IV

109TH CONGRESS
1ST SESSION

H. RES. 643

Directing the Attorney General to submit to the House of Representatives all documents in the possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 22, 2005

Mr. CONYERS (for himself, Mr. BERMAN, Mr. BOUCHER, Mr. NADLER, Mr. SCOTT of Virginia, Ms. ZOE LOFGREN of California, Ms. JACKSON-LEE of Texas, Ms. WATERS, Mr. MEEHAN, Mr. DELAHUNT, Mr. WEXLER, Mr. WEINER, Mr. SCHIFF, Ms. LINDA T. SÁNCHEZ of California, Mr. VAN HOLLEN, Ms. WASSERMAN SCHULTZ, Mr. KENNEDY of Rhode Island, Mr. DOGGETT, Mr. MCDERMOTT, Mr. FILNER, Mr. MARKEY, Ms. SCHAKOWSKY, Ms. LEE, Mrs. TAUSCHER, Ms. MCCOLLUM of Minnesota, Mr. UDALL of New Mexico, and Mr. HOLT) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Directing the Attorney General to submit to the House of Representatives all documents in the possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency.

1 *Resolved*, That the Attorney General is directed to
2 submit to the House of Representatives not later than 14

1 days after the date of the adoption of this resolution all
2 documents in the possession of the Attorney General relat-
3 ing to warrantless electronic surveillance of telephone con-
4 versations and electronic communications of persons in the
5 United States conducted by the National Security Agency
6 (other than such warrantless electronic surveillance au-
7 thorized to be conducted under section 102(a) of the For-
8 eign Intelligence Surveillance Act of 1978), subject to nec-
9 essary redactions or requirements for handling classified
10 documents, including any and all opinions regarding
11 warrantless electronic surveillance of telephone conversa-
12 tions and electronic communications of persons in the
13 United States.

○

Mr. CONYERS. Thank you, Mr. Chairman and colleagues. I am urging the Members here today to carefully consider the resolution of inquiry which has been cosponsored by 44 Members of Congress, including every single Democrat on this Committee.

Let me make it clear that we are requesting materials only. This is a resolution not calling for a hearing, not calling for subpoenaing anyone. It is merely a request for documents that—it is a strategy by which the Chairman has used many, many times. I have a list of such incidents in which that has gone on.

We are asking the Attorney General to submit all documents in his possession relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency subject to necessary redactions or requirements for handling classified documents. Every Member of this Committee is cleared to handle secret material, but we are not asking that the Attorney General do anything but send to us materials that would give us additional information. We have requested hearings. We have asked for information. And we would like now to have this officially voted.

The request would include any and all opinions regarding warrantless electronic surveillance of telephone conversations and electronic communications of persons in this country as well as other records which would allow us to better understand the size, scope, and nature of the program.

The second thing I would like to explain is why we are asking for the information. We are not asking for this information in a conclusory fashion. We are not saying that the President broke the law or has acted contrary to the Constitution. In fact, this resolution could produce documents that rebut those allegations.

What is clear is that assuming what has been reported is true, many constitutional and legal experts, some Democrats, some Republicans, have indicated that this secret domestic surveillance program raises substantial questions about whether the program is legal and whether it is constitutional, and the people that I am counting on are people, many of whom have been before this Committee: Lawrence Tribe, William Sessions, former Director of the FBI under three Presidents, William Alstyne, a law professor of distinction, and Bruce Fein, a Deputy Associate Attorney General in the Reagan administration, Jonathan Turley, who was here in the Clinton impeachment.

So the question before us is not whether you agree or disagree with these individuals, but whether you think their judgments are sufficient, serious reasons to further warrant inquiry by this Committee. I am trying to get us off the dime in the House of Representatives.

I would also add that the Congressional Research Service has weighed in on this and that the Department of Justice, even though it had a briefing on Monday, indicated that many of the legal questions are close calls.

The third point I would like to make is if you agree that this warrants further inquiry, the question then is what kind of action should this Committee take? Now, I commend the Chairman——

Chairman SENSENBRENNER. The gentleman's time has expired, and without objection, he will be given two additional minutes.

Mr. CONYERS. I thank you, Mr. Chairman. I commend the Chairman for sending a letter to the Attorney General asking questions about the program. Many of us have questions of our own to ask, and I hope that the Chairman will forward them to the Attorney General and ask that they be considered, as well.

Questions alone, however, are not sufficient. They can be danced around, ignored. We all know what can happen. This Committee has always taken the very practical approach that the best way to find out what people were thinking at the time they made decisions is to get the documents they wrote at the time reflecting those thoughts. In fact, on a number of matters, including everything from biometric passports, judicial sentencing practices, the Civil Rights Commission, Legal Services Commission, the Chairman's first step has been to obtain and preserve relevant documents.

The Washington Post has written that the executive branch treats the Congress as an annoying impediment to the real work of Government. It provides information to Congress grudgingly, if at all. It handles letters from lawmakers as if they are junk mail, routinely tossing them aside without responding.

It is time that the House of Representatives, starting with the Committee that controls constitutional questions, begins to serve as a genuine check and balance on the Administration. It is not partisan. To me, it is a constitutional issue and I urge my colleagues on both sides of the aisle to help us before it is too late, and I thank you.

Chairman SENSENBRENNER. The gentleman's time has expired.

Are there amendments?

Mr. LUNGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Mr. Chairman, I ask to strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, as one who has worked on this Committee with Members of both sides on our oversight of the PATRIOT Act and the FISA courts, I rise in support of the Chairman's motion.

When the FISA law was enacted during the Carter administration, the Attorney General at that time made it very clear that the enactment of the FISA court did not in any way impinge on the President's inherent constitutional authority as Commander in Chief in the area of gathering information with respect to foreign enemies, and that is what we are talking about here. Someone may argue that perhaps it would have been a better business practice for the President to have come to the Congress in larger numbers, that is, talked with more Members than he did, but that is not the constitutional question.

I never question the motivation of Members bringing actions to the floor, but I must say, when I observed a hearing by Members of the other side recently on this very subject, it appears to me that the conclusions have already been reached. As a matter of fact, I even heard Members of the other side specifically advising people in the Justice Department and other branches of the executive

branch not to follow the President's orders and informing them that if they did so, they were breaking the law. Such conclusionary statements not only confuse the issue, but I think put people at peril who are following lawful orders of the President.

It seems to me rather straightforward to say that if the President has the authority as Commander-in-Chief and with respect to the grant of authority to use force against those who perpetrated 9/11, as well as individuals, organizations, or countries that support them, and was told to use force for the purpose of preventing such attacks, that force includes the Administration of lethal force. And it seems to me that if the President has the authority to command the death of those who are terrorists, he certainly has the right to listen to them before he has troops attempt to ferret them out and kill them. The fancy way of saying that is gathering intelligence of a foreign enemy is a legal incident to the power to conduct war.

The President made a decision to do this and to inform the Congress by way of talking to the leadership in the House and the Senate and the leadership on the House Intelligence Committee and the Senate Intelligence Committee. That was a decision of the President. Others may think he should have talked to more.

But I would just reflect on my previous service here and my current service here and the time in between. We have not exactly covered ourselves with glory in terms of punishing Members of the House or the Senate who leak, particularly when they serve on the Intelligence Committee. And a President of the United States given the authority under the Constitution and pursuant to the authority given to him by the Congress to direct force against those who perpetrated 9/11 and to prevent future such attacks, that President has to weigh very, very carefully when you have a program like this as to whether or not he increases the chances that leaks might take place and destroy such a program. That is not an illegal act by the President. That is an act by a President under his authority as Commander in Chief.

Whether you like it or not, the American people elected this President fully knowing he was running for Presidency and would be Commander in Chief. And there is no evidence whatsoever that this President has done other than what he has said, that is, attempted to eavesdrop on communications between those people identified as al-Qaeda operatives or affiliates with individuals in the United States or individuals in the United States with those other kinds of people. There is no evidence whatsoever that the President has directed this against political enemies.

If you will recall the words of Justice White in dealing with this question a number of years ago——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. LUNGREN. I ask unanimous consent that I get two additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. LUNGREN. Justice White suggested that in this area, the President has primary responsibility and suggested that when he exercised it in this fashion, he should maintain personal oversight and engage the active participation of the Attorney General. Every bit of evidence we have is the President has done that. The Attorney General has actively looked over this. They have attorneys re-

viewing this on an ongoing basis. The President has reviewed it personally every 30 days, all consistent with the suggestions made by Justice White when he reviewed this kind of question before the Supreme Court.

The President went further and briefed Members of Congress, and I have heard Members of Congress say, well, how could that be fair? We didn't have our staff with us. If the problem is that our leadership in the House and the Senate, or our leadership on the Intelligence Committees don't feel that they are capable of asking the proper questions, of understanding this, then we ought to get different leadership. That is the burden of leadership. And if people believe that that is too much to do as the Ranking Members and the chairmen of the Intelligence Committees, let us get other people. This idea that we blame our inactivity on the fact that we don't have staff present is absolutely silly.

There is no evidence whatsoever that at these briefings anybody objected while they were at these briefings to what was going on.

And so if you look at the totality of evidence that has been presented, the information that has been presented, the setting in which this has taken place, it is apparent that the Administration has answered the question——

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. LUNGREN. And I would suggest that we support the Chairman's motion.

Chairman SENSENBRENNER. Are there amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, I fully support this resolution of inquiry. Last December 16, the *New York Times* first reported that the National Security Agency was conducting warrantless wiretapping on American soil at the secret request of the President. The program turned the giant ear of the Federal Government inwards to listen to domestic communications. Despite the Administration's claim that only members of al-Qaeda, individuals affiliated with it, or persons working with terrorists are being monitored, news reports suggested perhaps thousands of innocent Americans are being spied upon.

Warrantless domestic surveillance is illegal. There is a court precisely empowered to review applications for domestic surveillance to gather foreign intelligence. The Foreign Intelligence Surveillance Act, FISA, requires judicial approval of all electronic surveillance in this country and investigations to prevent, quote, "international terrorism or sabotage" or to, quote, "monitor foreign spies."

When President Bush decided to bypass the FISA court and ordered the domestic surveillance without court approval, he broke the law. The law makes it a crime for government officials to, "engage in electronic surveillance under the color of law except as authorized by statute." FISA makes this crime punishable, "by a fine

of not more than $10,000 or imprisonment for not more than 5 years, or both."

The President took an oath to preserve, protect, and defend the Constitution of the United States and to take care that the laws be faithfully executed. When the President acts outside the limits set by the Constitution and contrary to the law, he engages in a criminal conspiracy against the United States, against the separation of powers, one of the chief pillars supporting our liberties, and against those liberties.

This is a direct challenge to us. It is our responsibility as Members of the House of Representatives to protect American liberties by investigating the President's usurpations of power and to determine whether they constitute high crimes and misdemeanors in the constitutional sense. It would be a terrible dereliction of duty if we were to disregard this responsibility.

The legal arguments the Administration makes in defense of this program are frivolous. FISA specifies that it is, quote, "the exclusive means by which electronic surveillance may be conducted except as authorized by a statute," close quote. The President argues that the authorization for the use of force, AUMF resolution, is the statute that does that, that contains that authorization. He relies on *Hamdi v. Rumsfeld* to find that his warrantless domestic surveillance program is constitutional because it is a fundamental incident to the use of force allowed by the statute.

But there is no limit to this baseless interpretation. Under this interpretation of the resolution, the President could suspend the writ of habeas corpus, torture detainees, put people in concentration camps, authorize breaking and entering without a warrant, or for that matter, authorize murder in the streets of the capital if he thinks doing so would be helpful in defeating terrorism.

In *Hamdi*, Justice O'Connor, to the contrary, points out that, quote, "a state of war is not a blank check for the President when it comes to the rights of the nation's citizens," close quote.

We are all familiar with the basic rule of statutory construction that a specific law cannot be set aside by a general law, but only by a law that specifically and explicitly repeals or modifies it. Congress has clearly spoken on the question of domestic electronic surveillance in FISA and this specific and carefully-drawn statute cannot be superceded by an assertive interpretation of the AUMF which contains not a single page, not even a hint that Congress intended to repeal FISA or to repeal its exclusivity. In fact, there is legislative history that Congress refused to expand FISA to give the President this kind of authority. The argument that the AUMF resolution permits warrantless domestic spying is, therefore, frivolous.

The President also claims that he enjoys inherent constitutional authority regardless of FISA to conduct warrantless domestic surveillance because we are at war. He claims that as long as he is acting to protect national security, his inherent authority trumps the law. Devoid of any limiting principle, this claim asserts the monarchial doctrine that with respect to war powers, Congress can place no limits on unlimited executive power. This logic could be applied to any action, unlawful surveillance today, perhaps murder tomorrow. President Bush's monarchial abuses, if left unchecked,

will, as Justice Robert Jackson said, lie around like a loaded gun and be utilized by any future incumbent who claims a need.

Finally, the question arises as to why the President believes it necessary to proceed without getting warrants from the FISA court. If the Administration is telling us the truth and they are wiretapping only conversations between people in this country and suspected al-Qaeda agents abroad, there would be no difficulty whatever in promptly getting FISA warrants whenever necessary.

Logic therefore compels the conclusion that, as press reports suggest, the Administration is lying to us and, in fact, is going well beyond what they have stated into conduct——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. I ask for unanimous consent for two additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you. Logic, therefore, compels the conclusion that, as press reports suggest, the Administration is lying to us and, in fact, is going well beyond what they have stated into conduct for which they could not get FISA warrants.

It may be that if we are told the truth, we would amend FISA to permit what they are doing. Or it may be that if we are told the truth, we would find that my conclusions are mistaken. Or it may be that if we were told the truth, because of the shocking and dangerous nature of what would be revealed, we would never amend the law to permit such conduct to continue.

We must, Mr. Chairman, know the facts. We must see the documents to know what the story is, and that, Mr. Chairman, is why I support this resolution of inquiry.

I thank you. I yield back.

Chairman SENSENBRENNER. Are there amendments?

Mr. INGLIS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman. I am going to vote in support of the Chairman's motion because I think that particularly with the letter that the Chairman sent here recently on February 8, it corrects the over-broad nature of the underlying resolution of inquiry.

Mr. Chairman, I think the letter of February 8 is an excellent letter. It really does ask the right questions and I congratulate the staff and the Chairman on asking those questions and putting a reasonable date for a response. March 2 is a fairly quick response. It is appropriate that it is that quick. If we get the answers to all of these questions, of course, that will be after an awful lot of work on the Administration's part, but I think that it will lead us to a better understanding of the program.

I would take the——

Mr. CONYERS. Would the gentleman yield on that point just a moment?

Mr. INGLIS. Certainly.

Mr. CONYERS. All I want to do is, what about the other two dozen Members of Judiciary who have questions as well as the Chairman?

Mr. INGLIS. Reclaiming my time, I think it would be appropriate to work in a cooperative way to find an opportunity to ask those additional questions, and I would say particularly that the last question in the Chairman's letter is the one that I would call attention to the Administration for a special response, and that is the Chairman asked what amendments to FISA might be needed, and I think that it would be helpful for the Administration to consider the addition of some judicial oversight at some point in this process, perhaps with that 45-day trigger or maybe even moving the trigger up faster than 45 days and having judicial oversight after the fact if it can't be done before the wiretaps are authorized.

I understand the technological issues with having a judge oversee the issuance of the wiretaps before they are conducted, but perhaps if they were reviewed very quickly afterwards to determine whether the wiretap was appropriate or not, it might help to guard the program from excesses.

Mr. DELAHUNT. Would the gentleman yield?

Mr. INGLIS. I would be happy to yield to the gentleman.

Mr. DELAHUNT. I appreciate the tone and the constructive nature of your observation, but I would also point out that there is a provision that allows—the so-called emergency exigent circumstances provision—that allows exactly what the gentleman suggests, that up to 72 hours afterward, after the surveillance itself is conducted, the Attorney General can certify as to the emergency and therefore go and present to the FISA court.

That is what is perplexing to me and to others, that I have yet to hear a case that has any substance to it or any data to indicate that FISA as it currently exists does not meet the needs of a program that if it is just discretely focused on al-Qaeda and so-called affiliated organizations, what is the problem? That is my concern, or that is one of my multiple concerns, and I thank the gentleman for yielding.

Mr. INGLIS. I am happy to yield, and reclaiming my time, I would just conclude by saying, Mr. Chairman, again, I want to associate myself with the letter. I think it is an excellent letter and I look forward to the responses. I hope the Administration will be forthcoming, as I am sure they will be, in answering the questions, particularly that last one about suggestions, and perhaps also hear what Mr. Delahunt just had to say. Perhaps there isn't a need for a change in the underlying law. On the other hand, maybe this program could be improved by either being closer to the underlying law, or if the underlying law needs to be changed, let us look at that.

I yield back.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee, is recognized for 5 minutes.

Ms. JACKSON LEE. I thank you, Mr. Chairman. One would applaud the tone that is in this hearing room this morning. I wouldn't doubt the sincerity of the Chairman or of my colleagues on the other side of the aisle.

But I would argue that the importance of H. Res. 643 may be more important than any one of us could eloquently articulate. From my perspective, there is nothing more blasphemous than the

imploding of the Constitution, and particularly the sanctity of the views and values of the American people that they live in a democracy.

And I believe the reason for H. Res. 643 is to answer my good friend, that leadership is not Congress. Congress is a myriad of individuals who have responsibilities to almost a million Americans. And the Judiciary Committee as a whole has an enormous responsibility not only to the vastness of America, but to our colleagues as the protectors and arbiters and interpreters of the Constitution because we are the Judiciary Committee. I think it falls upon us sometimes dastardly deeds. I did not want to sit here some years ago dealing with the articles of impeachment, but it was this majority that thought it was warranted on behalf of this Judiciary Committee, our duty to find the truth and our duty, of course, to the American people.

And so I would argue that this resolution and one that will follow couldn't be more important in this Committee's protective role of the Constitution and the American people.

Mr. Chairman, might I offer to you the delegate vote of the American Bar Association. I ask unanimous consent that it may be submitted into the record.

Chairman SENSENBRENNER. Objection.

Ms. JACKSON LEE. But I would suggest to you then from it, and I would hope that at some point it might be admitted, but I would say to you that a bipartisan group of lawyers have found that the Administration did not comply with FISA and urged them overwhelmingly to comply, and they have said in words, we join with you in the conviction that terrorism must be fought with the utmost vigor, but we also believe we must ensure that this fight is conducted in a manner reflective of the highest American values. The bipartisan ABA task force that proposed the policy included a former FBI Director and a former General Counsel of the CIA.

The *Washington Times* noted that though Attorney General Gonzales made a good effort, his defense was anemic.

And so I think it is important to note that the President has secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to allegedly search for evidence of terrorist activities, but he is being condemned by vast voices across America who are not partisan. It is noted that he did this without the court-approved warrants ordinarily required for domestic spying, and I believe that my colleague, Mr. Delahunt, made it very clear in his dialogue that, in fact, after the fact, after the action, you still have the ability to go into the court and get an after-the-fact warrant. How in the word can the hands of the Attorney General or the Administration be tied in light of this flexibility?

Due to the highly classified nature of this program, the details have not been revealed. Officials familiar with it, however, say that NSA has eavesdropped without warrants on up to 500 people in the United States at any given time. Why can't the Members of Congress in classified briefings know who those individuals are? Some reports indicate that the total number of people monitored domestically have reached into the thousands, while others indicated that significantly more people have been spied upon than others.

I would argue that, really, the American people are owed the understanding, not that we relate the names as Members of Congress receiving it in a classified manner, but whether these individuals were involved in anything other than the acts that might perpetrate a terrorist act. Martin Luther King was owed the understanding of why he was being spied on, and the misrepresentations that he was engaged in communist activities, we have been through this before. It is imperative that we follow through on this resolution.

I oppose—I do not oppose the monitoring of telephone calls and e-mail messages when it is necessary for national security reasons, Mr. Chairman. I am, however, opposed to engaging in such monitoring without a warrant because we have a Foreign Intelligence Surveillance Court that was established for the sole purpose of issuing such warrants when they are justified and it has worked, 19,000 warrants issued and maybe five denied.

The day after——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE. I ask unanimous consent for 2 minutes.

Chairman SENSENBRENNER. Without objection.

Ms. JACKSON LEE. The day after this monitoring became public, President Bush admitted that he had authorized it and claimed that he had the authority to do so. According to the President, the order was fully consistent with his constitutional responsibilities and authorities, and I respectfully disagree with the President and so does the ABA.

The law establishes well-defined procedures for eavesdropping on U.S. persons and President Bush failed to follow these procedures. The starting point for understanding the surveillance law is the fourth amendment to the Constitution, which states clearly that American privacy may not be invaded without a warrant based on probable cause. Don't fool the American people. Don't cause them to be fearful of their own Constitution.

The United States Supreme Court has held that this protection applies to Government eavesdropping. Consequently, all electronic surveillance by the Government in the United States is illegal unless it falls under one of a small number of precise exceptions specifically carved out in the law. After 9/11, Congress approved an authorization to use military force against those responsible for the attacks in order to authorize the President to conduct foreign military operations, such as the invasion of Afghanistan, but that resolution contains no, no language changing, overriding, or repealing any laws by Congress, particularly FISA. And FISA contains explicit language describing the President's powers during time of war and provides that 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 15 days following a declaration of war by the Congress.

Therefore, the President did not operate under authority. This resolution will give us the basis, the facts, and the ability to go forward and secure the American people in the justified manner within the Constitution. And consequently, even assuming that the use of force resolution places us on a war footing, warrantless surveil-

lance would have been legal for only 15 days after the resolution was passed on September 18, 2001.

The FISA law takes account of the need for emergency surveillance. The need for quick action cannot be used as a rationale for going outside the law. FISA allows wiretapping without court order in emergency. The court simply must be notified within 72 hours. Mr. President, why not? Mr. Attorney General, why not? Why not utilize the law as it is? Why not show to the world that we are a democracy and a republic and we believe in the Bill of Rights and the Constitution and the rights of all Americans?

The Government is aware of this emergency power and has used it repeatedly. If President Bush found these provisions inadequate——

Chairman SENSENBRENNER. The time of the gentlewoman has once again expired.

Ms. JACKSON LEE. —he could have used something else. I ask my colleagues to support resolution——

Chairman SENSENBRENNER. Are there amendments? The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I will be brief since I am losing my voice. I would ask unanimous consent to submit my full statement for the record.

Chairman SENSENBRENNER. Without objection.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I cosponsored this resolution, and I think we need to do more than just consider it today, we need to pass it. But the fact is that simply passing this resolution will not satisfy the Judiciary Committee's responsibility to conduct true oversight over the reported NSA domestic surveillance program and the Justice Department's role in it. We need to hold hearings to find out the facts.

Nearly two months ago Congressman Boucher and I, along with 15 of our colleagues on the Judiciary Committee, called upon the Chairman for investigation and hearings into the NSA domestic surveillance program authorized by the President. We have still not received a response to our request. The informal briefing held earlier this week also does little to satisfy this Committee's need for answers. The two days notice given on a Saturday for this briefing ensured that almost no Members would be able to actually attend and ask the Justice Department critical questions about this program. We need to hold investigative hearings, and today's markup of this resolution does nothing to answer our request for hearings, now almost two months old.

If Americans are conspiring with al Qaeda agents, I want our intelligence and law enforcement agencies to know about it—with warrants obtained under the FISA Court. If existing laws like FISA are insufficient to conduct counter-terror intelligence activities, then Congress should have the opportunity to amend those laws within recognized processes under the rule of law. That is what is at stake here—serious questions about whether or not this program follows the law, and serious questions about whether anything in the existing FISA law even needs to be changed.

The Attorney General's testimony in the Senate last week left questions about whether this program violates the 4th Amendment. His testimony was contradictory and obscure on whether or not a probable cause standard was being applied. His testimony also raised serious questions about whether information collected unlawfully was then secretly or inadvertently used by criminal prosecutors, again potentially violating the 4th Amendment. The Attorney General failed to provide assurances that physical searches were not being performed under this program, and that purely domestic calls were not being intercepted. And the Attorney General declined to answer when asked what other activities were authorized by the President in reliance solely upon his claimed powers as Commander in Chief. All of these are seri-

ous questions that deserve answers that investigative hearings in this Committee could provide.

The need for hearings in this Committee is further underscored by the reluctance of the Executive Branch to investigate this program. Nearly two months ago I and 38 of my colleagues wrote to the Inspector Generals at the Defense Department and the Justice Department seeking investigations into this program. Both of them declined to investigate, with the feeblest of excuses.

The Defense Department's Inspector General told us that he would defer to NSA's Inspector General, even though press reports tell us NSA's Inspector General is not looking at the legality of the program and is not doing any new review of this program. The Justice Department's Inspector General told us he lacked jurisdiction because the matter involved the Attorney General's provision of legal advice—even though the issue here is not the Attorney General's credentialing as a lawyer but whether or not his official actions comply with the law. We also asked GAO to investigate, but GAO told us that it lacked the power to investigate if the President designated this as a foreign intelligence matter. The bottom line is that we received no responses to our request for investigations, apart from refusals to actually investigate.

There is a pattern of a reluctance to investigate emerging here, and I do not believe the Judiciary Committee should contribute to that pattern. This Committee should finally begin the investigative hearings into this program we called for nearly two months ago.

Ms. LOFGREN. I would just add to my written statement that we have focused on the rights of individuals in the press about this whole issue, but I think there is a broader question for the Congress which really has to do with the relationship between the executive and legislative branches.

I think it is important, and I am a cosponsor of this resolution. I think this is one way to do it. But if this resolution does not pass, and I am aware that these matters are often decided on a party line vote, we must take some action because it would be a severe mistake for the majority to assume that because they are in control of the House and Senate and there is a Member of their own party in the White House that this is something not worthy of their attention. This really goes to the fundamental question of whether the legislative and judicial branches will have authority over the actions of the executive.

We don't really even know exactly what has happened in this NSA matter. I have written with my colleagues to the Attorney General, to the NSA. I am not getting any information back. I do think it would be important for this Committee to find out, in a classified setting if necessary, exactly what is happening, whether it does, in fact, comply or not comply with the FISA statute. We don't even know that for sure. And if it does not, we need to come to some kind of decision to either conform the statute to the activity or have the executive conform the activity to the existing statute. We cannot simply ignore activity that is beyond the scope of what was envisioned by the statute and the judiciary.

And so I would urge my colleagues on the other side of the aisle, if you vote against this today, come up with some strategy for us to work together. This is one of those times when we ought to be working together for the benefit of the very structure of our Government.

Mr. LUNGREN. Would the gentlelady yield?

Ms. LOFGREN. I would yield to the gentleman.

Mr. LUNGREN. I guess my question would be, is one of your underlying premises that if it is outside of FISA, it is therefore illegal for the President to act, or do you agree with Griffin Bell's testi-

mony before the Congress at the time the FISA law was passed that while we passed this law to create a structure for these kinds of activities, it does not and cannot impinge on the inherent constitutional authority of the President in this area?

Ms. LOFGREN. I believe that the—first of all, let me, reclaiming my time, note that unless there is somebody on the Intelligence Committee who knows more than I do, probably none of us really is aware of exactly what this program is. I have been trying to find out, and if someone does know, I would like to find that out.

Number two, there are a set of facts that could lead one to the conclusion that this activity does comply with FISA. You know, I would like to find that because I don't think—the last thing the country needs right now is a constitutional crisis.

Number three, I do think that there are constraints on the actions of the executive when there is a specific statute. There are things that the Congress cannot constrain the President on. The communications I have had to the executive branch, I think have been measured because I think we have an obligation to find out first what is going on and to reassure ourselves for the country that our system of Government is really being adhered to, and I don't think a single one of us can say that with assuredly here today.

So I am hopeful, even if we don't adopt this today, that we come up with a strategy to ensure not only the Congress, but the country and our heirs that we will leave our system of Government as strong as we found it, and I yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman. I will try not to take the full 5 minutes. I have listened very respectfully to the majority's arguments about the need for aggressive techniques to fight terrorism. I have listened to the Administration's arguments that in the same light, the President's statements at the State of the Union Address were on point. I agree with them. I couldn't agree with them more wholeheartedly.

The American President and our Administration should be relentless in pursuing people who are talking to al-Qaeda. We should survey them. We should spy upon them. We should do whatever is necessary, whatever is required to get the information regarding what anybody is doing with al-Qaeda or anybody is doing—what anybody is doing that threatens the United States.

That is not the issue, however, that is presented to this Committee. What is presented to this Committee is to the extent that the President and the Administration has avoided the FISA court, whether it be justifiable or not, I would argue not but some will argue that it is. What were the reasons for doing so, and should then this Congress engage in a debate as to whether or not, based on what we found out, we ought to change the law?

Compiled with this is the assertion that the President makes which unfortunately does not comport with the truth, and that is that only people dealing with al-Qaeda have been the targets of this program. At the hearing that Mr. Conyers held on a Friday morning that unfortunately only Democrats were as part of, and I would respectfully suggest to my good friends and fellow Florid-

ians, Mr. Keller and Mr. Feeney, what we found out at that hearing from testimony from a gentleman named Mr. Hirsch, who is a part of a group called the Truth Project, fellow Floridians, who their alleged crime apparently is that a group of grandmothers and some business people and I think maybe one former Korean war veteran had the audacity to meet at a Quaker church in Florida and talk about peace. As a result of these grandmothers meeting and talking about peace, they were then listed as a credible threat to the United States of America and were subjected to all this spying.

Now, with all due respect to the President, I specifically asked Mr. Hirsch, well, did anybody in your group ever visit Afghanistan? Did anybody in your group ever visit Pakistan? Did you ever visit Iraq? Did anybody engage in training programs in any of those countries? And the testimony on the record was, to his knowledge, no one has ever visited those countries. No one has ever had anything to do with anybody from those countries. No one has certainly ever trained. And from his point of view, no one in the group had ever even left the country, except maybe the one guy who was a Korean War veteran and had left during the Korean War to fight for our country.

The point of this whole analysis is that if the President is simply conducting surveillance on people having to do with al-Qaeda or reasonably expected in circumstances dealing with al-Qaeda, there wouldn't be one objection on this side of the aisle, and I don't think there would be a single objection from any American.

But the point is, the President has gone outside of FISA. And whether you agree that it is illegal that he did it or disagree, the Congress of the United States and the American people have a right to know why the President of the United States is conducting surveillance on what appears to be ordinary Americans. We have a right to know that information and this Congress has then a right and obligation to debate it and come up with a sound and just policy that protects the Constitution, and this H. Res. 643 is the only legitimate mechanism at this point that this Committee has discussed that allows us to begin that process and that is why I support it.

Mr. LUNGREN. Would the gentleman yield?

Mr. WEXLER. Thank you, Mr. Chairman.

Mr. LUNGREN. Would the gentleman yield?

Mr. WEXLER. Sure.

Mr. LUNGREN. I just ask this as a hypothetical. Let us suppose, and this is a pure hypothetical, that through actions conducted in Afghanistan or Iraq with identified al-Qaeda operatives, we discover that they have a list of 25 phone numbers of people in the United States. At that point in time, we don't have probable cause of a court nature to say that those people are necessarily identified. Would the gentleman say it would be inappropriate to eavesdrop on conversations between——

Chairman SENSENBRENNER. The gentleman's time has expired, and without objection will be given two additional minutes.

Mr. LUNGREN. Would the gentleman suggest it would be improper for such a program to allow us to eavesdrop on conversations between that al-Qaeda operative and one of these individuals,

even if that individual, based on everything we know—I mean, we don't have any evidence that they're doing anything other than that fact. Would that be inappropriate, or would the gentleman consider that to be an appropriate mechanism of attempting to figure out in the first instance whether is intelligence to be gathered between an al-Qaeda operative and someone in the United States?

Mr. WEXLER. To respond to the gentleman's inquiry, in my view, it would be entirely appropriate to then engage in surveillance and spying and whatever information gathering is necessary, and based on what I understand the record of the FISA court to be in terms of the 13,000-plus warrants of surveillance that have been granted, there is no reason to believe that the FISA court would not give the President or the Administration every power based on the probable cause of the scenario you laid out.

Mr. LUNGREN. Would the gentleman further yield? If, in fact, the numbers that we have are so numerous such that it would be impractical to come in each and every instance as an individual piece of evidence before the court, would the gentleman consider the proposal made by Attorney General Levy some time ago which suggested that whatever authority we have would allow a court to approve an overall program? His suggestion was an overall program as opposed to individual wiretaps.

Mr. WEXLER. Well, again in response, at first glance, that sounds troubling to me, so what we're basically saying——

Mr. LUNGREN. I am talking about——

Mr. WEXLER. —we're not going to apply the Constitution and the protections of the Constitution to individuals. We're just going to create a program for the whole country and hope that people are covered by it? The whole point is to apply the facts of each individual circumstance and determine whether there is probable cause.

Mr. NADLER. Would the gentleman yield?

Mr. WEXLER. Of course.

Mr. NADLER. I would point out to the gentleman from California that the Administration says there are no more than about 500 of these wiretaps at any time, so you're not talking about vast numbers. I would yield back.

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. FEENEY. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney.

Mr. FEENEY. I would move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FEENEY. This Committee has some important oversight responsibilities and I take those duties seriously. I think every other Member does, as well. But some in the minority have focused totally on FISA as though it is the exclusive power the President has when it comes to surveillance in international terrorist or international war situations.

In fact, I hope that our friends on the other side have read the 51 questions that our Chairman has sent to the Attorney General of the United States. These are very serious questions. These are

exactly the questions that legitimately the minority and the majority want to have answered. I think it is an appropriate forum.

The suggestion that FISA is the exclusive power that the President of the United States has to protect us by use of surveillance during a time of war, I think is foolhardy.

Mr. NADLER. Would the gentleman yield?

Mr. FEENEY. Not until I am done, Mr. Nadler.

President Jimmy Carter's Attorney General, shortly after the passage of FISA, had this to say about FISA. FISA 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. So Mr. Griffin Bell's position is that not just under FISA powers, but there are preexisting constitutional powers that FISA does not affect.

In addition to that, since Mr. Carter was President, we have the passage of the authorization of military force, which has additional powers added, so there are at least three separate sets of powers that the President has, FISA being just one of them, his inherent constitutional powers and the authorization to use military force.

What the Chairman's letter does is to ask the Administration with respect to all of the cases that involve international or domestic surveillance for terrorism or to prosecute the war on terror, under which powers does the Administration consider itself proceeding under? I think those are the legitimate questions that we need to ask. If we get a response to this and are unsatisfied with the response, I think individually or collectively, this Committee can pursue the issue further.

But the Chairman has asked on behalf of the United States Congress every reasonable question at this point that can be asked. I congratulate the Chairman. I think rather than doing the grandstanding and fear-mongering out there that we're all being spied upon under some inherent Presidential power, we ought to wait until we have given 2 weeks now for the President of the United States through his Attorney General to respond to these very important questions, and again, I want to congratulate the Chairman——

Mr. NADLER. Now will the gentleman yield?

Mr. FEENEY. I will be happy to yield to Mr. Nadler.

Mr. NADLER. Thank you. The FISA Act—we are confusing three things here. No one doubts that the President has inherent constitutional power to spy abroad. No one doubts that. The FISA Act says that with respect to electronic surveillance in the United States or against American persons, that is anybody who is physically here, FISA is the exclusive source of authority.

Mr. FEENEY. Well, Mr. Nadler, number one, I think that is inaccurate, Mr. Nadler, but even if, reclaiming my time, even if you are accurate about that, Congress has no ability through legislation to restrict the inherent powers of the executive of the United States. We don't have the power——

Mr. NADLER. Would the gentleman yield on that point?

Mr. FEENEY. —said that, which it doesn't, it wouldn't be effective.

Mr. NADLER. Would the gentleman yield on that point?

Mr. FEENEY. I will yield back.

Mr. NADLER. Thank you. What we are talking about is surveillance allegedly directed at someone here who is communicating with some alleged terrorist abroad. If it is directed at the terrorist abroad and happens to overhear a conversation here, nobody has any question about that. We are talking about directed at someone in the United States. There, I would submit, and I think the case law accurately shows that there is no inherent power. And the AUMF, which simply gives the President the power to repel or to punish the people who attacked us on September 11, cannot by implication repeal a specific statute. If we wanted to repeal or set aside that specific statute, you have to say so because the statutory construction rule that you can never repeal something specific or modify it by a general term.

Mr. FEENEY. Well, look, the gentleman may be right, he may be wrong about this, but here is the point. The Chairman of this Committee on behalf of all of us has asked in 51 very specific questions the Administration through the Attorney General to answer by what authority is the Administration prosecuting the war on terror on this surveillance, and I personally am prepared to give the Administration 2 weeks to answer——

Mr. SCHIFF. Would the gentleman yield?

Mr. FEENEY. Mr. Chairman, I will yield back the balance of my time.

Mr. SCHIFF. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I would like to respond to some of the arguments that have been made by the opposition on this. I strongly support the resolution. My gentleman from Florida started out by saying he takes his oversight responsibility seriously. With all due respect, I don't think this Committee has taken its oversight responsibility seriously.

We have had little or no hearings to oversee the executive in this Committee. We have fought bitterly to protect our jurisdiction vis-a-vis other Committees of the Congress, but when it comes to overseeing the executive, we have, I think, been very unequal as a coequal branch of Government. We are now proposing basically interrogatories to the Administration rather than calling witnesses before this Committee. Those interrogatories don't give individual Members the opportunity to ask questions we would like to ask and ask follow-up questions we would like to ask.

In considering the minutiae of hearings that we have had in this Committee, the failure to have a hearing on something which on its face is one of the most serious issues of Presidential power and potential overstep of Presidential power is really incomprehensible to me.

The argument has been made by my colleague from California on the other side of the aisle that, well, this practice was disclosed to some of the Members of the Congress and maybe it would have been a better business practice to disclose it to more Members of the Congress. Well, that seems to presuppose that if you take a

practice which, let's assume for argument, is a violation of FISA, is without authority, but you disclose it, it no longer is a violation of the law. That, I don't think is correct. It doesn't really matter how many Members of Congress were disclosed—this program was disclosed to. If it violated FISA or title III and the President didn't have the constitutional authority inherently, it's still a violation of law. That argument doesn't make the problem go away.

It's also been argued that, well, FISA, according to Griffin Bell and others, couldn't limit the President's inherent constitutional authority. Well, that's true, but is this an area where the President's inherent constitutional authority allows the President to act as this program has provided? Well, we don't know because we don't know really anything about how that program has been used, how broad it's been.

My colleague from California posits, well, what if we had a list in Afghanistan of al-Qaeda members trying to call the United States? Well, what, my colleague from California, if we had a purely domestic call between you and I that was wiretapped by the President and the President claimed that FISA and title III, title III also couldn't limit the President's inherent constitutional authority, that he had some reason to believe that you and I were involved in a terrorist act or we had a contact with someone or we were leaking classified information or who knows what?

There is no limiting principle to the arguments that you make. The only limiting principle really is the vigor with which the Congress is willing to do its oversight. That is the only real limiting principle. FISA is very clear on its terms. The only thing we could do to make it more clear is to pass another law that says, when the Congress says exclusive, it really means exclusive. But when we say exclusive, it does mean exclusive.

And so the further argument has been made by the Administration, well, even the debate about this has been harmful to the national security, and this I find the most disturbing of all because I think it betrays some of the duplicity that's gone on in the whole discussion of the PATRIOT bill and FISA and the NSA program. We have debated the PATRIOT bill in this Committee for hours and hours. I have supported the PATRIOT bill. I've been at odds with many of the people in my party supporting different versions of the PATRIOT bill.

But now I find that the Administration's real position on the PATRIOT bill is it doesn't really matter what we do, because the Administration can do what it likes regardless of the PATRIOT bill and regardless of FISA. And, in fact, in the Senate—and this is the question that I don't think is in the interrogatories that I would like to ask—in the Senate, when one of the Republican Members said to the Administration witness, we can change FISA if you find the probable cause standard too high, we can change it, and the Administration's response, we don't need to change FISA. FISA is working just fine, thank you very much.

The real answer, the truthful answer would have been, Senator, we don't need you to change FISA because we don't consider ourselves limited by FISA. We're doing what we want anyway. That would have been the more candid answer.

Now, what is this national security argument that we can't debate this, we can't amend FISA, we can't have a discussion in Congress about FISA because it gives aid and comfort to the enemy somehow? Are we so naive to assume that our enemies don't think that we eavesdrop on them? It doesn't matter to al-Qaeda whether we go to a FISA court or not, but it does matter to the United States. It matters to us——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. SCHIFF. I would request an additional 2 minutes.

Chairman SENSENBRENNER. Without objection.

Mr. SCHIFF. I appreciate the Chairman's fairness on this. It does matter to all of us whether we uphold our own Constitution, whether we have checks and balances. As my colleague from Florida on this side of the aisle pointed out, this is not about whether we bug al-Qaeda. We do bug al-Qaeda. We will bug al-Qaeda. We should bug al-Qaeda. The question is whether we have any checks and balances, whether there's any review of who we're eavesdropping on and what the standard is that should be applied. Is there anyone that can scrutinize the work of the executive?

I think our system works better, I think our system works more efficiently and I think that we protect our own rights when we do our job of oversight, and that doesn't mean sending a bunch of questions to be answered by a bunch of lawyers in the White House. When you send interrogatories, you get lawyers sending back answers. It doesn't tend to elucidate, it tends to obscure.

And I wish, given the seriousness of this issue, that I wasn't reading headlines like this in the Washington Post: "Congressional Probe of NSA Spying is in Doubt, White House Sways Some GOP Lawmakers."

We are a co-equal branch of Government. It is time that we started acting that way.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from Florida seek recognition?

Mr. KELLER. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes, and will the gentleman yield briefly?

Mr. KELLER. I will yield.

Chairman SENSENBRENNER. I ask unanimous consent to put in the record a list of oversight that this Committee has done on the war on terror from October 2001 through November 2005, which includes hearings, letters, briefings both classified and unclassified. It's pretty comprehensive, and anybody that says that there has been no oversight done by this Committee just doesn't know what's been going on here. I ask unanimous consent to put this in the record and thank the gentleman for yielding.

[The information of Chairman Sensenbrenner follows:]

Terrorism Related Oversight Activities by the House Committee on the Judiciary October 2001 to February 15, 2006

1. October 10, 2001, Subcommittee on Immigration, Border Security, and Claims hearing on: "Use of Information Technology to Secure America's Borders;"
2. November 11, 2001, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The Anti-Hoax Terrorism Act;"
3. November 14, 2001, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Implementation of the International Conventions for the Suppression of Terrorist Bombings and the Suppression of the Financing of Terrorism;"
4. December 19, 2001, Subcommittee on Immigration, Border Security, and Claims hearing on: "Department of Justice Immigration Detention Policies;"
5. February 12, 2002, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The Cyber Security Enhancement Act;"
6. March 19, 2002, Subcommittee on Immigration, Border Security, and Claims on Pilot Training for Terrorist Hijackers;"
7. May 10, 2002, Department of Justice Entry-Exit update for Committee on the Judiciary per USA PATRIOT Act and Border Security Act;
8. May 20, 2002, Department of State update for Committee on the Judiciary re: biometrics - implementation of USA PATRIOT Act and Border Security Act;
9. May 23, 2004, briefing for staff of the Committee on the Judiciary by the Immigration and Nationality Service on implementation of Section 411 of the USA PATRIOT Act;
10. May 24, 2002, briefing for staff of the Committee on the Judiciary by the Immigration and Nationality Service on Section 416: Foreign Student Monitoring Program;
11. June 5, 2002, meeting between Committee on the Judiciary and Department of Justice staff regarding the entry/exit pilot registration and entry/exit per the USA PATRIOT Act and the Border Security Act;
12. June 13, 2002, letter from the Committee on the Judiciary to Attorney General Ashcroft regarding use of the USA PATRIOT Act;
13. June 25, 2002, Subcommittee on Immigration, Border Security, and Claims and Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The Risk to Homeland Security from Identity Fraud and Identity Theft;"
14. July 15, 2002, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from the Inspector General of the Department of Justice to Chairmen Leahy and Sensenbrenner and Ranking Minority Members Hatch and Conyers;
15. July 26, 2002, letter from Assistant Attorney General Daniel Bryant to the Committee on the Judiciary responding to questions regarding the USA PATRIOT Act;
16. July 26, 2002, briefing for Committee on the Judiciary by Immigration and Naturalization Service staff regarding the entry/exit pilot registration and entry/exit per the USA PATRIOT Act and the Border Security Act;
17. August 1, 2002, briefing for Committee on the Judiciary by Immigration and Naturalization Service staff regarding U.S.-Canadian Border Accords and Section 413: Multilateral Cooperation against Terrorists;

18. August 14, 2002, briefing for Committee on the Judiciary by Congressional Research Service staff regarding Mandatory Detention of Suspected Terrorists;
19. August 20, 2002, briefing for Committee on the Judiciary staff by Department of Justice regarding SEVIS;
20. August 26, 2002, letter from Assistant Attorney General Daniel Bryant to the Committee on the Judiciary responding to questions regarding the USA PATRIOT Act;
21. September 13, 2002 briefing for Committee on the Judiciary staff by Department of Justice regarding SEVIS;
22. September 18, 2002, Subcommittee on Immigration, Border Security, and Claims hearing on: "INS' Implementation of the Foreign Student Tracking Program;"
23. September 20, 2002, letter from Assistant Attorney General Daniel Bryant to the Committee on the Judiciary responding to questions regarding the USA PATRIOT Act;
24. September 20, 2002, briefing for Committee on the Judiciary staff by Department of State, the Central Intelligence Agency, and the Department of Justice staff on special security clearances for visa issuance;
25. October 4, 2002, briefing for Committee on the Judiciary by Department of State regarding status of provisions requiring certain identifying information in background checks for visa applicants;
26. October 4, 2002, briefing for Committee on the Judiciary by the Government Accountability Office staff regarding biometric identifiers;
27. October 4, 2002, letter from Assistant Attorney General Daniel Bryant to Chairman Sensenbrenner regarding section 203 of the USA PATRIOT Act;
28. December 13, 2002, briefing for House Committee on the Judiciary by the Government Accountability Office staff regarding the terrorism-related grounds upon which an alien may be denied admission into the U.S.;
29. January 22, 2003, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from Inspector General of the Department of Justice to Chairmen Hatch and Sensenbrenner and Ranking Minority Members Leahy and Conyers;
30. February 6, 2003, briefing for House Committee on the Judiciary by Department of State staff regarding Northern Border security;
31. March 13, 2003, Subcommittee on Courts, the Internet, and Intellectual Property hearing on: "Copyright Piracy and Links to Crime and Terrorism;"
32. April 1, 2003, letter from the Committee on the Judiciary to Attorney General Ashcroft regarding use of the USA PATRIOT Act;
33. April 1, 2003, presentation by the Immigration and Naturalization Service for Committee on the Judiciary staff regarding SEVIS and the USA PATRIOT Act;
34. April 2, 2003, Subcommittee on Immigration, Border Security, and Claims hearing on: "Immigration Student Tracking: Implementation and Proposed Modifications;"
35. May 8, 2003, Subcommittee on Immigration, Border Security, and Claims hearing on: "War on Terrorism: Immigration Enforcement Since September 11, 2001;"
36. May 13, 2003, letter from Acting Assistant Attorney General Jamie Brown to the Committee on the Judiciary responding to questions regarding the USA PATRIOT Act;
37. May 13, 2003, Subcommittee on Immigration, Border Security, and Claims hearing on: "John Allen Muhammad, Document Fraud, and the Western Hemisphere Passport Exception;"

38. May 20, 2003, Subcommittee on the Constitution hearing: "Anti-Terrorism Investigations and the Fourth Amendment After September 11th: Where and When Can Government Go to Prevent Terrorist Attacks?;"
39. May 23, 2003, letter from the Committee on the Judiciary to the Homeland Security Council regarding the USA PATRIOT Act;
40. May 28, 2003, briefing for Committee on the Judiciary by FinCEN staff regarding implementation of the USA PATRIOT Act;
41. June 5, 2003, Committee on the Judiciary hearing on the Department of Justice, including its use of the provisions authorized by the USA PATRIOT Act;
42. June 10, 2003, classified briefing for Committee on the Judiciary Members & staff by the Department of Justice on the use of the Foreign Intelligence Surveillance Act (FISA) under the USA PATRIOT Act;
43. June 13, 2003, letter from Assistant Secretary of the Department of Homeland Security Pamela J. Turner to the Committee on the Judiciary responding to questions regarding the USA PATRIOT Act;
44. June 13, 2003, briefing for Committee on the Judiciary by Department of Justice Office of Inspector General staff regarding the USA PATRIOT Act;
45. June 25, 2003, briefing for Committee on the Judiciary by Secret Service staff regarding money laundering and the USA PATRIOT Act;
46. July 7, 2003, briefing for Committee on the Judiciary by Department of Treasury staff regarding implementation of USA PATRIOT Act section 411: Definitions Relating to Terrorism;
47. July 8, 2003, briefing for Committee on the Judiciary by Department of State staff regarding the Department's support for Department of Treasury regulations implementing Title III of the USA PATRIOT Act;
48. July 10, 2003, briefing for Committee on the Judiciary by Department of Treasury staff regarding compliance with the USA PATRIOT Act;
49. July 10, 2003, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The Anti-Hoax Terrorism Act;"
50. July 17, 2003, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from Inspector General of the Department of Justice to Chairmen Hatch and Sensenbrenner and Ranking Minority Members Leahy and Conyers;
51. July 22, 2003, Committee on the Judiciary hearing on: "Terrorist Threat Integration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security," held jointly with the Select Committee on Homeland Security;
52. July 30, 2003, Briefing for Committee on the Judiciary by Immigration and Customs Enforcement staff regarding SEVIS implementation under the USA PATRIOT Act;
53. August 7, 2003, briefing for Committee on the Judiciary Members & staff by the Department of Justice regarding the long-standing authority for law enforcement to conduct delayed searches and collect business records and the effect of the USA PATRIOT Act on those authorities;
54. October 16, 2003, Subcommittee on Immigration, Border Security, and Claims hearing on: "Visa Overstays: A Growing Problem for Law Enforcement;"
55. October 29, 2003, classified briefing for Committee on the Judiciary Members & staff by the Department of Justice or on the use of FISA under the USA PATRIOT Act;

56. November 20, 2003, request by Chairmen Sensenbrenner & Hostettler to the Government Accountability Office for a study of the implementation of the USA PATRIOT Act anti-money laundering provisions. Report was released on June 6, 2005;
57. December 10, 2003, briefing for Committee on the Judiciary by the Department of State regarding passport security;
58. January 16, 2004, briefing for Committee on the Judiciary by Departments of Homeland Security and State staff regarding law enforcement data sharing and cooperation on counter-terrorism;
59. January 21, 2004, briefing for Committee on the Judiciary by Department of State staff regarding programs to prevent passport theft and counterfeiting to avoid terrorism;
60. January 27, 2004, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from Inspector General of the Department of Justice to Chairmen Hatch and Sensenbrenner and Ranking Minority Members Leahy and Conyers;
61. January 30, 2004, briefing for Committee on the Judiciary by Congressional Research Service staff on sharing law enforcement and intelligence information;
62. February 3, 2004, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Law Enforcement Efforts within the Department of Homeland Security;"
63. February 9, 2004, letter from the Committee on the Judiciary to the Federal Bureau of Investigation regarding the FBI's efforts to hire, train, and retain intelligence analysts;
64. February 9, 2004, briefing for Committee on the Judiciary by Department of Homeland Security staff regarding CSIS Smart Border North;
65. February 9, 2004, letter to Attorney General Ashcroft from the Committee on the Judiciary regarding the Department of Justice's Office of the Inspector General's December 2003 Supplemental Report on allegations of abuse at the Metropolitan Detention Center in New York;
66. February 9, 2004, letter to FBI Director Mueller from the Committee on the Judiciary regarding border corruption;
67. February 10, 2004, Subcommittee on Commercial and Administrative Law hearing on: "Privacy in the Hands of Government: The Privacy Officer for the Department of Homeland Security;"
68. February 23, 2004, briefing for Committee on the Judiciary by Department of Justice staff on its views of S. 1709, the "Security and Freedom Ensured (SAFE) Act of 2003," and H.R. 3352, the House companion bill, as both bills proposed changes to the USA PATRIOT Act;
69. February 25, 2004, letter to the Secretary of the Department of Treasury from the Committee on the Judiciary concerning FinCEN's compliance with the USA PATRIOT Act;
70. March 1, 2004, letter to the Director of the Secret Service from the Committee on the Judiciary concerning cooperation and coordination between government agencies;
71. March 3, 2004, briefing for Committee on the Judiciary staff regarding the IDENT/IAFIS Integration Report;
72. March 4, 2004, Subcommittee on Immigration, Border Security, and Claims hearing on: "Alien Removal under Operation Predator;"
73. March 8, 2004, briefing for Committee on the Judiciary by Department of State staff regarding border security;

74. March 18, 2004, Subcommittee on Immigration, Border Security, and Claims hearing on: "U.S. VISIT: A Down Payment on Homeland Security;"
75. March 25, 2004, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Progress in Consolidating Terrorist Watchlists–The Terrorist Screening Center." (Oversight hearing held jointly with the Subcommittee on Intelligence and Counterterrorism, Select Committee on Homeland Security);
76. March 26, 2004, letter to Attorney General Ashcroft from the Committee on the Judiciary regarding federal support to address interoperability of first responders' communications;
77. March 29, 2004, briefing for Committee on the Judiciary by Department of Homeland Security staff regarding information sharing;
78. March 30, 2004, letter to Secretary Ridge from the Committee on the Judiciary regarding appropriate funding for state and local first responders;
79. April 13, 2004, briefing for Committee on the Judiciary by Department of State staff regarding USA PATRIOT Act implementation;
80. April 21, 2004, Committee on the Judiciary hearing on: "Should the Congress extend the October 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?;"
81. April 26, 2004, briefing for Committee on the Judiciary by National Targeting Center staff regarding information sharing with state and local agencies, and support for visa and port of entry inspections;
82. April 29, 2004, briefing for Committee on the Judiciary by Department of Homeland Security staff on implementation of watchlist programs under the USA PATRIOT Act;
83. May 4, 2004, briefing for Committee on the Judiciary and Member staff by Congressional Research Service regarding Homeland Security Presidential Directive 6;
84. June 4, 2004, briefing for Committee on the Judiciary by Department of Treasury staff regarding terrorism money laundering and the USA PATRIOT Act;
85. June 7, 2004, briefing for Committee on the Judiciary staff by Robert Lieken, author of *Bearers of Global Jihad: Immigration and National Security after 9/11*;
86. June 17, 2004, letter to the Government Accountability Office from the Committee on the Judiciary requesting a study of visa fraud and vulnerabilities;
87. June 23, 2004, letter from Chairman Coble to Ranking Member Conyers detailing extensive oversight that has been conducted on the USA PATRIOT Act to date;
88. July 8, 2004, letter from Assistant Attorney General William Moschella to the Committee on the Judiciary regarding section 215 of the USA PATRIOT Act;
89. July 28, 2004, briefing for the staffs of the Committee on the Judiciary and other Committees by the Federal Air Marshal Service, Federal Bureau of Investigation, Department of State, and Department of Homeland Security regarding Northwest flight 327 involving 14 Syrian musicians;
90. August 20, 2004, letter from the Committee on the Judiciary to Secretary Powell regarding 14 Syrian musicians on board Northwest flight 327;
91. August 20, 2004, Subcommittee on Commercial and Administrative Law and Subcommittee on the Constitution hearing on: "Privacy and Civil Liberties in the Hands of Government Post-September 11, 2001: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee;"

92. August 23, 2004, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Recommendations of the 9/11 Commission;"
93. September 8, 2004, letter from the Committee on the Judiciary to the Director of the FBI regarding the 14 Syrian musicians on board Northwest flight 327;
94. September 13, 2004, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from Inspector General of the Department of Justice to Chairmen Hatch and Sensenbrenner and Ranking Minority Members Leahy and Conyers;
95. September 28, 2004, letter from Committee on the Judiciary to Director of the Federal Air Marshal Service Thomas Quinn regarding security gaps in travel;
96. October 20, 2004, letter from the Director of the Federal Air Marshal Service to the Committee on the Judiciary regarding security gaps in travel;
97. October 20, 2004, letter from the House Committee on the Judiciary to Secretary Ridge regarding 14 Syrian musicians on board Northwest flight 327;
98. October 27, 2004, letter from the Director of the FBI to the Committee on the Judiciary responding to its September 8, 2004, letter regarding 14 Syrian musicians on board Northwest flight 327;
99. November 18, 2004, letter from the Committee on the Judiciary to the Government Accountability Office requesting a study regarding terrorist travel;
100. January 10, 2005, letter to the Department of Justice from the Committee on the Judiciary regarding watch list effects on visas applications;
101. January 10, 2005, Committee on the Judiciary staff oversight visit to the Forensics Document Lab;
102. February 8, 2005, letter from the Committee on the Judiciary to the Acting Director of the Customs and Border Protection regarding the Advanced Passenger Information System;
103. February 17, 2005, letter to the Government Accountability Office from the Committee on the Judiciary requesting a review of the global role of the FinCEN and the Department of Treasury under the USA PATRIOT Act;
104. February 18, 2005, letter from the Committee on the Judiciary to all of the countries that are Visa Waiver participants, regarding biometric passport requirements;
105. February 25, 2005, briefing for Committee on the Judiciary by U.S. VISIT, Ident Enforcement Overview and the Office of Screening Coordination and Operations staff;
106. March 3, 2005, Subcommittee on Immigration, Border Security, and Claims hearing on: "Immigration Enforcement Resources Authorized in the Intelligence Reform and Terrorism Prevention Act of 2004;"
107. March 11, 2005, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act* from Inspector General of the Department of Justice to Chairmen Hatch and Sensenbrenner and Ranking Minority Members Leahy and Conyers;
108. March 15, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The Department of Homeland Security to Examine the Security of the Nation's Seaports and the Cargo Entering Those Ports;"
109. March 22, 2005, law enforcement sensitive briefing for Committee on the Judiciary Members & staff by Department of Justice staff on the use of FISA under the USA PATRIOT Act;

110. March 23, 2005, letter from the Embassy of Australia to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries;
111. March 23, 2005, briefing for Committee on the Judiciary by the Departments of State and Homeland Security staff regarding the status of biometric passports and on-readers for foreign passports;
112. March 23, 2005, briefing for Committee on the Judiciary by Department of Justice's Office of the Inspector General staff on the USA PATRIOT Act;
113. March 28, 2005, letter from the Embassy of Italy to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
114. March 28, 2005, letter from the Embassy of Liechtenstein to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
115. March 28, 2005, letter from the Embassy of Luxembourg to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
116. **March 30, 2005, letter from the Embassy of Singapore to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;**
117. **March 31, 2005, letter from the** Committee on the Judiciary to the President of the European Commission concerning the biometric passport requirements for Visa Waiver Countries;
118. April 4, 2005, letter from American Civil Liberties Union to the Committee on the Judiciary regarding its March 25, 2005, letter about the USA PATRIOT Act;
119. April 6, 2005, letter from the Embassy of France to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
120. April 6, 2005, Committee on the Judiciary hearing with Attorney General Gonzales on: "The USA PATRIOT Act;"
121. April 7, 2005, letter from the Committee on the Judiciary to the President of the European Council of Ministers and Vice President of the European Commission concerning the biometric passport requirements for Visa Waiver Countries;
122. April 11, 2005, letter from the Department of State to the Committee on the Judiciary concerning the status of the biometric passports;
123. April 13, 2005, letter from the Embassy of Portugal to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
124. April 13, 2005, briefing for the House Committee on the Judiciary by Government Accountability Office staff on data security and terrorism prevention;
125. April 14, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Department of Justice to Examine Use of Section 218 of the USA PATRIOT Act;"
126. April 15, 2005, Department of State response to the Committee on the Judiciary regarding visa policy change;
127. April 15, 2005, briefing for the House Committee on the Judiciary on immigration and

the terrorist nomination process and screening by the National Targeting Center and National Counterterrorism Center staff;

128. April 19, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Sections 203(b) and (d) of the USA PATRIOT Act and their Effect on Information Sharing;"
129. April 20, 2005, letter from the Embassy of Brunei to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
130. April 21, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Implementation of the USA PATRIOT Act: Sections of the Act that Address Crime, Terrorism, and the Age of Technology, Sections 209, 217, and 220;"
131. April 21, 2005, Subcommittee on Immigration, Border Security, and Claims hearing on: "October 2005 Statutory Deadline for Visa Waiver Program Countries to Produce Security Passports: Why it Matters to Homeland Security;"
132. April 21, 2005, letter from the Embassy of the Netherlands to the Committee on the Judiciary Committee concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
133. April 21, 2005, letter from the Embassy of Spain to the Committee on the Judiciary letter concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
134. April 22, 2005, briefing for the Committee on the Judiciary by Government Accountability Office staff on information sharing regarding terrorist watch lists;
135. April 25, 2005, letter from the Embassy of Iceland to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
136. April 26, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Have Sections 204, 207, 214, & 225 of the USA PATRIOT Act, & Sections 6001 & 6002 of the Intelligence Reform & Terrorism Prevention Act of 2004, improved FISA Investigations?;"
137. April 27, 2005, letter from the Director of National Intelligence to the Committee on the Judiciary regarding *Patterns of Global Terrorism*;
138. April 28, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Section 218 of the USA PATRIOT Act – If It Expires Will the "Wall" Return;"
139. April 28, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Have Sections 206 & 215 Improved Foreign Intelligence Surveillance Act (FISA) Investigations;"
140. May 3, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Sections 201, 202, 213, & 223 of the USA PATRIOT Act & Their Effect on Law Enforcement Surveillance;"
141. May 5, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Section 212 of the USA PATRIOT Act that Allows Emergency Disclosure of Electronic Communications to Protect Life and Limb;"
142. May 6, 2005, letter from the FBI to the Committee on the Judiciary responding to February 9, 2005, letter on the FBI's efforts to hire, train, and retain intelligence analysts;

143. May 10, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "The prohibition of Material Support to Terrorists & Foreign Terrorist Organizations & on the DOJ Inspector General's Reports on Civil Liberty Violations under the USA PATRIOT Act;"
144. May 12, 2005, letter from the Embassy of Norway to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
145. May 19, 2005, letter from the Committee on the Judiciary to the Attorney General regarding use of the USA PATRIOT Act;
146. May 24, 2005, letter from Assistant Attorney General Moschella to Representative Flake, Chairman Sensenbrenner, and Ranking Member Conyers regarding law enforcement tools used to fight terrorism;
147. May 26, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Material Witness Provisions of the Criminal Code & the Implementation of the USA PATRIOT Act; Section 505 that Addresses National Security Letters; & Section 804 that Addresses Jurisdiction over Crimes Committed at U.S. Facilities Abroad;"
148. June 1, 2005, letter from Attorney General Gonzales to the Committee on the Judiciary regarding efforts to fight terrorism;
149. June 3, 2005, letter from the Committee on the Judiciary to the Department of State's Office of Inspector General regarding security concerns in the Visa Mantis program;
150. June 7, 2005, letter from the Department of Justice to the Committee on the Judiciary responding to January 10, 2005, letter concerning the use of watch list information to deny or revoke visas;
151. June 7, 2005, classified briefing for Committee on the Judiciary by the Department of Justice staff regarding the use of FISA under the USA PATRIOT Act;
152. June 8, 2005, letter from the Embassy of Japan to the Committee on the Judiciary concerning the biometric passport requirements for Visa Waiver Countries in response to letter sent on February 18, 2005;
153. June 8, 2005, Committee on the Judiciary hearing on: "Reauthorization of the USA PATRIOT Act;"
154. June 10, 2005, Committee on the Judiciary hearing on: "Reauthorization of the USA PATRIOT Act;"
155. June 10, 2005, briefing for Committee on the Judiciary by American Association of Motor Vehicle Administrators and the Congressional Research Service staff on HAZMAT endorsement regulations under the USA PATRIOT Act;
156. June 13, 2005, letter from the Department of Justice's Office of Inspector General to the Committee on the Judiciary regarding its review of the Terrorist Screening Center;
157. June 14, 2005, letter from the Department of Justice to the Committee on the Judiciary responding to May 19, 2005, letter regarding the USA PATRIOT Act;
158. June 14, 2005, letter from Assistant Attorney General William Moschella to Chairman Wolf, Ranking Member Mollohan, Chairman Sensenbrenner, and Ranking Member Conyers regarding section 215 of the USA PATRIOT Act;
159. June 14, 2005, letter from Assistant Attorney General William Moschella to Chairman Coble responding to a request by Representative Delahunt regarding treatment of detainees in the aftermath of the 9/11 terrorist attacks;

160. June 15, 2005, briefing for oversight staff of Committee on the Judiciary by the Government Accountability Office regarding airline security and terrorist travel;
161. July 22, 2004, briefing for House Committee on the Judiciary by Department of Justice staff on expedited removal of illegal aliens with a nexus to terrorism;
162. June 27, 2005, briefing for House and Senate Committees on the Judiciary staff by the Department of Homeland Security's Director of the U.S. VISIT program;
163. June 28, 2005, letter from the House Committee on the Judiciary to the Chairman and Ranking Member of the Senate Judiciary Committee concerning Section 213 of the USA PATRIOT Act;
164. June 28, 2005, letter from the Committee on the Judiciary to Secretary Rice regarding the security at the U.S. Embassies in Riyadh and Jeddah;
165. June 30, 2005, Subcommittee on Immigration, Border Security, and Claims hearing on: "Immigration Removal Procedures Implemented in the Aftermath of the September 11th Attacks;"
166. July 1, 2005, letter from the Committee on the Judiciary to the Attorney General regarding use of the USA PATRIOT Act;
167. July 11, 2005, letter from Assistant Attorney General William Moschella to the Committee on the Judiciary regarding use of the USA PATRIOT Act;
168. July 11, 2005, letter from Secretary Chertoff to the Committee on the Judiciary responding to October 20, 2004, letter on 14 Syrian musicians on Northwest flight 327;
169. July 12, 2005, letter from the Department of Homeland Security to the Committee on the Judiciary regarding the Civil Liberties Restoration Act;
170. July 12, 2005, letter from Assistant Attorney General William Moschella to the Committee on the Judiciary responding to July 1, 2005, letter regarding use of the USA PATRIOT Act;
171. July 12, 2005, letter from Assistant Attorney General William Moschella to the Committee on the Judiciary responding to May 19, 2005, letter regarding use of the USA PATRIOT Act;
172. July 12, 2005, briefing for Committee on the Judiciary by Congressional Research Service staff regarding the Terrorist Screening Center;
173. July 14, 2005, letter from the Committee on the Judiciary to the Department of Homeland Security regarding illegal aliens with a nexus to terrorism;
174. July 18, 2005, letter from the Committee on the Judiciary to Deputy Assistant Secretary of State Moss regarding the Terrorist Screening Center;
175. July 28, 2005, Committee on the Judiciary panel discussion regarding REAL ID implementation;
176. August 1, 2005, letter from Deputy Assistant Secretary of State Moss to the Committee on the Judiciary regarding the Terrorist Screening Center;
177. August 10, 2005, briefing by a staff member of the former 9-11 Commission for Committee on the Judiciary staff regarding terrorist travel, immigration, and fraudulent documents;
178. August 15, 2005, letter from the Department of Justice's Office of Inspector General to the Committee on the Judiciary regarding the implementation of Section 1001 of the USA PATRIOT Act.

179. August 18, 2005, letter from the Committee on the Judiciary to the Government Accountability Office requesting a review of existing controls to ensure that foreign students' participation in research at American universities does not imperil U.S. interests;
180. August 19, 2005, letter from the Committee on the Judiciary to Deputy Assistant Secretary of State Moss regarding the Terrorist Screening Center;
181. August 19, 2005, letter from the Committee on the Judiciary to Attorney General Gonzales regarding the USA PATRIOT Act;
182. August 29, 2005, letter from Attorney General Gonzales to Chairmen Specter, Sensenbrenner, Roberts, and Hoekstra regarding the USA PATRIOT Act;
183. August 30, 2005, briefing for House and Senate Committees on the Judiciary by Office of Foreign Assets Control staff regarding the USA PATRIOT Act;
184. September 6, 2005, briefing for Committee on the Judiciary by International Biometrics Industry Association staff on security programs;
185. September 7, 2005, letter from the Committee on the Judiciary to Secretary Chertoff regarding the Immigration Advisory Program at London Heathrow International Airport;
186. September 8, 2005, Committee on the Judiciary staff attended a Counterterrorism Blog seminar on: "Four Years Later: Are We Safer;"
187. September 9, 2005, letter from the Committee on the Judiciary to the Attorney General concerning FISA and the USA PATRIOT Act;
188. September 12, 2005, letter from Senators Roberts, Sessions, Kyl, DeWine, Hatch to Chairmen Sensenbrenner, Specter, and Hoekstra concerning the intelligence authorities within the USA PATRIOT Act;
189. September 15, 2005, Subcommittee on Immigration, Border Security, and Claims hearing on: "Sources and Methods of Foreign Nationals Engaged in Economic and Military Espionage;"
190. September 20, 2005, letter from Deputy Assistant Secretary of State Moss to the Committee on the Judiciary regarding the Terrorist Screening Center;
191. September 20, 2005, letter from the Attorney General to the Committee on the Judiciary following up on a July 12, 2005 letter from Assistant Attorney General William Moschella to questions submitted by Members of the Committee;
192. September 21, 2005, briefing for Committee on the Judiciary by the Department of State's Bureau of Population, Refugees, and Migration staff regarding refugee consultations that could impact homeland security;
193. September 22, 2005, letter from Department of State to the Committee on the Judiciary responding to July 18, 2005, letter regarding the Terrorist Screening Center;
194. September 23, 2005, letter from Secretary Powell to the Committee on the Judiciary responding to August 20, 2004, letter on 14 Syrian musicians on Northwest flight 327;
195. September 26, 2005, briefing for Committee on the Judiciary by Representative Weldon's staff regarding the Able Danger program;
196. September 26, 2005, letter from the Department of Justice to the Committee on the Judiciary responding to September 9, 2005, letter concerning FISA and the USA PATRIOT Act;

197. September 28, 2005, closed briefing for Committee on the Judiciary by Citizen and Immigration Services staff;
198. October 4, 2005, briefing for Committee on the Judiciary by Committee on Armed Services staff regarding the Able Danger program;
199. October 5, 2005, briefing for Committee on the Judiciary by Department of State staff regarding the Terrorist Screening Center, National Counterterrorism Center, and Central Intelligence Agency clearance;
200. October 5, 2005, briefing for Committee on the Judiciary by Department of Defense staff regarding the Able Danger program;
201. October 5, 2005, letter from the Department of Homeland Security to the Committee on the Judiciary on expedited removal of illegal aliens with a nexus to terrorism;
202. October 6, 2005, briefing for Committee on the Judiciary by Committee on Armed Services regarding the Able Danger program;
203. October 6, 2005, classified briefing for Committee on the Judiciary Members & staff by the Department of Justice on the Foreign Intelligence Surveillance Court and the USA PATRIOT Act;
204. October 7, 2005, Committee on the Judiciary staff oversight visit to the Terrorist Screening Center;
205. October 11, 2005, letter from the Department of Homeland Security to the Committee on the Judiciary responding to September 7, 2005, letter on the Immigration Advisory Program at London Heathrow International Airport;
206. October 18, 2005, briefing for Committee on the Judiciary by the Federal Bureau of Investigation and Citizen and Immigration Services staff regarding Green Card background checks;
207. October 19, 2005, briefing for Committee on the Judiciary by American Association of Motor Vehicle Administrators staff on HAZMAT regulations under the USA PATRIOT Act;
208. October 20, 2005, letter from Members of Congress to the Committee on the Judiciary regarding section 215 of the USA PATRIOT Act;
209. October 24, 2005, Committee on the Judiciary staff participation in a panel at the Canadian Embassy regarding REAL ID regulations;
210. October 25, 2005, letter from the Committee on the Judiciary to Secretary of State regarding security at U.S. Embassy in Riyadh in response to letter sent on February 18, 2005;
211. October 25, 2005, classified briefing for House and Senate Committees on the Judiciary and on Intelligence by Department of Justice staff on FBI use of National Security Letters;
212. November 2, 2005, briefing for Committee on the Judiciary by Immigration and Customs Enforcement staff staff regarding Operation Black Jack;
213. November 9, 2005, classified briefing for Committee on the Judiciary by Department of Justice staff on FBI use of National Security Letters;
214. November 10, 2005, letter from Vice-President Commissioner Franco Frattini to the Chairman of the Judiciary Committee concerning the Visa Waiver program;

215. November 17, 2005, briefing hosted by Representative Weldon regarding the Able Danger program attended by staff of the Committee on the Judiciary;
216. November 17, 2005, Subcommittee on Crime, Terrorism, and Homeland Security hearing on: "Weak Bilateral Law Enforcement Presence at the U.S.-Mexico Border: Territorial Integrity and Safety Issues for American Citizens;"
217. November 29, 2005, briefing for Committee on the Judiciary by Drug Enforcement Agency staff regarding drug and alien smuggling;
218. December 14, 2005, briefing for Committee on the Judiciary by Immigration and Customs Enforcement's Forensic Document Lab staff on fraudulent commercial drivers' licenses;
219. December 20, 2005, briefing for Committee on the Judiciary by Transportation Security Administration staff regarding Operation Viper;
220. January 13, 2006, briefing for Committee on the Judiciary by Government Accountability Office staff regarding the Federal Law Enforcement Training Center;
221. January 17, 2006, briefing for Committee on the Judiciary by Federal Bureau of Investigation staff regarding their relationship with the Federal Air Marshal Service;
222. January 19, 2006, briefing for Committee on the Judiciary by Transportation Security Administration staff regarding behavioral recognition;
223. February 6, 2006, letter from Professor Robert Alt to the Committee on the Judiciary regarding the National Security Agency's Terrorist Surveillance Program;
224. February 10, 2006, letter from the Committee on the Judiciary to the Attorney General regarding the National Security Agency's Terrorist Surveillance Program;
225. February 10, 2006, letter from Professor John Eastman, Chapman University, to the Committee on the Judiciary regarding the National Security Agency's Terrorist Surveillance Program;
226. February 10, 2006, letter from the Committee on the Judiciary to the Congressional Research Service requesting a review of analysis of the NSA's Terrorist Surveillance Program;
227. February 13, 2006, briefing for Committee on the Judiciary by the Department of Justice staff regarding the NSA's Terrorist Surveillance program.

Mr. KELLER. I thank the gentleman. Reclaiming my time, I just have three points to make regarding this issue and I am just going to try to give as much straight talk as I can on it.

The first point is we are talking about, as General Hayden from the NSA has said, all calls consist of one party outside the U.S. and there are reasonable grounds to believe that one part is an agent of al-Qaeda or a related terrorist group. What that means, as he has given analogy, if someone, for example, Bin Laden himself sneaks across our porous Mexican-U.S. border into San Diego and he makes a call from San Diego, California to Orlando, Florida, there is not authority given to NSA to wiretap that without a warrant, and he's said that on national TV.

Second, the issue of constitutional authority versus the authority to use military force. I'm not on the Supreme Court, obviously, but I'm personally not convinced that we have authority under the authorization to use military force, just in the interest of straight talk. I think there is a good faith argument that the President does have constitutional authority under article II, that that authority rises above any law passed by Congress. There is a FISA appellate court *In re Sealed Case* where they said, quote, "We take for granted that the President does have that authority, and assuming that this is so, FISA could not encroach the President's constitutional authority."

In fact, four Democratic Presidents have asserted, either through themselves or their attorney generals, that they, too, believe that they have authority under the Constitution to do warrantless searches. Those Presidents or their attorney generals are FDR, Truman, Clinton, and Carter.

Now, if that being the case, it brings me to my third point. Why don't we just go before the FISA court 72 hours afterwards, as is frequently argued? It's my understanding that there are certain exigent circumstances or hot pursuit situations that they could not practically go before the FISA court for 72 hours, and you then ask, well, why is that, and they say, well, to tell you that answer, we would have to tell you how the program works and we can't do that. And so that is essentially where we are.

I think the Senate has done oversight hearings. I think Chairman Sensenbrenner has sent some very detailed questions that must be answered by March 2 that he has posted on the Judiciary Committee website for all to see. And I think we should give the Administration a good faith opportunity to respond to those questions, and that's where——

Mr. NADLER. Would the gentleman yield for a moment?

Mr. KELLER. I will yield back.

Mr. NADLER. I would simply point out, firstly, that those citations you cite, the In re Sealed Case case and the attorneys general, were referring to warrantless wiretaps abroad, overseas, not in the United States, and that is the key difference. Everyone agrees that the President has inherent authority overseas, that is to say, outside the United States.

Mr. KELLER. Well, reclaiming my time, then, I would just point out what General—and I'm just taking him at his word—has testified that in all of these cases where you have a warrantless search, there is at least one party overseas.

Mr. NADLER. Would the gentleman yield again?

Mr. KELLER. I will.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Could I have unanimous consent to give the gentleman two additional minutes?

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you. We are talking about, again, directing a wiretap surveillance at someone in the United States, allegedly talking to someone overseas. If it's directed at the person overseas, there's no question. So the fact that one person is overseas is not relevant from this point of view.

But the second thing, I would simply observe that given the credibility doubts that many people have about the Administration in this respect arising from the fact that it is not clear at all why they need the authority to go beyond FISA if all they are doing is what they say they're doing, so maybe they're doing something else, simply asking for interrogatories is not sufficient. That's why we need to see the documents.

Mr. KELLER. Let me reclaim my time and then yield back.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. First of all, in response to one of the things that was just—I move to strike the last word. I'm sorry.

Mr. Chairman, I just want to, in response to one of the last things that was said, when the prior Presidents claimed that inherent right, they were claiming it in the absence of any controlling statute. Since those claims have been made, there is now a criminal statute prohibiting exactly what they claimed to have and we need to determine whether or not the President's claim that he can violate a specific criminal law prohibiting what he's saying he can do.

Now, if the Administration has reasonable wiretaps that need to be done, they can be done under FISA now. He can get a warrant and do that. In fact, if he's in a hurry, he can get the warrant after he's done it. So we are not talking about whether or not he can do reasonable wiretaps. We are talking about whether or not he has to comply with the criminal law.

Now, frankly, Mr. Chairman, I think one of the problems, we don't know what he is doing. We know what has leaked out so far, but there is nothing definitive that suggests that all the calls that are being made are international calls. Some may be domestic. We had a briefing yesterday, the Judiciary Committee and staff had a Committee briefing yesterday where it was not clear whether or not domestic-to-domestic calls were also part of this plan.

I asked the question whether or not what is being done would qualify for a FISA warrant and the answer I got wasn't yes or no. I don't know what the answer was, but it certainly wasn't yes or no. It was clearly evasive. There were assertions and assumptions and innuendo that would clearly not rule out more than what has leaked out so far. There's more to this than we know. We'd just like to know what's going on.

One of the problems is if you accept the reasoning that the President is not confined by the criminal law, there is no limitation to that power. There are no checks and balances. In fact, there was no anticipation that there would be any checks and balances. Certainly, there's no suggestion that this would be revealed to a court in an attempt to get a warrant. You just do it and hope it doesn't get out. You could—this isn't a covert operation. This is a program. You briefed a handful of Members of Congress under the threat of criminal prosecution. If they told anybody, including their staff, that's not how you comply with the criminal law.

The question of whether it's legal or not, Mr. Chairman, I was watching C-SPAN last night and saw another Committee hearing that dealt somewhat with this issue and the suggestion was made that there were NSA officials who were relieved that the President was reelected because they doubted that what they were doing was legal and if a new President Kerry had come in and found out what had been going on, they might have to go to prison. And so they were relieved that the President was reelected.

We ought to ask these people, who are these people and why did they think they might have to go to prison for what they were doing? Do we care that there are people who think they're breaking the law and do it anyway? Why don't we have a hearing, do some investigation, and do something other than have the Chairman on behalf of somebody, the gentleman said on behalf of the Committee. I wasn't consulted on the questions. I'm advised that no Democrats had input into the questions. So the questions have been propounded on behalf of the Republicans on the Committee. That's not an investigation.

We need to get the facts. We need to determine what is going on and why these people think they were breaking the law. I don't think that's asking too much of this Committee and I would, therefore, support the resolution and oppose the negative recommendation.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. SCOTT. Yes.

Ms. JACKSON LEE. I thank the gentleman. Let me just very briefly say that I think the debate is at the tone that it should be because we are discussing the Constitution. To my colleagues on the other side of the aisle, and I have not heard this question asked to the Chairman but I will just ask it for the record, I'm not sure if the materials that are going to be requested by the Chairman comes to the entire Committee, comes to one staff person. Will we have access to them?

I think the key element to H. Res. 643 by the Ranking Member, Mr. Conyers, why it has such value, such importance, is, one, because, as I said earlier, and for me it's personal, having investigated the treatment of Dr. Martin Luther King as a member——

Chairman SENSENBRENNER. Will the gentleman yield? The responses to the questions that were asked in my letter will come to the Committee and will be made public unless they are classified, and there are separate provisions under the House rule to deal with that.

Ms. JACKSON LEE. I thank the Chairman. May I just finish my sentence and simply say that our oversight is so pivotal in this, Mr. Chairman, and I——

Chairman SENSENBRENNER. The time of the gentleman from Virginia has expired.

Mr. SCOTT. One additional minute, Mr. Chairman?

Chairman SENSENBRENNER. Without objection.

Ms. JACKSON LEE. I thank you very much. The reason why this is so important, because I have heard repeatedly that we are referring again to the inherent powers of the President. It is clear in our constitutional structure that we are equal branches of Government. It also is clear in some materials that I am going to offer in the record at a later time that there is question to the complete blanket suggestion that there are inherent powers that cannot be questioned. It was deemed impossible to cover aspect and eventuality of Government.

Presidents have claimed for themselves certain powers that they feel come with the authority granted to them in article II. They have also claimed powers implied by article II that the Supreme Court has stepped in when it felt that the President has overstepped its mark. So, therefore, there are checks and balances. The Supreme Court can oversee this idea of inherent powers, and so it is the responsibility of Congress as an equal branch of Government to be able to check the inherent powers that a President argues for, and I believe they have overstepped their bounds.

Chairman SENSENBRENNER. The time of the gentleman from Virginia has once again expired.

Mr. SCOTT. Can I have 30 additional seconds?

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. WATERS. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California seek recognition?

Ms. WATERS. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I would like to add my voice to those Members who are trying to impress upon you the importance of oversight on this issue.

To tell you the truth, I have frankly been surprised that you have not taken a more aggressive role. I consider you to be one of the credible civil libertarians and that I don't expect you to take a back seat to the Senate or anybody else in probing this issue or these kinds of issues. I sit here as a Member of Congress watching the news nightly, watching what the Senate is doing, and feeling as if I'm an outsider with no real role or participation in what is going on.

Now, first of all, we are elected by the people and we're not elected to watch the Senate do the work of this country. We're participants in this. We have a role in this. This is the people's House. I don't expect, again, to be on the outside of this discussion.

The only way we can be involved in this discussion is through our Committee work. That's why we serve on these Committees. And I expect the Chairman not to tell us that we can't have a hearing, that he's going to send some questions over to the White House

or to NSA or anybody. I expect those questions to be placed before the relevant individuals in this Committee with all of us participating.

It may be that some Members of our caucus were told that somehow, there was a program that would allow the President of the United States to break the law. I don't know. And listening to one of the Members of my own caucus talk about the fact, since it was classified information, they didn't feel that they could say anything, is just unacceptable. It's not good enough.

And I don't think we can go back to our constituents telling them, well, our Chairman won't let us. He is going to send some questions. Well, the Senate is going to do the job. I want to do the job. I want us to do the job.

I wanted to amend this resolution today, but I don't think that it's practical to do so, but let me tell you why. FISA and the rest of cyberspace, and I'm going to read from a report by an individual, FISA should also be viewed in the context of Echelon program. Echelon is a secret intergovernmental project of the United States, Canada, Great Britain, Australia, and New Zealand that maintains a series of powerful facilities around the world to intercept electronic communication, some believe all such transmissions. The data is downloaded and stored and each Echelon country is notified and receives copies of messages that contain key words which such country has included in a dictionary.

Now, I got interested in this key word business by reading in the newspaper that we have scanning that's going on, and this means everybody is being scanned. And when the key words pop up in a conversation, then the technology will allow them to direct the surveillance to where those key words are coming from.

Now, this is America, Mr. Chairman, and I don't expect that my conversations or my neighbor's conversations or any citizen's conversations will be routinely scanned and screened with the help of the telecommunications companies that we pay to provide us service and that we are subject to be under surveillance simply because we use a particular word. In this Congress, I hope that I can talk with my colleagues about al-Qaeda. I hope that I can talk with interested constituents about terrorism and what is going on without then being a victim of this kind of scanning that will cause my conversations to be listened to.

And so I guess what I'm saying to you, Mr. Chairman, is I really do expect more from you than this. I expect that you should be feeling the same way that I feel, that you don't want to be on the outside of this discussion. You are the Chairman of this Committee. And again, the Senate should have no more power to investigate than we do. And when you talk about simply using questions to go to the President rather than doing your job of opening up this Committee so that we can have those kinds of investigations, then I'm going to have to think that you are not who I thought you were.

Mr. Chairman, you can talk all you want to to somebody else while I'm talking to you. I want you to——

Chairman SENSENBRENNER. Well, the time of the gentlewoman has expired. Without objection, she will be given as much more time as she needs.

Ms. WATERS. I respectfully request another additional minute so I can tell you——

Chairman SENSENBRENNER. Without objection.

Ms. WATERS. —that I don't care if you talk to someone else while I'm talking to you. I think the reason you're doing that is because I'm shaming you about the inability to get the job done here. Now, you can have back the time and give it to whomever you want to give it to.

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. You may have the time.

Mr. DELAHUNT. You know, to pursue the theme of my friend from California, I would inquire of the chair that once we receive these answers to these 51 questions, is it the intention of the chair to call for additional hearings in terms of the issue that we've been discussing here today?

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. DELAHUNT. Of course.

Chairman SENSENBRENNER. It is the intention of the chair to have Attorney General Gonzales up on a general oversight hearing, and as you know, at these hearings, Members may ask whatever questions of the Attorney General the spirit moves them to ask.

Mr. DELAHUNT. I thank the chair for the answer. I would go beyond that, and I would make this request of the chair. A former colleague of ours on this Committee who currently serves in the Senate, Lindsey Graham, described this particular issue as a *Marbury v. Madison* moment, and I concur and I agree with Senator Graham.

This is a profound constitutional issue. Not only does it implicate individual's civil liberty, but it does go to the separation of powers and the relationship between the branches.

I haven't had an opportunity to read the 51 questions. I'm sure that they're good questions.

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. DELAHUNT. I yield.

Chairman SENSENBRENNER. I'd just point out to the gentleman from Massachusetts that question number 50 propounded the questions that a group of organizations that included the Arab American Anti-Discrimination Committee and the ACLU requested in a letter dated January 30 to Mr. Conyers and myself. We included those questions of the Attorney General, and there were four of them. So the questions that were asked in the letter were wide-ranging and I think we have to wait until the Justice Department responds to make a determination on where to go next, and I won't presuppose any response that they have.

Let me say that, as Mr. Conyers and I did in the questions that we asked on the PATRIOT Act, if the response is irrelevant or nonresponsive or evasive, I intend on being the crabby professor that I can be and telling the student to redo it, because if the first letter gets a grade of incomplete, we would like to have a complete answer so that this Committee can grade it each to ourselves.

Mr. DELAHUNT. Well, again, I thank the chair for that amplification. At the same time, I think it was Mr. Feeney who indicated that these questions were propounded on behalf of the Committee, and I think it was Zoe Lofgren who indicated that—or maybe it was Bobby Scott that it was propounded by the chair, presumably on behalf of the Republican Members of the Committee, not the Democratic Members. It's my understanding, and I could be wrong that there was no consultation with Democratic Members. I know that there would be individuals on this side of the aisle that could propound a series of questions that would go beyond the 51.

But having said all that, I think it's important that the American people know that Democrats were not consulted in the 51 questions that were put to the Attorney General. But I do acknowledge that in the past the Chair has held Department of Justice's allegorical feet to the fire and I am confident that he will do the same.

But that is not sufficient, in my judgment. This is such an issue of such consequence that we deserve to have multiple hearings, not just from representatives of the Administration but, for example, Mr. Lungren from California has raised an array of constitutional issues. They deserve a hearing. They deserve to be heard. He alludes to Attorney General Bell. I would like to have Griffin Bell before this Committee, as I'd like to have the Deputy Attorney General Comey who, according to reports, refused to sign off on this particular program—the second in command of the Department of Justice. The second in the command because——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. DELAHUNT. May I have an additional minute?

Chairman SENSENBRENNER. Without objection.

Mr. DELAHUNT. But I am confident, Mr. Chairman, that none of us wants to have as our legacy that, for all intents and purposes, as Ms. Waters indicated, didn't do our job. The Senator Judiciary Committee has done some hearings. I don't want to describe them as extensive. The Intelligence Committees. But this is our one hearing, and—I agree, they only did one 2- or 3-day hearing. There should be multiple hearings. This is not, in my judgment, about partisan politics. I know that there are Members that serve on this Committee on the other side of the aisle that share my reservations and share the concerns. This is constitutional and it is about the institution.

And again, we don't want to have a legacy that we sat here as props while——

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman.

Mr. Chairman, I consider myself in the pro-spying caucus of the Democratic Party. I think we should be spying a lot. It's inexpensive, it's something we didn't do enough leading up to September 11, it prevents us the necessity of having to send the young men and women of our country to fight for war in error. But I kind of have—that's my philosophical position. I'm trying to figure out if there are any conservatives left on this Committee that have a philosophy of their own.

I never thought I'd say this, but I long for the days of Bob Barr. At least he understood that when you're a conservative, you're suspicious of the idea that the Federal Government is encroaching further and further into our lives. And they're suspicious, and that suspicion always led them to be concerned about the metaphorical black helicopter but also the creeping line.

And what happened to the tradition that we were starting to carve out under Chairman Sensenbrenner of fighting for our jurisdiction? You know, if there is one change that we have had in recent years in this Committee, is every single day we are scratching and clawing to make sure other Committees don't take our jurisdiction, making sure, God forbid, we allow the United States Senate to be the straw that stirs the drink.

And now look at you. You're like, Oh, we can't ask for information because we sent them a letter.

Have you seen how they answer these letters? Did you see the Attorney General in front of the Senate? It was a shame for legislatures everywhere. And now you're saying, well, let's just wait for a letter.

The resolutions we are considering today say give us all the information; we're big boys and girls, we can figure out how to deal with it. Why is it that that is—I've heard no explanation about why that would be a bad thing for this Committee in its deliberation. If you think—whether it's 2 days, Mr. Chairman, 22 days or 32 days, you are not going to get the equivalent of a letter from the Attorney General saying butt out. You just haven't been following the news. That's what it is going to be.

We have to start acting like we mean it around here. If you're concerned about fighting for our jurisdiction, let's go ahead and do it. If you want the United States Senate—and a couple of my colleagues said, well, the Senate had hearings. Is that going to be our measure for our job here, watching the United States Senate do their work? I mean, honestly, if we didn't get it, if we needed further evidence of the fecklessness of that body, look at that hearing that they had.

Chairman SENSENBRENNER. The Chair will remind the gentleman from New York of the rules about impugning the integrity of the other body even when it's warranted.

Mr. WEINER. Mr. Chairman, I thank you. I apologize, although I would dispute "feckless" because I think it is arguably a point of fact, no longer an opinion.

And let me just say this. Let me just say this to some of my colleagues. I've heard some fascinating arguments against this. One is the gentleman from California, Mr. Lungren, sets up the ground ball FISA argument. You got phone numbers in a terrorist camp, a whole list of phone numbers—yeah, that's a ground ball. That's as easy as it comes. That's exactly what FISA was created for. I doubt very much that that's the case study here, because that's an easy one. We can all resolve that one. There are many junior high school civics students who would say clearly there's probable cause there.

I've heard the gentleman from Florida, Mr. Feeney, say, Oh, but we have a letter. Don't go ahead and ask them for information, be-

cause we've got this letter, we've got make sure they answer our letter.

Well, what happened to us? This is the Judiciary Committee of the House of Representatives. Don't we have some right and some authority?

And then finally, in the best argument for the passage of these resolutions was Mr. Keller. He said he has some legitimate concerns. He's not quite sure himself. He says there are some gray areas.

Exactly. Let's get the information in front of us and draw some conclusions. And I'll tell you where I'm probably going to come down is I'm probably going to come down in saying, yeah, let's give the President the authority he—we want to make sure that there aren't obstacles in the way to doing a legitimate intelligence gathering exercise. I think there's broad consensus in this country and in this Committee that that's——

How are we going to do it? Are we going to do it by waiting for 30 days for a take-a-hike letter from the Attorney General, or are we going to do it by having him come here and probably not even swear him in and then when we do we watch him bob and weave and say I've got no idea, how would I know, I'm just the Attorney General?

No. We use the powers that we have in this body to say give us the information. We're going to go through it. It's not just going to be one group of Members of Congress that are locked in a steel room in the Capitol. We on the Judiciary Committee see broad constitutional questions here. We're ready to tackle them. We have divergent views, but we have one thing in common, and that we are deadly serious about the jurisdiction of this Committee and making sure we do everything we can to make sure the security of our citizens is ensured.

And one of the ways you do it is with a resolution like this. We should pass it in bipartisan fashion. The conservatives and the people who pretend to be conservatives should both vote for it.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman and Ranking Member Conyers.

I, too, would like to encourage all the Members of this Committee to vote for the present resolution. And I want to be clear, I'm not arguing that domestic surveillance doesn't have a place in our fight against terrorism. If domestic surveillance will help us prevent an attack or capture terrorists, we should do it, but within the bounds of the law and within the bounds of our Constitution. And Congress shouldn't be setting the precedent of surrendering its role of being a check on the executive branch to ensure that the executive branch doesn't overstep the law or violate the Constitution.

That is what this resolution is about, protecting the constitutional rights of American citizens. If this resolution is defeated, we take another step in the dangerous direction of ceding congressional oversight.

The President, a handful of officials in his Administration, and some of my vocal Republican colleagues on the Committee think

that the NSA's secret and warrantless electronic surveillance of Americans is legal. They have tried to convince us that the authorization for the use of military force in Iraq and Afghanistan and the President's authority as commander in chief during a time of war grants him the power to conduct such warrantless surveillance. And I vehemently disagree with this conclusion. Frankly, so do most experts on intelligence and the Constitution, both Republican and Democrat. Many of these experts agree that there is no legal authority at all for warrantless surveillance because the fourth amendment protects us against unreasonable searches and seizures. Furthermore, the Foreign Intelligence Surveillance Act unequivocally requires judicial approval of all electronic surveillance in this country.

If there is so much disagreement about the legality of NSA surveillance, then let the Attorney General appear before this Committee to answer our questions. At a minimum, the AG should comply with the terms of this resolution and give us the documents related to NSA's domestic surveillance program.

I think it's very interesting that all of a sudden the Judiciary Committee is willing to surrender its substantial oversight role. Since I've been on this Committee, we have aggressively guarded our jurisdiction and oversight authority. We've gone toe-to-toe with the Justice Department and other House Committees over telecommunications antitrust jurisdiction, immigration, and even the regulation of steroid use by professional athletes. I don't know about anybody else on this Committee, but I think the American people are a little more interested in protecting their privacy rights than whether or not Rafael Palmeiro is suspended for an additional 10 days. But that's just my opinion.

With this resolution, we reaffirm our jurisdiction to investigate constitutional violations. And shockingly, this Committee is choosing not to investigate the constitutionality of warrantless surveillance of everyday Americans. Let me repeat that. This Committee is choosing to punt and to not investigate warrantless surveillance of everyday Americans. I find this unacceptable. And what is worse is that it sets a dangerous precedent to allow the Administration to circumvent congressional oversight.

I think the American people deserve more from their Members of Congress. This Committee needs to pass this resolution, and I encourage all of my colleagues to vote yes. I yield back the remainder of my time.

Chairman SENSENBRENNER. The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you. And Mr. Chairman, I'm pleased we're here debating this issue today. I agree with my colleague, Mr. Feeney, on the other side of the aisle that oversight is important. I would remind my colleagues, however, that the only reason we're having this important discussion today is because Mr. Conyers introduced a resolution which, if we don't deal with it somehow today, will go to the floor of the House.

That's why we're having this discussion. It's the first discussion that this Committee has had on this very important issue—which I agree with my other colleagues who said this is an issue that raises important questions about the Constitution, raises important questions about separation of powers, rule of law, and a range of national security questions. And we've had a give-and-take here on some very important issues just this morning, which of course raises the question about why we have not yet had a hearing and why we're not going to have a hearing around this total issue.

Now, a number of us back in mid-December, when we learned about this issue in the *New York Times*—despite all the oversight that's been done in the United States Congress, we learned about this issue in the *New York Times* —we asked the Chairman if we would hold a hearing. Well, we didn't have a hearing, we didn't even get the room. But Mr. Conyers did organize a hearing in the basement of this building, where we took some important testimony, including testimony from Bruce Fein, an attorney in the Justice Department in the Reagan administration. There was important testimony there.

Now, I'm glad, Mr. Chairman, that you're setting these questions. I've looked at the questions. I think there are lots of good questions. I think there could be additional questions. But I think we'd all have to agree that if we want to get to the bottom of this, just going back and forth with questions is not enough. I mean, the original opinion came out from the Attorney General's Office as to why they thought this was legal; we read it. They then expanded it. We got a 41-page opinion which, although it was longer, it didn't get any better. And I think all of us who have read that opinion know what the answers to these questions are going to be.

But you wouldn't want to have a witness where you can only do written back-and-forth. You need to have cross-examination. Anyone who has looked at the way you get to the bottom of things, you've got to have cross-examination. You need more than just the Attorney General in front of this Committee. We need the Attorney General, we need others that our colleagues have mentioned, including James Comey, the Deputy Attorney General who refused to sign off on this. We need scholars on both sides. Because I think what will happen is, when we begin to hear the testimony, we'll understand that the overriding weight of legal opinion in this country on all sides is that the President does not have the authority.

But that's a debate that we should have. We've begun to have it this morning only because of this resolution, only because of a resolution which forced the Chairman's hand, which forced us all to be here. This Committee shouldn't take any credit for saying this is part of our oversight, this discussion today. This is purely as a result of a procedural motion that was filed by Mr. Conyers.

And it shouldn't be that way. We should be taking the lead. I strongly believe our Founding Fathers believed when they created our system of Government and created the Congress as a separate branch, that they expected Republicans and Democrats alike in this body to live up to their obligations to make sure we have oversight over the executive branch.

Now, another Committee in this body held over 40 hours of hearings on the Clinton Christmas card list. And yet, we haven't had

1 hour of hearings in the House Judiciary Committee on one of the most important constitutional separation of powers that's been raised. And as I understand it, we're not even planning on having a hearing targeted to this issue generally. We're going to have our regular hearing over the Department of Justice. The Attorney General will be here. We're not going to have any other witnesses, not going to call any other people on either side of this issue. That is not fulfilling our constitutional obligation.

I think it's a dereliction of duty that we haven't had a hearing yet. It certainly is a dereliction of duty to this Committee and this House if we don't have a full hearing on this issue so that we can explore all sides and answer questions for the betterment of the American people. And I urge you, Mr. Chairman, to uphold the integrity of this Committee and do that.

Chairman SENSENBRENNER. The time of the gentleman has expired. The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. And I'll be brief.

First of all, with all due respect, I understand that President Clinton's Christmas list was a much larger group than any amount of people that we're looking for in al-Qaeda.

Having said that, I want to thank Mr. Conyers for bringing his resolutions. I know that I personally will be voting against them, but not because it's inappropriate to ask the questions but because I believe that we as a Committee have an obligation to deal with the constitutional question that's been alluded to by many Members on both sides of the aisle. I look forward to this Committee determining to its own satisfaction whether or not the President has that constitutional authority.

But just as the question of whether or not somebody can burn a flag or any number of other actions that one can quickly realize what the action is, we don't need any more facts about whether or not the President ordered, on a limited or even slightly less than limited basis, the eavesdropping on conversations that were believed to include an al-Qaeda representative in a foreign country. We do need to decide whether or not there's a constitutional ability.

And I might just close by saying that I do not believe that the FISA Court or any legislation done by this body limits the President's constitutional authority. And I would hope that we would all refrain from talking about laws as though laws changed the Constitution. Only a constitutional amendment changes inherent constitutional authority of the President.

What that, I yield back.

Mr. FRANKS. Will the gentleman yield for a question?

Chairman SENSENBRENNER. The gentleman has yielded back. The gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, as always, I think it's just very important to remind ourselves why we're all here. And the context of this debate is ultimately about the protection of both the Constitution and the United States of America. And sometimes I think it's important to realize that the causal reason that we're having this discussion is because we are in a war on terror.

After 9/11, many of the same people that are speaking in favor of the motion on the floor here today said that somehow the Presi-

dent didn't do his job in paying attention to what terrorists were doing. And now, in my judgment, he has gone to great lengths to try to do his job. In fact, I believe that if the President failed to be listening where it was possible to al-Qaeda or al-Qaeda-related terrorists communicating inside the United States, he would be derelict if he failed to do that.

Now, the FISA Court has concluded twice that the President has the constitutional power for this limited scope of terrorist surveillance. I think that probably the best statement of the day was by a gentleman on our side of the aisle here, when he said if the President has been given or the President has the constitutional authority and the responsibility from all of us to hunt down, to ferret out, and to kill terrorists, then perhaps we should all conclude that he has the right to listen to them on the phone before he proceeds.

And I'm just convinced that one of the reasons that the Chairman has gone forward with this letter is because he understands that not only does he have to move forward in a process that gives clear direction in what he's trying to ascertain from the Administration, but he also understands that there is a danger, when he brings these things before the Committee, of leaks, and that puts him in an incredibly difficult position because he not only has to measure his responsibility for oversight, but he also has to measure the impact that that will have on the overall war on terror.

Now, I guess it's easy for us to all talk about how serious terrorism is, but sometimes I think we forget it so callously. If terrorists have their ultimate end, we will see some type of nuclear yield weapon detonated in this country, perhaps in this city. And it will decapitate the forces of freedom. And I cannot understand why we don't focus on that more clearly, because in the final analysis, our responsibility is to protect this Nation. In the final analysis, if the President does not have the ability to surveil terrorists in time of war, in this situation, then the Constitution and the Republic is in grave danger.

I think the Chairman has acted in good faith and with wisdom, and therefore I will——

Chairman WATT. Will the gentleman yield on that point?

Mr. FRANKS. I will yield back to the Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Mr. Chairman, I will try not to take the full 5 minutes, but I can't promise you that.

First of all, I want to say that I do not envy the Chairman's position here. I know that he is a person who strongly believes in the jurisdiction of this Committee and strongly believes in the Constitution. I also know that there are substantial pressures to protect the President and the Administration here because it's a Republican President and Administration.

I want to applaud the Chairman for the 50 or so questions that he has submitted to the Administration. I especially want to thank him for including some questions from the various groups. The

thing that's troubling about that as I heard it, though, was it now appears that those groups may have a higher standing there than the Members of this Committee, on our side, as least.

I have reviewed the resolution. It appears to be a very reasonably worded proposed resolution—and requests the documents, not answers to a set of questions. It requests the information that I think this Committee, under the safeguards proposed in the resolution—which on page 2, starting on line 8, says "subject to necessary redactions or requirements for handling classified documents," so, I mean, there's a lot of stuff that the Administration could still keep from this Committee—but I think this Committee has some oversight jurisdiction here and we can't responsibly do it unless we have the information to look at what this Administration has been doing. This resolution will allow us to do that.

Now, that's what I have to say on the resolution. But let me go one step beyond that and tell you where I am out in the political context, because I think you're going to find this very interesting. There is a growing chorus in my congressional district and in the Progressive community that we should start toward impeachment proceedings against this President. I have been against all those odds even as a Progressive member, saying we can't do this willy-nilly, this is irresponsible. It is against the backdrop that I recall Representative Bobby Scott and myself sitting here in this Committee during impeachment, and while all the cameras were rolling and all the hoopla was going on, Representative Scott and I were sitting here quietly talking to each other about whether we would apply the same standard that we were applying in that case if this were a Republican president.

So I've been saying to those people who have been out there talking about this that impeachment is something that we shouldn't be playing with because we don't need an ongoing impeachment every 4 years every time we disagree with a decision that has been made by a president. The standard is so much higher. But if we don't have a means for understanding what the President is doing and this Administration is doing, if they're just saying trust me, or if they're saying I don't really much care what you think, I'm going to do whatever I want to do regardless of the constitutional standard, I think we are put in a very, very difficult position.

I ask unanimous consent for 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. To exercise the kind of judgment, aside from all the politics that is playing out on these extremely important things that are coming before us. And right now, what I see on this Committee appears to be a partisan divide on whether we are going to aggressively and affirmatively exercise our oversight responsibilities.

With all respect to whoever it was over there who said the President has authority beyond FISA, fine. But this Committee has responsibility beyond FISA also. This is not only about whether FISA was complied with. This is the Judiciary Committee of the people of the United States House of Representatives, and we've got some constitutional responsibilities, too. And if we don't have the information we need to evaluate what is being done, quietly, privately, redacted, no classified leaks, subject to whatever limitations you all

want to put, I think we can't do what we are obligated to do constitutionally.

It is for those reasons I support this proposed resolution.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there amendments? If there are no amendments, a reporting quorum is present.

The question occurs on the motion to report House Resolution 643 adversely. All in favor of reporting adversely will say aye? Opposed, no?

Chairman SENSENBRENNER. The noes appear to have it. The gentleman from Michigan, Mr. Conyers, asks for a recorded vote. Those in favor of reporting the bill adversely will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH OF TEXAS. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Feeney?

Mr. FEENEY. Aye.

The CLERK. Mr. Feeney, aye. Mr. Franks?
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye. Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sanchez?
Ms. SANCHEZ. No.
The CLERK. Ms. Sanchez, no. Mr. Van Hollen?
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no. Ms. Wasserman Schultz?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.

Members who wish to cast or change their votes? The gentleman from Indiana, Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? The gentleman from Illinois, Mr. Hyde?

The gentleman from Illinois, Mr. Hyde?

Mr. HYDE. Aye.

The CLERK. Mr. Hyde, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 21 ayes and 16 nays.

Chairman SENSENBRENNER. And the motion to report adversely is agreed to. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the House rules in which to submit additional, dissenting, supplemental, or minority views.

Pursuant to notice, I now call up House——

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. I ask unanimous consent to include materials from the Congressional Research Service, American Bar, 14 constitutional scholars, Professor Tribe, and Attorney Bruce Fein in the record.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. Thank you.

[The material referred to follows:]

Memorandum January 5, 2006

SUBJECT: Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information

FROM: Elizabeth B. Bazan and Jennifer K. Elsea
Legislative Attorneys
American Law Division

Recent media revelations that the President authorized the National Security Agency (NSA) to collect signals intelligence[1] from communications involving U.S. persons within the United States, without obtaining a warrant or court order,[2] raise numerous questions

[1] "Signals intelligence" is defined in the DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Joint Publication 1-02 (April 12, 2001), as follows:

> 1. A category of intelligence comprising either individually or in combination all communications intelligence, electronic intelligence, and foreign instrumentation signals intelligence, however transmitted. 2. Intelligence derived from communications, electronic, and foreign instrumentation signals. Also called SIGINT. . . .

Id. at 390 (cross-references omitted). "Communications intelligence" is defined as "Technical information and intelligence derived from foreign communications by other than the intended recipients. Also called COMINT." *Id.* at 84. "Electronic intelligence" is defined as "Technical and geolocation intelligence derived from foreign non-communications electromagnetic radiations emanating from other than nuclear detonations or radioactive sources. Also called ELINT. . . ." *Id.* at 140 (cross-references omitted). "Foreign instrumentation signals intelligence" is defined as:

> Technical information and intelligence derived from the intercept of foreign electromagnetic emissions associated with the testing and operational deployment of non-US aerospace, surface, and subsurface systems. Foreign instrumentation signals intelligence is a subcategory of signals intelligence. Foreign instrumentation signals include but are not limited to telemetry, beaconry, electronic interrogators, and video data links. Also called FISINT. . . .

Id. at 167 (cross-references omitted).

[2] James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at 1, 22 (citing anonymous government officials to report that the executive order, which allows some warrantless eavesdropping on persons inside the United States, "is based on classified

(continued...)

regarding the President's authority to order warrantless electronic surveillance. Little information is currently known about the full extent of the NSA domestic surveillance, which was revealed by the New York Times in December, 2005, but allegedly began after the President issued a secret order in 2002. Attorney General Alberto Gonzales laid out some of its parameters, telling reporters that it involves "intercepts of contents of communications where one . . . party to the communication is outside the United States" and the government has "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."[3] The aim of the program, according to Principal Deputy Director for National Intelligence General Michael Hayden, is not "to collect reams of intelligence, but to detect and warn and prevent [terrorist] attacks."[4]

The President has stated that he believes his order to be fully supported by the Constitution and the laws of the United States,[5] and the Attorney General clarified that the Administration bases its authority both on inherent presidential powers and the joint resolution authorizing the use of "all necessary and appropriate force" to engage militarily those responsible for the terrorist attacks of September 11, 2001 ("AUMF").[6] Although the

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[2] (...continued)
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").

[3] *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) (hereinafter Gonzales Press Conference), *available at* [http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html]. The Attorney General emphasized that his discussion addressed the legal underpinnings only for those operational aspects that have already been disclosed by the President, explaining that "the program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country." *Id.*

[4] *Id.*(describing the program as more "aggressive" than traditional electronic surveillance under FISA, but also as "less intrusive").

[5] President Bush's Radio Address of December 17, 2005, *excerpted in 'A Vital Tool,'* USA TODAY, December 19, 2005, at A12.

[6] Authorization for Use of Military Force ("the AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). Attorney General Gonzales explained

> Justice O'Connor . . . said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder — the duration of the hostilities. So even though the authorization to use force did not mention the word, 'detention,' she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, 'authorize the President to use all necessary and appropriate force.'
>
> For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in

(continued...)

resolution does not expressly specify what it authorizes as "necessary and appropriate force," the Administration discerns the intent of Congress to provide the statutory authority necessary take virtually any action reasonably calculated to prevent a terrorist attack, including by overriding at least some statutory prohibitions that contain exceptions for conduct that is "otherwise authorized by statute." Specifically, the Administration asserts that a part of the Foreign Intelligence Surveillance Act (FISA)[7] that punishes those who conduct "electronic surveillance under color of law *except as authorized by statute*"[8] does not bar the NSA surveillance at issue because the AUMF is just such a statute.[9] On December 22, 2005, the Department of Justice Office of Legislative Affairs released a letter to certain members of the House and Senate intelligence committees setting forth in somewhat greater detail the Administration's position with regard to the legal authority supporting the NSA activities described by the President.[10]

The Administration's views have been the subject of debate. Critics challenge the notion that federal statutes regarding government eavesdropping may be bypassed by executive order, or that such laws were implicitly superceded by Congress's authorization to use military force. Others, however, have expressed the view that established wiretap procedures are too cumbersome and slow to be effective in the war against terrorism, and that the threat of terrorism justifies extraordinary measures the President deems appropriate, and some agree that Congress authorized the measures when it authorized the use of military force.

This memorandum lays out a general framework for analyzing the constitutional and statutory issues raised by the NSA electronic surveillance activity. It then outlines the legal framework regulating electronic surveillance by the government, explores ambiguities in those statutes that could provide exceptions for the NSA intelligence-gathering operation at issue, and addresses the arguments that the President possesses inherent authority to order the operations or that Congress has provided such authority.

Constitutional Separation of Powers

Foreign intelligence collection is not among Congress's powers enumerated in Article I of the Constitution, nor is it expressly mentioned in Article II as a responsibility of the President. Yet it is difficult to imagine that the Framers intended to reserve foreign intelligence collection to the states or to deny the authority to the federal government altogether. It is more likely that the power to collect intelligence resides somewhere within

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[6] (...continued)
this kind of electronic surveillance.

Gonzales Press Conference, *supra* note 3.

[7] Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

[8] 50 U.S.C. § 1809 (emphasis added).

[9] *See* Gonzales Press Conference, *supra* note 3.

[10] Letter from Assistant Attorney General William E. Moschella to Chairman Roberts and Vice Chairman Rockefeller of the Senate Select Committee on Intelligence and Chairman Hoekstra and Ranking Minority Member Harman of the House Permanent Select Committee on Intelligence (Dec. 22, 2005) (hereinafter "OLA Letter").

the domain of foreign affairs and war powers, both of which areas are inhabited to some degree by the President together with the Congress.[11]

The *Steel Seizure Case*[12] is frequently cited as providing a framework for the courts to decide the extent of the President's authority, particularly in matters involving national security. In that Korean War-era case, the Supreme Court declared unconstitutional a presidential order seizing control of steel mills that had ceased production due to a labor dispute, an action justified by President Truman on the basis of wartime exigencies and his role as Commander-in-Chief,[13] despite the fact that Congress had considered but rejected earlier legislation that would have authorized the measure,[14] and that other statutory means were available to address the steel shortage.[15] The Court remarked that

> It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that 'The executive Power shall be vested in a President . . .'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'
>
> 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

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[11] The Constitution specifically gives to Congress the power to "provide for the common Defence," U.S. CONST. Art. I, § 8, cl. 1; to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* § 8, cl. 11; "To raise and support Armies," and "To provide and maintain a Navy," *id.* § 8, cls. 12-13; "To make Rules for the Government and Regulation of the land and naval Forces," *id.* § 8, cl. 14, "To declare War," id. § 8, cl. 1; 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," *id.* § 8, cl. 18. The President is responsible for "tak[ing] Care that the Laws [are] faithfully executed," Art. II, § 3, and serves as the Commander-in-Chief of the Army and Navy, *id.* § 2, cl. 1.

[12] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[13] *Id.* at 582 (explaining the government's position that the order to seize the steel mills "was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.").

[14] *Id.* at 586 (noting that "[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency").

[15] *Id.* at 585. The Court took notice of two statutes that would have allowed for the seizure of personal and real property under certain circumstances, but noted that they had not been relied upon and the relevant conditions had not been met. In particular, the Court dismissed the government's reference to the seizure provisions of § 201 (b) of the Defense Production Act, which the government had apparently not invoked because it was "'much too cumbersome, involved, and time-consuming for the crisis which was at hand.'" *Id.* at 586.

> '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. [16]

The Court also rejected the argument that past similar assertions of authority by presidents bolstered the executive claims of constitutional power:

> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. 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 by the Constitution 'in the Government of the United States, or any Department or Officer thereof.'[17]

The *Steel Seizure Case* is not remembered as much for the majority opinion as it is for the concurring opinion of Justice Robert Jackson, who took a more nuanced view and laid out what is commonly regarded as the seminal explication of separation-of-powers matters between Congress and the President. Justice Jackson set forth the following oft-cited formula:

> 1. 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. . . . A seizure executed by the President pursuant to an Act of Congress 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 absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. 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 Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[18]

To ascertain where in this framework the President's claimed authority might fall appears to require a determination of the Congress's will and an assessment of how the Constitution allocates the asserted power between the President and Congress, if at all. If the

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[16] *Id.* at 587.

[17] *Id.* at 589.

[18] *Id.* at 637-38 (Jackson, J., concurring) (footnotes and citations omitted).

Constitution forbids the conduct, then the court has a duty to find the conduct invalid, even if the President and Congress have acted in concert. In the absence of a constitutional bar, Congress's support matters, except in the rare case where the President alone is entrusted with the specific power in question. In other words, under this view, the President may sometimes have the effective power to take unilateral action in the absence of any action on the part of Congress to indicate its will, but this should not be taken to mean that the President possesses the inherent authority to exercise full authority in a particular field without Congress's ability to encroach.

William Rehnquist, at the time an Associate Justice of the Supreme Court, took the opportunity in *Dames & Moore v. Regan*[19] to refine Justice Jackson's formula with respect to the cases falling within the second classification, the "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[20]

> 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."[21]
>
> [I]t is doubtless the case that executive action in any particular instance 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. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.[22]

In *Dames & Moore*, petitioners had challenged President Carter's executive order establishing regulations to further compliance with the terms of an executive agreement he had entered into for the purpose of ending the hostage crisis with Iran. The orders, among other things, directed that legal recourse for breaches of contract with Iran and other causes of action must be pursued before a special tribunal established by the Algiers Accords. President Carter relied largely on the International Economic Emergency Powers Act (IEEPA),[23] which provided explicit support for most of the measures taken, but could not be read to authorize actions affecting the suspension of claims in U.S. courts. The Carter Administration also cited the broad language of the Hostage Act, which states that "the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of the hostages.[24] Justice Rehnquist wrote for the majority

> Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore

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[19] 453 U.S. 668 (1981) (citing *Youngstown* at 637).

[20] *Id.* at 668-69.

[21] *Id.*

[22] *Id.* at 669.

[23] Pub. L. 95-223, 91 Stat. 1626, codified as amended at 50 U.S.C. §§ 1701 *et.seq.*

[24] *Id* at 676 (citing the Hostage Act, 22 U. S. C. § 1732).

> the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.[25]

The Court remarked that Congress's implicit approval of the longstanding presidential practice of settling international claims by executive agreement was critical to its holding that the challenged actions were not in conflict with acts of Congress.[26] The Court cited Justice Frankfurter's concurrence in *Youngstown* stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II."[27] Finally, the Court stressed that its holding was narrow:

> We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[28]

A review of the history of intelligence collection and its regulation by Congress suggests that the two political branches have never quite achieved a meeting of the minds regarding their respective powers. Presidents have long contended that the ability to conduct surveillance for intelligence purposes is a purely executive function, and have tended to make broad assertions of authority while resisting efforts on the part of Congress or the courts to impose restrictions. Congress has asserted itself with respect to domestic surveillance, but has largely left matters involving overseas surveillance to executive self-regulation, subject to congressional oversight and willingness to provide funds.[29]

Background: Government Surveillance

Investigations for the purpose of gathering foreign intelligence give rise to a tension between the Government's legitimate national security interests and the protection of privacy interests and First Amendment rights.

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[25] *Id.* at 678-79 (internal citations omitted).

[26] *Id.* at 680 (citing the International Claims Settlement Act of 1949, 64 Stat. 13, codified as amended at 22 U.S.C. § 1621 *et seq.* (1976 ed. and Supp. IV)).

[27] *Id* at 686 (citing *Youngstown* at 610-611 (Frankfurter, J., concurring)).

[28] *Id.* at 688.

[29] For background on the evolution of U.S. intelligence operations, see CRS Report RL32500, *Proposals for Intelligence Reorganization, 1949-2004*, by Richard A. Best, Jr.

The Fourth Amendment. The Fourth Amendment to the Constitution 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.

While the right against unreasonable searches and seizures was originally applied only to tangible things, Supreme Court jurisprudence eventually expanded the contours of the Fourth Amendment to cover intangible items such as conversations. As communications technology has advanced, the technology for intrusion into private conversations has kept pace, as have government efforts to exploit such technology for law enforcement and intelligence purposes. At the same time, the Court has expanded its interpretation of the scope of the Fourth Amendment with respect to such techniques, and Congress has legislated both to protect privacy and to enable the government to pursue its legitimate interests in enforcing the law and gathering foreign intelligence information. Yet the precise boundaries of what the Constitution allows, as well as what it requires, are not fully demarcated, and the relevant statutes are not entirely free from ambiguity.

The Origin of Wiretap Warrants. In *Katz v. United States*,[30] the Court held for the first time that the protections of the Fourth Amendment extend to circumstances involving electronic surveillance of oral communications without physical intrusion.[31] In response, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")[32] to provide for search warrants to authorize electronic surveillance for law enforcement purposes, but prohibiting such surveillance in other instances not authorized by law. The *Katz* Court noted that its holding did not extend to cases involving national security, and Congress did not then attempt to regulate national security surveillance. Title III, as originally enacted, contained an exception. It stated that

> Nothing contained in this chapter or in section 605 of the Communications Act . . . 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. . . .[33]

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[30] Katz v. United States, 389 U.S. 347, 353 (1967), *overruling* Olmstead v. United States, 277 U.S. 438 (1928).

[31] *Id.* at 359 n.23.

[32] Pub. L. 90-351, 82 Stat. 211, codified as amended at 18 U.S.C. §§ 2510 *et seq.* For more background see CRS Report 98-326: *Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping*, by Charles Doyle and Gina Stevens.

[33] 82 Stat. 214, formerly codified at 18 U.S.C. § 2511(3). The Supreme Court interpreted this provision not as a conferral or recognition of executive authority, but rather, an indication that Congress had "left presidential powers where it found them." United States v. United States District Court, 407 U.S. 297, 303 (1972). The Senate Judiciary Committee noted, however, that the "highly controversial disclaimer has often been cited as evidence of a congressional ratification of the president's inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security." S. REP. No. 95-604(I), at 6-7 (1978).

Intelligence Surveillance. Several years later, the Supreme Court addressed electronic surveillance for domestic intelligence purposes. In *United States v. United States District Court*, 407 U.S. 297 (1972) (the *Keith* case), the United States sought a writ of mandamus to compel a district judge to vacate an order directing the United States to fully disclose electronically monitored conversations. The Sixth Circuit refused to grant the writ,[34] and the Supreme Court granted certiorari and affirmed the lower court decision. The Supreme Court regarded *Katz* as "implicitly recogniz[ing] that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards."[35] Mr. Justice Powell, writing for the *Keith* Court, framed the matter before the Court as follows:

> The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.[36]

The Court held that, in the case of intelligence gathering involving domestic security surveillance, prior judicial approval was required to satisfy the Fourth Amendment.[37] Justice

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[34] 444 F. 2d 651.

[35] United States v. United States District Court, 407 U.S. 297, 313-14 (1972).

[36] 407 U.S. at 299.

[37] *Id.* at 313-14, 317, 319-20. Thus, the Court stated, "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The Government argues the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. . . ." *Id.* at 317-18. The Government also argued that such surveillances were for intelligence gathering purposes; that the courts "as a practical matter would have neither the knowledge nor the techniques to determine whether there was probable cause to believe that surveillance was necessary to protect national security;" and that disclosure to a magistrate and court personnel of information involved in the domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents" due to the increased risk of leaks. *Id.* at 318-19. The Court found that "these contentions on behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration," but concluded that a case had not been made for a departure from Fourth Amendment standards. *Id.* at 319-20. Justice Powell also observed that,

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "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," *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). . . . Fourth Amendment protections become the more necessary when the targets of official surveillance may be

(continued...)

Powell emphasized that the case before it "require[d] no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without the country."[38] The Court expressed no opinion as to "the issues which may be involved with respect to activities of foreign powers or their agents,"[39] but invited Congress to establish statutory guidelines.[40] Thus, at least insofar as domestic surveillance is concerned, the Court has recognized that Congress has a role in establishing rules in matters that touch on national security.

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[37] (...continued)

> 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." . . .

Id. at 313-14.

[38] *Id.* at 308.

[39] *Id.* at 321-22. The *Keith* Court also stated, "Further, 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." *Id.* at 308.

[40]

> We recognize that domestic surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*]. Often, too, 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. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crimes. Given these potential distinctions between Title III criminal surveillances and those involving domestic security, *Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III.* Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court . . .; and that the time and reporting requirements need not be so strict as those in § 2518. The above paragraph does not, of course, attempt to guide the congressional judgment but rather to delineate the present scope of our own opinion. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. *We do hold, however, that prior judicial approval is required for the type of domestic surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.*

407 U.S. at 323-24 (emphasis added). Some of the structural elements mentioned here appear to foreshadow the structure Congress chose to establish for electronic surveillance to gather foreign intelligence information in FISA.

Court of appeals decisions following *Keith* met more squarely the issue of warrantless electronic surveillance in the context of foreign intelligence gathering. In *United States v. Brown,*[41] while affirming Brown's conviction for a firearm violation, the Fifth Circuit upheld the legality of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes where the conversation of Brown, an American citizen, was incidentally overheard.[42] The Third Circuit, in *United States v. Butenko*,[43] in affirming the district court's denial of an espionage defendant's application for disclosure of wiretap records, concluded that warrantless electronic surveillance was lawful, violating neither Section 605 of the Communications Act[44] nor the Fourth Amendment, if its primary purpose was to gather foreign intelligence information.[45]

The Ninth Circuit, in *United States v. Buck*,[46] affirmed the conviction of a defendant found guilty of furnishing false information in connection with the acquisition of ammunition and making a false statement with respect to information required to be kept by a licensed firearm dealer. In responding to Buck's contention on appeal that it was reversible error for the district court to fail to articulate the test it applied in ruling, after an in camera inspection, that the contents of one wiretap did not have to be disclosed to the appellant because it was expressly authorized by the Attorney General and lawful for purposes of gathering foreign intelligence, the Ninth Circuit stated that "[f]oreign security wiretaps" were "a recognized exception to the general warrant requirement and disclosure of wiretaps not involving illegal surveillance was within the trial court's discretion." The court found a determination that the surveillance was reasonable was implicit in the lower court's conclusion.[47]

In its plurality decision in *Zweibon v. Mitchell*,[48] a case involving a suit for damages brought by 16 members of the Jewish Defense League against Attorney General John Mitchell and nine FBI special agents and employees for electronic surveillance of their telephone calls without a warrant, the District of Columbia Circuit took a somewhat different view. The surveillance was authorized by the President, acting through the Attorney General, as an exercise of his authority relating to the nation's foreign affairs and was asserted to be essential to protect the nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the security of the United States. The D.C. Circuit, in a plurality decision, held that a warrant was constitutionally required in such a case involving a wiretap of a domestic organization that was not an agent of a foreign power or working in collaboration with a foreign power posing

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[41] 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

[42] *Id.* at 426.

[43] 494 F.2d 593 (3rd Cir. 1974), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974).

[44] Pub. L. 73-416, Title VII, § 705, formerly Title VI, § 605, 48 Stat. 1103, codified as amended at 47 U.S.C. § 605 (providing that except as authorized in Title III, "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").

[45] 494 F.2d at 602, 604, and 608. However, it would be unlawful if the interception were conducted on a domestic group for law enforcement purposes. *Id.* at 606.

[46] 548 F.2d 871 (9th Cir. 1977), *cert. denied*, 439 U.S. 890 (1977).

[47] *Id.* at 875-76.

[48] 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

a national security threat.[49] The court further held that the appellants were entitled to the liquidated damages recovery provided in Title III unless appellees on remand establish an affirmative defense of good faith.[50] While its holding was limited to the facts before it, the plurality also noted that "an analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional."[51]

Surveillance for Foreign Intelligence Purposes. The Foreign Intelligence Surveillance Act of 1978 (FISA)[52] sought to strike a balance between national security interests and civil liberties. The legislation was a response both to the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (hereinafter the Church Committee) revelations of past abuses of electronic surveillance for national security purposes and to the somewhat uncertain state of the law on the issue. The Church Committee found that every President since Franklin D. Roosevelt had both asserted the authority to authorize warrantless electronic surveillance and had utilized that authority.[53] Concerns over abuses of such authority provided impetus to the passage of the legislation. As the Senate Judiciary Committee noted in its statement of the need for legislation:

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[49] 516 F.2d at 650-55.

[50] *Id.* at 659-73.

[51] *Id.* at 613-14. In the context of the its broad dictum, the court did not clarify what "exigent circumstances" might entail. The court explained its understanding of the distinction between "domestic" and "foreign" as follows:

> Throughout this opinion, "internal security" and "domestic security" will refer to threats to the structure or existence of the Government which originate directly from domestic organizations which are neither agents of nor acting in collaboration with foreign powers, and "internal security" or "domestic security" surveillance will refer to surveillance which is predicated on such threats. "Foreign security" will refer to threats to the structure or existence of the Government which emanate either directly or indirectly from a foreign power, and a "foreign security" surveillance will refer to surveillance which is predicated on such threats. A surveillance is a foreign security surveillance regardless of the stimulus that provoked the foreign power; thus the surveillance in this case will be treated as a foreign security surveillance even though the Soviet threats were provoked by actions of a hostile domestic organization. We believe such treatment is required by the limited holding of the Supreme Court in Keith. "National security" will generally be used interchangeably with "foreign security," except where the context makes it clear that it refers to both "foreign security" and "internal security."

Id. at 614 n.42 (internal citations omitted).

[52] Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

[53] *See* S. REP. NO. 95-604(I), at 7, 1978 U.S.C.C.A.N. 3904, 3908. The Senate Judiciary Committee report's "Background" section traces in some detail the history of Executive Branch wiretap practice from the 1930's (after the Supreme Court in *Olmstead* held that the Fourth Amendment did not apply to "intangible" conversations and therefore no warrant was necessary) to the time of the consideration of FISA. *See id.* at 9-15, 1978 U.S.C.C.A.N. at 3911-16. *Olmstead* was overruled by *Katz*, *see supra* note 30 and accompanying text. The report of the House Permanent Select Committee on Intelligence, in its "Background" section, also provides a detailed recitation on the subject in H. REP. NO. 95-1283 at 15-21.

> The need for such statutory safeguards has become apparent in recent years. This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused. . . . 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. In summarizing its conclusion that surveillance was "often conducted by illegal or improper means," the Church committee wrote:
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>> Since the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant . . . . . past subjects of these surveillances have included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. (Vol. 2, p.12)
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>> * * * *
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>> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information — unrelated to any legitimate government interest — about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. (Vol. 3, p. 32.)[54]

The Senate Judiciary Committee also focused on the potentially chilling effect of warrantless electronic surveillance upon the exercise of First Amendment rights:

> 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. Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. 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.[55]

The Senate Judiciary Committee stated that the bill 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," while permitting the legitimate use of electronic surveillance to obtain foreign intelligence information. Echoing the Church Committee, the Senate Judiciary Committee recognized that electronic surveillance has enabled intelligence agencies to obtain valuable and vital information

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[54] *Id.* at 7-8, 1978 U.S.C.C.A.N. at 3909.

[55] *Id.* at 8, 1978 U.S.C.C.A.N. at 3909-10.

relevant to their legitimate intelligence missions which would have been difficult to acquire by other means.[56]

Electronic Surveillance: The Current Statutory Framework

The interception of wire, oral, or electronic communications[57] is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), as amended.[58] Government surveillance for criminal law enforcement is permitted under certain circumstances and in accordance with the procedures set forth in Title III. Government surveillance for the gathering of foreign intelligence information is covered by FISA. These statutes are relevant to the analysis of the legality of the reported NSA surveillance to the extent that their provisions are meant to cover such surveillance, prohibit it, or explicitly exempt it from requirements therein. If Congress meant for FISA to occupy the entire field of electronic surveillance of the type that is being conducted pursuant to the President's executive order, then the operation may fall under the third tier of Justice Jackson's formula, in which the President's "power is at its lowest ebb" and a court could sustain it only by "disabling the Congress from acting upon the subject."[59] In other words, if FISA, together with Title III, were found to occupy the field, then for a court to sustain the President's authorization of electronic surveillance to acquire foreign intelligence information outside the FISA framework, FISA would have to be considered an unconstitutional encroachment on inherent presidential authority. If, on the other hand, FISA leaves room for the NSA surveillance outside its strictures, then the claimed power might fall into the first or second categories, as either condoned by Congress (expressly or implicitly), or simply left untouched.

Title III. Title III provides the means for the Attorney General and designated assistants to seek a court order authorizing a wiretap or similar electronic surveillance to investigate certain crimes (18 U.S.C. § 2516). Most other interceptions of electronic communications are prohibited unless the activity falls under an explicit exception. Under 18 U.S.C. § 2511, any person who "intentionally intercepts . . . any wire, oral, or electronic communication" or "intentionally uses . . . any electronic, mechanical, or other device [that transmits a signal over wire or radio frequencies, or is connected with interstate or foreign commerce] to intercept any oral communication," without the consent of at least one party to the conversation, is subject to punishment or liability for civil damages. The statute also prohibits the intentional disclosure of the contents of an intercepted communication. It prohibits attempts to engage in the prohibited conduct as well as solicitation of other persons to carry out such activity.

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[56] *Id.* at 8-9, 1978 U.S.C.C.A.N. at 3910.

[57] For definitions of "wire communications," "oral communications," and "electronic communications," see 18 U.S.C. § 2510(1), (2), and (12). The latter includes, with certain exceptions, the transfer of any signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic or photooptical system affecting interstate or foreign commerce.

[58] Pub. L. 90-351, 82 Stat. 211, codified as amended at 18 U.S.C. §§ 2510 *et seq.*

[59] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). *See supra* notes 10 *et seq.*, and accompanying text.

Certain exceptions in Title III apply to federal employees and other persons "acting under color of law,"[60] including exceptions for foreign intelligence acquisition. Section 2511 excepts officers, employees, and agents of the United States who, in the normal course of their official duty, conduct electronic surveillance pursuant to FISA (18 U.S.C. § 2511(2)(e)). Furthermore, Congress emphasized in § 1511(2)(f) that

> Nothing contained in [chapters 119 (Title III), 121 (stored wire or electronic surveillance or access to transactional records) or 206 (pen registers and trap and trace devices) of title 18, U.S. Code], or section 705 of the Communications Act of 1934,[61] 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 [119] 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.[62]

Title III does not define "international or foreign communications" or "domestic." It is unclear under the language of this section whether communications that originate outside the United States but are received within U.S. territory, or vice versa, were intended to be treated as foreign, international or domestic. Recourse to the plain meaning of the words provides

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[60] Title III also contains some exceptions for private parties, including communications service providers with respect to activity incident to the provision of such service (§ 2511(2)(a)), and for activity related to equipment maintenance and repair, prevention of fraud or unauthorized access, and protection from unlawful interference (§ 2511(2)(g)-(h)). Listening to broadcasts and electronic communications that are available to the general public and not encrypted, such as police band radio, is not prohibited (§ 2511(2)(g)).

[61] 47 U.S.C. § 605 ("[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception. . . .").

[62] 18 U.S.C. § 2511(2)(f), added by the Foreign Intelligence Surveillance Act of 1978 (FISA), § 201(b), Pub. L. 95-511, 92 Stat. 1783. Prior to this amendment, the section read:

> Nothing contained in this chapter, or section 605 [now 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 by 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 wire and oral communications may be conducted.

The Electronic Communications Privacy Act, Pub. L. 99-508, § 101(c)(1)(A), substituted "wire, oral, or electronic communication" for "wire or oral communications." Pub. L. 99-508, § 101(b)(3), added the references to "chapter 121," which deals with stored wire and electronic communications and access to transactional records. That subsection also substituted "foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means" for "foreign communications by a means."

some illumination. *Webster's New Collegiate Dictionary* (1977), in pertinent part, defines "international" to mean "affecting or involving two or more nations" or "of or relating to one whose activities extend across national boundaries." Therefore, "international communications" might be viewed as referring to communications which extend across national boundaries or which involve two or more nations. "Foreign" is defined therein, in pertinent part, as "situated outside a place or country; *esp* situated outside one's own country." Thus, "foreign communications" might be interpreted as referring to communications taking place wholly outside the United States. "Domestic" is defined, in pertinent part, in *Webster's* to mean "of, relating to, or carried on within one and esp. one's own country." Therefore, "domestic communications" may be defined as communications carried on within the United States.

The phrase "utilizing a means other than electronic surveillance [under FISA]" could be interpreted as modifying only the clause immediately before it or as modifying the previous clause as well. If it is read not to pertain to the clause regarding acquisition of intelligence from foreign or international communications, then Title III and the other named statutes would not affect the interception of foreign and international communications, whether they are acquired through electronic surveillance within the meaning of FISA or through other means. The legislative history does not support such a reading, however, for two reasons. First, the second clause, relating to intelligence activities involving foreign electronic communications systems,[63] was inserted into the law in 1986 between the first clause and the modifying phrase.[64] It is thus clear that the modifier initially applied to the first clause, and nothing in the legislative history suggests that Congress intended to effect such a radical change as exempting any electronic surveillance involving communications covered by FISA from the procedures required therein. Second, this conclusion is bolstered by the last sentence of the subsection, which specifies that the methods authorized in FISA and the other statutes are to be the exclusive methods by which the federal government is authorized to intercept electronic communications. Whether given communications are covered by the exclusivity language would require an examination of the definitions of covered communications in Title III and in FISA.[65]

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[63] The statute does not explain whether "involving a foreign electronic communications system" encompasses only communications that are transmitted and received without ever traversing U.S. wires, cables, or broadcasting equipment, or whether a communication carried primarily by a U.S. carrier that is at any point routed through a non-U.S. communication system "involves" the foreign system. Either way, the interception would have to be carried out pursuant to "otherwise applicable Federal law."

According to the Senate Judiciary Committee, the language was meant

> to clarify that nothing in chapter 119 as amended or in proposed chapter 121 affects existing legal authority for U.S. Government foreign intelligence activities involving foreign electronic communications systems. The provision neither enhances nor diminishes existing authority for such activities; it simply preserves the status quo. It does not provide authority for the conduct of any intelligence activity.

S. REP. NO. 99-541, at 18 (1986). "Proposed chapter 121" refers to FISA.

[64] Electronic Communications Privacy Act of 1986 § 101(b)(3), Pub. L. 99-508, 100 Stat. 1848 (1986).

[65] *See infra* section defining "electronic surveillance."

As originally enacted, § 2511 contained what appeared to be a much broader exception for national security intercepts. It excluded from the coverage of Title III surveillance carried out pursuant to the "constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack . . ., [and] to obtain foreign intelligence information deemed essential to the security of the United States. . . .[66] Congress repealed this language when it enacted FISA, and inserted § 2511(2)(f), *supra*, to make the requirements of Title III or FISA the exclusive means to authorize electronic surveillance within the United States, and to "put[] 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 chapters 119 and 120 [of title 18, U.S. Code]."[67] Subsection (2)(f) was intended to clarify that the prohibition does not cover NSA operations (as they were then being conducted) and other surveillance overseas, including that which targets U.S. persons.[68]

FISA. The Foreign Intelligence Surveillance Act (FISA) provides a framework for the use of "electronic surveillance," as defined in the Act,[69] and other investigative methods[70] to

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[66] 82 Stat. 214, formerly codified at 18 U.S.C. § 2511(3). The Supreme Court interpreted this provision not as a conferral or recognition of executive authority, but rather, as an indication that Congress had "left presidential powers where it found them." United States v. United States District Court, 407 U.S. 297, 303 (1972). The Senate Judiciary Committee noted, however, that the "highly controversial disclaimer has often been cited as evidence of a congressional ratification of the president's inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security." S. REP. NO. 95-604(I), at 6-7 (1978).

[67] S. REP. NO. 95-604(I), at 64 (1978). Further, the Committee stated, "[a]s to methods of acquisition *which come within the definition of 'electronic surveillance'* in this bill, the Congress has declared that this statute, not any claimed presidential power, controls." *Id.* (emphasis added). The reference to chapter 120 of Title 18, U.S.C., in the report language quoted in the text above is to the foreign intelligence provisions in S. 1566, which became FISA. The Senate version of the measure would have included the foreign intelligence surveillance provisions as a new chapter 120 of Title 18, U.S. Code.

[68] The Senate Judiciary Committee explained that the provision was designed "to make clear 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(I), at 64 (1978). The Senate Select Committee on Intelligence echoed this understanding. S. REP. NO. 95-701, at 71 (1978). While legislation then pending that would have regulated these types of operations was not enacted (S. 2525, 95th Cong.), Congress established oversight over such intelligence activities through a review of relevant executive branch procedures and regulations by the House and Senate Intelligence Committees. *See* S. REP. NO. 99-541, at 18 (1986) ("As in the past, the Senate expects that any relevant changes in these procedures and regulations will be provided to the Senate and House Intelligence Committees prior to their taking effect."). The President is also required to report "illegal intelligence activity" to the intelligence committees, 50 U.S.C. § 413(b). "Illegal intelligence activity" is undefined, but legislative history suggests it includes activities that violate the Constitution, statutes, or Executive orders. *See* S. REP. NO. 102-85, at 31 (1991) (explaining that the definition of "illegal intelligence activity" was not changed from the previous version of § 413).

[69] See discussion of the scope of "electronic surveillance" under FISA in the next section of this memorandum, *infra*.

[70] FISA also authorizes the use for foreign intelligence purposes of physical searches, 50 U.S.C. §

(continued...)

acquire foreign intelligence information.[71] In pertinent part, FISA provides a means by which the government can obtain approval to conduct electronic surveillance of a foreign power or its agents without first meeting the more stringent standard in Title III that applies to criminal investigations. While Title III requires a showing of probable cause that a proposed target has committed, is committing, or is about to commit a crime, FISA requires a showing of probable cause to believe that the target is a foreign power or an agent of a foreign power.

In the aftermath of the September 11, 2001, terrorist attacks on the United States, Congress amended FISA so that it no longer requires a certification that the (primary) purpose of a search or surveillance is to gather foreign intelligence information.[72] As amended by the USA PATRIOT Act,[73] FISA requires that a "significant purpose" of the investigation be the collection of foreign intelligence information, which has been interpreted

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[70] (...continued)
1821 *et seq.*; pen registers and trap and trace devices, 50 U.S.C. § 1842 *et seq.*; and orders for production of business records or any tangible thing "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."

[71] "Foreign intelligence information" is defined in FISA, 50 U.S.C. § 1801(e), to mean:

> (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; or
> (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —
> (A) the national defense or the security of the United States; or
> (B) the conduct of the foreign affairs of the United States.

[72] *See* CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance*. "Foreign intelligence information" is defined in 50 U.S.C. § 1801(e) to mean:

> (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; or
> (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —
> (A) the national defense or the security of the United States; or
> (B) the conduct of the foreign affairs of the United States.

[73] P.L. 107-56 § 218.

to expand the types of investigations that may be permitted to include those in which the primary purpose may be to investigate criminal activity, as long as there is at least a measurable purpose related to foreign intelligence gathering.[74] Congress later enacted a measure that removed, for a time,[75] the requirement for the government to show that the intended target, if a non-U.S. person, is associated with a foreign power.[76]

Electronic Surveillance Under FISA. Whether FISA applies to the electronic surveillances at issue turns in large part on the definition of "electronic surveillance" under FISA. To constitute "electronic surveillance" under FISA, the surveillance must fall within one of four categories set forth in 50 U.S.C. § 1801(f), FISA. These include:

> (1) 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[77] 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;
> (2) 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;
> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement

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[74] *See In re* Sealed Case, 310 F.3d 717, 735 (U.S. Foreign Intell. Surveillance Ct. Rev. 2002) ("The addition of the word 'significant' to section 1804(a)(7)(B) imposed a requirement that the government have a measurable foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes.").

[75] This amendment, added by section 6001 of the Intelligence Reform and Terrorism Prevention Act, Pub. L. 108-458, 118 Stat. 3742 (2004), is subject to the sunset provision of the USA PATRIOT Act. *See* CRS Report RL32186, *USA PATRIOT Act Sunset: Provisions That Expire on December 31, 2005*, by Charles Doyle.

[76] See CRS Report RS22011, *Intelligence Reform and Terrorism Prevention Act of 2004: 'Lone Wolf' Amendment to the Foreign Intelligence Surveillance Act*, by Elizabeth B. Bazan.

[77] "United States person" is defined in 50 U.S.C. § 1801(i) to mean:

> (i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

Under the definition of "foreign power" in 50 U.S.C. § 1801(a), the foreign powers defined in subsections 1801(a)(1), (2), or (3) are either foreign governments or components thereof, factions of a foreign nation or foreign nations which are not substantially composed of U.S. persons, or entities openly acknowledged by a foreign government or governments to be directed and controlled by that government or those governments. These three subsections of the "foreign power" definition do not include international terrorist organizations. *See infra* note 87 for the full definition of "foreign power" under 50 U.S.C. § 1801(a).

> purposes, and if both the sender and all intended recipients are located within the United States; or
> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.[78]

The legislative history of the Act suggests that some electronic surveillance by the National Security Agency involving communications taking place entirely overseas, even involving U.S. persons, was not intended to be covered.[79] At the same time, FISA was clearly meant to cover some communications even if one party to the communication is overseas. The interception of wire or radio communications sent by or intended to be received by a targeted United States person[80] in the United States is covered under 50 U.S.C.

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[78] With respect to the ability of FISA to keep pace with the rapidly changing level of communications technology, it is possible that 50 U.S.C. § 1801(f)(3) and (4) may provide some or all of the needed statutory flexibility. *See, e.g.,* S. REP. NO. 95-604(I) at 34-35, 1978 U.S.C.C.A.N. at 3936, discussing the congressional intent that subsection 1801(f)(4) was intended to be "broadly inclusive, because the effect of including a particular means of surveillance is not to prohibit it but to subject it to judicial oversight." Thus, it was intended to include "the installation of beepers and 'transponders,' if a warrant would be required in the ordinary criminal context. . . . It could also include miniaturized television cameras and other sophisticated devices not aimed merely at communications." *Id. See* United States v. Andonian, 735 F. Supp. 1469, 1473 (C.D. Cal. 1990), *aff'd and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

[79] For example, in discussing the definition of "electronic surveillance," in H.R. 7308, the House Permanent Select Committee on Intelligence stated,

> Therefore, this bill does not afford protections to U.S. persons who are abroad, nor does it regulate the acquisition of the contents of international communications of U.S. persons who are in the United States, where the contents are acquired unintentionally. The committee does not believe that this bill is the appropriate vehicle for addressing this area. The standards and procedures for overseas surveillance may have to be different than those provided in this bill for electronic surveillance within the United States or targeted against U.S. persons who are in the United States.
>
> The fact that this bill does not bring the overseas surveillance and activities of the U.S. intelligence community within its purview, however, should not be viewed as congressional authorization of such activities as they affect the privacy interests of Americans. The committee merely recognizes at this point that such overseas surveillance activities are not covered by this bill. In any case, the requirements of the fourth amendment would, of course, continue to apply to this type of communications intelligence activity.

H. REP. NO. 95-1283(I), at 50-51 (June 5, 1978). The House passed H.R. 7308, amended (Roll No. 737), 124 *Cong. Rec.* 28427 (Sept. 7, 1978). Then the House passed S. 1566, having stricken all but the enacting clause of S. 1566 and having inserted in lieu thereof the text of S. 7308. H.R. 7308 was laid on the table, 124 *Cong. Rec.* 28427-28432 (Sept. 7, 1978).

[80] The House Permanent Select Committee on Intelligence described the import of "intentionally targeting" in the context of subsection (1) of the definition of "electronic surveillance" as follows:

> Paragraph (1) protects U.S. persons who are located in the United States from being

(continued...)

§ 1801(f)(1). The interception of international wire[81] communications to or from *any* person (whether or not a U.S. person) within the United States without the consent of at least one party is covered under § 1801(f)(2), where the communications are acquired within the United States. The interception of a radio communication is covered under § 1801(f)(3) if all parties to it are located within the United States, unless there is no reasonable expectation of privacy and a warrant would not be required under Title III, even if the interception is acquired by using a device located outside of the United States. The interception of wire, oral, or electronic communications that is not included within the definition of "electronic surveillance" for the purposes of FISA may nevertheless be prohibited by or subject to a warrant requirement pursuant to 18 U.S.C. § 2511 (Title III).

In discussing the repeal in the conforming amendments to FISA of the "national security disclaimer" in former 18 U.S.C. § 2511(3), and the addition of 18 U.S.C. § 2511(f) in the conforming amendments in S. 1566, the Senate Judiciary Committee observed:

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[80] (...continued)

> targeted in their domestic or *international* communications without a court order no matter where the surveillance is being carried out. The paragraph covers the acquisition of the contents of a wire or radio communication of a U.S. person by intentionally targeting that particular, known U.S. person, provided that the person is located within the United States. Thus, for example, any watchlisting activities of the National Security Agency conducted in the future, directed against the international communications of particular U.S. persons who are in the United States, would require a court order under this provision.
>
> Only acquisition of the contents of those wire or radio communications made with a reasonable expectation of privacy where a warrant would be required for law enforcement purposes is covered by paragraph (1). It is the committee's intent that acquisition of the contents of a wire communication, without the consent of any party thereto, would clearly be included.
>
> The term "intentionally targeting" a particular, known U.S. person who is in the United States includes the deliberate use of a surveillance device to monitor a specific channel of communication which would not be surveilled but for the purpose of acquiring information about a party who is a particular, named U.S. person located within the United States. It also includes the deliberate use of surveillance techniques which can monitor numerous channels of communication among numerous parties, where the techniques are designed to select out from among those communications the communications to which a particular U.S. person located in the United States is a party, and where the communications are selected either by name or by other information which would identify the particular person and would select out his communications.
>
> This paragraph does not apply to the acquisition of the contents of international or foreign communications, where the contents are not acquired by intentionally targeting a particular known U.S. person who is in the United States. . . .

H. REP. NO. 95-1283(I), at 50-51 (June 8, 1978) (emphasis in original).

[81] "Wire communication" means "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." 50 U.S.C. § 1801(l).

> Specifically, this provision 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[82] and electronic surveillance conducted outside the United States. As to methods of acquisition which come within the definition of 'electronic surveillance' in this bill, the Congress has declared that this statute, not any claimed presidential power, controls.[83]

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[82] The legislative history of FISA reflects serious concerns about the past NSA abuses reflected in the Church Committee reports. *See, e.g.*, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK III, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, UNITED STATES SENATE, S. REP. NO. 94-755, 94th Cong., 2d Sess., at 733-86 (1976), *cited in* S. REP. NO. 95-604(I) at 34 n. 39, 1978 U.S.C.C.A.N. at 3936. Some actions had been taken to address some of these concerns by the President and the Attorney General near the time that FISA was being considered. The decision not to cover NSA activities "as they were then being conducted" in FISA may, in part, have been an acknowledgment of constraints that had been imposed upon some of these practices in E.O. 11905 (Feb. 18, 1976), *cited in* S. REP. NO. 95-604(I) at 34 n. 40, 1978 U.S.C.C.A.N. at 3936; and in the "substantial safeguards [then] currently embodied in classified Attorney General procedures, " H. REP. NO. 95-1283 at 21. In addition, S. 2525 (95th Cong.) was then pending, which, had it passed, would have addressed those areas excluded from FISA in separate legislation. The House Permanent Select Committee also noted the value of congressional oversight in adding an additional safeguard. Nevertheless, the Committee deemed these protections insufficient without the statutory structure in FISA:

> In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties. This committee is well aware of the substantial safeguards respecting foreign intelligence electronic surveillance currently embodied in classified Attorney General procedures, but this committee is also aware that over the past thirty years there have been significant changes in internal executive branch procedures, ant there is ample precedent for later administrations or even the same administration loosening previous standards. Even the creation of intelligence oversight committee should not be considered a sufficient safeguard, for in overseeing classified procedures the committees respect their classification, and the result is that the standards for and limitations on foreign intelligence surveillances may be hidden from public view. In such a situation, the rest of the Congress and the American people need to be assured that the oversight is having its intended consequences–the safeguarding of civil liberties consistent with the needs of national security. While oversight can be, and the committee intends it to be, an important adjunct to control of intelligence activities, it cannot substitute for public laws, publicly debated and adopted, which specify under what circumstances and under what restrictions electronic surveillance for foreign intelligence purposes can be conducted.
>
> Finally, 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. NO. 95-1283, at 21-22.

[83] S. REP. NO. 95-604(I) at 62-65, 1978 U.S.C.C.A.N. at 3964-66. *See also* S. REP. NO. 95-701 at

(continued...)

At the same time, the Committee signaled its intent to reserve its option to regulate U.S. electronic surveillance operations that did not fall within the ambit of FISA:

> The activities of the National Security Agency pose particularly difficult conceptual and technical problems which are not dealt with in this legislation. Although many on the committee are of the opinion that it is desirable to enact legislative safeguards for such activity, the committee 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. This language insures that certain electronic surveillance activities targeted against international communications for foreign intelligence purposes will not be prohibited absolutely during the interim period when these activities are not regulated by chapter 120 and charters for intelligence agencies and legislation regulating international electronic surveillance have not yet been developed.[84]

FISA Exceptions to Requirement for Court Order. Three current provisions of FISA provide for some measure of electronic surveillance without a court order to gather foreign intelligence information in specified circumstances, 50 U.S.C. §§ 1802 (electronic surveillance of certain foreign powers without a court order upon Attorney General certification);[85] 1805(f) (emergency authorization of electronic surveillance for up to 72

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[83] (...continued)
71-72, 1978 U.S.C.C.A.N. at 4040-41.

[84] *Id.*

[85] 50 U.S.C. § 1802 provides:

> (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

(continued...)

hours, while an order approving such surveillance is sought from a judge of the Foreign

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[85] (...continued)

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.

(b) Applications for a court order under this subchapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under section 1803 of this title, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 1805 of this title, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) of this section unless such surveillance may involve the acquisition of communications of any United States person.

Intelligence Surveillance Court (FISC));[86] and 1811 (electronic surveillance without a court order for 15 days following a declaration of war by the Congress).

In particular, 50 U.S.C. § 1802 permits the Attorney General to order electronic surveillance without a court order for up to one year to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that the electronic surveillance is solely directed at means of communications used exclusively between or among foreign powers or on property or premises under the open and exclusive control of a foreign power (the definition here does not include international terrorist organizations)[87] where "there is no substantial likelihood that the surveillance will

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[86] The emergency authorization provision in 50 U.S.C. § 1805(f) states:

> (f) Emergency orders
> Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that —
> (1) 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; and
> (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;
> he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

[87] "Foreign power" for purposes of electronic surveillance under FISA is defined in 50 U.S.C. § 1801(a)(1) through (6) as:

> (1) a foreign government or any component thereof, whether or not recognized by the United States;
> (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
> (3) an entity that is openly acknowledged by a foreign government or governments to be

(continued...)

acquire the contents of any communication to which a United States person is a party;" and minimization procedures are put in place.[88] The Attorney General is also required to report minimization procedures to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence 30 days in advance. The 30-day requirement can be waived if the Attorney General determines immediate action is required, in which case he is to notify the committees immediately of the minimization procedures and the reason for the urgency. The FISA court is to receive a copy of the certifications under seal.

The emergency authorization provision in 50 U.S.C. § 1805(f) authorizes the Attorney General to issue emergency orders to permit electronic surveillance prior to obtaining a court order if the Attorney General determines that emergency conditions make it impossible to obtain an order with due diligence before the surveillance is begun. The Attorney General or his designee must immediately inform a FISA judge and submit a proper application to that judge as soon as practicable, but not more than 72 hours[89] after the Attorney General authorizes such surveillance. Minimization procedures must be followed. In the absence of a judicial order, the surveillance must terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time the surveillance was authorized. No information obtained or evidence derived from such surveillance may be used as evidence or otherwise disclosed in any trial, hearing, or other government proceeding, and no information concerning any U.S. person may be disclosed at all without that person's consent except with the Attorney General's approval where the information indicates a threat of disaster or serious bodily harm to any person.

Where Congress has passed a declaration of war, 50 U.S.C. § 1811 authorizes the Attorney General to conduct electronic surveillance without a court order for fifteen calendar days following a declaration of war by Congress. This provision does not appear to apply to the AUMF, as that does not constitute a congressional declaration of war.[90] Indeed, even if the authorization were regarded as a declaration of war, the authority to conduct

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[87] (...continued)

directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

However, for the purpose of § 1802, only subsections 1801(a)(1) through (3) are included.

[88] "Minimization procedures" are specific procedures implemented with respect to a particular surveillance in order to minimize the acquisition and retention, and prohibit the dissemination, of information concerning unconsenting U.S. persons required to be protected. *See* 50 U.S.C. § 1801(h).

[89] Section 314(a)(2)(B) of P.L. 107-108, the Intelligence Authorization Act for Fiscal Year 2002, 115 Stat. 1402 (Dec. 28, 2001), H.Rept. 107-328, replaced 24 hours with 72 hours in each place that it appears in 50 U.S.C. § 1805(f).

[90] For a discussion of declarations of war and authorizations for the use of military force, see CRS Report for Congress RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by David M. Ackerman and Richard F. Grimmett.

warrantless electronic surveillance under 50 U.S.C. § 1811 would only extend to a maximum of 15 days following its passage.[91]

The Administration's Position

The Administration's position, as set forth in the Office of Legislative Affairs letter to the leaders of the House and Senate intelligence Committees, is that the President has the constitutional authority to direct the NSA to conduct the activities he described, and that this inherent authority is supplemented by statutory authority under the AUMF.[92] The Administration interprets the AUMF, based on its reading of the Supreme Court opinion in *Hamdi*,[93] as authorizing the President to conduct anywhere in the world, including within the United States, any activity that can be characterized as a fundamental incident of waging war. It includes communications intelligence among the fundamental incidents of waging war. The following sections analyze the extent to which the President's authority to conduct warrantless electronic surveillance is inherent, whether the AUMF authorizes the operations,[94] and whether the NSA operations are consistent with FISA and Title III.[95]

The President's Inherent Authority to Conduct Intelligence Surveillance. The statutory language in FISA and the legislative history of the bill that became FISA, S. 1566 (95th Cong.), reflect the Congress's stated intention to circumscribe any claim of inherent presidential authority to conduct electronic surveillance, as defined by the Act, to collect foreign intelligence information, so that FISA would be the exclusive mechanism for the conduct of such electronic surveillance. Thus, in the conforming amendments section of the legislation, the previous language explicitly recognizing the President's inherent authority was deleted from 18 U.S.C. § 2511(3), and the language of 18 U.S.C. § 2511(f) was added to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, which states, in part, that "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 that Act, and the interception of domestic wire, oral, and electronic communications may be conducted."[96] The House amendments to the

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[91] This provision originated in the House version of the bill, which would have allowed the President to authorize electronic surveillance for periods up to a year during time of war declared by Congress. The conference substituted a compromise provision authorizing electronic surveillance without a court order to acquire foreign intelligence information for 15 days following a declaration of war. H.R. CONF. REP. NO. 95-1720, at 34 (1978). The 15-day period was intended to "allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency." *Id.* The conferees also expressed their intent that "all other provisions of this act not pertaining to the court order requirement shall remain in effect during this period." *Id.*

[92] OLA Letter, *supra* note 10, at 2.

[93] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[94] *See* OLA Letter, *supra* note 10, at 3 ("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.").

[95] We do not address the Administration's argument that the NSA electronic surveillance at issue is compatible with the Fourth Amendment. For analysis pertinent to that issue, see *supra* section on the Background of Government Surveillance.

[96] For further discussion of the pertinent provisions of Title III, see the discussion at notes 54 *et seq.*

(continued...)

bill provided that the procedures in the bill and in 18 U.S.C., Chapter 119 (Title III), were to be the exclusive "statutory" means by which electronic surveillance as defined in the bill and the interception of domestic wire and oral communications may be conducted, while the Senate bill did not include the word "statutory." The House Conference Report, in accepting the Senate approach, stated, in part, 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 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).[97]

In this language, the conferees acknowledge that the U.S. Supreme Court, as the final arbiter of constitutional power, might reach a different conclusion. The Court has yet to rule on the matter.[98]

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[96] (...continued)
and accompanying text.

[97] H. CONF. REP. NO. 95-1720, at 35, 1978 U.S.C.C.A.N. at 4064 (Oct. 5, 1978); *see also* S. REP. NO. 95-604(I) at 62-65, 1978 U.S.C.C.A.N. at 3964-66; S. REP. NO. 95-701 at 71-72, 1978 U.S.C.C.A.N. at 4040-41.

[98] However, some lower court decisions provide significant support for the argument that the exclusivity provision circumscribes the President's use of inherent authority to engage in electronic surveillance to collect foreign intelligence information outside the FISA structure. *See, e.g.*, United States v. Andonian, 735 F. Supp. 1469 (C.D. Cal. 1990), *aff'd and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). The *Andonian* court found that the exclusivity language in FISA

> reveals that Congress intended to sew up the perceived loopholes through which the President had been able to avoid the warrant requirement. The exclusivity clause makes it impossible for the President to 'opt-out' of the legislative scheme by retreating to his 'inherent' Executive sovereignty over foreign affairs. At the time of the drafting of FISA, such a retreat would have meant completely unfettered use of electronic surveillance in the foreign affairs arena, as the Supreme Court had twice declined to hold such Executive action captive to the warrant requirement [citing *Keith*, 407 U.S. 297, *Katz*, 389 U.S. at 358, n. 23, and S. REP. NO. 95-604[(I)] at 12-14, 1978 U.S.C.C.A.N. at 3913-16]. . . . The exclusivity clause in 18 U.S.C. section 2511(2)(f) assures that the President cannot avoid Congress' limitations by resort to 'inherent' powers as had President Truman at the time of the 'Steel Seizure Case.' Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952). . . . The difficulty in the case was due to Congressional silence. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives and events and contemporary imponderables rather than on abstract theories of law. . . . To foreclose the arguments which piqued the Court in Youngstown, Congress denied the President his inherent powers outright. Tethering executive reign, Congress deemed

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The passage of FISA and the inclusion of such exclusivity language reflects Congress's view of its authority to cabin the President's use of any inherent constitutional authority with respect to warrantless electronic surveillance to gather foreign intelligence. The Senate Judiciary Committee articulated its view with respect to congressional power to tailor the President's use of an inherent constitutional power:

> 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.[99]

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[98] (...continued)

> that the provisions for gathering intelligence in FISA and Title III were 'exclusive.'

Id. at 1474-76. *Cf.*, United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982). The court stated that

> FISA is the fifth legislative attempt since the Watergate era to bridle the Executive's 'inherent' power. Congress believes that FISA has provided a '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.' . . . The Act received broad support in Congress and from the then Attorney General Griffin Bell and President Carter. . . . When, therefore, the President has, as his primary purpose, the accumulation of foreign intelligence information, his exercise of Article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping. While the executive power to conduct foreign affairs exempts the President from the warrant requirement when foreign surveillance is conducted, the President is not entirely free of the constraints of the Fourth Amendment. The search and seizure resulting from the surveillance must still be reasonable. With the enactment of FISA, . . . Congress has fashioned a statute for foreign surveillance that fully comports with the Fourth Amendment.

Id. at 1311-12. *See* United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000). The court noted that

> All of the circuit cases finding a foreign intelligence exception [to the warrant requirement] arose before the enactment of FISA (which sets forth procedures for foreign intelligence collection, *see* 50 U.S.C. § 1801 *et seq.*) and are probably now governed by that legislation. FISA only governs foreign intelligence searches conducted within the United States. See 50 U.S.C. §§ 1801(f)(1-4), 1803(a), 1821(5), 1822(c).

Id. at 272 n. 8.

[99] S. REP. NO. 95-604(I), at 16, 1978 U.S.C.C.A.N. at 3917. *See also* Attorney General Bell's testimony with respect to the Administration's position, *id.* at 4, 1978 U.S.C.C.A.N. at 3905-06; S. REP. NO. 95-701, at 6-7, 1978 U.S.C.C.A.N. at 3975. The need to comply with FISA for the collection of foreign intelligence information through electronic surveillance is reiterated in E.O. 12333 ("United States Intelligence Activities" (December 4, 1981), as amended), Section 2.5, dealing with Attorney General approval required for certain collection techniques:

> 2.5 Attorney General Approval. The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United

(continued...)

On the other hand, the Administration asserts constitutional authority under Article II of the Constitution, including his Commander-in-Chief authority, to order warrantless foreign intelligence surveillance within the United States:

> This constitutional 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 . . . .").[100]

The U.S. Foreign Intelligence Surveillance Court of Review (Court of Review) was created by FISA, 50 U.S.C. § 1803, and has appellate review over denials of FISA applications by the Foreign Intelligence Surveillance Court which was also established under that section. Denials of such applications by the Court of Review may be appealed to the U.S. Supreme Court. The Court of Review has decided only one published case, which is cited by the Administration above. The case was not appealed to the U.S. Supreme Court. As the 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 considerable weight.

The Court of Review, in its opinion, make two references which appear pertinent to the Administration's position. The first statement, which is cited by the Administration, was made by the Court of Review, in *In re Sealed Case*,[101] in its discussion of the constitutionality of FISA and its exploration of the underlying rationale of the "primary purpose" test as articulated in *United States v. Truong Dinh Hung*,[102] (which dealt with a pre-FISA surveillance). The Court of Review, in this portion of its constitutional analysis, was considering whether the primary purpose of a FISA electronic surveillance must be to gather foreign intelligence information in order for it to pass constitutional muster. *Truong* saw such a standard as a constitutional minimum. In assessing and rejecting the *Truong* approach, the Court of Review stated:

> It will be recalled that the case that set forth the primary purpose test *as constitutionally required* was *Truong*. The Fourth Circuit thought that *Keith*'s balancing standard implied the adoption of the primary purpose test. We reiterate that *Truong* dealt with a pre-FISA surveillance based on the President's constitutional responsibility to conduct the foreign affairs of the United States. 629 F.2d at 914. Although *Truong* suggested the line it drew was a constitutional minimum that would apply to a FISA surveillance, *see id.* at 914 n.

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[99] (...continued)

> States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978, shall be conducted in accordance with that Act, as well as this Order.

[100] OLA Letter, *supra* note 10, at 2.

[101] 310 F.3d 717 (U.S. Foreign Intell. Surveillance Ct. Rev. 2002).

[102] 629 F.2d 908 (4th Cir. 1980).

> 4, it had no occasion to consider the application of the statute carefully. The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. It was incumbent upon the court, therefore, to determine the boundaries of that constitutional authority in the case before it. *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.* 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.[103]

While the Court of Review does not cite to the cases to which it is referring, its allusion to the holdings of "all the other courts to have considered the issue," appears to have been to cases which pre-date FISA's passage or which address pre-FISA surveillances.[104] Such cases dealt with a presidential assertion of inherent authority in the absence of congressional action to circumscribe that authority. Where the Congress has exercised its constitutional authority

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[103] 310 F.3d at 742 (emphasis added).

[104] *Id.* at 742, n. 26; *cf.*, United States v. Duggan, 743 F.2d 59, 71 (2d Cir. 1984) ("Prior to the enactment of FISA, virtually every court that had addressed the issue had concluded that the President had the inherent power to conduct warrantless electronic surveillance to collect foreign intelligence information, and that such surveillances constituted an exception to the warrant requirement of the Fourth Amendment. *See* United States v. Truong Dinh Hung, 629 F.2d 908, 912-14 (4th Cir.1980), *cert. denied*,454 U.S. 1144 (1982); United States v. Buck, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir.) (en banc), *cert. denied*,419 U.S. 88 (1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). *But see* Zweibon v. Mitchell, 516 F.2d 594, 633-51 (D.C. Cir. 1975) (dictum), *cert. denied*, 425 U.S. 944 (1976). The Supreme Court specifically declined to address this issue in *United States v. United States District Court*, 407 U.S. 297, 308, 321-22 (1972) (hereinafter referred to as "*Keith*"), but it had made clear that the requirements of the Fourth Amendment may change when differing governmental interests are at stake, *see* Camara v. Municipal Court, 387 U.S. 523 (1967), and it observed in *Keith* that the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations. 407 U.S. at 321-24, 92 S.Ct. at 2138-40."); *Truong Dinh Hung*, 629 F.2d at 914 ("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. *See* First National Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765-68, 92 S.Ct. 1808, 1812-1814, 32 L.Ed.2d 466 (1972); Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 310, 62 L.Ed. 726 (1918). The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. See United States v. Curtiss-Wright Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, 407 U.S. at 316-18, 92 S.Ct. at 2136-2137, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance. In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. Accord, United States v. Butenko, 494 F.2d 593 (3 Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974); United States v. Brown, 484 F.2d 418 (5 Cir. 1973), cert. denied, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974); United States v. Clay, 430 F.2d 165 (5 Cir. 1970), *rev'd on other grounds*, 403 U.S. 698, 91 S.Ct. 2068, 29 L.Ed.2d 810 (1971). *Contra*, Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir.1975) (dictum in plurality opinion in case involving surveillance of domestic organization having an effect on foreign relations but acting neither as the agent of nor in collaboration with a foreign power).").

in the areas of foreign affairs and thereby has withdrawn electronic surveillance, as defined by FISA, from the "zone of twilight," between Executive and Legislative constitutional authorities, it might be argued that the President's asserted inherent authority to engage in warrantless electronic surveillance was thereby limited. In the wake of FISA's passage, the Court of Review's reliance on these pre-FISA cases or cases dealing with pre-FISA surveillances as a basis for its assumption of the continued vitality of the President's inherent constitutional authority to authorize warrantless electronic surveillance for the purpose of gathering foreign intelligence information might be viewed as somewhat undercutting the persuasive force of the Court of Review's statement.

The second reference to the "President's inherent constitutional authority" in *In re Sealed Case* is in the conclusion to the opinion. Here the Court of Review makes an oblique reference to the President's inherent authority:

> 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 surveillances it authorizes are reasonable.[105]

The latter statement was made in support of the Court of Review's conclusion that the procedures for electronic surveillance to gather foreign intelligence information under FISA, as amended by the USA PATRIOT Act, Pub. L. 107-56, were constitutionally sufficient under Fourth Amendment standards, whether the court orders under FISA were viewed as warrants for Fourth Amendment purposes or not. While not an explicit recognition of presidential inherent constitutional authority, it might be argued that, when viewed in light of the earlier statement, some level of recognition of that authority might also be inferred from this reference.

Both statements were made in a case in which the Court of Review upheld the constitutionality of FISA, an act which, in express legislative language in its conforming amendments to Title III and in its legislative history, was clearly intended to cabin any inherent presidential authority over electronic surveillance within its sweep, and to provide an exclusive structure for the conduct of such electronic surveillance. It might be argued that the adoption of one of two possible interpretations of the statement would avoid internal inconsistency within the court's decision. One approach would be to interpret these statements by the Court of Review as referring to the President's inherent authority to conduct such surveillances outside the scope of "electronic surveillance" under FISA. In essence, the court's statements would then be seen as a reference to presidential authority over those areas of NSA activities which were intentionally excluded from FISA when it was enacted. Alternatively, it might be argued that the court's statements may refer to continuing exercise of inherent presidential authority within the FISA structure, which the Court of Review found to be constitutional.

In light of the exclusivity language in Title III, 18 U.S.C. § 2511(2)(f) and the legislative history of FISA, it might be argued that electronic surveillance pursuant to FISA is subject to the statutory framework, and does not rely upon an assertion of Presidential inherent authority to support it. Alternatively, it might be contended that, in enacting FISA, the

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[105] 310 F.3d at 746.

Congress circumscribed the manner in which the President might exercise his inherent constitutional authority with respect to foreign intelligence electronic surveillance, rather than eliminating the President's authority.

As this discussion suggests, while the congressional intent to cabin the President's exercise of any inherent constitutional authority to engage in foreign intelligence electronic surveillance may be clear from the exclusivity provision in FISA and from the legislative history of the measure, some support may be drawn from the Court of Review's decision in *In re Sealed Case* for the position that the President continues to have the power to authorize warrantless electronic surveillance to gather foreign intelligence outside the FISA framework. Whether such authority may exist only as to those areas which were not addressed by FISA in its definition of "electronic surveillance" or is of broader sweep appears to be a matter with respect to which there are differing views.

The Authorization to Use Military Force. In the aftermath of the September 11, 2001, attacks, 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 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.[106]

Pursuant to that authority, the President ordered U.S. armed forces to invade Afghanistan for the purpose of rooting out Al Qaeda terrorists and toppling the Taliban government that had provided them safe harbor.

The Administration regards the AUMF as providing the authority to conduct electronic surveillance of the type reported in the press.[107] This conclusion, it argues, is supported by the 2004 Supreme Court decision in *Hamdi v. Rumsfeld,*[108] in which the Supreme Court issued its most thorough interpretation of the AUMF to date.[109] In *Hamdi*, a plurality of the Court affirmed the President's power to detain a U.S. citizen as an "enemy combatant" as part of the necessary force authorized by Congress in the AUMF, despite an earlier statute which provides that no U.S. citizen may be detained except pursuant to an act of Congress.[110] However, the Court appears to have relied on a more limited interpretation of the scope of the AUMF than that which the Administration had asserted in its briefs, and, declaring that a "state of war is not a blank check for the President when it comes to the rights of the

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[106] Authorization for Use of Military Force ("the AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). For a discussion of the scant legislative history accompanying the AUMF, see CRS Report RS22357, *Authorization for Use of Military Force in Response to the 9/11 Attacks (Pub. L. 107-40): Legislative History*, by Richard F. Grimmet.

[107] *See* OLA Letter, *supra* note 10.

[108] 542 U.S. 507 (2004).

[109] *See* CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis*, by Jennifer K. Elsea.

[110] 18 U.S.C. § 4001(a). For more background and analysis of that statute, see CRS Report RL31724 *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea; CRS Report RS22130, *Detention of U.S. Citizens*, by Louis Fisher.

Nation's citizens,"[111] the Court clarified that notwithstanding the authorization, such detainees have some due process rights under the U.S. Constitution.[112]

The Administration's position would seem to rely on at least two assumptions. First, it appears to require that the power to conduct electronic surveillance for intelligence purposes is an essential aspect of the use of military force in the same way that the capture of enemy combatants on the battlefield is a necessary incident to the conduct of military operations. Second, it appears to consider the "battlefield" in the war on terrorism to extend beyond the area of traditional military operations to include U.S. territory. Both assumptions have been the subject of debate.

The Use of Force. The government finds support in the *Hamdi* decision for its assertion that the AUMF implies authority to conduct electronic surveillance operations as a necessary incident to the use of force. This implied authority, it is urged, provides the statutory authority required to dispense with FISA requirements in the same way the *Hamdi* court found the requirement in the Non-Detention Act (18 U.S.C. § 4001(a)), which prohibits the detention of U.S. citizens except pursuant to an act of Congress, to be satisfied by the AUMF.

There is reason, however, to limit *Hamdi* to actual military operations on the battlefield as that concept is traditionally understood. Justice O'Connor wrote for the plurality that

> 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. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.[113]

Hamdi may be limited to a confirmation that the authorization to employ military force against an enemy army necessarily encompasses the authority to capture battlefield enemies, because such captures are an essential aspect of fighting a battle.[114] International law does not permit the intentional killing of civilians or soldiers who are *hors de combat,* preferring capture as the method of neutralizing enemies on the battlefield.[115] The capture of an enemy combatant is arguably as much a use of force as killing or wounding one. Justice O'Connor wrote for the plurality

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[111] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[112] *Id.* at 517 (2004).

[113] *Hamdi* at 520.

[114] *Padilla v. Hanft*, another case involving an American citizen detained by the military as an "enemy combatant," could be read as an expansion of the detention authority to encompass persons arrested in the United States, far from any battlefield. 423 F.3d 386 (4th Cir. 2005), *petition for cert. filed*, 74 USLW 3275 (Oct 25, 2005)(NO. 05-533). The Fourth Circuit reversed a lower court's finding that the detention was unlawful, but the appellate finding was based on an understanding that the petitioner had taken up arms against American forces in Afghanistan prior to traveling to the United States with the intent of carrying out acts of terrorism. Whether *Hamdi* would also extend to a person detained as an enemy combatant based wholly on activity carried out within the United States has not been addressed by any court.

[115] *See generally* Department of the Army, FM 27-10, The Law of Land Warfare (1956).

> There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. 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.[116]

While the collection of intelligence is also an important facet of fighting a battle, it is not clear that the collection of intelligence constitutes a use of force. The *Hamdi* plurality cited the Geneva Conventions and multiple authorities on the law of war to reach its conclusion that the capture of combatants is an essential part of warfare.[117] The Administration has not pointed to any authority similar to those cited by the *Hamdi* plurality to support its proposition that signals intelligence is a fundamental aspect of combat. To be sure, there can be little doubt that Congress, in enacting the AUMF, contemplated that the armed forces would deploy their military intelligence assets in Afghanistan or wherever else the conventional aspect of the conflict might spread, but a presumption that the authorization extends to less conventional aspects of the conflict could unravel the fabric of *Hamdi*, especially where measures are taken within the United States. While five Justices were willing to accept the government's argument that the detention of enemy combatants captured on the battlefield[118] is a vital aspect of war-fighting, Justice Thomas alone indicated his agreement with the government's argument that wartime detention is also necessary for intelligence purposes.[119] Justice O'Connor agreed that the law of war supports detention of enemy combatants to prevent their return to the battlefield, but agreed with the petitioner that "indefinite detention for the purpose of interrogation is not authorized."[120]

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[116] *Hamdi* at 518. Justice Thomas agreed with this proposition, supplying the fifth vote. *Id.* at 587 ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.").

[117] *Hamdi* at 518-19.

[118] The *Hamdi* plurality limited its decision to "enemy combatants" as defined to mean "an individual 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." *Hamdi* at 516.

[119] *Id.* at 595 (Thomas, J., dissenting) ("The Government seeks to further [its security] interest by detaining an enemy soldier not only to prevent him from rejoining the ongoing fight. Rather, as the Government explains, detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism."). Justice Scalia, with Justice Stevens, recognized that the government's security needs include the "need to obtain intelligence through interrogation," but declined to evaluate whether the need could be met within the criminal justice system, noting that such determinations are "beyond . . . the Court's competence . . . but . . . not beyond Congress's." *Id.* at 577-78 (Scalia, J., dissenting).

[120] *Hamdi* at 521. Justices Souter and Ginsberg, while accepting the government's position that the AUMF could be read to authorize actions consonant with the usages of war, rejected the assertion that such usages could be invoked to justify the detention of a captive where the military's actions are incompatible with the law of war. *Id.* at 549-50 (Souter, J., concurring in part and dissenting in part). Justices Scalia and Stevens would have found that a U.S. citizen enjoys the full range of due process rights, the AUMF notwithstanding. *Id.* at 556 (Scalia, J., dissenting).

The boundaries of the authority available under this argument are difficult to discern. May *any* statutory prohibition arguably touching on national security that applies "unless otherwise authorized by statute" be set aside based on the AUMF? Presidential assertions of wartime power have faltered for lack of express congressional approval, especially where civil liberties are implicated.[121] A less expansive interpretation of the AUMF might dictate that "necessary and appropriate force" must be read, if possible, to conform to the Constitution and Congress's understanding of what activity constitutes a use of force as opposed to an exercise of authority within the domestic sphere.

The Domestic Sphere versus Military Operations. Although the lack of a formal declaration of war is not relevant to the existence of an armed conflict and is arguably unnecessary for the President to invoke *some* war powers, it may be argued that a formal declaration makes a difference in determining what law applies within the United States, whether to aliens or citizens.[122] For example, the Alien Enemy Act and the Trading with the Enemy Act (TWEA),[123] both of which regulate the domestic conduct of persons during a war, expressly require a declared war and are not triggered simply by an authorization to use force.[124] The Supreme Court long ago held that the President has no implied authority to promulgate regulations permitting the capture of enemy property located in the United States during hostilities short of a declared war, even where Congress had authorized a "limited"

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[121] *Compare* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), *Ex parte* Endo, 323 U.S. 214 (1944) (authority to detain U.S. citizen during war not authorized by implication), *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (civilian accused of violating the law of war in non-hostile territory could not be tried by military commission), *and* Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804) (where Congress had authorized as part of a limited war the seizure of vessels bound *to* French ports, the President could not authorize the seizure of vessels coming *from* French ports) *with Ex parte* Quirin, 317 U.S. 1, 26-27 (1942) (President's order establishing military commissions to try enemy combatants for violating the law of war was valid where Congress had recognized military commissions in statute), Hirabayashi v. United States, 320 U.S. 81, 89-90 (1943) (discriminatory wartime curfew implemented by the executive branch could be enforced against U.S. citizen where Congress had expressly provided for such enforcement) *and* Korematsu v. United States, 323 U.S. 214 (1944) (same). The Administration cites the *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), for the proposition that "the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty." OLA Letter, *supra* note 10, at 2. The *Prize Cases* have generally been interpreted as supporting an assertion of inherent presidential power to thwart an attack. *See* CONSTITUTION ANNOTATED, S. REP. NO. 108-17, at 328-29. It may, however, be significant that the naval blockade there at issue was instituted prior to Congress's having had the opportunity to take action rather than in the face of a statutory prohibition against such action, and was quickly ratified by Congress. *See id.* at 461-62. Given the Court's tendency to treat the latter question as one calling for judicial avoidance based on the "political question" doctrine, *id.* at 329, it is possible that the question may never reach a fuller exegesis. However, the area has been characterized by concessions between the President and Congress with respect to the scope of authority of each. *See id.*, *id.* at 473-75.

[122] *See Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (noting that separation-of-powers concerns are "heightened when the Commander-in-Chief's powers are exercised in the domestic sphere").

[123] 50 U.S. App. § 1 *et seq.*

[124] *See generally* CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Background and Legal Implications*, by David M. Ackerman and Richard F. Grimmett (identifying statutes effective only during declared wars or during hostilities).

war.[125] More pertinently, FISA contains an exception to its requirements for 15 days after a congressional declaration of war.[126] The inclusion of this exception strongly suggests that Congress intended for FISA to apply even during wartime, unless Congress were to pass new legislation. The fact that Congress amended FISA subsequent to September 11, 2001, in order to maximize its effectiveness against the terrorist threat further bolsters the notion that FISA is intended to remain fully applicable. To conclude otherwise would appear to require an assumption that Congress intended the AUMF to authorize the President to conduct electronic surveillance, even against American citizens not involved in combat, under fewer restrictions than would apply during a declared war, notwithstanding FISA provisions strengthened to take such circumstances into account. Even assuming, for argument's sake, that the NSA operations are necessary to prevent another terrorist attack, a presumption that Congress intended to authorize them does not necessarily follow.

It might be argued that the United States *is* part of the battlefield in the war against terrorism in more than just a metaphorical sense. Proponents of this point of view would argue that the AUMF to authorizes the use of force anywhere in the world,[127] including the territory of the United States, against any persons determined by the President to have "planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Under this view, the United States is under actual and continuing enemy attack, and the President has the authority to conduct electronic surveillance in the same way the armed forces gather intelligence about the military operations of enemy forces, even if no actual combat is taking place. After all, intelligence efforts are aimed at identifying an attack before it occurs. If electronic surveillance is considered to be a use of force, the AUMF would seem to limit it to those who "planned, authorized, committed, aided" the Sept. 11 attacks or who "harbored such . . . persons." To the extent that the President's executive order authorizes surveillance of persons who are suspected of merely supporting Al Qaeda or affiliated terrorist organizations, it may be seen as being overly broad.

Are the NSA electronic surveillances consistent with FISA and Title III? Having concluded that the AUMF authorizes the NSA activity, the Administration finds that the activity meets FISA requirements as well. Although the Administration appears to accept the premise that the surveillance is "electronic surveillance" within the meaning of FISA, it argues that it is excused from following the required procedures because section 109 of FISA[128] exempts from criminal liability those who conduct electronic surveillance without following the FISA procedures where such surveillance is "authorized by statute."

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[125] *See* Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804).

[126] 50 U.S.C. § 1811. The legislative history indicates that the 15-day period was intended to "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).

[127] *See* Khalid v. Bush, 355 F.Supp.2d 311, 320 (D. D.C. 2005) (noting that "the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists").

[128] 50 U.S.C. § 1809(a)(1).

Subsection (a) of section 109 of FISA provides criminal sanctions[129] for a person who intentionally "engages in electronic surveillance under color of law except as authorized by statute;" or who "discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute." Under subsection (b), it is a defense to a prosecution under subsection (a) 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. Under subsection (d), there is federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.[130]

The language of this section was drawn by the conferees from the House version of the measure, with modifications taken from the Senate version.[131] The House Conference

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[129] Subsection (c) provides, "An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both." In light of the general fines provision in 18 U.S.C. § 3571, the maximum fine would appear to be $250,000 for an individual defendant, and $500,000 for an institutional defendant."

[130] Under 50 U.S.C. § 1810, an aggrieved person, other than a foreign power or an agent of a foreign power, as defined in 50 U.S.C. § 1801(a) or (b)(1)(A), who has been subjected to electronic surveillance or about whom information obtained by electronic surveillance of that person has been disclosed or used in violation of 50 U.S.C. § 1809 may bring an action against any person who committed that violation for actual and punitive damages, plus reasonable attorney's fees and other reasonably incurred investigation and litigation costs. Actual damages may not be less than liquidated damages of $1,000 or $100 per day for each day of the violation, whichever is greater.

[131] The Senate Judiciary Committee, in S. REP. NO. 95-604(I), at 61, 1978 U.S.C.C.A.N. at 3962-3963; *see also*, pertinent portion of the Senate Select Committee on Intelligence's S. REP. NO. 95-701, at 68-69, 1978 U.S.C.C.A.N. at 4037-4038, described the Senate version of this provision, which would have provided conforming amendments to Title 18 of the U.S. Code:

> [Section 4(a)(1) and (2) are]. . . designed to establish the same criminal penalties for violations of [FISA, conceived in the Senate bill as a new chapter 120 of Title 18, U.S. Code] as apply to violations of chapter 119 [of Title 18, U.S.C.]. As amended, these sections will make it a criminal offense to engage in electronic surveillance except as otherwise specifically provided in chapters 119 and 120. This amendment also provides, however, that "with respect to techniques used by law enforcement officers" which do not involve the actual interception of wire or oral communications, yet do fall within the literal definition of electronic surveillance in Chapter 120 [FISA] — such as the use of a pen register — the procedures of chapter 120 do not apply. In such cases criminal penalties will not attach simply because the government fails to follow the procedures in chapter 120 (such penalties may, of course, attach if the surveillance is commenced without a search warrant or in violation of a court order.) In all cases involving electronic surveillance for the purpose of obtaining foreign intelligence information, however, the prohibitions of 18 U.S.C. 2511 would apply.
> (a)(3), (4), (5), and (6). These amendments make clear that the prohibitions in chapter 119 concerning disclosure and use of information, obtained through the interception of wire or oral communications in sections 2511(1)(c) and (d), also apply to disclosure and use of information obtained through electronic surveillance as defined in chapter 120.
>
> The statute calls for a fine of not more than $10,000 or imprisonment for not more than

(continued...)

Report, H. CONF. REP. 95-1720, at 33, 1978 U.S.C.C.A.N. at 4062, adopted the House version of these provisions, with amendments to include the Senate provision regarding disclosure or use of information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute. The House Conference Committee described its actions as follows:

> The Senate bill provided, by conforming amendment to title 18, United States Code, for criminal penalties for any person who, under color of law, willfully engages in electronic surveillance except as provided in this bill; for any person who willfully discloses, or endeavors to disclose to any other person information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through unlawful electronic surveillance; and for any person who willfully uses, or endeavors to use, information obtained through unlawful electronic surveillance.
>
> The House amendments provided for separate criminal penalties in this act, rather than by conforming amendment to title 18, for any person who intentionally engages in electronic surveillance under color of law except as authorized by statute. A defense was provided for a defendant who 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.
>
> The conference substitute adopts the House provision modified to add the Senate criminal penalty for any person who discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute. The conferees agree that the criminal penalties for intelligence agents under this Act should be essentially the same as for law enforcement officers under title 18.[132]

The Administration appears to rely upon the Authorization to Use Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (2001), in arguing that the NSA electronic surveillances at issue are "authorized by statute," as that phrase is used in 50 U.S.C. § 1809(a). The FISA bill as passed included the House version of Section 109(a)(1) of the measure, while Section 109(a)(2) was drawn from the Senate passed bill. The House Permanent Select Committee's Report, H. Rep. No. 95-1283(I), at 96 (June 8, 1978), sheds some light on the intended meaning of Section 109(a)(1) of H.R. 7308 (95th Cong.) which became 50 U.S.C. § 1809(a)(1):

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[131] (...continued)
five years, or both, for each violation.

[132] The House Intelligence Committee discussed the meaning of "intentionally" in the context of Section 109(a)(2) of the House bill, which was replaced by the Senate language. However, as the legislative language was written, the word "intentionally" applied to both Section 109(a)(1) and Section 109(a)(2). The House Report, H. REP. No. 95-1283, at 97, emphasized that "intentionally" as used in this section was "intended to reflect the most strict standard for criminal culpability. What is proscribed is an intentional violation of an order or one of the specified provisions, not just intentional conduct. The Government would have to provide beyond a reasonable doubt both that the conduct engaged in was in fact a violation, and that it was engaged in with a conscious objective or desire to commit a violation. . . ."

> Section 109(a)(1) carries forward the criminal provisions of chapter 119 [of Title 18, U.S.C.] 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 [of the Omnibus Crime Control and Safe Streets Act of 1968] and this title. Since certain technical activities — such as the use of a pen register — fall within the definition of electronic surveillance under this title, but not within the definition of wire or oral communications under chapter 119 [of Title 18, U.S.C.], the bill 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.

The House Permanent Select Committee on Intelligence also noted that, "[o]ne of the important purposes of the bill is to afford security to intelligence personnel so that if they act in accordance with the statute and the court order, they will be insulated from liability; it is not to afford them immunity when they intentionally violate the law."

Thus, the legislative history appears to reflect an intention that the phrase "authorized by statute" was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning, in which case a clear indication of Congress's intent to amend or repeal it might be necessary before a court would interpret a later statute as superceding it. Nevertheless, without taking into account the legislative history, the phrase might be seen as having a more expansive application. This broader view appears to have been taken by the Administration in its position regarding the authority provided by the AUMF.

Next, the Administration turns to the wiretap prohibition contained in Title III, which contains an exception for surveillance carried out pursuant to FISA. Pointing out that the exception in section 109 is broad in comparison to the exception in 18 U.S.C. § 2511, whose prohibition applies "except as otherwise *specifically provided in this chapter*," the Administration appears to conclude that the broader FISA exception subsumes the narrower exception in Title III, at least with respect to national security wiretaps. It cites two of the specific exceptions in Title III. First, 18 U.S.C. 2511(2)(e) provides a defense to criminal liability to government agents who "conduct electronic surveillance, as defined in section 101 of [FISA], as authorized by that Act." The Administration appears to interpret "as authorized by [FISA]" to include activity exempt from the FISA prohibition by virtue of its being authorized by other statute. Under this interpretation, subsection 2511(2)(e) should be read to exempt electronic surveillance "as authorized by FISA *or any other statute*."

Similar analysis leads the Administration to conclude that the Title III exclusivity provision in 18 U.S.C. § 2511(2)(f) poses no impediment. Section 2511(2)(f), which exempts U.S. foreign intelligence activities not covered by FISA, also provides that the procedures in Title III and FISA "shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." The Administration argues that

> 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).[133]

In other words, it appears, the FISA "procedures" described in Title III (in 18 U.S.C. § 2511(2)(f)) can include any other procedures authorized, expressly or implicitly, by any other statute, because these would not be prohibited by FISA section 109. This reading would seem to make the exclusivity provision meaningless, a construction not ordinarily favored by courts. It may be questioned whether Congress actually intended for the exception to the criminal prohibition in FISA to negate the more specific requirements in Title III and its exclusivity provision.

The Administration continues

> 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. 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.[134]

It is unclear how FISA and the AUMF are seen to collide. Principles of statutory construction generally provide guidance for interpreting Congress's intent with respect to a statute where the text is ambiguous or a plain reading leads to anomalous results; and where possible, a statute that might be read in such a way as to violate the Constitution is to be construed to avoid the violation. However, such principles are only to be applied where there is a genuine ambiguity or conflict between two statutes,[135] and where there is some possible reading that might avoid a conflict. While the Court has been known to read into a statute language that does not appear, it would be unusual for the Court to read express statutory language out of a statute, except by declaring at least that portion of the statute to be unconstitutional. It would not ordinarily be presumed that Congress meant the opposite of what it said, merely because its words are constitutionally problematic.

It appears that the Administration's views regarding the statutory authorization supporting the NSA activity also rely on an assumption that FISA, at least to the extent that

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[133] OLA Letter, *supra* note 10, at 3.

[134] *Id.* at 4 (citing *INS v. Cyr*, 533 U.S. 289, 300 v. (2001) (holding that "if an otherwise acceptable 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") (internal citation omitted); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (noting that a "'cardinal principle' of statutory interpretation [is] that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'") (citations omitted)). Both cited cases involved due process implications rather than whether a statute violated the principle of separation of powers by encroaching on presidential powers.

[135] *See, e.g,* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) ("Where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted)).

its provisions apply to activity conducted in the war against terrorism, may be an unconstitutional encroachment into presidential powers. Its argument, partly based on the exigencies of the post-9/11 period, seems to imply such a view of FISA:

> 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.

Insofar as the Administration's position is founded upon a concern that FISA was not adequate to the needs of the moment, it might be considered whether 50 U.S.C. §§ 1802 (Attorney General certification that certain conditions are met) and 1805(f) (72-hour emergency order), where applicable, may have provided some of the flexibility that the President considered warranted under the circumstances. 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 those procedures and practices in order to introduce more streamlined procedures to address such needs. Where FISA's current statutory framework proved inadequate to the task, legislative changes might be pursued.

The Administration argues that, "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."[136] However, some of these concerns may be minimized or addressed by virtue of the fact that, where appropriate, oversight may be conducted in executive session; and access to classified information, including information relating to sensitive intelligence sources and methods, may be limited by statute, by House and Senate procedures, or both. Nevertheless, to some degree, the federal legislative process is, by its very nature, public. Depending upon how such legislation was structured, an argument may be made that it might give rise to some inferences as to present or future intelligence practices or capabilities. On the other hand, the legislative vehicle chosen and the legislative language used might minimize some of those concerns. In addition, 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 an asserted need for secrecy.[137]

Conclusion

Whether an NSA activity is permissible under the Fourth Amendment and the statutory scheme outlined above is impossible to determine without an understanding of the specific

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[136] *See* OLA Letter, *supra* note 10, at 5.

[137] *C.f.* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 603-04 (Frankfurter, J., concurring):

> The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

facts involved and the nature of the President's authorization, which are for the most part classified. If the NSA operations at issue are encompassed in the definition of "electronic surveillance" set forth under FISA, it would seem consistent with Congress's intent that such surveillance must be carried out in accordance with FISA procedures. Although section 109(a) of FISA does not explicitly limit the language "as authorized by statute" to refer only to Title III and to FISA, the legislative history suggests that such a result was intended. The exceptions to the criminal prohibition under Title III, however, are specifically limited to those mentioned within Title III. Even if the AUMF is read to provide the statutory authorization necessary to avoid criminal culpability under FISA, it does not necessarily follow that the AUMF provides a substitute authority under FISA to satisfy the more specific language in Title III. To the extent that any of the electronic surveillance at issue may be outside the sweep of FISA or Title III, Congress does not appear to have legislated specifically on the subject, nor, by the absence of legislation, to have authorized or acquiesced in such surveillance.

Whether such electronic surveillances are contemplated by the term "all necessary and appropriate force" as authorized by the AUMF turns on whether they are, under the *Hamdi* analysis, an essential element of waging war. Even assuming that the President's role as Commander in Chief of the Armed Forces is implicated in the field of electronic surveillance for the collection of foreign intelligence information within the United States, it should not be accepted as a foregone conclusion that Congress has no role to play.[138] By including the emergency authorization for electronic surveillance without a court order for fifteen days following a declaration of war, Congress seems clearly to have contemplated that FISA would continue to operate during war, although such conditions might necessitate amendments. Amendments to FISA in the USA PATRIOT Act and subsequent legislation further demonstrate Congress's willingness to make adjustments. The history of Congress's active involvement in regulating electronic surveillance within the United States leaves little room for arguing that Congress has accepted by acquiescence the NSA operations here at issue.

To the extent that the Administration seems to base its interpretation of the AUMF and FISA on the assumption that a reading contrary to the one they rely upon would be an unconstitutional violation of separation-of-powers principles, it appears to regard the matter as deserving the highest level of deference under *Youngstown's* first category[139] simply by virtue of the assumption that it would survive scrutiny under the third category. To conclude that Congress's enactments are unconstitutional and therefore could not reflect Congress's intent seems to beg the question.

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[138] *Id.* at 643-44 (Jackson, J., concurring).

> There are indications that 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 its inhabitants. He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions.

[139] *See* OLA Letter, *supra* note 10, at 3 (asserting that "the President's 'authority is at its maximum,'" under Justice Jackson's concurrence in *Youngstown* and suggesting that the NSA operations contrast with the seizure invalidated in that case, which resulted from "the absence of a statute 'from which [the asserted authority] [could] be fairly implied'" (citing *Youngstown* at 585)).

Court cases evaluating the legality of warrantless wiretaps for foreign intelligence purposes provide some support for the assertion that the President possesses inherent authority to conduct such surveillance. The Court of Review, the only appellate court to have addressed the issue since the passage of FISA, "took for granted" that the President has inherent authority to conduct foreign intelligence electronic surveillance under his Article II powers, stating that, "assuming that was so, FISA could not encroach on that authority."[140] However, much of the other lower courts' discussions of inherent presidential authority occurred prior to the enactment of FISA, and no court has ruled on the question of Congress's authority to regulate the collection of foreign intelligence information.

From the foregoing analysis, it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here under discussion, and it would likewise appear that, to the extent that those surveillances fall within the definition of "electronic surveillance" within the meaning of FISA or any activity regulated under Title III, Congress intended to cover the entire field with these statutes. To the extent that the NSA activity is not permitted by some reading of Title III or FISA, it may represent an exercise of presidential power at its lowest ebb, in which case exclusive presidential control is sustainable only by "disabling Congress from acting upon the subject."[141] While courts have generally accepted that the President has the power to conduct domestic electronic surveillance within the United States inside the constraints of the Fourth Amendment, no court has held squarely that the Constitution disables the Congress from endeavoring to set limits on that power. To the contrary, the Supreme Court has stated that Congress does indeed have power to regulate domestic surveillance,[142] and has not ruled on the extent to which Congress can act with respect to electronic surveillance to collect foreign intelligence information. Given such uncertainty, the Administration's legal justification, as presented in the summary analysis from the Office of Legislative Affairs, does not seem to be as well-grounded as the tenor of that letter suggests.

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[140] 310 F.3d at 742; *see also id.* at 746.

[141] *Id.* at 638.

[142] United States v. United States District Court, 407 U.S. 297, 323-24 (1972).

Michael S. Greco
President

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February 13, 2006

The President George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

Last month I appointed a distinguished and bipartisan task force of lawyers to address issues and concerns regarding the program of domestic electronic surveillance being conducted by your Administration outside the FISA process. The membership included a former Director of the FBI, a former general counsel of the CIA, a former general counsel of the NSA, former chairs of the ABA Standing Committee on Law and National Security, former federal prosecutors and others possessing great expertise in constitutional and national security law. That task force unanimously brought forward to our House of Delegates a set of recommendations on the subject which were adopted today by an overwhelming vote of that body. I enclose a copy of the recommendations, accompanying report and roster of the membership.

We hope that your Administration will give serious consideration to these recommendations. We would welcome the opportunity to discuss with the appropriate officials our views in this matter. We join with you in the conviction that terrorism must be fought with the utmost vigor, but we also believe we must ensure this fight is conducted in a manner reflective of the highest American values.

Very truly yours,

Michael S. Greco

cc: Honorable Alberto Gonzales
Honorable Michael Chertoff
Honorable Harriet Miers

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) (2001) (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 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]

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[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.

[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

In light of the importance of these issues, ABA President Michael S. Greco appointed a Task Force on Domestic Surveillance in the Fight Against Terrorism[5] 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]

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

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[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 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 from14 Constitutional Law Professors and Former Government Officials,

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.

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

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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://bordc.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/sgp/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/sgp/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.

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

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[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.

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).

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

[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.

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, § 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

[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).

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 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 meaningless18 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

[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.

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.

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. <u>The Need for Additional Congressional Investigation and Oversight</u>

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/MNGOHCBM9N1.DTL

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

[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.

> 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/AR2006013091318.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

[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.

> 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

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:

[16] See Fn. 9, *supra*.

> [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

APPENDIX

ABA Task Force on Domestic Surveillance in the Fight Against Terrorism
Biographies

Chair

Neal R. Sonnett

Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the "Nation's Top White Collar Criminal Defense Lawyers," was selected three times by that publication as one of the "100 Most Influential Lawyers In America," and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is Chair-Elect of the American Judicature Society, Secretary of the ABA Section of Individual Rights and Responsibilities, Chair of the ABA Task Force on Treatment of Enemy Combatants, and serves as the ABA's official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami. In June, 2006 he will receive the Selig Goldin Award, the highest award of the Florida Bar Criminal Law Section.

Members

Mark D. Agrast

Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., where he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties,

criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Deborah Enix-Ross

Prior to joining Debevoise & Plimpton LLP in October 2002, Ms. Enix-Ross served, from January 1998 through September 2002, as a Senior Legal Officer and Head of the External Relations and Information Section of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center in Geneva, Switzerland.

Before joining WIPO, Ms. Enix-Ross was the Director of International Litigation for the Dispute Analysis and Corporate Recovery Services Group (DA&CR) of Price Waterhouse LLP, and before that, served for seven years as the American representative to the International Chamber of Commerce (ICC) International Court of Arbitration.

Ms. Enix-Ross holds a law degree from the University of Miami School of Law, a Diploma from the Parker School of Foreign and Comparative Law of Columbia University, and a Certificate from the London School of Economics. The U.S. Departments of Commerce and State appointed her as one of the original eight U.S. members of the tri lateral NAFTA Advisory Committee on Private Commercial Disputes. She is Chair-Elect of the American Bar Association (ABA) Section of International Law, a Fellow of the American Bar Foundation and a member of the ABA Center for Rule of Law Initiatives.

Stephen A. Saltzburg

Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In 1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was

appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions

William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

James R. Silkenat

Jim Silkenat is a partner in the New York office of Arent Fox and coordinates the firm's International Business Practice Group. His primary focus is on international joint ventures, mergers and acquisitions, privatizations, project finance transactions (in developed and developing countries) and private equity investment funds. He is a former Legal Counsel of the World Bank's International Finance Corporation.

An active member of the American Bar Association, Mr. Silkenat has served as Chair of both the Section of International Law and the Section Officers Conference. In 1990 he was elected to the ABA House of Delegates and has served as Chair of the New York Delegation in the House of Delegates since 2000. He served on the ABA Board of Governors from 1994-1997 and has chaired the ABA's Latin American Legal Initiatives Council.

Mr. Silkenat is also a former Chair of the Fellows of the American Bar Foundation, of the A.B.A.'s Museum of Law and of the A.B.A.'s China Law Committee. He is also a member of the House of Delegates of the New York State Bar Association and Chair of the Council on International Affairs of the Association of the Bar of the City of New York. Jim is a former Adjunct Professor of Law at Georgetown University Law

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Center and Chair of the Lawyers Committee for International Human Rights (now, Human Rights First).

Suzanne Spaulding

Suzanne Spaulding is a Managing Director at The Harbour Group, LLC. Ms. Spaulding is an expert on national security related issues, including terrorism, homeland security, critical infrastructure protection, cyber security, intelligence, law enforcement, crisis management, and issues related to the threat from chemical, biological, nuclear, or radiological weapons. She works with clients to develop and implement legislative strategies around these and other issues.

Prior to joining The Harbour Group, Ms. Spaulding was Minority Staff Director for the U.S. House of Representatives Permanent Select Committee on Intelligence. Her previous legislative experience includes serving as Deputy Staff Director and General Counsel for the Senate Select Committee on Intelligence and as Legislative Director and Senior Counsel for Senator Arlen Specter (R-PA). She has also worked for Representative Jane Harman (D-CA) and served as Assistant General Counsel for the CIA..

Ms. Spaulding received her undergraduate and law degrees from the University of Virginia. She is the immediate past Chair and current Advisory Board member of the American Bar Association's Standing Committee on Law and National Security. In addition, Ms. Spaulding is a member of the ABA President's Task Force on Enemy Combatants and of the Gavel Award Screening Committee.

Special Advisers

Harold Hongju Koh

Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Elizabeth Rindskopf Parker

Dean Rindskopf Parker joined Pacific McGeorge as its eighth dean in 2003 from her position as General Counsel for the 26-campus University of Wisconsin System. Her fields of expertise, in addition to the law of national security and terrorism, include international relations, public policy and trade, technology development and transfer, commerce, and litigation in the areas of civil rights and liberties.

Dean Rindskopf Parker's expertise in national security and terrorism comes from 11 years of federal service,

first as General Counsel of the National Security Agency (1984-1989), then as Principal Deputy Legal Adviser at the U.S. Department of State (1989-1990), and as General Counsel for the Central Intelligence Agency (1990-1995). From 1979 to 1981, Dean Rindskopf Parker served as Acting Assistant Director for Mergers and Acquisitions at the Federal Trade Commission.

A member of the American Bar Foundation and the Council on Foreign Relations, and former Chair of the ABA Standing Committee on Law and National Security, Dean Parker is a frequent speaker and lecturer and has taught national security law at Case Western Reserve Law School, Cleveland State School of Law and Pacific McGeorge. Currently, she serves on several committees of the National Academy of Sciences, including the Roundtable on Scientific Communication and National Security, and the Commission on Scientific Communication and National Security, examining responses to terrorism.

Liaison to the Task Force

Alan Rothstein

Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinate the extensive law reform and public policy work of this 22,000-member Association. Founded in 1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics from Brown University before earning his J.D. from NYU in 1978. Prior to his legal career, Rothstein worked as an economist in the environmental consulting field and for the New York City Economic Development Administration.

Mr. Rothstein serves on the boards of directors of Volunteers of Legal Service and Citizens Union, where he chairs its Committee on State Affairs. He also serves on the New York State Bar Association House of Delegates.

January 9, 2006

The Hon. Bill Frist
Majority Leader
United States Senate
Washington, D.C. 20510

The Hon. Harry Reid
Minority Leader
United States Senate
Washington, D.C. 20510

The Hon. J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, DC 20515

The Hon. Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

The Hon. Arlen Specter
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

The Hon. Patrick Leahy
Ranking Minority Member
Senate Judiciary Committee
United States Senate
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The Hon. F. James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
U.S. House of Representatives
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The Hon. John Conyers
Ranking Minority Member
House Judiciary Committee
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The Hon. Pat Roberts
Chairman
Senate Select Committee on Intelligence
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The Hon. John D. Rockefeller, IV
Vice Chairman
Senate Select Committee on Intelligence
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The Hon. Peter Hoekstra
Chairman
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Hon. Jane Harman
Ranking Minority Member
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U.S. House of Representatives
Washington, D.C. 20515

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 "vitally 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.

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[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. Ouelette*, 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

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[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.

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[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]

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[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 "concurred 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..

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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.

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[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'ns*, 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]

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[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

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[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. Nogueras*, 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.

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[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.

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[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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The Washington Times

If Men Were Angels

by Bruce Fein

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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

…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

…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?

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January 6, 2006

The Honorable John Conyers, Jr.
United States House of Representatives
2426 Rayburn House Office Bldg.
Washington, DC 20515-2214

Dear Congressman Conyers:

I appreciate your interest in my views as a constitutional scholar regarding the legality of the classified program of electronic surveillance by the National Security Agency ("NSA") that the President authorized within months of the September 11, 2001, attacks by Al Qaeda, a program whose existence the President confirmed on December 17, 2005, following its disclosure by *The New York Times* several days earlier.

Some have defended the NSA program as though it involved nothing beyond computer-enhanced data mining used to trace the electronic paths followed by phone calls and e-mails either originating from or terminating at points overseas associated with terrorists or their affiliates or supporters. But that type of intelligence gathering, whose history long antedates September 11, 2001, typically entails little or no interception of communicative *content* that would make it a "search" or "seizure" as those terms are understood for Fourth Amendment purposes (see *Smith v. Maryland,* 442 U.S. 735 (1979) (the "pen register" case)), or "electronic surveillance" as that term is used in the Foreign Intelligence Surveillance Act (FISA)(see 50 U.S.C. § 1801 (f)(1)-(2)). Unfortunately, as Attorney General Gonzales candidly conceded in a press briefing on December 19, 2005, the program under discussion here authorized *precisely* such interception of "contents of communications." See http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

Although there may be room for debate about the boundary between content interception and mere traffic analysis in other contexts, the Attorney General eliminated speculation on the point when he said in that press briefing 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," and it is undisputed that a court order is precisely what the Executive Branch chose to proceed *without*. The President was therefore being less than forthright when, two weeks after

admitting that he had authorized what the FISA defines as "electronic surveillance" that would normally require a judicial warrant, he told reporters in Texas that the "NSA program is one that *listens to a few numbers*" because "the enemy is calling somebody and we want to know *who they're calling . . . .*" See http://www.nytimes.com/aponline/national/AP-Bush.html?ei=5094&en=8b73b4903455b75... (1/3/2006). To be sure, the President did say "we want to know who they're calling *and why," to* "find out what the enemy's *thinking,"* hopefully alerting the attentive listener to the possibility that the contents of individual messages are being intercepted. But by centering the discussion on what sounds more like number-crunching than content-trawling, the President encouraged the program's other apologists to depict it as relatively innocuous by shifting attention away from precisely what makes this program of secret surveillance so legally controversial.

Equally diversionary is the frequently repeated suggestion that, whatever the program intercepts, the only messages it reaches are "communications, back and forth, from within the United States to overseas *with members of Al Qaeda*," to quote the Attorney General's December 19 press briefing. Again, however, the attentive listener might have caught the more precise account the Attorney General let slip at another point in that same briefing, when he noted that the surveillance that had been going on under presidential auspices for roughly four years in fact reaches all instances in which "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." Given the breadth and elasticity of the notions of "affiliation" and "support," coupled with the loosely-knit network of groups that Al Qaeda is thought to have become, that definition casts so wide a net that no-one can feel certain of escaping its grasp.

A strong case can be made that, even under the circumstances confronting the United States in the aftermath of the terrorist attacks launched by Al Qaeda on September 11, 2001, and even with assurance that conversations are being intercepted solely to aid in preventing future terrorist attacks rather than for use as evidence to prosecute past misdeeds, so indiscriminate and sweeping a scheme of domestic intrusion into the private communications of American citizens, predicated entirely on the unchecked judgment of the Executive Branch, violates the Fourth Amendment "right of the people to be secure . . . against unreasonable searches and seizures" even if it otherwise represents an exercise of constitutional power entrusted to the President by Article II or delegated to the President by Congress in exercising its powers under Article I.

The precise question of such a scheme's consistency with the Fourth Amendment has never been judicially resolved — nor is it likely to be resolved in this situation. For the scheme in question, far from being *authorized* by Congress, flies in the face of an *explicit congressional prohibition* and is therefore unconstitutional without regard to the Fourth Amendment unless it belongs to that truly rare species of executive acts so central to and inherent in the power vested in the President by Article II that, like the power to propose or veto legislation or to issue pardons, its exercise cannot constitutionally be fettered in any way by the Legislative Branch.

Any such characterization would be hard to take seriously with respect to unchecked warrantless wiretapping. As the Supreme Court famously held in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), an emergency presidential takeover for a limited time of certain critical publicly held corporations like Bethlehem Steele Co. and the United States Steele Co., in order to avert the threat that would be posed to our national security by a stoppage of the steel production needed for weapons and other materials essential to the ongoing Korean War, falls outside that tiny category of congressionally illimitable executive acts and is indeed unconstitutional unless affirmatively authorized by Congress. If that is so, then certainly an unchecked presidential program of secretly recording the conversations of perhaps thousands of innocent private citizens in the United States in hopes of gathering intelligence potentially useful for the ongoing war on a global terrorist network not only falls outside that category but misses it by a mile.

The only escape from that conclusion would be to hold that inherent and illimitable presidential power to abridge individual liberty and erode personal privacy categorically exceeds presidential power to displace temporarily the corporate managers of entirely impersonal business property, without confiscating, transferring, or otherwise touching the property's ultimate ownership by the holders of its shares. But our Constitution embodies no such perverse system of priorities.

The presidential power at issue in this case is therefore subject to the control of Congress. And that Congress has indeed forbidden this exercise of power is clear. The Foreign Intelligence Surveillance Act of 1978 unambiguously limits warrantless domestic electronic surveillance, *even in a congressionally declared war*, to the first 15 days of that war; criminalizes any such electronic surveillance not authorized by statute; and expressly establishes FISA and two chapters of the federal criminal code, governing wiretaps for intelligence purposes and for criminal investigation, respectively, as the "*exclusive* means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 50 U.S.C. §§ 1811, 1809, 18 U.S.C. § 2511(2)(f). 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 inasmuch as the 15-day period would "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). If a year was deemed too long, one can just imagine what the Conferees would have said of *four* years.

Rather than reaching for the heaviest (and, in this context, least plausible and hence most ineffectual) artillery by claiming an inherent presidential power to spy on innocent American citizens within the United States even in the teeth of a clear and explicit congressional prohibition of that technique of intelligence-gathering beyond the first 15 days of a declared war, the administration points to the FISA's own caveat that its prohibitions are inapplicable to electronic surveillance that is "otherwise authorized" by a congressional statute, which of course encompasses a joint resolution presented to and signed by the President.

The Authorization to Use Military Force (AUMF) against Al Qaeda, Pub.L. No. 107-40, 115 Stat. 224 §2 (a) (2001), is just such a resolution, the administration claims, for it 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 aggression. Although that resolution of course says nothing about electronic surveillance as such, neither does it say anything specifically about the detention of enemy combatants fighting for Al Qaeda in Afghanistan as part of the Taliban, the organization from within which the Al Qaeda terrorist network launched those infamous attacks. Yet, in the face of congressional legislation (the Non-Detention Act) expressly forbidding the executive detention of any United States citizen except "pursuant to an Act of Congress," 18 U.S.C. § 4001(a), the Supreme Court in *Hamdi v. Rumsfeld,* 124 S.Ct. 2633 (2004), held that such detention in the United States of individuals who are U.S. citizens captured while fighting against American forces in Afghanistan "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," escapes the prohibition of that anti-detention statute by virtue of its implied authorization by the AUMF as an exercise of the "necessary and appropriate force" Congress authorized the President to use, a conclusion supported by the fact that such detention for this limited purpose is a "fundamental and accepted . . . incident to war." 124 S.Ct. at 2640.

If *Hamdi* treated the AUMF as an "explicit congressional authorization," 124 S.Ct. at 2640-41, for *imprisoning* an enemy combatant despite AUMF's failure to mention "detention" or "imprisonment" in so many words, the argument goes, the AUMF must be read to impliedly authorize the far less severe intrusion of merely *eavesdropping* on our terrorist enemies, and on members of organizations that indirectly support them. After all, the collection of "signals intelligence" about our enemies abroad is no less an accepted incident of war than detaining the captured enemy — just as signals intelligence of foreign agents (including some going to and from the United States) has been accepted as an inherent power of the President even in the *absence* of war. Surely, then, now that Al Qaeda *has* launched a war against us, and now that Congress has responded with the functional equivalent of a declaration of war in the AUMF, even the entirely innocent American citizen in Chicago or Cleveland whose phone conversation with a member of an Al Qaeda-supportive organization happens to be ensnared by the eavesdropping being undertaken by the NSA cannot be heard to complain that no statute specifically authorized the Executive to capture her telephone communications and e-mails as such. Invasion of that citizen's privacy was, alas, but one of war's sad side effects — a species of collateral damage.

The technical legal term for that, I believe, is poppycock. *Hamdi* obviously rested on the modest point that statutory authority to kill or gravely injure an enemy on the field of battle impliedly authorizes one to take the far less extreme step of detaining that enemy, solely for the duration of the battle, to prevent his return to fight against our troops. Power to engage in domestic electronic surveillance on a wide scale within the territorial United States — intercepting, recording and transcribing conversations of

unsuspecting citizens who have committed no wrong, are not foreign agents traveling to and from the United States, and in fact pose no threat themselves but merely happen to have accepted a phone call or received an e-mail from, or sent an e-mail to, a member of an organization that is said to be supportive of the Al Qaeda network — is by no stretch of the legal imagination a "lesser included power" contained within the power to repel future terrorist attacks by Al Qaeda on the United States.

Thus the argument that the AUMF does not impliedly authorize this wide-ranging and indefinitely enduring program to extract potentially useful intelligence from ordinary citizens easily survives challenge based on *Hamdi*. More than that, *Hamdi* in fact yields added *support* for the conclusion that the AUMF cannot provide the requisite authorization. For the *Hamdi* plurality agreed "that *indefinite* detention *for the purpose of interrogation*," even of conceded enemy combatants, "is not authorized" by the AUMF. 124 S.Ct. at 2641 (emphasis added). It follows *a fortiori* that indefinite subjection of American citizens who are not even *alleged* to be enemies, much less enemy *combatants*, to ongoing invasions of their privacy in the United States for purposes of obtaining valuable information is not authorized either.

Moreover, it makes a difference that the FISA's specific regulation of all electronic surveillance in the United States deals with the subject at issue here in a far more comprehensive and elaborate way than the Anti-Detention Statute involved in *Hamdi* dealt with the military detentions at issue there — military detentions that the Court treated as falling within the Anti-Detention Statute merely for the sake of argument when it held only that, *if* that statute otherwise applied, then it was trumped by the more specifically relevant AUMF. Here, in contrast, there can be no serious doubt that it is the FISA, and not the AUMF, that deals more specifically with the activity in question.

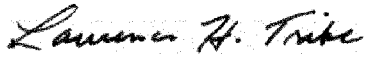
Construing the AUMF, taken in conjunction with the President's power as Commander in Chief under Article II, as implicitly conferring broad authority to engage in whatever warrantless surveillance the President might deem necessary in a war of indefinite duration against Al Qaeda-related terrorism even in the face of FISA's prohibitions would entail interpreting the AUMF far more broadly than anyone could, in truth, have anticipated. If that AUMF authorization were indeed *this* broad, the President must simply have overlooked its continued existence when he recently chided Congress for failing to reenact the PATRIOT Act's provisions. To be sure, the AUMF, even on the Justice Department's extravagant reading, enacted no *criminal* proscriptions of the sort that parts of the PATRIOT Act included. Nor did it purport to authorize the President to enact such criminal laws, morphing into some sort of one-man legislature. But, on the government's broad reading, the AUMF certainly *had* armed the President, as of September 18, 2001, with the authority to take most of the steps the PATRIOT Act expressly authorized — including *all* of the purely investigative and preventive actions it empowered the President to take — until the recent sunsetting of some of its provisions. And it had empowered him as well, again on the government's reading, to override any statutory prohibitions that might otherwise have stood in his way.

On the government's proposed reading of the AUMF, in other words, the PATRIOT Act, insofar as it confers the powers of investigation and prevention most fiercely sought by the President, becomes a needless and mostly redundant bauble. A statutory construction with such bizarre and altogether unanticipated consequences — and one that rests on so shaky a foundation — would be inadmissible even if accepting it would not leave us with serious questions under the Fourth Amendment, which it of course would.

Finally, it is telling that Attorney General Gonzales, when asked in his December 19 press briefing why the administration hadn't simply proposed to Congress, in closed session if necessary, that it amend FISA to grant legislative permission for the kind of domestic surveillance program the President deemed essential to the nation's security, replied that the administration had concluded such a request would probably have been futile because Congress would most likely have denied the authority sought! To argue that one *couldn't have gotten* congressional authorization (in late 2001, when the NSA program was secretly launched) after arguing that, by the way, one *did* get congressional authorization (in late 2001, when the AUMF was enacted) takes some nerve. Apart from the obvious lapse in logic, it is axiomatic that legislative reluctance to relax or eliminate a prohibition is no defense to a charge of its violation.

The inescapable conclusion is that the AUMF did *not* implicitly authorize what the FISA expressly prohibited. It follows that the presidential program of surveillance at issue here is a violation of the separation of powers — as grave an abuse of executive authority as I can recall ever having studied.

Yours truly,



Laurence H. Tribe

[The prepared statement of Mr. Flake follows:]

PREPARED STATEMENT OF THE HONORABLE JEFF FLAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

I am voting to report, unfavorably, Ranking Member Conyer's resolution seeking all documents related to the President's National Security Agency (NSA) domestic wiretapping program. I do not believe Congress needs "all" documents related to this program. However, I am concerned about recent revelations regarding domestic wiretapping.

The President has claimed that the Authorization of Use of Military Force Resolution (AUMF) authorizes NSA domestic surveillance. This seems to me to be a stretch. As a member of the House International Relations Committee, which reported that Resolution, I can attest that we did not authorize such a program. The AUMF does not mention FISA or domestic surveillance. The Resolution's title clearly authorizes "military" force. It makes one wonder what other programs, unauthorized by Congress, may also be in operation.

As a member of the House Judiciary Committee, I find it disconcerting that we worked to reauthorize the Patriot Act while being kept in the dark about the existence of the wiretapping program. I and the other members of the Subcommittee on Crime, Terrorism, and Homeland Security worked in good faith to craft a bill that protected civil liberties while providing for the powers the President sought. If the President wanted to go beyond the powers he currently has with FISA, he should have sought clear congressional authorization. The argument that seeking such explicit authorization would have tipped the terrorists off is not compelling. Surely the terrorists know that surveillance is already possible under FISA.

The administration's claims that an "inherent commander-in-chief power" lets the President act unilaterally. This claim runs contrary to the argument that this program is authorized by the AUMF. If the President can act on his own, certainly he would not need to cite the AUMF. In addition, the Department of Justice would not have needed to brief the Chief Judge of the FISA court on the existence of this program.

The Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia when called into actual service of the United States." Nowhere does the Constitution state that the President has exclusive powers governing military affairs. The Constitution states that Congress has the power "to make rules for the government and regulation of the land and naval forces."

The President cannot choose to ignore the FISA statute. He must provide Congress with the information necessary to afford him the powers he needs. Since it appears that is up to the House and Senate Judiciary Committees to craft any FISA changes that will grant the President the flexibility he seeks, members of this Committee must be briefed on the details of the program in a secure environment.

I do not agree that, at this time, we should force the President to release all information on the program. The President should recognize that we are willing to work with him, and appreciate that we need the information on this program to perform our oversight responsibility.

Let me reiterate that I believe that the NSA ought to have the ability to monitor communications between known or suspected terrorists overseas and U.S. citizens. I simply believe that it can, and should be done within our constitutional framework.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

President Bush secretly authorized the National Security Agency (NSA) to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity, and he did this without the court-approved warrants ordinarily required for domestic spying. Due to the highly classified nature of this program, the details have not been revealed. Officials familiar with it, however, say that NSA has eavesdropped without warrants on up to 500 people in the United States at any given time. Some reports indicate that the total number of people monitored domestically has reached into the thousands, while others indicated that significantly more people have been spied upon.

I do not oppose the monitoring of telephone calls and e-mail messages when it is necessary for national security reasons. I am opposed, however, to engaging in such monitoring without a warrant. We have a Foreign Intelligence Surveillance

Court that was established for the sole purpose of issuing such warrants when they are justified.

The day after this monitoring became public, President Bush admitted that he had authorized it and claimed that he had the authority to do so. According to the President, the order was fully consistent with his constitutional responsibilities and authorities. I respectfully disagree with the President. The law establishes well-defined procedures for eavesdropping on U.S. persons, and President Bush failed to follow those procedures.

The starting point for understanding surveillance law is the Fourth Amendment to the Constitution, which states clearly that Americans' privacy may not be invaded without a warrant based on probable cause. The United States Supreme Court has held that this protection applies to government eavesdropping. Consequently, all electronic surveillance by the government in the United States is illegal unless it falls under one of a small number of precise exceptions specifically carved out in the law.

After 9/11, Congress approved an Authorization to Use Military Force against those responsible for the attacks in order to authorize the president to conduct foreign military operations such as the invasion of Afghanistan, but that resolution contains no language changing, overriding, or repealing any laws passed by Congress.

The Foreign Intelligence Surveillance Act (FISA) contains explicit language describing the president's powers during time of war and provides that 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 days following a declaration of war by the Congress. Consequently, even assuming that the use-of-force resolution places us on a war footing, warrantless surveillance would have been legal for only 15 days after the resolution was passed on September 18, 2001.

The FISA law takes account of the need for emergency surveillance. The need for quick action cannot be used as a rationale for going outside the law. FISA allows wiretapping without a court order in an emergency; the court simply must be notified within 72 hours. The government is aware of this emergency power and has used it repeatedly. If President Bush found these provisions inadequate, he should have taken his case to Congress and asked for the law to be changed, not simply ignored it.

Congress needs to know more about this situation. I have cosponsored H. Res. 643, which directs the Attorney General to submit to the House of Representatives all documents in the possession of the Attorney General relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency.

I urge you to vote for this resolution. Thank you.

[Intervening business.]

The business before the Committee having been completed for today, without objection the Committee stands adjourned.

[Whereupon, at 12:25 p.m., the Committee was adjourned.]

DISSENTING VIEWS

We strongly dissent from the adverse reporting of H. Res. 643. This resolution would have simply required the Judiciary Committee to conduct its constitutionally mandated oversight role by obtaining those documents that reflect how the highest lawyers in the United States government could approve a program that has nearly unanimous, bipartisan legal opposition.

On December 16, 2005, we learned that the U.S. has been conducting warrantless surveillance of U.S. persons on U.S. soil, an unprecedented program that is not provided for in law. Since then, the President and his Justice Department have been on a publicity tour, trying to justify a program that is not only most likely illegal, but according to Administration sources, is also ineffective.

We all have grave legal and policy concerns, concerns which led every other Committee of jurisdiction to hold at least cursory hearings. As a result, we introduced this resolution to obtain the basic information necessary to understand more than the 42-page legal justification the Justice Department is now distributing. To understand the intelligence, criminal and constitutional implications of this program we need to know how this program works, who approved of it, and why.

A. H. RES. 643 WOULD HAVE PROVIDED INSIGHT INTO WHY THE JUSTICE DEPARTMENT APPROVED A PROGRAM THAT MANY EXPERTS AND SCHOLARS BELIEVE IS ILLEGAL

H. Res. 643 requests the Attorney General to submit all documents in his possession relating to warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States conducted by the National Security Agency, subject to necessary redactions or requirements for handling classified documents. This request would have included any and all opinions regarding warrantless electronic surveillance of telephone conversations and electronic communications of persons in the United States, as well as other records which would allow us to better understand the size, scope, and nature of the program.

This is a measured and reasonable step. As a resolution of inquiry, this legislation is simply a voluntary request for information. It would have been within the discretion of the Attorney General to decide what information to share with Congress. Further, the request explicitly asked the Attorney General to redact any sensitive information and provide instructions for handling classified documents. In all, the legislation is quite a modest request considering the weight of issues implicated by warrantless wiretapping on American soil.

B. WARRANTLESS SPYING ON AMERICAN CITIZENS RAISES SERIOUS CONSTITUTIONAL QUESTIONS WHICH CANNOT BE ANSWERED WITHOUT FURTHER INFORMATION

We are not asking for this information in a conclusory fashion. We are not saying that the President broke the law or has acted contrary to the Constitution. In fact, this resolution may well produce documents that rebut those allegations. What is clear is that, assuming what has been reported is true, many Constitutional and legal experts—Republicans and Democrats—have indicated that this secret domestic surveillance program raises substantial questions about whether the program is legal and whether it is constitutional.

These include the Nation's most preeminent legal and intelligence authorities:

(1) Harvard Professor Laurence H. Tribe;

(2) Fourteen of the nations preeminent legal scholars, including William S. Sessions, the former Director of the FBI under Presidents Ronald Reagan, George H.W. Bush and Bill Clinton, and William W. Van Alstyne, a Law Professor at William and Mary who was a witness called by this Committee's Republican Members during the impeachment of President Clinton;

(3) Bruce Fein, a former Deputy Associate Attorney General in the Reagan Administration,

(4) Jonathan Turley, a Constitutional scholar and another witness called by the Republicans on this Committee during the Clinton impeachment,

(5) the non-partisan Congressional Research Service, and

(6) the American Bar Association.

The question before the Committee was not whether we agreed with these individuals, but whether we think their judgments are sufficiently serious to warrant further inquiry by this Committee. We are immensely disappointed that 22 out of 23 Republican members disregarded this weight of legal opinion.

C. THIS COMMITTEE IS ABDICATING ITS OVERSIGHT ROLE BY IGNORING MOST LIKELY ILLEGAL AND UNCONSTITUTIONAL ACTS BY ITS OWN JUSTICE DEPARTMENT

On December 18, 2005, every Democratic member of this Committee wrote the Chairman and requested that he hold hearings on the NSA spying program. To date, no hearing has been held, and the letter has not been answered. In fact, the House Judiciary Committee is the only committee of jurisdiction that hasn't held some sort of hearing or inquiry into the matter.

Chairman Sensenbrenner arranged a briefing for Committee members and their staff on Monday, February 13, 2006. However, notice did not go out until Saturday the 11th, too late for members to change their schedules to attend. Mr. Scott was the only Representative available for the briefing, and we have asked for another briefing with reasonable notice.

Chairman Sensenbrenner did however send a letter to Attorney General Alberto Gonzales on February 8, with 51 questions relating to the NSA scandal. The majority claims that letter is a substitute for this resolution of inquiry.

The Chairman's letter, while lengthy, seeks little new information if any at all. The first 38 questions ask the Justice Department whether it thinks the wiretapping program is legal. It is already clear from the Justice Department's publicly distributed white paper that it does.[1]

There are also a number of questions that are clearly irrelevant to the spying program and are asked for partisan purposes. For example, a number of questions ask about whether previous Administrations engaged in similar behavior or believed they had the authority to do so.

The Chairman's letter and briefing do not answer a number of important questions that must be answered before a legal determination can be made. To decide whether this program is reasonable under the 4th Amendment—as the Administration claimed in its briefing—members must know the particulars of the program.

D. CONCLUSION

A letter alone—which can be ignored or danced around—is not sufficient. This Committee has always taken the common sense approach that the best way to find out what people were thinking at the time they made decisions, is to get the documents they wrote at that time reflecting those thoughts. In fact, on a number of matters—including biometric passports, judicial sentencing practices, the Civil Rights Commission, and Legal Service Commission—the Chairman's first step has been to obtain and preserve relevant documents.

The Washington Post has written, that the Executive Branch treats Congress "as an annoying impediment to the real work of government. It provides information to Congress grudgingly, if at all. It handles letters from lawmakers like junk mail, routinely tossing them aside without responding."

[1] Department of Justice, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT, Jan. 19, 2006.

It's time that Congress begins to serve as a genuine check and balance on the Administration. This is not a partisan issue, but a constitutional issue that this Committee is obligated to act independently and fairly on.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
RICK BOUCHER.
JERROLD NADLER.
BOBBY SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
BILL DELAHUNT.
ROBERT WEXLER.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.
DEBBIE WASSERMAN SCHULTZ.

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