A Legal Analysis of the NSA Warrantless Surveillance Program

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The warrantless NSA surveillance program is an illegal and unnecessary intrusion into the privacy of all Americans and undermines our true national security interests. Congress must act swiftly to determine the scope of the program and insist that all electronic surveillance in the United States be conducted pursuant to the Foreign Intelligence Surveillance Act (FISA).

The government's defense of the NSA program rests on both a claim of inherent powers and a claim of statutory authorization. This memorandum examines these arguments and concludes that they lack serious merit. It also explains why the administration's end-run around FISA has not served the national security interests of the country and has undermined the civil liberties of the American people.

The precise details of the NSA program, first reported by the *New York Times*[2] and then confirmed by the administration, are still not known. What is known is that the NSA program the President authorized after September 11, 2001 is conducted without judicial warrants and intercepts conversations of American citizens in the United States, at least when the other party is abroad and one or both are suspected of having ties to al Qaeda or an organization affiliated with or supporting al Qaeda.[3] FISA's warrant requirement covers such surveillance targets even in time of war. This program is a flagrant violation of FISA.

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[2] James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, A1.

[3] See press briefing by Attorney General Alberto Gonzales and General Michael V. Hayden, Principal Deputy Director of National Intelligence, December 19, 2005. (Hereinafter "Press Briefing.") (http://www.fas.org/irp/news/2005/12/ag121905.html).

FISA Is The Exclusive Framework For Conducting Electronic Surveillance

The flaws in the Administration's arguments are best understood against the backdrop of Congress's enactment of FISA in 1978. FISA was the product of exhaustive hearings conducted by the Church Committee, which uncovered a decades-long record of abuses resulting from unchecked government surveillance conducted in the name of national security.[4]

The Church Committee discovered that in the absence of any judicial or external check, the executive branch had for years aimed its surveillance power not only against legitimate national security threats, but also against government employees, journalists, anti-war activists and others for political purposes, even though its purported purpose was to detect and monitor "subversive activities." The loose standard the executive branch used to justify wiretaps allowed administrations, from Roosevelt to Nixon, to wiretap American citizens who posed no threat to national security. It also allowed the NSA, through a program called Operation SHAMROCK, to intercept telegrams sent not only to and from foreign targets, but also between Americans in the United States and Americans or foreign persons abroad.[5] The targets were often individuals who opposed U.S. government policy, but posed no threat to national security.[6] The Committee heard many accounts of such civil liberties abuses committed in the name of national security.

It was in this environment that the Ford and Carter Administrations, working with Congress, determined to create a complete statutory framework for national security wiretapping.[7] By doing so, they acted to resolve the issue

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[4] The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities was known as the "Church Committee" after its chairman, Senator Frank Church.

[5] Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans, Book II*, Sen. R. No. 94-755 (94th Cong., 2d Sess.), Apr. 24, 1976 at 169.

[6] *Id.*

[7] The FISA Conferees included Senators Ted Kennedy, Joe Biden, and Charles Mathias in the Senate and Representatives Edward Boland and Robert Kastenmeier in the House.

left open by the Supreme Court of whether the Constitution requires judicial warrants for wiretaps directed at citizens for national security purposes.[8]

Congress knew that FISA had to be exhaustive in order to resolve the unanswered issues and to ensure that—regardless of any "inherent" power the President has to order warrantless surveillance—FISA would be the exclusive framework for the conduct of government electronic surveillance. Indeed, the Senate Judiciary Committee Report on FISA made clear that "even if the President has 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance."[9] (Emphasis added.)

To further emphasize this point, FISA repealed the section of the 1968 law on criminal wiretaps (known as Title III) that had explicitly stated that Title III was not intended to limit the President's power in national security cases. In FISA's legislative history, Congress stated that "the bill recognizes no inherent power of the President in this area" and it intended to make clear that "the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States…."[10] To make this clear, Congress also amended Title III to provide that Title III and FISA "shall be the exclusive means by which electronic surveillance ... may be conducted."[11]

Further, FISA made it a crime to conduct electronic surveillance under color of law except as authorized by statute. It provided an affirmative defense for government officials only if the surveillance was conducted pursuant to a warrant from the FISA Court. And finally, Congress insisted on removing

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[8] *See* United States v. United States District Court, 407 U.S. 297 (1972) (expressly leaving open the question of whether warrantless wiretapping of someone who posed a national security threat, as opposed to a domestic security threat, was constitutional).

[9] Report of Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act of 1977, S. Rep. No. 95-604, 95th Cong., 1st Sess., at 16.

[10] S. Rep. No. 95-604 at 6, 7.

[11] 18 U.S.C. § 2511(2)(f) (stating that "procedures in this chapter or chapter 121 and [FISA] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted").

from a draft of the FISA statute a provision that would have left open the possibility that the President could continue to conduct warrantless wiretaps.

That Congress and the Ford and Carter Administrations intended FISA to be the sole authority for conducting electronic surveillance is evidenced by the effort of the statute's drafters to anticipate every contingency to ensure the statute would be comprehensive. They addressed the need for secrecy by providing for a secret court authorized to examine classified information and issue secret wiretap orders. They recognized the need for more flexible standards to obtain a warrant in the context of counterterrorism by allowing a judge to issue a warrant on a showing of probable cause that the target of surveillance is a foreign power or an agent of a foreign power, including foreign terrorist groups, rather than the more stringent criminal standard applicable to law enforcement wiretaps. They also recognized that surveillance technology was evolving rapidly and that the adequacy of privacy safeguards had to be measured against technological advances.[12] They anticipated the government's need to act quickly to protect national security by providing an emergency exception that allows the government to begin electronic surveillance as long as it files a warrant application with the court within 24 hours. (After 9/11, Congress, at the request of the Bush Administration, extended the emergency period to 72 hours.)[13]

Furthermore, because Congress and the Ford and Carter Administrations intended that FISA would be the sole authority for the conduct of electronic surveillance, they included a wartime provision that suspends the warrant requirement for 15 days after a declaration of war. The FISA Conference Report made clear that Congress expected the President to come to the Congress if he needed additional authority during a war.

This legislative history makes it clear beyond any reasonable doubt that only an explicit amendment of FISA could authorize warrantless wiretaps beyond 72 hours in peacetime or 15 days after a declaration of war.

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[12] S. Rep. No. 95-604 at 44.

[13] Intelligence Authorization Act for FY02¸ Pub. L. No.107-108, 115 Stat. 1393, 2001.

The Administration's Arguments Are Fatally Flawed

The administration's argument in defense of the NSA program is two-pronged. It is set out most clearly in a letter from Assistant Attorney General William Moschella sent on December 22, 2005 to the leaders of the House and Senate Intelligence Committees (Moschella Letter),[14] and in the Press Briefing.[15]

First, the administration argues that "under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further [terrorist] attacks, and the Constitution gives him all necessary authority to fulfill that duty," including "the authority to order warrantless foreign intelligence surveillance within the United States." (Moschella Letter, at p. 2.)

Second, "the authorization to use force, which was passed by the Congress in the days following September 11th," authorizes the administration "to engage in this kind of signals intelligence." (Statement of Attorney General Gonzales, Press Briefing, at p. 1.)

FISA Regulates The President's Constitutional Authority

The first claim—that the program is legal because the President has inherent authority to authorize warrantless wiretaps—might have had some plausibility if Congress had not acted so decisively to prohibit warrantless surveillance in the United States when it enacted FISA. As Justice Jackson explained in his influential concurring opinion in the *Steel Seizure* case, the scope of the President's constitutional authority in a particular area is affected by whether Congress has acted in that area.[16] The President's power is greatest when he acts with the support of the Congress and is weakest when he acts directly contrary to the will of Congress.[17] The record is clear that Congress intended to prohibit warrantless intercepts in the

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[14] http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

[15] *See* supra, note 3.

[16] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=343&invol=579.

[17] *Id.*

United States. Indeed, the FISA Conference Report states expressly that, by making FISA the "exclusive means" for conducting electronic surveillance, Congress intended "to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case."[18] Therefore, whatever authority the President has to conduct such surveillance is not exclusive and is necessarily circumscribed by FISA.

Of course, the President has some inherent authorities under the Constitution, including his powers as Commander in Chief of the armed forces. Since, as already noted, Congress has not only legislated an alternative means to conduct electronic surveillance of Americans in the United States, but has sought to prevent the President from conducting warrantless surveillance, we must ask whether the President nonetheless retains authority to conduct such surveillance.

No court has decided this question in the context of FISA. To support its argument, the administration relies on four circuit court opinions that have held that the President has inherent authority to conduct warrantless searches in the United States when agents of a foreign power are the targets. However, all of these cases were decided before FISA was enacted and hence are simply not on point. Although the FISA Appeals Court in 2002 stated that it "took for granted" that the President has such authority, it made this comment in passing, providing no analysis, and its actual holding in the case did not depend on this assumption

Well-established jurisprudence in this area is fatal to the administration's claim of unrestricted authority. The courts have been most reluctant to recognize unlimited and unchecked presidential power when the executive branch threatens or tramples on individual rights in the name of national security.[19] If anything, the claim that warrantless searches are constitutional seems to have been furthered weakened by *Hamdi v. Rumsfeld*, where

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[18] FISA Conference Report at 35.

[19] There is a substantial question whether warrantless wiretaps are constitutional. Before the adoption of FISA in 1978, the government carried out warrantless wiretaps in non-emergency cases, but the Supreme Court never addressed the issue, and the government was at risk that the Court would hold its warrantless eavesdropping unconstitutional. After FISA created a judicial process for wiretapping, there continued to be doubt as to whether the President had the power to order without judicial approval physical searches, which were not covered by FISA when first enacted. That uncertainty led Attorney General Janet Reno to ask that FISA be extended to physical searches, which Congress did in the early 90's.

Justice O'Connor wrote last year in the very opinion on which the government now relies:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. It was the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty. The war power is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

The Supreme Court correctly states that all three branches of government should be involved in the development and implementation of any government policies that affect Americans' civil liberties. If the administration needed additional surveillance powers to deal with the terrorist threat, the President should have come to the Congress seeking to amend FISA. In a constitutional democracy, governmental activities that interfere with individual liberty should be publicly debated so that citizens can have meaningful input and elected officials can be held accountable for their actions. The administration's decision to tell a few members of Congress, who were sworn to secrecy and had no ability to consult with their staff or other members, does not constitute congressional involvement, let alone congressional authorization or oversight. To cut out the courts entirely and to render Congress impotent in this manner is an insult to our democratic institutions.

Notably, in the case that gave rise to Justice Jackson's framework for assessing the constitutionality of presidential action, Congress had provided an alternative means to deal with strikes during wartime, but, significantly, had not explicitly made that the *sole means* to deal with the problem. Nevertheless, the Supreme Court held that the president's constitutional powers did not give him the right to create on his own a separate process to

seize steel mills, even though the United States was at war with Korea and President Truman asserted that his action was necessary to support our war effort. In enacting FISA, Congress emphasized repeatedly throughout the legislative history and in the criminal wiretap statute itself that FISA was the exclusive means to conduct warrantless surveillance. Therefore, President Bush’s power is at an even lower ebb than President Truman’s was in the Steel Seizure case.

Under the framework enunciated by Justice Jackson and repeatedly applied since then, to survive constitutional scrutiny, presidential measures that flout congressional will must derive from the President's “own constitutional powers minus any constitutional powers of Congress over the matter.”[20] Only by prohibiting Congress from acting in the matter--in effect, by claiming that Congress exceeded its constitutional authority when it enacted FISA--can the administration's flagrant violations of the law be sustained. The Justice Department has not so far publicly made such an extravagant claim, but such a claim is implicit in other Justice Department memos and there could well be a still secret DOJ memo in which they make the claim.

Recall that we have been given only post-facto justifications, some of which rely on a case (*Hamdi*) that was not yet decided when the President authorized the program. We do not know what legal justification led President Bush to conclude that he had this authority. Certainly Congress should insist on seeing all of the memos that were relied upon in creating and perpetuating the program and should make them public with any necessary redactions.

The Congressional Resolution Authorizing the Use of Military Force After 9/11 Did Not Amend FISA

The administration’s second claim—that after 9/11, Congress’s resolution authorizing the use of force also authorized the President to conduct a warrantless surveillance program in the United States—is utterly specious.

Seeking to surmount the legal barriers that FISA erected against unfettered use of warrantless surveillance within the United States, the administration argues that Congress in effect amended FISA through the Authorization for

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[20] 343 U.S. at 637.

the Use of Military Force (AUMF), which authorized the administration to use military force in response to the 9/11 attacks.[21] The administration argues that the AUMF included an implicit grant of authority to the President to conduct warrantless surveillance if he concluded that it was essential to combating al Qaeda. Neither the text nor the legislative history of the AUMF supports this claim.

The AUMF only authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." It does not mention wiretaps or the exercise of force in the United States.

The administration also argues that the Supreme Court decision in 2004 in *Hamdi* supports its argument that the AUMF gives the President the power to conduct warrantless surveillance in the United States.[22] The petitioner in the *Hamdi* case, an American citizen, had been captured on the battlefield in Afghanistan and later brought to the United States, where he was detained in a military facility as an "enemy combatant." In *Hamdi*, the Supreme Court concluded that the AUMF authorized the administration to detain Hamdi to prevent him from returning to the battlefield in Afghanistan because such a detention is "a fundamental incident of waging war." [23]

The government goes on to argue that "communications intelligence targeted at the enemy" is also a "fundamental incident of waging war."[24] This is certainly true when it comes to surveillance on the battlefield. But it strains logic and, more important, the delicate system of checks and balances that defines our constitutional democracy to suggest that conducting warrantless electronic surveillance in the United States--surveillance that captures the

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[21] S.J. Res. 23 (Sept. 18, 2001), The Avalon Project: S.J. Resolution 23 - Authorization for Use of Military Force (Enrolled Bill) September 18, 2001.

[22] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), http://straylight.law.cornell.edu/supct/html/03-6696.ZO.html.

[23] *Id.*

[24] Moschella Letter at 3.

conversations of American citizens--is likewise a fundamental incident of war.

Congress certainly intended no such thing. Former Senator Tom Daschle who was Majority Leader of the Senate when Congress passed the AUMF, confirmed this. He reports that the administration at the last minute sought to get a reference to activities in the United States into the resolution and that the Congress refused. [25]

Moreover, even if Congress believed that electronic surveillance in the United States was a necessary part of the war it had just authorized against al Qaeda, it had no reason to authorize a new electronic surveillance program since it had already provided under FISA a procedure for the President to conduct warrantless searches for 15 days and then return to Congress if he needed additional authority.

The legislative history of FISA and the text of the AUMF make clear that Congress intended to require the President to use FISA to conduct electronic surveillance in the United States and did not in the AUMF authorize the current NSA program.[26]

The argument that the President could not ask Congress for an amendment to FISA without revealing sensitive intelligence information is specious. Terrorists no doubt assume that their conversations are monitored. That, after all, was the argument for giving the government roving wiretap authority in the Patriot Act. Moreover, it is possible to explain the need for greater authority without revealing sensitive intelligence information. Indeed, when Congress first considered the need for FISA and when it subsequently amended FISA on several occasions, including in the Patriot

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[25] Tom Daschle, Power We Didn't Grant, *Washington Post,* Dec. 23, 2005, p. A21. http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html

[26] The Moschella Letter points out that the section of FISA creating the crime of wiretapping under color of law used the qualifying phrase "except as authorized by statute" rather than, say, "except as authorized by FISA and Title III." According to the administration, this language means that Congress could authorize warrantless wiretaps in another statute. But the legislative history of FISA makes clear that Congress intended the "except authorized by statute" language to mean "except as authorized by" FISA or Title III. *See* Report of the House Permanent Select Committee on Intelligence, Foreign Intelligence Surveillance Act, H.R. 95-1283, I at 96 (stating that FISA "makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law except as specifically authorized in chapter 119 of Title III and this title").

Act, it followed procedures that Congress has in place to deal with the sensitivity of such information and the need to maintain secrecy.

Also specious is the claim that the administration had to bypass FISA's carefully crafted procedures for obtaining warrants because the Congress that enacted FISA did not have today's terrorist threat in mind. From the start, FISA provided for surveillance of suspected international terrorists. Congress even loosened the "agent of a foreign power" standard to account for surveillance of terrorists. It recognized that in determining under FISA whether someone was a terrorist, the government would have to rely on "circumstantial evidence, such as concealment of one's true identity or affiliation with the [terrorist] group, or other facts and circumstances…."[27] Moreover, after 9/11, the President asked for additional authority to combat terrorism and Congress amended FISA in the Patriot Act to provide it.

The Administration's End-Run Around FISA Undermines National Security

Far from protecting our national security, the administration's extra-judicial eavesdropping program actually makes us less safe. By operating this secret and illegal NSA spying program, the administration created the environment that prompted the leaks from government officials, who were concerned about the rights of Americans and the administration's possible violations of criminal law. The administration would prefer that criminal charges be brought against the whistleblowers, but whistleblowers are often the only check on unlawful conduct when an administration defies our system of checks and balances and refuses to allow meaningful congressional or judicial oversight of its activities.

The administration would also like to blame the whistleblowers for harming national security. But it is because of the administration's unlawful conduct that sources and methods used to collect intelligence have been revealed, jeopardizing our national security and undermining the government's ability to successfully prosecute alleged terrorists. Indeed, defense attorneys representing alleged terrorists now are challenging the legality of the evidence against their clients, asserting that evidence must be excluded if it was the fruit of an unlawful wiretap under the NSA program.

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[27] FISA Conference Report at 20.

Furthermore, the administration's audacious claim of executive authority to eavesdrop on American citizens without a warrant and without oversight has undermined the American people's trust and the bipartisan consensus that is crucial to forging a strong policy to combat terrorism.

Congress must conduct hearings to determine exactly what is being done in the new NSA program and why the administration concluded that it could not use FISA. Congress should then take the necessary action to restore the public trust and to ensure that the current president and all future presidents obey the law.

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