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United States Senate

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February 3, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Ranking Member:

As the Committee on the Judiciary is poised to conduct a hearing on the President's program to intercept terrorist communications, I write to express my strong support for the continuation of this important program, as one of the members of Congress that has been fully and repeatedly briefed.

Despite legal analysis by some critics, I am confident that the President retains the constitutional authority to conduct "warrantless" electronic surveillance within the United States when the primary purpose of the surveillance is the collection of foreign intelligence information regarding foreign powers, such as international terrorist organizations, and their agents, assistants, and collaborators. I am equally confident that the President's exercise of this authority has been, and continues to be, reasonable in the context of the United States' ongoing war against terrorist organizations that are intent on targeting our homeland again.

I want to take this opportunity to explain why I believe this National Security Agency (NSA) program is within the President's inherent authorities, why the program is legal, necessary, and reasonable, and why Congress, through the congressional intelligence committees, has been kept "fully and currently informed" as required by statute.

Constitutional Authority of the President

Whether our nation has been at peace or engaged in active hostilities, Presidents from George Washington to President George W. Bush have intercepted communications to determine the plans and intentions of enemies that threaten our national security. As the first Commander-in-Chief of our nation's military, General George Washington intercepted mail to gather intelligence concerning British activities.¹ From World War I through the Cold War, Presidents have conducted warrantless surveillance of both international and domestic communications to protect this nation.²

A. *Olmstead* and the Communications Act of 1934

For a significant portion of the 20th Century, the application of the Fourth Amendment³ to electronic surveillance was the subject of significant debate. In *Olmstead v. United States*, the Supreme Court held that electronic surveillance of telephone communications was not a "search or seizure" for Fourth Amendment purposes unless the surveillance was accomplished by an "actual physical invasion of [house or curtilage]."⁴ Notwithstanding the lack of Fourth Amendment protection for telephone conversations, Chief Justice Taft left open the possibility that Congress might legislate to make evidence derived from the interception of telephone conversations inadmissible in federal criminal trials.⁵ Following *Olmstead*, electronic surveillance of telephone conversations – including surveillance for national security purposes –

¹ See CENTRAL INTELLIGENCE AGENCY, INTELLIGENCE IN THE WAR OF INDEPENDENCE, 31-32 (1997).

² See, e.g., Exec. Order No. 2,604 (1917) (authorizing censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines); Memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson (May 21, 1940) (authorizing electronic surveillance of the "communications of persons suspected of subversive activities" while limiting those investigations "insofar as possible to aliens"); Letter from Attorney General Thomas C. Clark to President Harry S Truman (July 17, 1946) (requesting and receiving authority to conduct electronic surveillance in cases "vitaly affecting the domestic security").

³ The Fourth Amendment states:

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.

U.S. CONST. amend. IV.

⁴ *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

⁵ See *id.*

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would not have violated the Fourth Amendment unless accompanied by a trespass to secure access to the communications or the seizure of “tangible material effects.”⁶

In 1934, Congress passed Section 605 of the Communications Act of 1934.⁷ Section 605 placed certain restrictions on the interception, disclosure, and publication of the contents of radio and wire communications.⁸ Despite a lack of clarity in the legislative history of the Act, the Supreme Court interpreted Section 605 as a prohibition on electronic surveillance of telephone conversations conducted by federal officials investigating criminal conduct and excluded from evidence the information obtained by the electronic surveillance.⁹

In the face of Section 605 and *United States v. Nardone (Nardone I)*, Presidents continued to authorize electronic surveillance in matters related to national security, considering the two merely as a prohibition on “the interception and divulgence” of the contents of wire and

⁶ *See id.* at 466.

⁷ Pub. L. No. 73-416, 48 Stat. 1103 (1934) (codified as amended at 47 U.S.C. § 605 (2005)). Section 605 provided:

No person receiving or assisting in receiving, or 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, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and *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*

Id. at 1103-1104 (emphasis added).

⁸ *See id.*

⁹ *See Nardone v. United States (Nardone I)*, 302 U.S. 379 (1937) (excluding the information derived from the wiretap as evidence). The Court subsequently extended the exclusionary rule pronounced in *Nardone I* to any evidence derived from prohibited wiretapping. *See Nardone v. United States (Nardone II)*, 308 U.S. 338 (1939).

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radio communications outside the "Federal establishment."¹⁰ Based on this interpretation, President Roosevelt advised Attorney General Jackson:

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.¹¹

¹⁰ See *United States v. United States District Court (Keith)*, 444 F.2d 651, 662 (6th Cir. 1971) ("[The language of Section 605] failed to establish a decisive policy [on wiretapping]. . . . And successive Attorneys General took the statute as license to wiretap so long as their agents did not divulge [the existence, contents, substance, purport, effect, or meaning of such intercepted communications].") (citing Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195 (1954); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954)); see also generally S. Rep. No. 604, Part 1, 95th Cong., 1st Sess. 10 (Nov. 15, 1977) (citing Attorney General Edward H. Levi, Testimony before the Select Committee to Study Governmental Operations with respect to Intelligence Activities of the United States Senate (the Church Committee) (Nov. 6, 1975) and the final report of the Church Committee).

¹¹ Memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson (May 21, 1940). During World War II, the term "fifth columns" (or "fifth columnists") were groups of "traitors who act[ed] secretly and subversively out of sympathy with an enemy of their country." See *The Mavens' Word of the Day*, Random House, at <http://www.randomhouse.com/wotd/index.pperl?date=20010417>.

Thus, in the face of legislation arguably prohibiting wiretapping *and* Supreme Court precedent prohibiting information derived from wiretapping to be used as evidence of a crime, President Roosevelt, acting as Commander-in-Chief, authorized wiretapping of threats to the nation where the information would effectively have only one value – as intelligence to detect and prevent attacks. President Truman broadened the scope of the authorization by removing the caveat that such surveillance should be limited “insofar as possible to aliens.”¹²

B. *Katz* and Title III

As Fourth Amendment jurisprudence evolved, the Supreme Court reconsidered *Olmstead*. In *Katz v. United States*, the Court held that the interception of telephone conversations was indeed governed by the requirements of the Fourth Amendment.¹³ The Court went on to hold, despite the self-limited nature of the surveillance,¹⁴ that the Government should have sought a warrant to authorize the activity.¹⁵ In mandating that a warrant be sought for electronic surveillance under ordinary circumstances, *Katz* specifically held open the possibility of an exception to the warrant requirement in cases “involving the national security.”¹⁶

Responding to *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).¹⁷ Title III, for the first time, provided procedures for the Government to procure an order authorizing electronic surveillance of specified crimes.¹⁸ Title III also authorized how information derived from such surveillance could be disclosed and

¹² Letter from Attorney General Thomas C. Clark to President Harry S Truman (July 17, 1946) (requesting and receiving authority to conduct electronic surveillance in cases “vital affecting the domestic security”).

¹³ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴ *Katz*, 389 U.S. at 354-55 (describing limits that government agents unilaterally imposed on the scope and duration of the electronic surveillance, including refraining from listening to a conversation inadvertently intercepted).

¹⁵ *Id.* at 359.

¹⁶ *See id.* at 358 n.23. Justice Stewart, writing for the Court, explained, “Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented in this case.” *Id.*

¹⁷ Pub. L. No. 90-351, 82 Stat. 211-225 (1968).

¹⁸ *See id.* at 218 (adding 18 U.S.C. § 2518, “Procedure for interception of wire or oral communications”); *id.* at 216 (adding 18 U.S.C. § 2516, “Authorization for interception of wire or oral communications”).

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used and provided penalties for electronic surveillance not authorized by Title III.¹⁹ Importantly, however, Congress specifically recognized that nothing in Title III or in Section 605 of the Communications Act of 1934

shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in [Title III] be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as necessary to implement that power.²⁰

Thus, as originally enacted, Title III avoided encroaching on what Presidents had long asserted as constitutional authority and overruled the exclusionary rule of *Nardone I* and *II* with respect to such surveillance.²¹

C. *Keith, Truong*, and the Foreign Intelligence Surveillance Act of 1978

Title III had been on the books for only four years when the Supreme Court considered for the first time the application of the warrant requirement of the Fourth Amendment to electronic surveillance authorized by the President for internal security purposes.²² In *United States v. United States District Court (Keith)*, the Court was confronted with electronic surveillance by the Government of wholly domestic organizations who had conspired to destroy Government property and of one defendant who had bombed the office of the Central

¹⁹ See *id.* at 217 (adding 18 U.S.C. § 2517, “Authorization for disclosure and use of intercepted wire or oral communications”); *id.* at 213 (adding 18 U.S.C. § 2511, “Interception and disclosure of wire or oral communications prohibited”).

²⁰ See *id.* at 214 (adding 18 U.S.C. 2511(3)).

²¹ See also *United States v. United States District Court (Keith)*, 407 U.S. 297, 302-08 (1972).

²² *Keith*, 407 U.S. at 299.

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Intelligence Agency in Ann Arbor, Michigan.²³ The Court held that the warrant requirement of the Fourth Amendment applied to domestic security surveillance by the Government.²⁴ But, *Keith* is just as important for the question that the Court *specifically refused to address*:

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers and their agents.²⁵

Thus, the Supreme Court was careful to avoid any implication that *Keith* might apply to warrantless electronic surveillance of foreign powers or their agents.

Following *Keith*, every federal court to consider the issue has found that a warrant is not required when the President conducts electronic surveillance for the primary purpose of collecting foreign intelligence concerning foreign powers and their agents, collaborators, and assistants.²⁶

For example, in *United States v. Truong Dinh Hung*, the Fourth Circuit considered the legality of the warrantless electronic surveillance of Truong Dinh Hung, a Vietnamese citizen working with an American citizen to pass classified information to the North Vietnamese during the 1977 Paris negotiations.²⁷ Acting on information provided by an informant, the Government tapped Truong's phone and placed a bug in his apartment.²⁸ Distinguishing the case from *Keith*,

²³ See *id.* at 299-300.

²⁴ See *id.* at 321; see also *id.* at 308-09 (clarifying that in the context of the present case “[t]here is no evidence of any involvement, directly or indirectly, of a foreign power”).

²⁵ *Id.* at 321-322, 322 n.20; see also *id.* at 308-09 (“It is important at the outset to emphasize the limited nature of the question before the Court. . . . Further, the instant case requires no judgement on the scope of the President’s surveillance power with respect to the *activities of foreign powers, within or without this country.*” (emphasis added)).

²⁶ See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); *United States v. Buck*, 548 F.2d 871 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc), *cert. denied sub nom., Ivanov v. United States*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). Only the D.C. Circuit, in dicta, has even questioned the proposition. See *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (plurality opinion in case involving surveillance directed at organization with no foreign connection).

²⁷ See *Truong*, 629 F.2d at 911-12.

²⁸ *Id.* at 912.

the court stated,

For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, “unduly frustrate” the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would be a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chances of leaks regarding sensitive executive operations.²⁹

The Fourth Circuit questioned the ability of courts to make the “delicate and complex decisions that lie behind foreign intelligence surveillance,” compared to the “unparalleled expertise” of the Executive branch in areas of national security and military and foreign affairs.³⁰ The court further noted the constitutional responsibility of the President for “the conduct of the foreign policy of the United States in times of war and peace.”³¹

The *Truong* court did not write the President a “blank check” in recognizing an exemption from the warrant requirement of the Fourth Amendment for foreign intelligence surveillance. First, the court specifically limited the use of the authority to circumstances under which “the object of the search or the surveillance is a foreign power, its agent or collaborators.”³² Second, the court held that “the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”³³ The court also found that the “reasonableness” requirement of the Fourth Amendment further binds the scope and extent of warrantless electronic surveillance for foreign intelligence purposes.³⁴

²⁹ *See id.* at 913.

³⁰ *Id.* at 913-14.

³¹ *See id.* at 914 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

³² *See id.* at 915. The Court also noted that, “The exception applies only to foreign powers, their agents, and their collaborators. . . . Thus, the executive can proceed without a warrant only if it is attempting primarily to obtain foreign intelligence from foreign powers or *their assistants*.” *Id.* at 916 (emphasis added).

³³ *Id.* at 915.

³⁴ *See id.* at 916.

The Foreign Intelligence Surveillance Act of 1978 (FISA) was enacted largely in response to abusive use of warrantless electronic surveillance to target U.S. persons for domestic activities protected by the First Amendment. Of particular note, the Senate Judiciary Committee highlighted the warrantless electronic surveillance of Dr. Martin Luther King, the politically motivated surveillance by the Nixon administration, and the targeting of domestic organizations with objections to the Vietnam War.³⁵ Congress also cited the work of the Church Committee to demonstrate the need for procedures governing electronic surveillance for foreign intelligence purposes:

Since the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of a judicial warrant. . . . [P]ast 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.

....

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.³⁶

³⁵ See, e.g., S. Rep. 604, 95th Cong., 1st Sess., 7-8 (Nov. 15, 1977) (noting “the number of illegal or improper national security taps and bugs conducted during the Nixon administration); *id.* at 27 (noting surveillance of “Americans who were active in the protest against United States involvement in Vietnam”, and who may have been in contact with foreign powers or their representatives, but whose activities were not under the direction of a foreign intelligence service); *id.* at 29 (discussing surveillance of Dr. King on “national security grounds” based on his association with two advisors suspected of American Communist party membership); see also, e.g., S. Rep. No. 701, 95th Sess., 2d Sess., 34 (Mar. 14, 1978) (noting collection activities of the NSA whereby international telegraph communications were collected and analyzed for both foreign intelligence and for law enforcement “watchlisting” purposes).

³⁶ S. Rep. No. 604, 95th Cong., 1st Sess., at 8 (citations omitted).

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Congress clearly sought through FISA to constrain the President's inherent authority to conduct warrantless electronic surveillance for national security purposes. To accomplish this objective, FISA repealed that portion of Title III expressing neutrality with respect to the President's authority.³⁷ In place of legislative neutrality, the congressional judiciary and intelligence committees expressed their intention that Title III and FISA would be the "exclusive means" by which the President could conduct electronic surveillance for national security purposes.³⁸

Despite the insistence of these committees, the debate over the President's inherent constitutional authority continued as FISA worked its way through the legislative process. Explaining the position of President Jimmy Carter's administration, Attorney General Griffin Bell testified before the House:

[T]he current bill [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.³⁹

³⁷ See Pub. L. No. 95-511, § 201(c) (Oct. 25, 1978).

³⁸ See *id.* at § 201(b) (adding 18 U.S.C. § 2511(2)(f)); see also H.R. Rep. 1283, Pt. 1, 95th Cong., 2d Sess., 100-02 (June 8, 1978) ("[W]ith respect to the interception of domestic wire and oral communications, and to electronic surveillance . . . the procedures of [Title III and FISA] shall be the exclusive means by which such activities may be conducted."); S. Rep. 701, 95th Cong., 2d Sess., 71-72 (Mar. 14, 1978) ("[T]he procedures of [Title III and FISA] shall be the 'exclusive means by which electronic surveillance. * * * and be (sic) * * * conducted.' This statement puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillance in the United States outside the procedures contained in [Title III and FISA]."); S. Rep. 604, 95th Cong., 1st Sess., 64-65 (Nov. 15, 1977) (same).

³⁹ See Testimony of Attorney General Griffin Bell, Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcommittee on Legislation of the House Committee on Intelligence, 95th Cong., 2d Sess. 15 (1978). President Carter, in his signing statement on FISA, stated, "The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted." See Statement by President Jimmy Carter on Signing S. 1566 Into Law (Oct. 25, 1978). It is important to note, however, that the views and opinions of one President cannot bind future President's to an interpretation of law intrudes on the President's constitutional authority. In providing guidance to President Clinton regarding the enforcement of an unconstitutional statute, Assistant Attorney General Walter Dellinger stated:

The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. . . . *(Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.)*

In fact, the House-passed version of FISA would have recognized only that the Act constituted the “exclusive statutory means” of conducting electronic surveillance for national security purposes.⁴⁰

Reconciling the differences of the House and Senate, the conferees explained the ultimate position of Congress as follows:

The conference substitute adopts the Senate provision which omits the word “statutory.” 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.”⁴¹

Following passage of FISA, no court has had the opportunity to address what is essentially a political, separation of powers question:⁴² whether the language of FISA and intent of Congress can deprive the President of constitutional authority to conduct warrantless electronic surveillance for national security purposes. Congress has amended FISA on several occasions to add additional flexibility and authority for the President to collect important foreign intelligence information pursuant to statutory authorization. With these modifications, the Act has performed adequately, even as our adversaries have attempted to use advances in communications technology to harm our nation. Yet, federal courts have continued to acknowledge the constitutional authority of the President.⁴³ In fact, the Foreign Intelligence Surveillance Court of Review – the very court established by Congress to review appeals of matters relating to FISA

⁴⁰ See H.R. Conf. Rep. 1720, 95th Cong., 2d Sess., 35 (Oct. 5, 1978).

⁴¹ *Id.* (citing *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

⁴² See, e.g., *Butenko*, 494 F.2d at 601 (“We do not intimate, at this time, any view whatsoever as the proper resolution of the possible clash of the constitutional powers of the President and Congress.”).

⁴³ See, e.g., *In re: Sealed Case No. 02-001*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. Rev. 2002); *United States v. Duggan*, 743 F.2d 59, 72-74 (2d Cir. 1984); *United States v. Usama Bin Laden*, 126 F. Supp. 2d 264, 270-77 (S.D.N.Y. 2000) (adopting exception to warrant requirement of Fourth Amendment for physical search and electronic surveillance of U.S. person overseas when searches are conducted overseas. are primarily for foreign intelligence purposes, and are targeted at foreign powers or their agents).

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electronic surveillance applications – has noted the consistent recognition of the President’s constitutional authority by the federal courts, stating “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.*”⁴⁴

The NSA Terrorist “Early Warning” Capability: Legal, Necessary, and Reasonable

As Chairman of the Select Committee on Intelligence, I have been briefed on the NSA terrorist “early warning” capability established by the President in the uneasy days after the terrorist attacks of September 11, 2001. From my first briefing on that program to the most recent, I have been, and remain, convinced that the NSA program is legal, necessary, and reasonable.

Whether the authority of the President in this case is at its “maximum” or its “lowest ebb,”⁴⁵ one thing is clear: Congress, by statute, cannot extinguish a core constitutional authority of the President. From the founding of this nation, the collection of intelligence has been recognized as an inherent authority of the President. As John Jay explained,

The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.⁴⁶

The Supreme Court has confirmed the relationship of intelligence collection to the President’s constitutional responsibility “as Commander-in-Chief and as the Nation’s organ for foreign

⁴⁴ *In re: Sealed Case No. 02-001*, 310 F.3d at 742 (emphasis added).

⁴⁵ Compare *Youngstown Sheet and Tube Co.*, 343 U.S. at 635 (“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.”) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)) with *Youngstown Sheet and Tube Co.*, 343 U.S. at 637 (“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.”).

⁴⁶ See *The Federalist No. 64*, at 435 (John Jay) (Jacob E. Cooke ed. 1961).

affairs.”⁴⁷ With respect to electronic surveillance, the federal courts have consistently recognized that these constitutional responsibilities of the President vitiate the need for a warrant to collect foreign intelligence.⁴⁸ Heeding the words of the FISA conferees, I believe the Supreme Court would recognize (and arguably has recognized)⁴⁹ the President’s constitutional authority to conduct warrantless electronic surveillance and, even after FISA, determine that Congress cannot define the “exclusive means” for the conduct of that authority.

Therefore, FISA notwithstanding, the President’s constitutional authority is sufficient to justify the initiation and conduct of the NSA terrorist surveillance program. The terrorist attacks of September 11, 2001, were carried out by al Qaeda operatives living within the United States and coordinating their activities through international communications with al Qaeda leaders. The leaders of al Qaeda continue to threaten attacks on the homeland. As Usama bin Ladin proclaimed on January 19, 2006, “Operations are under preparation, and you will see them on your own ground once they are finished, God willing.”⁵⁰

Having assumed a constitutional responsibility to protect the United States from foreign attack⁵¹ and facing an enemy that has successfully attacked on more than one occasion (by clandestinely placing operatives within our borders) and who threatens to do so again, the President exercised his inherent constitutional authority as Commander-in-Chief to prevent further attacks.⁵² The terrorist surveillance program targets only the international communications of persons within the United States where there is “a reasonable basis to conclude that one party to

⁴⁷ See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see also *Webster v. Doe*, 486 U.S. 592, 605-06 () (O’Connor, J., concurring in part and dissenting in part) (“The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of ‘the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.’” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); *Totten v. United States*, 92 U.S. 105, 106 (1876) (“[The President] was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.”).

⁴⁸ See *Truong*, 629 F.2d at 912-16; *Butenko*, 494 F.2d at 601, 602-08; *Brown*, 484 F.2d at 425-27.

⁴⁹ The Supreme Court denied certiorari in *Truong*, cert. denied, 454 U.S. 1144 (1982), and in *Butenko*, cert. denied sub nom., *Ivanov v. United States*, 419 U.S. 881 (1974).

⁵⁰ See Text: ‘Bin-Laden tape’, BBC News, at http://news.bbc.co.uk/2/hi/middle_east/4628932.stm.

⁵¹ See *The Prize Cases*, 67 U.S. (2 Black) 635, 692-93 (1862).

⁵² See also *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (“[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval.”).

the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.”⁵³ These groups have been identified by Congress as enemies of this nation, further amplifying the President’s inherent authority.⁵⁴ The Principal Deputy Director of National Intelligence (PDDNI) – the former Director of NSA – has described the terrorist “early warning” capability as “hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda.”⁵⁵ Clarifying the targeted nature of the program, the PDDNI went on to state, “It is not a driftnet . . . grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices.”⁵⁶ The terrorist surveillance program is “carefully reviewed approximately every 45 days to ensure that it is being used properly.”⁵⁷ International communications intercepted by the program are also subject to “minimization procedures” such that “U.S. identities are expunged when they’re not essential to understanding the intelligence value of any report”⁵⁸ – the same standard applied to all other signals intelligence collection.

The FISA does not provide an effective alternative to authorize the “hot pursuit” of terrorists operating within this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility nearly impossible to achieve. FISA’s burden of proof – probable cause that an individual is an agent of a foreign power – is higher than the “reasonableness” the Fourth Amendment requires and does not enable surveillance of all the assistants and collaborators of our enemies that the President should target for intelligence collection. Attorney General-approval of “emergency” surveillance under FISA must meet a probable cause standard, is limited to “foreign powers” or “agents of a foreign power” as defined in FISA, and is similarly encumbered by a bureaucratic approval process.

⁵³ See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director of National Intelligence, at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

⁵⁴ See Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40 (Sept. 18, 2001).

⁵⁵ See Remarks by General Michael V. Hayden, Principal Deputy Director of National Intelligence and Former Director of the NSA, Address to the National Press Club, “What American Intelligence & Especially the NSA have been doing to Defend the Nation,” Office of the Director of National Intelligence, at http://www.dni.gov/release_letter_012306.html.

⁵⁶ See *id.*

⁵⁷ See Press Conference of President Bush, at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-2.html> (Dec. 19, 2005).

⁵⁸ See Remarks of General Hayden, *supra* note 55.

Based on the targeted nature of the terrorist surveillance program, FISA's limited effectiveness in providing for an effective "early warning" capability against the al Qaeda target, and the targeting of surveillance only against an enemy of the nation confirmed by an act of Congress, the President's initiation of the program is well within his constitutional authority as Commander-in-Chief. Even applying the scrutiny of Justice Jackson's "third category," I believe the legal justification for the NSA program is sound. Our nation is at war with an enemy that continues to threaten attacks; attacks the enemy previously conducted through "sleeper cells" living clandestinely within our borders. Under those circumstances, the President's exercise of his inherent constitutional authority to intercept enemy communications through the NSA terrorist surveillance program is constitutional.

The President's constitutional authority as Commander-in-Chief is not unlimited, however. Any exercise of the constitutional authority to conduct warrantless electronic surveillance must comply with the "touchstone of the Fourth Amendment" – "reasonableness."⁵⁹ The terrorist surveillance program authorized by the President more than meets that test. Certainly the effort to detect and disrupt future attacks on this nation by al Qaeda and affiliated terrorist organizations operating both outside and within the United States represents the most compelling government interest.⁶⁰ As President Franklin D. Roosevelt noted when he authorized warrantless electronic surveillance of our enemies in the days before World War II, "It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed."⁶¹ Moreover, given the targets of the terrorist surveillance program, the application of "minimization procedures" to any intercepted communications, and the periodic legal review of the program, it is quite clear to me that the terrorist surveillance program meets the "reasonableness" requirements of the Fourth Amendment. The Fourth Amendment's "reasonableness" requirement acts as the appropriate check on the President's inherent authority under these circumstances. Bounded by the Fourth Amendment, the President's exercise of his constitutional authorities could hardly be characterized as a "blank check" – particularly in light of the limited nature of the NSA terrorist "early warning" capability.

⁵⁹ See *United States v. Knights*, 534 U.S. 112, 118-19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (internal quotation marks omitted))).

⁶⁰ "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." See *Haig v. Agee*, 453 U.S. 280, 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

⁶¹ See Memorandum from President Franklin D. Roosevelt, *supra* note 11.

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Opportunity for Congressional Oversight

As Chairman of the Select Committee on Intelligence, I also believe that the President has met his obligations under Title V of the National Security Act of 1947. Section 501, 502, and 503 of the National Security Act of 1947 represent a delicate compromise between Congress and the President.⁶² While briefings to all members and staff may represent a preferred method of notification of intelligence activities under Title V, the congressional intelligence committees have historically acquiesced to requests by the Executive branch to limit access to particularly sensitive matters – even when only the Chairman and Vice Chairman were notified. This practice was not limited to notifications under Section 503 where the so-called “Gang of Eight” notification sets the floor on who in Congress *must* be advised of authorized covert actions. Arguments of critics misinterpret the legislative text and fail to account for this history of compromise.

First, the analysis of critics, including that of the Congressional Research Service, inserts additional text into Section 502 of the National Security Act of 1947 – text that is neither supported by the plain language of the National Security Act of 1947, nor mandated by the legislative history of Section 502. Section 502 provides that “the Director of National Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall . . . keep the *congressional intelligence committees* fully and currently informed of all intelligence activities”⁶³ Section 3 of the National Security Act of 1947⁶⁴ defines the term “congressional intelligence committees” as “the Select Committee on Intelligence of the Senate [and] the Permanent Select Committee on Intelligence of the House of Representatives.” Neither Section 3 nor the legislative history of Section 502 lead to the conclusion that the term “congressional intelligence committees” means “[*all members of the*] congressional intelligence committees.”

Second, the history and practice underlying Section 502 do not support this misinterpretation of the term “congressional intelligence committees.” Critics ignore the history of cooperation and compromise between the Congress and the President on the oversight of intelligence activities and the provision to Congress of sensitive information regarding

⁶² Sections 501 (50 U.S.C. § 413) and 502 (50 U.S.C. § 413a) require, respectively, that the President and the Director of National Intelligence (and the heads of all U.S. government departments, agencies, and other entities) keep the “congressional intelligence committees” “fully and currently informed” of all intelligence activities of the United States. Section 503 (50 U.S.C. § 413b) establishes specified procedures for Presidential approval and Congressional notification concerning “covert actions.”

⁶³ 50 U.S.C. § 413a (emphasis added).

⁶⁴ 50 U.S.C. § 401a.

intelligence sources and methods. As a former Chairman of the Select Committee on Intelligence, this custom and practice of the Committee is something of which Chairman Specter should be well aware. In Section 502 of the National Security Act of 1947, the phrase – “To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters” – embodies a recognition of the competing constitutional authorities and responsibilities of the Congress and the President.⁶⁵ The Executive branch has consistently placed limitations on the distribution of extremely sensitive intelligence information within the Committee. When circumstances require the protection of exceptionally sensitive matters – though by volume relatively infrequent and rare – the Executive branch has limited distribution of information to only the Chairman and Vice Chairman. Although this practice does not represent the preferable mode of notification, the Committee has condoned and respected Executive branch limitations. Indeed, Congress recognized this constitutional tension and acknowledged it in statutory language implicitly allowing such limitations.

Conclusion

To this point, I have focused nearly exclusively on the President’s inherent constitutional authority to implement the terrorist “early warning” capability that has been so publicly described – much to the detriment of our intelligence collection capabilities. I should mention, however, that I do not discount the legal arguments of the Department of Justice concerning the Authorization for the Use of Military Force (AUMF) and its implicit authorization of this capability.⁶⁶ The AUMF represents a broad grant of authority to the President to “use all necessary and appropriate force against those nations, organizations, or persons he determine[s] planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States.”⁶⁷ The AUMF also recognizes the President’s authority under the Constitution to “take action to deter and prevent acts of international terrorism against the United States.”⁶⁸ Indeed, I am quite certain that a court, confronted with the legality of the NSA program, would avoid the constitutional issues on which I have focused and resolve any case in favor of the program based on a reasonable interpretation of the statutes involved and out of a prudential responsibility to

⁶⁵ 50 U.S.C. § 413a.

⁶⁶ Pub. L. No. 107-40 (Sept. 18, 2001); *see also Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁶⁷ Pub. L. No. 107-40, § 2(a) (Sept. 18, 2001).

⁶⁸ *Id.* at preamble.

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avoid confronting constitutional issues when other issues are dispositive.⁶⁹ If this were the case, the President would be exercising his authority not in *Youngstown's* "category three," but in "category one" where his authorities are at their maximum.⁷⁰

I have focused instead on the constitutional authorities of the President because I believe that those authorities should be the beginning and end of our legislative inquiry into the "legality" of this program. It is quite clear to me that Congress could not, through passage of FISA, extinguish the President's constitutional authority to conduct the terrorist surveillance program at issue.⁷¹ It strains credulity to believe that Congress could deprive the President of an authority so directly related to his responsibilities as "Commander-in-Chief and as the Nation's organ for foreign affairs"⁷² – an authority that Presidents have long exercised and that federal courts have consistently recognized.⁷³

I am convinced that Congress could do only what the conferees on the FISA made explicit – take the President's authority to its lowest ebb.⁷⁴ Based on the constitutional authority of the legislature, I have little doubt that the subject of electronic surveillance, even in the context of national security investigations, is a lawful object of legislative effort. But, unlike the authority to seize steel mills – by comparison so indirectly and distantly tied to the President's Article II authority and so directly tied to Congress' enumerated authorities in Article I – the regulation of

⁶⁹ See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (footnote collecting citations omitted)).

⁷⁰ *Youngstown Sheet and Tube Co.*, 343 U.S. at 635 ("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.") (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

⁷¹ See *In Re: Sealed Case No. 02-001*, 310 F.3d at 742 ("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."); Testimony of Attorney General Griffin Bell, *supra* note 39 and accompanying text; see also, e.g., *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 484-85 (1989) (Kennedy, J., concurring).

⁷² See *Curtiss-Wright*, 299 U.S. at 320.

⁷³ See *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); see also *Webster v. Doe*, 486 U.S. 592 (1988); *Haig v. Agee*, 453 U.S. 280 (1981).

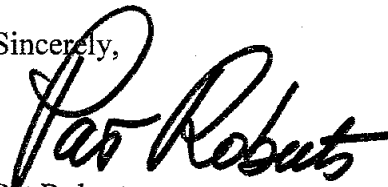
⁷⁴ See H.R. Conf. Rep. 1720, 95th Cong., 2d Sess., 35 (Oct. 5, 1978).

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the President's constitutional authority to collect intelligence information incident to actual or potential attack by foreign powers and their agents is a subject over which Congress cannot assert complete dominion. Any effort to do so would undoubtedly be found unconstitutional and could, perhaps, unnecessarily disclose the methods by which this nation collects foreign intelligence. Public discourse on matters of intelligence, while important to the operation of a free and open democracy, invariably chips away at the mechanisms that protect our freedom. Any legislative effort in this area must be mindful of that undeniable fact.

I respectfully request that this letter be entered into the record of the hearing of the Committee on the Judiciary currently scheduled for February 6, 2006, at which Attorney General Alberto R. Gonzales will appear.

Sincerely,

A handwritten signature in black ink that reads "Pat Roberts". The signature is written in a cursive, flowing style with a large initial "P".

Pat Roberts
Chairman

cc: The Honorable John D. Rockefeller IV
Vice Chairman
Select Committee on Intelligence

Members of the Committee on the Judiciary
United States Senate

Members of the Select Committee on Intelligence
United States Senate