

# A Legal Analysis of the NSA Warrantless Surveillance Program

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The warrantless National Security Agency (NSA) surveillance program is an illegal and unnecessary intrusion into the privacy of all Americans. The 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). This memorandum examines the government's legal defense of the program and concludes that it lacks serious merit.

## **The Bush Administration Position**

The government's defense of the NSA warrantless surveillance program, first reported by the *New York Times* and then confirmed by the administration, rests on both inherent powers and a claim of statutory authorization.

The precise details of the program are still not known. In a December 19, 2005 press briefing, Attorney General Alberto Gonzales and General Michael V. Hayden, principal deputy director of National Intelligence laid out the legal justification for the NSA program. (Press Briefing).<sup>2</sup> The administration has admitted that after 9/11 the President authorized NSA to conduct warrantless electronic surveillance in the United States. The program included acquiring the content of 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.

The administration's position 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)<sup>3</sup>, and in the Press Briefing.

First, in the words of the Moschella Letter, "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)

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<sup>2</sup> (<http://www.fas.org/irp/news/2005/12/ag121905.html>).

<sup>3</sup> <http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf>

Second, in the words of the Attorney General, “the authorization to use force, which was passed by the Congress in the days following September 11<sup>th</sup>, constitutes” authority for the administration “to engage in this kind of signals intelligence.” (Press Briefing, at p. 1)

The claim of inherent authority might have some plausibility had Congress not acted so decisively to prohibit warrantless surveillance of US persons in the United States when it enacted FISA) in 1978. The second claim -- that after September 11 Congress authorized the President to conduct this warrantless surveillance program -- is utterly specious.

The arguments regarding the constitutional and statutory claims are intertwined. As Justice Jackson explained in his influential and frequently cited concurring opinion in the *Steel Seizure* case,<sup>4</sup> the scope of the President's constitutional authority is affected by what Congress has done. 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. The record is clear that Congress intended to prohibit warrantless intercepts in the United States. Because the constitutional argument can only be evaluated in light of the statutory claim, I deal with the latter first.

### **The Enactment of FISA**

To understand why the assertion that Congress authorized the recently-disclosed NSA program is untenable, we must recall the legal and political backdrop to Congress's enactment of FISA in 1978.<sup>5</sup>

When it first considered wiretaps in the *Olmsted*<sup>6</sup> case in 1928, the Supreme Court concluded that they were not covered by the Fourth Amendment. It was only in 1967

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<sup>4</sup> *YOUNGSTOWN CO. v. SAWYER*, 343 U.S. 579 (1952), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=343&invol=579>. The Jackson concurrence has frequently been cited by approval in opinions for the Supreme Court. For example, in this opinion for the Court by Chief Justice Rehnquist: “And yet 16 years later, Justice Jackson in his concurring opinion in *Youngstown*, supra, which both parties agree brings together as much combination of analysis and common sense as there is in this area, focused not on the ‘plenary and exclusive [453 U.S. 654, 662] power of the President’ but rather responded to a claim of virtually unlimited powers for the Executive by noting:

‘The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.’ [343 U.S., at 641](#).

*DAMES & MOORE v. REGAN*, 453 U.S. 654 (1981), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=453&invol=654>

<sup>5</sup> I bring to this task not only a review of the history but also a deep personal involvement--both as the target of a warrantless wiretap during the Nixon Administration and as a representative of the ACLU during enactment of FISA

<sup>6</sup> *OLMSTEAD v. U.S.*, 277 U.S. 438 (1928), <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=277&invol=438>

that the Court held in *Katz*<sup>7</sup> that the Fourth Amendment did apply to wiretaps. But a much-cited footnote in *Katz* raised for the first time the possibility that the warrant requirement of the Fourth Amendment might not apply when national security is involved: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case," the Court observed.

In 1972, the Court provided a partial answer to the question left open in *Katz*, holding in the *Keith*<sup>8</sup> case that a warrant is required for wiretaps in domestic national security cases. But it expressed no view as to whether a warrant would be required with respect to activities of foreign powers or their agents. In fact, the Supreme Court has never squarely confronted this question.

After *Keith* was handed down, the public began to learn of the extent of warrantless surveillance and other activities of intelligence and law enforcement agencies that many considered inappropriate. Congress created special investigating committees which issued reports including descriptions of abuses by both the FBI and the NSA in conducting wiretaps and recommending the Congress legislate procedures requiring warrants for any surveillance of Americans.<sup>9</sup> President Ford appointed a commission to investigate improper activities, and the press reported abuses by intelligence agencies. A number of lawsuits were filed challenging warrantless wiretaps. In this uncertain legal environment, AT&T, then the monopoly phone company, and some FBI agents were hesitant to conduct warrantless wiretaps.

In this setting the Ford administration came to the Congress seeking enactment of what became FISA to provide for the granting of warrants to conduct wiretaps by a special court operating under different standards when a foreign power or its agents were involved. As Kate Martin of the Center for National Security Studies has detailed in a recent CNSS Memorandum to Interested Persons,<sup>10</sup> the question of whether the President would retain authority to conduct warrantless wiretaps was a key issue in the legislative debate over FISA. Congress was aware of the fact that the administration was then conducting warrantless wiretaps in the United States. In enacting FISA, Congress dealt with this issue with the greatest of care, striking a careful and considered balance between imperative national security claims and our national commitment to basic liberties. It was willing to create a scheme for authorizing wiretaps for intelligence purposes, including in cases of suspected international terrorism, but only if it was the sole means that would be used. Congress intended to prohibit warrantless wiretaps of the

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<sup>7</sup> *KATZ v. U.S.*, 389 U.S. 347 (1967)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=389&invol=347>

<sup>8</sup> *UNITED STATES v. UNITED STATES DISTRICT COURT*, 407 U.S. 297 (1972)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=407&invol=297>

<sup>9</sup> Senate Select Committee on Intelligence (Church Committee)

[http://www.aarclibrary.org/publib/church/reports/book2/html/ChurchB2\\_0163a.htm](http://www.aarclibrary.org/publib/church/reports/book2/html/ChurchB2_0163a.htm)

<sup>10</sup> <http://www.cnss.org>

kind then being conducted, and it took several steps in enacting FISA to make its intentions unmistakable.<sup>11</sup>

First, Congress insisted on removing from a draft of the FISA statute a provision proposed by the Ford administration that would have left open the possibility that the President could continue to conduct warrantless wiretaps.

Second, it repealed the section of a 1968 law on criminal wiretaps that had explicitly stated that that law was not intended to limit the President's power in national security cases.

Third, and of crucial relevance to the current controversy over the legality of the ongoing NSA program, FISA went on affirmatively to provide that the criminal wiretap statute (known as Title III) and FISA "shall be the **exclusive means** by which electronic surveillance ... may be conducted." (Emphasis added). Further, Congress 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 an order from a court.

Congress carefully considered whether the President needed power to conduct surveillance in certain emergency situations. It concluded that there were two such situations. One was when it was necessary to begin surveillance immediately. Congress authorized the Executive to initiate a warrantless surveillance as long as it sought a warrant within 24 hours. After 9/11, Congress, with the support of the President, extended the time to 72 hours.<sup>12</sup> In addition, Congress considered whether the President needed additional power to conduct electronic surveillance in wartime and expressly provided that the President could conduct warrantless surveillance for 15 days after a declaration of war.

In doing so, as Joseph Onek of the Open Society Institute has pointed out, Congress rejected a House provision that provided for a longer period during which a wartime president could conduct warrantless wiretaps. The 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 Congress provided that only an explicit amendment of FISA could authorize warrantless wiretaps beyond 72 hours in peacetime or 15 days after a declaration of war.

(It is true, as the Moschella Letter argues, 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." The government

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<sup>11</sup> *Foreign Intelligence Surveillance Act*, Pub. L. No 90-351, 82 Stat. 212, 1978 (codified as amended at 50 U.S.C. 1801 et. seq. and 18 U.S.C. 2510 et. seq.)

<sup>12</sup> *Intelligence Authorization Act for FY02*, Pub. L. No. 107-108, 115 Stat. 1393, 2001. Sec 314 [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ108.107](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ108.107)

argues that this language means that Congress could authorize warrantless wiretaps in another statute. That Congress intended FISA to provide the sole authority for presidential wiretaps is, as noted, stated in precise language elsewhere in the statute, and there is nothing to suggest that Congress intended to alter that by the language of FISA's criminal provision.)

### **The Congressional Authorization to Use Military Force**

Seeking to surmount the legal barriers that FISA erected against unfettered recourse to warrantless surveillance within the United States, the administration has argued that Congress in effect amended FISA because its authorization to use force in response to the 9/11 attacks (AUMF)<sup>13</sup> included a grant of authority to the President to conduct such 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 brief resolution 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." (Emphasis added).

The Bush administration contends that, in authorizing the use of force against the perpetrators of 9/11, Congress authorized electronic surveillance. It relies on the 2004 Supreme Court decision in *Hamdi*.<sup>14</sup> 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." The administration rightly asserts that, in *Hamdi*, the Supreme Court concluded that the AUMF included authorization to detain Hamdi to prevent him from returning to the battlefield in Afghanistan because such a detention is "a fundamental incident of waging war" and therefore can be reasonably said to have been authorized by Congress in the AUMF.<sup>15</sup>

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<sup>13</sup> S.J. Resolution 23 - Authorization for Use of Military Force (Enrolled Bill); September 18, 2001, [http://www.yale.edu/lawweb/avalon/sept\\_11/sjres23\\_eb.htm](http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm)

<sup>14</sup> *HAMDI et.al. v. RUMSFELD*, 542 U.S. 507 (2004), <http://straylight.law.cornell.edu/supct/html/03-6696.ZO.html>

<sup>15</sup> There is some question about what the plurality opinion of Justice O'Connor holds with regard to what class of American citizens may be detained under the authority of the AUMF. Even careful readers of her opinion come away with the sense that she limited her holding to Americans **captured** on the battlefield. (In fact, Attorney General Gonzalez presented this interpretation of *Hamdi* at his press briefing) As the Fourth Circuit points out in its decision upholding the detention of Padilla (<http://pacer.ca4.uscourts.gov/opinion.pdf/056396.P.pdf>), the main body of the opinion suggests that a citizen can be detained if he had been on the battlefield and was being held to prevent him from returning to the battlefield without regard to where he was captured. It is only when she discusses Justice Scalia's dissenting opinion challenging the notion that the AUMF could have authorized Hamdi's detention does Justice O'Connor mention (and indeed emphasize) that Hamdi was captured on the battlefield. This debate would appear to be moot since four Justices in dissenting in *Padilla* express the view (stated by Justice

The government goes on to argue that "communications intelligence targeted at the enemy" is also a "fundamental incident of waging war." 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 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, 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.<sup>16</sup>

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 for a procedure for the President to conduct warrantless searches for 15 days and then return to Congress if he needed additional authority. At no time after 9/11 did the President seek additional authority to conduct warrantless surveillance because the nation was at war; as noted above, he did seek and get greater flexibility to deal with emergencies.

In this regard the statutory scheme that Congress created to deal with the detention of Americans during wartime is completely different and undermines the government's reliance on the *Hamdi* decision. Concerned about prior detentions of Americans in wartime, Congress, in repealing various emergency grants to the President, included the authority to detain Americans during an emergency, but did not create an alternative procedure for detaining Americans. Rather, it provided that no Americans could be detained except pursuant to statute.<sup>17</sup> Thus, if the AUMF was not construed to permit such detentions even of persons captured on the battlefield, the President would be without authority to detain such persons. Congress certainly did not intend that result, and hence it is reasonable to conclude that the AUMF should be read to include the

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Scalia in *Hamdi*) that the AUMF cannot be read to authorize detentions of persons detained in the United States (<http://www.oyez.org/oyez/resource/case/1730/>). Thus a majority of the Court has already expressed a view on this subject. I suspect that the Government is trying so hard to prevent the Supreme Court from hearing the Padilla case because it knows that this will be the outcome and that the reasoning is likely to discredit its argument that *Hamdi* supports its position.

<sup>16</sup> *Washington Post*, December 23, 2005, p. A21. <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html>

<sup>17</sup> As Justice O'Connor explained in her plurality opinion in *Hamdi*: "18 U.S.C. § 4001(a) states that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.' Congress passed §4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.*, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II. H. R. Rep. No. 92—116 (1971); *id.*, at 4 ('The concentration camp implications of the legislation render it abhorrent').

authority to detain Americans captured on the battlefield despite the absence of any specific reference to such detentions.

By contrast, in the case of electronic surveillance, Congress in FISA created a scheme to conduct electronic surveillance in wartime, and hence it is not reasonable to conclude that Congress intended in the AUMF to permit the President to substitute a different scheme in the absence of clear language stating that intent.

Thus, I think a review of the legislative history of FISA and the AUMF makes 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.

### **The Constitutional Argument**

As Justice Jackson noted in his concurring opinion in the *Steel Seizure* case: "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."

Notably, in the case that gave rise to Jackson's framework for assessing the constitutionality of presidential action, the Supreme Court held that the President's constitutional powers did not give him the right to seize steel mills even though we were at war in Korea and the president asserted that his action was necessary to support our war effort. Congress there had provided an alternative means to deal with strikes during wartime, but had not explicitly made that the sole means to deal with the problem. Thus, because FISA did provide explicitly that it was the exclusive means, the President's power is at an even lower ebb.

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." Only by disabling 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 which rely on *Hamdi*, a case not yet decided when the President authorized the program. We do not know what the legal reasoning was that led the President to conclude that he had this authority. Certainly Congress should insist on seeing all of the memos that were relied upon and should make them public with any necessary deletions.



Of course, the President has some inherent authorities deriving from the Constitution, including his powers as Commander in Chief of the armed forces. As Jackson's framework suggests, Congress does not have the power to limit some of these powers, but under our constitutional system Congress can limit others by establishing an alternative procedure for addressing the same issues addressed by Executive measures. Since, as already noted, Congress has not only legislated an alternative means to conduct electronic surveillance of Americans in the United States but has also sought to prevent the President from conducting warrantless searches, we must ask whether the President nonetheless retains authority to conduct such searches.

No court has decided this question. As the government notes, four circuit court opinions 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, as the FISA district court noted in a 2002 en banc opinion, all of these cases were decided before FISA was enacted and hence are simply not on point. The FISA Appeals Court in the same year did, as the government notes, "take for granted" that the President has such authority, but it provided no analysis for this dicta and its actual holding in this case did not depend on this assumption.

When Executive action threatens or tramples individual rights in the name of national security, the courts have been most reluctant to recognize unlimited and unchecked presidential power. As Justice O'Connor wrote last year in the very *Hamdi* 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." (Citations omitted)

This well established need to involve the three branches of government when actions are needed which touch on the liberties of Americans is the place to start in seeking a solution. If the government needed additional surveillance powers to deal with the terrorist threat, the President should have come to the Congress seeking an amendment to FISA. In a constitutional democracy activities of the government that intrude on individual liberty should be debated in public to give citizens a chance to express their views and to enable them to judge their elected leaders knowing fully what they have done.



Informing a very small number of members in great secrecy and with no scope to consult with their staff or other members is a far from adequate substitute. Moreover it violates the Intelligence Oversight Act which requires that the intelligence committees as a whole be informed of all intelligence activities and permits the President to limit the notification to only the so-called “gang of 8” for certain covert operations.<sup>18</sup> It is worth noting that at least three of those who were briefed expressed concern (Senators Daschle and Rockefeller, and Representative Pelosi).

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 and 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 its enactment of the Patriot Act, it did so with due regard for the sensitivity of such information and without revealing any secrets. Congress also showed great sensitivity to the needs of the intelligence agencies in providing for a flexible standard for determining when surveillance was needed and by creating a special court to hear the government’s requests for warrants.

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. Moreover, after 9/11, the President asked for additional authority to combat terrorism and Congress amended FISA several times to provide the President with the authority he requested.

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. Then it should determine what needs to be done to insure that, in the future, Presidents obey the law.

January 5, 2006

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<sup>18</sup> 50 USC 413 [http://www.law.cornell.edu/uscode/html/uscode50/usc\\_sec\\_50\\_00000413----000-.html](http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00000413----000-.html)