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Reviving the Nixon Doctrine: NSA Spying, the Commander-In-Chief, and Excutive Power in the War on Terror

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13 WASH. & LEE J. Civil Rts. & Soc. Just. 17-40 (2006)

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REVIVING THE NIXON DOCTRINE: NSA SPYING, THE COMMANDER-IN-CHIEF, AND EXECUTIVE POWER IN THE WAR ON TERROR

By David Cole*

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"When the President does it, that means that it is not illegal."[1] So Richard Nixon infamously defended his approval of a plan to engage in warrantless wiretapping of Americans involved in the antiwar movement of the 1970s. For thirty years Nixon's defense has stood as the apogee of presidential arrogance. Nixon was ultimately proved wrong. The wiretapping plan was shelved when FBI Director J. Edgar Hoover, of all people, objected to it. Nixon's approval of the program was listed in the articles of impeachment, and he was forced to resign. Nixon learned the hard way that presidents are not above the law.

President George W. Bush appears not to have learned that lesson. His defense of the National Security Agency's warrantless wiretapping of Americans resurrects the Nixon doctrine with one modification. For Bush,

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* Professor, Georgetown University Law Center. I am pro bono co-counsel in *Center for Constitutional Rights v. Bush*, which challenges the legality of the NSA spying program. Before my involvement in that lawsuit, I also co-authored two letters to Congressional leaders on behalf of fourteen constitutional law professors and former government officials addressing the Justice Department's defense of the legality of the National Security Agency (NSA) spying program. These letters are published in David Cole and Martin S. Lederman, TIT LE, 81 Ind. L.J. 1355 (2006). After the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), we wrote a third letter addressing that decision's implications for the NSA. *See* Letter to Congressional leaders from Curtis A. Bradley, et al., July 14, 2006, available at http://intelligence.house.gov/media/pdfs/FISA07190608.pdf (last visited November 20, 2006). This essay is adapted in part from those letters, and thus I owe a debt of gratitude to all of the cosigners for their suggestions and contributions along the way: Curtis Bradley, Walter Dellinger, Ronald Dworkin, Richard A. Epstein, Harold Hongju Koh, Philip B. Heymann, Martin S. Lederman, Beth Nolan, William S. Sessions, Geoffrey R. Stone, Kathleen M. Sullivan, Laurence H. Tribe, and William W. Van Alstyne. I owe particular thanks to Martin Lederman, who shared the laboring oar with me in drafting the letters.

[1] Interview by David Frost with Richard Nixon, former President, United States (May 19, 1977).

when the Commander-in-Chief does it, it is not illegal. In a memorandum to Congress, the Bush Administration argued that the Commander-in-Chief may not be restricted in his choice of the "means and methods of engaging the enemy," and that President Bush is therefore free to wiretap Americans without court approval in the "war on terror" even though Congress has made it a crime to do so.[2] This is not the first time President Bush has asserted uncheckable executive power in the "war on terror." He has claimed similar powers with respect to torture; cruel, inhuman, and degrading treatment; and detention of so-called "enemy combatants." These claims to unchecked power have triggered strong negative reactions from conservatives and liberals, Republicans and Democrats, and Supreme Court Justices and members of Congress. Yet these rebukes seem not to affect the president, who continues to assert the authority.

The administration's stance with respect to National Security Agency (NSA) spying is emblematic of its approach to the war on terror. At virtually every juncture, it has taken overly aggressive positions that unnecessarily run roughshod over fundamental principles of the rule of law. By doing so, the president has sparked negative feedback at home and abroad. This pattern of overreaching is unnecessary to keep us secure and is in fact likely to make us less safe, as it divides our nation and plays into the terrorists' hands by fueling anti-American sentiment abroad.

This essay will argue that the administration's defense of the NSA spying program is fundamentally flawed, both as a matter of law and as a matter of national security policy. The administration makes three legal arguments in defense of the policy, contending that: (1) Congress authorized the program without saying so when it authorized the use of military force against al Qaeda; (2) the Commander-in-Chief has inherent and uncheckable authority under Article II of the Constitution to conduct such warrantless wiretapping, notwithstanding a criminal prohibition; and (3) the program is consistent with the Fourth Amendment.[3] Each argument fails. The argument that Congress authorized the program defies basic principles of statutory construction. The claim that the Commander-in-Chief has

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[2] U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (2006) [hereinafter DOJ Memo].

[3] *See* Letter from William Moschella, Assistant Att'y Gen., to select members of the House and Senate Intelligence Committees, (Dec. 22, 2005), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa122205ltr.pdf (last visited Oct. 26, 2006) [hereinafter Moschella Letter] (summarizing the legal authorities with which the administration justifies its NSA spying program); *see also* DOJ Memo, *supra* note 2, at 32; *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S.Comm. on the Judiciary*, 109th Cong. (2006) (statement of Alberto Gonzales, Att'y Gen. of the United States) [hereinafter Executive and NSA Wartime Authority Hearing] (stating that there are numerous Congressional checks on the way in which the President conducts war time activities). These letters are also published at 81 Ind. L.J. 1355.

uncheckable authority with respect to "the means and methods of engaging the enemy" is contrary to the text of the Constitution, the structure of checks and balances, and a long line of Supreme Court precedent. And no Fourth Amendment precedent supports the notion that the president may wiretap Americans without probable cause or a warrant.

As a matter of national security policy, the administration defends the program by claiming that if al Qaeda is calling into the United States, we should be listening to that call. Few dispute that proposition. But under existing law, the president did not need to authorize conduct in violation of the Foreign Intelligence Surveillance Act (FISA)[4] to track those calls. Accordingly, the NSA program presumably must be broader than that. Second, to the extent the president seeks to engage in more widespread surveillance than that authorized by FISA, the proper recourse was to ask Congress to change the law. The administration sent what ultimately became the USA PATRIOT ACT (Patriot Act)[5] to Congress within days of the terrorist attacks of September 11, 2001, and the Patriot Act made several revisions to FISA. But the president chose not to ask Congress to change FISA to authorize this particular program, and instead ordered that the law be violated in secret. That is not a permissible option in a democracy. Moreover, had the president pursued the legal avenue for changing the law, it is likely Congress would have extended him authority to do what was necessary, and the program would have generated far less attention and controversy than it has today. The controversy surrounding the program centers not so much on the surveillance itself, but on the fact that the president has asserted unchecked authority to violate criminal law in secret. There would have been far less controversy, and far less public disclosure, had the president followed the law.

I. The Statutory Argument

The administration's initial defense of the NSA spying program is that Congress authorized the program when, on September 14, 2001, it enacted the Authorization to Use Military Force (AUMF) against the perpetrators of 9/11 and those who harbor them.[6] This argument fails for three reasons. First, it is directly contrary to specific language in other federal statutes establishing that FISA and the criminal code are the

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[4] Foreign Intelligence Survey Act of 1978, 50 U.S.C. §§ 1801–1811 (2000).

[5] USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2000) (codified as amended in multiple sections of the U.S.C.).

[6] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, § 2 (a) (2001) (codified as amended at 50 U.S.C. § 1541 (Supp. III 2003)).

"exclusive means" for conducting electronic surveillance. Second, it would require repeal by implication of language in those statutes. Third, it conflicts with the administration's claim that it chose not to ask Congress to amend FISA to authorize the program because several members of Congress told them that it would be "difficult, if not impossible" to obtain.

An assessment of the administration's statutory argument must begin with the legal landscape Congress faced when it enacted the AUMF. At that time, and today, FISA comprehensively regulates electronic surveillance for foreign intelligence purposes within the United States.[7] FISA, enacted in 1978 after revelations of widespread spying on Americans by federal law enforcement and intelligence agencies—including the NSA—struck a careful balance between protecting civil liberties and preserving the "vitally important government purpose" of obtaining valuable intelligence to safeguard national security.[8]

With minor exceptions not invoked by the Bush administration and not relevant here, FISA authorizes "electronic surveillance" for foreign intelligence purposes only upon certain specified showings, and only if approved by a court.[9] Foreign intelligence surveillance is permissible upon a showing of probable cause that the target of the surveillance is an "agent of a foreign power," which includes a member of a terrorist organization.[10] Congress sought to make clear that electronic surveillance was to be undertaken only pursuant to federal statute. To that end, Congress expressly provided that FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigation) are the "*exclusive* means by which electronic surveillance … may be conducted."[11] And Congress made it a crime under two separate provisions of the U.S. Code to undertake electronic surveillance not authorized by statute.[12]

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[7] FISA, 50 U.S.C. §§ 1801–1811.

[8] S. Rep. No. 95-604, pt. 1, at 9 (1977).

[9] FISA, 50 U.S.C. § 1802, 1804, 1805. FISA defines "electronic surveillance" to include any acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication sent by or intended to be received by a particular, known United states person who is in the United states, if the contents are acquired by intentionally targeting that United States person, under the circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes . . . without the consent of an party thereto if such acquisition occurs in the United States . . . the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information . . . .50 U.S.C. § 1801(f).

[10] *Id.* at § 1805(a).

[11] 18 U.S.C. § 2511(2)(f) (emphasis added); *see also* Memorandum from Elizabeth B. Bazan and Jennifer K. Elsea, Legislative Attorneys for the American Law Division, to the United States Dept. of State (Jan. 5, 2006) (on file at the Congressional Research Service at http://www.eff.org/Privacy/Surveillance/NSA/nsa_research_memo.pdf) (noting Congress's stated intention to make FISA the sole mechanism for the collection of foreign intelligence information).

[12] 50 U.S.C. § 1809; 18 U.S.C. § 2511 (making it a crime to conduct wiretapping except as "specifically provided in this chapter," § 2511(1), or as authorized by FISA, § 2511(2)(e)).

Most importantly for purposes of this question, Congress *specifically* addressed in FISA itself the question of domestic wiretapping during wartime. In 18 U.S.C. § 1811, titled "Authorization during time of war," FISA dictates that "[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."[13] Thus, even where Congress has declared war—a more formal step than an authorization such as the AUMF—the law limits warrantless wiretapping to the first fifteen days of the conflict. The legislative history explains that if the President needed further warrantless surveillance during wartime, Congress would consider and enact further authorization as appropriate.[14]

The Bush administration has conceded that the NSA program falls within the definition of "electronic surveillance" covered by FISA,[15] and that the program was not authorized by any of the above provisions. The surveillance is conducted without court orders, and although the administration has been inconsistent about this, it appears that the surveillance may be predicated on a less solid showing than the "probable cause" required by FISA.[16] The administration maintains, however, that the program did not violate existing law because Congress implicitly authorized the NSA program when it enacted the AUMF against al Qaeda.

The administration's statutory argument fails for three reasons. First, the argument rests on an unstated general "implication" from the AUMF that directly contradicts express and specific language in FISA. Specific and "carefully drawn" statutes prevail over general statutes where there is a conflict.[17] In FISA, Congress directly and specifically regulated domestic warrantless wiretapping for foreign intelligence and national

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[13] 50 U.S.C. § 1811.

[14] H.R. Conf. Rep. No. 95-1720, at 34 (1978) (explaining the 15-day during which the attorney general may authorize electronic surveillance). The report states:

> The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency . . . . The conferees expect that such amendment would be reported with recommendations within seven days and that each House would vote on the amendment within seven days thereafter.

Id.

[15] *See* DOJ Memo, *supra* note 2, at 3 (arguing that electronic surveillance conducted by the NSA is consistent with FISA).

[16] Michael Hayden, who headed the NSA while the program was established, has stated that the trigger for surveillance under the program is "softer" than the probable cause required by FISA. Attorney General Gonzales, however, contradicted that claim and asserted that NSA officials are employing a probable cause standard. Executive and NSA Wartime Authority Hearing, *supra* note 3.

[17] *See* Morales v. TWA, Inc., 504 U.S. 374, 384–85 (1992) (quoting International Paper Co. v. Ouelette, 479 U.S. 481, 494 (1987)) (explaining that a broad clause should not preempt a more warily drawn statute).

security purposes, including during wartime, and those provisions preclude the administration's interpretation of the AUMF.

In light of the specific and comprehensive regulation of FISA, especially the fifteen-day war provision, there is no basis for finding in the AUMF's general language implicit authority for unchecked warrantless domestic wiretapping. As Justice Frankfurter stated in rejecting a similar argument by President Truman when he sought to defend the seizure of the steel mills during the Korean War on the basis of implied congressional authorization:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress.[18]

Because Congress specifically provided that even a declaration of war—a more formal step than an authorization to use military force—would authorize only fifteen days of warrantless surveillance, one cannot reasonably conclude that the AUMF provided the President with *unlimited and indefinite* warrantless wiretapping authority. In addition, such a notion ignores any reasonable understanding of legislative intent. An amendment to FISA of the sort that would presumably be required to authorize the NSA program here would be a momentous statutory development, undoubtedly subject to serious legislative debate. It is not the sort of change that Congress would make inadvertently and without a single word of discussion. As the Supreme Court recently noted, "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[19]

The administration invokes *Hamdi v. Rumsfeld,*[20] and argues that because the Supreme Court in that case construed the AUMF to provide

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[18] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

[19] Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

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

sufficient statutory authorization for detention of American citizens captured on the battlefield in Afghanistan, the AUMF may also be read to authorize the President to conduct "signals intelligence" on the enemy, even if that includes electronic surveillance targeting U.S. persons within the United States.[21] However, FISA's provision addressing wiretapping authority during wartime plainly distinguishes this situation from *Hamdi*. Congress has not specifically enacted a statute authorizing limited detention of American citizens during wartime, and therefore the Court was free to read the AUMF to include an authorization to detain U.S. citizens fighting for the enemy. Had there been a statute on the books providing that when Congress declares war, the President may detain Americans as "enemy combatants" *only* for the first fifteen days of the conflict, the Court could not reasonably have read the AUMF to authorize silently what Congress had specifically sought to limit.[22]

The administration argues that 50 U.S.C. § 1811 is not dispositive because the AUMF might convey more authority than a declaration of war, noting that a declaration of war is generally only a single sentence.[23] But in fact, declarations of war have always been accompanied, in *the same enactment*, by an authorization to use military force.[24] It would make no sense to declare war without authorizing the president to use military force in the conflict. In light of that reality, Section 1811 necessarily contemplates a situation in which Congress has both declared war *and* authorized the use of military force—and even that double authorization permits only fifteen days

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[21] *Id.* at 516–17.

[22] The Department of Justice argues that signals intelligence, like detention, is a "fundamental incident of waging war," and therefore is authorized by the AUMF. DOJ Memo, *supra* note 2, at 12–13. But what is properly considered an implied incident of conducting war is affected by the statutory landscape that exists at the time the war is authorized. Thus, even if warrantless electronic surveillance *of Americans* for foreign intelligence purposes were a traditional incident of war when that subject was unregulated by Congress—which is far from obvious, at least in cases where the Americans targeted are not themselves suspected of being foreign agents or in league with terrorists—it can no longer be an implied incident after the enactment of FISA, which expressly addresses the situation of war, and precludes such conduct beyond the first fifteen days of the conflict.

[23] DOJ Memo, *supra* note 2, at 26–27.

[24] *See, e.g.*, Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring war against the United Kingdom and authorizing President to use land and naval forces); Act of May 13, 1846, ch. 16, 9 Stat. 9 (providing for prosecution of existing war against Mexico and authorizing President to use military force); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (declaring war against Spain and empowering President to use land and naval forces); Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1 (declaring war against Germany and authorizing President to employ naval and military force); Joint Resolution of Dec. 7, 1917, ch. 1, 40 Stat. 429 (declaring war against Austrio-Hungarian Empire and authorizing President to employ naval and military force); Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795 (declaring war against Japan and authorizing President to employ naval and military force); Joint Resolution of Dec. 11, 1941, ch. 564, 55 Stat. 796 (declaring war against Germany and authorizing President to employ naval and military force); Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797 (declaring war against Italy and authorizing President to employ naval and military force).

of warrantless electronic surveillance. Where, as here, Congress has seen fit only to authorize the use of military force—and not to declare war—the President cannot assert that he has been granted *more* authority than when Congress declares war as well.[25]

Second, the administration's statutory authorization argument would require the conclusion that Congress implicitly repealed several parts of 18 U.S.C. § 2511. Subsection (2)(f) identifies FISA and specific criminal code provisions as "the *exclusive* means by which electronic surveillance . . . may be conducted."[26] In addition, § 2511 makes it a crime to conduct wiretapping except as "*specifically provided in this chapter,*"[27] or as authorized by FISA.[28] The AUMF is neither "in this chapter" nor an amendment to FISA, and therefore to find that it authorizes electronic surveillance would require an implicit repeal of all the above provisions of § 2511.

Repeals by implication are strongly disfavored; they can be established only by "overwhelming evidence" that Congress intended the repeal.[29] Here, there is no such evidence. "[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[30] Section 2511 and the AUMF, however, are fully reconcilable. The former makes clear that specified existing laws are the "exclusive means" for conducting electronic surveillance, and that conducting wiretapping outside that specified legal regime is a crime. The AUMF authorizes only such force as is "necessary and *appropriate*." There is no evidence that Congress considered tactics violative of existing express statutory limitations "appropriate force." Accordingly, there is no basis whatsoever, let alone the "overwhelming evidence" required, for overcoming the strong presumption against implied repeals.

The Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*, confirms that the AUMF cannot be construed to authorize warrantless wiretapping. In *Hamdan*, the Court held that the president's military commissions for trying

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[25] It is noteworthy that one of the amendments the DOJ was contemplating seeking in 2002 in a draft bill leaked to the press and popularly known as "Patriot II," would have amended 50 U.S.C. § 1811 to extend its fifteen-day authorization for warrantless wiretapping to situations where Congress had not declared war but only authorized use of military force or when the nation had been attacked. If, as the DOJ now contends, the AUMF gave the President unlimited authority to conduct warrantless wiretapping of the enemy, it would be unnecessary to seek such an amendment. *See* Domestic Security Enhancement Act of 2003, § 103 (Strengthening Wartime Authorities Under FISA) (draft Justice Dept bill) *(*seeking to expand FISA's wartime exception to apply also after Congress has authorized use of military force*)*.

[26] 18 U.S.C. § 2511(2)(f).

[27] *Id.* § 2511(1).

[28] *Id.* § 2511(2)(e).

[29] *See* J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 137 (2001) (requiring overwhelming evidence to establish repeal by implication).

[30] *Id.* at 141–42 (quoting Morton v. Mancari, 417 U.S. 535, 550 (1974)).

foreign terror suspects for war crimes, which were established by an executive military order, violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions incorporated therein. The administration had argued in *Hamdan* that when Congress enacted the AUMF against Al Qaeda, it implicitly authorized the president to implement his military commissions, thereby overriding any limits that might have been found in preexisting statutes such as the UCMJ. The Court summarily rejected this argument: "[W]hile we assume that the AUMF activated the President's war powers, and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."[31] The Court also noted that "'[r]epeals by implication are not favored.'"[32] And it explained that even where Congress has not only enacted a force authorization but also *declared war*, such steps in and of themselves do not authorize the President to do what pre-existing statutes forbid.[33]

These conclusions apply equally to the question whether the AUMF authorized warrantless wiretapping in violation of FISA. There is "nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth [in FISA]."[34] And nothing in the legislative history of the AUMF suggests any intent by Congress to override FISA or to impliedly repeal any of its provisions.

Finally, Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because various members of Congress advised the administration that it would be "difficult, if not impossible to do so."[35] The administration cannot argue on the one hand that Congress authorized the NSA program in the AUMF, and at the same time, that it did not ask Congress for such authorization because it would be difficult, if not impossible to get it.[36]

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[31] 126 S. Ct. at 2775 (citations omitted).

[32] *Id.*

[33] *Id.* at 2775 n.24 (citing *Ex parte Quirin*, 317 U.S. 1, 26-29 (1942)).

[34] 126 S. Ct. at 2775.

[35] *See* Press Briefing from Alberto Gonzales, U.S. Att'y Gen., and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html ("We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.").

[36] The administration had a convenient vehicle for seeking any such amendment in the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Patriot Act amended FISA in several respects, including in sections 218 (allowing FISA wiretaps in criminal investigations) and 215 (popularly known as the "libraries provision"). Yet the administration did not ask Congress to amend FISA to authorize the warrantless electronic surveillance at issue here.

II. The Commander-In-Chief Argument

When pressed on its statutory argument, which Republican Senator Arlen Specter dismissed as defying "logic and plain English," the administration inevitably retreats to its constitutional contention, arguing that as long as its reading of the AUMF is "fairly possible,"[37] it should be adopted to avoid a possible "conflict between FISA and the president's Article II authority as Commander-in-Chief."[38] The administration contends that the president has exclusive constitutional authority over "the means and methods of engaging the enemy," and that therefore if FISA prohibits warrantless "electronic surveillance" deemed necessary by the president, FISA is unconstitutional.[39] As will be noted in Point III below, the "constitutional avoidance" doctrine does not support the administration because *accepting* its interpretation of the AUMF would raise serious constitutional questions under the Fourth Amendment. In addition, there is not a serious constitutional question that Congress can regulate wiretapping of Americans even during wartime.

The argument that conduct undertaken by the Commander-in-Chief that has some relevance to "engaging the enemy" is immune from congressional regulation is directly contradicted by both case law and historical precedent. Every time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute.[40] No precedent holds that the president, when acting as Commander-in-Chief, is free to disregard an act of Congress, much less a criminal statute enacted by Congress that was designed specifically to restrain the president as such.

There is no doubt that presidents have routinely collected signals intelligence on the enemy during wartime.[41] But that historical fact proves little, because for all or most of that history, Congress did not regulate foreign intelligence gathering in any way. As Justice Jackson made clear in his influential opinion in *Youngstown*, to say that a president may undertake certain conduct in the absence of contrary congressional action does not mean that he may undertake that action where Congress has addressed the

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[37] Executive and NSA Wartime Authority Hearing, *supra* note 3.

[38] Moschella Letter, *supra* note 3.

[39] DOJ Memo, *supra* note 2, at 6–10, 28–36.

[40] *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 133–34 (Chase, C.J., concurring) (affirming limitations set upon executive authority under the Habeas Corpus Act of March 3, 1863, 12 Stat. 696, which prevented suspension of the writ where statutory requirements are not met).

[41] *See* John C. Reitz, *E-Government*, 54 Am. J. Comp. L. 733, 749–50 (2006) (surveying the history and scope of presidential authority to conduct warrantless electronic surveillance of foreign enemies dating back to Franklin D. Roosevelt).

issue and disapproved of executive action.[42] Here, Congress has not only disapproved of the action the president has taken but has done so in the most emphatic way possible, by making it a crime.

The Supreme Court has addressed the propriety of executive action contrary to congressional statute during wartime on only a handful of occasions, and each time it has required the president to adhere to legislative limits on his authority. In *Youngstown*, the Supreme Court invalidated President Truman's seizure of the steel mills during the Korean War where Congress had "rejected an amendment which would have authorized such governmental seizures in cases of emergency."[43]

In *Little v. Barreme*,[44] the Court held unlawful a seizure pursuant to presidential order of a ship during the "Quasi War" with France.[45] The Court found that Congress had authorized the seizure only of ships going *to* France, and therefore the president could not unilaterally order the seizure of a ship coming *from* France.[46] Just as in *Youngstown*, the Court invalidated executive action taken during wartime, said to be necessary to the war effort, but implicitly disapproved by Congress.[47]

President Bush's unilateral executive action with respect to the NSA is more sharply in conflict with congressional legislation than the presidential actions deemed invalid in *Youngstown* and *Barreme*. In those cases, Congress had merely failed to give the President the authority in question, and thus the statutory limitation was *implicit*. Here, Congress went further and expressly *prohibited* the President from taking the action he has taken.

In 2004, President Bush asserted similar unilateral Commander-in-Chief authority in *Rasul v. Bush*,[48] and not a single Justice accepted the contention.[49] In that case, the Bush administration maintained that it would be unconstitutional to interpret the habeas corpus statute to afford judicial review to enemy combatants held at Guantanamo Bay because it "would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters" and would therefore raise "grave

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[42] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[43] *Id*. at 586; *see also id.* at 597–609 (Frankfurter, J., concurring); *id.* at 656–60 (Burton, J., concurring); *id.* at 662–66 (Clark, J., concurring in the judgment).

[44] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

[45] *Id.* at 179.

[46] *Id.* at 177–78.

[47] *Id.* at 178

[48] Rasul v. Bush, 542 U.S. 466 (2004).

[49] *Id.* at 480; *id.* at 488 (Kennedy J., concurring); *id.* at 506 (Scalia dissenting).

constitutional problems."[50] Refusing to accept this argument, the Court held that Congress had conferred habeas jurisdiction on the federal courts to entertain the detainees' habeas actions.[51] Even Justice Scalia, writing for the dissenters, agreed that Congress could have extended habeas jurisdiction to the Guantanamo detainees, but differed as to whether Congress had in fact done so.[52] Thus, not a single Justice accepted the Bush administration's contention that the president's role as Commander-in-Chief may not be limited by congressional and judicial oversight. [53]

In *Hamdi*, the Court similarly rejected the president's argument that courts may not inquire into the factual basis for the detention of a U.S. citizen as an enemy combatant.[54] Refuting the administration's vision of unilateral executive power, Justice O'Connor wrote for the plurality, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[55]

The Court in *Hamdan v. Rumsfeld* went out of its way to address whether the president has Article II authority to contravene statutes that restrict his ability to engage and defeat the enemy in times of war.[56] The Court explained that even assuming the president has "independent power, absent congressional authorization, to convene military commissions," nevertheless "he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." [57]

In a concurrence, Justice Kennedy invoked Justice Jackson's three-tiered categorization of presidential power in *Youngstown*, and explained that

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[50] Brief for Respondents at 42, 44, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

[51] *Rasul*, 542 U.S. at 480–81.

[52] *Id.* at 506 (Scalia, J., dissenting).

[53] Similarly, in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), the Court unanimously found that the Executive violated the Habeas Corpus Act of March 3, 1863, 12 Stat. 696, by failing to discharge from military custody a petitioner held by presidential order and charged with, inter alia, affording aid and comfort to rebels, inciting insurrection, and violating the laws of war. *Id.* at 115–17, 131 (majority opinion); *id.* at 133–36 (Chase, C.J., concurring); *id* .at 133 (noting that "[t]he constitutionality of this act has not been questioned and is not doubted," even though the act "limited this authority [of the President to suspend habeas] in important respects").

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

[55] *Id.*

[56] The Solicitor General had invoked the President's Article II powers as a basis for a narrow construction of the UCMJ, arguing that "'the detention and trial of petitioners—ordered by the President in the declared exercise of the President's powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress.'" Brief for Respondents at 23, *Hamdan v. Rumsfeld*, No. 05-184 (U.S., filed Feb. 23, 2006) (quoting *Quirin*, 317 U.S. at 25).

[57] *Hamdan*, 126 S. Ct. at 2774 n.23 (citing the "lowest ebb" passage of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

the president was acting at the lowest ebb of presidential power, because he had acted "in a field with a history of congressional participation and regulation," and in contravention of "an intricate system of military justice" regulated by the UCMJ.[58]

The Bush administration has sought to distinguish *Hamdan*, questioning whether Congress had the constitutional authority to enact FISA. It contends that whereas the UCMJ was enacted pursuant to Congress's express Article I authorities, "[t]here is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation."[59] But FISA has been in place for almost thirty years, during which time Republican and Democratic administrations alike have operated under its modest limitations and conditions, with no suggestion that FISA is not appropriate Article I legislation.

FISA was enacted pursuant to at least three Article I powers. Like the statutes that restricted the President's war powers in the leading cases of *Little v. Barreme*,[60] and *Youngstown*, and like countless other current federal statutes involving wire and electronic communications systems, FISA is valid Commerce Clause legislation, because it regulates and protects wire communications transmitted between states and between nations.[61] FISA is also properly viewed as a statute "necessary and proper for carrying into execution . . . powers vested by this Constitution in the Government of the United States, or in . . . any officer thereof."[62] Just as the Necessary and Proper Clause empowered Congress to create the NSA in the first instance,[63] it authorizes Congress to set the terms under which that agency shall operate. Finally, as the NSA is part of the Department of Defense, FISA's application to that agency is also an exercise Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[64]

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[58] *Id.*, 126 S. Ct. at 2800-2801 (Kennedy, J., concurring, joined by Souter, Ginsburg and Breyer, JJ.).

[59] See Letter to Senator Charles Schumer from William E. Moschella, Assistant Attorney General, U.S. Department of Justice ("DOJ July 10th Letter") at 2, available at http://lawculture.blogs.com/lawculture/files/NSA.Hamdan.response.schumer.pdf (last visited November 20, 2006).

[60] Little v. Barreme, 6 U.S. 170 (1804).

[61] *See* 50 U.S.C. § 1501(l) (defining "wire communication" to mean "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities *for the transmission of interstate or foreign communications*").

[62] Art. I, § 8, cl. 18.

[63] *cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[64] Art. I., § 8, cl. 14.

The administration argues that the President's authority to collect foreign intelligence is "a direct corollary of his authority, recognized in *Hamdan*, to direct military campaigns."[65] But *Hamdan* likewise concerned an Executive war powers function— the trial of enemy combatants for violations of the laws of war—that "'by universal agreement and practice'" is an "'important incident of war.'"[66] The Court in *Hamdan* nonetheless found no constitutional concern with construing a congressional statute to limit the president in his trial of enemy combatants. So, too, there is no constitutional impediment to Congress restricting the President's ability to conduct electronic surveillance within the United States and targeted at United States persons.

In short, not a single Justice in *Hamdan* offered the slightest indication that the UCMJ, as construed by the Court, would violate Article II—even though the statutory restrictions in *Hamdan* dealt solely with the President's treatment of alleged unlawful enemy combatants, and (unlike FISA) not with the conduct of non-enemy U.S. persons inside the United States.

Detaining and trying enemy combatants captured on the battlefield is surely far closer to the core of "engaging the enemy" than is warrantless wiretapping of U.S. persons within the United States. Yet the Supreme Court in *Rasul*, *Hamdi*, and *Hamdan* squarely held that Congress and the courts both had a proper role to play in reviewing and restricting the president's detention power. These cases refute the administration's contention, resurrected in the context of the NSA spying debate, that Congress may not enact statutes that regulate and limit the President's options as Commander-in-Chief.

The Constitution's text and history confirm this conclusion. The framers of the Constitution made the president the "Commander in Chief," but otherwise assigned substantial power to Congress in connection with war-making. Article I gives Congress the power to declare war and to authorize more limited forms of military enterprises (through "letters of marque and reprisal"); to raise and support the army and navy; to prescribe "rules for the Government and Regulation of the land and naval forces;" to define offenses against the law of nations; and to spend federal dollars.[67] In addition, Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or

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[65] DOJ July 10th Letter at 2.

[66] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Quirin*, 317 U.S. at 28).

[67] U.S. CONST. art. I, § 8, cls. 10–14.

Officer thereof."[68] The president, meanwhile, is constitutionally obligated to "take Care that the Laws be faithfully executed,"[69]—including FISA. These provisions make clear that while the framers recognized the desirability of giving the president the authority to direct the troops, they also recognized the real dangers of presidential wartime authority and sought to limit that authority by vesting in Congress broad authority to create, fund, and regulate the very forces that the president commands in engaging the enemy. These textual provisions cannot be read to afford the president uncheckable authority to choose the "means and methods of engaging the enemy."

History confirms this conclusion. Congress has routinely enacted statutes regulating the Commander-in-Chief's "means and methods of engaging the enemy."[70] It has subjected the Armed Forces to the Uniform Code of Military Justice, which expressly restricts the means they use in "engaging the enemy."[71] It has enacted statutes setting forth the rules for governing occupied territory, and these statutes displace presidential regulations that have governed such territory in the absence of legislation.[72] And most recently, it has enacted statutes prohibiting torture[73] and cruel, inhuman, and degrading treatment.[74]

If the Bush administration were correct that Congress cannot interfere with the Commander-in-Chief's discretion in "engaging the enemy," all of these statutes would be unconstitutional. Yet President Bush has conceded, contrary to the position initially taken by the Justice Department's August 2002 torture memorandum, that he may not order torture as Commander-in-Chief.[75] Torturing a suspect, no less than wiretapping an American, might provide information about the enemy, yet President Bush has conceded that Congress can prohibit that conduct. Surely Congress has as much authority to regulate wiretapping of Americans as it has to regulate torture of foreign detainees.

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[68] *Id.* at art. I, § 8, cl. 18.

[69] *Id.* at art. II, § 3.

[70] *See* Santiago v. Nogueras, 214 U.S. 260, 265–66 (1909) (stating that the authority of military government during the period between the cession and the action of Congress is of large extent but not unlimited).

[71] *The National Security Agency's Domestic Spying Program: February 2, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006*, 81 IND. L.J. 1415, 1420 (2006).

[72] *Id.*

[73] 18 U.S.C. §§ 2340–2340A (2000).

[74] Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1003, 119 Stat. 2739–2740 (2005)..

[75] *See* Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. TIMES, Jan. 28, 2006, at A13 (describing a CBS News interview in which President Bush said, "I don't think a president can order torture, for example . . . . There are clear red lines").

The Justice Department has argued in the alternative that even if Congress may regulate "signals intelligence" during wartime to some degree, construing FISA to preclude warrantless wiretapping of Americans in the context of the NSA spying program would impermissibly intrude on the president's exercise of his Commander-in-Chief role.[76]

In assessing this argument, it is important to first note what FISA does and does not regulate. Administration defenders have repeatedly argued that if the president is wiretapping an al Qaeda member in Afghanistan, it should not have to turn off the wiretap simply because he happens to call someone within the United States. The simple answer is that *nothing in FISA would compel that result.* FISA does not regulate electronic surveillance acquired abroad and targeted at non-U.S. persons, even if the surveillance happens to collect information on a communication with a U.S. person. FISA's requirements are triggered only when the surveillance is "targeting [a] United States person who is in the United States," or the surveillance "acquisition occurs in the United States."[77] Thus, the hypothetical tap on the al Qaeda member abroad is not governed by FISA at all.

Second, even when the target of surveillance is a U.S. person within the United States or the information is physically acquired here, FISA does not require that the wiretap be turned off. FISA merely requires that it be approved by a judge, based on a showing of probable cause that the target is an "agent of a foreign power," which includes a member of a terrorist organization, or even, in some circumstances, an unaffiliated "lone wolf" terrorist.[78] Such judicial approval may be obtained *after* the wiretap is put in place, so long as it is approved within seventy-two hours.[79] Accordingly, the notion that FISA bars wiretapping of suspected al Qaeda members is a myth.

Because FISA leaves unregulated electronic surveillance conducted outside the United States and not targeted at U.S. persons, it leaves to the president's unfettered discretion a wide swath of "signals intelligence." Moreover, it does not actually prohibit *any* signals intelligence regarding al Qaeda, but merely requires judicial approval where the surveillance targets a U.S. person or is acquired here. As such, the statute cannot reasonably be said to intrude impermissibly upon the president's ability to "engage the enemy," and certainly does not come anywhere close to "prohibit[ing] the President from undertaking actions necessary to fulfill his constitutional

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[76] DOJ Memo, *supra* note 2, at 29, 34–35.

[77] 50 U.S.C. § 1801(f)(1)–(2) (2000).

[78] *See id.* at §§ 1801(a)–(b), 1805(a)–(b) (suggesting that if the target is a non-U.S. person, it is sufficient to show that he is a "lone wolf" terrorist).

[79] *Id.* § 1805(f).

obligation to protect the Nation from foreign attack," as the Justice Department claims.[80] Again, if, as President Bush concedes, Congress can absolutely prohibit certain methods of "engaging the enemy," such as torture, surely it can impose reasonable regulations on electronic surveillance of U.S. persons.

In support of its constitutional argument, the Justice Department has invoked the decision of the Foreign Intelligence Surveillance Court in *In re Sealed Case No. 02-001*,[81] and decisions of several courts that have recognized in dicta the president's inherent authority to engage in surveillance for foreign intelligence purposes. The court in *In re Sealed Case* did suggest that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance.[82] But this statement is no more than a truism; to paraphrase another president, everything depends on the meaning of the word "encroach." The court in *In re Sealed Case* plainly did not mean that *any regulation* of foreign intelligence gathering amounts to impermissible *encroachment* because it upheld FISA. Indeed, the court did not even attempt to define what sorts of regulations would constitute impermissible "encroachment." Thus, this statement does not support the conclusion that the president's authority to conduct foreign intelligence surveillance must be wholly unfettered, but only the much more limited proposition that at some point, regulation may rise to the level of impermissible encroachment.

Significantly, the only decision cited in *In re Sealed Case* for the proposition that the president has inherent authority to engage in foreign intelligence surveillance addressed the president's power *before FISA was enacted*.[83] That decision, which reviewed the constitutionality of pre-FISA surveillance after FISA was enacted, also acknowledged that FISA itself was constitutional, and therefore also does not support the contention that the president's "inherent" power is immune from congressional regulation. [84]

In fact, apart from the dictum in *In re Sealed Case*, all the cases that have recognized inherent presidential authority to conduct foreign intelligence surveillance have addressed the president's pre-FISA authority. But the president's authority before FISA was enacted was radically different from his authority thereafter. Before FISA was enacted, Congress expressly

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[80] DOJ Memo, *supra* note 2, at 35.

[81] *See In re* Sealed Case No. 02-001, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (per curiam) (finding that FISA, as amended, was constitutional because the surveillance it authorizes is reasonable).

[82] *Id.* at 742.

[83] *See id.* (citing United States v. Truong Dinh Hung, 629 F.2d 908, 915 n.4 (4th Cir. 1980)).

[84] *See id.* at 746 ("We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorizes are reasonable.").

recognized the president's "constitutional power . . . to obtain foreign intelligence information deemed essential to the security of the United States."[85] When Congress enacted FISA in the wake of demonstrated abuses of that power, however, it repealed that provision and, as shown above, made it a crime to conduct wiretapping without congressional authority. Before FISA, the president was therefore acting in Justice Jackson's *Youngstown* "category one,"[86] namely, where the president acts with the express or implied approval of Congress. In that setting, the president's powers are at their zenith. In authorizing the NSA to conduct warrantless wiretapping in contravention of FISA, by contrast, the president is acting in Justice Jackson's "category three,"[87] where the president acts in contravention of the express or implied will of Congress. There, the president's power is at its "lowest ebb."[88] Thus, the fact that the president had the power to act when Congress had approved of his actions does not mean that the president can choose to violate criminal prohibitions once Congress has regulated the subject.

Some statutes might well impermissibly interfere with the president's role as Commander-in-Chief. If Congress sought to place authority to direct battlefield operations in an officer not subject to the president's supervision, for example, such a statute would likely violate the president's role as Commander-in-Chief. Similarly, Congress should not be constitutionally permitted to micromanage tactical decisions in particular battles. But short of such highly unlikely hypotheticals, Congress has broad leeway to govern and regulate the armed services and certainly to protect the privacy expectations of Americans using telephone and email communications.

III. The Fourth Amendment Argument

The NSA spying program also raises serious constitutional questions under the Fourth Amendment. While the specific contours of the program remain undisclosed, we know that it involves warrantless wiretapping of United States persons within the United States, in which one of the persons on the call is thought to be associated with al Qaeda or unspecified "affiliated organizations." Fourth Amendment analysis must begin with the recognition that the Supreme Court has never upheld warrantless wiretapping within the United States, *for any purpose*. The Court has squarely held that individuals

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85 18 U.S.C. § 2511(3) (1976) *repealed by* Pub.L. No. 95-511, 92 Stat. 1797 (1978).
86 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).
87 *Id.* at 637.
88 *Id.*

have a reasonable expectation of privacy in telephone calls, and that probable cause and a warrant are necessary to authorize electronic surveillance of such communications.[89] And it has specifically rejected the argument that domestic security concerns justify warrantless wiretapping.[90]

The Court in *United States v. United States Dist. Court*[91] left open whether warrantless wiretapping for foreign intelligence purposes would be permissible.[92] The Justice Department contends that the NSA program can be justified under a line of Fourth Amendment cases permitting searches without warrants and probable cause to further "special needs" above and beyond ordinary law enforcement.[93] But while it is difficult to apply the Fourth Amendment without knowing all the details of the program, the "special needs" doctrine, which has sustained automobile drunk driving checkpoints and standardized drug testing in schools, does not appear to support warrantless wiretapping of this kind.

The need to gather intelligence on the enemy surely qualifies as a "special need," but that is only the beginning, not the end, of the inquiry. The Court then looks to a variety of factors to assess whether the search is reasonable, including the extent of the intrusion; whether the program is standardized or allows for discretionary targeting; and whether there is a demonstrated need to dispense with the warrant and probable cause requirements. The Court has upheld highway drunk driving checkpoints, for example, because they are standardized, the stops are brief and minimally intrusive, and a warrant and probable cause requirement would be unadministrable and would therefore defeat the purpose of keeping drunk drivers off the road.[94] Similarly, the Court has upheld school drug testing programs because students have diminished expectations of privacy in school, the testing was limited to students engaging in extracurricular programs (so that students had advance notice and the choice to opt out), the drug testing was standardized, and the intrusion was minimal because the tests only revealed the presence of drugs. [95]

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[89] *See* Katz v. United States, 389 U.S. 347 (1967) (finding that government's activities in electronically listening to and recording defendant's words violated the privacy upon which defendant justifiably relied, and thus constituted a search and seizure within the Fourth Amendment).

[90] *See* United States v. U. S. Dist. Court, 407 U.S. 297 (1972) (finding that electronic surveillance in domestic security matters requires an appropriate prior warrant procedure).

[91] *Id.*

[92] *Id*. at 321.

[93] DOJ Memo, *supra* note 2, at 36–41.

[94] *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (establishing that highway sobriety checkpoint programs are consistent with the Fourth Amendment).

[95] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (authorizing a school drug testing policy of students as constitutional under the Fourth and Fourteenth Amendments because the State may

The NSA spying program has *none* of the safeguards found critical to upholding "special needs" searches in other contexts. It consists not of a minimally intrusive brief stop on a highway or a urine test limited to detecting drugs, but of the wiretapping of private telephone and email communications, which could reveal all sorts of personal and intimate details of the target's private life. It is not standardized, but subject to discretionary targeting under a standard and process that remain secret. Those whose privacy is intruded upon have no notice or choice to opt out of the surveillance. And it is neither limited to the environment of a school nor analogous to a brief stop for a few seconds at a highway checkpoint. Finally, and most importantly, the fact that FISA has been used successfully for almost thirty years demonstrates that a warrant and probable cause regime is *not* impracticable for foreign intelligence surveillance.

Accordingly, to extend the "special needs" doctrine to the NSA program, which authorizes unlimited warrantless wiretapping of the most private of conversations without statutory authority, judicial review, or probable cause, would render that doctrine unrecognizable.

IV. Security Concerns

Given the broad consensus that we should be listening into al Qaeda's phone calls when they call into the United States, the real issue in the NSA spying debate is whether the president can violate criminal law in secret. Contrary to the administration's claims, security concerns do not justify defying FISA's criminal prohibition or bypassing the judicial approval that FISA demands. Attorney General Gonzales has claimed that the NSA program employs the same substantive standard required by FISA—"probable cause."[96] If so, warrants should be readily granted by the FISA courts, which have rarely rejected a wiretapping application. The attorney general contends that the program would suffer if NSA officials had to seek approval from the FISA court for its wiretaps because it takes time to prepare an application.[97] The fact that a wiretap may be put in place immediately before the FISA court approves it, so long as a request is submitted to the court within seventy-two hours, is insufficient, according to the attorney general, because it takes time for executive officials to make the initial determination that the court would in fact grant the request.[98] But if

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exercise a degree of supervision over its students who are in the temporary custody of the State as schoolteacher).

[96] *Id.*

[97] *Id.*

[98] Executive and NSA Wartime Authority Hearing, *supra* note 3.

the NSA is using the same probable cause standard as is set forth in FISA, then some executive official has to make the initial "probable cause" determination whether or not court approval is subsequently sought. The mere fact that one's probable cause determination will be subject to review by another should not alter the initial determination, unless in practice the NSA is applying a lower standard of suspicion. But to date, the attorney general has insisted that the NSA is using the same probable cause standard set forth in FISA. If that is the case, there is no excuse for failing to seek judicial confirmation of the executive's probable cause judgments.

The administration also argues that obtaining statutory authorization for the NSA spying program would require disclosure of its operational details and would thereby compromise its effectiveness. This argument, too, is difficult to accept. Surely al Qaeda members assume that we are listening to their calls. If they consulted a lawyer, they would know, for example, that there are no statutory limits on the president obtaining electronic surveillance of their communications abroad, even if they are calling into the United States. Thus, they would have to assume that all their calls are being monitored, regardless of any disclosure of the details of the NSA spying program.

Moreover, even if an al Qaeda member could be confident that a particular call was governed by the legal limits set forth in FISA, he would still have to assume that his communications would be intercepted. FISA permits such interception on a showing of probable cause that an individual is an "agent of a foreign power," which includes a member of al Qaeda or other international terrorist organization. Because an al Qaeda member cannot know how much information the government has about him, he would have to assume that his calls could be monitored. Thus, revelation of the NSA program cannot conceivably "tip off" al Qaeda members any more than the current state of the law does.

When pressed on this issue before the Senate Judiciary Committee, Attorney General Gonzales suggested that the concern is not so much the existence of legal authority to wiretap, but the widespread news coverage that the program has received.[99] He suggested that even if al Qaeda members might know in theory that they could be subject to surveillance, front page news on the subject will bring that lesson home much more concretely.[100] But if that is the concern, the administration is as much to blame for tipping off al Qaeda as anyone. Had it simply included in the omnibus Patriot Act another provision authorizing this program, the NSA

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[99] *Id.*
[100] *Id.*

spying program might have generated some debate, but it would have been just one among many provisions debated in the enactment of the Patriot Act. If the program is as narrow as administration officials portray it, its approval would not likely have been controversial, and like many provisions in the 342-page Patriot Act, it might have generated no press attention. In any event, once enacted, news attention would almost certainly have died down substantially.

By forgoing the legal route of amending FISA, however, the president virtually guaranteed that the program would ultimately generate widespread attention. The program was presumably leaked to the *New York Times* precisely because of concerns within the administration about its legality. The reason the program has generated so much attention since its disclosure is not because of any broad concern about the surveillance of suspected al Qaeda members, but because of concern about the assertions of executive power that the administration has advanced to defend the program. Thus, had the administration sought and obtained congressional approval of the wiretapping provisions in the Patriot Act, this issue would likely have generated far less attention than it now has.

In other words, the controversy surrounding the NSA spying program has been sparked not by the substance of the NSA spying program —we still don't know what that substance really is—but by the way the administration went about putting the program in place, and especially by the implications of the administration's arguments for the system of checks and balances so central to our constitutional democracy. If the administration could have put the same surveillance program in place with congressional approval, it would have been able to gather the same intelligence, while avoiding the national controversy its actions have sparked.

These features of the NSA spying program—unnecessary overreaching by the administration sparking a negative reaction that could have been avoided had the power been asserted in a less arrogant manner—are unfortunately common to many of the Bush administration's post-9/11 counterterrorism initiatives. On issue after issue, the administration has overplayed its hand and then been forced to pay the consequences. These consequences have ultimately undermined our national security in ways that are likely to plague us for the foreseeable future.

The administration's treatment of those detained at Guantanamo Bay, Cuba, illustrates the point. Few would dispute that in a military conflict, a nation is entitled to capture and detain those fighting for the enemy for the duration of the conflict. The world did not object to our using military force to respond to the attacks of September 11, 2001, and would not have objected to our detaining those fighting for al Qaeda, had we pursued

that authority in a measured way. Under the Geneva Conventions, a detainee is entitled to an informal hearing to determine his status where there is any room for doubt and is entitled to be treated humanely.[101] Yet rather than honor these minimal restrictions, the Bush administration proclaimed the Geneva Conventions had no applicability, refused to provide any hearings until it lost in the Supreme Court, and subjected the detainees to coercive interrogation tactics that without a doubt amount to inhumane treatment and in some instances rise to the level of torture. These tactics, entirely unnecessary to achieve the primary goal of incapacitating enemy forces during the military conflict with al Qaeda, turned Guantanamo into a black mark on the United States' reputation.

The same is true of the administration's approach to torture and cruel, inhuman, and degrading treatment. The United States has signed and ratified a treaty absolutely prohibiting such conduct under all circumstances, including wartime. But the administration early on apparently decided that rather than adhere to that universally accepted prohibition, it would work to create as many loopholes and exceptions as possible, to free up officials to employ harshly coercive interrogation tactics. Thus, in the Justice Department's 2002 torture memorandum, it construed torture exceedingly narrowly in order to permit threats of death, the administration of drugs, infliction of mental pain, and infliction of physical pain short of that associated with organ failure or death.[102] The Justice Department also concocted a novel interpretation of the treaty prohibition on cruel, inhuman and degrading treatment to exempt foreign nationals held abroad of its protections. These efforts led to the graphically documented abuse of prisoners at Abu Ghraib and Guantanamo, and to the undocumented but widely acknowledged abuse of others who had "disappeared" into secret CIA prisons known only as "black sites." And those practices, once disclosed, fueled anti-American sentiment around the world and handed al Qaeda and other terrorists the best propaganda it could hope for.

The NSA spying revelations are not likely to generate the same level of international opprobrium as Abu Ghraib and Guantanamo, because the protection of privacy is not as firmly established as the safeguards against torture and arbitrary detention. These spying regulations, however, have already caused substantial controversy within the United States. The country

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[101] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[102] Memorandum from Jay S. Bybee, Asst. Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) *available at* http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf (last visited Feb. 2, 2006).

is sharply divided on whether the program was legal.[103] This internal division is itself costly. It should not be difficult to unite the nation in the fight against al Qaeda, and a united nation is stronger than a divided one. Assertions of uncheckable presidential power to violate criminal statutes in secret do not help to unite the country behind its leader.

In each of the areas described above—detention, torture, cruel, inhuman and degrading treatment, and now NSA spying—the administration has asserted a presidential prerogative to choose "the means and methods of engaging the enemy" without regulation, restriction, or oversight by the other branches. As a technical matter, the administration does not claim that the president is above the law. But there is a very thin line between a claim that one is above the law, and an assertion that one has exclusive power "to say what the law is" with respect to "engaging the enemy."[104] That view is contrary to constitutional text and history; wholly unnecessary to preserve our security; and almost certain to make Americans less safe as we proceed in the struggle to protect ourselves from terrorist attacks.

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[103] See David Jefferson, Newsweek Poll: Americans Wary of NnSA Spying, Newsweek, May 14, 2006, available at http://www.msnbc.msn.com/id/12771821/site/newsweek/ (reporting that 53 percent of Americans thingk the NSA's surveillance program "goes too far in invading people's privacy," while 41 percent see it as a necessary tool to combat terrorism).

[104] DOJ Memo, *supra* note 2, at 6–10, 28–36.