A COMPREHENSIVE ANALYSIS OF THE NATIONAL SECURITY AGENCY'S WIRETAPPING PROGRAM AND ITS CORRELATION WITH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

MICHAEL FRAGGETTA*

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.
– Benjamin Franklin[1]

I. INTRODUCTION

The Administration of President George W. Bush subscribes to the constitutional theory of the unitary executive; this theory takes the position that "all executive authority must be in the President's hands, without exception."[2] According to Vice President Dick Cheney, "[i]n wartime, . . . the president 'needs to have his constitutional powers unimpaired.'"[3]

Some of the applications of the Unitary Executive Theory have included "the power to go to war without congressional authorization, . . . the power to detain 'enemy combatants,' including Americans captured on American soil, without access to a lawyer or to hearings, and . . . the power to engage in coercive interrogation of enemies, even torture, when necessary."[4] President George W. Bush and Vice President Dick Cheney have attempted over the duration of their Administration to expand the powers of the

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* J.D., cum laude, Touro College Jacob D. Fuchsberg Law Center, 2007; B.B.A.., Hofstra University, 1999; Admitted in New York and Connecticut. I wish to thank Professor Jeff Morris of Touro College Jacob D. Fuchsberg Law Center for his steady support and expert guidance. Thank you to my parents for their constant devotion. Special thanks to my wife Maria for her unwavering fortitude and understanding., you are the bedrock of my motivation.

1. BENJAMIN FRANKLIN, PENNSYLVANIA ASSEMBLY: REPLY TO THE GOVERNOR (1756), *reprinted in* 6 THE PAPERS OF BENJAMIN FRANKLIN, APR. 1, 1755-SEPT. 30, 1756, at 238, 242 (Leonard W. Labaree ed., Yale University Press 1963).

2. Robert Parry, *Alito & the Ken Lay Factor*, consortiumnews.com, Jan. 12, 2006, http://www.consortiumnews.com/2006/011106.html.

3. Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A01 (quoting Vice President Dick Cheney).

4. Posting of Cass Sunstein to University of Chicago Law School: The Faculty Blog, http://uchicagolaw.typepad.com/faculty/2005/12/the_presidents_.html (Dec. 28, 2005, 11:21 CST).

President through a series of signing statements.[5] One of the more controversial programs of the Bush Administration has been the National Security Agency's (NSA) secret wiretapping program.

Aspects of the Unitary Executive Theory are not novel. President Abraham Lincoln suspended habeas corpus during the Civil War, President Franklin D. Roosevelt sent Japanese Americans to internment camps during World War II, and during the 1980s, President Ronald Reagan ignored a congressional ban and provided aid to contra rebels in Nicaragua.[6]

The Unitary Executive Theory as espoused by the Bush Administration came to the forefront after the traumatic and devastating terrorist attack on United States soil. On the tranquil morning of September 11, 2001, four commercial passenger jet airliners were hijacked by terrorists.[7] Two of the planes were flown into the two main towers of the World Trade Center in New York, New York.[8] The third plane crashed into the Pentagon, and the fourth plane crashed into a field in Pennsylvania.[9] These events caused the deaths of 2,973 men, women, and children.[10] In the days that followed these horrific events, President Bush issued a secret executive order authorizing the NSA to conduct surveillance of telephone conversations without acquiring a warrant from the Foreign Intelligence Surveillance Act Court or any other court either before or after the surveillance.[11]

The complete facts of the NSA program remain a secret.[12] However, what has been determined is that the program involves the interception of telephone communications where at least one party to the conversation is a

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5. Jennifer Van Bergen, *The Unitary Executive: Is the Doctrine Behind the Bush Presidency Consistent with a Democratic State?*, FINDLAW, Jan. 9, 2006, http://writ.news.findlaw.com/commentary/20060109_bergen.html. A signing statement is "an official document in which a president lays out his interpretation of a new law." Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1, *available at* http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/.

6. *See, e.g.*, Baker & VandeHei, *supra* note 3.

7. STAFF OF NATIONAL COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES, 106TH CONG., REPORT ON THE CIRCUMSTANCES SURROUNDING THE SEPT. 11, 2001 TERRORIST ATTACKS 11 (2004), *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf.

8. *Id.* at 285.

9. *Id.* at 10, 30.

10. *Id.* at 311.

11. *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 266, 267 (Feb. 6, 2006) (statement of Alberto R. Gonzales, Att'y Gen. of the United States), *available at* http://a257.g.akamaitech.net/7/257/2422/26juy20061500/www.access.gpo.gov/congress/senate/pdf/109hrg/27443.pdf.

12. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, A16.

suspected or known terrorist.[13] The program permits surveillance even if one of the parties to the conversation is a United States citizen.[14] This program continued unbeknownst to the public until December 2005, when the New York Times broke the wall of silence and exposed the surveillance program.[15]

Several legal commentators immediately responded to the revelation of this controversial program pointing out that President Bush faced several legal hurdles to prove the legality of this program.[16] Among these hurdles is the Fourth Amendment because these wiretaps were being conducted without a warrant or a neutral third party to weigh the reasonableness of the intrusion.[17] Another major hurdle, and the focus of this Article, is whether the surveillance violates the Foreign Intelligence Surveillance Act (FISA). FISA is a statute enacted by Congress in 1978, which deals with foreign-intelligence surveillance.[18] FISA sets procedures that the executive agencies must adhere to in order to legally conduct surveillance for foreign-intelligence purposes where at least one party is in the United States.[19]

Shortly after the revelation of this program, the Department of Justice (DOJ) released a very detailed legal opinion arguing for the legality and constitutionality of the program.[20] In response to the DOJ, the Congressional Research Service released its own legal analysis arguing that the NSA wiretaps must conform to the procedures of FISA.[21]

FISA was enacted after years of controversy over presidential abuses in the conduct of foreign-intelligence surveillance for national-security purposes. Prior to the enactment of FISA, in some of the most important cases involving the warrant requirement for electronic surveillance, the United States Federal Court of Appeals and the United States Supreme

13. Eric Lichtblau & Scott Shane, *Basis for Spying in U.S. Is Doubted*, N.Y. TIMES, Jan. 7, 2006, at A12.

14. Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A1.

15. Risen & Lichtblau, *supra* note 12, at A1.

16. Scott Shane, *Criminal Inquiry Opens Into Leak in Eavesdropping*, N.Y. TIMES, Dec. 31, 2005, at A1.

17. *See* U.S. CONST. amend. IV.

18. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1863 (2000).

19. *See id.* §§ 1801-1802.

20. *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006).

21. *See* Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, American Law Div., Congressional Research Service, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006) [hereinafter CRS Memo].

Court refrained from requiring a warrant when the purpose of the surveillance was national security.[22]

II. HISTORY OF WARRANTLESS SURVEILLANCE

In 1976, Congress created the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee).[23] The Church Committee learned that "intelligence activity . . . exceeded the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions."[24] The Church Committee uncovered years of abuse by presidents and executive agencies which authorized surveillance under a national-security rationale when, in fact, there was no national-security interest present.[25] The Church Committee found that "[s]ince the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant."[26]

Among the transgressions uncovered by the Church Committee were that the Central Intelligence Agency (CIA) and Federal Bureau of Investigation (FBI) combined had opened nearly 380,000 first-class letters and photographed the contents.[27] The NSA, through secret arrangements with three U.S. telegraph companies, obtained millions of private telegrams that were sent to or from the U.S.[28] The U.S. Army maintained intelligence files on an estimated 100,000 Americans, and another 11,000 intelligence files were created through Internal Revenue Service investigations that were initiated on a political basis.[29]

The Church Committee further revealed that "[e]ach administration from Franklin D. Roosevelt's to Richard Nixon's permitted, and sometimes encouraged, government agencies to handle essentially political intelligence."[30] For instance, past subjects of warrantless wiretapped surveillance "have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine

22. *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980); *see also* Katz v. United States, 389 U.S. 347, 358 n.23 (1967).

23. STAFF OF S. COMM. ON THE SELECT COMMITTEE ON INTELLIGENCE, 110TH CONG., RULES OF PROCEDURE FOR THE SELECT COMMITTEE ON INTELLIGENCE 11 (Comm. Print 1976).

24. S. REP. NO. 94-755, at 2 (1976).

25. *Id.* at 5.

26. *Id.* at 12.

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 6-7.

30. *Id.* at 9.

threat to the national security."[31] The only plausible basis for these surveillances was political.[32]

In addition to those noted above, there were investigations of lawful, non-violent organizations including the Women's Liberation Movement and the National Association for the Advancement of Colored People (NAACP).[33] The government's surveillance of the NAACP, for instance, continued for over twenty-five years and was authorized to determine whether the NAACP had any connections with the Communist party.[34] This surveillance continued despite a report during the first year of the investigation that found "that the NAACP had a 'strong tendency' to 'steer clear of Communist activities.'"[35]

Civil-rights leader Dr. Martin Luther King, Jr. was a significant target of surveillance by the FBI.[36] After Dr. King orated his legendary "I Have A Dream" speech, the FBI determined that Dr. King needed to be taken "'off his pedestal'" and labeled him the "'most dangerous and effective Negro leader in the country.'"[37] The Church Committee discovered that the FBI continued a course of surveillance and harassment against Dr. King under the reported rationale of a fear that he would abandon his non-violent ways and incite violence.[38] In one particularly heinous instance, the FBI had secretly recorded Dr. King and then sent him an anonymous letter threatening to release its embarrassing tape recording, which was meant to destroy his marriage, unless he committed suicide.[39]

Amidst these startling revelations, Congress passed the Foreign Intelligence Surveillance Act (FISA). This legislation was aimed at eliminating the carte blanche given to intelligence agencies of past presidents and executive agencies and required, among other things, that before commencing surveillance the federal agency conducting the surveillance must bring their proposal before a specially created court—the Foreign Intelligence Surveillance Court (FISA Court).[40]

In order to understand the present, it is important to review the past; thus, this Article begins by reviewing the legal history of electronic surveillance in the United States and how the courts and Congress have dealt with ever-evolving technology. Then we turn to FISA and the subsequent laws that had supplemented FISA, most notably the Patriot Act. We then

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31. *Id.* at 12.
32. *See id.* at 13.
33. *Id.* at 7-8.
34. *Id.* at 8.
35. *Id.* (citation omitted).
36. *Id.* at 11.
37. *Id.* (internal citation omitted).
38. *Id.* at 11-12.
39. *Id.* at 11.
40. 50 U.S.C. § 1803 (2007), *amended by* Protect America Act of 2007, Pub. L. No. 110-182, 122 Stat. 605 (2008).

review the legal commentators' positions on both sides of this controversial issue of the legality of the NSA surveillance program. Finally, this Article examines whether Congress intended FISA to be an all-encompassing statute with respect to foreign-intelligence surveillance and judicial challenges to the program.

A. Pre-FISA Electronic Surveillance Jurisprudence

The Executive Branch of the United States is entrusted with the authority to handle most issues dealing with foreign affairs.[41] Included with this authority is the implicit responsibility to protect national security.[42] Presidents have long used the controversial tool of warrantless wiretaps, arguably as a method for maintaining national security.[43]

In 1791 the Fourth Amendment was ratified.[44] It states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[45] The fine line between the President's inherent authority to handle foreign affairs under Article II of the Constitution and deal with national security and the warrant requirement of the Fourth Amendment has been reviewed and analyzed by the courts and Congress.[46] The majority of the analysis, however, has occurred in the past eighty years.

Since the enactment of the Fourth Amendment, the Supreme Court has heard many cases concerning the Amendment's applicability.[47] The earlier cases dealt with actual physical invasions of a person's house or property and the seizure of tangible things such as documents or contraband.[48] As technology improved, with innovative inventions such as the telephone, so did the means by which the government could invade someone's privacy.

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41. United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980).

42. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 310 (1972).

43. *See* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1313-14 (2004).

44. U.S. CONST. amend. IV, U.S.C. at LXII n.12 (2000).

45. U.S. CONST. amend. IV.

46. *See, e.g.*, *Keith*, 407 U.S. 297 (weighing the President's duty to safeguard domestic security against the mandates of the Fourth Amendment in the context of the Omnibus Crime Control and Safe Streets Act).

47. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 458-69 (1928) (citing Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gould v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616 (1886)).

48. *See, e.g.*, *Agnello*, 269 U.S. 20; *Amos*, 255 U.S. 313; *Gould*, 255 U.S. 298.

Soon the wiretapping of telephones became an important method of conducting surveillance and gathering evidence against alleged criminals.[49]

The first time that the Supreme Court had the opportunity to hear a case in which a defendant challenged evidence obtained by federal investigators via a wiretap on a telephone was in 1928.[50] In *Olmstead v. United States*, the Supreme Court declined to expand the Fourth Amendment doctrine to forbid the use of a wiretap without first obtaining a warrant.[51] The Court held that because there was no physical invasion involved and no seizure of any tangible property, there was no violation of the Fourth Amendment.[52]

The Court in *Olmstead* applied a formalistic approach to the then-existing rule of law, and Justice Brandeis delivered a prophetic dissent. Justice Brandeis believed that the true purpose of the Fourth Amendment was to protect a person's privacy as much as it was to forbid law enforcement officials from forcing their way into a person's house.[53] He thought that the mere fact that technology had improved over the years should not be an open ticket for the government to invent new and novel means of invading privacy.[54] After reiterating that the Supreme Court had held that a sealed letter was protected by the Fourth Amendment from a warrantless search, he stated that "[t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails."[55] While the Supreme Court in *Olmstead* did not hold that wiretaps without a warrant were unconstitutional, it suggested that Congress could legislate to require warrants for such wiretaps.[56]

Heeding the suggestion of the Supreme Court, Congress passed the Communications Act of 1934, which "made it illegal to intercept and disclose any wire or radio communication."[57] Despite this Act, when the issue of national security was elevated and the Senate was slow in passing a resolution authorizing national-security wiretapping during World War II, President Franklin D. Roosevelt acted unilaterally and authorized warrantless wiretaps in instances where "'grave matters involving defense of

49. Wiretapping has been defined as "[e]lectronic or mechanical eavesdropping, usu[ally], done by law-enforcement officers under court order, to listen to private conversations." BLACK'S LAW DICTIONARY 1631 (8th ed. 2004).

50. *Olmstead*, 277 U.S. 438.

51. *Id.* at 466.

52. *Id.* at 465-66.

53. *Id.* at 478 (Brandeis, J., dissenting).

54. *Id.* at 474.

55. *Id.* at 475.

56. *Id.* at 465-66 (majority opinion).

57. Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 182 (2003) (citing Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1103-04 (codified as amended at 47 U.S.C. § 605 (2000))).

the nation' were involved."[58] This practice was subsequently followed by other Presidents, including Harry Truman and Lyndon B. Johnson.[59]

In 1967 the Supreme Court handed down another landmark decision: *Katz v. United States*.[60] In *Katz*, the Court effectively overruled *Olmstead* by holding that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.'"[61] The Court went as far as to enforce a new requirement to obtain a warrant from a neutral magistrate before wiretapping a phone.[62] The Court noted that "[s]earches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment" and that includes wiretapping and eavesdropping on a private telephone conversation.[63] The Court stopped short of enforcing the warrant requirement in cases involving national security, which was not at issue.[64]

Concurring in the decision, Justice Douglas took exception to the national-security exclusion enunciated by the Court. He believed that regardless of whether the suspected crime was gambling or espionage the investigated parties should be protected by the guarantees of the Fourth Amendment.[65] He also noted that the warrant requirement demanded that a neutral judge or magistrate be entrusted with the responsibility to grant the warrant, and that because the President is an interested party in any national security investigation, this decision, in essence, permitted the President to conduct warrantless wiretaps for national-security investigations without it being a violation of the Fourth Amendment.[66]

In 1968, in response to the *Katz* decision, Congress convened and drafted the Omnibus Crime Control and Safe Streets Act entitling Title III of the Act "Wiretapping and Electronic Surveillance."[67] This monumental Act set the guidelines for law enforcement to follow in order to comply with the *Katz* decision and to acquire a warrant to conduct electronic surveillance of

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58. *Id.* (quoting *Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearing on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence*, 94th Cong. 24 (1976) (statement of Edward Levi, Att'y Gen. of the United States)).

59. *Id.*

60. 389 U.S. 347 (1967).

61. *Id.* at 353 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

62. *See id.* at 356-57.

63. *Id.* at 357.

64. *Id.* at 358 n.23 ("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.").

65. *Id.* at 359-60 (Douglas, J., concurring).

66. *Id.*

67. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351 §§ 2510-2520, 82 Stat. 197, 212-23 (1968) (codified as 18 U.S.C. §§ 2510-2520 (2002)).

specified criminal activities.[68] Congress followed the blueprint drawn up by the *Katz* decision in enacting the Omnibus Crime Control & Safe Streets Act. This Act deals primarily with criminal activities, and, just like the majority in *Katz*, it provides a national-security and foreign-intelligence exception within the body of the Act.[69]

Then in 1972, the Supreme Court enunciated their holding in *United States v. U.S. Dist. Court (Keith)*, commonly known as the *Keith* case.[70] In this case, the Court held that federal investigators were required to obtain a warrant prior to conducting electronic surveillance related to domestic security investigations.[71] The government had wiretapped the phones of individuals suspected of bombing federal buildings within the U.S. without first obtaining a warrant.[72] The Court, while mandating that domestic-security electronic surveillance must comply with the mandates of the Fourth Amendment and requires a prior warrant, made it very clear that its holding did not address the issue "involved with respect to activities of foreign powers or their agents."[73]

B. FISA & Its Progeny

By the 1970s the Fourth Amendment, as applied by the Supreme Court and Congress, had evolved to the point where electronic surveillance that involved no actual criminal trespass still required a warrant, and even domestic aspects of national security required prior judicial approval before such an intrusion.[74] However, nothing enunciated by the courts or Congress had hindered the executive's authority to conduct warrantless electronic surveillance under the justification of national security. In fact, the cases discussed in this Article imply that their decisions do not hinder the executive's authority to conduct foreign-intelligence surveillance.[75]

During the 1970s, Congress, in response to the many abuses exposed by the Church Committee, enacted FISA. "FISA is a federal statute that

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68. *Id.* § 2516.

69. *Id.* § 2511 ("Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation . . . [or] to obtain foreign intelligence information deemed essential to security of the United States, or to protect national security information against foreign intelligence activities.").

70. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972).

71. *Id.* at 316-17.

72. *Id.* at 299-301.

73. *Id.* at 321-22.

74. *See* U.S. CONST. amend. IV (stating in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

75. *See* Katz v. United States, 389 U.S. 347, 358 n.23 (1967); *see also Keith*, 407 at 322-23 (discussing the need for different standards to conduct warrantless searches that pertain to national-security issues).

governs how the U.S. Government employs certain privacy-intruding techniques in foreign intelligence investigations" conducted within the U.S.[76] FISA places restrictions on the President's ability to conduct electronic surveillance on foreign agents within the U.S. by clearly defining a "foreign power" and an "agent of a foreign power,"[77] and it only permits foreign-intelligence surveillance against foreign powers and their agents after the proper FISA procedures are followed.[78] The procedures set forth in FISA include getting approval for the surveillance from a special court—the Foreign Intelligence Surveillance Court (FISA Court).[79] If the FISA Court denies an application for surveillance, then the request can be appealed to the Foreign Intelligence Surveillance Court of Review (FISCR).[80]

The initial request for surveillance must indicate probable cause that the target of the surveillance is "a foreign power or an agent of a foreign power."[81] This is a sharp contrast to applications for ordinary criminal warrants, which require probable cause that the target of the surveillance committed a crime.[82] FISA orders can be obtained to conduct electronic surveillance on both U.S. and non-U.S. citizens.[83] If the target is a U.S. citizen, then the length of time permitted for the surveillance is curtailed.[84] There are also other restrictions on the surveillance that may be conducted on U.S. citizens.[85]

In 1980, in *United States v. Truong Dinh Hung*, the Fourth Circuit Court of Appeals held that the President was "excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence

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76. Ronald D. Lee, Address at the Fifth Annual Institute on Privacy Law 2004, New Developments & Compliance Issues in a Security-Conscious World: The Foreign Intelligence Surveillance Act (FISA): Spies, Terrorists, and the Rights of United States Persons (June 22, 2004) (PowerPoint slides available at Westlaw, 789 PLI/Pat 373).

77. 50 U.S.C. § 1801 (2000).

78. *See id.* § 1804 (stating that the application requirements to gain a court order permitting foreign-intelligence surveillance).

79. *See id.* §§ 1803-1804 (stating that the composition and process of the FISA Court and the requirements of the application for a court order for electronic surveillance).

80. *Id.* § 1803.

81. *Id.* § 1804(a)(4)(A).

82. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

83. 50 U.S.C. § 1804 (a)(3) (noting that the citizenship of a target is not required information in the application for a court order for electronic surveillance).

84. *Id.* § 1805(e)(1).

85. United States v. Rosen, 447 F. Supp. 2d 538, 548 (E.D. Va. 2006) (stating that no foreign intelligence surveillance may be conducted against a U.S. person "'*solely* upon the basis of activities protected by the First Amendment'" (quoting 50 U.S.C. § 1805(a) (2003))).

reasons."[86] Although the Supreme Court never explicitly stated that there is a warrant exception to the Fourth Amendment when it comes to foreign-intelligence surveillance, the idea was certainly never denied.[87] This case, however, concerned surveillance conducted prior to the enactment of FISA and, thus, FISA did not apply.[88] The Court of Appeals did discuss FISA in a footnote and noted that FISA provided the method by which the executive could obtain a warrant to conduct foreign-intelligence surveillance, also making note of the warrant exceptions.[89] The court also mentioned that Congress was not erroneous in requiring FISA orders to be obtained against U.S. citizens.[90]

In another case, *United States v. Duggan*, the Second Circuit Court of Appeals stated that FISA was enacted to create procedural safeguards that Congress deemed "'necessary to ensure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment.'"[91]

After the devastating attacks of September 11, 2001, Congress expedited the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act).[92] The Patriot Act, among many other things, amended FISA in several ways. It changed the number of judges that sit on the FISA Court and, perhaps most appreciably, amended the purpose purported by the Attorney General in acquiring a FISA surveillance order.[93] Originally FISA required that "the *purpose*" of the surveillance is to obtain foreign-intelligence information, and the Patriot Act changed that to "a *significant purpose*."[94] The addition of the word "significant" has been held by the FISCR to permit FISA surveillance even when the purpose of the investigation is for criminal prosecution, so long as there is still a measurable purpose of gathering foreign-intelligence information.[95] This is significant because it enables the federal government to conduct wiretaps for criminal investigations under the less restrictive confines of FISA as opposed to having to secure a traditional warrant.

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86. United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980).

87. *See* Mitchell v. Forsyth, 472 U.S. 511, 531-33 (1985) (citing Berger v. New York, 388 U.S. 41, 88 (1967); Katz v. United States, 389 U.S. 347, 358 n.23 (1967)).

88. *Truong Dinh Hung*, 629 F.2d at 912 ("Truong's phone was tapped and his apartment was bugged from May, 1977 to January, 1978."); 50 U.S.C. § 1804 (2003) (effective Oct. 25, 1978).

89. *Truong Dinh Hung*, 629 F.2d at 914 n.4.

90. *See id.*

91. 743 F.2d 59, 73 (2d Cir. 1984) (quoting S. Rep. No. 95-701, at 13 (1978)).

92. USA PATRIOT Act of 2001, Pub. L. No. 107-56, §1, 115 Stat. 272 (2001).

93. *Id.* §§ 208, 218.

94. *Id.* § 218 (emphasis added).

95. *In re* Sealed Case, 310 F.3d 717, 734-35 (FISA Ct. Rev. 2002).

There were other changes to FISA found in the Patriot Act, including one change that permits more open communication between law enforcement and foreign-intelligence agents;[96] however, the Patriot Act did not change the general crux of FISA, which is to obtain warrants to conduct foreign-intelligence surveillance on domestic soil. In fact, FISA provides criminal sanctions if a person uses electronic surveillance where there is reason to know that the surveillance was not authorized by statute.[97] There are exceptions to FISA including a wartime qualification that empowers the President to authorize electronic surveillance without a court order to acquire foreign-intelligence information for a period of fifteen days following a declaration of war by the Congress.[98]

FISA is a check on the executive's authority to conduct electronic surveillance in more ways than by merely requiring oversight by the FISA Court. There are other safeguards included that the executive must adhere to in order to comply with the statute.[99] There are, of course, instances where foreign-intelligence gathering is needed expeditiously. For those occasions, Congress included an emergency section within FISA.[100] The emergency-order section permits the Attorney General, acting on behalf of the President, to authorize surveillance prior to submitting a warrant request before the FISA Court.[101] While this section permits the Attorney General to conduct surveillance without obtaining a court order, there are restrictions such as that the factors required to normally obtain a FISA order must be present and that the Attorney General must seek the proper order as soon as practical, not to exceed twenty-four hours after initiating the surveillance.[102]

There is also another section of FISA that is attributed to exceptions to the warrant requirement.[103] Under this section, there is a one-year time limit for warrantless surveillance, and the Attorney General must certify in writing several criteria outlined by the statute; one factor is that the surveillance has no substantial likelihood of acquiring communications to which a United States citizen is a party.[104]

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96. USA PATRIOT Act § 203.

97. 50 U.S.C. § 1809(a)(2) (2000).

98. *Id.* § 1811.

99. *Id.* § 1808(a)(1) ("On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this subchapter.").

100. *Id.* § 1805(f) (defining the emergency situations in which the Attorney General may authorize employment of electronic surveillance).

101. *See id.*

102. *Id.*

103. *See id.* § 1802.

104. *Id.* § 1802(a)(1), (a)(1)(B), (a)(2).

III. POST 9/11 WIRETAPPING: COMMENTATORS, CONGRESS, AND THE COURTS

In December 2005, the New York Times reported on a program approved by the President that authorized warrantless wiretaps on Americans and others within the jurisdiction of the United States.[105] The program had begun soon after the attacks of September 11, 2001, and was officially authorized by the President via an executive order signed in 2002.[106] Perhaps the hurdles in FISA were the reasons that the Bush Administration began conducting warrantless wiretaps for foreign-intelligence purposes after 9/11, therefore circumventing the requirements of FISA.

Due to the efforts of the New York Times, the secret program became common knowledge leading to intense debate. Proponents of the program tend to argue that the authority to conduct these wiretaps is inherent under the presidential powers outlined in Article II of the U.S. Constitution or, in any event, that doing so is permissible under FISA.[107] Opponents claim that the President is violating federal law and the Separation of Powers Doctrine.[108] This secret program does not utilize any aspect of FISA. There are no requests for surveillance brought before the FISA Court neither is there a one-year limit on warrantless wiretapping.[109] The Administration completely circumvented FISA and conducted this surveillance program acting as if FISA did not apply.

The secret surveillance program authorized by the President has ignited intense debate. We begin this analysis by looking at the Administration's position on the program and the views of several commentators who believe that the program is legal and essential to the safety of the American citizenry.

In response to the publication of this secret program by the New York Times, the DOJ issued a forty-two-page report arguing the legality and constitutionality of the NSA program.[110] Several arguments were made. First and foremost was "that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes."[111] The argument is clear—the President, acting as the Commander-in-Chief of the Armed Forces and the sole organ of the nation in external relations, has the inherent authority to conduct foreign-intelligence surveillance.[112] Courts have consistently

105. Risen & Lichtblau, *supra* note 12, at A1.
106. *Id.*
107. *See infra* notes 123-31 and accompanying text.
108. *See infra* notes 150-54 and accompanying text.
109. Risen & Lichtblau, *supra* note 12, at A16.
110. U.S. DEP'T OF JUSTICE, *supra* note 20.
111. *Id.* at 7.
112. *Id.* at 6-7.

applied this theory.[113] Second, the President clearly has the authority to resist a sudden attack upon the United States and, if attacked, may fight force with force.[114] The events on September 11, 2001, were just such an attack. The DOJ interprets the Permissible Force Doctrine as support for the inherent authority of the President to conduct warrantless surveillance.[115]

The second argument made by the DOJ was that the Authorization for Use of Military Force (AUMF) confirms and supplements the President's inherent authority to conduct warrantless surveillance.[116] In response to the attacks on September 11, 2001, Congress passed the AUMF on September 14, 2001.[117] The AUMF "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.'"[118]

The DOJ argued that the use of electronic surveillance is a type of force to be utilized against the enemy as defined by the AUMF.[119] The AUMF permits military action within U.S. borders, and according to the DOJ, the use of electronic surveillance is a vital "use of force" in locating and identifying the enemy.[120] The DOJ further argued that the decision in *Hamdi v. Rumsfeld* supports this analysis because "five Justices . . . [concluded] that the AUMF incorporates fundamental 'incidents' of the use of military force."[121] Even though detention was not specifically described in the AUMF, it does not mean that detention was not meant to be a part of it, as detention is considered authorized as being a fundamental incident of military force.[122] As explained, the DOJ interprets surveillance as also being a fundamental incident of military force. However, it should be noted that in the plurality opinion of *Hamdi* drafted by Justice O'Connor, she noted that "a state of war is not a blank check for the President when it comes to the

113. *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980) (finding that "the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance"); United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 310 (1972) (finding that even though the case was confined to domestic surveillance, the court acknowledged that in the discharge of the President's duty to protect the nation from those that would subvert it by unlawful means electronic surveillance may be used).

114. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863).

115. *See* U.S. DEP'T OF JUSTICE, *supra* note 20, at 10.

116. *Id.*

117. *Id.* at 11.

118. *Id.* at 11 (emphasis omitted) (quoting AUMF § 2(a)).

119. *Id.*

120. *See id.* at 11-12.

121. *Id.* at 13 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004)).

122. *Hamdi*, 542 U.S. at 519.

rights of the Nation's citizens."[123] Justice O'Connor also noted that even in the Executive Branch's role in dealing with enemies the Constitution "envisions a role for all three branches when individual liberties are at stake."[124]

The DOJ supported its interpretation of electronic surveillance as being an incident of war and thus permitted under the AUMF by providing evidence from past presidents ranging from George Washington to Abraham Lincoln to Franklin D. Roosevelt.[125] The core problem with these examples is that they all occurred prior to the enactment of FISA. As discussed earlier, prior to FISA neither the courts made it clear in their decisions concerning electronic surveillance that those decisions did not reflect the President's authority to conduct foreign-intelligence surveillance,[126] nor had Congress legislated to restrict the President from conducting foreign-intelligence surveillance until passage of FISA.[127] Although, as discussed earlier, the DOJ argued that being an inherent power, Congress cannot legislate to curb the President's authority to conduct foreign-intelligence surveillance.[128]

The DOJ, recognizing the significance of FISA, further argued that the activities of the NSA are consistent with FISA.[129] It claimed that FISA itself "expressly contemplates that the Executive Branch may conduct electronic surveillance outside FISA's express procedures if and when a subsequent statute authorizes such surveillance."[130] The section under FISA referenced by the DOJ is entitled "Criminal Sanctions," which provides that an individual acting under the color of law shall not be prosecuted if the

123. *Id.* at 536 (involving a U.S. citizen that U.S. authorities wanted to detain as an enemy combatant) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

124. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 380 (1989)).

125. U.S. DEP'T OF JUSTICE, *supra* note 20, at 15-17 (finding that General Washington intercepted communications during the Revolutionary War, President Lincoln wiretapped telegraphs, President Wilson ordered the censorship of messages sent outside the United States via telegraph and telephone lines, and President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities (citations omitted)).

126. U.S. v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 321-22 (1972); *see also* United States v. Truong Dinh Hung, 629 F.2d 908, 913-14 (4th Cir. 1980) (noting that the appellate court agreed with the district court that the President did not need a warrant for foreign-intelligence surveillance and that requiring such would "unduly frustrate" the President from carrying out his duties).

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

128. U.S. DEP'T OF JUSTICE, *supra* note 20, at 19.

129. *Id.* at 20-22.

130. *Id.* at 20.

electronic surveillance conducted was permitted under a statute.[131] The DOJ reasoned that the AUMF is such a statute and takes a broad view of the term "statute" which is shown by defining the AUMF as a statute.[132] It referred to the Black's Law Dictionary definition of a statute and determined that it is "of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill."[133]

Some legal commentators have supported the DOJ's position. In an interview with Paul Gigot on Fox News, John Yoo, Deputy Assistant Attorney General from 2001 to 2003 and one of the main architects of the DOJ's position with respect to the NSA program, argued that FISA is outdated and not fit to deal with the problem posed by al Qaeda.[134] Mr. Yoo endorsed the position that the President, as Commander-in-Chief, has the responsibility to defend the nation through the use of force when it is attacked and that the use of force has "ancillary . . . or related powers," such as the power to intercept communications with the enemy.[135]

John C. Eastman, a professor of law and the Director of the Claremont Institute Center for Constitutional Jurisprudence, also has argued in support of the position taken by the DOJ.[136] He reasoned that under the NSA program, the President acted pursuant to his inherent constitutional authority combined with the statutory authority provided by Congress in the AUMF.[137] Under this analysis, the president's power is at its zenith and falls into the first category of Justice Jackson's three tiers of Presidential power, which were enunciated in *Youngstown Sheet & Tube v. Sawyer*.[138] Mr. Eastman went on to claim that "[u]nder the Constitution, confirmed by two centuries of historical practice and ratified by Supreme Court precedent, the President clearly has the authority to conduct surveillance of enemy communications in time of war."[139] In arguing that the President's power to conduct the electronic surveillance is inherent, Mr. Eastman reasoned that if it is found that FISA is all encompassing and has the effect of restricting the

131. *Id.*; *see* 50 U.S.C. § 1809(a)(1) (2000) (stating that "[a] person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute").

132. U.S. DEP'T OF JUSTICE, *supra* note 20, at 23-28.

133. *Id.* at 23-24 (citations omitted).

134. *See* Interview with John Yoo, Former Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Fox Broadcast News, in Berkley, Cal. (Jan. 28, 2006), *available at* http://www.foxnews.com/story/0,2933,183179,00.html.

135. *Id.*

136. Letter from John C. Eastman, Professor of Law, Chapman University and Director, The Claremont Institute Center for Constitutional Jurisprudence to the Honorable James Sensenbrenner, Jr., Chairman Judiciary Committee, U.S. House of Representatives, at 2 (Jan. 27, 2006), *available at* http://judiciary.house.gov/media/pdfs/nsaeastmanltr.pdf.

137. *Id.* at 3.

138. *Id.*

139. *Id.* at 6.

President's inherent power, then FISA would be an unconstitutional intrusion on the President's constitutional powers.[140]

In a prepared statement, Attorney General Alberto Gonzales defined the legality of the NSA's program by summarizing the position taken by the DOJ. He explained that the AUMF gave congressional authority to the President to "'use all necessary . . . force'" against al Qaeda and to "protect Americans both 'at home and abroad.'"[141] While acknowledging that there is no specific mention of surveillance in the text of the AUMF, he argued that the AUMF still authorized the surveillance by implication.[142]

Gonzales based his reasoning on Justice O'Connor's opinion in *Hamdi*, where she opined that, under the AUMF, even though there was no specific mention of detaining prisoners, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[143] The Attorney General, analogous to his supporters, argued that history has shown that surveillance of the enemy is also a fundamental incident of war and, thus, is incorporated under the AUMF.[144]

Under this position, the President has inherent constitutional power to conduct warrantless foreign-intelligence surveillance; and, thus, as stated by Mr. Chapman, if FISA is found to be an all-encompassing statute, then it would be limiting the inherent authority of the President and be unconstitutional. Gonzales argued, however, that FISA is not an all-encompassing statute and permits the President's actions.[145] His theory was two fold. The first part mirrors the DOJ's position that FISA bars the use of electronic surveillance under color of law "'except as authorized by statute.'"[146] The fact that this section says "statute" as opposed to FISA or any specific statute is significant. Mr. Gonzales reasoned that the use of the term "statute" in the FISA language permits the use of any statute Congress passes and that the AUMF is just such a statute.[147]

The second part of the Attorney General's argument related to the war provision in FISA, which permits warrantless surveillance for a period of fifteen days following a declaration of war.[148] He reasoned that the fifteen-

140. *Id.* at 5.

141. Alberto R. Gonzales, U.S. Attorney Gen., Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America, Remarks at the Georgetown University Law Center (Jan. 24, 2006) (internal citations omitted), *available at* http://www.law.georgetown.edu/news/documents/Gonzalesspeech-1.pdf.

142. *Id.* at 6.

143. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

144. Gonzales, *supra* note 141, at 7-8.

145. *Id.* at 11-12.

146. *Id.* at 11 (quoting 50 U.S.C. § 1809 (2000)).

147. *See id.* at 10.

148. 50 U.S.C. § 1811 (2000) ("[T]he President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to

day window was meant to provide the President with an opportunity to begin conducting enemy surveillance while Congress contemplated a new statute to reflect the current needs of the government.[149] Furthermore, when Congress enacted the AUMF, the AUMF provided the President with congressional authority to engage in all those activities that are fundamentally incidental to waging war, which includes electronic surveillance.[150] Thus, the AUMF permits the President to bypass the procedures of FISA throughout the conflict with al Qaeda.[151]

While there are supporters of the program, it has no shortage of detractors. Robert Reinstein was quoted as saying that the program is "a pretty straight forward case where the president is acting illegally."[152] Kate Martin and Caroline Fredrickson have alleged that the President is authorizing criminal activity by supporting the NSA program.[153]

Edward Lazarus responded to the NSA revelations in December 2005 before the DOJ released its official opinion.[154] While Mr. Lazarus did not have the opportunity to review the DOJ report when he issued his opinion, he presumed that the Administration would claim that the AUMF implicitly repealed FISA.[155] He argued that at the time Congress drafted the AUMF, Congress did not conceive that the legislation would include anything relating to the current NSA program.[156] The DOJ's position, as noted earlier, was that the AUMF did not repeal FISA; the AUMF merely supplemented FISA.[157] The DOJ's position is also contrary to Mr. Lazarus's assertion that the Administration would argue that the AUMF could overrule any federal statute.[158]

In a letter to Congress, drafted after the DOJ released its legal rationale for the NSA program, fourteen legal scholars expressed their disagree-

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acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.").

149. *See* Gonzales, *supra* note 141, at 11.

150. *See id.* at 11-12.

151. *See id.*

152. Eric Lichtblau & James Risen, *Legal Rational by Justice Department on Spying Effort*, N.Y. TIMES, Jan. 20, 2006, at AF1, A14. Robert Reinstein is the Dean of Temple University Law School. *Id.* at A14.

153. Eggen, *supra* note 14, at A11. Kate Martin is the Director of the Center for National Security Studies, and Caroline Fredrickson is the Director of the Washington Legislative Office of the American Civil Liberties Union. *Id.*

154. Edward Lazarus, *Warrantless Wiretapping: Why It Seriously Imperils the Separation of Powers, and Continues the Executive's Sapping of Power from Congress and the Courts*, FINDLAW, Dec. 20, 2005, http://writ.lp.findlaw.com/lazarus/20051222.html. Edward Lazarus, a FindLaw columnist, was a former Federal Prosecutor, and currently in private practice in appellate litigation. *Id.*

155. *See id.*

156. *Id.*

157. *See* U.S. DEP'T OF JUSTICE, *supra* note 20, at 20, 23-28.

158. *Compare id. with* Lazarus, *supra* note 154.

ment.[159] These scholars include the former Dean of Stanford Law School, the current Dean of Yale Law School, and a host of other legal scholars.[160] They relied on the doctrine that specific statutes always prevail over general ones.[161] FISA is a specific statute, while the AUMF is a very general statute and cannot be read to circumvent FISA.[162] Both the DOJ and these scholars argued that the fifteen-day window was meant to give Congress an opportunity to draft new legislation that might satisfy the need of the Administration during a conflict; however, the DOJ believed that the AUMF was just such a statute, while these scholars did not.[163] Thus, the scholars did not believe that the authority to conduct warrantless wiretaps could be found in the AUMF.[164] In addition, these scholars take the position that FISA was intended by Congress to be the exclusive means by which the President could conduct foreign-intelligence surveillance on domestic soil.[165]

The scholars' letter also attacked the DOJ's position that the President has inherent constitutional powers to conduct foreign-intelligence surveillance and that if FISA was interpreted to prohibit the NSA activities, then FISA would be an unconstitutional encroachment on the presidential powers.[166] The authors of the letter contended that "[c]onstruing FISA to prohibit warrantless domestic wiretapping does not raise any serious constitutional question, while construing the AUMF to authorize such wiretapping would raise serious" Fourth Amendment implications.[167] First, they explained that Congress concluded that regardless of any potential inherent authority of the President to conduct foreign-intelligence surveillance, Congress still has the power to regulate that authority through legislation.[168] The President may not act in direct contradiction to an enactment of Congress; and if the President does have the inherent authority and acts on it in complete disregard of FISA, then the President would be acting in direct contradiction to FISA, a congressional statute.[169] According

159. Curtis Bradley, David Cole, Walter Dellinger, Ronald Dworkin, Richard Epstein, Philip B. Heymann, Harold Hongju Koh, Martin Lederman, Beth Nolan, William S. Sessions, Geoffrey Stone, Kathleen M. Sullivan, Laurence H. Tribe, & William Van Alstyne, *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. OF BOOKS 42 (2006) [hereinafter *Legal Scholars Letter to Congress*].

160. *Id.* at 44 (noting that Kathleen Sullivan was the Dean of Stanford Law School and Harold Hongju Koh is the Dean of Yale Law School).

161. *Id.* at 42.

162. *Id.*

163. *Id.*

164. *Id.* at 43.

165. *Id.* at 42-43.

166. *Id.* at 43-44; U.S. DEP'T OF JUSTICE, *supra* note 20, at 6-10.

167. *Legal Scholars Letter to Congress*, *supra* note 159, at 43.

168. *Id.* at 43.

169. *See id.*

to Justice Jackson's concurrence in *Youngstown*, "when the President acts in defiance of 'the expressed or implied will of Congress,' his power is 'at its lowest ebb.'"[170]

In the weeks that followed the story about the NSA program, the Congressional Research Service (CRS) investigated the DOJ's legal rationale for the program. While not concluding whether the program was legal or illegal, the organization did indicate that the administration's legal arguments were not as certain as it set forth.[171] The memo noted that when an action is not barred by the Constitution and where Congress has not spoken directly on the issue, the President may sometimes have the power to unilaterally take the action; however, unless the power is specific, wholly entrusted to the President by the Constitution, the President does not have "inherent authority to exercise full authority in a particular field without Congress's ability to encroach."[172] This was a clear attack of the DOJ and Attorney General's position discussed earlier regarding the President's inherent power and the potential unconstitutionality of FISA.

The CRS argued that any NSA surveillance between two overseas parties, even if one of the parties to the conversation is a U.S. citizen, is not subject to FISA.[173] However, Congress was well aware of this when it enacted FISA and purposely reserved the right to draft additional legislation to deal with such instances of wiretapping.[174] The CRS disagreed with the notion that the President has the sole inherent power to conduct foreign-intelligence surveillance and that power cannot be encroached by Congress.[175] The CRS pointed out that one of the rationales that the DOJ relied upon was the only published opinion from the FISCR.[176] In that opinion, which concerned warrantless foreign-intelligence surveillance, the FISCR stated that the President has inherent constitutional authority to conduct warrantless wiretapping for foreign-intelligence purposes and that FISA could not encroach on the President's constitutional power.[177] The CRS pointed out that in making that assertion, the FISCR relied upon cases pre-dating FISA that "dealt with a presidential assertion of inherent authority in the absence of congressional action to circumscribe that authority."[178]

The CRS also doubted whether intelligence gathering is an incident of force as proposed by the Administration and whether the *Hamdi* decision,

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170. *Id.* at 44 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

171. CRS Memo, *supra* note 21, at 42-44.

172. *Id.* at 6.

173. *Id.* at 20.

174. *Id.* at 23.

175. *Id.* at 3-4.

176. *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

177. *Id.* at 742; *see* U.S. DEP'T OF JUSTICE, *supra* note 20, at 8.

178. CSR Memo, *supra* note 21, at 31.

which the Administration's rationale was relied upon heavily, actually supports the Administration's argument.[179] Their fear was that if the AUMF, which contains a clause reading "unless otherwise authorized by statute," can be read so broadly that it can conceivably be used to set aside any statutory prohibition relating to national security.[180]

The CRS found that the war provision in FISA strongly suggests that FISA was meant to apply during wartime; the fact that soon after the attacks of September 11, 2001, Congress specifically amended FISA in the Patriot Act is evidence that Congress intended FISA to remain the prevailing method of conducting foreign-intelligence surveillance on domestic soil.[181] The amendments to FISA in the Patriot Act show that Congress did not intend the AUMF to be a new means of conducting foreign-intelligence surveillance, and, thus, the AUMF was not a statute enacted to amend FISA because FISA was specifically amended in the Patriot Act.[182]

The CRS found that in the legislative history of FISA, the phrase "authorized by statute,"[183] upon which the Administration relies, was actually meant to refer to Title III or FISA and not other statutes,[184] although admittedly the plain language contained within the statute does lend to some credibility to the Administration's position on the phrase. Thus, while the CRS did not explicitly identify the NSA program as being illegal, mainly because it did not have enough evidence on the program to make that determination, the CRS reasoned that if the NSA operations are "encompassed in the definition of 'electronic surveillance' set forth under FISA," then the surveillance must be carried out in accordance with FISA procedures to be consistent with the congressional intent.[185]

The CRS also noted that "no court has held squarely that the Constitution disables the Congress from endeavoring to set limits on [the President's foreign-intelligence surveillance] power."[186]

Since the release of the NSA program there have been comments made on the record of the House and Senate floors. In the House of Representatives, Massachusetts Congressman Barney Frank gave a speech regarding the President's authorization of the NSA program and stated that "the President [was] ignoring the Foreign Intelligence Surveillance Act."[187] Senator Arlen Specter explained that the NSA is "in contradistinction to

179. *Id.* at 35.

180. *Id.* at 36.

181. *See id.* at 43.

182. *See id.* at 43.

183. 50 U.S.C. § 1809(a) (2000) (stating "[a] person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute").

184. CRS Memo, *supra* note 21, at 43.

185. *Id.*

186. *Id.* at 44.

187. 152 CONG. REC. H5215 (daily ed. July 13, 2006) (statement of Rep. Frank).

Foreign Intelligence Surveillance Act, which flatly prohibits any kind of electronic surveillance without a court order."[188] FISA is clear on that point "that it is the exclusive remedy for wiretapping;" thus, the President's program is in violation of FISA.[189] Senator Joseph Biden declared that FISA "was a reaffirmation of the principle that it is possible to protect national security and at the same time the Bill of Rights."[190]

In support of the NSA program, Senator Kit Bond claimed that the NSA program did not violate FISA because Congress cannot take away inherent powers of the President regarding foreign-intelligence surveillance.[191] Senator Saxby Chambliss held similar views and explained that the President has the inherent power to deal with foreign-intelligence surveillance, and, thus, the NSA program could not be in violation of FISA.[192]

Thus, Congress's reaction to the revelation of the NSA program has been mixed. A majority of Congressmen seem to believe that the NSA program is in violation of FISA, while there are some staunch supporters whose main assertion is that the President has inherent powers that cannot be circumscribed by Congress in FISA.

A. Discovering Congressional Intent

Due to the secrecy of the program, we do not know all the facts. However, from the information that has been revealed, it appears on its face that the NSA's wiretapping program violates FISA; thus, the continued authorization of the program by the President violates the Separation of Powers Doctrine. The U.S. Constitution provides limits on the powers of each enumerated branch of government, and each branch is one with limited power: (1) Congress is entrusted with the authority to enact laws;[193] (2) the President has authority to execute the laws enacted by the Congress;[194] and (3) the Supreme Court has the authority to interpret congressional statutes for constitutionality.[195] Although the President can petition Congress to

188. 152 CONG. REC. S853 (daily ed. Feb. 8, 2006) (statement of Sen. Specter) (explaining that when the Senate Judiciary Committee held a hearing on the Administration's electronic-surveillance program, it "dealt solely with the issues of law as to whether the resolution to authorize the use of force on September 14 provided authority in contradistinction" to FISA).

189. 152 CONG. REC. S10927 (daily ed. Nov. 14, 2006) (statement of Sen. Specter); *see id.* at S10926-27.

190. 152 CONG. REC. S2301 (daily ed. Mar. 16, 2006) (statement of Sen. Biden).

191. 152 CONG. REC. S879 (daily ed. Feb. 9, 2006) (statement of Sen. Bond).

192. 152 CONG. REC. S783 (daily ed. Feb. 8, 2006) (statement of Sen. Chambliss).

193. U.S. CONST. art. I, § 1.

194. U.S. CONST. art. II, § 1, cl. 1.

195. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

change existing law, he does not have any authority to repeal existing laws.[196]

It is important to determine whether Congress intended FISA to encompass the field of foreign-intelligence surveillance on domestic soil. The first step in determining the intent of Congress is to read the language of the statute itself.[197] Congress stated, "[T]he Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire[, electronic,] and oral communications may be conducted."[198] This language appears to be clear on its face in that Congress intended FISA to be the sole means of obtaining electronic surveillance when dealing with foreign-intelligence gathering.

We have already learned that the DOJ and the Attorney General have both interpreted the language of FISA to permit the President to authorize foreign-intelligence surveillance via another statute enacted to work in conjunction with FISA.[199] Specifically, the AUMF has been declared this type of statute, even though there is no mention of FISA or electronic surveillance anywhere within the AUMF statute.[200]

When there is some ambiguity in a statute, the second step is to look at the congressional legislative history to determine the true intent of Congress when it enacted the statute.[201] After reviewing the legislative record from the period prior to the enactment of FISA in 1978, we have learned that Congress intended that FISA be the exclusive means by which foreign-

196. Clinton v. City of New York, 524 U.S. 417, 445-46 (1998).

197. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

198. 18 U.S.C. § 2511(2)(f).

> Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

Id.

199. *See* discussion *supra* Part III.

200. *See* discussion *supra* Part III.

201. *Chevron*, 467 U.S. at 842-45.

intelligence surveillance could be authorized.[202] This intent is apparent in the congressional record leading up to the passage of FISA.

The report of the Permanent Select Committee on Intelligence stated that "[t]he purpose of the Foreign Intelligence Surveillance Act is to provide legislative authorization for and regulation of all electronic surveillance conducted within the United States for foreign intelligence purposes."[203] This notion was expressed by the bill's sponsor, Senator Edward Kennedy, who stated that "[t]he bill would require that all foreign intelligence electronic surveillance in the United States—as well as some overseas interceptions—be subject to a judicial warrant requirement based on probable cause."[204]

During deliberations of this proposed bill, Representative John M. Murphy stated that "[e]very operation of the NSA which falls under the definition of electronic surveillance, as defined in the bill, is covered by the bill."[205] Senator Strom Thurmond explained that "[i]n providing a warrant procedure the American public is reassured that no individual will be subject to electronic surveillance unless a judicial officer has authorized it."[206]

A conference report related to this bill discussed the issue of presidential inherent power by stating that "the bill does not recognize, ratify, or deny the existence of any Presidential power to authorize warrantless surveillance in the United States in the absence of legislation."[207] The issue of the inherent presidential authority was a contentious one on Capital Hill during deliberations of this bill. Congressman Robert McClory, in opposition to the bill, stated that the bill "transfer[s] the power that is granted by the Constitution to the President of the United States, to the courts. . . . It is an attempt to amend the Constitution by a simple legislative enactment,"[208] and Congressman John M. Ashbrook declared that he did "not think we can take away the inherent power of the President."[209]

Senator Malcolm Wallop declared:

> The power to surveil for purposes of national defense and foreign affairs is clearly part of the President's powers over defense and foreign affairs. Yet, this bill stipulates that before the President exercises part of his powers over defense and foreign affairs his actions must be approved by another branch of Government.[210]

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202. *See* discussion *supra* Part III.A.
203. H.R. REP. NO. 95-1283, pt. 1, at 24 (1978).
204. 124 CONG. REC. 10,887 (1978) (statement of Sen. Kennedy).
205. 124 CONG. REC. 28,127 (1978) (statement of Rep. Murphy).
206. 124 CONG. REC. 10,891 (1978) (statement of Sen. Thurmond).
207. H.R. REP. NO. 95-1283, pt. 1, at 24 (1978).
208. 124 CONG. REC. 36,410 (1978) (statement of Rep. McClory).
209. 124 CONG. REC. 28,135 (1978) (statement of Rep. Ashbrook).
210. 124 CONG. REC. 10,895 (1978) (statement of Sen. Wallop).

Conversely, Senator James Abourezk exclaimed that this bill enables Congress to go "on record as saying that no such 'inherent power' exists."[211]

The House conference report concedes that regardless of whether the President has this inherent power or not, "Congress has at least concurrent authority to enable it to legislate with regard to the foreign intelligence activities."[212] Thus, "Congress has the power to regulate the conduct of such [foreign-intelligence] surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted."[213]

Initially, Congress had two versions of FISA: one issued in the House and the other in the Senate.[214] The Senate bill, which came first, contained the following clause that FISA "shall be the 'exclusive means by which electronic surveillance . . . may be . . . conducted.'"[215] The House amended the Senate's version and added the term "statutory" to this clause, thus implying that FISA was not the exclusive means of conducting this surveillance; it was only the "exclusive statutory" means possible to conduct foreign-intelligence surveillance.[216] The House's version was meant to endorse the President's inherent authority to conduct warrantless foreign-intelligence surveillance. Congressman John M. Ashbrook debated in the House prior to amending the Senate's version of the bill to incorporate the term "statutory" because he did "not think we can take away the inherent power of the President."[217]

The Senate's version was the bill eventually agreed upon by Congress, and the term statutory was removed from the final version of the bill.[218] This caused heated discourse in the House; however, this debate further justifies the argument that Congress intended this statute to be all encompassing and to curtail the inherent presidential authority to conduct these wiretaps.

Congressman Robert McClory was particularly upset by the removal of the term statutory from the language of the bill. He explained that the term statutory "served to recognize the power which the Constitution vests in the President to engage in foreign intelligence gathering . . . . Sadly—and reprehensibly—this amendment was summarily dismissed . . . ."[219] Similarly, Congressman Bob Wilson was disturbed that "an amendment

211. *Id.* at 10,897 (statement of Sen. Abourezk).

212. H.R. REP. NO. 95-1283, pt. 1, at 24 (1978).

213. *Id.*

214. S. REP. NO. 95-604, pt. 1, at 64 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3904 (quoting 18 U.S.C. § 2511(2)(f)).

215. *Id.* at 3965.

216. H.R. REP. NO. 95-1720, at 35 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4048, 4064.

217. 124 CONG. REC. 28,135 (1978) (statement of Rep. Ashbrook).

218. 18 U.S.C. § 2511(2)(f) (2000).

219. 124 CONG. REC. 36,411 (1978) (statement of Rep. McClory).

recognizing the constitutional power of the President to protect our national security—was totally rejected by the conferees."[220]

Congress ultimately concluded that by removing the term statutory from this clause it would eliminate the loophole by which the President could use his inherent powers to conduct foreign-intelligence surveillance without FISA.[221]

In a Senate report on FISA, the legislature reiterated its intent that FISA be the exclusive means of conducting foreign-intelligence surveillance.[222] In one of the FISA drafts there was an "executive 'inherent power' disclaimer clause," which authorized the President to use his inherent powers to conduct foreign-intelligence surveillance outside the confines of FISA should it become necessary to protect the nation from attack, hostile acts of a foreign power, or to obtain information deemed essential to the national security of the U.S.[223] This clause would have spoken to the current issue but was specifically removed from the final version of FISA and replaced with the aforementioned clause that stated that FISA "'shall be the exclusive means' for conducting electronic surveillance, as defined by this legislation," thus describing Congress's intent that even while under attack from a foreign power FISA still remained the exclusive method of conducting foreign-intelligence surveillance.[224]

Senator Strom Thurmond disagreed with that proposal. He explained that he did not "support procedures that would unduly restrict the ability of the President, under his inherent power, to engage in intelligence-gathering activities against foreign powers or their agents."[225] While voting in favor of this bill, he stated that "this legislation . . . permit[s] the President to continue his power to engage in foreign intelligence surveillance, but with judicial safeguards . . . . if these procedures were to become cumbersome and an obstacle . . . Congress would immediately reconsider this legislation and make changes."[226] While he opposed restricting the President, his condition that the restrictions in place should be amended if they become too cumbersome implies that he was aware of the severe restrictions that this bill placed on the inherent authority of the President.

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220. *Id.* at 36,413 (statement of Rep. Wilson).

221. H.R. REP. NO. 95-1720, at 35 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4048, 4064 (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Congress over the matter.")).

222. S. REP. NO. 95-604, pt.1, at 17 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3918.

223. *Id.* at 6, *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3908.

224. *Id.*

225. 124 CONG. REC. 34,845 (1978) (statement of Sen. Thurmond).

226. *Id.*

Senator Edward Kennedy proposed that this bill was "a recognition, long overdue, that the Congress does have a role to play in the area of foreign intelligence surveillance[]" and that "[i]t would for the first time expressly limit whatever inherent power the executive may have to engage in electronic surveillance in the United States. In so doing, the bill ends a decade of debate over the meaning and scope of the 'inherent power' disclaimer clause . . . ."[227]

In a Senate report from the Select Committee on Intelligence, speaking about the inherent powers of the President with regard to foreign-intelligence surveillance on domestic soil, the record reflects that nothing in the FISA statute should be interpreted to mean that "the President has independent, or 'inherent,' authority to authorize electronic surveillance in any way contrary to the provisions of [FISA]."[228] Congressman Robert W. Kastenmeier explained after passage of the bill that "the executive branch will be bound by statutory restrictions; no longer will a claim of inherent executive authority to conduct national security wiretapping be recognized."[229]

In reviewing the legislative history, one aspect is crystal-clear: Congress fully intended FISA to be the exclusive means by which the President could conduct foreign-intelligence surveillance within the United States. The congressional record demonstrates that Congress's true intent when it enacted FISA was not only that FISA should be the exclusive means of conducting foreign-intelligence surveillance, but that the President could not circumvent the confines of FISA by conducting foreign-intelligence surveillance claiming inherent powers. This intent is reiterated throughout the legislative record and even detractors to the bill acknowledge in their recorded statements that this bill in turn eliminated the inherent authority of the President to conduct warrantless wiretaps for national-security purposes.

The Senate was careful to note that the ultimate question of whether this statute was constitutional and whether it could impede the President's inherent authority would be decided by the Supreme Court, as explained by Senator Birch Bayh.[230] Senator Frank Church stated that he was "certain the Supreme Court would sustain the validity of the law against any attempt in the future by a President to assert some inherent power."[231]

B. Judicial Challenges To The NSA Program

The American Civil Liberties Union (ACLU), several other individuals, and several other organizations brought suit against the NSA and other

227. 124 CONG. REC. 10,887 (1978) (statement of Sen. Kennedy).

228. S. REP. NO. 95-701, at 47 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3973, 4016.

229. 124 CONG. REC. 36,410 (1978) (statement of Rep. Kastenmeier).

230. 124 CONG. REC. 10,900 (1978) (statement of Sen. Bayh).

231. *Id.* (statement of Sen. Church).

executive agencies alleging that the NSA wiretapping program was illegal and unconstitutional.[232] In a forty-four-page opinion in *ACLU v. National Security Agency*, District Court Judge Anna Diggs Taylor held that the NSA program violated the First and Fourth Amendments, the Separation of Powers, and FISA.[233] Consequently, she issued a permanent injunction enjoining the continued surveillance by the NSA.[234]

After determining that the state secret privilege was inapplicable to the case at bar because additional information, which was not already public knowledge, was not necessary to make a determination on the merits,[235] Judge Taylor found that the NSA program "fail[ed] to procure judicial orders as required by FISA" and that the plaintiff's First Amendment rights were infringed upon because the program stifled the plaintiff's liberty of expression.[236] She explained that due to the NSA surveillance, the plaintiffs were reluctant to speak openly and freely with associates and contacts in the Middle East and Asia for fear that their conversations were being recorded.[237]

She also found that the President's actions left him at the "lowest ebb" of Justice Jackson's three tiers as enunciated in *Youngstown* because the NSA activities were in direct contradiction to a Congressional statute—FISA.[238] In addition, the court found that the AUMF, a general statute, could not be construed to govern FISA because FISA was a specific statute.[239] Finally, responding to the defendant's inherent power argument, Judge Taylor held that the Chief Executive is a position created by the Constitution and the actions of the Chief Executive cannot violate the Constitution.[240] Since Judge Taylor determined that the actions taken by the NSA had violated the First and Fourth Amendments and the Separation of Powers Doctrine, she also determined the actions were unconstitutional, regardless of any inherent power the Chief Executive may possess.[241]

Soon after this decision, the Sixth Circuit Court of Appeals granted a stay of the injunction pending appeal.[242] The NSA appealed this case to the

232. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).
233. *Id.* at 782.
234. *Id.*
235. *Id.* at 766.
236. *Id.* at 776.
237. *Id.* at 758.
238. *Id.* at 777-78.
239. *Id.* at 779.
240. *Id.* at 780-81 ("We must first note that the Office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all 'inherent powers' must derive from that Constitution.").
241. *Id.*
242. ACLU v. Nat'l Sec. Agency, 467 F.3d 590, 591 (6th Cir. 2006).

Court of Appeals.[243] The Appellate Court vacated the lower court's injunction and remanded the case for dismissal.[244]

Shortly after the elections in November 2006, the Bush Administration announced that it had formulated a plan by which the FISA Court could provide approval for all the NSA wiretaps that had previously been conducted with no court oversight.[245] While this is a progressive step to fortify the legality of the NSA wiretaps, it must be noted that the Executive Branch is not permitted to rewrite existing laws.[246] For the program to be legal, it must conform to the confines of FISA. The Executive Branch is not permitted to rewrite FISA to conform to their needs.[247] While the specific guidelines for FISA Court approval of the NSA wiretaps at this time are not clear, if they conform to the guidelines of FISA, then there are no constitutional or legal issues; however, if there are new procedures that were not in FISA or are significantly inconsistent with FISA, then the program will be unconstitutional.

IV. CONCLUSION

The language used by Congress in drafting FISA appears clear and unambiguous at first glance. After reviewing the legislative record, it is evident that Congress carefully considered the concept of presidential inherent authority to conduct foreign-intelligence surveillance and purposefully and convincingly expressed their intent that FISA be the exclusive means to conduct foreign-intelligence surveillance as defined by the Act and that Congress has the authority to regulate the field of foreign-intelligence surveillance on domestic soil.

Based on this research and the limited information released concerning the NSA program, it appears evident that the program was issued in violation of FISA.

243. ACLU v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007).

244. *Id.* at 648.

245. Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

246. Clinton v. City of New York, 524 U.S. 417, 438-39 (1998).

247. *See id.* at 448-49.