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Hearing on "Constitutional Limitations on Domestic Surveillance"
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I appreciate the opportunity to appear today to discuss the "Constitutional Limitations on Domestic Surveillance." Ironically, the most controversial surveillance over the past several years has not been "domestic" at all, but rather the international surveillance involved in the NSA's Terrorist Surveillance Program ("TSP"), and it is to the legal issues surrounding that program that I will address my remarks. I should make clear that I am speaking here on my own behalf.

Let me begin by stating that I believe President Bush was fully within his constitutional and statutory authority when he authorized the TSP, including his decision to permit the interception of al Qaeda communications into and out of the United States without first obtaining an order from the Foreign Intelligence Surveillance Act ("FISA") Court.

The President's critics have variously described the NSA program as "widespread," "domestic," and "illegal." It is none of these things. Rather, the program is limited, targeted on the international communications of individuals engaged in an armed conflict with the United States, and is fully consistent with FISA. First, in assessing the President's actions here, it is important to highlight how narrow is the actual dispute over the NSA's TSP. Few of the President's critics claim that he should not have ordered the NSA to monitor al Qaeda's communications on a global basis. Indeed, in the wake of the September 11, 2001 attacks, he would surely have been remiss in his duties had he not ordered this surveillance. Moreover, few of the President's critics have had the temerity to claim that he was required to obtain the FISA Court's permission to intercept and monitor al Qaeda communications outside of the United States.

It is, in fact, only with respect to communications actually intercepted by the NSA within the United States, as opposed to by satellites or listening posts located abroad, or where the "target" of the intercept is an American citizen or resident alien, that FISA is relevant at all to this national discussion. Despite the rhetoric, FISA is not a comprehensive statute that requires the President to obtain a "warrant" to collect foreign intelligence. It is a narrow law that requires an "order" be obtained for

"electronic surveillance" in only four circumstances:

1. Where a United States person in the United States is the target of, *rather than incidental to*, the surveillance;

2. Where the acquisition of the intelligence will be accomplished by devices located within the United States;

3. Where the sender and all recipients of the relevant communication are present in the United States; or

4. Where surveillance devices are used within the United States to collect communications other than wire or radio communications.

That being the case, based upon how the President, Attorney General, and General Hayden (former head of NSA), have described the NSA program, it is not at all clear that any of the intercepts would properly fall within FISA in the first instance. In that regard, the NSA program appears to have been:

1. targeted at al Qaeda operatives and their associates – in other words, communications are intercepted and monitored based on an al Qaeda association; and

2. directed only at international communications with an al Qaeda operative or associate on one end: As General Hayden made clear, "one end of any call targeted under this program is always outside the United States;" and

3. the purpose is not to collect evidence for a criminal prosecution, but to identify and thwart additional attacks against the United States.

Whatever this program is, it is not the pervasive dragnet of American domestic communications about which so many of the Administration's critics have fantasized. Moreover, unless some of these communications are intercepted in the United States, or the targeted al Qaeda operative happens also to be a "United States person," FISA does not apply by its own terms.

The Administration has properly refused to publicly articulate the full metes and bounds of the NSA program. For the sake of argument, however, let us assume that some of the communications intercepted as part of this program are intercepted within the United States, or that some of the targeted al Qaeda operatives are "United States persons" within FISA's meaning. (This would include American citizens, permanent resident aliens, and U.S. corporations. 50 U.S.C. § 1801(i)). The program remains lawful and constitutional.

Indeed, the TSP clearly falls within the President's inherent constitutional authority, under Article II, as Chief Executive and Commander-in-Chief. This authority has been consistently recognized and respected, with the exception of one District Court decision now on appeal, by the United States' courts. Indeed, the United States Foreign Intelligence Surveillance Court of Review, established under FISA, has itself acknowledged this authority. In *In re Sealed Case No. 02-001*, where the Court of Review reversed an effort by the FISA trial court to reimpose a kind of "wall" between intelligence gathering and law enforcement, despite Congress' amendment of FISA as part of the Patriot Act, the Court also noted that: "all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." 310 F.3d 717, 742 (FISA Ct. of Review 2002). It went on to state that "[w]e take for granted that the President does have that authority [to conduct warrantless surveillance for foreign intelligence purposes] and, assuming that is so, FISA could not encroach on the President's constitutional power." *Id*.

Significantly, in this connection, the FISA Court of Review was discussing another

important precedent, *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980). This is, in fact, the leading case recognizing the President's inherent power, as a function of his role in formulating and implementing U.S. foreign policy, to order warrantless electronic surveillance for foreign intelligence purposes. This power exists even when the surveillance is in the United States and directed at an American citizen. In *Truong*, the Carter Administration authorized warrantless wire-tapping of a resident alien and an American citizen, in the United States, in a successful effort to identify the source of classified documents being illegally transmitted to foreign government representatives.

The defendants challenged their espionage convictions by arguing that this surveillance violated the Fourth Amendment guarantee against unreasonable searches and seizures and the attendant warrant requirement. In response, the Carter Administration stated without equivocation that: "In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs." Truong, 629 F.2d at 912. The United States Court of Appeals for the Fourth Circuit agreed, and ruled that the warrantless surveillance ordered in this case had been lawful. The court reasoned as follows:

> For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following [*United States v. United Stated District Court (Keith*), 407 U.S. 297 (1972)], "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. [Citations omitted.]
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> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. . . .
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> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the preeminent authority in foreign affairs. [Citations omitted]. The President and his deputies are charged by the Constitution with the conduct of the foreign policy of the United States in times of war and peace. [Citations omitted.] Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic surveillance, [citations omitted] so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

Truong, 629 F.2d at 913-14.

FISA was, of course, enacted shortly before the decision in *Truong* was announced, and the court did not, therefore, address the law's impact as part of its holding. Neither has the Supreme Court considered whether, or to what extent, FISA may have trenched upon the President's constitutional authority. This, however, is the question we are left with. President Bush did not invent this authority, as some critics have implied, nor has he asserted more power than his predecessors have claimed. As explained by the Justice Department in its January 19, 2006, Memorandum (pp. 7-8, 16-17), various forms of warrantless electronic surveillance have been utilized since the Civil War. Presidents Franklin D. Roosevelt and Harry S. Truman authorized, without judicial participation, the use of wiretaps as a means of obtaining intelligence against the United States' enemies, as did President Woodrow Wilson.

See Exec. Order No. 2604 (Apr. 28, 1917). Both the Carter and Clinton Administrations also affirmed the President's inherent constitutional authority to conduct warrantless surveillance and/or searches for foreign intelligence purposes. See January 19 DOJ Memorandum, p. 8.

As to the question whether Congress exceeded its authority in enacting FISA, the answer depends very much on how that law is interpreted and applied. The interplay between the Executive and Congress is, in the best of circumstances, complex and shifting. As a general proposition, Congress is entitled to legislate on any number of matters that may impact how the President discharges his constitutional role. The test is whether Congress has "impede[d] the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691, 695-96 (1988) (appointment of independent counsel by special judicial body, and imposition of a removal for cause requirement, did not impermissibly impede the President's authority, where there were a number of other means by which the officials activities could be supervised). If FISA were construed to prohibit the President, without judicial approval, from monitoring enemy communications into and out of the United States during wartime, then the statute could fairly be said to impede the President's exercise of his constitutional authority and would, to that extent, be invalid. It need not, and should not, be so interpreted.

In this connection, it should also be noted that the Executive Branch secures one very valuable advantage when it does obtain an order pursuant to FISA's provisions – the evidence collected pursuant to such an order will almost certainly be admissible in a later criminal proceeding. *See, e.g., United States v. Squillacote*, 221 F.3d 542, 553-54 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001). At the same time, hard choices are often necessary during an armed conflict. If the President determines that the process established in FISA is insufficiently protective of national security, as he has done with respect to the NSA program, and he is prepared to risk having intelligence information secured without a FISA order later ruled inadmissible in court (as the *Truong* Court suggested was a possibility in certain circumstances, 629 F.2d at 915), then he is fully entitled to rely on his constitutional authority alone. To the extent that Congress sought to forbid such reliance, and to foreclose the President's right to order the interception, without a FISA order, of enemy communications in wartime, it exceeded its constitutional authority.

In any case, assessment of the TSP's legality need not go so far. As the Department of Justice correctly pointed out in its memorandum of January 19, 2006, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," FISA itself provides that electronic surveillance otherwise subject to the statute can lawfully be accomplished without a FISA order if it is "authorized by statute." 50 U.S.C. § 1809(a)(1). The surveillance of al Qaeda, in the United States or anywhere else in the world, has been authorized by statute – in the form of the September 18, 2001 Authorization for the Use of Military Force. 50 U.S.C. § 1541 note.

That statute specifically authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent* any future acts of international terrorism against the United States by such nations, organizations or persons." (Emphasis added).

This is a broad grant. There are, of course, many who argue that the September 18 Authorization was not broad enough to permit the NSA program because it did not specifically reference electronic surveillance or FISA. Significantly, however, an identical argument was advanced with respect to the capture and detention of certain al Qaeda and Taliban operatives under the "Non-detention Act," 18 U.S.C. § 4001(a). That law forbids the detention of American citizens save as authorized by act of Congress and specifically provides that: "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." It should go without saying that the Non-detention Act, and the principle it seeks to implement, are as important to our system of ordered liberty as is FISA.

Nevertheless, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court correctly interpreted the September 18, 2001 Authorization for the Use of Military Force to authorize the President to detain American citizens, consistent with 18 U.S.C. § 4001(a), because that authorization must be interpreted to permit all of the normal incidents of war. As explained by Justice O'Connor in her plurality opinion (which commanded a majority of 5 votes on this point), the detention of captured enemies "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. at 518.

Surely, the monitoring of enemy communications, whether into or out of the United States, is also such a "fundamental and accepted" incident to war. That is how wars are fought; that is how wars have always been fought; and it is especially how this war must be fought. Only through the collection and exploitation of intelligence can the purpose of Congress' September 18, 2001, Authorization – "to prevent any future acts of international terrorism against the United States" – be achieved. For his part, the President has not claimed the right to surveil the American population in general, but only enemy agents as they communicate into and out of the United States.

This type of intelligence gathering has been a critical part of warfare since the first man with a spear crept to the edge of his enemy's camp listening for voices in the night. As George Washington explained to an American agent during the War for Independence, the "necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprizes of the kind, and for want of it, they are generally defeated." *CIA v. Sims*, 471 U.S. 172 n.16 (1984) (quoting letter from George Washington to Colonel Elias Dayton, July 26, 1777). In ordering this surveillance the President acted fully in accordance with an express congressional authorization, at the very zenith of his powers as outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

For those who claim that the September 18, 2001, Authorization cannot be read to have amended FISA; it did not. FISA remains intact, just as the Non-detention Act remains intact. The September 18, 2001 Authorization works with these laws, not against them. Of course, had Congress formally declared war, under FISA section 111 (50 U.S.C. § 1811), the entire statute would have been suspended for 15 days. During that period, the President would have been free to target anyone and everyone's electronic communications, not merely those of known al Qaeda operatives. This program is much more limited.

Obviously, there are those who disagree with this analysis. There are few questions of either constitutional or statutory interpretation that cannot be debated, and debated in good faith. Arguing about what the Constitution's Framers or Congress meant on any particular occasion is how many of us in the legal profession earn our livings. However, claims that the President or his Administration have acted unlawfully, or beyond his constitutional authority, are groundless.

This is especially the case in view of the fact that there has been no suggestion that the President has misused or abused any of the information obtained from the NSA program. By all accounts, it has been utilized in carrying out Congress' instructions in the September 18, 2001, Authorization – "to prevent any future acts of international terrorism against the United States." Individual Senators, and members of this Committee of both parties, may well honestly believe that this law did not authorize the President to use any incident of force that is otherwise prohibited by statute, and their opinions must be respected. However, the Supreme Court disagreed only two years ago in the *Hamdi* case. That case supports the President's position with respect to the NSA program.

For a more complete statement of my views, please see Andrew C. McCarthy, David B. Rivkin, Jr. & Lee A. Casey, *NSA's Warrantless Surveillance Program: Legal, Constitutional and Necessary*, which is available at:
http://www.fed-soc.org/doclib/20070522_terroristsurveillance.pdf

Thank you, and I would be pleased to answer any questions the Committee may have.