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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Letter from Scholars and Former Government Officials on National Security Agency Activities (2006)

In 2005, the news broke that the administration of President George W. Bush had been engaged in a program of electronic surveillance as part of its battle against international terrorism. Run by the National Security Agency, the covert surveillance program extended over both citizens and aliens and their communications both inside and outside the territory of the United States. In December of 2005, the Justice Department recognized the existence of the program and defended its legality. In January 2006, a group of law professors and former government officials wrote a public letter questioning the legality of the program.

Compare this letter with the Justice Department's defense of the NSA program. How do they differ in their understanding of the law?

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The basic legal question here is not new. In 1978, after an extensive investigation of the privacy violations associated with foreign intelligence surveillance programs, Congress and the President enacted the Foreign Intelligence Surveillance Act (FISA). FISA comprehensively regulates electronic surveillance within the United States, striking a careful balance between protecting civil liberties and preserving the "vitally important government purpose" of obtaining valuable intelligence in order to safeguard in order to safeguard national security.

With minor exceptions, FISA authorizes electronic surveillance only upon certain specified showings, and only if approved by a court. The statute specifically allows for warrantless *wartime* domestic electronic surveillance—but only for the first fifteen days of a war. It makes criminal any electronic surveillance not authorized by statute . . . .

. . . [T]he AUMF [Authorization for the Use of Military Force] cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance . . . .

. . . [E]ven conceding that the President in his role as Commander in Chief may generally collect "signals intelligence" on the enemy abroad, Congress indisputably has authority to regulate electronic surveillance within the United States, as it has done in FISA. Where Congress has so regulated, the President can act in contravention of statute only if his authority is *exclusive*, that is, not subject to the check of statutory regulation. The DOJ letter pointedly does not make that extraordinary claim.

. . . . The Supreme Court has never upheld warrantless wiretapping within the United States. Accordingly, the principle that statutes should be construed to avoid serious constitutional questions provides an additional reason for concluding that the AUMF does not authorize the President's actions here.

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

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) (Frankfurter, J., concurring).

. . . . Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because it was advised that Congress would reject such an amendment. . . .

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We do not dispute that, absent congressional action, the President might have inherent constitutional authority to collect "signals intelligence" about the enemy abroad. Nor do we dispute that, had Congress taken no action in this area, the President might well be constitutionally empowered to conduct domestic surveillance directly tied and narrowly confined to that goal—subject, of course, to Fourth Amendment limits. . . .

To say that the President has inherent authority does not mean that his authority is exclusive, or that his conduct is not subject to statutory regulations enacted (as FISA was) pursuant to Congress's Article I powers. As Justice Jackson famously explained in his influential opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) (Jackson, J., concurring), the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." . . .

. . . . Interpreting the AUMF and FISA to permit unchecked domestic wiretapping for the duration of the conflict with al-Qaeda would certainly raise serious constitutional questions. The Supreme Court has never upheld such a sweeping power to invade the privacy of Americans at home without individualized suspicion or judicial oversight.

The NSA surveillance program permits wiretapping within the United States without *either* of the safeguards presumptively required by the Fourth Amendment for electronic surveillance—individualized probable cause and a warrant or other order issued by a judge or magistrate. The Court has long held that wiretaps generally require a warrant and probable cause. . . . And the only time the Court considered the question of national security wiretaps, it held that the Fourth Amendment prohibits domestic security wiretaps without those safeguards. *United States v. United States District Court* (1972). Although the Court in that case left open the question of the Fourth Amendment validity of warrantless wiretaps for foreign intelligence purposes, its precedents raise serious constitutional questions about the kind of open-ended authority the President has asserted with respect to the NSA program. . . .

. . . . The NSA domestic spying program, by contrast, includes none of these safeguards. It does not require individualized judicial approval, and it does not require a showing that the target is an "agent of a foreign power." According to Attorney General Gonzales, the NSA may wiretap any person in the United States who so much as receives a communication from anyone abroad, if the administration deems either of the parties to be affiliated with al-Qaeda, a member of an organization affiliated with al-Qaeda, "working in support of al Qaeda," or "part of" an organization or group "that is supportive of al Qaeda." Under this reasoning, a US citizen living here who received a phone call from another US citizen who attends a mosque that the administration believes is "supportive" of al-Qaeda could be wiretapped without a warrant. The absence of meaningful safeguards on the NSA program at a minimum raises serious questions about the validity of the program under the Fourth Amendment, and therefore supports an interpretation of the AUMF that does not undercut FISA's regulation of such conduct.

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