

The National Security Agency (NSA) eavesdropping on Americans A programme that is neither legal nor necessary

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‘Neither the President nor the Attorney General is a magistrate ... I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.’ Justice Douglas¹

1. Introduction

One evening, when I was fourteen years old, I was writing an email to a friend. I heard my dad walking towards my room, so I minimized the screen. Although I did not have anything to hide, this is something I always did. This time, however, he asked to see what I was writing. ‘Nothing,’ I replied. He insisted, so I gave in. After reading my email, he walked away, with his head high, like he had just accomplished something. I felt very angry and violated, even if the actual harm seemed trivial at the time.² But the truth is that what appears to be an insignificant harm, in fact, violates our principles and causes us moral and conceptual damage.³

Now, picture having someone reading your emails and listening to your phone conversations – all without your permission or knowledge. That is precisely what is happening in America today.⁴

This Comment examines the legal history of wiretapping and the debate on whether the President has the legal authority to authorize the NSA to conduct warrantless electronic surveillance of Americans, inside the United States. First, this Comment considers the history of wiretapping and the development of wiretapping laws, including the role of the President, Congress, and the Supreme Court in shaping those laws. Second, this Comment studies the birth and statutory framework of the Foreign Intelligence Surveillance Act of 1978 (FISA).⁵ Third, this Comment disputes the President’s constitutional authority to direct the NSA to conduct warrantless

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1 *Katz v. United States*, 389 US 347, 359 (1967) (Douglas, J., concurring). Justice Brennan concurred with Justice Douglas in this opinion.

2 See Patricia D. Rogers, *Invasion of Privacy*, 9 March 2005, at <http://www.youthcomm.org/NYC%20Features/SeptOct2005/NYC-2005-09-03.htm> (featuring a story of a child who felt that her mother was invading her privacy). The author made up the story, getting the idea from this source.

3 See Ira Singer, *Privacy and Human Nature*, at <http://www.abdn.ac.uk/philosophy/endsandmeans/vol5no1/singer.shtml> (last modified 4 March 2003) (stating that even ‘harmless’ violation of privacy has ‘weight and harmful implications’).

4 See James Risen and Eric Lichtblau, ‘Bush Lets U.S. Spy on Callers Without Courts’, *NY Times*, 16 December 2005, p. 1, 22 (leaking the story that President Bush is eavesdropping on Americans without first obtaining a warrant from the secret FISA court).

5 Pub. L. No. 95-511, Title I, 92 Stat. 1796 (1978) (codified at 50 USC § 1801 *et seq.*).

electronic surveillance to acquire foreign intelligence information. Fourth, this Comment highlights that the President not only lacks the statutory authority to conduct warrantless wiretapping, but that he broke the law by authorizing communications interception outside of FISA. And finally, this Comment looks at public policy reasons against a unilateral presidential determination to spy on Americans.

2. Background

2.1. History of wiretapping and development of wiretapping law

Throughout our history, presidents have frequently intercepted communications to protect the nation.⁶ The first Commander-in-Chief, George Washington, intercepted mail to better understand the British activities.⁷ Asserting inherent constitutional authority, under Article II,⁸ presidents, including Lincoln, Roosevelt, and Truman, have conducted electronic surveillance in the name of national security.⁹ Wiretapping also took place during the Civil War by the Union and Confederate armies against each other.¹⁰ The use continued after the Civil War when Congress attempted to obtain electronic messages maintained by a telegraph company for various investigations.¹¹ This was met with resistance, and several states passed laws prohibiting telegraph companies' employees from sharing telegram messages.¹² The rise in high and organized crime led to the creation of a more professional, well-structured law enforcement.¹³ And, in 1907, Attorney General Charles Bonaparte asked Congress to create an investigative force within the Department of Justice,¹⁴ but Congress rejected the idea.¹⁵ However, President Theodore Roosevelt accepted Bonaparte's request and issued an Executive Order, authorizing the creation of a detective sub-division within the DOJ, known as the Bureau of Investigation.¹⁶ Wiretapping was institutionalized in 1930 when the Federal Bureau of Investigation (FBI) merged with the Treasury Department Bureau of Prohibition, an agency that used wiretaps.¹⁷ After the merger, Attorney General William Mitchell amended the FBI policy, which previously prohibited wiretapping, to allow electronic surveillance when approved by the FBI Director and

6 See *Letter from Chairman Pat Roberts of the Senate Select Committee on Intelligence of the United States Senate to Chairman Arlen Specter and Ranking Member Patrick Leahy of the Senate Judiciary Committee of the United States Senate*, 3 February 2006, p. 2, available at http://www.fas.org/irp/congress/2006_cr/roberts020306.pdf (last visited 27 March 2006) (discussing the constitutionality of warrantless electronic surveillance) (hereinafter: Chairman Roberts's Letter).

7 *Ibid.*

8 See US CONST. Art. II. Article II in part states:
Section I. The executive Power shall be vested in a President of the United States of America ...
Section II. The President shall be Commander in Chief of the Army and Navy of the United States ...
Section III. He shall take Care that the Laws be faithfully executed...
US CONST. Art. II, §§ 1-3.

9 Chairman Roberts's Letter, *supra* note 6.

10 See Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, 1995, p. 111.

11 See David J. Seipp, *The Right to Privacy in American History*, 1978, pp. 30-40.

12 See Seipp, *supra* note 11, p. 65.

13 See Daniel J. Solove, 'The Future of Internet Surveillance Law', 2004 *George Washington Law Review*, no. 6, p. 1271.

14 *Ibid.*, p. 1272.

15 *Ibid.*

16 *Ibid.* The name of this sub-division was later changed to the Federal Bureau of Investigation (FBI).

17 See *Social Workers Party v. Attorney General*, 642 F. Supp. 1357, 1390 (1986).

one of the assistant attorney generals.¹⁸ And a considerable debate over the application of the Fourth Amendment¹⁹ to electronic surveillance started.²⁰

2.1.1. Constitutional permission and statutory restriction

Addressing the issue of wiretapping for the first time, the Supreme Court, in a 5-4 decision, refused to extend Fourth Amendment protection to warrantless wiretapping unless a trespassory, physical intrusion was involved.²¹ Rejecting an ‘enlarged and unusual meaning to the Fourth Amendment’, the Court reasoned that Congress, not the Court, is more suited to ‘protect the secrecy of telephone messages’.²² However, Justice Brandeis, in his famous dissent, noted that the Fourth Amendment gives us ‘the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men’.²³ And he cautioned that the majority’s decision did not take into consideration scientific and technological advances that would someday become very intrusive.²⁴ This decision gave the president a green light to conduct warrantless wiretapping while inviting Congress to regulate it. As a result, Congress began controlling electronic surveillance by prohibiting funds for wiretaps used to enforce prohibition laws.²⁵ Soon thereafter, it passed the Federal Communications Act of 1934²⁶ that prohibited the unauthorized interception of ‘any wire or radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person ...’.²⁷

18 *Ibid.*

19 US CONST. amend. IV. The Fourth Amendment 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

20 See Chairman Roberts’s Letter, *supra* note 6.

21 *Olmstead v. United States*, 277 US 438, 464 (1928) (holding that the Fourth Amendment protects against a physical intrusion; therefore, the non-trespassory interception of a phone conversation is not within the scope of the Fourth Amendment).

22 *Ibid.*, pp. 465-466.

23 *Ibid.*, p. 478 (Brandeis, J., dissenting).

24 *Ibid.*, p. 474 (Brandeis, J., dissenting).

Justice Brandeis famously stated:

in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be. The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

...

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.* (emphasis added)

25 Act of 1 March 1933, Pub. L. No. 387, ch. 144, 47 Stat. 1371, 1381 (1933).

26 Pub. L. No. 73-416, 48 Stat. 1103 (1903) (codified as amended at 47 USC § 605 (2005)).

27 *Ibid.*, § 605 states:

no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto...

The Department of Justice (DOJ) construed the Communications Act as not one that outlawed interception; rather, according to the DOJ's view, three elements had to be met before the law is violated:

1. the government engages in prohibited interception;
2. it discloses any information obtained by means of that interception; and
3. the disclosure is to someone outside of the Executive Branch.²⁸

That type of understanding of the Communications Act left the President free to wiretap. As expected, the Supreme Court, in *Nardone v. United States*,²⁹ stepped in three years later to interpret the language of Section 3.³⁰ The Court held that the Communications Act outlawed electronic surveillance of telephone conversation, and it prohibited the admission of evidence obtained using wiretaps.³¹ Two years later, the Court went further, in *Nardone II*,³² and it extended the exclusionary rule to any evidence derived from the knowledge gained by intercepting communications in violation of the Act.³³

In response, the Roosevelt Administration amended the DOJ policies to comply with *Nordeen*,³⁴ however, it authorized electronic surveillance in the context of national security, limiting it 'insofar as possible, to aliens'.³⁵ Extending this authorization by eliminating the 'alien' requirement, President Harry Truman directed his attorney general to allow electronic surveillance in cases that significantly threatened domestic security.³⁶ Responding to the President, Congress passed the National Security Act of 1947³⁷ that divided the executive branch's role between foreign affairs and domestic affairs.³⁸

Meanwhile, reaffirming *Olmstead*, the Supreme Court, in *Goldman v. United States*,³⁹ held that the use of a detectaphone against a wall to overhear conversations is not a violation of the Fourth Amendment.⁴⁰ However, the dissent of Chief Justice Stone, Justice Frankfurter, and Justice Murphy showed that the Court was shifting Fourth Amendment protection from places to

28 See *Social Workers Party*, 642 F. Supp. at 1390.

29 302 US 379 (1937).

30 *Ibid.*

31 *Nardone*, 302 US at 382 (Interpreting the Federal Communications Act of 1934 in a domestic security context, the Court applied the exclusionary rule to evidence obtained in violation of Act).

32 *Nardone v. United States (Nardone II)*, 308 US 338 (1939) (holding that evidence acquired by the use of knowledge obtained from illegal wiretapping may not be admitted in a criminal trial).

33 *Ibid.*, p. 340.

34 *Social Workers Party*, 642 F. Supp at 1390.

35 *Ibid.*: Chairman Roberts's Letter, *supra* note 6, pp. 2-3. President Roosevelt authorized Attorney General Jackson to approve electronic surveillance against aliens in certain circumstances.

President Roosevelt's memo to Attorney General Jackson stated:

I agreed with the broad purpose of the Supreme Court decision [in *Nordeen v. United States*] relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation . . . You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices . . .

You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens. *Ibid.* (quoting the Memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson, 21 May 1940).

36 *Social Workers Party*, 642 F. Supp at 1390.

37 50 USC § 40303(d)(1) (2004) (creating the CIA, the National Security Council, and the Department of Defense).

38 See Jason A. Gonzalez, 'Constitutional Aspects of Foreign Affairs: How The War On Terror Has Changed The Intelligence Gathering Paradigm', 2005 *Naval Law Review*, pp. 289, 293 (stating that Congress intended to separate the President's Commander-in-Chief authority from his Chief Executive power, thereby making a distinction between national security and domestic security).

39 316 US 129 (1942).

40 *Ibid.*, p. 135.

people.⁴¹ And consistent with this shift in thinking, the Court, in *Irvine v. California*,⁴² unanimously agreed that information obtained by means of microphones installed in the defendant's home violated his Fourth Amendment rights. Nonetheless, the Justice Department read the decision to be only applicable to domestic, criminal matters, thereby, permitting the FBI to use electronic surveillance for national security purposes.⁴³ But once again, moving further away from *Olmstead*, the Court held that the installation of a microphone next door to the defendant's home that barely touched the heating duct inside his home was an intrusion protected by the Fourth Amendment.⁴⁴

2.1.2. Olmstead to Katz: shift of Fourth Amendment protections from places to people

While congressional statutes, as interpreted by the Supreme Court, were restricting electronic surveillance statutorily, the Executive Branch conducted around 7,000 wiretaps and 2,200 microphone surveillances between 1940 and the mid-1960s.⁴⁵ In 1965, however, President Johnson limited the use of electronic surveillance to matters of national security only.⁴⁶ And soon thereafter, the Court, in *Katz v. United States*,⁴⁷ finally embraced Justice Brandeis's dissent from thirty-nine years earlier that electronic surveillance is within the scope of the Fourth Amendment, effectively overturning *Olmstead*.⁴⁸ The Court held that the defendant's Fourth Amendment rights were violated when FBI agents attached an electronic listening and recording device, without a warrant, in a public telephone booth from where the defendant made phone calls.⁴⁹ However, the Court reserved a judgment on the application of its holding to matters of national security.⁵⁰ Nevertheless, Justice White, in his concurring opinion, concluded that if the President of the United States or the attorney general has determined electronic surveillance as reasonable and authorized such surveillance, a judicial sanctioned warrant is not necessary.⁵¹ On the other hand, Justice Douglas and Justice Brennan, in their concurring opinion, rejected the notion that the President is capable of serving as an 'adversary-and-prosecutor and disinterested, neutral magistrate' all at the same time, hence requiring the president to comply with the warrant provisions of the Fourth Amendment in matters of national security.⁵² As a result, it was clear,

41 See Americo R. Cinquegrana, 'The Walls (And Wires) Have Ears: The Background And First Ten Years Of The Foreign Intelligence Surveillance Act of 1978', 1989 *U. Pa. L. Rev.*, pp. 793, 798-799 (explaining a history of wiretapping and the development of FISA).

MR. CHIEF JUSTICE STONE and MR. JUSTICE FRANKFURTER stated:

Had a majority of the Court been willing at this time to overrule the *Olmstead* case, we should have been happy to join them. Goldman at 136 (Stone, C.J., and Frankfurter, J. dissenting).

Justice Murphy noted:

it is clear that the use of the detectaphone under the circumstances revealed by this record was an unreasonable search and seizure within clear intentment of the Fourth Amendment ... In numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs. It compensates him for trespass on his property *or against his person* ... (Murphy, J., dissenting) (emphasis added).

42 347 US 128 (1954).

43 *Social Workers Party*, 642 F. Supp at 1391.

44 *Silverman v. United States*, 365 US 505, 507-08 (1961) (holding that an intrusion, however slight, is an actual intrusion protected by the Fourth Amendment).

45 See Cinquegrana, *supra* note 41, pp. 798-799 (citing Electronic Surveillance Within the United States for Foreign Intelligence Purpose: Hearings on S. 3197 before the Subcomm. On Intelligence and the Rights of Americans of the Senate Select Comm. On Intelligence, 94th Cong., 2nd Sess. 4-5 (1976)).

46 See Cinquegrana, *supra* note 41, pp. 798-800; *Social Workers Party*, 642 F. Supp at 1391.

47 389 US 347, 353 (1967) (holding that the Fourth Amendment protects people, not just areas, and therefore, warrantless electronic surveillance, even if in a public place, violates the Fourth Amendment).

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*, p. 359, 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').

51 *Ibid.*, p. 363 (White, J., concurring).

52 *Ibid.*, pp. 359-360 (Douglas, J., concurring).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurred, observed:

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved *they are not*

at this point, that electronic surveillance was deemed subject to the restrictions of the Fourth Amendment in the context of domestic security;⁵³ however, ambiguity appeared when the government was involved in warrantless eavesdropping for the purpose of national security.⁵⁴

2.1.3. Title III and Keith

Following *Katz*, Congress passed the Omnibus Crime Control and Safe Streets Act (Title III),⁵⁵ the first federal law that outlined specific procedure to conduct electronic surveillance of specific crimes.⁵⁶ Title III regulated the use of both electronic surveillance and microphone surveillance and criminalized the conduct if done without a warrant.⁵⁷ Interestingly, however, section 3 of the Act expressly affirmed the President's constitutional authority to permit electronic surveillance 'to protect the United States'.⁵⁸ The DOJ saw Title III as a congressional acceptance of the President's inherent constitutional authority.⁵⁹ As such, the Executive Branch adopted five categories where the DOJ allowed warrantless electronic surveillance.⁶⁰ The department allowed warrantless surveillance to collect foreign intelligence if it dealt with

1. the protection of the Nation against actual or potential attack or other hostile acts of a foreign power;
2. obtaining foreign intelligence information deemed essential to the security of the United States; and
3. protecting the national security information against foreign intelligence activities.

detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The *President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases.* They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, *I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.* (emphasis added).

53 *Ibid.*, p. 353.

54 *Ibid.*, pp. 359-363.

55 Pub. L. No. 90-351, 82 Stat. 211-225 (1968) (codified as amended at 18 USC §§ 2510-2520 (1968)).

56 See Chairman Roberts's Letter, *supra* note 6, pp. 5-6; Alex Market, *Timeline: Wiretaps' Use and Abuse*, National Public Radio, 20 December 2005, available at <http://www.npr.org/templates/story/story.php?storyId=5061834> (last visited 27 March 2006).

57 18 USC §§ 2510 *et seq.*

58 18 USC § 2511(3), repealed by Pub.L.No. 95-511, § 201©.

The power of the President was reserved by stating:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

59 S. Rep. No. 94-755, pt. 2, at 106-107 (1976), available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIcc.htm> (last visited 25 March 2006) (Senate Select Committee, the Church Committee, named after its chairman, Sen. Frank Church, studied Governmental Operations with Respect to Intelligence Activities).

60 *Ibid.*

The department allowed domestic intelligence surveillance if it dealt with

1. the protection of the United States against overthrow of the government by force or other unlawful means, or
2. against any other clear and present danger to the structure or existence of the government.⁶¹

Not surprisingly, four years later, the Supreme Court stepped in to interpret Section 3 of the Act, addressing the issue of electronic surveillance for the last time in *United States v. United States District Court* (Keith case).⁶² The Court, in *Keith*, held that the President does not have the authority to conduct warrantless surveillance on a person or a group with no significant connection with a foreign power or its agent or agencies.⁶³ The Court concluded that Section 3 of the Act is not an endorsement of the president's inherent authority, leaving 'presidential power where it found them.'⁶⁴ However, the Court limited the reach of its holding only to the domestic aspects of national security, offering no opinion on the issue involving foreign powers or their agents.⁶⁵ But it did invite Congress to set standards for electronic surveillance in the context of national security.⁶⁶

2.1.4. Keith: a start of controversy

Because the *Keith* Court failed to extend its holding to electronic surveillance related to national security, lower courts began to differ on the issue. Four of the five circuit courts that addressed the issue of electronic surveillance for the purpose of national security sided with the government, recognizing a foreign intelligence exception to the warrant provision of the Fourth Amendment. For example, the Fifth Circuit Court held that warrantless wiretapping, authorized by the attorney general for the purpose of foreign intelligence, that incidentally picked up domestic criminal activity, did not violate the defendant's Fourth Amendment rights.⁶⁷ The court reasoned that such deference to the Executive Branch is justified 'because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs'.⁶⁸ The Third Circuit also recognized a foreign intelligence exception to the warrant requirement, though it concluded that searches and seizures for national security purposes have to reasonable under the Fourth Amendment.⁶⁹ Similarly, the Ninth Circuit held that security wiretaps are a recognized exception

61 *Ibid.*

62 *United States v. United States District Court (Keith)*, 407 US 297, 320 (1972) (holding that the defendant's Fourth Amendment rights were violated when the Attorney General authorized warrantless electronic surveillance of him because he was suspected of bombing the Central Intelligence Agency (CIA) office in Detroit).

63 *Ibid.*

64 *Ibid.*, p. 303. The Court stated:

Section 2511 (3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them.

65 *Ibid.*, pp. 321-322 (stating, 'We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents').

66 *Ibid.*, pp. 322-323.

67 *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973).

68 *Ibid.* It is worth noting, however, that this court similarly held that warrantless surveillance is valid a year earlier, before the Supreme Court ever decided the *Keith* case. *States v. Clay*, 430 F. 2d 165 (5th Cir. 1972) (upholding the defendant's conviction for willfully refusing to be inducted into the armed forces on the grounds that he was properly denied discovery of the warrantless wiretap because the Attorney General authorized it for the purpose of obtaining foreign intelligence information).

69 *United States v. Butenko*, 494 F.2d 593, 603-06 (3rd Cir. 1974) (holding that the President has the constitutional authority to conduct electronic surveillance for the purpose of gathering foreign intelligence information on a defendant who was transmitting national defense information to foreign governments).

to the general warrant requirement.⁷⁰ And, finally, deciding the case in a pre-FISA context, the Fourth Circuit held that ‘because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.’⁷¹ But, while the court recognized a foreign intelligence exception to the warrant provision of the Fourth Amendment, it acknowledged that FISA overrode that exception, requiring the President to obtain a warrant before conducting surveillance.⁷²

However, the District of Columbia Circuit Court of Appeals did not recognize presidential authority to conduct warrantless surveillance even before FISA.⁷³ The Court stated that ‘an analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional’.⁷⁴

2.1.5. The Foreign Intelligence Surveillance Act of 1978 (FISA): an answer to the presidential abuse of warrantless electronic surveillance

Following *Keith*, while the lower courts continued to disagree on the issue of foreign intelligence surveillance, the Watergate Scandal broke, which revealed that ‘warrantless electronic surveillance in the name of national security has been seriously abused’ by the Nixon Administration.⁷⁵ Senator Frank Church headed a Senate Select Committee, known as the Church Committee, to investigate the government’s intelligence activities.⁷⁶ The investigation showed a far-reaching infringement of individual privacy.⁷⁷ Of particular interest was the FBI’s surveillance of Dr. Martin Luther King that was entirely unrelated to any legitimate governmental interest.⁷⁸ In fact, the Church Committee discovered that Dr. King’s hotel room was bugged to obtain purely personal information.⁷⁹ The Church Committee pointed out that the inconclusive nature of wiretapping laws was largely the cause of such an expansive abuse and recommended that Congress adopt a statutory framework restricting the Executive Branch’s use of wiretaps within the United States.⁸⁰ The Church Committee noted:

‘Congress and the Supreme Court have both addressed the legal issues raised by electronic surveillance, but the law has been riddled with gaps and exceptions. The Executive branch has been able to apply vague standards for the use of this technique to particular cases as it has seen fit, and, in the case of [the National Security Agency’s] monitoring, the standards and procedures for the use of electronic surveillance were not applied at all.’⁸¹

70 548 F.2d 871, 875 (9th Cir. 1977).

71 *Truong Dinh Hung v. US*, 629 F.2d 908, 914 (4th Cir. 1980) (stating that the President’s surveillance must be reasonable under the Fourth Amendment, although he is not required to secure a warrant when the surveillance is conducted primarily for foreign intelligence purposes).

72 *Ibid.*, p. 914 n. 4 (‘Since the surveillance was conducted in this case, Congress has enacted the Foreign Intelligence Surveillance Act of 1978 ... That statute requires that executive officials seek prior judicial approval for some foreign intelligence surveillance’. (emphasis added)).

73 *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (holding that domestic surveillance *always* requires a warrant).

74 *Ibid.*, p. 614.

75 S. Rep. No. 95-604(I), pp. 7-8 (1978), as reprinted in 1978 USCCAN 3909. The Senate Judiciary Committee Report used the executive abuse as one of its reasons for promoting FISA.

76 S. Rep. No. 94-755.

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*, pp. 186-187.

The Senate Judiciary Committee (Committee), therefore, showed its support for legislation to protect national security while preserving civil liberties.⁸² It stated that while the Nixon Administration may have surpassed other administrations in conducting improper surveillance, ‘the surveillance was by no means atypical’.⁸³ The Committee pointed out that

‘The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information – unrelated to any legitimate government interest – about the personal and political lives of American citizens.’⁸⁴

As a result, the FISA law was enacted, with strong support from the Executive Branch.⁸⁵ The Attorney General at the time stated that the FISA Bill ‘sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past.’⁸⁶ Moreover, President Jimmy Carter showed his support for FISA and recognized that the law would require a ‘*a prior judicial warrant for all electronic surveillance* for foreign intelligence or counterintelligence purposes in the United States in which communications of US persons might be intercepted’.⁸⁷

2.1.6. The FISA framework

The Foreign Intelligence Surveillance Act (FISA),⁸⁸ as amended, provides an exclusive framework for the use of electronic surveillance to collect foreign intelligence.⁸⁹ It requires the President to obtain a warrant, through a certification that a significant purpose of the surveillance is to obtain foreign intelligence prior to conducting electronic surveillance.⁹⁰ Moreover, it criminalizes ‘engage[ing] in electronic surveillance under color of law except as authorized by statute’.⁹¹ The law, however, provides three main emergency exceptions to the warrant requirement:

82 S. Rep. No. 95-604(I), pp. 7-8.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*, p. 4 (statement of Attorney General Griffin Bell).

86 *Ibid.*

87 Signing S. 1566 Into Law (Oct. 25, 1978), available at <http://www.cnss.org/Carter.pdf> (last visited on 26 March 2006).

In his signing statement on FISA, he stated:

The Bill requires, for the first time, a prior judicial warrant for all electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of US persons might be intercepted. It clarifies the Executive’s authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others involved in intelligence collection that their acts are authorized by statute and, if a US person’s communications are concerned, by a court order. And it will protect the privacy of the American people.

In short, the act helps to solidify the relationship of trust between the American people and their Government. It provides a basis for the trust of the American people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that intelligence relating to national security can be securely required, while permitting review by the courts and Congress to safeguard the rights of Americans and others.

88 50 USC § 1801 *et seq.*

89 18 USC §2511 (2)(f) (stating that along with Title III, ‘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’) (emphasis added).

90 50 USC § 1801; 50 USC § 1804 (a).

91 50 USC § 1809 (a). It states:

A person is guilty of an offense if he intentionally--

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

1. It allows the President, through the attorney general, to authorize warrantless surveillance of certain foreign powers for up to a year.⁹²
2. It authorizes the President to conduct electronic surveillance, without a court order, for up to 15 days following a congressional declaration of war.⁹³ And
3. It allows the attorney general, in an emergency situation, to wiretap without a warrant, and apply for a warrant as soon as possible but no later than 72 hours later.⁹⁴

2.1.7. *The Patriot Act expansion of FISA applicability*

Soon after the attacks on September 11, Congress passed the USA PATRIOT Act⁹⁵ (the Patriot Act) to provide law enforcement tools in combating terrorism by loosening the restrictions in FISA. The Patriot Act also amended FISA to make it more flexible to respond to the changing threat to the nation from terrorism. Following are some of the changes which the Patriot Act made to FISA:

1. The Patriot Act amended FISA by lowering the original requirement that the surveillance must have foreign intelligence as its ‘primary purpose’ to foreign intelligence as ‘a significant purpose’.⁹⁶
2. Section 206 of the Act expanded FISA to permit roving or multipoint wiretaps⁹⁷ where the court finds that the actions of the target may have the effect of thwarting the identification of a specified communication or a third party.⁹⁸ Instead of specifying the ‘nature and location of each of the facilities or places at which the electronic surveillance will be directed’, as was required by the previous law, this change allows new surveillance immediately if the target changes providers in an effort to thwart surveillance.⁹⁹
3. To allow more agility, section 208 increased the number of FISA court judges from seven to eleven, three of whom must reside within 20 miles of the District of Columbia.¹⁰⁰
4. To give the Executive Branch more time to conduct surveillance without going back to court, section 207 amended the order for electronic surveillance targeted against a foreign agent within the US from 90 days to 120 days¹⁰¹ and changed the extension of that order to a year.¹⁰²
5. Section 214(a)(1) amended FISA to remove the government burden of proving that the surveillance target is an agent of foreign power before obtaining a pen register order.¹⁰³

92 50 USC § 1802. It states:

the President, through the Attorney General, may authorize electronic surveillance without a court order under this title [50 USCS §§ 1801 *et seq.*] to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--

(A) the electronic surveillance is solely directed at--

(I) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers.

93 50 USC § 1811 (‘Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title [50 USCS §§ 1801 *et seq.*] to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress’).

94 50 USC § 1805 (f).

95 USA PATRIOT Act, Pub. L. 107-56, § 218, 115 Stat. 272 (26 October 2001). The USA PATRIOT Act, (hereinafter referred to as the Patriot Act) is an acronym that stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

96 50 USC § 1804 (a)(7)(B) and § 1804 (a)(7)(B).

97 Roving or multipoint wiretaps are surveillance of an individual, without specifying the particular telephone line, computer, or location to be monitored. Y. Kamisar *et al.*, *Basic Criminal Procedure: Cases, Comments, and Questions*, 2005, p. 479.

98 The Patriot Act § 206 (amending 50 USC § 1823(c)(2)(B)).

99 *Ibid.*

100 The Patriot Act § 208 (amending 50 USC § 1803(a)).

101 The Patriot Act § 207(a)(1) (amending 50 USC § 105(e)(1)).

102 The Patriot Act § 207(b) (amending 50 USC § 105(e)(2)).

103 The Patriot Act § 214(a)(1) (amending 50 USC § 402(a)(1)).

6. Section 214(a)(3) permitted the use of pen registers or trap and trace devices for electronic communications, including e-mails and telephones.¹⁰⁴
7. Section 214(b) allowed the Attorney General to authorize the use of a pen register or trap and trace device during emergency when the court order is pending.¹⁰⁵

2.2. The National Security Agency eavesdropping on Americans

On December 16, 2005, the New York Times reported that the President had authorized the National Security Agency (NSA) to spy on Americans, inside the United States, without first obtaining a warrant from the secret FISA court.¹⁰⁶ Soon thereafter, the President admitted that he had authorized surveillance on what he called ‘people with known links to al Qaeda and related terrorist organizations’.¹⁰⁷ Although the operational details of the programmes are largely unknown, the President has described the NSA activities to be critical to the national security of the country.¹⁰⁸ And the President assured the nation that the programme is properly reviewed every 45 days to ensure that it is being properly used.¹⁰⁹

However, the programme has started a national controversy. Many members of Congress, legal scholars, various organizations, and former government officials have challenged the legality of the programme.¹¹⁰ A number of terrorism defendants, the American Civil Liberties Union, the Center for Constitutional Rights, and the National Association of Criminal Defense Lawyers have filed legal challenges to the programme.¹¹¹ And Senator Russ Feingold, a Democrat from Wisconsin, has announced that he will introduce a Bill to censure the President for breaking the FISA law.¹¹²

104 The Patriot Act § 214(a)(3) (amending 50 USC § 1842 (b)(2)(A)).

105 The Patriot Act § 214(b) (amending 50 USC §§ 1843 (a) and (b)(1)).

106 Risen and Lichtblau, *supra* note 4.

107 Press Conference of President Bush, 19 December 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> (last visited 26 March 2006) (stating that the president has ‘authorized the interception of international communications of people with known links to al Qaeda and related terrorist organizations’) (hereinafter: White House Press Conference).

108 *Ibid.* (stating that ‘two minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives’).

109 *Ibid.*

110 See *Wartime Executive Power And The National Security Agency’s Surveillance Authority Before the S. Comm. On the Judiciary*, 106th Cong., 6 February 2006 (hereinafter: Senate Judiciary Committee Hearing); see Letter to Congressional Leaders from 14 Constitutional Scholars and Former Government Officials, 9 January 2006, available at <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf> (last visited 27 March 2006) (disputing the president’s legal authority to authorize the NSA programme) (hereinafter: Jan. 9th Scholars’ letter); Bill of Rights Defense Committee, <http://bordc.org/threats/spying.php> (last visited 27 March 2006); Federation of American Scientists, available at <http://www.fas.org/irp/agency/doj/fisa/> (last visited 27 March 2006); Electronic Privacy Information Center, <http://www.epic.org/privacy/terrorism/fisa/> (last visited 27 March 2006).

111 Jerry Markon, ‘Spying Cited in Bid To Erase Terror Plea’, *Washington Post*, 4 February 2006, p. A07 (stating that a number of defendants, including a Northern Virginia imam convicted of inciting his followers to train for violent jihad and an Ohio truck driver who has filed guilty to terrorism charges, have asked courts to throw out their cases because the information obtained, through the NSA programme, violated their Fourth Amendment rights); Eric Lichtblau, ‘Two Groups Planning to Sue Over Federal Eavesdropping’, *NY Times*, 17 January 2006, available at <http://www.nytimes.com/2006/01/17/politics/17nsa.html?ei=5088&en=9c888ae5dacdae17&ex=1295154000&partner=rssnyt&emc=rss&pagewanted=all> (the American Civil Liberties Union in Federal District Court in Detroit and the Center for Constitutional Rights in Federal District Court in Manhattan); See National Association of Criminal Defense Lawyer News release, 19 January 2006, *When the Government Becomes a Lawbreaker*, Part 2, available at <http://www.nacdl.org/public.nsf/newsreleases/2006mn001?OpenDocument> (last visited 28 March 2006) (NACDL filed a law suit seeking ‘declaratory and injunctive relief to force the NSA to cease and desist warrantless interception of American’s electronic and telephone conversations’).

112 Press Conference of Senator Russ Feingold, 6 March 2006, <http://www.feingold.senate.gov/releases/06/03/20060312.html> (last visited 26 March 2006). The press release, in part, states:

The President must be held accountable for authorizing a programme that clearly violates the law and then misleading the country about its existence and its legality ... If Congress does not censure the President, we will be tacitly condoning his actions, and undermining both the separation of powers and the rule of law.

3. Analysis

3.1. *The President lacks the constitutional authority to conduct warrantless wiretapping*

3.1.1. *The President's inherent authority depends on congressional acts*

The DOJ has argued that the President has the constitutional authority, under Article II,¹¹³ to order warrantless domestic surveillance.¹¹⁴ Citing pre-FISA authority, the DOJ has reasoned that the executive power to conduct foreign and military affairs, including collecting intelligence, has been extensively recognized by the United States Supreme Court.¹¹⁵ Although the Supreme Court has traditionally deferred to the President in dealing with issues of international affairs,¹¹⁶ the Court's decisions, cited by the DOJ, are in pre-FISA context. And none of the cited cases have approved warrantless domestic surveillance.¹¹⁷ Indeed, there has not been a single Supreme Court decision that has ever recognized the President's ability to spy on the American people without a judicial warrant.¹¹⁸ In fact, the legitimacy of the President's constitutional authority fluctuates, depending on whether Congress has legislated or not.¹¹⁹

Under the three-level framework, set forth by Justice Jackson, the President's authority is at maximum when Congress has expressly or impliedly supported his actions because he is acting pursuant to 'his own right plus all that Congress can delegate'.¹²⁰ Whereas, when Congress is silent, the President is relying solely on his own power, and his inherent authority is reduced.¹²¹ Here, the actual test of his power will depend on the importance of events surrounding the situation.¹²² However, when the President takes measures contrary to the will of the Congress,

¹¹³ US CONST. Art. II.

¹¹⁴ Letter to Chairman Roberts and Vice Chairman Rockefeller of the Senate Intelligence Committee and Chairman Hoekstra and Ranking Minority Member Harman of the House Intelligence Committee from Assistant Attorney General William E. Moschella on Legal Authority for NSA Surveillance, 22 December 2005, available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf> (last visited 28 March 2006) (making a case for the President's constitutional and statutory authority to authorize warrantless surveillance for foreign intelligence purposes) (hereinafter: Asst. A.G. Moschella's Letter); US Department of Justice, *Legal Authorities Supporting The Activities Of The National Security Agency Described By The President*, 19 January 2006, pp. 7-8, available at <http://www.fas.org/irp/nsa/doj011906.pdf> (making a case for the government's authority to engage in warrantless surveillance) (hereinafter: DOJ Jan. 19 Memo).

¹¹⁵ *Ibid.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 US 304, 319 (1936) ('The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'); *Johnson v. Eisentrager*, 339 US 763, 788 (1950) (stating that the President's war power 'includes all that is necessary and proper for carrying these powers into execution'); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 US 103, 111 (1948); *Totten v. United States*, 92 US 105, 106 (1876) ('The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world').

¹¹⁶ DOJ Jan. 19 Memo, *supra* note 114.

¹¹⁷ *Ibid.*

¹¹⁸ Letter to Congressional Leaders from 14 Constitutional Law Professors and Former Government Officials, 2 February 2006 (disputing the president's authority to wiretap without a warrant) (hereinafter: February 2nd Scholars' Letter). This letter was emailed to the author of this article by David Cole, Professor, Georgetown University Law Center, one of the Scholars who authored the letter to the Congressional leaders.

¹¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635 (1952) (Jackson, J., concurring) (holding that the President does not have the inherent executive authority, as Commander-in-Chief, to seize the nation's steel industry in contravention of Congressional law).

¹²⁰ *Ibid.*, pp. 635-637 (Jackson, J., concurring). Justice Jackson noted:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

¹²¹ *Ibid.*, p. 637 (Jackson, J., concurring). Here, Justice Jackson stated:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

¹²² *Ibid.*

the legitimacy of his power is at its lowest because the power equilibrium, put together by our Constitution, is at stake.¹²³ Under this category, the President's power will be upheld only if Congress is barred from acting because the President possesses the exclusive authority in the area.¹²⁴ And when Congress is not barred and it puts forth 'specific procedures to deal with the type of [war-time] crisis confronting the President, he must follow those procedures in meeting the crisis'.¹²⁵ The key lesson of *Youngstown* is that, although a judge may defer to the President's inherent authority, the decisive factor will be whether the President is following the will of Congress.¹²⁶

In this case, Congress has not only specifically regulated domestic electronic surveillance,¹²⁷ it has criminalized that conduct if not performed according to the procedures set forth by Congress.¹²⁸ Besides, the legislative history explains that Congress wanted 'this statute, not any claimed presidential power', to control electronic surveillance 'putting to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillance in the United States'.¹²⁹ Indeed, the congressional conferees intended 'to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure [*Youngstown*] case: when the President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb'¹³⁰

Accordingly, any court will review the President's inherent power within the third category of Justice Jackson's framework. In fact, the only court in the nation addressing the issue has characterized the President's power at its weakest, holding the programme unconstitutional.¹³¹ Therefore, the President's authority is not likely to survive because he is relying solely 'upon his own constitutional powers minus any constitutional powers of Congress over the matter'.¹³² And because the President, even when acting as Commander-in-Chief, did not 'abide by the specific procedures' of FISA, he has violated the law, as was concluded by the federal court in Michigan.¹³³

Although the Bush Administration has suggested that Congress may not limit the President's inherent authority in this case,¹³⁴ congressional acts that touch upon and concern national security are consistent with the constitutional framework.¹³⁵ And the Supreme Court has acknowledged

123 *Ibid.*, pp. 637-38 (Jackson, J., concurring). Justice Jackson observed:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Any Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

124 *Ibid.*, p. 638 (Jackson, J., concurring).

125 *Ibid.*, p. 662 (Clark, J., concurring).

126 See J.L. Mashaw *et al.*, *Administrative Law: The American Public Law System, Cases and Materials*, 2003, p. 257.

127 50 USC § 1801 *et seq.*

128 18 USC § 2511.

129 Congressional Research Service, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, 5 January 2006, available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (a bipartisan Congressional research service that issued a report on the presidential authority to conduct warrantless wiretapping) (hereinafter: Congressional Research Service) (citing H. R. Rep. No. 95-1720 at 35 (1978) (Conf. Rep.)).

130 *Ibid.* (citing H. R. Rep. No. 95-1720 at 35 (1978) (Conf. Rep.)).

131 *American Civil Liberties Union v. National Sec. Agency*, 438 F. Supp. 2d 754 (2006) (holding the NSA programme unconstitutional).

132 *Youngstown*, 343 US, p. 637.

133 *Youngstown*, 343 US, p. 662 (Clark, J., concurring).

134 DOJ Jan. 19 Memo, *supra* note 114, pp. 6-10 (reasoning that interpreting FISA to limit the President's inherent authority will raise constitutional concerns).

135 The Constitution specifically gives Congress the authority to make laws, US CONST. Art. I, including the power to provide for common defence, US CONST. Art. I § 1, declare war, US CONST. Art. I § 8, cl. 11, and to make rules regulating the military, US CONST. Art. II § 1, cl. 14.

a role for Congress to regulate domestic surveillance in the context of national security.¹³⁶ Moreover, the Court, in *Rasul v. Bush*,¹³⁷ has further discredited the line of reasoning adopted by the Bush Administration.¹³⁸ There, the Court rejected the government's argument that applying habeas corpus status to Guantanamo detainees would unconstitutionally interfere with the President's executive power.¹³⁹ Furthermore, the Court in *Little v. Barreme*¹⁴⁰ invalidated a presidential order, implicitly prohibited by Congress, to seize ships coming from France.¹⁴¹ In fact, the precedent holds that every time Congress has interfered with the President's authority, Congress has prevailed.¹⁴² That is why Congress has regulated the President's war-related authority on many occasions.¹⁴³ And if congressional interference with the President's foreign affairs authority is unconstitutional, all those statutes would be unconstitutional. Therefore, the President's authority is not exclusive, and Congress is not barred from legislating.

If anything, the President is acting in a sharper contrast with the will of Congress here than the President in *Youngstown* or *Barreme* because in those two cases Congress had merely failed to give President the authority to act.¹⁴⁴ Whereas here, Congress has affirmatively placed specific procedures to be followed – even during war time.

3.1.2. Previous Presidents' interception of communication is irrelevant post-FISA

To lend more support to the President's exclusive constitutional authority to conduct electronic surveillance, Attorney General Alberto Gonzales has argued that previous presidents, including Washington, Lincoln, Roosevelt, and Truman, have authorized warrantless interception of communications.¹⁴⁵ However, that argument is largely irrelevant because the passage of FISA, in 1978, has diminished the President's authority to the third category of Justice Jackson's three-level framework.¹⁴⁶ FISA restricted the President's power to collect domestic intelligence, and finding 'authority so explicitly withheld [by Congress] is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress'.¹⁴⁷ Therefore, post-FISA presidents do not have the same type of authority that pre-FISA presidents had. In fact, since the

136 *Keith*, pp. 322-324 (inviting Congress to create statutory standards for domestic surveillance); the President may not disregard congressional limitation placed on his own war powers. *Youngstown*, 343 US, p. 637.

137 542 US 466 (2004).

138 *Ibid.* (holding that habeas corpus status applies to Guantanamo detainees).

139 Brief for Respondents at 42, 44, *Rasul v. Bush* (Nos. 03-334, 03-343).

140 6 US 170 (1804).

141 February 2nd Scholars' Letter, *supra* note 118 (citing *Little v. Barreme*, 6 U.S. 170 (1804) (holding unlawful a seizure pursuant to a presidential order of a ship during the 'Quasi war' with France because Congress had authorized the seizure of ships going *to* France, not *from* France)).

142 February 2nd Scholars' Letter, *supra* note 118.

143 *Ibid.* (citing Uniform Code of Military Justice, rules enacted to govern occupied territory, and statute prohibiting torture, 18 USC §§ 2340-2340A, and prohibiting the use of cruel, inhuman, and degrading treatment. Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2739-2740 (2005)).

144 February 2nd Scholars' Letter, *supra* note 118.

145 See DOJ Jan. 19th Memo, *supra* note 114, pp. 7-8; Senate Judiciary Committee Hearing, *supra* note 110.

The Attorney General told the Senate Judiciary Committee that:

Presidents throughout our history have authorized the warrantless surveillance of the enemy during wartime . . . General Washington, for example, instructed his army to intercept letters between British operative, copy them, and then allow those communications to go on their way. President Lincoln used the warrantless wiretapping of telegraph messages during the Civil War to discern the movements and intentions of opposing troops. President Wilson in World War I authorized the military to intercept each and every cable, telephone and telegraph communication going into or out of the United States. During World War II, President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to review, without warrant, all telecommunications, quote, 'passing between the United States and any foreign country.'

146 *Youngstown*, 343 US, p. 637.

147 *Ibid.*, p. 609 (Frankfurter, J., concurring).

passage of FISA, presidents can no longer legally wiretap outside of the procedures set-forth by Congress.¹⁴⁸

3.2. The President lacks statutory authority to conduct warrantless wiretapping

Shortly after the September 11, 2001 terrorist attack, Congress passed a resolution allowing 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.’*¹⁴⁹

Reading the ‘use all necessary and appropriate force’ provision broadly, the Bush Administration has construed the Authorization for Use of Military Force (AUMF) to mean that the executive branch is free to conduct domestic wiretapping without obtaining a warrant from the FISA Court.¹⁵⁰ Relying heavily on *Hamdi v. Rumsfeld*,¹⁵¹ the Administration has reasoned that AUMF supplements FISA in the same way that it supplemented the Non-Detention Act.¹⁵² In that case, Yaser Hamdi, an American citizen, was captured in Afghanistan during the United States military action against the Taliban regime.¹⁵³ He was transferred to the United States and was classified as an enemy combatant, receiving no due process.¹⁵⁴ The government argued that Congress has authorized Hamdi’s detention through the AUMF.¹⁵⁵ The Court agreed, concluding that ‘[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and appropriate force”, Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here’.¹⁵⁶ Similarly, notwithstanding FISA, the Administration has asserted that Congress has also authorized the President, through AUMF, to permit electronic surveillance of Americans.¹⁵⁷ However, recently, the Supreme Court, in *Hamdan v. Rumsfeld*,¹⁵⁸ expressly rejected this very argument by the government. There, the President argued that the AUMF implicitly allows the President to convene military commissions to try those captured in the war on terrorism.¹⁵⁹ The Court stated that, although AUMF activated the President’s war powers, nothing in the text or legislative history alters the procedure to establish military commissions under Article 21 of the

148 *Ibid.*, p. 662.

149 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (18 September 2001) (reported as a note to 50 USC § 1541) (emphasis added) (hereinafter: AUMF).

150 See Adam Liptak, ‘2 Laws and Their Interpretation in Limelight at Wiretap Hearing’, *NY Times*, 7 February 2006, p. A1; DOJ Jan. 19th Memo, *supra* note 114, pp. 6-10; Asst. A.G. Moschella’s Letter, *supra* note 114; see also Senate Judiciary Comt. Hearing, *supra* note 110.

151 542 US 507 (2004) (holding that although the detention of American citizens, as enemy combatants, is a fundamental incident of waging war and therefore covered under the ‘necessary and appropriate force’ under the AUMF, the detainees have the right to challenge their status as enemy combatants).

152 Asst. A.G. Moschella’s Letter, *supra* note 114 (citing 18 USC 4001(a) (prohibiting the detention of American citizens unless authorized by Congress in another statute).

153 *Hamdi v. Rumsfeld*, 542 US 507, 510 (2004).

154 *Ibid.*

155 *Ibid.*, p. 517.

156 *Ibid.*, p. 519.

157 See Asst. A.G. Moschella’s Letter, *supra* note 114; Congressional Research Service, *supra* note 129.

158 126 S. Ct. 2749 (2006) (stating that AUMF and the Detainee Treatment Act do not authorize the President to convene military commissions).

159 *Ibid.*, p. 2774.

Uniform Code of Military Justice.¹⁶⁰ Thus, the Court expressly rejected repealing of existing statutes by implications.¹⁶¹

Moreover, the Administration's reliance on *Hamdi* assumes that wiretapping Americans, within the United States, is an incident of waging war, similar to detaining enemy combatants that are captured on the battlefield in Afghanistan.¹⁶² However, the Court has a narrow view of what 'incidents of waging war', are under AUMF, by concluding that 'detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, 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'.¹⁶³ Furthermore, the Court clarified that its holding is limited to enemy combatants fighting in Afghanistan by stating that

'for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there . . . *We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.*'¹⁶⁴

And the Court rejected the government's assertion to let the Commander-in-Chief deal with enemy combatants as he sees fit – precisely the kind of argument made by the Bush Administration now – stating that a 'state of war is not a blank check for the president when it comes to the rights of the Nation's citizens'.¹⁶⁵ Therefore, the Court has a far more limited reading of AUMF than the one put forward by the DOJ.

Moreover, the Administration's argument suggests that AUMF triumphs over FISA.¹⁶⁶ But AUMF contains no language referring to electronic surveillance, while FISA has been carefully drafted to regulate domestic wiretapping after years of debate.¹⁶⁷ And when there is a statutory conflict, specific statutes prevail over general statutes.¹⁶⁸ Therefore, the Administration's argument fails for two reasons: One, there is no statutory conflict because only FISA is a wiretapping statute. Two, even if AUMF is construed to have impliedly authorized wiretapping, thereby, creating a statutory conflict, the case-law clearly shows that FISA will prevail over AUMF. Similarly, the case-law is also clear that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouse holes'.¹⁶⁹ In fact, the only court addressing this issue has expressly rejected this assertion, holding that AUMF does not alter or modify FISA.¹⁷⁰ There, the court concluded

¹⁶⁰ *Ibid.*, p. 2775.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* (stating that the Administration's position assumes 'that the power to conduct electronic surveillance for intelligence purposes is an essential aspect of the use of military force in the same way that the capture of enemy combatants on the battlefield is a necessary incident to the conduct of military operations'). And I would suggest that the Court's holding is reasonable because if AUMF allows the president to kill enemy combatants on the battlefield in Afghanistan, he ought to be able to detain those he captures there. However, the same rationale cannot be applied to wiretapping Americans at home.

¹⁶³ *Ibid.* (quoting *Hamdi v. Rumsfeld* 542 US 507, 518 (2004)).

¹⁶⁴ *Hamdi*, 542 US, p. 516.

¹⁶⁵ Congressional Research Service, *supra* note 129 (quoting *Hamdi v. Rumsfeld* 542 US 507, 536 (2004)).

¹⁶⁶ The Administration has argued that the President can disregard the specific procedures established by FISA and use any necessary and appropriate force to conduct domestic surveillance. See Senate Judiciary Comt. Hearing, *supra* note 110; see also DOJ Jan 19th Memo, *supra* note 114.

¹⁶⁷ 50 USC § 1803.

¹⁶⁸ Jan. 9th Scholars' Letter, *supra* note 110 (citing *Morales v. TWA, Inc.*, 504 US 374, 384-385 (1992)).

¹⁶⁹ February 2nd Scholars' Letter, *supra* note 118 (quoting *Whitman v. American Trucking Ass'ns*, 531 US 457 (2001)).

¹⁷⁰ National Sec. Agency, 438 F. Supp. 2d at 70-71.

that FISA is highly specific, and AUMF is ‘utterly general’, so FISA prevails.¹⁷¹ Therefore, it is highly unlikely that a court will conclude that AUMF impliedly, overrode, supplemented, or modified FISA.

Additionally, the Administration’s assertion that AUMF allows unlimited wiretapping is further discredited by the fact that FISA has expressly rejected that notion, even during war time.¹⁷² FISA has limited warrantless surveillance to the first fifteen days of Congress declaring a war.¹⁷³ And such strong and specific language suggests that Congress intended FISA to be applicable even when a war is declared, let alone a mere authorization of military force.¹⁷⁴ In fact, it is very clear that Congress intended FISA, along with Title III, to be the ‘exclusive means by which electronic surveillance . . . may be conducted’.¹⁷⁵ And although the Supreme Court has not yet addressed the exclusivity of FISA, lower courts have rejected the President’s position, holding that the exclusivity clause in 18 USC § 2511 (2)(f) limits the President’s inherent authority.¹⁷⁶

Finally, 18 USC § 2511 (1) makes it a crime to conduct wiretapping unless done in accordance with this statute or FISA.¹⁷⁷ Therefore, if AUMF is read to have allowed the President to conduct warrantless wiretapping, it would mean that AUMF implicitly repealed 18 USC § 2511 (2)(f), the provision making FISA and Title III the exclusive means to conduct electronic surveillance.¹⁷⁸ However, a statute may not be impliedly repealed, absent ‘overwhelming evidence’ that Congress intended such repeal.¹⁷⁹ But here, there is no evidence that Congress intended AUMF to include electronic surveillance and to repeal 18 USC § 2511 (2)(f).¹⁸⁰

On the contrary, it is clear that most members of Congress, when authorizing the military force in 2001, did not vote for warrantless spying on Americans inside the United States; rather, they were voting to attack al Qaeda and the Taliban regime in Afghanistan.¹⁸¹ Even members of the President’s own party deny the assertion that AUMF supplemented or repealed other specific statutes.¹⁸² During the February 6th, 2006 Senate Judiciary Committee hearing,¹⁸³ when the attorney general stated that the FISA statute and the AUMF statute are ‘complimenting each other’, the Republican Chairman of the Committee was quick to reject his argument as one that ‘defies logic and plain English’.¹⁸⁴ Addressing the attorney general, Senator Lindsey Graham, a conservative Republican from South Carolina, stated that his vote for the war in 2001 was not

171 *Ibid.*

172 50 USC § 1811 (stating that the ‘President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress’).

173 *Ibid.*

174 Congressional Research Service, *supra* note 129.

175 18 USC § 2511(2)(f) (‘procedures in this chapter [119 of the Omnibus Crime Control and Safe Streets Act] 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’). § 2511(2)(f) repealed language from the Omnibus Crime Control and Safe Streets Act that reserved the president’s constitutional power ‘to take such measures as he deems necessary to protect the Nation against actual or potential attack . . . [and] to obtain foreign intelligence information deemed essential to the security of the United States . . .’ Congressional Research Services (quoting 82 Stat.214, formerly codified at 18 USC § 2511(3)).

176 Congressional Research Services (citing *United States v. Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990) (holding that the ‘exclusivity clause makes it impossible for the President to “opt-out” of the legislative scheme by retreating to his “inherent Executive sovereignty over foreign affairs . . . [and] The exclusivity clause in 18 USC section 2511(2)(f) assures that the President cannot avoid Congress’ limitations by resort to “inherent” powers as had President Truman at the time of the “Steel Seizure Case”’); *United States v. Falvey*, 540 F. Supp. 1306 (EDNY 1982) (stating that FISA has lowered the President’s inherent authority)).

177 February 2nd Scholars’ Letter, *supra* note 118.

178 January 9th Scholars’ Letter, *supra* note 110.

179 *Ibid.* (quoting *J.E.M.Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 US 124, 137 (2001)).

180 *Ibid.*

181 Evan Thomas and Daniel Klaidman, ‘Full Speed Ahead’, *News Week*, 9 January 2006, p. 30.

182 See Senate Judiciary Committee Hearing, *supra* note 110.

183 *Ibid.*

184 *Ibid.*

‘giving this president or any other president the ability to go around FISA carte blanche’.¹⁸⁵ Calling the attorney general’s rationale dangerous, Senator Graham stated that the Administration’s line of reasoning ‘may make it harder for the next president to get a force resolution if we take this [argument] too far’.¹⁸⁶ And it is risky to go along with the president’s rationale when the war on terrorism, like the Cold War, can last for decades, allowing him to conduct warrantless wiretapping for as long without any checks.¹⁸⁷

Moreover, the President’s statutory argument seems to carry little weight with some members of his own administration.¹⁸⁸ The attorney general himself has acknowledged that lawyers, within the Justice Department, dissented with the idea that AUMF is a sufficient authority to circumvent the procedures set forth by FISA.¹⁸⁹ And although the Justice Department has denied the allegation, Deputy Attorney General James Comey appears to have acknowledged that AUMF, as an authority to wiretap without a warrant from the FISA court, ‘had grown stale’.¹⁹⁰

Therefore, it is not logical to conclude that AUMF, a resolution that does not mention electronic surveillance even once, can substitute the specific language of FISA and repeal 18 USC § 2511 (2)(f), especially in the absence of congressional intent to do so. To conclude otherwise would mean that Congress intended AUMF to implicitly allow spying on Americans, not involved in combat, on domestic soil, notwithstanding FISA or 18 USC § 2511, under fewer restrictions than when a formal war is declared.¹⁹¹

3.3. Public policy arguments against warrantless surveillance

3.3.1. The flexibility of FISA makes warrantless wiretapping unnecessary

Attorney General Alberto Gonzales has argued that to catch al Qaeda, quick action is necessary,¹⁹² therefore, ‘the President made the determination that FISA is not always sufficient’.¹⁹³ That argument does not hold because FISA contains emergency provisions that provide speed and agility. The Act allows that ‘the President, through the attorney general, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year’ if it is directed towards foreign persons or property.¹⁹⁴ Another emergency provision permits the attorney general to ‘authorize the emergency employment of electronic surveillance’ without a warrant and request a warrant as soon as possible but not more than 72 hours (3 days) after the surveillance has been authorized.¹⁹⁵ And when Congress has declared a war, the attorney general is allowed to conduct warrantless domestic surveillance for up to 15 days.¹⁹⁶ Moreover, the Federal Intelligence Surveillance Court (FISC) itself has been very willing to grant warrants, issuing all but 6 of the 20,000 requests made by the government.¹⁹⁷ Therefore, contrary to the DOJ’s assertion, FISA provides the

185 *Ibid.*

186 *Ibid.*

187 *Ibid.*, p. 17 (Sen. Brownback statement).

188 See *ibid.*; Thomas and Klaidman, *supra* note 181.

189 Senate Judiciary Committee Hearing, *supra* note 110.

190 Thomas and Klaidman, *supra* note 181.

191 See Congressional Research Service, *supra* note 129.

192 Senate Judiciary Committee Hearing, *supra* note 110, p. 12 (Statements of Attorney General Gonzales).

193 *Ibid.*

194 50 USC § 1802.

195 50 USC § 1805(f).

196 50 USC § 1811.

197 Senate Judiciary Committee Hearing, *supra* note 110, p. 6 (Statements of Ranking member Patrick Leahy).

President with the necessary tools to respond to the changing threat in an effective and efficient manner.¹⁹⁸

Besides, if FISA is truly inadequate to meet the needs of the Executive Branch to protect the nation against terrorism, the President could have asked Congress to amend the law, rather than circumventing the legal framework put in place by Congress. Although the attorney general has argued that FISA could not be amended without compromising the secrecy of the programme,¹⁹⁹ Congress has amended FISA five times since September 11, 2001, ‘to give it more flexibility’ without compromising its secrecy or effectiveness.²⁰⁰

3.3.2. Lack of judicial oversight leads to abuse

The express language of the Constitution gives Congress the power to make laws.²⁰¹ Similarly, the President is required to ensure that laws, including FISA, are ‘faithfully executed’.²⁰² And the role of the judiciary is to serve as impartial magistrates, interpreting our laws.²⁰³ By creating three separate, yet interdependent, branches of government, the framers wanted to make sure that power does not concentrate in the hands of a few.²⁰⁴ Particularly, when individual liberties are at stake, the Constitution ‘most assuredly envisions a role for all three branches’.²⁰⁵ And it is due to the ‘separation of powers and division of functions among the different branches and levels of Government’ that individual freedoms are preserved.²⁰⁶ Therefore, the ‘Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates’²⁰⁷ because the framers understood that ‘executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech’.²⁰⁸

FISA was formulated precisely to protect civil liberties from executive abuse, without compromising national security.²⁰⁹ The legislative history points out that unchecked wiretapping had allowed the President to collect information, unrelated to national security, ‘about the personal and political lives of American citizens’.²¹⁰ Once again, as far as we know, this exceeding executive power has allowed the President to spy on political, environmental, animal rights, anti-war, and faith-based groups.²¹¹ As a result, the President’s marginalization of the judiciary and Congress is not only contrary to the constitutional framework, it raises serious concerns over abuse of his unchecked power.

198 See Kathleen Taylor, ‘Abuse of power must be challenged’, *The Seattle Times*, 23 March 2006, available at http://seattletimes.nwsource.com/html/opinion/2002882760_kathleentaylor23.html (arguing that the president’s use of the NSA programme is unnecessary and illegal).

199 See Senate Judiciary Committee Hearing, *supra* note 110.

200 *Ibid.*, p. 6 (Statements of Ranking member Patrick Leahy).

201 See US Const. Art. I.

202 See US Const. Art. II.

203 See US Const. Art. III.

204 See *Keith*, 407 US, p. 317.

205 *Hamdi*, 542 US, p. 536.

206 *Keith*, 407 US, p. 317.

207 *Ibid.*

208 *Ibid.*

209 See S. Rep. No. 95-604(I), pp. 7-8.

210 *Ibid.*

211 See Taylor, *supra* note 198 (‘In Georgia, the FBI and local Homeland Security officials spied on vegans picketing against a meat store in DeKalb County. In California, college students in Santa Cruz who protested the presence of military recruiters on campus found their protest listed as a “credible threat” on a Pentagon surveillance programme database. Here in Washington, the ACLU helped peace activist Glen Milner obtain surveillance records held by the FBI. The files reveal that federal agents had spied on a variety of peace groups, including the Raging Grannies, a group of senior citizens who sing out their political views’).

4. Conclusion

In summary, the President's inherent constitutional power to wiretap has been diminished because Congress has specifically regulated electronic surveillance.²¹² And because Congress has laid down specific procedures, the President is required to follow them, even in times of war.²¹³ Moreover, AUMF cannot legally be interpreted to authorize unlimited electronic surveillance. It is a general statute that authorizes the use of force against al Qaeda and the Taliban regime.²¹⁴ And it neither expressly nor impliedly allows the President to unilaterally determine who he wants to wiretap.²¹⁵ On the other hand, FISA expressly and exclusively²¹⁶ provides specific guidelines for the use of electronic surveillance to collect foreign intelligence inside the United States.²¹⁷ So, even if AUMF is construed to have included communications interception inside the United States, the specificity of FISA language prevails over the generality of AUMF.²¹⁸ Additionally, when the President acts as 'the prosecutor and disinterested, neutral magistrate', subject neither to congressional review nor courts' scrutiny, it not only violates the constitutional equilibrium of power but also leads to abuse. After all, it was the presidential abuse of electronic surveillance that gave birth to FISA.²¹⁹ Finally, the flexibility of FISA and the willingness of the FISA court to serve as a rubber stamp for the Executive Branch further diminish the need for such blatant invasion of our private conversations. Therefore, it is highly unlikely that any court will uphold the legality of the NSA programme.

Given these reasons, it is important for the President to immediately cease the warrantless NSA activities, abide by the limitation of FISA, and respect the constitutional checks and balances. If the President believes that FISA cannot adequately respond to the changing nature of threat that our nation faces, he must seek to amend the law and not violate it. Similarly, Congress must make it clear that AUMF is not a wiretapping statute that implicitly supplements FISA. Additionally, Congress must take its oversight role seriously and launch a comprehensive investigation to better understand the facts and scope of the programme. Only after a thorough review can Congress hold the President accountable, create a better oversight to ensure that such abuse of power is not repeated, and recommend any needed amendments to FISA.

212 18 USC §§ 1801 *et seq.*

213 *Youngstown*, 343 US, p. 662 (Clark, J., concurring).

214 50 USC § 1541.

215 AUMF.

216 18 USC § 2511 (2)(f).

217 18 USC §§ 1801 *et seq.*

218 Jan. 9th Scholars' Letter, *supra* note 110 (citing *Morales v. TWA, Inc.*, 504 US 374, 384-85 (1992)).

219 S. Rep. No. 94-755.