

Goodling, Monica

From: Matthew_T_McDonald@who.eop.gov
Sent: Tuesday, January 17, 2006 10:49 AM
To: Goodling, Monica
Subject: IN CASE YOU MISSED IT: Attorney General Alberto Gonzales On CNN's "Larry King Live"

Importance: Low

Attachments: tmp.htm



tmp.htm (13 KB)

In Case You Missed It ...

Attorney General Alberto Gonzales On CNN's "Larry King Live"

CNN'S LARRY KING: "General, Al Gore said today that President Bush repeatedly and persistently broke the law with the NSA domestic spying program and he wants a special counsel named to investigate. What are your thoughts?"

ATTORNEY GENERAL ALBERTO GONZALES: "Well, I didn't see the speech of the former vice president. What I can say is that this program from its inception has been carefully reviewed by lawyers throughout the administration, people who are experienced in this area of the law, experienced regarding this technology and we believe the president does have legal authorities to authorize this program.

"I would say that with respect to comments by the former vice president it's my understanding that during the Clinton administration there was activity regarding the physical searches without warrants, Aldrich Ames as an example.

"I can also say that it's my understanding that the deputy attorney general testified before Congress that the president does have the inherent authority under the Constitution to engage in physical searches without a warrant and so those would certainly seem to be inconsistent with what the former vice president was saying today."

KING: "General, doesn't the idea of spying run against the grain of Americans?"

ATTORNEY GENERAL GONZALES: "I think, Larry, people need to understand that this is a very targeted and limited program that the president has authorized. We have to put this in context. Of course, we're talking about the most horrific attack on our soil in the history of this

country, 3,000 lives lost on September 11th.

"The president pledged to the American people that he would do whatever he could within the Constitution to protect this country. It has always been the case since we've had electronic communications that in a time of war this country engages in electronic surveillance in order to get information about the enemy.

"We need to know who the enemy is. We need to know what the enemy is thinking. We need to know where the enemy is thinking about striking us again. And so absolutely, this president is going to utilize all the tools that are available to him to protect this country and I think the American people expect that of the president of the United States, who is the only public official charged, not only with the authority with the duty of protecting all Americans."



Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JANUARY 19, 2006
WWW.USDOJ.GOV

OPA
(202) 514-2007
TDD (202) 514-1888

**TRANSCRIPT OF CONFERENCE CALL WITH STEVEN G. BRADBURY ON
RELEASE OF DETAILED LEGAL ANALYSIS OF THE NSA ACTIVITIES
DESCRIBED BY THE PRESIDENT**

WASHINGTON, D.C.

MR. ROEHRKASSE: Thank you very much. This is Brian Roehrkasse in the Office of Public Affairs. Thank you for joining us in this conference call today. Today's briefing will be on the record with Steven G. Bradbury, who is the Acting Assistant Attorney General for the Office of Legal Counsel.

We would ask that as you participate in this call today, if you are not asking a question, would you please keep your phones on mute to cut down any background or interference. Today's call is on the record, as I mentioned, but not for broadcast.

When you ask a question, please state your name and the organization that you're calling from. We have disseminated the materials, including a cover letter from the Attorney General and the white paper that's been prepared by the Department of Justice that's been disseminated to Congress now. If you don't have a copy of it, please feel free to call our office, and we can provide you with a copy of that.

For now I'll turn it over to Steve.

MR. BRADBURY: Yeah, again, this is Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel. And as you probably know, today the Department is releasing a white paper which contains a detailed legal analysis of the NSA activities described recently by the President. And these are the activities as the President described them that involves interception by the NSA of international communications coming into or going out of the U.S. where a party to the communication is linked to al Qaeda or related terrorist organizations.

And back on December 22nd, the Department sent a letter to the chairs and ranking members of the intelligence committees in Congress explaining in summary form the legal basis for the NSA activities described by the President.

What we're doing today, at the request of the Attorney General, is providing to members of Congress and also releasing publicly what is a more thorough and detailed analysis of the points that were covered in that letter from Assistant Attorney General for Legislative Affairs, Will Moschella, of December 22nd. So what you'll see in the white paper is a summary overview of the analysis, a background section, and then several parts of the analysis.

And again, as explained in that December letter, but treated in a much more comprehensive fashion in today's white paper, the activities that were described by the President involved the establishment of what is an early warning system to detect and prevent another catastrophic terrorist attack on the United States in the wake of the attacks of September 11th, and in the context of the ongoing armed conflict with al Qaeda and its allies.

And the fundamental basis, legal basis, for the President's authority to initiate such a system of military signals intelligence surveillance for the protection of the country is of course his authority under Article II of the Constitution, which assigns him the primary role in foreign relations on behalf of the United States, and the role as Commander in Chief.

And under that authority, the President has the duty to take action as necessary to protect the country, particularly in a time of armed conflict following what was the deadliest attack on the U.S. soil in the history of the nation.

And the Constitution, not surprisingly, gives the President authority necessary to take those actions in carrying out that duty. And the authority specifically under Article II to undertake warrantless surveillance during time of armed conflict is well established in the history of the country and has been something that presidents have done virtually in every armed conflict that the country has been involved in, certainly all of the major wars.

In addition, of course, in the days following 9/11, Congress passed the White resolution, which was the authorization for the use of military force, passed by Congress on September 14th and signed into law by the President on September 18th, 2001. And in that authorization, Congress expressly recognized that the President does have authority to take action to protect the country in order to prevent a further attack on the United States. And Congress gave its support, confirmed the President's authority and supplemented his constitutional authority with a very broad authorization statement, that the President can use all necessary force as he determines necessary to protect the country from further attack.

As we explained back in our December 22nd letter and is set forth more fully in this white paper, we believe that that statutory authorization contains within it necessary incident to the use of military force, the ability to undertake what is intelligence, communications intelligence, targeted at the enemy in the currently armed conflict, particularly when you're talking about an enemy that has already attacked the United States from within the country, and where there are agents of the enemy who may be hiding out in the country unbeknownst to the government, you have to be able to identify who they are, where they are, in order to prevent a further attack.

As we explain in the white paper, there's a lengthy history of practice in all armed conflicts of undertaking such military intelligence for defensive purposes. And so it's -- it is a normal and traditional incident of the use of force that fits comfortably within the broad language of the authorization.

Now then the next question is, is the activity that the President has described consistent with FISA, the Foreign Intelligence Surveillance Act. And as we explain in detail, we believe it is.

And we don't think you need to get the difficult question of the constitutional balance between the branches and whether FISA could be constitutionally applied in certain circumstances in the context of war to impose restrictions or prohibitions on the President's ability to defend the country, and that's because FISA itself acknowledges the possibility that Congress would separately authorize by statute the President to conduct this kind of surveillance, because FISA prohibits electronic surveillance except as authorized by statute.

And the authorization for the use of military force is a statute, and as we develop in this paper, it is precisely we believe the type of statute, the type of broad authorization that you would expect Congress to pass in the context of an armed conflict in the wake of a catastrophic attack like the attacks of 9/11.

And so, therefore, the use of this authority in the way the President has described is consistent with FISA and the procedures of FISA.

We then go on to explain at length in here that if there's any doubt about that question, if there's an ambiguity in FISA as to whether the authorization for the use of military force can be read in harmony with FISA, then that ambiguity must be construed in favor of the President's ability to use this authority in order to avoid any serious constitutional question that would arise about the constitutionality of the FISA restrictions.

And by the way, for purposes of this analysis, we're assuming that the NSA activities that the President has described would otherwise constitute electronic surveillance for purposes of FISA. We're not saying that's the case, but we're assuming for purposes of the analysis that that would be the case.

And in the course -- you'll see in the course of that discussion of FISA, we talk here in depth about aspects of the FISA statute that have been raised by others, including the Declaration of War provisions in FISA, the exclusive means language in FISA. We get into all of that in great detail.

The final part of the white paper addresses the Fourth Amendment issues, the civil liberties protections, and explains that this activity, which is focused on international communications, which is reviewed by the President and senior advisors every 45 days, and which is determined based on the latest intelligence to be necessary to protect the country, is the kind of activity that falls well within established areas where warrant would not be required. Because it's based on needs and serves purposes that go well beyond routine law

enforcement. So it's a special use aspect of the Fourth Amendment where a warrant is not required, where the touchstone for Fourth Amendment purposes is reasonableness. And with everything that's at stake, and with all the limitations and in this narrow context, we think it's comfortably within the reasonableness requirement of the Fourth Amendment.

So that's an overview of what you'll see in the white paper. What we tried to do is get into much more detail that we previously have and address some of the points that have been made by others in the public discussion about these activities.

So I'm happy to take any questions that people have at this point.

MR. ROEHRKASSE: Okay. When you ask your questions again, if you could please remember to state your name and the name of the organization that you're from. So please, let's go ahead and begin.

QUESTION: Mr. Bradbury, Pete Williams from NBC News.

I'm a little puzzled about why the reasoning here isn't somewhat circular. You say that you believe the court's opinion in Hamdi, which of course expressed -- I just re-read that section. It looks only at the question of whether the detention of enemy combatants is authorized by the use of military force authorization.

MR. BRADBURY: Yes.

QUESTION: It is not the general -- it doesn't go on to say, "and anything else the President has to do in wartime is okay, too." It's limited solely to enemy combatants. You say Hamdi, that the Hamdi decision gets you there, and then you say that the authorization of use of military force also solves your FISA conflict problem. But one conclusion depends on the other. I mean, isn't this somewhat circular?

MR. BRADBURY: Well, I guess you would say, Pete, that we don't -- we don't say the Hamdi decision gets us there. I understand that the Hamdi case -- the court case is only focused on one particular issue. The issue before the court was detention of U.S. citizens who are enemy combatants.

Of course, the court wouldn't have a holding that goes beyond that context.

All we're saying is that the reasoning that the majority of the -- the majority of the court applied in Hamdi to conclude that the authorization for the use of military force is an act of Congress that authorized, even though it doesn't say anything about detention, it authorized detention of a U.S. citizen such that it satisfied the requirements of Section 18 USC Section 4001(a), which says that no U.S. citizen shall be detained except pursuant to an Act of Congress.

And so in getting to that conclusion, what the court said is that the authorization for the use of military force expressly and unmistakably encompasses all of the traditional incidents of

the use of force and --

QUESTION: Well, but it doesn't say that.

MR. BRADBURY: But it uses the language to explain that detention of an enemy combatant is an -- is expressly in the -- is unmistakably a traditional incident of the use of -- and that's what -- that's what the authorization for the use of force is getting at.

But of course, the court didn't have to go on to say -- didn't have to hold that what this means is the President can do anything, and it didn't have to hold -- I'm not saying it held electronic surveillance of the enemy is part of that.

What we have set forth in the white paper is a history of the practice of the country in wartime to demonstrate that communications intelligence targeted at the enemy is one of the traditional and fundamental incidents of the use of force. And that's the only point.

QUESTION: Mr. Bradbury, this is Larry Abramson with National Public Radio.

Are you saying that the Foreign Intelligence Surveillance Act is basically null and void until the war on terror is over and that there's no real role for the Foreign Intelligence Surveillance Court during this period?

MR. BRADBURY: Absolutely not. The FISA statute is a very valuable tool on the -- in the war on terror, and actually the department and the government have made full and extensive use of FISA since 9/11. The number of FISA applications has ramped up exponentially since 9/11.

So FISA is not a moribund statute. FISA is an extremely valuable tool, and is used to the fullest by the -- by the government.

QUESTION: Well, it's the cumulative knowledge that FISA was meant to deal with the gathering of foreign intelligence surveillance, and now you're saying that the President has the authority to do that without the court, so why would there be a need for two separate tracks for gathering the same information?

MR. BRADBURY: Well, FISA is a very valuable tool, and it enables very extensive surveillance, including domestic -- particularly domestic surveillance, where you're talking about a foreign intelligence purpose.

And the statute allows the government to undertake such surveillance and make use of that surveillance for law enforcement purposes, for intelligence purposes -- extremely valuable tool and one that is geared very extensively.

I think all we're saying is that, first of all, when Congress enacted FISA in 1978, that really wasn't the final word on how the government and the President might respond in time of war, in actual armed conflict, particularly following the sort of unprecedented catastrophic

attack on the United States that we had in 9/11.

And we believe that if you look at FISA by its terms and particularly its legislative history, as well, that it was very evident that Congress, while some Member of Congress clearly had the intent of regulating or restricting the foreign intelligence surveillance activities of the -- of the President, that the question of what would happen in an actual armed conflict where the government was at war, where the country was at war and had been attacked, what you see is that Congress -- Congress left open the possibility that subsequent Congresses would enact specific authorizations, or different statutory authorizations, to address the circumstances that might arise, and we think that's exactly what the authorization for the use of military force is, because if you read the authorization for the use of military force to exclude that fundamental incident of force, which is very essential, sort of a first step in the use of force, which is communications intelligence, signals intelligence targeted at your enemy to try to even identify who your enemy is and where he is, that -- that -- that that's a natural incident of the -- of the authorization and that that's how Congress chose to deal with the current, the specific circumstances of the current armed conflict.

QUESTION: Jim Angle -- over at Fox. Could I ask you a question about why you're going through all of these other things?

Many national security experts say if you collected the information overseas, and the person targeted is overseas, which is the explanation the Attorney General has given, the vice president has given, then that does not require a FISA warrant even if one end is in the U.S. Is that true, and if so, why not just say that FISA doesn't apply in these situations?

MR. BRADBURY: Well, that's true, and depending on the circumstances, Jim, in certain circumstances that may be true. In other circumstances, where you have one end in the U.S., it may not.

And again, I can't get into -- I'm really not in a position to get into operational details about the particular activities of the NSA, and that's why I say that, for purposes of this white paper, we're just assuming, for purposes of this legal analysis, the activities in question would constitute electronic surveillance that would be covered by the procedures of FISA -- otherwise be covered.

QUESTION: But unless you target someone in the United States, you're saying, it does -- unless you target them, it does not -- in other words, it's not incidental -- then it does not require a FISA warrant; is that correct?

MR. BRADBURY: FISA has a multi-layered and complicated definition of electronic surveillance, which is what FISA -- it doesn't mean electronic surveillance in the colloquial sense. Not all electronic surveillance, as we might think of it, would be covered by FISA. But it has a very specific definition.

And part of the definition is, if it's a -- if it's electronic surveillance that particularly -- or a particular U.S. person.

Another part of it is if it's electronic surveillance over a wire, a wire -- of wire communications that are acquired in the United States, and it doesn't -- and it doesn't talk about specifically targeting a particular U.S. person.

QUESTION: Mr. Bradbury, it's Mike Isikoff with Newsweek.

The authorization for force in -- after 9/11 related to the people who authorized, harbored, committed, or aided in the planning and commission of the 9/11 attacks, the first sentence of your white paper here says, "The President is authorized electronic surveillance against persons linked to al Qaeda or related terrorist organizations." Who -- has "related terrorist organizations" been defined? What is the standard you're using here for who this program can apply to?

MR. BRADBURY: Mike, I'm going to have to answer that in just very general terms, because the specifics would get into the details of the activities, and I'm just not in a position to talk about the classified aspects of the activities. That's why I sort of kept it at that level of generality.

But I think there are well-established and ordinary principles from -- one source being traditional laws of war and the principles of laws of war about who is affiliated with, associated with, allied with your enemy for purposes of the -- the kind of rules of engagement, if you will, in the ongoing armed conflict.

So I think under sort of traditional law of war principles, you don't want to focus that unreasonably narrowly, because that's just impractical.

I mean, the -- what we're dealing with here obviously is an enemy that metastizes, diffuses, changes form, uses different names, uses different cells, front organizations, et cetera, and so that's sort of the nature of the enemy.

QUESTION: Just to follow up on that, though, of course, FISA isn't restricted to people having anything to do with al Qaeda. It is any, you know, designated foreign terrorist organization or foreign power. But the authorization that you're -- you know, the 9/11 authorization in Afghanistan is restricted to al Qaeda. And I'm wondering whether the NSA program uses the broader FISA standard, which would be any terrorist organization, whether it had anything to do with al Qaeda or not, or if you have a more narrowly focused one.

And I'm still unclear from your answer just what this -- you know, what this -- are there any written standards here at all as to who or what applies?

MR. BRADBURY: Well, again, Mike, really, if there were such written standards, and let's assume there are, that would all be part of the classified program, obviously. It would be part of the activity that -- at the NSA and the authorization that the NSA within, you know, is undertaking.

Obviously, the program, the activities that the President described remain classified in all respects. That the President has talked about the activities to the American people does not mean that the program is no longer classified.

And so I guess that's as much as I can say. I am talking about what the President had described.

QUESTION: So you're not going to answer whether the AUMS definition is being followed under NSA?

MR. BRADBURY: No, I'm -- I'm saying that we believe the authorization for the use of military force and the definitions and -- and the -- there's (inaudible) incidents that go along with that to cover the activities that the President has described.

QUESTION: This is Bob Dees with Cox Newspapers. I have a quick two-parter.

One is, you assert in your summary that the President has -- is the sole organ for the nation with respect to foreign affairs. I'm wondering how that squares with things like the War Powers Act and other aspects of Congressional authority.

And second, how do you respond to people who are going to read this paper as a sort of blank check giving the President limitless power in a time of war?

MR. BRADBURY: No, I think the activities that the President has described are narrowly tailored.

We're talking about only international communications where one end is overseas, and we're talking about only communications where one party to the communication is -- there's a reasonable basis to believe that one party to the communication is an agent or member of al Qaeda or an affiliated terrorist organization, and again, only international communications. One end must be outside the United States.

So it's -- it's -- it is narrowly focused. It is not domestic surveillance. It is not broad surveillance of U.S. citizens, et cetera. It's not surveillance of domestic groups or -- that get into the sort of issues that were raised in the past with the abuses that were examined by the Church Commission.

In that way, the program was designed to protect -- to be protective of civil liberties and consistent with (inaudible) and it undergoes periodic review for that -- for that purpose.

In terms of the -- so in terms of the blank check point, as I've tried to -- as I've tried to explain, it is limited by what is a traditional historically recognized incident of the use of military force, and is not a -- is not a blank check that says the President can do anything he wants.

In terms of the sole organ, that's of course a quote from the Supreme Court, and really what that means, it goes back to principles enunciated by the founders in the Federalist Papers that when it comes to responding to external threats to the country, protecting the country in wartime, when it comes to interactions with foreign powers, the government was designed to have a single executive who could act nimbly and agilely with speed as necessary to do that.

And in that sense, the President is the primary organ. Of course, we're not saying that Congress has no role in time of war. There are well-recognized authorities for Congress in the Constitution --

MR. ROEHRKASSE: We have time for two more questions.

QUESTION: Steve, this is Kevin Johnson at USA Today.

Can you -- are you saying that the AUMF supersedes FISA where they're in conflict, specifically in Section 1811 that says the President, through the Attorney General, may authorize electronic surveillance without a court order for a period not to exceed 15 calendar days following a declaration of war by Congress? How does that square with what you're saying, or is what you're saying that the AUMF supersedes anything where they're in conflict?

MR. BRADBURY: We're not saying -- we don't need to say that the AUMF has repealed FISA or supersedes FISA, though there are, frankly, decent arguments on that point, which again we explained in the paper, but rather, FISA itself contains an express provision that says, except as authorized by statute.

So it's reasonably read to include -- to contemplate the possibility of an exception where Congress, by special statute, provides for -- provides a separate authority.

And so it's completely consistent with FISA. You don't -- there isn't a direct conflict. There isn't a tension.

This is a Category 1 case under Justice Jackson's concurring opinion in *Youngstown Sheet and Tube*. It's a case where, as properly construed, the authorization for the use of military force is a congressional endorsement of support for the President's use of his constitutional authority, and the two are married, and we're in a Category 1 situation.

QUESTION: Steve, it's Andrew Cohen with CBS News. Let me ask you a question.

It's hard to read this white paper of yours without also considering the two complaints that were filed earlier in the week, and I'm wondering, to what extent should we consider this white paper a preview of what you're going to say when you begin to defend those? And also, what do you guys say to people like Christopher Hitchens, who what everyone thinks of his writing is no enemy force? How are you going to resolve the issues that are raised by those journalists and by those attorneys who are saying that, you know, their

communications, their rights are being affected by your surveillance efforts?

MR. BRADBURY: Well, first of all, I guess I'd say I'm not a litigator, I'm not part of that effort, and obviously the government represented by the department will respond in due course to the complaints that have been filed.

This white paper that we're talking about today was not at all prepared or issued as a public (inaudible) in connection with the litigation, was requested by the Attorney General to provide a deeper and fuller analysis for purposes -- primarily for purposes of Congress and -- and the public generally to get a better understanding of the analysis that the department has gone through to conclude that the activities the President has described are lawful in all respects.

MR. ROEHRKASSE: Perfect. Thank you very much. Again, for those that may have joined late, this call was on the record with Acting Assistant Attorney General Steven G. Bradbury, and that's Acting Assistant Attorney General for the Office of Legal Counsel.

If you have not received the document, please feel free to call our office and we'll send it to you.

QUESTION: Thank you.

MR. BRADBURY: Thank you.

MR. ROEHRKASSE: All right, thanks.

###

Goodling, Monica

From: USDOJ- Office of Public Affairs
Sent: Wednesday, December 21, 2005 4:27 PM
To: USDOJ- Office of Public Affairs
Subject: CORRECTED: TRANSCRIPT OF ATTORNEY GENERAL ALBERTO R. GONZALES AND HOMELAND SECURITY SECRETARY MICHAEL CHERTOFF PRESS BRIEFING NEED FOR SENATE TO REAUTHORIZE THE USA PATRIOT ACT

Attachments: Picture (Enhanced Metafile); Presentations 12 Drawing



Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, DECEMBER 21, 2005
PHONE: (202) 514-2007
WWW.USDOJ.GOV
(202) 514-1888

AG

TDD

TRANSCRIPT OF ATTORNEY GENERAL ALBERTO R. GONZALES AND HOMELAND SECURITY SECRETARY MICHAEL CHERTOFF PRESS BRIEFING ON NEED FOR SENATE TO REAUTHORIZE THE USA PATRIOT ACT

ATTORNEY GENERAL ALBERTO R. GONZALES: We're going to pause, reflect and give thanks for all the blessings that they have received this year. And like the people say in London and Amman, some Americans are going to give thanks that we haven't had another terrorist attack here in America. The people at the Department of Justice, the people of Homeland Security, I would like to thank Secretary Mike Chertoff for being here, have worked very hard, along with the other people in the Bush administration in doing what we can do to protect America from another attack here in this country. For the past four years, the tools of the Patriot Act have been extremely viable in allowing us to deter and prevent attacks, to prosecute terrorism, and to prosecute other kinds of crimes. In ten days 16 of the provisions of the Patriot Act are scheduled to expire. That would be bad for this country. It would have serious operational consequences for the Department of Justice, including the Federal Bureau of Investigation. Generally if we were to lose these tools, it would mean that certain authorities could no longer be used beginning January 1.

It would mean that authorities that we use to allow us to be more efficient in responding to threats would no longer be available. And finally, it would mean that we would not be able to communicate the way that we need to communicate. Certain types of information, for example, obtained from grand jury testimony or wiretaps could not be shared with the intelligence community. It would re-erect the wall. It would create uncertainty. Bob Mueller tells me that his agents would be hesitant in sharing of information, wanting first to consult with the U.S. Attorney or perhaps a federal judge when unsure whether the information could be properly shared. So it would severely hamper the operations of the Department of Justice.

There are critics, some critics of the Patriot Act who say this is about civil liberties. They present a false choice to the American people. This is not a choice between civil liberties and the Patriot Act. The Patriot Act includes many protections for liberties, and that's why the Department of Justice has been outstanding these past four

years. The conference bill includes 30 additional safeguards of civil liberties. If you look at what some people consider the most controversial provisions, section 215, business records provision, and national security letters, under the conference bill it is now clear that you can consult an attorney when you receive one of these orders, or letters. It is now clear that you can challenge these in court. It is now clear the Department of Justice has to make a public disclosure of the use of these authorities. It is now clear that the Inspector General of the Department of Justice is going to be auditing the way that these authorities are used. But this is not enough for some of the critics.

Their fear of abuse is so great that they want to impose additional burdens on these authorities. Burdens that are so great that it will in essence make them meaningless, useless, for the law enforcement community, even though these tools have been effective, and even though these tools have been used in a way that is protective of civil liberties. If the impasse continues, when Americans wake up on January 1, we will not be as safe. This may not be evident those first few weeks, or even the first few months, but we will not be as safe because we are facing an enemy, as the President reminded us this morning, that's very patient, and very diabolical. And so that is what is at stake in the reauthorization of the Patriot Act, and that is why the Senate needs to act to reauthorize the Patriot Act and vote on the conference bill. As the President said, the house has left town. We do not have the opportunity for an extension. The options are to either let the Patriot Act expire or to vote to allow the reauthorization of these provisions. Mike?

HOMELAND SECURITY SECRETARY MICHAEL CHERTOFF: I'm happy to come over and join the Attorney General in the part of our effort to make sure that the Patriot Act does in fact continue in force into the next year. I know that, as the Attorney General begins every morning, looking at what the threats are and what's going on in the world. And I know I spend time lying awake at night worrying about what might come next. The number one tool in defending this country is intelligence. Gathering it, investigating it, and sharing it. If we don't have the full ability to use the tools of gathering, sharing and using intelligence, we are putting very important weapons in the war on terror down on the ground and walking away from them. And I don't think that's anything we can afford to do. You know, we are lucky in this past year, we have been spared a terrorist attack. And a lot of that luck is luck that we made because we were very aggressive in using these tools appropriately, but wisely and effectively. Other parts of the world have not been so lucky. We've seen the damage that can be done in bombs in Jordan and London. And the take-away message from this is that the threat is still very much alive. Those who want to carry on the war against us are still committed to doing so. And they will continue to keep trying. Our line of defense is a line with intelligence and investigation. And the patriot act gives us the ability to do that in a way that respects the constitution, respects the civil liberties, but gets the job done. Let me make one other observation. I spent a lot of years as a line prosecutor at the Department of Justice, and as the head of the Criminal Division in this building. Many of the tools which we are talking about using in the patriot act against terrorists are tools that have been used for years in the decades against drug dealers, or people involved in white collar crime. And they've been used effectively and they've been used without there being a significant impact on civil liberties.

The question I ask myself when I hear people criticize roving wiretaps, for example, is, why is this something that we use successfully and prudently in the area of dealing with marijuana importers, but yet a tool that people want to deny us in the war against people who want to import chemical weapons or explosives. That makes no sense to me. Why is it, for example, that delayed notification search warrants, which again, we use in all kinds of garden variety criminal cases, with the supervision of a judge, why should that tool be denied to our investigators when they're seeking to go into a house with a search warrant to see if there are explosives there, or other kinds of weapons that can be used against Americans.

Common sense the tools that have been used without any significant impact on civil liberties in a wide variety of cases over the last 10 or 20 years, ought to continue to be available here against perhaps the greatest threat we face in this country, which is the threat of terror. So I'm here to join the Attorney General in urging the members of the Senate to finish the job that was accomplished by the house, that was accomplished by the conference.

We've been working towards this for four years. We've known this was coming. It's not a surprise. There's been a lot of debate. There have been, I think, two dozen hearings on this. There have been dozens of witness whose have testified. There's really nothing more to be done but to complete the work that's been in process really for the last several years. If we don't get that work done, I agree with the Attorney General, we're going to wake up on January 1, and we will have left some of the most important weapons against terror in the cupboard, unavailable to be used by our front line defenders.

ATTORNEY GENERAL: Okay. We'll take a few questions.

REPORTER: I wondered why, you had said that, you were told it was difficult, if not impossible to get Congress to reauthorize the FISA, the warrant for eavesdropping. How is it that you and the administration can enforce the resolution, granted the authorization that is impossible to get in another...

[Inaudible]

ATTORNEY GENERAL: I'm here to talk about the Patriot Act. But I will answer the one question, because I read the quote. Someone showed me the quote in *The Washington Post*. What I said, or what I surely intended to say, if I didn't say is that we consulted with leaders in the congress about the feasibility of legislation to allow this type of surveillance. We were advised that it would be virtually impossible to obtain legislation of this type without compromising the program. And I want to emphasize the addition of, without compromising the program. That was the concern. [Inaudible]

This is the last question I'll answer with respect to the matter relating to the NSA. I have no reason -- I don't know the reason. I'm not going to speculate why a judge would step down from the FISA court. If you're asking about the legality of the program. I came out on Monday and explained the administration's position, the legal rationale for the legality of the program. We believe the President has both the statutory authority and constitutional authority to engage in the intelligence during a time of war with our enemy. Any questions regarding the Patriot Act?

REPORTER: A combination question. There are reports that there were some domestic call-to-call tapping into by the new NSA provisions. What assurances can you give that that didn't happen, and is that part -- becoming part of the debate about the Patriot Act?

ATTORNEY GENERAL: Well, I don't know if it's going to be part of the debate about the Patriot Act. I'm not going to answer the first part, because I said I wouldn't answer any more questions about the NSA. But in my remarks, the way the Department of Justice and other government agencies have administered or use the authorities of the Patriot Act, during the past four years, they have been analyzed and scrubbed and reanalyzed and rescrubbed. And the record is an exceptional one. We take very seriously what our responsibilities are in exercising these tools.

REPORTER: As the Secretary Chertoff said, these are not extraordinary tools. They have been used for -- many of these tools have been used for decades dealing with a wide variety of crimes. Nonetheless, we understand that there are extraordinary responsibilities upon those of us in government in exercising these tools in a way to ensure that we exercise them consistent with the authorization, and consistent with the protection of civil liberties. The people on the hill, they're patriots as well. Why are they so adamant about fighting the provision?

ATTORNEY GENERAL: That is a good question. Secretary Chertoff is right, we -- we've known this day for four years, December 31. We knew this day was coming. There have been 23 hearings just this year. Over 60 witnesses. I, myself, testified three times. There's been a great deal of debate and discussion. There is a process in our congress about how legislation is passed. The house passes a bill, the senate passes a bill. They each did that. It then goes in a conference to work out the differences. There is a conference bill that is produced. That

occurred here. And now the house and the senate should be voting on the conference bill. If one body decides they don't like what's in the conference bill, if they decide to filibuster every time because they don't like what comes out of the conference bill, we would have very few laws passed here in Washington. We've had ample time and opportunity to review the authorities of the patriot act, how those authorities have been exercised. There's no guarantee in three months or six months or nine months that we will be able to reach a compromise, or that the compromise reached would be one that would be -- that would ensure the protection of Americans in this country. And therefore, we strongly believe the time to act is now.

SECRETARY CHERTOFF: Let me just add one thing. Because I've got to confess, this makes me scratch my head sometimes. I was involved as the attorney general, both in different capacities, in the original framing of the Patriot Act. There's been a lot of time to identify potential flaws. Some of the potential flaws -- I think all of the potential flaws were actually acknowledged in the run up to this reauthorization. The Attorney General endorsed some changes. So I look to see what's left. And it, frankly, puzzles me. I see people expressing concern, for example, about roving wiretaps. I say, well, why has that never been a concern with respect to all the years we used it against drug dealers or marijuana importers? Or for that matter, in the four years since we had the Patriot Act. I've heard concern about, you know, the standard for obtaining information with respect to business records. That standard is higher under the Patriot Act than it is in garden variety fraud cases. So you kind of present the American people with a little bit of a schizophrenic situation here. On the one hand, in all kinds of garden variety crimes, we have tools that we routinely use, always upheld by the courts, day in and day out, and they continue on. And when we do a terrorist, which I think certainly are at the top of anybody's list of things we have to be concerned about, not only have we raised the protections higher, but now we're hearing complaints that they're not high enough. I don't question anybody's pa terrorism, but I do think you've got to stand back and use common sense and recognize what we're asking for here is, adapting proven tools that have been used responsibly for decades in perhaps the struggle that is the most significant struggle we face in this country.

REPORTER: Attorney General Gonzales, if the Senate does not reauthorization the provisions of the Patriot Act, does the President have the ability to give the go ahead for these procedures on his own?

ATTORNEY GENERAL: What I will say is, we continue to have hope that these provisions will be reauthorized. If they're not reauthorized, we will look at the department of Homeland Security and other agencies throughout the government to see what authorities will exist and we will do what we can do under existing authorities to continue to protect America.

REPORTER: Attorney General, members of the hill have posed this open question indicating that now that the President has -- or has used this authority, to use this NSA program, why is the Patriot Act needed at this point? And what gaps does the patriot act fill when there is this program that you have already in existence that very few people know about?

ATTORNEY GENERAL: Well, again, I'm not going to talk about the NSA program. These authorities have been effective. We can give you example after example where these authorities have been effective. The authorities have not been abused. The law enforcement community has been very adamant about the need, the continued need for this program. And for these -- for this reason this program -- the patriot act should be reauthorized, the tools under the patriot act should be reauthorized.

REPORTER: The President on numerous occasions has cited the example of the Farris case is why we need to renew the Patriot Act. Yet in arguing with *The New York Times*, they also cited the same, case. The Iman Farris n case. Which was it that allowed that case to take place?

ATTORNEY GENERAL: I don't know how to answer -- I don't know the answer to that question. I haven't record *The New York Times* story, so I don't know the answer to that question. Mike, do you know?

REPORTER: Is that an example of the reason we need the Patriot Act?

ATTORNEY GENERAL: I don't recall doing that, no. But we can certainly give you an answer. We can go back and look at that and give you an answer. Thank you very much.

###

Goodling, Monica

From: USDOJ- Office of Public Affairs
Sent: Friday, December 16, 2005 3:56 PM
To: USDOJ- Office of Public Affairs
Subject: TRANSCRIPT OF REMARKS BY ATTORNEY GENERAL ALBERTO R. GONZALES AT THE 'INNOCENCE LOST' INITIATIVE PRESS CONFERENCE

Attachments: Picture (Metafile); Picture (Metafile)



Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, DECEMBER 16, 2005
WWW.USDOJ.GOV

AG
(202) 514-2007
TDD (202) 514-1888

TRANSCRIPT OF REMARKS BY ATTORNEY GENERAL ALBERTO R. GONZALES AT THE 'INNOCENCE LOST' INITIATIVE PRESS CONFERENCE

MR. GONZALES: Good afternoon. I am joined by Assistant Director Chris Swecker from the FBI, Assistant Attorney General Alice Fisher of the Criminal Division, and John Rabun, Vice President of the National Center for Missing and Exploited Children.

We're here to talk about import successes in the "Innocence Lost" initiative, an ongoing national investigation into child prostitution in the United States.

Our society has no place for those who prey on children and no tolerance for child prostitution or sex trafficking. And that's why the Justice Department launched the Innocence Lost initiative more than two years ago to help stop this terrible practice.

Within the past two days, we've unsealed indictments and criminal complaints in Pennsylvania, New Jersey, Michigan and Hawaii, charging more than 30 individuals with crimes related to child prostitution. And we've arrested 19 people for their alleged roles in this sex trafficking across America. And several more perpetrators remain at large, and we're working to bring them to justice.

As a result of these recent investigations and arrests, we have rescued more than 30 children from prostitution. Some were as young as 12 years old.

The abhorrent acts alleged in these charges include children being herded around the country as sex slaves, forced to work as prostitutes in brothels and at truck stops, and beaten at the hands of pimps and peddlers.

In one case, young children were coaxed into the car of a defendant and then held for days with threat of physical harm if they tried to escape. These young girls were forced to perform sex acts while the defendants watched and collected money from patrons.

The alleged perpetrators of these crimes will, we hope, be brought to justice as a result of these arrests and indictments. They are, of course, presumed innocent unless and until proven guilty.

As part of Innocence Lost, the National Center for Missing and Exploited Children brings together federal, state and local law enforcement for a joint training program. The results to date have been impressive. In two-and-a-half years, 200 child victims have been rescued, and we've collected more than 500 arrests, 70 indictments and 67 convictions.

These numbers represent remarkable progress. Thanks in large part to the efforts of local law enforcement, we've nearly doubled the number of arrests, indictments and convictions in just the last few months.

Today we add to those totals. But the true impact of the Innocence Lost initiative can only be measured in human terms. We have a responsibility to protect America's children. So we're continuing to track down those who would steal away their hopes and dreams in this despicable manner.

Bearing this responsibility are a number of investigators, prosecutors and professional staff from the Justice Department, the FBI, the National Center for Missing and Exploited Children, and state and local law enforcement agencies across the country. And I'd like to thank them for the work that has led to today's successes and their continued diligence in this important effort.

Thank you.

MR. SWECKER: Thank you, Mr. Attorney General. And I want to thank the Justice Department and the Attorney General's personal support behind this initiative. This is something that we know is near and dear to his heart.

Now I want to underscore what he just said. As you know, the domestic trafficking of children for the purpose of prostitution is a significant crime problem and is national in scope. According to a study by the University of Pennsylvania, there are approximately 300,000 youth currently at risk of becoming victims of commercial and sexual exploitation in the United States.

The average age of a child who enters into prostitution is 14, with some as young as 9 years old. A large percentage of these children run away from home because of physical, sexual and psychological abuse. Prostitution is a continuation of the victim's sexual exploitation, not the beginning. These children are victimized many times over, not just by the predators that entice them or force them into prostitution, but also by the customers, and even the legal system, which often fails to treat them like victims.

To combat this heinous crime, in June '03, the FBI launched a national initiative in conjunction with the Justice Department, CEOS, called Innocence Lost. Our mission was to establish taskforces, share intelligence and train personnel on how to identify and disrupt these highly organized rings that lure children into prostitution.

An important part of this effort was training. In the spring of '03, we teamed with the National Center for Missing and Exploited Children, DOJ's Child Exploitation and Obscenity Section, to provide training to interdisciplinary teams of FBI agents, local law enforcement officers and social service providers. Six such training sessions were held at the National Center for Missing and Exploited Children and sponsored by them, and over 350 key personnel have been trained. The partnership between NCMEC, CEOS and out state and local partners was a major factor in the over 100 percent jump in arrests just in the last year.

The mobility and multi-jurisdictional nature of these investigations made it critical for law enforcement to join together and enlist our community partners to address this matter. Initially, 14 field offices were identified as having the highest incidence of child prostitution.

In your packet you'll find a map, and I hope also a CD that has the pictures of the outstanding fugitives in this case.

These cases are manpower intensive, intelligence-driven and make use of not only standard techniques but very technical surveillance-type techniques, undercover operations, cooperating witnesses, et cetera. Over 500 arrests in the last two years.

I would encourage you also to go to our website, www.fbi.gov. That's where we also have the pictures of the fugitives also posted. So, if you get a chance to promote the website, we would ask that people go there and they can pick up the pictures of the fugitives that we have outstanding. And we need the public's help in trying to get them apprehended.

Thank you very much. And let me introduce John Rabun, Vice President and Chief Operating Officer of the National Center for Missing and Exploited Children.

MR. RABUN: This is a momentous occasion, because in my history, first as a minister, second as a trained social worker, and third as a law enforcement officer, for 34 years in crimes against children work, trying to protect children, this Attorney General directed the entire Justice Department, including the FBI, to pay attention to kids. That's what this is all about.

These are not the little waifs that we like to see on the advocacy cards that come, you know, about missing children. These are not the little bitty, you know, knee-high sized kids that are so cute. These are teenagers, many of which don't even recognize that they're victims. They're hidden. They're hidden not only from us, the public, they're hidden from us in law enforcement. We haven't had the skills to know who they are, what they look like, how they act, what they do, where they do it. We hear about them.

But we like to think that that happens in other countries. That never would happen, you know, in Washington. It would never happen where I live in Herndon. Certainly wouldn't happen wherever you live. We're wrong. It happens in all of those places.

This initiative has helped train law enforcement to recognize those hidden victims, to deal appropriately with them, not just in the way we've always as law enforcement officers dealt with adult criminals. We know how to do that. These are children, even when some of them don't act like it.

This has been a huge undertaking, and one that continues to go on, and I trust will go on, as we further train local and state law enforcement at the Center to support the federal effort. There are trained social workers accompanying these officers so that these kids are treated in the right -- and I mean in a therapy sense -- treated in the right way.

This is a multi-disciplinary effort. That's what we're all about. It's incredible. And I want to take a second to thank Ms. Fisher for giving us Drew Oosterbaan, the head of CEOS, to work with us; to thank Chris for giving us Dave Johnson, the Unit Chief, and Agent McFinnerty, who works at our offices, Jamie Codsence, who is the analyst who works at our office, because we've shown together, as a team, a private sector charity, the U.S. Justice Department, that if we're willing to work together, we in fact can rescue the kids.

And Mr. Attorney General, it's more than words come to me, you know, to have the might and the majesty of the United States Department of Justice, you know, come forward to save kids and to say you count is unbelievable from where I sit. And it's particularly poignant, I think, in a day when we of a people of the Book say, "For to us, a child is born."

Thank you, Attorney General.

MR. GONZALES: Questions?

QUESTION: What was your role in providing the legal justification for the President's decision in 2002 to approve NSA?

MR. GONZALES: Questions relating to this operation first. Any questions relating to the program? Okay.

And let me just say that as you know, we do not comment and will not comment on intelligence matters. We are engaged in a struggle against terrorism, and the President feels a constitutional duty to wage that war aggressively in order to defend the American people, but to do so in a way that is consistent with the Constitution, and consistent with the laws. He understands the duty not only to defend this country, but to defend civil liberties. And that's my answer to your question.

Yes ma'am?

QUESTION: Sir, there is a statute on the books, 18 USC 2511.2(f), that says electronic surveillance must be conducted -- excuse me -- only according to the rules of FISA. Did this Executive Order amount to an effective repeal of 2511 --

MR. GONZALES: Again, I'm not going to talk about the New York Times story or about ongoing -- possible ongoing intelligence.

QUESTION: Will you follow the law?

MR. GONZALES: Of course we follow. I just gave my answer to that question as to whether or not we follow the law. Our priorities are to defend this country and to do it in a way that's consistent with the law.

Yes?

QUESTION: General, I know you say -- you're saying you cannot comment because it's an ongoing intelligence matter, but --

MR. GONZALES: What I said, I don't -- if I said that, let me clarify that. We're not going to comment on intelligence matters.

QUESTION: But don't the American people deserve to know what the country is doing, the government is doing in the name of security?

MR. GONZALES: Well, let me just say, as a general matter, without commenting on a particular -- on a particular story or on a particular program, there are ways that the American people may be advised about the activities of its government. For example, there may be classified briefings that are provided to members on the Hill. And as you know, as you well know, that oftentimes there are decisions made in laws that reflect a decision by Congress that certain kinds of communications need not be shared, that they are privileged. There are certain kinds of communications recognized in our courts that deserve confidentiality, certain matters related to privilege.

And so there is a basis. You don't -- there is a basis or -- types of information that for a variety of reasons, national security being one, that it is important to try to maintain confidentiality.

I certainly respect and understand the need for the American people to understand what their government is doing. And, obviously, we respect that and we try to make information available to the American people, but we also have a corresponding duty to ensure that national security is protected.

QUESTION: Let me ask a question on the other end of this, if I may.

MR. GONZALES: Can I take a question from anybody else?

QUESTION: Well, I mean, let me try another way to see if I can draw you out just a little bit. Understanding that you're not going to confirm any program, but if a program of the kind that we're talking about did exist --

MR. GONZALES: I'm not going to talk about -- answer a hypothetical question.

QUESTION: The question is whether or not it could be helpful with prosecutions, or whether this kind of information --

MR. GONZALES: Let me just say --

QUESTION: -- can be useful to prosecutions --

MR. GONZALES: Let me just say that winning the war on terror requires winning the war of information. We are dealing with a very dangerous, very patient, very diabolical enemy who wants to harm America. And in order to be effective dealing with this enemy, we need to have information. That's very, very important. And so we will be aggressive in obtaining that information, but we will always do so in a manner that's consistent with our legal obligations.

Last question.

QUESTION: I just wanted to ask you on the other end of this, will you undertake or have you been asked to undertake an investigation into how this information was leaked?

MR. GONZALES: Again, we normally would not comment as to whether or not the Department is involved in an investigation or engaged in an investigation.

Okay.

QUESTION: I'm not sure where things stand at this very moment, but what's the latest you're hearing and how do operate without a Patriot Act for the -- if that's what comes to be here?

MR. GONZALES: We're not even thinking that way. We are working hard to get the reauthorization approved by the Senate. It's very important to the Department, and so I'm optimistic that we'll be able to continue to use these tools beyond December 31st.

QUESTION: I hear cloture did not happen.

MR. GONZALES: I haven't heard that, so, I can't comment on that.

Thank you.

###

Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Wednesday, December 21, 2005 6:04 PM
To: Elwood, Courtney
Subject: RE: IN CASE YOU MISSED IT: President Had Legal Authority To OK Ta ps

My major disagreement with this, I think, is that the President's inherent authority to conduct electronic surveillance or physical searches in the *absence* of legislation is not the same as his inherent authority to do so in the *presence* of such legislation.

102

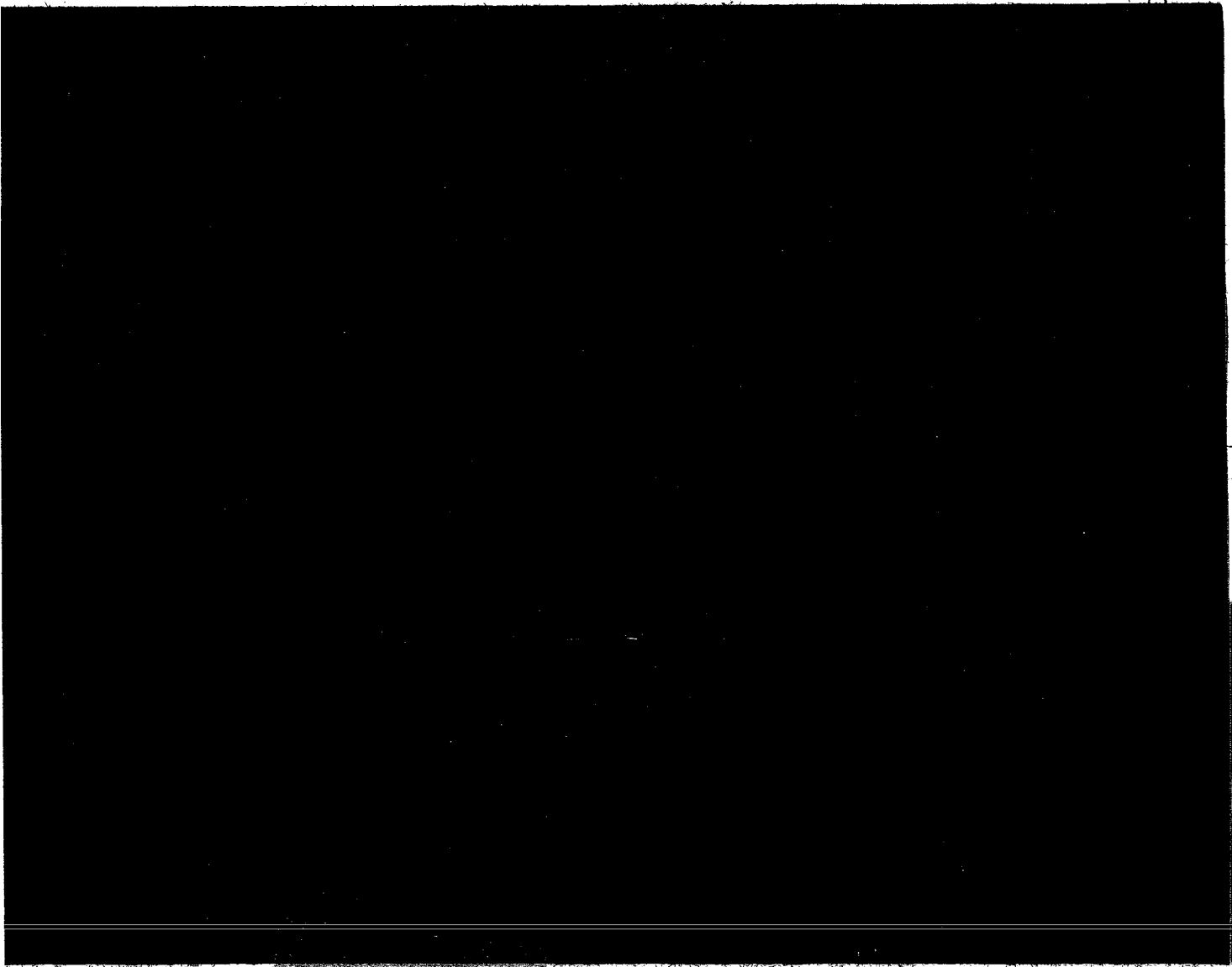
-----Original Message-----

From: Courtney.Elwood@usdoj.gov [mailto:Courtney.Elwood@usdoj.gov]
Sent: Wednesday, December 21, 2005 3:37 PM
To: Kris, David
Subject: Fw: IN CASE YOU MISSED IT: President Had Legal Authority To OK Taps
Importance: Low

I am sure you saw this.

Sent from my BlackBerry Wireless Handheld

Not responsive to request



LEGAL AUTHORITY FOR THE RECENTLY DISCLOSED NSA ACTIVITIES

1. In response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency (“NSA”) that he has authorized since shortly after 9/11. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. Leaders of Congress from both parties were briefed on these activities more than a dozen times.
2. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks. The surveillance conducted here is at the heart of the need to protect the Nation from attacks on our soil, since it involves communications into or out of the United States of persons linked to al Qaeda.
3. Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty, a point Congress recognized in the preamble to the Authorization for the Use of Military Force (“AUMF”) of September 18, 2001, 115 Stat. 224 (2001): “[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”
 - A. This constitutional authority includes the authority to order foreign intelligence surveillance within the U.S. without seeking a warrant, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority”); *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (collecting authorities). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished foreign threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972) (“*Keith*”).
 - B. Presidents of both parties have *consistently asserted* the authority to conduct foreign intelligence surveillance without a warrant. At the time FISA was passed, President Carter’s Attorney General stated explicitly that the President would interpret FISA not to interfere with the President’s constitutional powers and responsibilities. Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (testimony of Attorney General Griffin Bell). President Clinton’s Deputy Attorney General, Jamie Gorelick, explained to the House Intelligence Committee that “[t]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes, and that the President may, as has been done, delegate this authority to the Attorney General.” (July 14, 1994).

- C. As Justice Byron White noted almost 40 years ago, “[w]iretapping to protect the security of the Nation has been authorized by successive Presidents.” *Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring).
4. The President’s constitutional authority to authorize the NSA activities is supplemented by statutory authority under the AUMF.
- A. The AUMF authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States.” § 2(a). The AUMF clearly contemplates action within the U.S., *see also id.* pmbl. (the attacks of September 11 “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad”); it is not limited to Afghanistan. Indeed, those who directly “committed” the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.
- B. A majority of the Supreme Court has explained that the AUMF “clearly and unmistakably authorize[s]” the “fundamental incident[s] of waging war.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion of O’Connor, J.); *see id.* at 587 (Thomas, J., dissenting).
- C. Communications intelligence targeted at the enemy is a fundamental incident of the use of military force; we cannot fight a war blind. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the U.S. intercepted telegrams into and out of the country. The AUMF uses expansive language that plainly encompasses the long-recognized and essential authority to conduct traditional communications intelligence targeted at the enemy.
- D. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President’s “authority is at its maximum.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).
5. The President’s authorization of targeted electronic surveillance by the NSA is consistent with the Foreign Intelligence Surveillance Act (“FISA”).
- A. Section 2511(2)(f) of title 18 provides that the procedures of FISA and two chapters of title 18 “shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.” Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance to obtain the content of such international communications when intercepted on cables in the U.S., “except as authorized by statute.” 50 U.S.C. 1809(a)(1).
- B. By expressly excepting from its prohibition electronic surveillance undertaken “as authorized by statute,” section 109 of FISA permits an exception to the “procedures” of

FISA referred to in 18 U.S.C. 2511(2)(f) where authorized by another statute. The AUMF satisfies section 109's requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that the AUMF satisfies the requirement in 18 U.S.C. 4001(a) that no U.S. citizen be detained by the United States "except pursuant to an Act of Congress." See *Hamdi*, 542 U.S. at 519 ("it is of no moment that the AUMF does not use specific language of detention"); see *id.* at 587 (Thomas, J., dissenting).

- C. Even if it were also plausible to read FISA to contemplate that a subsequent statutory authorization must come in the form of an amendment to FISA itself, established principles of statutory construction require interpreting FISA to allow the AUMF to authorize necessary signals intelligence, thereby avoiding an interpretation of FISA that would raise grave constitutional questions.
6. If FISA were applied to prevent or frustrate the President's ability to create an early warning system to detect and prevent al Qaeda plots against the U.S., that application of FISA would be unconstitutional. The Court of Review that supervises the FISA court recognized as much, "taking for granted that the President does have" the authority "to conduct warrantless searches to obtain foreign intelligence information," and concluding that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717 (FISA Ct. of Review 2002).
 7. The NSA activities described by the President are fully consistent with the Fourth Amendment and the protection of civil liberties.
 - A. The touchstone of the Fourth Amendment is *reasonableness*.
 - B. The Supreme Court has long recognized that "special needs, beyond the normal need for law enforcement," will justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Courts have recognized that the Fourth Amendment implications of national security surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution. See, e.g., *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). See also *Katz v. United States*, 389 U.S. 347, 363-64 (White, J., concurring) (warrants not required "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable").
 - C. Intercepting calls into and out of the U.S. of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is such a "special need" and is clearly *reasonable* for Fourth Amendment purposes, particularly in light of the fact that the NSA activities are reviewed and reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate.
 8. FISA could not have provided the speed and agility required for the early warning detection system the President determined was necessary following 9/11.
 - A. In any event, the United States makes use of FISA to address the terrorist threat as appropriate, and FISA has proven to be a very important tool, especially in longer-term investigations.

B. The United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

9. Any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities.

Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Thursday, December 22, 2005 12:37 PM
To: Elwood, Courtney
Subject: Re: NSA talkers

Thanks, Courtney, these are very helpful and interesting. From a quick read on my BB, it looks like you guys are leading with Article II and using the AUMF as support, rather than leading with the AUMF interpreted broadly in light of constitutional avoidance doctrine, and then falling back to Article II. If I'm reading it right, that's an interesting choice -- maybe it reflects the VP's philosophy that the best defense is a good offense (I don't expect you to comment on that :-)). Thanks again for sharing these and I hope you have a nice holiday. I'll be in Texas (BB and cell: [REDACTED] until next Tuesday.

← FOIA EXEMPTION *bla*

(72)

-----Original Message-----

From: Courtney.Elwood@usdoj.gov
To: Kris, David
Sent: Thu Dec 22 12:05:26 2005
Subject: NSA talkers

FYI.

=====
This message is the property of Time Warner Inc. and is intended only for the use of the addressee(s) and may be legally privileged and/or confidential. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, he or she is hereby notified that any dissemination, distribution, printing, forwarding, or any method of copying of this information, and/or the taking of any action in reliance on the information herein is strictly prohibited except by the original recipient or those to whom he or she intentionally distributes this message. If you have received this communication in error, please immediately notify the sender, and delete the original message and any copies from your computer or storage system. Thank you
=====

(60)

Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Tuesday, December 20, 2005 6:23 PM
To: Elwood, Courtney
Subject: If you can't show me yours ...

Attachments: tmp.htm; NSA Program Questions (12-20-05).doc



tmp.htm (4 KB)



NSA Program Questions (12-20-05).doc

Courtney --

FOIA EXEMPTION b6

I haven't spoken to Senator Feinstein -- she was supposed to call me but hasn't yet -- but in the meantime I wrote the attached. It is a VERY rough cut -- done quickly, without the facts, and in part while playing with [REDACTED]. If you or others inside DOJ want to clear up my muddled thinking on any issue, of course I'd be happy to hear your views. I figured this might be a kind of stopgap measure pending your decision on whether to make public OLC's analysis. Thanks,

-- David

David S. Kris
Chief Ethics and Compliance Officer
Time Warner Inc.
NY Tel: 212-484-7803
DC Tel: 202-530-7877
NY & DC Fax: 212-202-4381
Mobile: 301-537-6547
E-Mail: <mailto:david.kris@timewarner.com> david.kris@timewarner.com
One Time Warner Center 800 Connecticut Avenue, NW
14th Floor Suite 1200
New York, NY 10019 Washington, DC 20006

=====
This message is the property of Time Warner Inc. and is intended only for the use of the addressee(s) and may be legally privileged and/or confidential. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, he or she is hereby notified that any dissemination, distribution, printing, forwarding, or any method of copying of this information, and/or the taking of any action in reliance on the information herein is strictly prohibited except by the original recipient or those to whom he or she intentionally distributes this message. If you have received this communication in error, please immediately notify the sender, and delete the original message and any copies from your computer or storage system. Thank you
=====



As I see things, the statutory and constitutional validity of the NSA surveillance program turns on the answers to five questions. I've tried to sketch out some discussion of the answers to those questions below. This is still a very rough draft, and I would want to think a lot more before saying anything definitive.

1. Did NSA engage in "electronic surveillance" as defined in FISA?

The answer to this question is almost surely "Yes." The Attorney General described NSA's conduct as "electronic surveillance of a particular kind, and this would be intercepts of contents of communications where . . . one party to the communication is outside the United States." (12/19/05 briefing). Implicit in the Attorney General's statement is that one party to the communication is inside the United States, and FISA's definition of "electronic surveillance" includes "the acquisition . . . of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States," apart from hacker communications. 50 U.S.C. § 1801(f)(2). Other subsections of the definition could also come into play, particularly if the target of the surveillance is a United States person – e.g., a citizen or green-card holder. See 50 U.S.C. § 1801(f)(2). No one has disputed that whatever NSA is doing, it is "electronic surveillance" as defined in FISA.

2. Did Congress in 1978 intend FISA's procedures (or those in Title III) to be the "exclusive means" by which the President could conduct "electronic surveillance" as defined in FISA?

Here too, the answer seems to be "Yes." A provision of FISA that is now codified at 18 U.S.C. § 2511(2)(f) provides in relevant part that "procedures in . . . the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in [50 U.S.C. § 1801(f)] . . . may be conducted" (emphasis added). The language of this "exclusivity provision" as a whole could be clearer,¹ but when read in light of FISA's legislative history its meaning is hard to avoid. The House Intelligence Committee's 1978 report on FISA explains (at page 101) that, "despite any inherent power of the President to authorize warrantless electronic surveillances in the absence of legislation, by [enacting FISA and Title III] Congress will have legislated with regard to electronic surveillance in the United States, that legislation with its procedures and safeguards prohibit[s] the President, notwithstanding any inherent

¹ Section 2511(2)(f) now provides as follows: "Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted."

powers, from violating the terms of that legislation.”² Congress recognized that the Supreme Court might disagree, but the 1978 House-Senate Conference report expresses an intent “to apply the standard set forth in Justice Jackson’s concurring opinion in the Steel Seizure Case: ‘When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Congress over the matter.’ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).”³

3. What are the “procedures” in FISA to which the exclusivity provision refers?

This is a bit of a tricky question. FISA creates the Foreign Intelligence Surveillance Court (FISC) and gives it “jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter.” 50 U.S.C. § 1803(a) (emphasis added). Thus, the “procedures” in question seem at a minimum to include those governing the FISC’s review and approval of FISA applications, which are set forth in 50 U.S.C. §§ 1804 and 1805 (for electronic surveillance), and require, among other things, the government to assert and the FISC to find “probable cause” that the target of the surveillance is a foreign power or an agent of a foreign power. The “procedures” in FISA would also presumably include any other rules under which the statute specifically authorizes electronic surveillance – i.e., the four situations set out in FISA in which electronic surveillance may be conducted (at least temporarily) even without FISC approval: (1) surveillance of communications systems used exclusively by foreign powers where there is no substantial likelihood of acquiring a U.S. person’s communications (50 U.S.C. § 1802); (2) emergencies (50 U.S.C. § 1805(f)); (3) training and testing (50 U.S.C. § 1805(g)); and (4) immediately following a declaration of war by Congress (50 U.S.C. § 1811). In short, the “procedures” to which the exclusivity provision refers appear to be those procedures in FISA under which electronic surveillance is specifically authorized.

There is an alternative reading under which FISA’s “procedures” could include those of any other statute, beyond FISA itself, that authorizes electronic surveillance. FISA contains provisions that establish criminal and civil liability for persons who intentionally “engage[] in electronic surveillance under color of law except as authorized by statute.” 50 U.S.C. §§ 1809 and 1810 (emphasis added). If these civil and criminal provisions are part of the “procedures” in FISA to which the exclusivity provision refers, then perhaps the exclusivity provision permits electronic surveillance not only as specifically authorized by FISA itself, but also electronic surveillance as authorized by any statute, including statutes other than FISA (and Title III, which as noted above is specifically cited in the exclusivity provision). This reading is a stretch, in my view,

² See also FISA Senate Judiciary Report at 64 (FISA “puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in [Title III and FISA]”); FISA Senate Intelligence Report at 71 (same).

³ FISA House Conference Report at 35.

because the civil and criminal penalty provisions in FISA are not really procedures for conducting electronic surveillance; they are penalty provisions for unauthorized electronic surveillance. However, if this reading were adopted, then the next question, discussed in 4 below, could be easier to answer.

Intermission.

Let's pause for a minute and review the bidding. The analysis so far is that (1) NSA was engaged in "electronic surveillance" as defined in FISA; (2) Congress in 1978 intended "electronic surveillance" to be conducted exclusively under FISA's procedures; and (3) those procedures permit electronic surveillance only as specifically authorized in FISA itself (although there is an alternative reading that FISA, through its civil and criminal penalty provisions, incorporates by reference any other statute that authorizes electronic surveillance). Those are relatively easy questions, but now I think it gets a little harder. The next question is whether Congress at some point after 1978 enacted legislation (or its equivalent) that changes the answer to the second question. In other words, did Congress implicitly repeal or amend the exclusivity provision set out in 18 U.S.C. § 2511(2)(f)? If not, the fifth and final question is the constitutional one – *Steel Seizure* on steroids – of whether Article II empowers the President to violate FISA.

4. Did Congress implicitly repeal or amend the exclusivity provision?

I haven't done a comprehensive review of legislation enacted after 1978, but the only law that has been cited as authority for the NSA program is the Authorization to use Military Force (AUMF),⁴ enacted by Congress shortly after the September 11, 2001,

⁴ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF provides:

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) **IN GENERAL**—That the President is authorized 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.

(b) **War Powers Resolution Requirements**—

(1) **SPECIFIC STATUTORY AUTHORIZATION**—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) **APPLICABILITY OF OTHER REQUIREMENTS**—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

terrorist attacks. In *Hamdi v. Rumsfeld*,⁵ the Supreme Court held that the AUMF authorized the use of military detention. Although the AUMF did not refer specifically to such detention, it did authorize the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11 attacks, and the Supreme Court held that in some situations, the detention “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.”⁶

It would not be difficult for the government to advance the same argument with respect to intelligence gathering, which has always been part of warfare. Although electronic surveillance is obviously of more recent vintage, even FISA’s legislative history acknowledges that such surveillance has been conducted by all Presidents since technology allowed in the 19th and beginning of the 20th century. Electronic surveillance of telegraph signals was apparently conducted in the Civil War. See *Berger v. United States*, 388 U.S. 41, 45-46 (1967). Surveillance of purely domestic communications might raise separate issues than foreign or international surveillance,⁷ but international communications between the U.S. and Afghanistan, or between the U.S. and other locations subject to the AUMF, seem at least arguably within the ambit of what the AUMF authorized.

The more difficult question is determining the effect of the AUMF in light of FISA’s exclusivity provision. In *Hamdi*, Congress had enacted a statute, 18 U.S.C. § 4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The Supreme Court explained that “Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 et seq., which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II.”⁸ The *Hamdi* Court found that the AUMF was an “Act of Congress” and that detention pursuant to it therefore satisfied Section 4001.

To read the AUMF to overcome FISA, the government probably would have to go one step further than the Court went in *Hamdi*. Where 18 U.S.C. § 4001 merely required an Act of Congress to authorize every detention, FISA’s exclusivity provision provides that electronic surveillance may be conducted “exclusively” under FISA’s procedures. To rely on the AUMF, therefore, the government would have to argue that it implicitly repealed the exclusivity provision. That is particularly the case because FISA

⁵ 124 S. Ct. 2633 (2004).

⁶ 124 S. Ct. at 2640

⁷ Compare *Hamdi* (U.S. citizen first detained in Afghanistan), with *Padilla v. Rumsfeld*, 124 S. Ct. 2711 (2004) (U.S. citizen first arrested in the United States).

⁸ 124 S. Ct. at 2639.

already contains an exception for surveillance and searches conducted for 15 days following a genuine declaration of war, 50 U.S.C. § 1811,⁹ which the AUMF clearly was not. Congress has the authority to repeal the exclusivity provision, of course, but courts tend to disfavor implied repeals through ambiguous language.¹⁰ On the other hand, reading the AUMF as an implied repeal would allow resolution of the case on statutory grounds, and thereby avoid a constitutional question, in keeping with the doctrine of constitutional avoidance.¹¹ My sense is that the AUMF was not – and would not be found by courts to be – an implied repeal of FISA’s exclusivity provision, but I acknowledge that it’s a hard question.

The result could be different if courts adopted the alternative reading of FISA discussed above. If FISA’s “procedures” for electronic surveillance include those of any “statute,” the case would be more like *Hamdi*, at least if a joint resolution passed by both Houses of Congress and signed by the President is a “statute” as that term is used in the civil and criminal penalty provisions of FISA.¹²

5. What happens if the NSA surveillance was prohibited by statute?

If courts conclude that the AUMF does not authorize the NSA surveillance – *e.g.*, because it does not repeal the exclusivity provision – then a constitutional issue likely arises. Does the President’s Article II power allow him to authorize the NSA surveillance despite FISA? This is a monumental question, well beyond the scope of this little note. But I believe that the legal (and political) validity of the President’s argument would turn in large part on the operational need for the surveillance and the need to eschew the use of FISA. To take a variant on the standard example, if the government had probable cause that a terrorist possessed a nuclear bomb somewhere in Georgetown, and was awaiting telephone instructions on how to arm it for detonation, and if FISA were interpreted not to allow surveillance of every telephone in Georgetown in those circumstances, the President’s assertion of Article II power to do so would be quite persuasive. By contrast, claims that FISA simply requires too much paperwork or the bothersome marshaling of arguments seem relatively weak justifications for resorting to Article II power in violation of the statute. A lot turns on the facts.

-- David Kris
12-20-05

⁹ “Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”

¹⁰ *See, e.g.*, *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

¹¹ *Clark v. Martinez*, 543 U.S. 371, ___ (2005).

¹² Even if it does not repeal the exclusivity provision, the AUMF might add some patina of Congressional endorsement to the President’s assertion of constitutional authority to violate FISA. Even if it did not shift the case out of Justice Jackson’s third *Steel Seizure* category – where the President acts in contravention of Congress’ will – it might represent at least a move on the “spectrum running from explicit congressional authorization to explicit congressional prohibition.” *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

-----Original Message-----

From: David.Kris@timewarner.com <David.Kris@timewarner.com>
To: Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>
Sent: Thu Jan 19 23:31:45 2006
Subject: RE: NSA

Not responsive to request



tmp.htm (6 KB)

Courtney

I'm making my way through the whitepaper now, and of course it's very professional and thorough and well written. I kind of doubt it's going to bring me around on the statutory arguments -- which I have always felt had a slightly after-the-fact quality or feeling to them -- but you never know, and in any event I can respect the analysis even if I don't fully agree. And I will remain open on the constitutional arguments, which is what I have always felt this was really about; I just don't feel I have much to say on the constitutional issues without knowing the facts.

But I do have one fairly minor question about this whitepaper that I may as well send you now. I am a little puzzled as to why you guys didn't rely more heavily on footnote 54 on page 100 of the 1978 House Intelligence Committee Report. You have the New York Telephone case cited and you make the pen-trap argument (on page 22), but I would have thought you'd put footnote 54 in neon lights.

Talk to you later.

-- David

Not responsive to request