Defending Liberty
Pursuing Justice

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

February 13, 2006

The Honorable F. James Sensenbrenner, Jr., Chair
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515-6415

The Honorable John Conyers, Jr., Ranking Minority Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515-6415

Dear Chairman Sensenbrenner and Representative Conyers:

Last month I appointed a distinguished and bipartisan task force of lawyers to address issues and concerns regarding the program of domestic electronic surveillance being conducted by your Administration outside the FISA process. The membership included a former Director of the FBI, a former general counsel of the CIA, a former general counsel of the NSA, former chairs of the ABA Standing Committee on Law and National Security, former federal prosecutors and others possessing great expertise in constitutional and national security law. That task force unanimously brought forward to our House of Delegates a set of recommendations on the subject which were adopted today by an overwhelming vote of that body. I enclose a copy of the recommendations, accompanying report and roster of the membership.

We hope that your Committee will give serious consideration to these recommendations. We join with you in the conviction that terrorism must be fought with the utmost vigor, but we also believe we must ensure this fight is conducted in a manner reflective of the highest American values. We would welcome the opportunity to testify at any hearings your Committee may hold on this subject. Please contact Robert D. Evans, Director of our Washington Office, if such an opportunity is possible.

Very truly yours,

Michael S. Greco

Michael S. Greco

> which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others involved in intelligence collection that their acts are authorized by statute and, if a U.S. person's communications are concerned, by a court order. And it will protect the privacy of the American people.
>
> In short, the act helps to solidify the relationship of trust between the American people and their Government. It provides a basis for the trust of the American people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that intelligence relating to national security can be securely required, while permitting review by the courts and Congress to safeguard the rights of Americans and others.

See Statement on Signing S.1566 Into Law, October 25, 1978, available at: http://www.cnss.org/Carter.pdf.

FISA applies to "electronic surveillance" which, among other things, would include the electronic acquisition, within the United States, of the content of communications to or from the United States or of communications of a "United States person" located in the United States. 50 U.S.C. § 1801 (f). A "United States person" includes, among others, U.S. citizens or permanent resident aliens. The Administration has never questioned, and in fact, has conceded, that the NSA surveillance program meets FISA's definition of "electronic surveillance."[10]

With certain exceptions, FISA requires that to conduct "electronic surveillance" the government must obtain a court order from a special, secret court created by FISA known as the FISA court. To obtain such an order, a federal officer must certify that "a significant purpose" of the surveillance is to obtain foreign intelligence information and provide a statement describing, among other things, the basis for the belief that the information sought is foreign intelligence information. 50 U.S.C. § 1804 (a)(4) and (7). The court will issue an order authorizing the surveillance upon making a series of findings, including that there is probable cause to believe that a target of the electronic surveillance is a foreign power or agent of a foreign power and that the surveillance is directed at facilities used, or about to be used, by a foreign power or agent of a foreign power. *Id.* at § 1805 (a) and (b). A "foreign power" includes international terrorist groups and an "agent of a foreign power" includes a person other than a United States person engaged in international terrorism. *Id.* at §1801(a)(4) and (b)(1)(C).

---

[10] Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at: www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

FISA provides a number of exceptions, two of which are of particular significance. First, it permits electronic surveillance without first obtaining a court order, in situations certified by the Attorney General as an emergency, provided that an order is sought within 72 hours of the authorization of the surveillance by the Attorney General. *Id.* at §1805(f). Second, recognizing the exigencies created by war, the President through the Attorney General, may authorize electronic surveillance without a court order for a period of 15 days after a declaration of war by Congress. *Id.* at § 1811.

This provision was intended to provide time to enable Congress to amend FISA if it was determined necessary to do so to meet special war-time needs. H.R. Conf. Rep. No. 95-1720, 95th Cong., 2nd Sess., 34 (1978). Notably, Congress rejected a request to make this exception extend for one year after a declaration of war, indicating that 15 days should be sufficient to make any necessary amendments. *Id.*

Congress made explicit its intention that FISA is the exclusive means by which electronic surveillance for foreign intelligence purposes may be conducted. 18 U.S.C. §2511 provides in part: "[T]he Foreign Intelligence Surveillance Act of 1978 [50 U.S.C. § 1801 *et seq.*] shall be the exclusive means by which electronic surveillance, as defined in Section 101 of such Act [50 U.S.C. §1801] . . . may be conducted." FISA also makes it a criminal offense "to engage in electronic surveillance under color of law except as authorized by statute." 50 U.S.C. § 1809 (a).[11]

Following the attacks of September 11, 2001, the Administration asked Congress to enact legislation to enhance its ability to protect the nation against such attacks by Al Qaeda and other international terrorists. Congress responded promptly to that request, enacting the USA PATRIOT Act in October and the Intelligence Authorization Act in December.

Those laws amended FISA in a number of respects, including expanding the period for emergency electronic surveillance from 24 hours to 72 hours and reducing the requirement that the government certify that the foreign intelligence gathering was a "primary purpose" of the electronic surveillance to a showing only that it was "a significant purpose." *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1394 (Dec.

---

[11] Two separate statutes regulate electronic surveillance: FISA governs electronic surveillance for foreign intelligence purposes; Title III of the Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*, 2701 *et seq.*, and 3121 *et seq.*, governs domestic electronic surveillance. 18 U.S. C. § 2511 expressly makes these two statutes the exclusive means for conducting electronic surveillance for foreign intelligence or domestic purposes.

28, 2001); USA PATRIOT Act, Pub. L. 107-56, § 218, 115 Stat. 272 (Oct. 26, 2001).[12]

In sum, FISA is a comprehensive and exclusive procedure for conducting foreign intelligence electronic surveillance in the United States. It anticipates emergencies and the exigencies of war, and it was specifically amended at the Administration's request to make it more responsive to the need to combat international terrorism following the attacks of September 11, 2001. Nevertheless, the Administration concedes that NSA conducted electronic surveillance for a period of four years without complying with FISA's procedures.

2. The AUMF Does Not Create an Exception to FISA

> The argument that Congress implicitly authorized the NSA program when it enacted the Authorization for Use of Military Force (AUMF) against al Qaeda, Pub. L. No. 107-40, 115 Stat. 224 (September 18, 2001), is unpersuasive. There is nothing in the text or the history of the AUMF to suggest that Congress intended to permit the Executive to engage in any and all warrantless electronic surveillance in the United States without judicial approval or a showing of probable cause as required by FISA.

The argument put forward by the Executive assumes that Congress intended to remove all restraint on electronic surveillance currently mandated by FISA or Title III, at least with regard to the fight against terrorism. The history of FISA demonstrates a congressional commitment to regulate the use of electronic surveillance and to assure that there is a judicial check on Executive power. Nothing in the AUMF suggests that Congress intended to unleash the Executive to act without judicial supervision and contrary to standards set by Congress in conformity with the Constitution.

---

[12] Indeed, Congress has amended FISA a total of five times since 1999 in response to requests from the Department of Justice. In addition to those set forth above, FISA amendments related to: court orders for pen registers, trap and trace devices, and certain business records of suspected agents of a foreign power, P.L. 105-272, §§ 601, 602 (1999); definition of "agent of a foreign power" to include people working for a foreign government who intentionally enter the United States with a fake ID or who obtain a fake ID while inside the US, P.L. 106-120, § 601 (2000); which federal officials could authorize applications to the FISC for electronic surveillance and physical searches, P.L. 106-567, §§ 602, 603 (2001); eliminated requirement that non U.S. persons be acting on behalf of a foreign power in order to be targeted, P.L. 108-458, § 6001 (2004).

The Executive's argument rests on an implicit, unstated inference from the AUMF. Such an inference is directly contrary to the explicit text of FISA. The Supreme Court has stated that specific and carefully drawn statutes prevail over general statutes where there is a conflict. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987)).

FISA contains a section entitled "Authorization during time of war," which provides that "[n]otwithstanding 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*." 50 U.S.C. § 1811 (emphasis added). One need not parse the language to determine Congressional intent, because the plain meaning of the language is indisputable: i.e., When Congress declares war, the President may permit the Attorney General to authorize electronic surveillance without a court order under FISA for 15 days. Thus, Congress limited the Executive power to engage in electronic surveillance without judicial supervision to 15 days **following a formal declaration of war**. It is inconceivable that the AUMF, which is not a formal declaration of war, could be fairly read to give the President more power, basically unlimited, than he would have in a declared war.

The legislative history of § 1811 demonstrates that Congress intended that the Executive seek legislation if it concluded that there was a need for electronic surveillance not authorized by FISA for more than 15 days: "The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. . . . The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." H.R. Conf. Rep. No. 95-1720, at 34 (1978).[13]

The Executive's argument distorts FISA and makes meaningless18 U.S.C. § 2511(2)(f), the provision that identifies FISA and specific criminal code provisions as "the *exclusive* means by which electronic surveillance . . . may be conducted" because the argument assumes that the Executive may treat any congressional act as authorizing an exception from Title III and FISA. Were the argument accepted, the Executive could justify repeal or suspension of FISA and Title III restrictions in statutes appropriating money for federal agencies or virtually any other legislation that, in the sole judgment of the Executive, would be rendered more effective by greater electronic surveillance.

---

[13] The House version of the bill would have authorized the President to engage in warrantless electronic surveillance for the first year of a war, but the Conference Committee rejected so long a period of judicially unchecked eavesdropping as unnecessary.

The argument that the AUMF implicitly creates an exception to FISA and is therefore consistent with § 2511(2)(f) strains credulity. It rests on the notion that Congress, although it never mentioned electronic surveillance or FISA in the AUMF, nevertheless implicitly intended to create an undefined, unrestrained exception to FISA and give the Executive unlimited power to engage in unlimited electronic surveillance with no judicial review.

In an area as heavily regulated and as important to basic notions of privacy as electronic surveillance, it is inconceivable that Congress would have ceded greater unfettered power and discretion to the Executive in dealing with al Qaeda than it would in a declared war.

Moreover, the Attorney General has essentially conceded that no reasonable person would conclude that Congress intended to cede such power to the Executive: "We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible." See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. In light of this concession, the claim that Congress granted the Executive this authority under the AUMF is not credible.

The administration has argued that its position is supported by the Supreme Court's opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but this is also unpersuasive. A plurality of the Court in *Hamdi* held that the AUMF authorized military detention of enemy combatants captured on the battlefield abroad as a "fundamental incident of waging war." *Id.* at 519. When Congress authorizes the use of force, it clearly contemplates that the enemy will be killed or captured. There can be little doubt that those who are captured on the battle field may be held while the battle is fought. Typically, those captured are deemed prisoners of war. But, in *Hamdi*, the question was whether a captured individual could be held as an enemy combatant. The plurality expressly limited its affirmative answer to individuals who were "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*." *Id.* at 516 (emphasis added).

It is not a fair reading of the *Hamdi* case to suggest that AUMF repeals all limitations on

Executive power previously contained in any federal statute as long as the Executive in its sole discretion deems additional power useful in the general fight against terror.

The Hamdi plurality agreed "that indefinite detention for the purpose of interrogation," even of conceded enemy combatants, "is not authorized" by the AUMF. *Id.* at 2641. If Congress did not provide the Executive with the right to detain enemy combatants for intelligence purposes, it is inconceivable that Congress intended to permit the indefinite eavesdropping and invasion of privacy of American citizens who are neither enemy combatants nor suspected of criminal activity.

3. The Government's Interpretation of the AUMF Is Not Required to Avoid a Constitutional Question

The Administration mistakenly argues that its construction of the AUMF is required to avoid a serious constitutional question. First, the canon of avoidance only comes into play if there is an ambiguity in a statute. *See United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001).

But neither FISA nor the AUMF are ambiguous on the question of electronic surveillance. FISA explicitly makes its procedures the exclusive means for conducting electronic surveillance. Meanwhile, the AUMF contains no reference to electronic surveillance, and as indicated above, nothing in the history or circumstances suggests that the AUMF was intended to authorize electronic surveillance.

In any event, the constitutional question must be serious and substantial. The Administration claims that unless its construction of the AUMF is accepted, a serious constitutional question would be raised as to whether FISA unconstitutionally encroaches on inherent powers of the President as Commander-in-Chief. That question is neither serious nor substantial. Even assuming that, after FISA, the President retains inherent authority to conduct electronic surveillance without a warrant to acquire foreign intelligence – a question that has never been decided – that does not mean that Congress lacks authority to regulate the exercise of that authority to prevent its abuse and unnecessary intrusions on civil liberties.

It should be noted that both President Ford and President Carter supported legislation to regulate the conduct of foreign intelligence surveillance, and as noted, FISA was enacted with the full support of President Carter. As the Senate report accompanying the bill that became FISA noted:

> The basis for this legislation is the understanding – concurred in by the Attorney General – that even if the President has an "inherent" constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable

warrant procedure governing foreign intelligence surveillance.

S. Rep. (Judiciary Committee) No. 95-604, 95th Cong., 1st Sess., Part 1 at 16 (1977). As Congress observed, this analysis was "supported by two successive Attorneys General." H.R. Rep. No. 95-1283, 95th Cong., 2nd Sess., Part 1 at 24 (1978).

The analysis is plainly correct. Whatever inherent authority the President may have to conduct foreign intelligence surveillance, Congress also has the authority under Article I to regulate the exercise of that authority. *See* Article I, Section 8, Cl. 1, 14 (power to provide for the common defense), Article I, Section 8, Cl. 3 (power to regulate commerce).

Here, through FISA, Congress has exercised its Article I powers to regulate electronic surveillance for foreign intelligence purposes in great detail and made it the exclusive means for conducting such surveillance. The NSA domestic surveillance program is in direct conflict with this detailed statutory scheme. Under the criteria set forth in Justice Jackson's famous concurring opinion in *Youngstown Sheet and Tube Co.* v. *Sawyer*, in these circumstances the President's inherent power is at its "lowest ebb." 343 U.S. 579, 637 (1952). To sustain the President's power here a court would have to find that such power was "beyond control by Congress." *Id.* at 640. In other words, the President's authority must be not just inherent but exclusive.

Such a conclusion would be at odds with the principles of separation of powers and our cherished system of checks and balances and faces a particularly high hurdle where, as here, individual liberties are at stake. As Justice O'Connor observed in *Hamdi* v. *Rumsfeld,* 542 U.S. 507, 536 (2004):

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Id.. (quoting *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

The government argues that prior presidents have exercised their inherent authority to conduct electronic surveillance without a warrant for foreign intelligence purposes and that courts have consistently upheld the exercise of that power.

But FISA was enacted precisely because, prior to FISA, prior presidents had repeatedly abused that power. *See* S. Rep. (Judiciary Committee) No. 95-604, 95th Cong., 1st Sess., Part 1 at 7-8 (1977) ("[The Church Committee] has concluded that every President since Franklin D.

Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority. While the number of illegal or improper national security taps and bugs conducted during the Nixon administration may have exceeded those in previous administrations, the surveillances were regrettably by no means atypical . . . [and were] 'often conducted by illegal or improper means' . .").

In enacting FISA, Congress was concerned not only with violations of the Fourth Amendment, but the chilling effect that abuses of electronic surveillance had on free speech and association. As the Senate Report accompanying FISA explained:

> Also formidable – although incalculable – is the "chilling effect" which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. . . . The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

Id. at 8.

Moreover, the cases upholding the President's inherent authority all preceded the enactment of FISA. No court has ever held that Congress was without power to regulate electronic surveillance for foreign intelligence purposes to protect against the abuse of such surveillance. The government incorrectly relies on a statement in *In re Sealed Case*, 310 F.3d 717 (FISA Court of Review 2002), that: "We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence] and, assuming that is so, FISA could not encroach on the President's constitutional power." *Id.* at 742. But this statement is dictum, made without any analysis, in a case which raised no issue about the President's inherent authority or the constitutional power of Congress to regulate the President's exercise of that authority under FISA.

To the contrary, the issue in *Sealed Case* was whether FISA's criteria for the issuance of court orders authorizing electronic surveillance satisfied the requirements of the Fourth Amendment. The Court of Review held that they did. Moreover, the cases cited by the Court of Review for the proposition that the President had inherent authority to conduct warrantless surveillance all addressed surveillance predating the enactment of FISA and hence, have no bearing on whether any inherent authority the President had survives FISA, i.e., whether the President has not just inherent but exclusive authority to order warrantless surveillance of Americans.

Finally, if there is any serious constitutional question, it is raised by the government's construction of the AUMF. It would give the President unfettered discretion, subject neither to regulation by Congress nor scrutiny by a court, to conduct warrantless electronic surveillance of Americans, based on the President's (or his designees') unilateral determination that there is reason to believe that one of the parties to the communication is a member of Al Qaeda or of groups affiliated with or supporting Al Qaeda.

While the Supreme Court has never addressed the question of whether such warrantless electronic surveillance would meet the requirements of the Fourth Amendment, and a conclusive assessment of that question would require a careful analysis of the facts, which the secrecy surrounding this program precludes. The government maintains that such surveillance fits within a "special needs" exception to the Fourth Amendment's requirement of a warrant or other court order authorizing a search and that given the post 9/11 circumstances its electronic surveillance without a court order was not an "unreasonable search" within the meaning of the Fourth Amendment. But the "special needs" exception is a narrow doctrine. The doctrine has usually been invoked to protect law enforcement officers from concealed weapons, prevent the destruction of physical evidence like illegal drugs, or permit testing for drugs or alcohol to regulate the safety of schools, workplaces or transportation. *See*, e.g., *O'Connor* v. *Ortega*, 480 U.S. 709 (1987); *New York* v. *Burger*, 482 U.S. 691 (1987), *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). None of these cases involved government acquisition of the content of private communications, where the intrusion into privacy has a chilling effect on freedom of speech and association. It was for that very reason that the Supreme Court rejected government claims that it had a special need for warrantless electronic surveillance of communications for domestic security purposes. As the Court explained:

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . . 'Historically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.' [Citation omitted.] History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

United States v. *United States District Court*, 407 U.S. 297, 313-314 (1972). These considerations also apply to electronic surveillance of persons in the United States for foreign intelligence purposes.

Thus, even if there were a "special needs" exception for warrantless surveillance of Americans, it is likely that a court would construe it extremely narrowly, subject to the Fourth amendment, and available only in extraordinary circumstances unforeseen by Congress and in which there is no time to seek amendment to the law. It is highly unlikely that a court would uphold the exercise of such authority for four years, let alone indefinitely. The government has not shown that resort to FISA's procedures is impractical, nor has it provided any explanation as to why in the more than four years since 9/11 it has not asked Congress for any amendments to FISA – beyond those sought and obtained under the USA PATRIOT Act – to address any alleged inadequacy of FISA.

The government's argument that the President and the NSA have limited the program to circumstances where they have "reason to believe" that at least one party to the communication is a member of Al Qaeda or organizations affiliated with or supporting Al Qaeda does not provide reasonable protections against unjustified invasions of the privacy of innocent persons or a safeguard against abuse from a long-term program. The "very heart" of the Fourth Amendment requirement is that the judgment of whether the evidence justifies invasion of a citizen's privacy be made by a "neutral and detached magistrate." *United States* v. *United States District Court*, 407 U.S. at 316 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971)). As the Court there explained:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . The Fourth Amendment contemplates a prior judicial judgment . . . , not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

Id. at 317 (internal citations omitted).

Thus, warrantless electronic surveillance in the United States for foreign intelligence purposes would raise very serious and substantial Fourth Amendment questions.

C. The Need for Additional Congressional Investigation and Oversight

There are important questions about the nature, scope, and operation of the NSA domestic surveillance program that remain unanswered and which have not been examined by the Congress. For example, it has been reported that serious dissension existed within the administration over the expansive authority granted to the NSA, that then-Deputy Attorney General James Comey, acting in the absence of Attorney General John Ashcroft who was in the hospital with a serious pancreatic condition, once refused to reauthorize the NSA program, causing a high level delegation of White House Counsel Gonzales and chief of staff Andy Card to visit Ashcroft in the hospital to appeal Comey's decision.[14]

The questions about the scope of the NSA's electronic surveillance are highlighted by conflicting statements made by government officials. While the Administration now argues that only calls by suspected terrorists emanating from outside the United States have been monitored, the San Francisco Chronicle reported on December 22, 2005 that:

> White House Press Secretary Scott McClellan said National Security Agency surveillance ordered by the president after the Sept. 11 attacks four years ago might have inadvertently picked up innocent conversations conducted entirely within the United States by Americans or foreigners.
>
> That would violate what McClellan called Bush's requirement that one party to the communication had to be outside the United States and raised the possibility that NSA surveillance of terror suspects had morphed into surreptitious monitoring of some communications strictly within the United States without court approval.
>
> In Congress, Rep. Peter Hoekstra, R-Mich., chairman of the House Intelligence Committee, told a news conference that White House officials had acknowledged during briefings for congressional leaders that U.S.-to-U.S. communications might be inadvertently intercepted during NSA's worldwide quest for al Qaeda-related conversations between terror suspects in the United States and overseas.

See Stewart M. Powell, "White House acknowledges some taps wholly domestic," Hearst Newspapers, December 22, 2005, at: http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/12/22/MNGOHGBM9N1.DTL

Moreover, public statements made well after the NSA program was underway raise issues that should be examined by Congress. When James A. Baker, the Justice Department's counsel for intelligence policy, testified before the Senate Select Committee on Intelligence on July 31, 2002, he stated that the Administration did not support a proposal by Senator Mike DeWine (R-OH) to lower the legal standard for electronic surveillance "because the proposed change raises both significant legal and practical issues," might not "pass constitutional muster," and "could potentially put at risk ongoing investigations and prosecutions." He added:

---

[14] *See* Daniel Klaidman, Stuart Taylor Jr. and Evan Thomas, "Palace Revolt," Newsweek, February 6, 2006, at: http://www.msnbc.msn.com/id/11079547/site/newsweek.

> We have been aggressive in seeking FISA warrants and, thanks to Congress's passage of the USA PATRIOT Act, we have been able to use our expanded FISA tools more effectively to combat terrorist activities. It may not be the case that the probable cause standard has caused any difficulties in our ability to seek the FISA warrants we require, and we will need to engage in a significant review to determine the effect a change in the standard would have on our ongoing operations. If the current standard has not posed an obstacle, then there may be little to gain from the lower standard and, as I previously stated, perhaps much to lose.

See Dan Eggen, "White House Dismissed '02 Surveillance Proposal," Washington Post, January 26, 2006. Interestingly, these paragraphs no longer appear in the official version of Baker's testimony.[15] Senator Russell Feingold recently accused Attorney General Gonzales of "misleading the Senate" during his confirmation hearings in his answer to a question about whether the president could authorize warrantless wiretapping of U.S. citizens. As the Washington Post reported:

> Gonzales said that it was impossible to answer such a hypothetical question but that it was "not the policy or the agenda of this president" to authorize actions that conflict with existing law. He added that he would hope to alert Congress if the president ever chose to authorize warrantless surveillance, according to a transcript of the hearing.

See Carol D. Leonnig, "Gonzales Is Challenged on Wiretaps," Washington Post, January 31, 2006, at: http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001318.html.

---

[15] *See* Chris Anderson, "NSA, FISA, and the 'Missing 3 Paragraphs,'" IndyMedia, January 27, 2006, at:http://nyc.indymedia.org/en/2006/01/63921.html.

Even the President has come under attack for potentially misleading statements. In a speech in Buffalo, NY, on April 20, 2004 – more than two years after the NSA program had been authorized – President Bush stated:

> Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so.

See "President Bush: Information Sharing, Patriot Act Vital to Homeland Security," Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004, at: http://www.whitehouse.gov/news/releases/2004/04/20040420-2.html

Thus, the Task Force Recommendations also urge the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; and (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies.

We also believe that these hearings should be open and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information.

Finally, the Congressional Research Service report of January 18, 2006, "Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions,"[16] makes it clear that Congress needs to thoroughly review and make recommendations concerning the intelligence oversight process, to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

---

[16] See Fn. 9, *supra.*

D. Conclusion

The American Bar Association has stood shoulder to shoulder with the president in the fight against terrorism. Every member of the Task Force – indeed, every member of this great Association – wants the president to use all appropriate tools to defeat these enemies of democracy. However, as President Greco said in creating the Task Force, "We must continually and vigilantly protect our Constitution and defend the rule of law." And, as Supreme Court Justice Murphy warned in a case arising during World War II:

> [W]e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring).

We simply cannot allow our constitutional freedoms to become a victim of the fight against terrorism. The proposed Recommendations should be adopted by the ABA House of Delegates in order to strike a proper balance between individual liberty and Executive power.

Respectfully submitted,

NEAL R. SONNETT, Chair
ABA Task Force on Domestic Surveillance
in the Fight Against Terrorism

February 2006

APPENDIX

ABA Task Force on Domestic Surveillance in the Fight Against Terrorism Biographies

Chair

Neal R. Sonnett

Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the "Nation's Top White Collar Criminal Defense Lawyers," was selected three times by that publication as one of the "100 Most Influential Lawyers In America," and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is Chair-Elect of the American Judicature Society, Secretary of the ABA Section of Individual Rights and Responsibilities, Chair of the ABA Task Force on Treatment of Enemy Combatants, and serves as the ABA's official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami. In June, 2006 he will receive the Selig Goldin Award, the highest award of the Florida Bar Criminal Law Section.

Members

Mark D. Agrast

Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., where he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties, criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Deborah Enix-Ross

Prior to joining Debevoise & Plimpton LLP in October 2002, Ms. Enix-Ross served, from January 1998 through September 2002, as a Senior Legal Officer and Head of the External Relations and Information Section of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center in Geneva, Switzerland.

Before joining WIPO, Ms. Enix-Ross was the Director of International Litigation for the Dispute Analysis and Corporate Recovery Services Group (DA&CR) of Price Waterhouse LLP, and before that, served for seven years as the American representative to the International Chamber of Commerce (ICC) International Court of Arbitration.

Ms. Enix-Ross holds a law degree from the University of Miami School of Law, a Diploma from the Parker School of Foreign and Comparative Law of Columbia University, and a Certificate from the London School of Economics. The U.S. Departments of Commerce and State appointed her as one of the original eight U.S. members of the tri lateral NAFTA Advisory Committee on Private Commercial Disputes. She is Chair-Elect of the American Bar Association (ABA) Section of International Law, a Fellow of the American Bar Foundation and a member of the ABA Center for Rule of Law Initiatives.

Stephen A. Saltzburg

Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In 1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was appointed to the

ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions

William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

James R. Silkenat

Jim Silkenat is a partner in the New York office of Arent Fox and coordinates the firm's International Business Practice Group. His primary focus is on international joint ventures, mergers and acquisitions, privatizations, project finance transactions (in developed and developing countries) and private equity investment funds. He is a former Legal Counsel of the World Bank's International Finance Corporation.

An active member of the American Bar Association, Mr. Silkenat has served as Chair of both the Section of International Law and the Section Officers Conference. In 1990 he was elected to the ABA House of Delegates and has served as Chair of the New York Delegation in the House of Delegates since 2000. He served on the ABA Board of Governors from 1994-1997 and has chaired the ABA's Latin American Legal Initiatives Council.

Mr. Silkenat is also a former Chair of the Fellows of the American Bar Foundation, of the A.B.A.'s Museum of Law and of the A.B.A.'s China Law Committee. He is also a member of the House of Delegates of the New York State Bar Association and Chair of the Council on International Affairs of the Association of the Bar of the City of New York. Jim is a former Adjunct Professor of Law at Georgetown University Law Center and Chair of the Lawyers Committee for International Human Rights (now, Human Rights First).

Suzanne Spaulding

Suzanne Spaulding is a Managing Director at The Harbour Group, LLC. Ms. Spaulding is an expert on national security related issues, including terrorism, homeland security, critical infrastructure protection, cyber security, intelligence, law enforcement, crisis management, and issues related to the threat from chemical, biological, nuclear, or radiological weapons. She works with clients to develop and implement legislative strategies around these and other issues.

Prior to joining The Harbour Group, Ms. Spaulding was Minority Staff Director for the U.S. House of Representatives Permanent Select Committee on Intelligence. Her previous legislative experience includes serving as Deputy Staff Director and General Counsel for the Senate Select Committee on Intelligence and as Legislative Director and Senior Counsel for Senator Arlen Specter (R-PA). She has also worked for Representative Jane Harman (D-CA) and served as Assistant General Counsel for the CIA..

Ms. Spaulding received her undergraduate and law degrees from the University of Virginia. She is the immediate past Chair and current Advisory Board member of the American Bar Association's Standing Committee on Law and National Security. In addition, Ms. Spaulding is a member of the ABA President's Task Force on Enemy Combatants and of the Gavel Award Screening Committee.

Special Advisers

Harold Hongju Koh

Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Elizabeth Rindskopf Parker

Dean Rindskopf Parker joined Pacific McGeorge as its eighth dean in 2003 from her position as General Counsel for the 26-campus University of Wisconsin System. Her fields of expertise, in addition to the law of national security and terrorism, include international relations, public policy and trade, technology development and transfer, commerce, and litigation in the areas of civil rights and liberties.

Dean Rindskopf Parker's expertise in national security and terrorism comes from 11 years of federal service, first as General Counsel of the National Security Agency (1984-1989), then as Principal Deputy Legal Adviser at the U.S. Department of State (1989-1990), and as General Counsel for the Central Intelligence Agency (1990-1995). From 1979 to 1981, Dean Rindskopf Parker served as Acting Assistant Director for Mergers and Acquisitions at the Federal Trade Commission.

A member of the American Bar Foundation and the Council on Foreign Relations, and former Chair of the ABA Standing Committee on Law and National Security, Dean Parker is a frequent speaker and lecturer and has taught national security law at Case Western Reserve Law School, Cleveland State School of Law and Pacific McGeorge. Currently, she serves on several committees of the National Academy of Sciences, including the Roundtable on Scientific Communication and National Security, and the Commission on Scientific Communication and National Security, examining responses to terrorism.

Liaison to the Task Force

Alan Rothstein

Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinate the extensive law reform and public policy work of this 22,000-member Association. Founded in 1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics from Brown University before earning his J.D. from NYU in 1978. Prior to his legal career, Rothstein worked as an economist in the environmental consulting field and for the New York City Economic Development Administration.

Mr. Rothstein serves on the boards of directors of Volunteers of Legal Service and Citizens Union, where he chairs its Committee on State Affairs. He also serves on the New York State Bar Association House of Delegates.