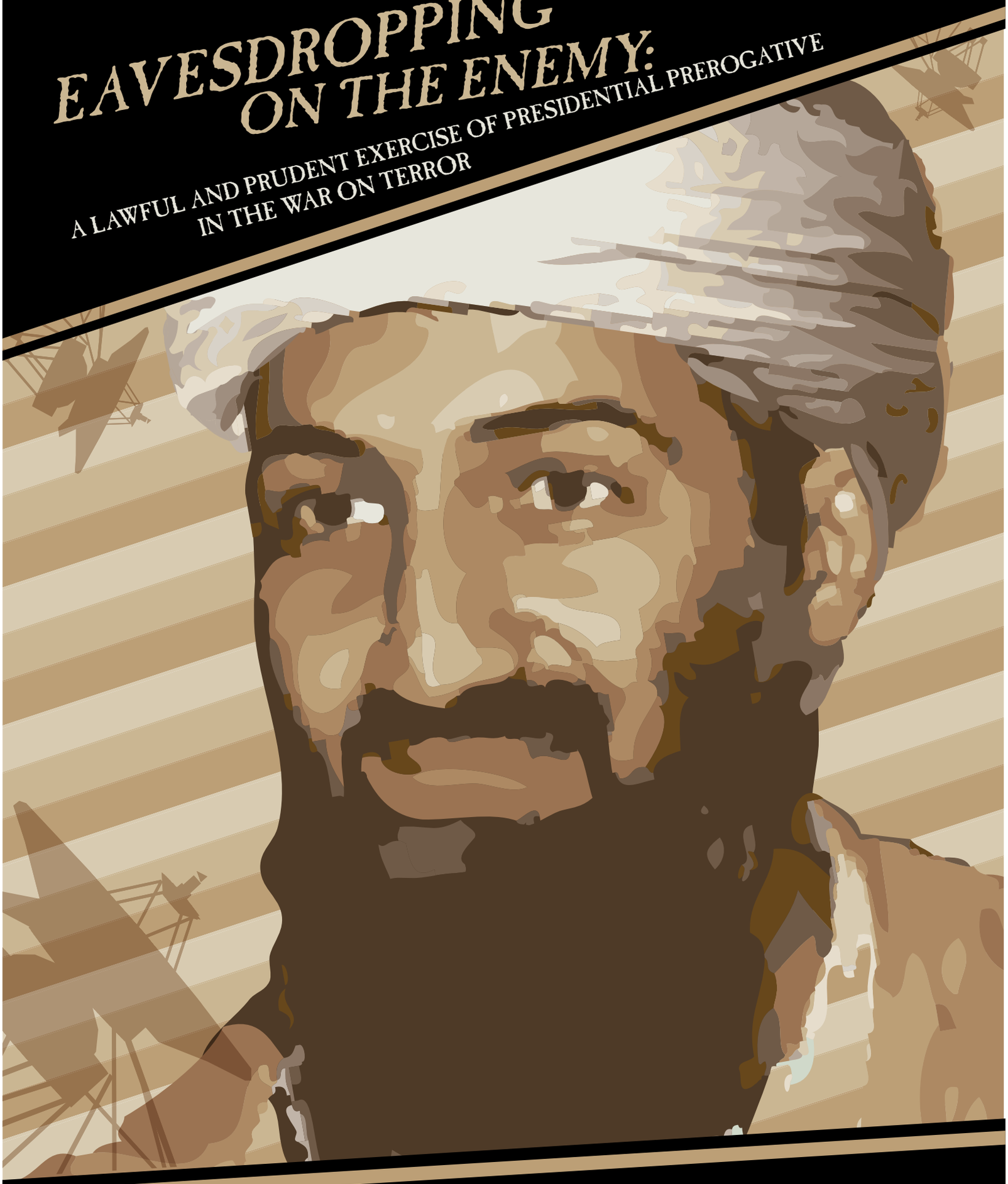
EAVESDROPPING ON THE ENEMY:

A LAWFUL AND PRUDENT EXERCISE OF PRESIDENTIAL PREROGATIVE IN THE WAR ON TERROR



By Michael Boos

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- Terror Attacks on America: A Wake-Up Call for Immigration and Border Control Reform
- The Proposed United Nations International Criminal Court: A Grave Threat to American Freedom, Liberty and Sovereignty
- The Unconstitutionality of the Federal Assault Weapons Ban.

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Introduction

The New York Times broke the story on December 16, 2005, under the front page headline: *Bush Lets U.S. Spy on Callers Without Courts.* The article stated:

> Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.[1]

Democrats reacted with predictable outrage. Former Vice President Al Gore called the Terrorist Surveillance Program an impeachable offense.[2] Senator John Kerry declared it "a clear violation of the law."[3] And Democrat National Committee Chairman Howard Dean complained: "We haven't seen this kind of abuse of power since Richard Nixon."[4]

Some Republicans have been critical, too. "There is no doubt that this is inappropriate," quipped Senate Judiciary Committee Chairman Arlen Specter.[5]

Within the legal community, the American Civil Liberties Union ("ACLU") and other Bush Administration critics on the left have filed lawsuits to stop any ongoing surveillance, alleging the program violates the Foreign Intelligence Surveillance Act ("FISA") and the First and Fourth Amendments of the U.S. Constitution.[6]

The New York Times has also gone to court. In a Freedom of Information Act lawsuit, the newspaper seeks access to highly classified NSA documents, including internal memos and legal memorandum about the Terrorist Surveillance Program. The lawsuit also seeks to make public the names of all persons subject to surveillance under the program.[7]

Despite the criticism and legal maneuvering, the Administration has not backed down. The White House asserts the NSA's activities are a lawful and prudent exercise of the president's executive powers aimed at protecting the American people from future international terrorist attacks.

In a publicly released White Paper addressing "the legal basis for the NSA activities," the Justice Department says:

> [The President] has authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States.
>
> * * * *
>
> The NSA activities are an indispensable aspect of this defense of the Nation. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, these activities provide the United States with an early warning system to help avert the next attack.[8]

The White Paper contends the President, as Commander in Chief of the armed forces has "well-recognized inherent constitutional authority . . . to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States."[9] It also argues Congress sanctioned the Terrorist Surveillance Program when it passed legislation "authoriz[ing] 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' of September 11th in order to prevent 'any future acts of international terrorism against the United States.'"[10] On this latter point, the White Paper says "warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force."[11]

1 The New York Times, December 16, 2005.
2 *Gore Says Bush Wiretapping Could Be Impeachable Offense,* ABC News, Jan. 16, 2006.
3 *John Kerry Bashes Bush Wiretaps, Talks of 2008,* ABC News, Jan. 22, 2006.
4 Statement of Howard Dean (Jan. 12, 2006). Available at www.democrats.org.
5 Official: Bush authorized spying multiple times, The Associated Press, Dec. 16, 2005. Available at www.msnbc.com.
6 *See American Civil Liberties Union v. National Security Agency/Central Security Service,* U.S.D.C Eastern District of Michigan (Case No. 2:06-cv-10204-ADT-RSW)(filed Jan. 17, 2006); *see also, Center for Constitutional Rights v. George W. Bush,* U.S.D.C. Southern District of NY (Case No. 06 CV 00313)(filed Jan. 17, 2006).
7 *See The New York Times Company v. United States Department of Defense,* U.S.D.C. Southern Dist. of NY (Case No. 06 CV 1553) (filed Feb. 27, 2006).

Following his address before a joint session of Congress in the Wake of the September 11, 2001 attacks on America, the House and Senate passed a joint resolution by near unanimous votes authorizing President Bush to "use all necessary an appropriate force" against those responsible for the September 11, 2001 attacks, in order to prevent any future action of international terrorism against the United States."

Many – but not all – conservatives agree. Mark Levin, president of Landmark Legal Foundation, says:

> Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt didn't seek congressional authority to secure intelligence against the enemy, because they already had the power under the Constitution.[12]

Which side is right?

Does the President, as Commander in Chief, have constitutional authority to order warrantless surveillance of suspected enemy communications in times of armed conflict?

If so, is the Terrorist Surveillance Program consistent with that authority?

Regardless of the President's inherent constitutional powers, did Congress, in passing the Authorization to Use Force following the September 11th attacks, authorize warrantless surveillance of international communications where a party to the intercepted communication is physically present in the United States?

Does FISA unconstitutionally infringe on the President's war fighting powers?

This report examines facts, statutes, historical practices and judicial precedent as they relate to these questions, and concludes the Bush Administration makes a compelling case that the Terrorist Surveillance Program is a lawful and prudent exercise of the President's war fighting powers.

Background

On September 11, 2001, the United States of America became the victim of the most destructive act of international terrorism in the history of the world. Nearly three thousand individuals -- most of who were U.S. citizens -- were killed when four commercial aircraft were hijacked and used as flying bombs by members of Osama Bin Laden's al Qaeda terror network. The death toll surpassed the number killed at Pearl Harbor on December 7, 1941.

Within a week, both houses of Congress overwhelmingly passed legislation authorizing the President to:

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

Shortly thereafter, the President issued a military order affirming the United States is in a state of "armed conflict" with al Qaeda and other forces of international terrorism.[14] Major overseas campaigns in the War on Terror have included toppling the Taliban regime in Afghanistan and the overthrow of Saddam Hussein in Iraq. At home, the top priority has been preventing future attacks from an enemy that has "demonstrated its ability to introduce

8 *Legal Authorities Supporting the Activities of the National Security Agency Described by the President ("Legal Authorities"),* U.S. Department of Justice (Jan. 19, 2006) at p. 1. Available at www.usdoj.gov.
9 *Id.*
10 *Id.* at 2, citing Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat 224, 224 (Sept. 18, 2001).
11 *Id.*
12 *John McCain, Weak on Defense,* National Review Online, Jan. 23, 2006. Available at www.nationalreview.com.
13 AUMF, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001).
14 Military Order § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001).

According to press reports, the Terrorist Surveillance Program helped to uncover and disrupt an al Qaeda plot to blow up the Brooklyn Bridge.

agents into the United States undetected and to perpetrate devastating attacks."[15]

The NSA, which is the Defense Department agency responsible for "signals intelligence support for the conduct of military operations,"[16] is one of many assets employed in the conflict. Among other things, the President has tasked the NSA "to intercept international communications into and out of the United States of persons linked to al Qaeda or related organizations" in order "to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States."[17]

According to the Administration, the Terrorist Surveillance Program is limited in scope to those communications in which there is "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda."[18]

While the White House has declined to provide specific information on the scope of the monitoring, news reports say the communication intercepts include phone conversations and e-mail correspondence.[19] The Associated Press, citing an unnamed senior intelligence official, says the number of intercepts exceeded three dozen between October 2001 and mid-December 2005.[20]

The program has also been unofficially credited with helping to uncover and disrupt at least one al Qaeda plot – a scheme hatched in the Middle East to blow up the Brooklyn Bridge.

In May 2003, Iyman Faris, a naturalized U.S. citizen born in Kashmir, pleaded guilty to conspiring to with al Qaeda to destroy the Brooklyn Bridge. He was sentenced to 20 years in prison in October 2003.[21]

As part of his plea deal, Faris admitted to traveling to Afghanistan in 2000 and 2002. During the second trip, he admitted to meeting with al Qaeda's "operational leader" to plan an attack on a New York City bridge.[22]

Upon returning to the United States, Faris admitted to taking steps to implement the plan by using the internet to get details on the Brooklyn Bridge's structure and to try to locate equipment for severing the bridge's suspension cables. He also admitted to using a longtime friend to send several coded messages to Pakistan between April 2002 and March 2003. The messages reported on the plot's progress.[23]

The day after the New York Times revealed the Terrorist Surveillance Program's existence, The Washington Post, citing unnamed government officials, reported the program had helped to "uncover and disrupt terrorist plots, including plans by Iyman Faris . . . to blow up the Brooklyn Bridge."[24]

Analysis

I. Historically, the President, as an incident of his constitutional authority as Commander in Chief, has exercised virtually unfettered power to gather intelligence on the nation's enemies in times of armed conflict.

From the earliest days of the American Republic through the mid 1970s, the President's authority to conduct intelligence operations in times of war was never seriously challenged. In one of the earliest cases to comment on the matter, the Supreme Court recognized President Abraham Lincoln's inherent authority to contract for the services of agents to spy on the Confederacy during the Civil War, stating:

> He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.[25]

For nearly the next one hundred years, the president's intelligence gathering authority remained unchecked. For example, in the months leading up to America's entry into World War II, President Franklin Roosevelt authorized Attorney General Robert H. Jackson:

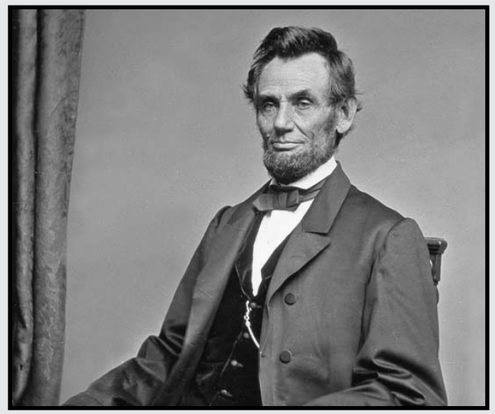
> to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.[26]

It was not until 1968, with passage of Title III of the Omnibus Crime Control and Safe Streets Act ("Title III")[27] that Congress enacted the nation's first comprehensive law regulating the government's use of electronic surveillance. Title III's main purposes included defining "on a uniform basis" the rules for authorizing wiretaps and using the contents thereof in court and administrative proceedings.[28]

While Title III regulated electronic surveillance conducted for law enforcement purposes, it specifically exempted surveillance conducted for foreign and domestic intelligence operations, stating:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1944 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.[29]

The first significant restrictions on the President's intelligence gathering authority were not imposed until 1972, when the Supreme Court ruled in *United States v. United States District Court for the Eastern District of Michigan* that a warrant is required for electronic surveillance of domestic security threats.[30] In reaching that conclusion, however, the Court cautioned that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."[31]



In Totten v. United States, the Supreme Court said President Lincoln "was undoubtedly authorized during the war, as commander-in-chief of the armies of the Untied States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.

15 *Legal Authorities* at p. 4.
16 Executive Order 12333, §§ 1.11(j) and 1.12(b)(7)(Dec. 4, 1981), 46 FR 59,941, 59,946 – 59,947 (Dec. 8, 1981).
17 *Id.* at 5.
18 *Id.*
19 *E.g. NSA Gave Other U.S. Agencies Information From Surveillance,* Washington Post, Jan. 1, 2006.
20 *Bush authorized spying multiple times, supra.* Note 5.
21 *See Iyman Faris Sentenced for Providing Material Support to Al Qaeda,* U.S. Department of Justice News Release, Oct. 28, 2003. Available at www.usdoj.gov.
22 *See id.*
23 *See id.*
24 *On Hill, Anger and Calls for Hearing Greet News of Stateside Surveillance,* Washington Post, Dec. 17, 2005.
25 *Totten v. United States,* 92 U.S. 105, 106 (1876).
26 *Zweibon v. Mitchell*, 516 F.2d 594, 674 (DC Cir. 1975)(reproducing as Appendix A memoranda from Presidents Roosevelt, Truman and Johnson).
27 Title III, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 801 *et seq.*, 82 Stat. 211-225 (June. 19, 1968).
28 *Id.* at § 801(b), 82 Stat. at 211.
29 18 U.S.C. § 2511(3)(1976), 90 Pub. L., § 802, 82 Stat. 214 (June 19, 1968).
30 *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297 (1972).
31 *Id.* at 308.

> "Attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations."—4th U.S. Circuit Court of Appeals, United States v. Truong Dihn Hung (1980)

In other words, the Supreme Court specifically limited the reach of its ruling in the 1972 case to purely domestic intelligence operations.

Since then, all but one of the federal appellate courts to address the issue have concluded the President has inherent constitutional power, even when the nation is at peace, to conduct warrantless surveillance for foreign policy purposes, including surveillance of persons who are physically located in the United States.

In the first case to reach a federal appeals court, the 5th U.S. Circuit Court of Appeals cited "the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs" in concluding "the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."[32]

A year later, the 3rd U.S. Circuit Court of Appeals said the President's responsibilities in the field of foreign affairs are of such paramount importance that the judicial branch must:

> act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues.[33]

In reaching this result, the 3rd Court explained:

> [F]oreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.[34]

The reasoning of the 3rd and 5th Circuits was echoed by the 4th U.S. Circuit Court of Appeals in 1980, when it opined that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . 'unduly frustrate' the President in carrying out his foreign affairs responsibilities."[35]

The 4th Circuit explained:

> [A]ttempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.[36]

The most recent appellate level decision on the scope of the President's constitutional authority in the context of foreign intelligence gathering comes from the United States Foreign Intelligence Surveillance Court of Review, which was established pursuant to FISA to review decisions of the Foreign Intelligence Surveillance Court.[37]

In its very first opinion, issued in 2002, the Court of Review noted that "all 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,"[38] and then declared:

We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.[39]

To date, the U.S. Court of Appeals for the District of Columbia is the only federal appeals court to question whether the President's inherent constitutional powers include authority to order warrantless surveillance for foreign intelligence purposes. In a splintered 1975 decision, four of the court's eight judges opined that "no wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought."[40]

But, as the FISA Court of Review notes in its 2002 opinion, the D.C. Circuit's commentary carries little weight because: (1) less than a majority of the judges signed off on the opinion, (2) the statement was dicta (i.e. not central to the outcome of the case), and (3) the opinion has not been followed by any other appellate-level court.[41]

It was not until 1978, with passage of FISA, that Congress attempted to limit the President's authority to conduct foreign intelligence activities. FISA repealed the section of Title III that recognized the President's inherent constitutional authority to conduct foreign intelligence activities unfettered by the statute's other provisions,[42] and provided that the procedures set out in Title III and in FISA "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." FISA also created the Foreign Intelligence Surveillance Court (FISA Court), which is empowered to grant or deny government applications for electronic surveillance orders in foreign intelligence investigations.[44]

According to the Administration's critics, FISA required the Administration to obtain an order from the FISA Court in order to undertake the Terrorist Surveillance Program. Absent such an order, they say the program violates FISA and the Constitution's Bill of Rights.

The Center for Constitutional Rights, which has filed suit against the program, says:

> [T]he NSA Surveillance Program violates a clear criminal law, exceeds the president's authority under Article II of the Constitution, and violates the First and Fourth Amendments. The Foreign Intelligence Surveillance Act explicitly authorizes foreign intelligence surveillance only upon orders issued by federal judges on a special court.[45]

These sentiments are echoed by the ACLU. "President Bush may believe he can authorize spying on Americans without judicial or Congressional approval, but this

32 *United States v. Brown,* 484 F.2d 418, 426 (5th Cir. 1973).
33 *Id.* at 608.
34 *United States v. Butenko,* 494 F.2d 593, 605 (3rd Cir. 1974)(en banc).
35 *United States v. Truong Dihn Hung,* 629 F.2d 908, 913 (4th Cir. 1980).
36 *Id.*
37 *See* 50 U.S.C. § 1803(b).

38 *In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).
39 *Id.*
40 *Zweibon v. Mitchell*, 516 F.2d 594, 651 (DC Cir. 1975)(en banc)(plurality opinion).
41 *In re Sealed Case*, 310F.3d at 742 n. 26.
42 FISA, Pub. Law 95-111, § 201(c), 92 Stat. 1783, 1797 (Oct. 25, 1978).
43 18 U.S.C. § 2511(2)(f).
44 *See* 50 U.S.C. § 1803(a).
45 Center for Constitutional Rights internet synopsis of *CCR v. Bush,* entitled: *CCR Files Suit over NSA Domestic Spying Program.* Available at www.ccr-ny.org.

program is illegal and we intend to stop it," says Anthony D. Romero, the group's executive director. [46]

But, as the precedents cited above show, the weight of historical and judicial precedent favors the President's claim of inherent constitutional authority to conduct such surveillance as an incident of his powers as Commander in Chief of the armed forces. For the first 200 years of the nation's existence, the President oversaw foreign and wartime intelligence operations unimpeded by Congress or the courts. It was not until 1968 that Congress enacted the nation's first comprehensive legislation regulating wiretapping and other modes of electronic surveillance. Yet that legislation, as initially enacted, specifically exempted activities falling within the scope of the President's constitutional powers. To date, the only constitutional restraint imposed by the courts occurred in 1972, when the Supreme Court ruled that a warrant is required for purely domestic intelligence operations. Since then, all but one of the federal appeals courts to address the issue has concluded the President has inherent constitutional authority to order warrantless surveillance for foreign surveillance purposes. And, in the one post-FISA case that has been decided, the FISA Court of Review concluded that "FISA could not encroach on the President's constitutional power" to conduct foreign intelligence operations. In short, the weight of historical and judicial precedent provides a solid legal foundation for the President's assertion of inherent constitutional power, as Commander in Chief, to authorize warrantless interception of international communications involving suspected al Qaeda terrorists even where one or more of the parties to the communication is located in the United States.

II. Recent Supreme Court precedent supports the Administration's contention that Congress authorized the Terrorist Surveillance Program when it passed the Authorization to Use Military Force ("AUMF") following the September 11, 2001 attacks on the United States.

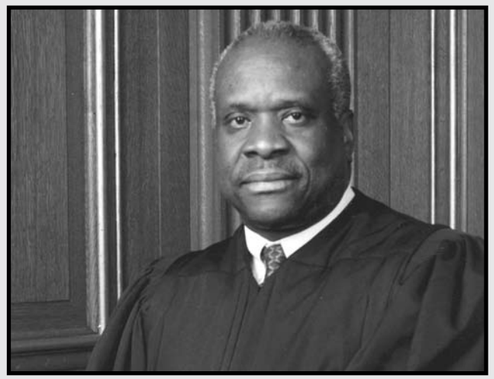
In the Administration's White Paper, Attorney General Gonzales asserts:

> In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President's constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its allies. [47]

But critics, such as conservative scholar Bruce Fein, contend the AUMF should not be read so broadly. Citing a FISA section that purports to restrict warrantless surveillance following a declaration of war to fifteen calendar days,[48] Fein says:

> FISA properly regulates the president's authority to wage war to safeguard First and Fourth Amendment freedoms that historically have been compromised by the commander in chief, whether during the Civil War, World War I, World War II or the Cold War.[49]

The gist of Fein's argument and those of other Administration opponents is that nothing short of a law explicitly amending FISA is sufficient to authorize the NSA's surveillance activities. The ACLU, for example, says: "Congress does not repeal legislation through hints and innuendos." [50]



Supreme Court Justice Clarence Thomas cast the decisive 5th vote in favor of the Supreme Court's holding in Hamdi v. Rumsfeld, that the "necessary and appropriate force" clause in the Authorization to Use Military Force encompasses the use of "fundamental incident[s] of waging war.

[46] *ACLU Sues to Stop Illegal Spying on Americans, Saying President Is Not Above the Law,* ALCU News Release, Jan. 17, 2006. Available at www.aclu.org.
[47] *Legal Authorities* at p. 10.
[48] *See* 50 U.S.C. § 1811.
[49] *Twist of directive signals*, The Washington Times, Jan. 31, 2006.
[50] ACLU briefing paper, entitled: *NSA Spying of Americans Is Illegal.* Available at www.aclu.org.

But the Administration's detractors fail to comprehend the significance of a recent Supreme Court decision that seriously undercuts their assertions.

In *Hamdi v. Rumsfeld*, the high court gave broad reading to the AUMF, concluding the resolution's "necessary and appropriate force" clause encompasses the use of "fundamental incident[s] of waging war." [51]

The issue in *Hamdi* centered on whether the AUMF authorized the detention of an American citizen captured in Afghanistan and returned to the United States, where he was being held as an enemy combatant. The ACLU and other opponents of the practice argued such confinement was unlawful because the AUMF included no specific language addressing detention of U.S. citizens and an obscure provision of the U.S. criminal code says: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." [52]

In rejecting the detainee's claim, the Supreme Court said:

> It is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here. [53]

The Court's reasoning in *Hamdi* is quite consistent with the Bush Administration's assertion that the AUMF overrides any FISA provisions purporting to restrict surveillance of enemy communications, including international communications involving a party who is located in the United States. As the precedents cited earlier in this report amply demonstrate, intelligence operations are as much a "fundamental incident of waging war" as is the detention of enemy combatants. Since the AUMF "clearly and unmistakably" permits the detention of enemy combatants despite the lack of specific language addressing the issue, one could reasonably conclude the absence of specific language nullifying FISA is similarly without legal significance.

In other words, the Supreme Court's *Hamdi* decision gives significant credence to the Bush Administration's contention that the AUMF overrides any restrictions FISA would otherwise place on the President's authority to intercept suspected enemy communications whether at home, abroad or in combination thereof.

III. There is no merit to the assertion that the Terrorist Surveillance Program is the functional equivalent to President Truman's unlawful order directing the government to seize control of American steel mills during the Korean War.

In *Youngstown Sheet & Tube Co. v. Sawyer*,[54] the Supreme Court held that President Truman exceeded the scope of his constitutional powers when he ordered the seizure of the nation's steel mills in order to avert a strike that threatened to disrupt the production of weapons and other war materials during the Korean War. The Court explained:

> [President Truman's] order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.[55]

[51] *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2002).
[52] 18 U.S.C. § 4001(a).
[53] *Hamdi*, 520 U.S. at 519; *see also, id.* at 589 (Thomas, J., dissenting)("I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants").
[54] *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952).
[55] *Id.* at 867.

Citing this case, the ACLU claims President Bush has no more authority to eavesdrop on suspected al Qaeda communications involving a party who is physically present in the United States than he has "to carry out an armed robbery or seize control of Citibank in order to pay for operations against terrorists."[56]

The ACLU and those who share the organization's view on this issue could not be more off mark. There is a big difference between the Truman Administration's attempted seizure of private businesses having at most a tangential relationship to ongoing hostilities and the Bush Administration's employment of commonplace military tactics in the theater of war.

To begin with, the NSA is a branch of the Department of Defense and its primary function is to provide intelligence in support of military operations;[57] it is not a private business.

Secondly, Congress specifically authorized the use of military force against al Qaeda and other forces of international terrorism. President Truman, in contrast, did not seek or obtain congressional authorization to send troops to fight in Korea.

Third, as demonstrated in sections I and II of this report, enemy surveillance operations, in contrast to the seizure of private businesses, are fundamental and accepted wartime tactics.

Finally, there can be no doubt that the American homeland is on the front lines in the War on Terror. Lest we forget, the United States was attacked on September 11, 2001 by U.S.-based al Qaeda operatives who were taking orders from overseas commanders. Nearly three thousand people died on American soil that morning. Since then, other U.S.-based terrorist cells have been uncovered and other planned attacks on U.S.-based targets have been averted, due in large part to successful intelligence operations in the U.S. and abroad. According to media reports, the Terrorist Surveillance Program is credited "with helping to uncover and disrupt terrorist plots, including plans by Iyman Faris, an Ohio truck driver who pleaded guilty in 2003 to planning to blow up the Brooklyn Bridge."[58] Other examples, not necessarily tied to the surveillance program, include the al Qaeda cell that was uncovered in Buffalo, New York, in September 2002,[59] and the foiled terror plot targeting the US Bank Tower in Los Angeles. [60]

To quote from a recent column by Mark Levin, it is "absurd" to contend that a President who has "the power to rain devastation on the enemy, including destroying entire cities as in World War II . . . doesn't have the authority to intercept the enemy's communications with individuals in the U.S. without judicial approval."[61]

In blunt terms, the Supreme Court's decision in *Youngstown Steel and Tube Co.* is wholly inapplicable to the present controversy, because the Terrorist Surveillance Program is not remotely comparable to President Truman's unlawful order to commandeer America's steel mills during the Korean War.

"The War on Terror is primarily a military conflict, not a law enforcement matter. Similar to World War II, America entry into the fray began with a surprise attack from the air, which was followed shortly thereafter with congressional authorization by nearly unanimous votes of the House and Senate."

IV. Domestic law enforcement cases are inapplicable to the Terrorist Surveillance Program. The War on Terror is primarily a military conflict, not a domestic law enforcement matter.

With the exception of *Youngstown Steel and Tube Co.*, the main precedents cited by opponents of the Terrorist Surveillance Program deal with surveillance conducted for law enforcement and domestic security purposes. As such, they offer no guidance on the President's war fighting authority.

Katz v. United States [62] and *United States v. United States District Court for the Eastern District of Michigan* [63] are chief among the cases cited by critics of the program. The ACLU, for example, cites the two cases for the proposition that "[t]he program violates the Fourth Amendment and FISA and will chill free speech." [64]

Neither decision supports the ACLU's position.

Katz addressed the constitutionality of an FBI wiretap of a public telephone booth and the use of the intercepted conversation in a criminal prosecution for transmitting wagering information by telephone. The case had nothing to do with war-time surveillance.

The ACLU's citation of *United States District Court* is similarly misplaced. While the Supreme Court held in that case that a warrant is required for domestic security surveillance, the Court specifically warned against reading the decision to require a warrant for surveillance involving "the activities of foreign powers, within or without this country."[65]

The War on Terror is primarily a military conflict, not a law enforcement matter. Similar to World War II, America's entry into the fray began with a surprise attack from the air, which was followed shortly thereafter with congressional authorization by nearly unanimous votes of the House and Senate. In the case of World War II, the authorization came in the form of declarations of war on Japan,[66] Germany[67] and Italy. [68] Here, because the forces of terror transcend national borders, the authorization does not target specific foreign powers, but includes "those nations, organizations, or persons [the President] determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons."[69]

As an incident of armed conflict, the lawfulness of the Terrorist Surveillance Program must be judged by the rules, laws and constitutional restraints applicable to warfare, not the rules pertaining to domestic law enforcement. And the rules for conducting warfare vest the President with broad powers. As confirmed by the precedents cited earlier in this report, the courts have consistently recognized the President's authority to conduct warrantless surveillance as an incidence of his powers as Commander in Chief of the armed forces. The cases cited by the Administration's opponents, which by and large deal with domestic law enforcement, have little to no bearing on the lawfulness of the Terrorist Surveillance Program.

V. Any law granting the courts a supervisory role in the interception and monitoring of enemy communications in times of armed conflict likely violates the Separation of Powers Doctrine.

Congress cannot transfer powers vested by the Constitution in the executive branch of the government to itself or the judiciary. As the Supreme Court explained in *INS v. Chadha*:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. [70]

56 *NSA Spying on Americans Is Illegal, supra.* Note 50.
57 *See* Executive Order 12333, §§ 1.11(j) and 1.12(b)(7), *supra*, note 15.
58 *On Hill, Anger and Calls for Hearing Greet News of Stateside Surveillance*, Washington Post, Dec. 17, 2005.
59 *See Six al Qaeda suspects in Buffalo denied bail*, USA Today, Sept. 17, 2002. Available at www.usatoday.com.
60 *See Bush highlights foiled 2002 L.A. terror plot*, MSNBC, Feb. 9, 2006. Available at www.msnbc.com.
61 *John McCain, Weak on Defense, supra.*, Note 12.
62 *Katz v. United States*, 389 U.S. 347 (1967).
63 *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972).
64 *Top Ten Myths About The Illegal NSA Spying On Americans.* Available at www.aclu.org.
65 *United States District Court*, 407 U.S. at 308.
66 Declaration of War on Japan, Pub. L. No. 77-328, 55 Stat. 796 (Dec. 8, 1941).
67 Declaration of War on Germany, Pub. L. No. 77-331, 55 Stat. 796 (Dec. 11, 1941).
68 Declaration of War on Italy, Pub. L. No. 77-332, 55 Stat 797 (Dec. 11, 1941).
69 AUMF, Pub. L. 107-40, § 2(a), 115 Stat, 224, 224 (Sept. 18, 2001).
70 *INS v. Chadha*, 462 U.S. 919, 951 (1983).

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." – U.S. Supreme Court, Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp. (1948).

The U.S. Constitution names the President as "Commander in Chief" of the armed forces,[71] and the authorities discussed earlier in this report clearly demonstrate that one of the attributes of the President's war fighting powers – whether derived from the Constitution alone or a congressional resolution authorizing the use of force – is control over war-time intelligence operations.

This is not a power shared with the courts. In the aftermath of World War II, the Supreme Court explained in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.* that:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if the courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[72]

Taken together, *Chadha, Waterman Steamship Corp.* and other court precedents cited in this report lead to one conclusion: Any interpretation of FISA vesting the courts with supervisory authority over war-time intelligence operations would render that statute unconstitutional.

Nevertheless, some members of Congress cannot resist the temptation to tread even further on the President's war fighting powers.

Comments from the Chairman of the Senate Judiciary Committee are a prime example. Senator Arlen Specter says he is pushing legislation to vest the FISA court with statutory authority to oversee any future surveillance of suspected enemy communications in the War on Terror. According to a report published by USA Today, Senator Specter's proposal would empower the FISA Court "to review the National Security Agency's domestic anti-terrorist surveillance every 45 days to ensure it does not go beyond limits described by the administration."[73]

Senator Arlen Specter, who chairs the Senate Judiciary Committee, is pushing legislation to vest the FISA Court with supervisory authority over the Terrorist Surveillance Program. But a 2002 decision by FISA Court of Review says such oversight would unconstitutionally infringe on the President's "inherent authority to conduct warrantless searches to obtain foreign intelligence information.

[71] U.S. Const. art. II § 2 cl. 1.
[72] *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).
[73] *Specter wants special court to supervise surveillance*, USA Today, Feb. 9, 2006; *see also, Specter eyes measure to curb surveillance*, The Washington Times, Feb. 21, 2006.

While chances of the Specter proposal becoming law are slim (even if such a bill could muster a simple majority in the House and Senate, it will require a two thirds majority in each house to override an anticipated presidential veto), the FISA Court of Review has already opined that any such oversight by the court would unconstitutionally infringe on the President's "inherent authority to conduct warrantless searches to obtain foreign intelligence information."[74]

In short, any law that purports to vest the courts with supervisory authority over the conduct of war-related intelligence operations would likely be struck down as an unconstitutional transfer of executive branch authority to the judiciary in violation of the Separation of Powers Doctrine.

Conclusion

If one were to rely mainly on reports published by the mainstream media, it would be easy to conclude the Bush Administration is deliberately violating FISA and the constitutional rights of hundreds or perhaps thousands of ordinary Americans through a NSA surveillance program purporting to intercept and monitor suspected al Qaeda communications. Headlines, editorials and news texts abound with phrases such as "domestic spying" and "warrantless surveillance" to describe the program, while commentators and spokesmen for special interest groups speak as if it is a foregone conclusion that the surveillance is widespread, ineffective and unlawful.

But the facts and overwhelming weight of precedent are to the contrary.

The number of communication intercepts involving persons located in America appears to be quite minimal, with reports indicating no more than a few dozen over a span of more than four years. Yet the program is credited with helping to uncover and disrupt at least one al Qaeda plot, a scheme to blow up the Brooklyn Bridge.

From a legal perspective it is critical to bear in mind that the War on Terror is primarily a military conflict, not a law enforcement matter as many of the President's critics mistakenly imply. And because the nation is in a state of congressional authorized "armed conflict" with forces of international terrorism, President Bush's powers as Commander in Chief of the Armed Forces are at their peak.

From the earliest days of the Republic, the President has exercised nearly unfettered discretion in the administration of war-time intelligence operations. Each of the nation's war Presidents has conducted enemy surveillance as an incident of his inherent constitutional authority, and the courts have consistently held that the judicial branch is powerless to meddle in such matters.

When considered in proper context, it is quite clear that the interception of international communications between al Qaeda terrorists in the United States and their overseas masters is a fundamental incident of waging war against the forces responsible for the heinous September 11, 2001 attacks on the United States and securing the nation from future attacks.

Furthermore, to the extent that FISA or any other statute may require court approval of such intercepts, the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld* is a strong indicator that the AUMF nullifies any such requirement. And if the AUMF doesn't annul any such requirement, FISA likely violates the Separation of Powers Doctrine, because Congress cannot delegate the President's war fighting authority to the courts.

When the relevant facts and precedents are weighed in the context of what is at stake – preventing foreign orchestrated terrorist attacks on the American homeland – the conclusion is obvious: President Bush's directive authorizing the NSA to eavesdrop on suspected al Qaeda communications is a lawful and prudent exercise of presidential prerogative in the War on Terror.

[74] *In re Sealed Case*, 310 F. 3d at 742.

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