A Comprehensive Analysis of the National Security Agency’s Wiretapping Program and its Correlation with the Foreign Intelligence Surveillance Act

Michael Fraggetta
ABSTRACT

This paper is an analysis of the unitary executive theory as ascribed to by the Bush/Cheney administration. The central focus of the paper analyzes the NSA wiretapping program, which was made public in 2005 and the correlation and support found for the program in the unitary executive theory.

The paper proceeds with a brief history of the warrantless surveillance in the United States and the evolution of electronic surveillance jurisprudence culminating with the passage of the Foreign Intelligence Surveillance Act in 1978. The paper then explores the NSA program and analyzes, in depth, the legal arguments set forth by the Department of Justice and others in support of the program as well as the legal arguments against the NSA program, specifically, the applicability of the foreign intelligence surveillance act.

The paper then dissects the foreign intelligence surveillance act in order to determine whether the NSA program was issued in violation of it. This analysis includes a comprehensive dissection of the legislative history of the foreign intelligence surveillance act.
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They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety. ¹

INTRODUCTION

The administration of President George W. Bush ascribes to the Constitutional theory of the unitary executive, this theory takes the position that all executive authority must be in the President’s hands without exception.² According to the Vice President Cheney, “in wartime, the president needs to have his constitutional powers unimpaired”.³

Some of the applications of the Unitary Executive theory have included “the power to go to war without Congressional approval”, “the power to detain “enemy combatants”, including Americans captured on American soil, without access to a lawyer or to hearings and the power to engage in coercive interrogation of enemies, even torture, when necessary.”⁴ The President and the Vice President, Dick Cheney have attempted over the duration of their administration to expand the powers of the President through a series of signing statements.⁵ One of the more controversial programs of the Bush administration has been the secret National Security Agency’s (NSA) wiretapping program.

Aspects of the Unitary Executive theory are not novel. President Lincoln suspended the writ of habeas corpus during the Civil War, Franklin Roosevelt sent Japanese Americans to internment camps during World War II, and during the 1980s, President Reagan ignored a Congressional ban and provided aid to contra rebels in Nicaragua.⁶

The unitary executive theory as espoused by the Bush administration came to the forefront after the most traumatic and devastating terrorist attack on United States soil. On the tranquil morning of September 11, 2001, four commercial passenger jet airliners were hijacked by terrorists. Two of the planes were flown into each of the two main towers of the World Trade Center in New York, NY. A third plane crashed into the Pentagon and the fourth plane crashed in a field in Pennsylvania. This day caused the death of over 2,973⁷ men, women and children. In the days that followed these horrific events, it is believed that President Bush issued a secret executive order authorizing the National Security Agency to conduct surveillance of telephone conversations without

¹ Benjamin Franklin.
² http://www.sourcewatch.org/index.php?title=Unitary_Executive_Theory
³ Peter Baker and Jim VandeHei, Clash is Latest Chapter in Bush Effort to Widen Executive Power, Wash. Post, December 21, 2005.
⁵ Signing statements detail how the Executive branch intends to construe an article of legislation, definition found at http://en.wikipedia.org/wiki/Unitary_executive_theory.
⁶ Peter Baker and Jim VandeHei, Clash is Latest Chapter in Bush Effort to Widen Executive Power, Wash. Post, December 21, 2005.
acquiring a warrant from the Foreign Intelligence Surveillance Act court or any other court either before or after the surveillance. 8

The complete facts of the NSA program remain a secret. However, what has been determined is that the program involves the interception of telephone communications where at least one party to the conversation is a suspected or known terrorist. The program permits surveillance, even if one of the parties to the conversation is a US citizen. 9 This program continued unbeknownest to the public until December 2005, when the New York Times broke the wall of silence and exposed the surveillance program.

Several legal commentators immediately responded to the revelation of this controversial program, pointing out that the President faces several legal hurdles to prove the legality of this program. Among them is the Fourth Amendment, 10 because these wiretaps are being conducted without a warrant or a neutral third party to weigh the reasonableness of the warrant. Another major hurdle and the focus of this paper is whether the surveillance violates the Foreign Intelligence Surveillance Act (FISA). FISA is a statute enacted by Congress in 1978, which deals with foreign intelligence surveillance. FISA sets procedures that the executive agencies must adhere to in order to legally conduct surveillance for foreign intelligence purposes where at least one party is in the United States.

Shortly after the revelation of this program, the Department of Justice (DOJ) released a very detailed legal opinion arguing for the legality and constitutionality of the program. 11 In response to the DOJ, the Congressional Research Service released its own legal analysis, arguing that the NSA wiretaps must conform to the procedures of FISA. 12

FISA was enacted after years of controversy over Presidential abuses in the conduct of foreign intelligence surveillance for national security purposes. Prior to the enactment of FISA, in some of the most important cases involving the warrant requirement for electronic surveillance, the Supreme Court refrained from requiring a warrant when the purpose of the surveillance was national security. 13

I. HISTORY OF WARRANTLESS SURVEILLANCE

In 1976, Congress created the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee). The committee learned that

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8 Id. searching “NSA Warrantless Surveillance Controversy”.
10 U.S. CONST. Amend. IV.
12 ELIZABETH B. BAZAN AND JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (2006).
“intelligence activity … exceeded the restraints on the exercise of governmental power which are imposed by our country’s Constitution, laws, and traditions.”  

This committee uncovered years of abuse by Presidents and executive agencies which authorized surveillance under a national security rationale when, in fact there was no national security interest present. The Committee found that “since the 1930s, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant.”

Among the transgressions uncovered by the Church Committee were that the CIA and FBI opened nearly 380,000 combined first class letters and photographed the contents. Millions of private telegrams to or from overseas and the US were obtained by the National Security Agency through secret arrangements with three United States telegraph companies. The United States Army maintained intelligence files on an estimated 100,000 Americans and another 11,000 intelligence files were created through Internal Revenue Service investigations that were initiated on a political basis.

The Church Committee further revealed that “each administration from Franklin D. Roosevelt’s to Richard Nixon’s has permitted, and sometimes encouraged, governmental agencies to handle essentially political intelligence.” Past subjects of surveillance included a United States Congressman, a United States Senator, Supreme Court Justices, “Congressional staff members, journalists, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security”. The only plausible basis for the surveillance was political.

In addition to those noted above, there had been warrantless wiretaps authorized against non-violent organizations including the Women’s Liberation Movement and the National Association for the Advancement of Colored Persons (NAACP). The surveillance of the NAACP by the FBI, for instance, continued for over 25 years and was authorized to determine whether the NAACP had any connections with the Communist party. This surveillance continued despite a report during the first year of the investigation, which found that the NAACP had “a strong tendency to steer clear of Communist activities”.

Civil Rights leader, Dr. Martin Luther King Jr was a significant target of surveillance. After Dr. King orated his legendary “I Have A Dream” speech, the FBI determined that Dr. King needed to be taken “off his pedestal” and labeled him the “most dangerous and effective Negro leader in the country”. The Church Committee discovered that the FBI

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15 Id. at 11.
16 Id. at 6.
17 Id. at 8.
18 Id.
19 Id at 13.
20 Id. at 7.
21 Id.
22 Id. at 9-10.
23 Id. at 10.
continued a course of surveillance and harassment against Dr. King under the reported rationale of a fear that he would abandon his non-violent ways and incite violence.\(^{24}\) In one particularly heinous instance the FBI had secretly recorded Dr. King and then sent him an anonymous letter threatening to release its embarrassing tape recording, which was meant to destroy his marriage, unless he committed suicide.\(^{25}\)

Amidst these startling revelations, Congress passed the Foreign Intelligence Surveillance Act. This legislation was aimed at eliminating the carte blanche given intelligence agencies of past Presidents and executive agencies, and required, among other things, that, before commencing surveillance, the federal agency conducting the surveillance bring their proposal before a specially created court, the Foreign Intelligence Surveillance Court.

In order to understand the present it is important to review the past, thus the note begins by reviewing the legal history of electronic surveillance in the United States and how the courts and Congress have dealt with ever evolving technology. Then we will turn to FISA and the subsequent laws that had supplemented FISA; most notably the Patriot Act. We then review the legal commentators’ positions on both sides of this controversial issue of the legality of the NSA surveillance program. Finally, this note shall examine whether Congress intended FISA to be an all-encompassing statute with respect to foreign intelligence surveillance and judicial challenges to the program

**II. PRE-FISA ELECTRONIC SURVEILLANCE JURISPRUDENCE**

The Executive branch of the United States is entrusted with the authority to handle most issues dealing with foreign affairs.\(^{26}\) Included with this authority is the implicit responsibility to protect national security.\(^{27}\) The Presidents have long used the controversial tool of warrantless wiretaps arguably as a method for maintaining national security.\(^{28}\)

In 1791, the Fourth Amendment was ratified. It states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…”.\(^{29}\) The fine line between the President’s inherent authority to handle foreign affairs under Article II of the Constitution and deal with national security and the warrant requirement of the Fourth Amendment has been reviewed and analyzed by the courts and congress. The majority of the analysis however, has occurred in the past eighty years.

\(^{24}\) Id.
\(^{25}\) Id.
\(^{29}\) U.S. CONST. Amend. IV.
Since the enactment of the Fourth Amendment, the Supreme Court has heard many cases concerning the amendment’s applicability. The earlier cases all dealt with actual physical invasions of a person’s house or property and the seizure of tangible things such as documents or contraband. As technology improved, with such innovative inventions such as the telephone, so did the means by which the government could invade someone’s privacy. Soon the wiretapping of telephones became an important method of conducting surveillance and gathering evidence against alleged criminals.

The first time that the Supreme Court had the opportunity to hear a case in which a defendant challenged evidence obtained by federal investigators via a wiretap on a telephone was in 1928. In *Olmstead v. US*, the Supreme Court declined to expand Fourth Amendment doctrine to forbid the use of a wiretap without first obtaining a warrant. The Court held that since there was no physical invasion involved and no seizure of any tangible property, there was no violation of the Fourth Amendment.

The Court in *Olmstead* applied formalistic approach to the then existing rule of law and Justice Brandeis delivered a prophetic dissent. Brandeis believed that the true purpose of the Fourth Amendment was to protect a person’s privacy as much as it was to forbid law enforcement officials from forcing their way into a person’s house. The mere fact that technology had improved over the years should not be an open ticket for the government to invent new and novel means of invading privacy. After reiterating that the Supreme Court had held that a sealed letter was protected by the Fourth Amendment from a warrantless search, he stated that “the evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mail.” While the Supreme Court in *Olmstead* did not hold that wiretaps without a warrant were unconstitutional, it suggested that Congress could legislate to require warrants for such wiretaps.

Heeding the suggestion of the Supreme Court, Congress passed the Communications Act of 1934, which made it “illegal to intercept and disclose any wire or radio communication”. Despite this Act, during World War II, when the issue of national security was elevated and Congress was lethargic in passing a resolution authorizing national security wiretapping, President Franklin D. Roosevelt acted unilaterally and authorized warrantless wiretaps in instances where “grave matters involving defense of

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31 A means of allowing a third party to listen in on a conversation between two individuals without the parties to the conversation being aware that their conversation is not private, *WORLD BOOK DICTIONARY* 2399 (1985).


33 *Id.* at 465-466.

34 *Id.* at 572.

35 *Id.* at 474.

36 *Id.* at 475.

37 *Id.* at 465-466.

the nation' were involved".39 This practice was subsequently followed by other Presidents including Harry Truman and Lyndon B. Johnson.40

In 1967 the Supreme Court decided another landmark decision, Katz v. U.S.41 In Katz, the court effectively overruled Olmstead, by holding that “the Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements overheard without any technical trespass under local property law”.42 The Court went as far as to enforce a new requirement that law enforcement attain a warrant from a neutral magistrate before wiretapping a phone.43 The Court noted that “searches conducted … without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment” and that includes wiretapping and eavesdropping on a private telephone conversation.44 The Court stopped short of enforcing the warrant requirement in cases involving national security, which was not at issue.45

Concurring in the decision, Justice Douglas took exception to the national security exclusion enunciated by the Court. He believed that regardless of whether the suspected crime was gambling or espionage, the investigated parties should be protected by the guarantees of the Fourth Amendment.46 He also noted that the warrant requirement demanded that a neutral judge or magistrate be entrusted with the responsibility to grant the warrant and that since the President is an interested party in any national security investigation, this decision in essence permitted the President to conduct warrantless wiretaps for national security investigations without it being a violation of the Fourth Amendment.47

In response to the Katz decision, Congress convened and in 1968 drafted the Omnibus Crime Control and Safe Streets Act.48 Title III of this act is entitled “Wiretapping and Electronic Surveillance”. This monumental act of legislation set the guidelines for law enforcement to follow to comply with the Katz decision and acquire a warrant to conduct electronic surveillance of specified criminal activities.49 Congress followed the blueprint drawn up by the Katz decision in enacting the Omnibus Crime Control & Safe Streets Act. This act deals primarily with criminal activities and just like the majority in Katz, it

39 Id.
40 Id.
42 Id. at 353.
43 Id. at 356-357.
44 Id.
45 Id. at 358 n.23 finding that “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”
46 Id. at 359-360.
47 Id.
provides a national security and foreign intelligence exception within the body of the Act.  

Then in 1972, the Supreme Court enunciated their holding in what has become commonly known as the “Keith Case”.  

In this case, the Court held that federal investigators were required to obtain a warrant prior to conducting electronic surveillance related to domestic security investigations.  

The government had wiretapped the phone of individuals suspected of bombing federal buildings within the U.S., without first attaining a warrant.  The Court, while mandating that domestic security electronic surveillance must comply with the dictates of the Fourth Amendment and require a prior warrant, made very clear that their holding did not address the issue “involved with respect to activities of foreign powers and their agents”.

III. FISA & ITS PROGENY

By the 1970s, Fourth Amendment doctrine as applied by the Supreme Court and Congress had evolved to the point where electronic surveillance that involves no actual criminal trespass still required a warrant and even domestic aspects of national security require prior judicial approval before such an intrusion.  However, nothing enunciated by the Courts or Congress had hindered the Executive’s authority to conduct warrantless electronic surveillance under the justification of national security.  In fact, the cases discussed heretofore infer that their decisions do not hinder the Executive’s authority to conduct foreign intelligence surveillance.

During the 1970s, Congress, in response to the many abuses exposed by the Church Committee, enacted the FISA.

“The Foreign Intelligence Surveillance Act is a federal statute that governs how the U.S. government employs certain privacy intruding techniques in foreign intelligence investigations” conducted within the United States.  FISA places restrictions on the President’s ability to conduct electronic surveillance on foreign agents within the U.S., by clearly defining a “foreign power” and an “agent of a foreign power” and only permitting foreign intelligence surveillance against foreign powers and their agents after

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50 18 U.S.C.A. §2511 stating in pertinent part “nothing contained in this chapter … shall limit the Constitutional power of the President to take such measures as he deems necessary to protect the nation … [or] to obtain foreign intelligence information deemed essential to security of the United States or to protect national security information”.
52 Id., at 316-317.
53 Id., at 321-322.
54 U.S. CONST. Amend. IV, which states in pertinent part “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”.
55 Katz at 358 n. 23; see also US v. USDC at 322-322.
the proper FISA procedures are followed.\textsuperscript{58} The procedures set forth in FISA include
getting approval for the surveillance from a special court, the Foreign Intelligence
Surveillance Court (hereinafter FISC).\textsuperscript{59} If the FISC denies an application for
surveillance, then the request can be appealed by the Attorney General to the Foreign
Intelligence Surveillance Court of Review.\textsuperscript{60}

The initial request for surveillance must indicate that there is probable cause that the
target of the surveillance is “a foreign power or an agent of a foreign power”.\textsuperscript{61} This is a
sharp contrast from applications for ordinary criminal warrants, which is that there must
be probable cause that the target of the surveillance committed a crime.\textsuperscript{62} FISA orders
can be obtained to conduct electronic surveillance on both US and non US persons.\textsuperscript{63} If
the target is a US person, then the length of the time permitted for the surveillance is
curtailed.\textsuperscript{64} There are also other restrictions on the surveillance that may be conducted on
US persons.\textsuperscript{65}

In 1980, the Court of Appeals for the Fourth Circuit held that the President was “excused
from securing a warrant only when surveillance was conducted 'primarily for foreign
intelligence reasons'”.\textsuperscript{66} This reaffirmed what the Supreme Court had said throughout the
20\textsuperscript{th} century, that there is a warrant exception to the Fourth Amendment when it came to
foreign intelligence surveillance. This case however, concerned surveillance conducted
prior to the enactment of FISA and thus FISA did not apply. The Court did discuss FISA
in a footnote and noted that FISA provided the method by which the executive could
obtain a warrant to conduct foreign intelligence surveillance, also making note of the
warrant exceptions.\textsuperscript{67} The Court also mentioned that the Congress was not erroneous in
requiring FISA orders to be ascertained against US citizens.\textsuperscript{68}

In another case, the Second Circuit stated that FISA was enacted to “create procedural
safeguards, which Congress deemed to be necessary to ensure that electronic surveillance
by the U.S. Government within this country conforms to the fundamental principals of
the Fourth Amendment”.\textsuperscript{69}

After the devastating attacks of September 11, 2001, Congress expedited the passage of
the Uniting and Strengthening America by Providing Appropriate Tools Required to

\begin{footnotes}
\item[60] Id.
\item[62] U.S. CONST. Amend. IV, which states in pertinent part “no warrants shall issue, but upon probable
cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the
persons or things to be seized”.
\item[65] 50 U.S.C. §1804 (1978) stating in pertinent part “no foreign intelligence surveillance may be conducted
against a U.S. person solely upon the basis of activities protected by the first amendment”.
\item[67] Truong Dinh Hung, 629 F. 2d at 915 n.4.
\item[68] Id.
\end{footnotes}
Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”). The Patriot Act, among many other things, amended FISA in several ways. It changed the number of judges that sit on the Foreign Intelligence Surveillance Court, and perhaps most appreciably, amended the purpose purported by the Attorney General in acquiring a FISA surveillance order. Originally FISA required that “the purpose of the surveillance is to obtain foreign intelligence information” and the Patriot Act changed that to “a significant purpose”. This addition of the word significant has been held by the Foreign Intelligence Court of Review to permit FISA surveillance even when purpose of the investigation is for criminal prosecution, so long as there is still a measurable purpose to gathering foreign intelligence information. This is significant because it enables the Federal government to conduct wiretaps for criminal investigations under the less restrictive confines of FISA as opposed to having to secure a traditional warrant.

There were other changes to FISA found in the USA Patriot Act, including one permitting more open communication between law enforcement and foreign intelligence agents, however, the Patriot Act did not change the general crux of FISA, which is to attain warrants to conduct foreign intelligence surveillance on domestic soil. In fact, FISA provides criminal sanctions if a person uses electronic surveillance where there is reason to know the surveillance was not authorized by statute. There are exceptions to FISA including a war time qualification that empowers the President to authorize electronic surveillance without a court order to acquire foreign intelligence information, for a period of fifteen days following a declaration of war by the Congress.

FISA is a check on the executive’s authority to conduct electronic surveillance in more ways than merely by requiring oversight by the FISC. There are other safeguards included that the executive must adhere to in order to comply with the statute. There are, of course, instances where foreign intelligence gathering is needed expeditiously. For those occasions, Congress included an emergency section within FISA. The emergency order section permits the Attorney General acting on behalf of the President to authorize surveillance, prior to submitting a warrant request before the FISC. While this section permits the Attorney General to conduct surveillance without attaining a court order, there are restrictions, such as, that the factors required to normally attain a FISA order must be present and the Attorney General must seek the proper order within 72 hours after initiating the surveillance.

71 Id.
72 In Re: Sealed Case, 310 F.3d 717, 734-735 (2002).
73 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, § 203.
76 50 U.S.C. § 1808 (1978) (On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this subchapter).
78 Id.
There is also another section of FISA, which is attributed to exceptions to the warrant requirement.\textsuperscript{79} Under this section, there is a one year time limit for warrantless surveillance, and the Attorney General must certify in writing several criteria outlined by the statute, one factor being that the surveillance has no substantial likelihood of acquiring communications to which a United States person is a party.\textsuperscript{80}

IV. POST 9/11 WIRETAPPING: COMMENTATORS, CONGRESS & THE COURTS

In December 2005, the New York Times reported on a program approved by the President that authorized warrantless wiretaps on Americans and others within the jurisdiction of the United States. The program had begun soon after the attacks of September 11, 2001 and was officially authorized by the President via an executive order signed in 2002.\textsuperscript{81} Perhaps the hurdles in FISA were the reasons that the Bush administration began conducting warrantless wiretaps for foreign intelligence purposes after 9/11, circumventing the requirements of FISA.

Due to the efforts of the NY Times, the secret program became common knowledge leading to intense debate. Proponents of the program tend to argue that the authority to conduct these wiretaps is inherent under the Presidential powers outlined in Article II of the U.S. Constitution or, in any event, that it is permissible under FISA. Opponents claim that the President is violating federal law and the separation of powers doctrine.\textsuperscript{82} This secret program does not utilize any aspect of the FISA. There are no requests for surveillance brought before the FISC nor is the one year limit on warrantless wiretapping.\textsuperscript{83} The administration completely circumvented FISA and conducted this surveillance program acting as if FISA did not apply.

The secret surveillance program authorized by the President has ignited intense debate. We shall begin this analysis by looking at the administration’s position on the program and the views of several commentators who believe the program not only is legal, but essential to the safety of the American citizenry.

In response to the publication of this secret program by the NY Times, the Department of Justice (hereinafter DOJ) issued a forty-two page report arguing the legality and constitutionality of the NSA program.\textsuperscript{84} Several arguments are made: First and foremost is that the “President has inherent Constitutional authority to order warrantless foreign wiretapping.”

\textsuperscript{80} Id.
\textsuperscript{81} James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers without Courts, N.Y. Times, December 16, 2005.
\textsuperscript{83} Id.
intelligence surveillance.” The argument is clear - the President, acting as the Commander in Chief of the Armed Forces and the sole organ of the nation in external relations, has the inherent authority to conduct foreign intelligence surveillance. Courts have consistently implied this theory. Second, the President clearly has the authority to resist a sudden attack upon the United States and, if attacked, the President may fight force with force. The events on September 11, 2001 were just such an attack. The DOJ interprets the permissible force doctrine as support for the inherent authority of the President to conduct warrantless surveillance.

The second argument made by the DOJ is that the Authorization to Use Military Force (AUMF) confirms and supplements the President’s inherent authority to conduct warrantless surveillance. In response to the attacks on 9/11, Congress passed the AUMF on September 14, 2001. The AUMF authorizes the “President ‘to use all necessary and appropriate force against those nations, organizations, or persons he determine planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001’.”

The DOJ argues that the use of electronic surveillance is a type of force to be utilized against the enemy as defined by the AUMF. The AUMF permits military action within the US borders and according to the DOJ the use of electronic surveillance is a vital “use of force” in locating and identifying the enemy. The DOJ further argues that the Hamdi decision supports this analysis because “five of the justices… [found] that the AUMF incorporates fundamental ‘incidents’ of the use of military force” and that the fact that detention was not specifically described in the AUMF does not mean detention was not meant to be a part of it as detention is a fundamental incident of military force. As explained, the DOJ interprets surveillance as also being a fundamental incident of military force. It should however, be noted that in the plurality opinion of Hamdi drafted by Justice O’Connor, she noted that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”. Justice O’Conner also noted that even in the executive’s role in dealing with enemies, the Constitution “envisions a role for all three branches when individual liberties are at stake”.

85 Id. at 6-10.
86 Id.
87 U.S. v. Truong, 629 F.2d at 914 (finding that the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance); U.S. v. U.S.E.D, 407 U.S. at 310 (finding that implicit in the duty to protect the nation is the duty to protect the government from those that would subvert it by unlawful means, this case specifically restrained from expanding its holding to cover foreign intelligence surveillance).
88 The Amy Warwick, 67 U.S. 635, 668 (1862), also known as the Prize Cases.
89 Department of Justice, supra note 75, at 10.
90 Id. at 10-13.
91 Id. at 11.
92 Id. at 12.
93 Id. at 13.
95 Id.
The DOJ supports its interpretation of electronic surveillance as being an incident of war and thus permitted under the AUMF by providing evidence from past Presidents ranging from George Washington, Abraham Lincoln and Franklin D. Roosevelt. The core problem with these examples is that they all occurred prior to the enactment of FISA. As discussed earlier, prior to FISA, the courts made clear in their decisions concerning electronic surveillance that those decisions did not reflect the President’s authority to conduct foreign intelligence surveillance nor had Congress legislated to restrict the President from conducting foreign intelligence surveillance until passage of the FISA, although, as discussed earlier, the DOJ argues that being an inherent power, congress cannot legislate to curb the President’s authority to conduct foreign intelligence surveillance.

The DOJ, recognizing the significance of FISA, further argues that the activities of the NSA are consistent with FISA. They claim that FISA itself expressly “contemplates that the Executive Branch may conduct electronic surveillance outside FISA’s express procedures, if and when a subsequent statute authorizes such surveillance.” The section under FISA referenced by the DOJ is entitled “criminal sanctions”, which procures that an individual acting under the color of law shall not be prosecuted if the electronic surveillance conducted was permitted under a statute. The DOJ reasons that the AUMF is just such a statute. The DOJ takes a broad view of the term statute by defining the AUMF as a statute. They referred to the Black’s Law Dictionary definition of a statute and determined that “it is of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill.”

Some legal commentators have supported the DOJ’s position. In an interview with Paul Gigot on Fox News, John Yoo, deputy assistant Attorney General from 2001 to 2003 and one of the main architects of the DOJ’s position with respect to the NSA program, argued that FISA is out-dated and not fitted to deal with the problem posed by Al Qaeda. Mr. Yoo endorsed the position that the President, as commander-in-chief, has the responsibility to defend the nation through the use of force when it is attacked and that the use of force has “ancillary or related powers” such as the power to intercept communications with the enemy.

John C. Eastman, a professor of law and director at the Claremont Institute Center for Constitutional Jurisprudence also has argued in support of the position taken by the DOJ.

96 Department of Justice, supra note 75 at 15-17 (finding that General Washington intercepted communications during the Revolutionary War, President Lincoln wiretapped telegraphs, President Wilson ordered the censorship of messages sent outside the United States via telegraph and telephone lines, President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities).
98 Department of Justice supra note 75 at 20.
99 50 U.S.C. § 1809 (1978) stating in pertinent part “[a] person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute”.
100 Department of Justice, supra note 75, at 23-28.
101 Id. at 24.
102 Fox News: John Yoo Defends Warrant-Less Wiretapping (Fox News Channel broadcast Jan. 28, 2006).
103 Id.
He reasons that, under the NSA program, the President is acting pursuant to his inherent Constitutional authority combined with the statutory authority provided by congress in the AUMF. Under this analysis, the President’s power is at its zenith and falls into the first category of Justice Jackson’s three tiers of Presidential power, which were enunciated in Youngstown. Mr. Eastman goes on to claim that “under the Constitution and confirmed by two centuries of historical practice and ratified by the Supreme Court precedent, the President clearly has the authority to conduct surveillance of enemy communications in a time of war.” In arguing that the President’s power to conduct the electronic surveillance is inherent, he reasons that, if it is found that FISA is all encompassing and has the effect of restricting the President’s inherent power, then FISA would be an unconstitutional intrusion onto the President’s Constitutional powers.

In a prepared statement, Attorney General Alberto Gonzalez defined the legality of the NSA’s program by summarizing the position taken by the DOJ. He explained that the AUMF gave congressional authority to the President to “use all necessary force” against Al Qaeda and to “protect Americans ‘both at home and abroad’”. While acknowledging that there is no specific mention of surveillance in the text of the AUMF, he argues that the AUMF still authorized the surveillance by implication.

Gonzalez bases his reasoning on Justice O’Connor’s opinion in Hamdi, where she opined that, under the AUMF, even though there was no specific mention of detaining prisoners, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war”[internal quotes omitted]. The Attorney General, analogous to his supporters, argues that history has shown that surveillance of the enemy is also a fundamental incident of war and thus is incorporated under the AUMF.

Under this position, the President has inherent Constitutional power to conduct warrantless foreign intelligence surveillance and, thus, as stated by Mr. Chapman, if FISA is found to be an all-encompassing statute, then it would be limiting the inherent authority of the President and be unconstitutional. Gonzales argues, however, that FISA is not an all-encompassing statute and permits the President’s actions. His theory is two fold: the first part mirrors the DOJ’s position that FISA bars the use of electronic surveillance under color of law “except as authorized by statute”. The fact that this section says statute as opposed to FISA or any specific statute is significant. Mr.
Gonzalez reasons that the use of the term statute in the FISA language permits the use of any statute Congress passes and that the AUMF is just such a statute. ¹¹³

The second part of the Attorney General’s argument relates to the war provision in FISA, which permits warrantless surveillance for a period of 15 days following a declaration of war. ¹¹⁴ He reasons that the fifteen day window was meant to provide the President with an opportunity to begin conducting enemy surveillance while Congress contemplated a new statute to reflect the current needs of the government and that when Congress enacted the AUMF, it provided the President with congressional authority to engage in all those activities that are fundamentally incidental to waging war, which includes electronic surveillance. Thus, the AUMF permits the President to bypass the procedures of FISA throughout the conflict with Al Qaeda. ¹¹⁵

While there are supporters of the program, it has no shortage of detractors. Robert Reinstein¹¹⁶ was quoted as saying “that the program was a pretty straight forward case where the President is acting illegally”. ¹¹⁷ Kate Martin¹¹⁸ and Caroline Fredrickson¹¹⁹ have alleged that the President is authorizing criminal activity by supporting the NSA program.¹²⁰

Edward Lazarus¹²¹ responded to the NSA revelations in December 2005 before the DOJ released its official opinion. While Mr. Lazarus did not have the opportunity to review the DOJ report when he issued his opinion, he indicated that he believed the administration’s position would be that the AUMF implicitly repealed FISA.¹²² He argued that at the time the AUMF was drafted it was not conceived that the legislation would include anything relating to the current NSA program.¹²³ The DOJ’s position as noted earlier was that the AUMF did not repeal FISA, it merely supplemented FISA. The DOJ also argues that contrary to Mr. Lazarus’s assertion that under the administration’s logic, the AUMF could overrule any federal statute is simply not true.

¹¹³ Id. at 4.
¹¹⁴ 50 U.S.C. § 1811 (1978), which states in pertinent part “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”.
¹¹⁶ Robert Reinstein, Dean of the Law School at Temple University.
¹¹⁸ Kate Martin, Director of the Center for National Security Studies.
¹¹⁹ Caroline Fredrickson, Director of the Washington Legislative Office of the American Civil Liberties Union.
¹²¹ Edward Lazarus, a FindLaw columnist, former Federal Prosecutor and currently in private practice in appellate litigation.
¹²³ Id.
In a letter to Congress, drafted after the DOJ released its legal rationale for the NSA program, fourteen legal scholars expressed their disagreement. These scholars include the former Dean of Stanford Law School, current Dean of Yale Law School and a host of other Constitutional scholars. They rely on the doctrine that specific statutes always prevail over general ones. The FISA was a specific statute, while the AUMF is a very general statute and cannot be read to circumvent FISA. Both the DOJ and these scholars argue that the fifteen day window was meant to give Congress an opportunity to draft new legislation that might satisfy the need of the administration during a conflict; however, the DOJ believes the AUMF was just such a statute, while these scholars do not. Thus the scholars do not believe that the authority to conduct warrantless wiretaps can be found in the AUMF. In addition, these scholars take the position that FISA was intended by Congress to be the exclusive means by which a President could conduct foreign intelligence surveillance on domestic soil.

The scholars’ letter also attacks the DOJ’s position that the President has inherent Constitutional powers to conduct foreign intelligence surveillance and that if FISA was interpreted to prohibit the NSA activities then FISA would be an unconstitutional encroachment on the Presidential powers. The authors of the letter contend that construing FISA to “prohibit warrantless domestic wiretapping does not raise any serious Constitutional questions … construing the AUMF to authorize such wiretapping would raise” Fourth Amendment implications. First, they explain that Congress concluded that regardless of any potential inherent authority of the President to conduct foreign intelligence surveillance, Congress still has the power to regulate that authority through legislation. A President may not act in direct contradiction to an enactment of Congress and if the President does have the inherent authority and acts on it in complete disregard to FISA, then the President would be acting in direct contradiction to FISA, a Congressional statute. According to Justice Jackson in Youngstown, “when a President acts in direct contradiction to Congress his power is at its lowest ebb.”

In the weeks that followed the story about the NSA program, the Congressional Research Service, (hereinafter CRS) investigated the DOJ’s legal rationale for the program and while not concluding whether the program was legal or illegal the organization did indicate that the administration’s legal arguments were not as certain as they set forth.

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125 Id. at 2.
126 Id. at 6-7.
127 Id. at 2-3.
128 Department of Justice, supra note 75, at 6-10.
129 Nolan, supra note 117, at 4.
130 Id. at 5.
131 Id.
132 Id.
133 Memorandum from the Congressional Research Service, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006).
The report noted that when an action is not barred by the Constitution and where Congress has not spoken directly on the issue, the President may sometimes have the power to unilaterally take the action, however, unless the power is a specific one wholly entrusted to the President by the Constitution, the President does not have “inherent authority to exercise full autonomy in a particular field without Congress’s ability to encroach”.\textsuperscript{134} This is a clear attack on the DOJ and Attorney General’s position discussed earlier regarding the President’s inherent power and the potential unconstitutionality of FISA.

The CRS argues that any NSA surveillance between two overseas parties, even if one of the parties to the conversation is a US citizen is not subject to FISA. However, Congress was well aware of this when it enacted FISA and purposely reserved the right to draft additional legislation to deal with such instances of wiretapping.\textsuperscript{135} The CRS disagrees with the notion that the President has the sole inherent power to conduct foreign intelligence surveillance and that power cannot be encroached by Congress. The CRS points out that one of the rationales that the DOJ relied upon was the only published opinion from the FISC of Review. In that opinion, which concerned warrantless foreign intelligence surveillance the FISC of Review stated that the President does have inherent Constitutional authority to conduct warrantless wiretapping for foreign intelligence purposes and that FISA could not encroach on the President’s Constitutional power. The CRS points out that in making that assertion, the FISC of Review relied upon cases predating FISA that “dealt with a Presidential assertion of inherent authority in the absence of Congressional action to circumscribe that authority”.\textsuperscript{136}

The CRS also doubts whether intelligence gathering is an incident of force as proposed by the administration and whether the Hamdi decision, which the administration relies heavily upon for its rationale, actually supports the administration’s argument.\textsuperscript{137} Their fear is that if the AUMF can be read so broadly, then it can conceivably be used to set aside any statutory prohibition relating to national security, which has in it a clause reading “unless otherwise authorized by statute”.\textsuperscript{138}

The CRS found that the war provision in FISA strongly suggests that FISA was meant to apply during wartime and the fact that soon after the attacks of September 11, 2001, Congress specifically amended FISA in the Patriot Act are evidence that Congress intended FISA to remain the prevailing method of conducting foreign intelligence surveillance on domestic soil.\textsuperscript{139} The amendments to FISA in the Patriot Act show that Congress did not intend the AUMF to be a new means of conducting foreign intelligence surveillance and thus the AUMF was not a statute enacted to amend FISA since FISA was specifically amended in the Patriot Act.\textsuperscript{140}

\textsuperscript{134} Id. at 6.
\textsuperscript{135} Id. at 20-23.
\textsuperscript{136} Id. at 30-31.
\textsuperscript{137} Id. at 35-36.
\textsuperscript{138} Id. at 36.
\textsuperscript{139} Id. at 43.
\textsuperscript{140} Id. at 43.
The CRS found that in the legislative history of FISA, the phrase “authorized by statute”\textsuperscript{141}, which the administration relies upon, was actually meant to refer to Title III and/or FISA and not other statutes, although admittedly, the plain language contained within the statute does lead to some credibility to the administration’s position on the phrase.\textsuperscript{142} Thus while the CRS does not explicitly identify the NSA program as being illegal, mainly because it did not have enough evidence on the program to make that determination, it does reason that if the NSA operations are “encompassed in the definition of ‘electronic surveillance’ set forth under FISA”, that the surveillance must be carried out in accordance with FISA procedures to be consistent with the congressional intent.\textsuperscript{143}

The CRS also notes that “no court has held squarely that the Constitution disables Congress from endeavoring to set limits on (the President’s foreign intelligence surveillance power)”\textsuperscript{144}

Since the release of the NSA program, there have been comments made on the record of the House and Senate’s floor. In the House of Representatives, Congressman Barney Frank of Massachusetts in a speech given regarding the President’s authorization of the NSA program stated that “the President is ignoring FISA”.\textsuperscript{145} Senator Arlen Spector exclaimed that the “NSA is in contradiction to FISA, which flatly prohibits any kind of electronic surveillance without a court order”;\textsuperscript{146} The “FISA says that it is the exclusive remedy for wiretapping” and that FISA is clear on that point and, thus, the President’s program is in violation of FISA.\textsuperscript{147} Senator Biden declared that “FISA reaffirmed the principle that it is possible to protect both national security and the Bill of Rights”.\textsuperscript{148}

In support of the NSA program, Senator Kit Bond claimed that “the NSA program did not violate FISA because Congress cannot take away inherent powers of the President regarding foreign intelligence surveillance”.\textsuperscript{149} Senator Saxby Chambliss agreed with his colleague when he explained that the President has inherent power to deal with foreign intelligence surveillance and, thus, the NSA program could not be in violation of FISA.\textsuperscript{150}

Thus, Congress’s reaction to the revelation of the NSA program has been mixed. A majority of Congressmen seem to believe that the NSA program is in violation of FISA, while there are some staunch supporters whose main assertion is that the President’s has inherent powers and thus those powers cannot be circumscribed by Congress in FISA.

\textsuperscript{141} 50 U.S.C. § 1809 (1978) stating in pertinent part “[a] person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute”.

\textsuperscript{142} Id. at 43.

\textsuperscript{143} Id. at 44.

\textsuperscript{144} Id.

\textsuperscript{145} 152 CONG. REC. H5131 (daily ed. July 13, 2006)(statement of Representative Frank).


\textsuperscript{149} 152 CONG. REC. S875 (daily ed. Feb. 9, 2006)(statement of Senator Bond).

V. DISCOVERING CONGRESSIONAL INTENT

Due to the secrecy of the program, we do not know all the facts, however, from what information has been revealed, it appears that on its face, the NSA wiretapping program violates FISA and thus the continued authorization of the program by the President violates the doctrine of separation of powers. The US Constitution provides limits on the powers of each enumerated branch of government. Each branch is one with limited powers. Congress is entrusted with the authority to enact laws.\(^{151}\) The President has authority to execute the laws enacted by the Congress.\(^ {152}\) The Supreme Court has the authority to interpret congressional statutes for constitutionality.\(^{153}\) The President does not have any authority to repeal existing laws,\(^ {154}\) although he can petition Congress to change existing law.

It is important to determine whether Congress intended FISA to encompass the field of foreign intelligence surveillance on domestic soil. In order to determine the intent of Congress, the first step is to read the language of the statute itself.\(^ {155}\) Congress stated “the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted”.\(^ {156}\) This language appears to be clear on its face in that Congress intended FISA to be the sole means of attaining electronic surveillance when dealing with foreign intelligence gathering.

We have already learned that the DOJ and the Attorney General have both interpreted the language of FISA to permit the President to authorize foreign intelligence surveillance via another statute enacted to work in conjunction with FISA. Specifically the AUMF has been declared such a statute, even though there is no mention of FISA or electronic surveillance anywhere within the AUMF statute.

When there is some ambiguity in a statute the second step is to look at the congressional legislative history to determine the true intent of Congress when it enacted the statute.\(^ {157}\)

\(^{151}\) U.S. CONST. Art. I, § 1.  
\(^{152}\) U.S. CONST. Art. II, § 1, cl. 1.  
\(^{156}\) 18 U.S.C. § 2511(2)(F)( Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted).  
\(^{157}\) Chevron., 467 U.S. at 837-838.
After reviewing the legislative record from the period prior to the enactment of FISA in 1978, we have learned that Congress intended that FISA be the exclusive means by which foreign intelligence surveillance could be authorized. This intent is apparent in the Congressional record leading up to the passage of FISA.

The report of the Permanent Select Committee on Intelligence, stated that “the purpose of the foreign intelligence surveillance act is to provide legislative authorization for and regulation of all electronic surveillance conducted within the U.S. for foreign intelligence purposes”. 158 This notion was expressed by the bill’s sponsor, Senator Edward Kennedy, who stated that “[t]he bill would require that all foreign intelligence electronic surveillance in the United States – as well as some overseas interceptions – be subject to a judicial warrant requirement based on probable cause”. 159

During deliberations of this proposed bill, Representative John M. Murphy stated that “[e]very operation of the NSA, which falls under the definitions of electronic surveillance, as defined in the bill, is covered by the bill”. 160 Senator Strom Thurmond explained that “in providing a warrant procedure the American public is reassured that no individual will be subject to electronic surveillance unless a judicial officer has authorized it”. 161

A conference report related to this bill discussed the issue of Presidential inherent power by stating that “the bill does not recognize, ratify, or deny the existence of any Presidential power to authorize warrantless surveillance in the US in the absence of legislation”. 162 The issue of the inherent Presidential authority was a contentious one on capital hill during deliberations of this bill. Congressman Robert McClory in opposition to the bill stated that this bill “transfers the power that is granted by the Constitution to the President of the United States, to the courts … it is an attempt to amend the Constitution by simple legislative enactment” 163 and Congressman John M. Ashbrook declared that he does “not think we can take away the inherent power of the President”. 164

Senator Malcolm Wallop declared that the “power to surveille for purposes of national defense and foreign affairs is clearly part of the President’s powers over defense and foreign affairs. Yet, this bill stipulates that before the President exercises’ part of his powers over defense and foreign affairs his actions must be approved by another branch of government.” 165 Conversely, Senator James Abourezk exclaimed that this bill enables Congress to go “on record as saying that no such inherent power exists.” 166

159 124 CONG. REC. 10,887 (1978).
166 124 CONG. REC. 10,897 (1978)
The House conference report concedes that regardless of whether the President has this inherent power or not, “Congress has at least concurrent authority to enable it to legislate with regard to the foreign intelligence activities”. 167 Thus Congress has power to regulate the conduct of such foreign intelligence surveillance by “legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted”. 168

Initially, Congress had two versions of the FISA bill, one issued in the House and the other in the Senate. The Senate bill, which was first, contained the following clause “FISA shall be the exclusive means to conduct foreign intelligence surveillance”. The House amended the Senate version and added the term statutory to this clause thus implying that FISA was not the exclusive means of conducting this surveillance, it was only the exclusive statutory means possible to conduct foreign intelligence surveillance. 169 The House’s version was meant to endorse the President’s inherent authority to conduct warrantless foreign intelligence surveillance. Congressman John M. Ashbrook debated in the House of Representatives prior to the amending the Senate version of the bill to incorporate the term “statutory” because he did “not think we can take away the inherent power of the President”. 170

The Senate’s version was the one eventually agreed upon by Congress and the term statutory was removed from the final version of the bill. This caused for heated discourse in the House of Representatives, however, this debate further justifies the argument that Congress intended this statute to be all encompassing and to curtail the inherent presidential authority to conduct these wiretaps.

Congressman Robert McClory was particularly upset by the removal of the term statutory from the language of the bill. He explained that the term statutory “served to recognize the power which constitutionally vests in the President to engage in foreign intelligence gathering … sadly this amendment was dismissed.” 171 Similarly, Congressman Bob Wilson was disturbed that “an amendment recognizing the Constitutional power of the President to protect our national security was totally rejected by the conferees”. 172

Congress ultimately concluded that by removing the term statutory from this clause it would eliminate the loophole by which the executive could use his inherent powers to conduct foreign intelligence surveillance without FISA. 173

In a Senate report on FISA the legislatures reiterated their intent that FISA be the exclusive means of conducting foreign intelligence surveillance. 174 In one of the FISA drafts there was an “executive inherent power clause”, which authorized the President to

168 Id.
use his inherent powers to conduct foreign intelligence surveillance outside the confines of FISA should it become necessary for the protection of the nation from attack or hostile acts of a foreign power or to obtain information deemed essential to the national security of the United States. This clause would have spoken to the current issue, but was specifically removed from the final version of FISA and replaced with the before mentioned clause that stated that FISA “shall be the exclusive means for conducting electronic surveillance as defined by this legislation”, thus describing Congress’s intent that, even while under attack from a foreign power, FISA still remained the exclusive method of conducting foreign intelligence surveillance.

Senator Strom Thurmond disagreed with that proposal. He explained that he did not support procedures that would unduly restrict the ability of the President under his inherent power to engage in intelligence gathering activities against foreign powers or their agents. While voting in favor of this bill, he stated that “this legislation … permits the President to continue his power to engage in foreign intelligence surveillance with judicial safeguards. If these procedures were to become too cumbersome or an obstacle …, the Congress would immediately reconsider the legislation and make changes”. While he was in opposition to restricting the President, his condition that should the restrictions in place become to cumbersome that they should be amended implies that he was aware of the severe restrictions that this bill placed on the inherent authority of the President.

Senator Edward Kennedy proposed that this bill was a “recognition long overdue, that the Congress has a role to play in the area of foreign intelligence surveillance” and that “it would for the first time expressly limit whatever inherent power the executive may have to engage in electronic surveillance in the United States. In doing so, the bill ends a decade of debate over the meaning and scope of the inherent power disclaimer clause”.

In a Senate report, from the Select Committee on Intelligence, speaking about the inherent powers of the President with regard to foreign intelligence surveillance on domestic soil, the record reflects that nothing in the FISA statute should be interpreted to mean that “the President has inherent or independent authority to authorize electronic surveillance in any way contrary to the provisions of FISA”. Congressman Robert W. Kastenmeier explained after passage of the bill that “the executive branch will be bound by statutory restrictions, no longer will a claim of inherent executive authority to conduct national security wiretapping be recognized”.

In reviewing the legislative history, one aspect is crystal clear, Congress fully intended FISA to be the exclusive means by which the President could conduct foreign intelligence surveillance within the United States. The Congressional record

175 Id. at 3908.
176 Id.
demonstrates that congress’s true intent when it enacted FISA was not only that FISA should be the exclusive means of conducting foreign intelligence surveillance, but that the President could not circumvent the confines of FISA by conducting foreign intelligence surveillance claiming inherent powers. This intent is reiterated throughout the legislative record and even detractors to the bill acknowledge in their recorded statements that this bill in turn eliminates the inherent authority of the President to conduct warrantless wiretaps for national security purposes.

The Senate was careful to note that the ultimate question of whether this statute was Constitutional and whether it could impede the President’s inherent authority would be decided by the Supreme Court as explained by Senator Birch Bayh. Senator Frank Church went on to state that he was “certain the Supreme Court would sustain the validity of the law against any attempt in the future by a President to assert some inherent power.”

VI. JUDICIAL CHALLENGES TO THE NSA PROGRAM

The American Civil Liberties Union (ACLU) and several other individuals and organizations brought suit against the NSA and other executive agencies alleging that the NSA wiretapping program was illegal and unconstitutional. In a 44 page opinion, District Court Judge Anna Diggs Taylor held that the NSA program violated the First and Fourth Amendments, the Separation of Powers doctrine and FISA. She issued a permanent injunction enjoining the continued surveillance by the NSA.

After determining that the state secret privilege was inapplicable to the case at bar because additional information, which was not already public knowledge, was not necessary to make a determination on the merits, Judge Taylor found that the NSA program “failed to procure judicial orders as required by FISA” and that plaintiff’s First Amendment rights were infringed because the program stifles the plaintiff’s liberty of expression. She explained that due to the NSA surveillance the plaintiffs were reluctant to speak openly and freely with associates and contacts in the Middle East and Asia for fear that their conversations were being recorded.

She also found that the President’s actions left him at the lowest ebb of Justice Jackson’s three tiers as enunciated in Youngstown because the NSA activities were in direct contradiction to a Congressional statute, FISA. In addition the AUMF could not be construed to govern FISA because FISA, being a specific statute, could not be governed by a general statute such as the AUMF. Finally, responding to the defendant’s inherent power argument, Judge Taylor held that the Chief Executive is a position created by the Constitution and the actions of the Chief Executive cannot violate the Constitution.

182 Id.
184 Id. at 43.
185 Id. at 32.
186 Id.
187 Id. at 38.
Since Judge Taylor determined that the actions taken by the NSA had violated the First and Fourth Amendments and the Separation of Powers doctrine they are unconstitutional regardless of any inherent power the Chief Executive may possess. ¹⁸⁸

Soon after this decision, the Sixth Circuit Court of Appeals granted a stay of the injunction pending appeal. ¹⁸⁹ The NSA has appealed this case to the Court of Appeals, however, the Appellate Court has not yet issued a ruling.

Shortly after the elections in November 2006, the Bush administration announced that it had formulated a plan by which the FISC would provide court approval for all the NSA wiretaps that had previously been conducted with no court oversight. ¹⁹⁰ While this is a progressive step in fortifying the legality of the NSA wiretaps it must still be noted that the executive branch is not permitted to rewrite existing laws. ¹⁹¹ For the program to be legal, it must conform to the confines of FISA. The executive branch is not permitted to rewrite FISA to conform to their needs. ¹⁹² While the specific guidelines for FISC approval of the NSA wiretaps at this time are not clear, if they conform to the guidelines of FISA then there are no constitutional or legal issues, however, if there are new procedures that were not in FISA or are significantly inconsistent from FISA, then the program would be unconstitutional.

CONCLUSION

The language used by Congress in drafting FISA appears clear and unambiguous at first glance. After reviewing the legislative record it is evident that Congress carefully considered the concept of Presidential inherent authority to conduct foreign intelligence surveillance and purposefully and convincingly expressed their intent that FISA be the exclusive means to conduct foreign intelligence surveillance as defined by the act and that Congress has the authority to regulate the field of foreign intelligence surveillance on domestic soil.

Based on this research and the limited information released concerning the NSA program, it appears evident that the program was issued in violation of FISA.

¹⁸⁸ Id. at 40.
¹⁸⁹ ACLU v. NSA, No. 06-2095-2140 (6th Cir. Sept. 7, 2006) (order granting stay of permanent injunction).
¹⁹² Id. at 448-449.