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TESTIMONY OF
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Mr. Chairman and Members of the Committee

When Franklin Roosevelt gave his famous "four freedoms" speech to the seventy-seventh Congress on January 6, 1941, he observed that the will that would prevail in war and preserve human freedom was the one that pursued its task "without regard to partisanship," but nevertheless was committed "to [an] all inclusive national defense. . ." I commend this committee for addressing the topic of reforming the Foreign Intelligence Surveillance Act of 1978 (FISA) in a responsibly bipartisan fashion that meets the novel and continuing threats of the war on terror in a manner that also safeguards civil liberty.

Frequent reference has been made to Justice Jackson's framework in Youngstown Sheet & Tube v. Sawyer for analyzing differences that occur between the executive and the legislative branches of our government. Youngstown is often remembered as a case which limited the President, but I submit it is better understood for its encouragement of cooperation. Yes, Justice Jackson opined that when the President acts against the legislative choices of Congress, his sole support for action must then be found in the Constitution, but he also was at least indirectly reminding Congress that in times of national peril, the Congress ought neither remain silent nor stand in unbending opposition. Both political branches must strive toward the common objective of defeating our nation's adversary. It is fair to say that Justice Jackson sketched his outline of the respective powers of the branches of our government not to encourage greater division, but greater harmony - to, if you will, ensure that when the President acts against a radicalized, terrorist force such as al Qaeda that indeed he acts not at the lowest ebb of authority, but at its zenith.

In the midst of the Iran-Contra debates, when I was serving President Reagan as head of the Office of Legal Counsel, I had occasion to reflect on the importance of this cooperation, noting that:

An overly adversarial attitude, which insists upon a precise demarcation of powers in matters of every significance, thrives on a level of confrontation which neither is in keeping with the intent of the framers nor is necessarily conducive to good government. As former Attorney General and Professor of Law Edward Levi remarked, '[t]he branches of government were not designed to be at war with one another. The relationship was not to be an adversary one . . . .' Similarly, the late Justice Robert Jackson observed that ' while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'

As history and even current events demonstrate, members of any branch of government forget this lesson at their peril. President Truman forgot it when he seized steel plants without legislative authorization or inherent constitutional authority. President Nixon did the same when he impounded or refused to spend funds authorized to be spent by Congress. Congress overstepped its constitutional boundary when it sought to empower a largely legislative commission to enforce election laws through litigation, and when it retained authority over the implementation of previously passed laws by means of the legislative veto. In each case, there was a direct corrective reaction by the branch encroached upon or an indirect correction through the courts. In a sense, these corrections give proof to the genius of the framers' creation for thwarting even petty tyrannies. However, each occasion for correction does its own damage, just as something repaired never quite equals the vitality it had when new. Furthermore, in these corrections lie the seeds of greater hostility and suspicion. . . .
Action, reaction, counteraction--the process is inexorable and self-destructive. . . . Thus, failure to understand that the framers envisaged the separated branches of government not as balkanized empires but as cooperative allies designed to 'achieve a harmony of purposes differently fulfilled' leads to a divorce, rather than a separation of powers, and, in that, its own undoing.

The Common Objective: To prevent further attack by use of enhanced surveillance

President Bush and the Congress are of one mind on the need for enhanced surveillance capacity. A few days after 9/11, President Bush promised to use "every tool of intelligence . . . and every weapon of war to the destruction of and to the defeat of the global terrorist network."

Likewise, the Joint Inquiry Report of the U.S. Senate Select Comm. on Intelligence & U.S. House Permanent Select Comm. on Intelligence, factual findings conclude: regarding intelligence failures before 9/11: "the [Intelligence] Community missed opportunities . . . to at least try to unravel the plot through surveillance and other investigative work within the United States; and, finally, to generate a heightened state of alert and thus harden the homeland against attack. The same Joint Inquiry Report of Congress made a systemic finding that FISA applications were declining because of difficulties with the process and the "perception . . . that the FISA process was lengthy and fraught with peril."

Attorney General Gonzales has commended the FISA judges for their heroic work to make probable cause and other findings under very demanding, often middle-of-the-night conditions. As the Attorney General observed, "[t]he FISA process makes perfect sense in almost all cases . . .," but "the terrorist surveillance program operated by the NSA [National Security Agency] requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail." The Attorney General noted that "[t]he critical advantage offered by the terrorist surveillance program compared to FISA is who [a professional intelligence officer] makes the probable cause determination and how many layers of review must occur before surveillance begins."

The reasonable necessity of the terrorist surveillance program has likewise been made plain by the Chairman of Select Committee on Intelligence, who has been briefed on the program from its inception and concludes that the "NSA Program is legal, necessary, and reasonable."

The Legal Issue

This Committee has already heard ample testimony on the legal issues surrounding the Terrorist Surveillance Program, and it is not my purpose to rehearse them. While some arguments, in my judgment, are more persuasive than others, I have concluded that the President has existing legal authority to undertake the program as it has been publicly discussed.

The primary argument against the President's existing legal authority is the claim, asserted by several academics and legal professionals in a letter to Congress dated February 9, 2006, to the effect that Congress had "expressly establishe[d] FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigations) as the 'exclusive means by which electronic surveillance . . . may be conducted,' 18 U.S.C. 2511(2)(f) (emphasis added)." While having tremendous respect for the insight of these men and women, I believe their almost

singular reliance upon this statutory section is no more definitive than the opposing view that relies heavily upon the "except as authorized by statute" caveat in 50 U.S.C. 1809(a)(1).

It was clear that in enacting FISA, Congress was primarily seeking to prevent a recurrence of abuse of domestic surveillance against domestic political adversaries. As a democratic matter, this was, and is, an unassailable objective. But it was also evident to those drafting and considering FISA that the Supreme Court had separately considered the President's authority over intelligence as it related to foreign affairs. In United States v. United States District Court, 407 U.S. 297 (1972) (the "Keith" case), the Supreme Court made clear that it was not addressing the President's authority to conduct foreign intelligence surveillance without a warrant and that it was expressly reserving that question: "[T]he 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." Id. at 308; see also id. at 321-22 & n.20 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."). Following Keith, three courts of appeals squarely concluded - after expressly taking the Supreme Court's decision into account--that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. See, e.g., Truong Dinh Hung, 629 F.2d at 913-14; Butenko, 494 F.2d at 603; Brown, 484 F.2d 425-26.

That the President has inherent authority to conduct foreign intelligence surveillance, of course, does not answer the question whether that authority is subject to Congressional regulation or whether such Congressional regulation, if it is constitutionally permissible, must necessarily be different in times of war and peace.

Congress' Foreign Affairs Power

With regard to congressional regulation, the answer must surely be informed by the broad grants of authority to Congress in matters of foreign affairs, including: "Congress shall have Power to provide for the common Defence, ..." to regulate foreign commerce, and to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the law of Nations." Of course, Congress is also empowered to declare war, to make rules of war, grant letters of marque and reprisal, and to raise, support and regulate an army and a navy. Treaties are ratified only on a two-thirds vote of the Senate. Beyond this, Congress also has the power to "provide for calling forth the Militia to execute the Laws of the Union.... and substantial authority over foreign commerce. There is also implied congressional power under the "necessary and proper" clause.

The President's Foreign Affairs Power

Of course, the President, as the Attorney General has ably demonstrated, can list significant constitutional support for his own authority, including a post-FISA, 2001 acknowledgment by Congress that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." The court created by the FISA regime, itself, has recorded that "all the other courts to have decided the issue [have] held that the President [has] inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . 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.") (emphasis added), see In re Sealed Case, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). As long as we have been a nation, the President and Congress have been contesting the exact scope of their respective authorities over foreign affairs without definitive resolution. It is well known that the eminent Justice Jackson opined that he could find apt quotations justifying both positions out of materials which he described as enigmatic as the dreams of the Pharaoh.

Enigmatic or not, the competing executive-legislative claims of authority were reflected in the deliberations over FISA and the matter was left unresolved. Whether or not one credits the Attorney General's construction of FISA under the "other statutes" provision or not, it is evident that the FISA drafters attempted to avoid encroaching on the substantial power of the President. Senator Roberts indicated in his letter to this committee of February 3, 2006 that some committee report language pertaining to FISA claimed to deny the president any constitutional authority to conduct surveillance in the United States "outside the procedures contained in [Title III and FISA]," while President Carter's Attorney General, Griffin Bell, sought to defend that independent power and indicated that the FISA legislation could not take it away. Thus, it is not surprising that when President Carter signed the legislation in October 1978, he indicated that the new legislation "clarifies the Executive's authority to gather foreign intelligence by electronic

surveillance in the United States." A "clarification" was needed because the decision in Keith and lower court decisions had applied different Fourth Amendment considerations to domestic and foreign surveillance, even as both implicated national security. In any event, as Senator Roberts has aptly observed, whether Congress may have intended to regulate the statutory or constitutional authority of the president, or both, "Congress, by statute, cannot extinguish a core constitutional authority of the President."

The Authority of the Congress and President - in light of FISA - in Time of War

It is a fair interpretation of FISA that it largely leaves wartime surveillance to be governed prospectively by later legislation as needed. In essence, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA's express procedures and during which Congress would be expected to re-visit the issue of what specific statutory authority the President needed in war-time. See 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, reprinted in 1978 U.S.C.C.A.N. at 4063. This is a highly significant, and indeed, particularly wise reservation of a question to be decided later. The Conference Report noted that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency."

Additional legislative history suggests that Congress' specific definition of "electronic surveillance" in FISA was intended to carefully exclude certain then-known intelligence activities - signals intelligence - conducted by the National Security Agency. According to the report of the Senate Judiciary Committee on FISA, "this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States." S. Rep. No. 95-604, at 64 (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of "electronic surveillance" was crafted for the same reason. See id. at 33-34, 1978 U.S.C.C.A.N. at 3934-36. FISA thereby "adopts the view expressed by the [then] Attorney General [Griffin Bell] during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation." Id. at 64, 1978 U.S.C.C.A.N. at 3965. The Department of Justice reports that such legislation placing limitations on traditional NSA activities was never passed. See National Intelligence Reorganization and Reform Act of 1978: Hearings Before the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 999-1007 (1978) (text of unenacted legislation).

While signals intelligence has been a common feature of past war efforts, this exclusion is apparently insufficient to cover the present Terrorist Surveillance Program of the NSA. Assuming this to be true, it is nevertheless significant that Congress understood that the NSA surveillance that it had categorically excluded from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The Senate Report, for example, specifically referred to the Church Committee Report for its description of the NSA's activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965-66 n.63, which stated that "the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans . . . ." S. Rep. 94-755, at Book II, 308 (1976). Congress' understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures again suggests the prudent manner in which Congress sought to avoid executive-legislative clash.

Which brings us to the question of what, if anything, does FISA require during wartime? It is fair to observe that in all the recorded military engagements of our past, the military has engaged in searches and surveillance without a warrant. Neither Congress nor the President has required the armed forces to seek a battlefield warrant to conduct visual or electronic surveillance of enemy forces. Was it FISA's intent for military operations within the United States to operate under a different rule? There is no legislative history requiring that FISA be construed contrary to historical practice. The Civil War is, of course, the main historical battle fought on our soil and there is no history suggesting that any search or observation of confederate forces during the Civil War was subject to a warrant requirement. The expressed congressional intent was to "reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights." S.Rep. No. 95-701, 95th Cong., 2d Sess. 16 (1978). The courts have interpreted this language carefully so as not to defeat valid intelligence needs. Thus, Judge Wilkey in U.S. v. Belfield, 692 F.2d 141 (D.C. Cir 1982) rejected the claim that FISA,

insofar as it does not require disclosure and an adversary hearing, violates the Fifth and Sixth amendments or was contrary to the Omnibus Crime Control and Safe Streets Act of 1968 (OCCA) 18 U.S.C. § 2518(9) (1976) (providing the contents of an intercepted communication may not be used in any proceeding unless the aggrieved person is first furnished with a copy of the application and court order authorizing the interception). Applying the general disclosure obligation, Judge Wilkey reasoned, would have ignored that Congress recognized the need for the Executive to engage in and employ the fruits of clandestine surveillance without being constantly hamstrung by disclosure requirements.

It is thus no disrespect to Congress' ample authority in matters of foreign affairs to believe that FISA should not be readily interpreted to "hamstring" the Executive in its conduct of wartime intelligence. Were enemy al Qaeda forces to invade and operate on the territory of the United States, the Constitution could not reasonably be construed to require a search warrant for the military to conduct surveillance of the enemy, and the greatest hesitation should be exhibited before attributing to Congress the intent to encumber the military with a FISA warrant.

There is nevertheless some confusion on this. A November 15, 2001 Department of the Army Memorandum from the Deputy Chief of Staff for Intelligence suggests that the collection of foreign intelligence information about U.S. Persons acting as foreign agents is on-going by military intelligence. No specific reference is made to the need for a FISA warrant, though there is a perfunctory reference to a pre-war-on-terror regulation, and that regulation (dating to 1984) incorporates a FISA requirement. Nonetheless, the post 9/11 DoD memorandum recites: Subject: Collecting Information on U.S. Persons

2. Many of the perpetrators of [the 9/11] attacks lived for some time in the United States. There is evidence that some of their accomplices and supporters may have been U.S. persons, as that term is defined in Executive Order 12333. This has cause concern in the field regarding MI's collection authority. With that in mind, [the memorandum] offers the following guidance:
a. Contrary to popular belief, there is no absolute ban on intelligence components collecting U.S. person information. That collection, rather, is regulated by EO 12333 and implementing policy in DoD 5240 1-R and AR 381-10.
b. Intelligence components may collect U.S. person information . . . .The two most important categories for present purposes are "foreign intelligence" and "counterintelligence." Both categories allow collection about U.S. persons reasonably believed to be engaged, or about it engage, in international terrorist activities. Within the United States, those activities must have a significant connection with a foreign power, organization, or person (e.g., a foreign terrorist group).
3 . . . .[S]taff has received reports from the field of well-intentioned MI personnel declining to receive reports from local law enforcement authorities, solely because the reports contain U.S. person information. MI may receive information from anyone, anytime. . . .Remember, merely receiving information does not constitute "collection" under AR381-10 ; collection entails receiving "for us."

But apart from the military intelligence piece of the puzzle, it must be conceded that the present war on terror is not solely undertaken by uniformed military pursuing intelligence activities in a battle theater, even if part of that theater is our homeland. As disclosed by the New York Times, civilian intelligence officers are apparently conducting the Terrorist Surveillance Program in a manner which captures, and therefore arguably searches, the conversations of U.S. persons as it is looking for the hidden terrorist enemy seeking to harm us from within or without. At most FISA could be said to apply to such wartime civilian officer surveillance only if Congress ignored its wartime exception and refused to legislate more specifically. This conclusion is informed by the FISA provisions discussed earlier - especially section 1811 providing an express, short-term exemption from FISA in the event of a war declaration and its related legislative history anticipating the enactment of specialized wartime legislation thereafter. The present hostilities are the very circumstances wisely anticipated by the drafters of FISA when they contemplated the need for additional legislation in a time of war.

FISA is in short not a wartime measure. In the war on terror, it is an important background principle - the beginning, not the end of an executive-legislative conversation. It is best understood as confirmation of the earlier executive branch and judicial view that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA importantly confirms - or as President Carter said, "clarifies" - the idea that, in the non-war-time foreign affairs context, the Fourth Amendment applies differently than in the criminal context. Following Justice Powell's outline in Keith, FISA tries to parallel the warrant process in a criminal proceeding, but adjusted to its different non-war-time, foreign intelligence

setting. FISA thus creates procedures for periods other than war, that, when used, creates a presumption that surveillance is reasonable by constitutional standards akin to, but not identical with, the Fourth Amendment. Any contemplated reform of FISA for war-time should arguably have a similar objective: to ensure that specialized war-time search measures meet a standard of reasonableness appropriate for a time of threat.

Does the AUMF sufficiently supplement FISA? - Balancing Inherent Presidential Power with Responsible Oversight

This committee is right to review whether there is a need for further legislation. As the American poet, T.S. Eliot observed: "War is not a life: it is a situation. One which may neither be ignored nor accepted." In light of the situation of war which cannot be ignored and the threat of attack which cannot be accepted, it was entirely plausible for legal advisors to the President to construe the AUMF as confirming the President's war-time authority for foreign intelligence surveillance without the necessity for meeting the existing FISA warrant requirement. Those opposing this view assert that to interpret the AUMF as permitting the president's Terrorist Surveillance Program would raise "serious constitutional questions." With all due respect, it is the reverse. All of the serious questions the opponents raise, however, assume what Keith did not; namely, that the Fourth Amendment applies to surveillance aimed at acquiring foreign intelligence information in the same fashion as domestic national security surveillance.

Keith, of course, suggested that Congress might fashion a specialized determination of probable cause for matters of domestic security cases. It expressly did not decide, because it was not before the Court, that the President's foreign intelligence authority, let alone his war-time authority to conduct surveillance of an enemy, was subject to the Fourth Amendment. To the contrary, the Court cited authority for the "view that warrantless surveillance though impermissible in domestic security cases, may be constitutional where foreign powers are involved." FISA, of course, went beyond Justice Powell's recommendation and regulated domestic and foreign intelligence surveillance, while reserving the question of the pursuit of foreign intelligence in war time, except for a blanket 15 day period of exemption to allow legislative deliberation. Whether it was constitutional for Congress in FISA to regulate in the area of foreign intelligence surveillance has not been resolved by the Supreme Court. It is indeed a serious and open question. The seriousness, and doubtfulness, of an affirmative answer is compounded when the question is put in war-time.

The opponents of the Terrorist Surveillance Program posit that "construing the AUMF to authorize [wiretapping of those in communication with al Qaeda] would raise serious questions under the Fourth Amendment." The argument is overbroad, and if credited, would cast doubt on FISA, itself. FISA warrants are not warrants under the Fourth Amendment. Fourth Amendment warrants require a showing of probable cause that "the evidence sought will aid in a particular apprehension or conviction for a particular offense" and "must particularly describe the things to be seized as well as the place to be searched." FISA warrants require only that the government show that probable cause exists to believe that the target of the surveillance is the agent of a foreign power. When the target is a U.S. person, FISA standards require that the conduct of the U.S. person falls within federal criminal statutes. Nonetheless, even in such cases, FISA requires a lesser showing of probable cause than would apply in domestic criminal cases. FISA warrants, therefore, are not "warrants" as that term is used in the Fourth Amendment. The showing of probable cause for a FISA warrant is not that required by the Amendment. The availability and pursuit of the FISA warrant enhances the constitutional determination of reasonableness only. That is the necessary import of the FISA Court of Review's decision, where it writes:

Although the Court in City of Indianapolis [distinguishing earlier checkpoint cases that secured the border or the safety of highways from intoxicated drivers from a checkpoint that had only general law enforcement purposes] cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. Our case may well involve the most serious threat our country faces. Even without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from Keith, that FISA as amended is constitutional because the surveillance it authorizes are reasonable.

Even if FISA had not already settled the Fourth Amendment issue outside of war-time, the Department of Justice ably demonstrated in its memorandum of January 19, 2006 why the compelling interest of protecting the nation from terrorist attack outweighs the narrow intrusion on individual privacy interests implicated by the Terrorist Surveillance

Program. These arguments are sound and will not be repeated here. They are referenced briefly below in summary, however, only to underscore that the Fourth Amendment cannot be meaningfully asserted, as the opponents of the Terrorist Surveillance Program have, to suggest that it was "implausible" to construe the AUMF as a sufficient, FISA-contemplated war-time authorization for the Terrorist Surveillance Program.

* The Fourth Amendment has never been understood to require warrants in all circumstances.
* There is a special need to operate without a warrant in the war on terror because the purpose of the search far exceeds general crime control.
* General reasonableness applies to the "special need" of preventing another terrorist attack.

The Fourth Amendment cannot be credibly raised as an objection to the AUMF as authority for the Terrorist Surveillance Program. As Attorney General Gonzales noted, the AUMF both recognizes the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and it supplemented that authority empowering 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" in order to prevent further attacks on the United States.

The most persuasive aspect of seeing the AUMF as authority for the Terrorist Surveillance Program is the breadth of its language making it comparable to a formal declaration of war. Like the historically rare war declarations, the AUMF does not restrict the resources available to the President. He can employ all the military forces of the government. Second, the AUMF does not limit the methods of force that the President can use. As Professors Goldsmith and Bradley have pointed out, a good number of force authorizations outside of declared wars, "have been limited to particular methods of force, such as subduing or seizing certain entities or compelling certain actions." There is no relevant limitation on targets at least as it relates to a Terrorist Surveillance Program aimed at al Qaeda. Lastly, like the authorization in declared wars, the purpose of the AUMF is quite expansive in objective: to both defeat the al Qaeda forces and to prevent further attacks.

The present AUMF is faithfully contrasted with others of more limited scope. For example, the 1991 authorization to use force against Iraq allowed the President only to implement UN resolutions related to Iraq's invasion of Kuwait. So too, the authorizations to use force in Lebanon in 1983 and Somalia in 1993 were even narrower. Goldsmith and Bradley write: "[i]n the Lebanon authorization, Congress limited the President's use of the armed forces to the performance of certain functions (as specified in an agreement with Lebanon), established an eighteen-month limitation on the authorization, and imposed detailed reporting requirements. Similarly, the Somalia authorization had a very limited purpose (most notably, the protection of U.S. personnel and bases), a time limitation of approximately five months, and (in a later statute) a reporting requirement.

The broadly worded AUMF also manifests an understanding that the war against al Qaeda implicates the homeland and necessarily includes the usual incidents of war. In 2004, the Supreme Court considered the scope of the AUMF in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), and confirmed this understanding. There, the question was whether the President had the authority to detain even though it was not expressly mentioned. As Justice O'Connor recognized, "it is of no moment that the AUMF does not use specific language of detention" or even refer to the detention of U.S. citizens as enemy combatants at all. Id. Nor did it matter that individual Members of Congress may not have specifically intended to authorize such detention, a distinct possibility in light of the Non-Detention Act. The reasoning necessarily must apply in a similar fashion to electronic surveillance. This is especially the case given the common acceptance of military intelligence gathering in wartime, the history of which has again been detailed for the Committee by the Attorney General.

The opponents of the Terrorist Surveillance Program have no effective response to the broad scope of the AUMF, the Court's sympathetic and flexible construction of it in Hamdi, and the historical practice of military intelligence in war time. It is hardly sufficient or meaningful to posit that these military engagements occurred pre-FISA, since as already noted, FISA deliberately left surveillance in war-time to be resolved later and contemporaneously with the relevant hostilities.

Having determined that FISA left the question of war-time surveillance unresolved, and that the AUMF, could reasonably and constitutionally be construed to authorize the Terrorist Surveillance Program, the question remains,

should Congress explicitly and specifically authorize the Terrorist Surveillance Program, and is the oversight mechanism proposed by the National Security Surveillance Act of 2006 (NSSA) both prudent and constitutional?

The National Security Surveillance Act of 2006

As discussed above, Congress has already given general authorization of the Terrorist Surveillance Program by means of the AUMF. Congress should only undertake explicit and specific authorization of the Terrorist Surveillance Program if it can do so without disclosing the particular operational features of the Terrorist Surveillance Program and without seriously reducing or eliminating its utility in the war with al Qaeda. The Attorney General in testimony before this Committee indicated that Members of Congress advised him that the pursuit of specific authorization would, in fact, run the risk of jeopardizing the program's integrity. NSSA, however, proposes to give approval without detailed public exposure of operational detail in legislative text, and assigning to the FISA Court the determination of constitutionality.

Program Warrants - A Non Judicial Function?

The essential purpose of NSSA is to authorize a program-wide warrant for the Terrorist Surveillance Program or equivalent programs. The authority of an Article III court to involve itself in this may appear somewhat novel. It might be argued to be a non-judicial function improperly assigned to the judicial branch. Professor Martin Redish has identified two separation of powers dangers inherent in congressionally mandated extrajudicial duties. First, as the "enforcer of counter-majoritarian constitutional norms and as a check against the representative branches, the judiciary must remain sufficiently independent of the political branches. Second, the unelected judiciary must not encroach on the authority of the democratically elected branches. Judges performing administrative tasks raise these issues. Indeed, as discussed below, the latter concern is of special relevance to NSSA.

If a program warrant is more administrative than judicial function, it would raise serious constitutional objection. As a general matter, Article III judges acting as judges (as opposed to their individual capacities) may not take on extrajudicial activity. For example, the Court examined this issue in Hayburn's Case, when it considered a request for a writ of mandamus ordering a circuit court to execute a statute empowering courts to set pensions for disabled Revolutionary War veterans. Congress said it wanted to utilize the judges "to make further use of the judges' honesty as well as their ability as intelligent and capable fact-finders." This motivation is certainly not dissimilar from the desire implicit in NSSA to have the detached judgment of the FISA judges check any abuse in the Terrorist Surveillance Program. Judges on three circuit courts (including later Supreme Court Chief Justice John Jay and later Justices Cushing from New York and Iredell from North Carolina concluded that the task could not be performed by an Article III court. Although Congress changed the law before the Supreme Court could decide the issue, the opinion noted in an extensive footnote that three circuit courts had held that the statute infringed on separation of powers by assigning a non-judicial function to the judiciary.

NSSA can be distinguished, however. Hayburn's Case was made especially problematic since the judicial decisions were subject to administrative review. NSSA by contrast directs its oversight not over the judicial, but the executive, branch. Sec. 705. In addition, while a program warrant is not the exact equivalent of a Fourth Amendment warrant, the determination of the appropriate standard of probable cause has long been acknowledged to be judicial in nature. For example, Sir Matthew Hale observed that it was for the judicial officer to "adjudge" the reasonableness of an accuser's suspicion. This sentiment was echoed by Lord Mansfield and Blackstone that it was the justice of the peace who judged the "grounds of suspicion." As a recent comment summarized, "[t]he determination of probable cause belongs to the judiciary. That is the common law principle that was constitutionalized through the Fourth Amendment." Given the lineage of the association between the courts and warrants, the constitutional objection that a program warrant is an improper assignment of a nonjudicial function to an Article III court should be rejected.

An Advisory Opinion?

This venerable doctrine preserving the separation of powers prohibits federal courts from providing opinions about the constitutionality of pending legislation or on constitutional questions referred to them by other branches of government. It can be argued that the program warrant, insofar as it requires an assessment of the Attorney General's conclusion that the Terrorist Surveillance Program "is consistent with the requirements of the United States

Constitution" is such an improperly referred request for opinion. To reach this conclusion, however, one would have to come close to declaring the adjudication of warrants generally to be likewise infirm. However, as noted above, the assessment of probable cause is quintessentially a judicial determination, at common law and under the Constitution. Moreover, the proposed findings required of the FISA judge - that any warrant issued be consistent with the Constitution - is simply the restatement of judicial oath. Most importantly, the program warrant is the fair equivalent of the FISA warrant, issued on similar criteria, though with necessary revision to reflect its broader, program application. The FISA warrant has been repeatedly held by lower courts to comport with the judicial office. For example, in U.S. v. Nicholson, it was argued that FISA violates Article III and the Separation of Powers doctrine. The court found that "[e]very court that has addressed the issue has held that an Article III judge is properly 'acting in his judicial capacity' when sitting on the FISA Court."

An impermissible general warrant?

Nor can it be fairly said that a program warrant is the equivalent of the historically disfavored general warrant. As the Supreme Court held in Stanford v. Texas, "The hated [general warrants] or writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power. . . .'" In Stanford, the Court invalidated a warrant to search generally for books, records, pamphlets, cards, etc., and other written instruments concerning the state Communist Party and its operations. By contrast, the Terrorist Surveillance Program is a far more narrowly directed program which does not target any single U.S. person with the kind of sweeping order present in Stanford. In addition, there is no credible suggestion that the Terrorist Surveillance Program is being employed as an instrument of political oppression.

Additional support may also be found by analogy to complex white collar or mob investigations. In the context of such investigations, it is lawful and often necessary to seize documentary evidence in order to prove certain types of criminal conduct, and papers and records are often unusually difficult to describe with specificity as it is seldom possible to be exactly certain what documents exist or will be present. Nevertheless, the Eleventh Circuit Court of Appeals has noted, "effective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence .... [hence,] reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the 'paper puzzle.'" The rule of thumb which can be synthesized from the exceedingly wide diversity of case law on the issue of the requisite constitutional particularity of document searches is that documentary evidence must be described in the search warrant as specifically as is reasonably possible given the nature of the investigation and the circumstances of the search. As the Eleventh Circuit Court of Appeals has elaborated:

There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in the commission of a crime. In these situations, we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.

In the Russell case cited in the note, the context dealt with a large number of stolen video-tapes and games, and the warrant authorized the seizure of "Written records of sales[,] ??? Computer documents [,] Bank records[,] Email records relating to E-bay auctions," and "Financial records relating to E-bay auctions." Despite the difficulties inherent in specifying the types of documents to be seized, see Vitek, 144 F.3d at 481, the court found that each category named in the warrant had a direct relationship to the suspected crime. The warrant therefore satisfied the Fourth Amendment's requirement of particularity. This level of flexible particularity is comparable to what the program warrant under NSSA envisions. As the definition of "electronic surveillance program" indicates in section 701(5)(A) not every conversation, but only those conveying foreign intelligence information is sought for surveillance. These, by original FISA definition when a U.S. person is implicated, "[are] necessary to the ability of the United States to protect against actual or potential attack, sabotage, or clandestine intelligence activities by, among others, an agent of a foreign power." 50 U.S.C. 1801(b)(2)(e)(1)(A),(B), or (C) (slightly paraphrased). If anything, the Terrorist Surveillance Program described by the Attorney General is even more particular insofar as it is related specifically to the foreign intelligence activities of al Qaeda or their confederates. Moreover, as the preamble to NSSA observes, the Supreme Court in Keith indicated that "[national] security surveillance may involve different policy and practical considerations from the surveillance of organized crime." NSSA Section 2(15).

It could be objected that the envisioned program warrant lacks particularity because it is reasonable to anticipate that it will harvest innocent (legal) as well as terrorist (illegal) conversations. The objection, however, is overstated, since courts regularly acknowledge that material evidence of criminal activity is not necessarily limited just to evidence describing the criminal activity. In complex tax fraud cases, for example, it is often necessary to reconstruct defendants' true financial and tax picture and evidence regarding legal as well as illegal transactions may be necessary to show a violation of federal tax laws and the extent of any possible violations. See United States v. Frederickson, 846 F.2d 517, 519-20 (8th Cir.1988) (to secure conviction of income tax evasion, government had to have evidence sufficient to reconstruct defendant's true income liability); United States v. Hershenow, 680 F.2d 847, 853(1st Cir. 1982) (warrant authorizing search and seizure of doctor's records depicting both legal and illegal practices held permissible "in order to get a complete picture of a patient's case").

It must be admitted that the flexibility for broader warrants noted above in case law involves document searches, not eavesdropping, and the searches were criminal prosecutions aimed at specific defendants. Such differences, however, have been averted to and dismissed in the consideration of FISA warrants. This is the essence of In re Sealed Case, 310 F. 3d 717, 746 (2002), which, itself, speaks in somewhat program-related terms. The FISA Court of Review writes in conclusion:
FISA's general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from "ordinary crime control." After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date. We acknowledge, however, that the constitutional question presented by this case-whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment-has no definitive jurisprudential answer. The Supreme Court's special needs cases involve random stops (seizures) not electronic searches. In one sense, they can be thought of as a greater encroachment into personal privacy because they are not based on any particular suspicion. On the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning. Although the Court in City of Indianapolis cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. Our case may well involve the most serious threat our country faces. Even without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from Keith, that FISA as amended is constitutional because the surveillance it authorizes are reasonable.

An Unreasonable Invasion of Privacy?

Programmatic approval is, of course, different than a warrant issued even with the looser particularity requirements of FISA. Hazarding a prediction over whether the Supreme Court would find a program-wide approval to be constitutionally reasonable might well depend on operational facts not available. For purpose of speculative analysis, however, I will assume (without any basis to know) that the Terrorist Surveillance Program involves sensitive data matching in which algorithms and other statistical formulas are employed to identify suspect, al-Qaeda-related conversations between an international point and someone in the United States. While computer technology greatly enhances matching capability, such activity is the equivalent of an investigator gathering bits of information in order to identify a suspect. Prior to computerized technology, this effort was often slow and filled with trial and error. With computer-assistance, the search range and the search effort is more vast and fast, but the number of false-positives likely to be higher as well. In the context of the Terrorist Surveillance Program, a false positive is an invasion of privacy unwarranted by al Qaeda-related connection.

Presumably, most of the reasonableness concerns can be met by rigorous minimization procedures, and NSSA prudently calls for this to be addressed in application by section 703(a)(8) and (13) directly and indirectly under 703(a)(13). These application provisions are then made the basis of necessary findings by the FISA court under section 704 (a)(4) and 704(b)(1)(A).

It has been suggested by one author that data mining based programs be analogized to investigative stops and frisks. This is indeed a promising analogy and one directly supportive of the Terrorist Surveillance Program and NSSA review thereof. Investigative stops may be conducted on the basis of reasonable suspicion that a crime is being or is about to be committed, and thus often involve a predictive judgment by the investigating officer. Terry v. Ohio, the first case upholding investigative stops against a Fourth Amendment challenge, is a good example of this kind of predictive assessment. Terry was seen walking repeatedly in front of a jewelry store in conversation with

several associates, suggesting a possible robbery. The Court found the police observation of this to form "articulable facts" justifying a stop for further investigation. Later, the Supreme Court extended this doctrine of preventive seizures to so-called "reactive" stops premised upon reasonable suspicion in light of past felony. As with the assumed data base matching underlying the Terrorist Surveillance Program, certain incoming or outgoing communications trigger reasonable suspicion when made to or from a number associated with al Qaeda operatives or associates. It is possible, of course, that the person stopped is wholly innocent, as it is possible that someone's communication could be caught innocently by the Terrorist Surveillance Program. This should not vitiate the reasonableness of the effort. As with a Terry stop, the entire point of the exercise is to either validate or dispel rational suspicion. For purposes of constitutional analysis, it should not matter whether the purpose is to dispel crime or the next terrorist attack. While it is an inconvenience to be wrongly stopped, and an infringement on liberty to be innocently surveilled, it is not a constitutional injury that is redressible in light of the countervailing need. The theory underlying investigative stops assumes and accepts for the sake of civil society that predictions of criminality will produce a certain number of false positives, and that the cost of error is an unfortunate, but necessary, part of maintaining safety and order. Virtually every American who has visited an airport since 9/11 has willingly borne a related cost.

In some reported cases, the Supreme Court has considered and generally accepted a Terry stop premised on a predictive formula, such as a drug profile. The profile was assessed as one of several factors to consider, not unlike the list of factors in NSSA section 704. Obviously, a factor of importance is the reliability of any computer algorithm for projecting that level of suspicion, but this too is provided for in NSSA section 704(b) - considering the past performance of the Terrorist Surveillance Program. The FISA court would presumably build up an expertise setting the appropriate threshold for computer-triggered investigations. There is a small amount of analogous case law. In this regard, one case evaluating the Fourth Amendment reasonableness of an air hijacker profile accepted a rate as seemingly low as six percent of weapons discovery among the selected targets.

Again, whether the Terrorist Surveillance Program is based on data matching or not is unknown to this witness. If it is, however, then the operational assessment done by the FISA court pursuant to NSSA section 704 (b)(1)(C) should find it to meet the standard of constitutional reasonableness. As one commentator put it: "If stopping and questioning an individual who is running in the street wearing a mask is reasonable . . ., then why is questioning or investigating someone whose electronic trail indicates a reasonable suspicion of terrorist activity presumptively not?"

An avoidable constitutional encroachment on Executive authority

To this point, NSSA has withstood constitutional review. Parts of section 704(b), however, are highly problematic insofar as they assign to the FISA court an evaluation that encumbers the core of the President's foreign affairs authority. Specifically, sections 704(b)(1) (B) and 704(b)(3) invite the court to assess the "benefits" of the foreign intelligence information obtained. This is beyond judicial competence, unnecessary to prevent abuse of the Terrorist Surveillance Program, and an impediment to the performance of the presidential function. In U.S. v. Duggan, the court avoided a serious separation of powers challenge to 50 U.S.C. 1801(e)(2)(B), defining foreign intelligence information as "that which is necessary to . . . the conduct of the foreign affairs of the United States." Had that been the sole definition and had the court not construed the statute as something the court was not to determine, the constitutional problem would have been unavoidable. Instead, the court ruled that the judge was merely to determine that the executive's certification was not "clearly erroneous." In my judgment, NSSA sections 704(b)(1) (B) and 704(b)(3) ought to be eliminated. If there is to be additional evaluative oversight, it ought to be left to Congress, as is anticipated by section 705.

I began this testimony with heartfelt gratitude that this Committee had undertaken this inquiry out of a bipartisan desire to strengthen our nation's security while safeguarding civil liberty. In so doing, Congress' ample foreign affairs authority was acknowledged. But the conduct of foreign affairs, while shared in general outline is also necessarily divided or allocated in some particular respects. If it is to be pursued, legislative authority over foreign affairs in this instance is best directed at setting a salutary framework for the surveillance of foreign intelligence information, and ill directed toward an assessment of its value or benefit. As John Jay in Federalist 64 observed, "perfect secrecy and immediate despatch are sometimes requisite." That is why, Jay explained, that the convention did well to give the Senate a ratifying role in treaties, but left the management of "the business of intelligence" to the prudent judgment of the President alone. As I have reflected in an earlier note, it is not certain that FISA, itself - at least in war-time - observes this line, but surely, this founding sentiment must now be observed in any reform of FISA. This is especially true when we are in the midst of a War, no matter how unconventional and Janus-faced that war may seem.

The Attorney General has come before you and thoughtfully demonstrated that among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans abroad, see, e.g., Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, see, e.g., The Prize Cases, 67 U.S. at 668. See generally Ex parte Quirin, 317 U.S. 1, 28 (1942) (recognizing that the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the Prize Cases, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. The Prize Cases, 67 U.S. at 670; see also Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he Prize Cases . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); id. at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). Indeed, "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted).

In exercising his constitutional powers and the sentiment explicated by our first Chief Justice (John Jay) in Federalist 64, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation's enemies in a time of armed conflict. The Supreme Court has consistently recognized the President's authority to conduct intelligence activities. See, e.g., Totten v. United States, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); Tenet v. Doe, 544 U.S. 1 (2005) (reaffirming Totten and counseling against judicial interference with such matters); see also Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."). Chief Justice John Marshall even described the gathering of intelligence as a military duty. See Tatum v. Laird, 444 F.2d 947, 952-53 (D.C. Cir. 1971) ("As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . . '") (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), rev'd on other grounds, 408 U.S. 1 (1972).

NSSA in its entirety must be carefully designed to safeguard civil liberty without undermining the President's core responsibility in time of war and his special competence in matters of foreign intelligence. Sections 704(b)(1) (B) and 704(b)(3) do not maintain this balance. Failing to strike this proper balance would transgress the separation of powers doctrine outlined in Morrison v. Olson. Under Morrison, these problematic features of NSSA represent a fundamental reallocation of the President's core responsibilities to judicial officers or Congress. This would be "an attempt by Congress to increase its own powers at the expense of the Executive Branch." Cf. Commodity Futures Trading Comm'n v. Schor, 478 U.S., at 856, 106 S. Ct., at 3259-3260. So too, in Morrison, the Court was careful to note that the duties given the special division were not in themselves "executive" functions in the constitutional sense. The NSSA provisions referenced are quite to the contrary. Indeed, it is fair to conclude that these provisions give the FISA court an unconstitutional supervisory power. Most of all, the NSSA provisions singled out here "impermissibly undermine" the powers of the Executive Branch, Schor, supra, 478 U.S., at 856, 106 S. Ct., at 3260, and "disrupt the proper balance between the coordinate branches [by] prevent [ing] the Executive Branch from accomplishing its constitutionally assigned functions," Nixon v. Administrator of General Services, supra, 433 U.S., at 443, 97 S. Ct., at 2790.

It is my judgment that, except for the provisions noted, NSSA is constitutional, and as a policy matter, advances the goals of responsible oversight. I should note, however, as a former presidential lawyer, that the greatly increased burden of both judicial and legislative oversight envisioned by the NSSA, especially compressed as it is over relatively short periods, may in itself be seen as an unconstitutional and unwise layering of paper submissions. These extensive filings, even if accompanied by the best of intentions and precautions, compound the occasion for improper

or inadvertent disclosure and the ultimate defeat of surveillance efforts that both Congress and the President wish success.

Respectfully submitted,
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